LAWS 105
CONTRACT LAW

(Lectures with Rachel Tooma)
Textbook: Clarke, Philip and Julie Clarke, *Contract Law: Commentaries, Cases and Perspectives* (Oxford University Press, 2nd ed, 2012)

AUSTRALIAN CATHOLIC UNIVERSITY
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LAWS 105 – CONTRACT LAW

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WEEK 1

Introduction - The Nature and Importance of Contract Law (Chapter 1)
Formation - Agreement (Chapter 2)

INTRODUCTION

Contract – a promise (or set of promises) that is legally binding.

- A Legally binding agreement
- For a promise to give rise to a contract, it must in substance amount to an undertaking by the promisor that is proffered in exchange for something sought in return from the promisee.

Legally binding – the law will compel the person making the promise (promisor) to perform, pay damages or compensate the person whom it was made (promisee) for non-compliance.

Note: some promises are legally binding even if they are not contractual in nature. If the promisee has relied upon that promise in circumstances in which it would be unjust to allow the promisor to resile with impunity. 'Equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts to his detriment, seeks to resile from the promise.' *Waltons Stores (interstate) Ltd v Maher* (1998) 162 CLR387.

Importance and Justification for Contract Law

Why law need to be enforced even though they are private undertakings

- The law enforces contracts because of the importance of contracts to our society (almost every transaction by a business will involve a contract). The law provides remedies for breach of contract.
- To remedy injustice

1. Economic-Utilitarian approach
   - It facilitates mutually beneficial exchanges, and so promotes overall social welfare or social 'wealth'
   - Most exchanges are complex and cannot be performed simultaneously. One would have to rely in confidence for the other to perform such obligation. Thus this facilitates the making and performing of deferred exchanges. The essential purpose is to secure cooperation in human behavior.

2. Individualist or Moral Justification
   - Focus not on social benefits but on the rights and duties of individual contracting parties. When contracts are performed, the parties have duties owed to each other to do what they agreed to do.
   - This approach focus on the remedy of injustice brought about by breach.

The Nature of Contract Law

- Main source of contract law in Australia is the common law, although there's increasing statute law.
- Derived from England – but increasingly diverging with the development of Australian common law and statute law.
- Common law: contract law is largely judge-made law.
- Statutes: there is not an Australian "Contract Act" (like the Indian Contract Act 1872).
- However, increasingly statutes in Australia are impacting on areas of contract law – eg, the Insurance Contracts Act 1984 (Cth) (with the stated purpose of reforming the law "so that a fair balance is struck between the interests of insurers, insured and other members of the public"), and – eg, the Competition and Consumer Act 2010 (Cth) (which contains provisions dealing with: misrepresentation, implied terms, manufacturers' liability and unconscionable conduct).

Contract Theories

I. Classical Contract Theory

Freedom of Contract
- Parties are empowered to create a charter of their rights and obligations inter se [on their own] (Brennan J in *Baltic shipping co v Dillon*)
- The parties to a contract are free to determine for themselves what primary obligations they will accept. (Lord Diplock in *Photo Production Ltd v Securicor Ltd*)
- individuals are the best judges of what is in their own interests and they should be 'free', within the broad limits of criminal law and public policy, to contract upon whatever terms they wish.
- LIMITS:
  - Some cases, it is mandatory to enter into contracts – third party personal injury insurance for motor vehicles; worker's compensation insurance.
  - Other cases, terms are prescribed or prohibited.
  - Inequality in bargaining position

Sanctity of Contract
- a contract once made, is 'sacred' and should therefore be enforced according to its terms and not rewritten by the courts because they may think that the parties have made a bargain that is unsatisfactory in some way.

II. Neoclassical Contract Theory (Modern Theory)

- The Classical theory is still very relevant today as the neoclassical contract has not so far departed from these classical law doctrines. But in its pure form, these could not accommodate the sympathy that developed from the position of those who lacked the bargaining power to protect their own interests, or the growing desire of courts to intervene in order to ensure just outcomes as a matter of public policy, serving social interests not because the individual had voluntarily assumed liability through manifestation of assent.
- Now there is an attempt to balance these ideals with the communal standards of responsibility to others.
- The core remains the principle of freedom of contract, as to distinguish from tort, but tempered within and without its formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties' actual agreement.

III. Other Theories

a. Will Theory
   - Contracts are seen as expressions of the human will and inherently worthy of respect
   - This theory asserts the liberal principle of individual self-determination and the value of individual judgment and volition. And it is enhanced when 2 of more wills meet in agreement.

b. The Bargain Theory
   - A common law development from the notion of contract as agreement
   - It sees consideration in terms of reciprocal conventional inducement.
   - The distinguishing feature of a contract is a bargain or exchange between parties.
   - But this fails to include contacts by deed made without consideration.

c. The Promise Theory
   - Contracts are promises that should be kept and thus appropriate for the law to enforce them.
   - This had a problem on when such promise is enforceable. Whether or not the intent to be bound should be considered is a problem area of this theory

d. The Reasonable Expectations Theory
   - Adam Smith's theory based on obligation to perform a contract on the reasonable expectations induced by a promise and the disappointment of those obligations occasioned by breach.
   - However in practice, the raising of a reasonable expectation is neither sufficient nor necessary for the existence of a promise or contract.

e. The reliance Theory
   - Contract arises whenever a promisee has relied upon a promise in a way which would cause detriment if it were not kept.
   - It is based on loss or injury to the promise, this theory has the advantage of appearing both objective and fair by depending on intent.

FORMATION

ELEMENTS OF A CONTRACT:

1. Must arise through an Agreement, which must be:
    a. Sufficiently certain
    b. Complete
2. Consideration or substitute
3. Intention to create legal relations
4. Capacity
5. Compliance with Formalities

I. AGREEMENT

- Idea of agreement is that there is a "meeting of minds".
- When called upon to determine whether agreement was reached – courts adopt an objective approach

- Objective approach - would a reasonable person think that the parties reached agreement? Yes, there was a contract; it did not matter that the *subjective* intention of the parties differed - that is, that Smith intended to sell new oats and Hughes intended to buy old oats. Hughes' conduct was such that a reasonable person would believe he was consenting to the terms offered by Smith.
    - *Smith v Hughes* [1871] LR 6 QB 597 Blackburn J:
      "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and the other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms".

- Must be entered into Voluntarily.
- Agreement is required only about entering into the contract and its terms, and is not concerned with the desirability of doing so, or what motivates the parties.
- Thus it can arise even if one or both parties believes that they were obliged to enter into it because of their economic or personal circumstance.
- It can exist even if one is not happy about its terms and has entered into it reluctantly.
- Usually, to determine whether an agreement was reached, the rules of offer and acceptance apply.
- OFFER - An offer is a promise by the offeror to do something/ not do something, if the offeree responds in a stipulated way.
- ACCEPTANCE - Acceptance is an affirmative response to an offer by the offeree. Any form or words or conduct can amount to an acceptance, provided there is intention by the offeree to accept the offer on the stated terms. Unless there is stipulation to the contrary, any form of words or conduct can amount to an acceptance, so long as intention can be discerned on the part of the offeree to accept the offer on the terms stipulated.
    - NOTE: the General Rule (GR) – an agreement is reached when and where the offeree's acceptance is communicated to the offeror. This is material to determine the issues as to the terms of the contract and jurisdiction in which disputes should be adjudicated.

OFFER

- An offer is any communication that is a promise to do something, if the person to whom the offer is directed makes a promise or does something in return.
- An offer can be made to an individual, or a group or the world at large.
- Must be stated in a clear, precise and detailed manner that makes it capable of acceptance – meaning the party making it intended that an affirmative response would immediately give rise to an agreement.
- Illustrations of offers (nothing left to be negotiated) include:
    - an automatic vending machine or ticketing machine;
    - submitting a tender for the supply of goods/services for a stipulated price;
    - making a bid at an auction;
    - for an online auction of goods: a seller listing goods for sale online, with a disclosed reserve price, is making an offer to sell.
    - advertising a reward or prize to be paid to anyone providing information or acting in a certain way

Carlill v Carbolic Smoke Ball Co [1893] 1QB 256

The advertisement of a reward to anyone who met the specified conditions is not a contract to the whole world but an offer made to the whole world. The contract is made only with the limited portion of the public who come forward and perform the condition on the faith of the ad. If this is an offer to be bound, then it is a contract the moment the person fulfills the condition. (Bowen LJ)

There was a unilateral contract comprising the offer (by advertisement) of the Carbolic Smoke Ball company) and the acceptance (by performance of conditions stated in the offer) by Mrs Carlill.

There was a valid offer
- An offer can be made to the world
- This was not a mere sales puff (as evidenced, in part, by the statement that the company had deposited £1,000 to demonstrate sincerity)
- The language was not too vague to be enforced

Although as a general rule communication of acceptance is required, the offeror may dispense with the need for notification and had done so in this case. Here, it was implicit that the offeree (Mrs Carlill) did not need to communicate an intention to accept; rather acceptance occurred through performance of the requested acts (using the smoke ball)

There was consideration; the inconvenience suffered by Mrs Carlill in using the smokeball as directed was sufficient consideration. In addition, the Carbolic Smoke Ball received a benefit in having people use the smoke ball.

INVITATION TO TREAT

- Or an "invitation to deal" is not an offer.
- The difference is a question of intent – that is – whether the "offeror" intended that an affirmative response would give rise to an agreement, or, just result in initiating or to further negotiation.
- This invites people to offer and the one issuing the invitation may accept or reject.
- Illustrations:

- Displaying goods in a shop or window

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] 1 QB 401

In a self-service store, where the customer takes their trolley to the cashier – the customer is making an offer to buy the goods in their trolley – and the cashier/ shopkeeper can accept the customers offer.

"The contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer" (Somervelle LJ)

- Conducting or advertising auctions

AGC (Advances) Ltd v McWhirter (1977) 1 BPR 9454

Auctions are usually an invitation to deal by the auctioneer – and the bids are the offers. Until the auctioneer announces the completion of the sale, any bidders may retract the bids.

Auction sale 'without reserve' (without a minimum or reserved price by the seller) - Will this constitute a definite offer to sell to the highest bidder?
- This is characterized as the auctioneer making an offer to sell to the highest bidder. This offer can be accepted by anyone who makes a bid. Thus, a collateral contract is created between the auctioneer and the bidder, the terms of which are that the property will be sold to the highest bidder. (*Warlow v Harrison* (1859) 1 El&El 309; 120 ER 925)
- If this does not happen, the bidder will have an action in damages for breach of contract against the auctioneer. However, this does not alter the characterization of the bid as merely an offer as far as the seller is concerned, with the result that there is still no contract of sale between the seller and the bidder if it has not been accepted by the auctioneer. (*Barry v Davies* [2000] 1WLR1962)

BUT NOTE: Online auctions: a seller who lists goods for sale with a disclosed reserve is making an offer to sell to the person that makes the highest bid if the bid is above the reserve. The buyer's bid is acceptance and a contract is created.

- Advertising goods or services for sale

General Rule (GR) : Advertisement (eg. a catalogue from a department store): usually an invitation to deal because the ad may generate more interest than the advertiser has capacity to honor.

Carlill v Carbolic Smoke Ball Co [1893] 1QB 256

(Bowen LJ, obiter) It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or house to let, in which case there is no offer to be bound by any contract. Such ads are offers to negotiate – offers to receive offers. However, even though this case also involves an ad, the intent was to make an offer, not an invitation to treat.

Exception (XPN)

Lefkowitz v Great Minneapolis Surplus Store (1957) 86 NW 2d 689

Published in newspaper: Saturday, 9am sharp. 3 brand new fur coats worth $100. First served $1 each. Plaintiff was first customer to ask for one but was refused.

(Murphy J) "where the offer is clear, definite, and explicit, and leaves nothing open to negotiation, it constitutes and offer, acceptance of which will complete the contract... Whether in any individual instance a newspaper ad is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstance. "

- Calls for tender

Invitations to tender are generally considered invitations to deal, with the tenders themselves constituting offers which may be accepted or rejected. However, the invitation to tender may carry with it a separate offer to consider all tenders submitted.

Blackpool and Flyde Aero Club Ltd v Blackpool Borough Council [1990] 3 All ER 25

The Council invited tenders for certain flights, to be submitted in an envelope on a stipulated date. The Aero Club submitted by the due date, but an error by the Council recorded it as received late and the tender was not considered. The Aero Club claimed the Council had promised to consider all tenders submitted by the due date.

Bingham J: Calls for tender are usually an invitation to deal – and the tenders made are the offers that may be accepted or rejected. Because of the 'considerable labour and expense' that may be involved in preparing a tender then, at least where invitations to tender are provided to selected parties with clear procedures (as in this case) then, if the invitee submits a conforming tender 'he is entitled … to be sure that his tender will … be opened and considered'. To this extent, the invitation to tender constituted an offer which was accepted when the Aero Club made a timely submission.

REQUEST FOR INFORMATION / STATEMENTS OF POSSIBLE TERMS

- This is not an offer.

Illustration:

- P asked D at what price they would be prepared to sell certain land. D replied with a figure. P, treating is as an offer, accepted. It was held that the reply of a price was not an offer but a statement of the minimum price at which they may be willing to sell. Thus the P communication could not amount to an acceptance, but an offer which D had not accepted. (*Harvey v Facey* [1893] AC 552)

- A letter from municipal council, whose policy at the time was to sell council houses t tenants, and which read in part "The corporation may be prepared to sell the house to you at the purchase price of 2725pound less 20% = 2180 pounds (freehold)" was not held to be an offer to sell but merely a statement of the terms upon which it might be willing to sell in due course. (*Gibson v Manchester City council* [1979] 1 WLR 294)

TERMINATION OF OFFERS

1. Lapse of time
   - an offer lapses on the expiry of the specified time.
   - If no time is specified, the offer lapses after a reasonable time.
   - If the offeror intentionally avoids receiving an acceptance within the stipulated time, acceptance communicated after that will still be effective (*Bragg v Alam* (1982) NSW Conv R 55-082)

2. Death of offeror
   - GR: offer will lapse with the death of offeror and cannot be accepted thereafter.
   - EXPT:
     - If offeree does not know of the death AND acceptance is possible unless precluded by the terms or nature of the offer (transaction contemplated personal performance by offeror)
     - If offeree does not know the death acceptance is possible if the terms contemplate that the contract could be performed by the offeror's estate, or if the offer was accompanied by an option not to revoke for a period of time that had not yet elapsed.
       - Once the offeree is notified of the offeror's death, the offer lapses.

3. Revocation by offeror
   - This occurs when offer is withdrawn and the offeror communicates this decision to the offeree. An offer can be revoked any time before it is accepted.
     - The postal rule will not apply on the communication of revocation. It only applies to the communication of acceptance. (*Byrne v Van Tienhoven* (1880) LR 5 CPD 344)
   - An offer cannot be revoked if the offeror has granted the offeree an option covering it.

- Option – involves a promise by the offeror not to revoke the offer, made in exchange for consideration provided by the offeree.
  a) A promise not to revoke that is made without consideration being given in return is not enforceable (*Board of Control of Eastern Michigan University v Burgess* (1973) 45 Mich App 183; 206 NW2d 256)
  b) The nature of the option as an irrevocable contract or a conditional contract depends on the wordings of the option. However, it is a different rule where an interest in land is involved.

- For bilateral contracts, an offer is revocable at any time prior to its acceptance, effective when communicated to the offeree (*Dickinson v Dodds* (1876) 2 Ch D 463, *Byrne v Van Tienhoven* (1880) LR 5 CPD 344, textbook p41).
- Where the offer has been directed to a particular individual, identifiable group, revocation must be communicated to that person or group. However, in the case of an offer made to the whole world at large, it is sufficient to publish a notice of revocation that is at least as prominent as the notice making the original offer (*Shuey v United States* (1875) 92 US 73 this was about the reward about the assassination of President Lincoln which was revoked by proclamation)

4. Rejection by offeree
   - an offer terminates on rejection by the offeree
   - a COUNTER-OFFER is considered a rejection. The counter offer essentially kills the offer to which it could not be revived by a subsequent expression of acceptance (*Hyde v Wrench* (1840) Beav 334)
   - this must be distinguished from a mere "request for more information or clarification"
     - example: asking whether the time of delivery and payment were negotiable, subsequent acceptance of terms creates a contract. (*Stevenson, Jaques and Co v McLean*)

5. Failure of a condition
   - If an offer is made conditional upon occurrence or non-occurrence of an event, then offer will lapse if event does, or does not occur.

ACCEPTANCE

- Acceptance is an affirmative response to an offer.
- It is an unequivocal statement by the offeree agreeing to the offer.
- An offer may only be accepted by the person to whom it is directed and to constitute a valid acceptance this statement or conduct must occur in response to the offer (although compliance with terms of an offer raises a rebuttable presumption that the act was done in response to the offer). It is sufficient if the offer was one of the reasons for the offeree acting in the way s/he did - even if not the dominant reason.

- The offeree's conduct must occur in response to the offer:
  Crown v Clarke (1927) 40 CLR 227.
  The Crown offered a monetary reward for information leading to the arrest and conviction of people responsible for the murder of two police officers. Clarke was arrested in connection with the murders and made a statement to police about the murders which led to the conviction of other men. Clarke was released and subsequently claimed the reward. Clarke gave information to secure his own release and not in response to the offer for reward to be effective as an acceptance the information needed to be given in exchange for the offer.

- There is no set form of acceptance. (oral, written or by conduct) but the court in Empirnall Case provided the test:
  - *Empirnall Holdings Pty Ltd v Machon Partners Ptd Ltd* (1988) 14 NSWLR 527: E engaged MP to redevelop a site it owned. After work commenced MP submitted a written contract to E. E never signed the document, but MP continued to carry out work and E continued to make payments in accordance with the document. E went bankrupt owing MP considerable sums.
    - The test: "whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signaling to the offeror that his offer had been accepted….. Since Empirnall has taken the benefit of the work with knowledge of the terms on which it was offered, an objective bystander would conclude that Empirnall had accepted the offer on those terms and conditions."

- An offeror cannot impose a contract on an offeree by deeming acceptance to have occurred unless positive steps are taken to reject the offer. –*Felthouse v Bindley* 142 ER 1037
- It is possible to waive the requirement for notification of acceptance in some cases - generally where it would be commercially impractical to require such communication - as in reward cases (*Carbolic Smoke Ball* Case)
- For there to be acceptance, the words/ conduct of the offeree must indicate assent to all the terms of the offer. It must be an unqualified agreement to the terms.
  - If the offeree's response is expressed as "acceptance" but actually introduces new terms – then it is a counter-offer, and the original offer is terminated. (there is a qualified acceptance)

COMMUNICATING ACCEPTANCE

- GR: an agreement is concluded when and where communication of acceptance is communicated (express/implied or by actions or completion) and received - in relation to instantaneous modes of communication acceptance is deemed to be received when it is given to the offeror.

- XPT:
  - Offeror waives the need to communicate
    - See: Carlill v Carbolic Smoke Ball [1893] 1 QB 256 where it was held by Bowen J that:
      "If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid money, are all the police or other persons whoch business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why of course that at once look after the dog, and as soon as they find the dog they have performed the condition… It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it… He does therefore impliedly indicate that he does not require notification of the acceptance of the offer."
  - Silence of the offeree ONLY in special circumstances
    - Silence alone cannot be treated as an assent. However, silence combined with other factors especially where the offeree's conduct can be characterized as acceptance by conduct may be considered.
    - See: *Empirnall Holdings Pty Ltd v Machon Partners Ptd Ltd* (1988) 14 NSWLR 527, Kirby K:
      "whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer had been accepted….. Since Empirnall has taken the benefit of the work with knowledge of the terms on which it was offered, an objective bystander would conclude that Empirnall had accepted the offer on those terms and conditions."
  - Offeror is Estopped from denying communication
    - Estoppel: in *Entores Ltd v Miles Far East Corporation [*1955] 2 All ER 493 Denning LJ said the following: – If the offeree believes that he/she has communicated acceptance – but in fact – the person who answered the call didn't catch the words of acceptance and doesn't ask for them to be repeated – then the offeror is bound because he is estopped from saying he didn't receive the message of acceptance.
  - The postal acceptance rule
    - *Bressan v Squires* [1974] 2 NSWLR 460
      The rule applies whenever the parties contemplated post as a mode – even if just a possible or permitted mode – of communication. It is 'not required that it should be within the contemplation of the parties that the action of posting should have the consequence of concluding the contract' as this would considerably narrow the exception. In this case the parties contemplated the option could be exercised by post. Consequently, prima facie, the exception applied. However, in this case there was further language used in the option that suggested *actual* notice of acceptance was required before acceptance would occur; consequently P's case failed.
    - Where the post (snail mail or other means of non-instantaneous methods of acceptance) is used for acceptance – THE POSTAL RULE applies.
    - Where the POSTAL ACCEPTANCE RULE applies, a properly addressed pre-paid letter of acceptance is effective on posting (whether or not received by the offeror).

NOTE: The Postal Acceptance rule will NOT APPLY:

a) If the terms and circumstances of the offer did not indicate contemplation of acceptance by post. (*Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd* [1994] 1 VR 74)
b) If it is unreasonable to use the post (if members of postal service were on strike) or if offer was made using a quicker means of communication (obiter in *Howard Smith Co v Varawa* (1907) 5 CLR 68 at 79 per Griffith CJ)
c) Instantaneous forms of communication – telephone, telex (*Brinkibon v Stahag* Stahl andStahlwarenhandelsgessellschaft mbH [1983] 2 AC 34), or email (*Schib Packaging Srl v Emrich* Industries Pty Ltd [2005] 12 VR 268)
d) Does not apply to revocation of offer (*Byrne v Van Tienhoven*)

- Offeror specified a special mode of indicating acceptance that does not involve communication

NOTE: if a particular form for acceptance is made mandatory then, to be effective, acceptance must take this form - however, the courts will be slow to conclude a stipulated form is mandatory unless clear language is used to that effect - where clear language is not used then an equally fast and effective method of communication will usually be held to suffice.

Manchester Diocesan Council for Education v Commercial & General Investments Ltd [1970] 1 WLR 241; [1969] 3 All ER 1593

Facts: MD called for tenders relating to property. C&G submitted an offer to buy). The tender stated that acceptance was to be notified to the person whose tender was accepted by letter sent 'by post addressed to the address given in his tender'. MD decided to accept C&G tender and sent their acceptance to the CG's solicitor, which was not the address given in the offer. C&G knew of this acceptance. Was there a contract? In particular, was a mandatory form stipulated for acceptance and, if so, was it complied with?

The method of acceptance prescribed in the tender was not *mandatory.* The offeror was made aware of the acceptance by an equally effective method and thus the acceptance was effective.

BATTLE OF FORMS

- When documents pass back and forth between the parties during negotiation, this is called a "battle of the forms". Offer and acceptance cannot be easily identified. The courts look at the circumstances of the case to determine whether agreement was reached, and on what terms.

Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979] 1 WLR 401

Lord Denning: when there is a "battle of the forms" there is a contract as soon as the last of the forms is sent and received without objection being taken to it. … The difficulty is to decide which form, or which part of which form, is a term or condition of the contract. In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them.'

ACCEPTANCE IN UNILATERAL AGREEMENTS

If acceptance is performing the act asked for (as *Carlill* suggests it is) then, applying the general rule an offeror could revoke after performance has started but before it is completed. However, in *Daulia v Four Millbank*[1978] 2 All ER 557 it was suggested that in the case of offers of unilateral contracts, the offer is accepted and a contract is made when an unequivocal commencement of the act has occurred.

More recently in Australia the Full Federal Court in *Mobil Oil v Wellcome* (1998) 81 FCR 475 held that there was no general rule that offers for unilateral contracts could not be revoked after the offeree had commenced performance.

AGREEMENTS WITHOUT OFFER AND ACCEPTANCE

Sometimes offer and acceptance cannot be identified – but there is an agreement. For example, competitors in a regatta that did not communicate with each other, but only with the organiser (and accepted the organisers rules). *Clarke v Dunraven (The Satanita)* [1897] AC 59: – Clarke and Dunraven entered a yacht race pursuant to the Yacht Racing Association Rules. – The rules provided that if a yacht was damaged due to negligence, then the negligent party must pay damages.

WEEK 2
Formation –
Certainty and Conditional Contracts (Chapter 3)
Consideration (Chapter 4)

II. CERTAINTY

An agreement must be sufficiently certain to be binding.
An agreement may be considered uncertain where:

a. Vague or ambiguous;
b. Illusory agreements;
c. Incomplete; and
d. Agreement to agree/ negotiate.

a. Vague or ambiguous

A contract will be non-binding due to being vague or ambiguous if a definite meaning cannot be given to the words used in the contract (that is, the court cannot work out what was intended).

Courts are reluctant to refuse enforcement if they can resolve the ambiguity (more than one meaning will not necessarily make the contract uncertain). Courts will seek to uphold agreements wherever possible, seeing that it as their duty to resolve uncertainty and correct defect in the words used by the parties if they can give effect to the discernable common intention. This is done by extrinsic Evidence, referring to customs, correcting clerical errors and importing standards of reasonableness.

This especially so in Commercial agreements (Obiter in *Scammel v Ousten* [1941] 1 All ER 14):

"in commercial documents connected with dealings in a trade with which the parties are perfectly familiar, the court is very willing, if satisfied that the parties thought they had made a binding contract, to imply terms and terms as to the method of carrying out the contract, which it would be impossible to supply in other kinds of contract."

And agreements that have been partly performed. (foxtel Mgnt Pty Ltd v Seven Cable TV Pty LTd (2000) 102 FCR 464)

CASES:

Scammel v Ousten [1941] 1 All ER 14

Parties (motor dealer and a purchaser) entered into an agreement for sale of a motor van on "hire purchase terms". Whether the term "hire purchase agreement" was uncertain? It was held it was too vague to constitute a contract because 5 possible meanings were attributed to the words. Thus no contract between the parties existed at all. (Lord Russel)

Raffles v Wichelhaus (1864) 2 H & C 906

Plaintiff agreed to sell cotton to the defendant. Cotton was described as cotton arriving "ex Peerless from Bombay". Two ships named "Peerless" left Bombay with cotton. Plaintiff intended to refer to one ship and the defendant the other. The defendant refused to accept delivery. There was no contract because of ambiguity in the contract and evidence the parties intended to refer to different ships – therefore no *consensus ad idem*.

Council of Upper Hunter County v Aust Chilling (1967) 118 CLR 429

Council entered into a contract to supply electricity to Australian Chilling and Freezing Co Ltd (ACF). Clause 5 of the contract stated: "if the Supplier's costs shall vary in other respects than has been hereinbefore provided the Supplier shall have the right to vary the maximum demand charge and energy charge". Council sought to increase its charges. ACF said the term "supplier's cost" made the contract void for uncertainty. NSWCA agreed – and the Council appealed to the High Court.

BARWICK CJ: a contract is not automatically void for uncertainty just because it may be construed in more than one way "So long as the language used by the parties... is not 'so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless."

b. Illusory agreements

A promise is illusory if one party has the discretion to abandon their obligations altogether. It makes the performance of a party's promise entirely a matter for that party's discretion. Example: Bob promises to supply Jill with apples if Jill pays Bob a price to be determined at her absolute discretion. Here, Jill could set a price of $0. This is Illusory because if Jill sets the price at $0 then she removes a promissory obligation

The difference between illusory terms and uncertain terms can be seen in: *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130: Illusory promises are clear in their meaning but are illusory.

c. Incomplete

Generally, parties must deal with the essential terms for the agreement to be enforceable. What is essential depends on the nature of the agreement. Usually an essential term is price: but if *Sale of Goods* legislation applies (s13(2) of the *Sale of Goods Act* 1923 (NSW) and s13 of the *Sale of Goods Act 1958* (Vic)) then if the price is not fixed, the buyer must pay a reasonable price.

If a contract contains a suitable mechanism to resolve incomplete elements, then the contract may be valid.

ANZ Bank v Frost Holdings Pty Ltd [1989] VR 695

The issue was whether there was a contract between Frost and ANZ for Frost to produce Calendars for ANZ. ANZ did not wish to proceed and Frost claimed breach of contract. Was the contract complete where the parties had not agreed on style, design, quality, content or number of copies to be produced? Court said though Kaye J, there was no agreement between the parties upon essential terms of the proposal.

Godecke v Kirwan (1973) 129 CLR 629

Godecke and Kirwan entered into an agreement for the sale of land by Kirwan to Godecke. The agreement stated that, if Kirwan required it, Godecke would execute a further agreement as determined by Kirwan's solicitors. Kirwan did not want to proceed with the sale. The trial judge found that the agreement was non-binding due to being incomplete. Godecke appealed. Appeal was allowed and court held through Walsh J that

"it is clearly established that a binding agreement may be made which leaves some important matter, like the price, to be settled by the decisions of a third party. There is no reason in principle for holding that there cannot be any binding contract is some matter is left to be determined by one of the contracting parties. Here, parties set out all principal terms to govern the sale of land, and even included provisions which imposed by implication an obligation to execute a formal contract, and a promise to execute if required a further agreement in accordance with the contract. This is limited to insertion of covenants and conditions not inconsistent with those contained in the offer. Thus a binding agreement was made."

NOTE: Essential matters can be left by parties to be determined in the future so long as this does not require them to reach a further agreement between themselves. This is done by including formula or mechanism provisions.

<u>Formula Provision</u>

- designed to settle the content of an essential term without the need for further negotiation between the parties. Ex. Leave price to be determined by reference to a nominated price list (Hillas & Co Ltd v Arcos Ltd [1932] All ER Rep 494) or consumer price index (Hely v Stirling [1982] VR246).

<u>Machinery Provision</u>

- mechanism agreed upon by the parties to resolve the precise content of a term sometime in the future. Such a device may be used, when the parties do not know would be appropriate at that time. Example: nominate a particular person, officer holder, to fix the sale price of land (Hall v Busst (1960) 104 CLR 206), or rent to be paid upon renewal of the lease. (Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600)
    - but if person dies or cannot or will not fix the price the contract cannot as a general rule be enforced. *Hall v Busst*

d. Agreement to agree / Agreement to negotiate.

Three kinds of agreements can be identified:

1. Agreements to reach agreement between the parties themselves *in the future* = <u>non-binding</u> for incompleteness.
2. Agreements to enter into negotiations in the future = Kirby: may be binding in Australia (parties don't wish to finalise an agreement now – but wish to immediately bind themselves, they can agree to suspend the operation of a contract until an event occurs in the future) *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) NSWLR 1
3. Agreements NOT to deal with a third party "lockout" agreements = binding – *Walford v Miles* [1992] 2 AC 128.

Agreement to negotiate

- This May or May not be enforceable. Check the language used in the contract if they intend to be bound.

Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) NSWLR 1 – Kirby P said: Basic law is that courts will not enforce an agreement to agree. An agreement to negotiate in good faith, **may** be enforceable (disagreeing with UK authority) – because of the doctrine of freedom of contract, and the fact that the two

parties had intended the heads of agreement to be binding. Where parties have agreed to negotiate in good faith, they should be held to that promise. The courts could assess an appropriate measure of damages for loss of chance.

Lock-out agreements

Walford v Miles [1992] 2 AC 128: Lord Ackner:

"There is clearly no reason in the English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B, agrees for a specified period of time, not to negotiate with anyone except A in relation to the sale of his property".

Lord Ackner described lockout agreements as a negative agreement where "B" agrees not to negotiate for a fixed period with a third party. B has not locked himself into negotiations with "A", rather, A has achieved an exclusive opportunity for a fixed period to bargain with B.

SEVERING UNCERTAIN PARTS OF A CONTRACT

If the uncertain part of the contract can be severed from the remainder of the contract – then the remainder is enforceable (if it can't then the whole contract is unenforceable).

To determine whether severance is possible, look at:

1. The intention of the parties; and
2. Whether the contract is divisible.

Life Insurance Co of Australia Ltd v Phillips (1925) 36 CLR 60

Phillips purchased 2 life insurance policies from the company. The policies were unambiguous (clear on death cover and premiums). Under the policy, after 3 years, Phillip had a right to a housing loan. The terms of the housing loan were vague (no indication of amount or interest). After 4 years, Phillip sought to have the policies declared void (for uncertainty), and recover the premiums he had paid.

CONDITIONAL CONTRACT

- A contract where obligations may be qualified or suspended until a condition is fulfilled.
- Parties are bound by agreement before the event occurs, or does not occur, and if they are, the content of their obligations, depends upon the nature of the condition. This is determined by reference to the intention of the parties as disclosed by the language they have used.
- Why do parties enter into conditional contracts?
  - To protect a party who, contracting on the understanding that a particular condition will be met, wishes to ensure they are not obligated under the contract if that condition is not fulfilled; or
  - To put off their obligations until a certain date or time.
- Common Examples/ Illustration:

<u>Subject to Contract</u>

The agreement may belong to any of three classes, into which class the agreement falls depends on the intention of the parties and is a question of construction. In construing the agreement account must be taken of relevant practices.

where an agreement for the sale of land is reached 'subject to contract', the presumption is that execution of the formal document is a condition precedent to contractual formation. *Farmer v Honan* (1919) 26 CLR 183 at 192

Masters v Cameron (1954) 91 CLR 353

The agreement may belong to any of three classes:

(a) execution of the formal document is a mere formality;
(b) execution of the formal document is a condition precedent to the parties' performance obligations; or
(c) execution of the formal document is a condition precedent to contractual formation.

First , where the agreement falls within the first class of case, the parties, having reached finality in negotiating the terms of their bargain, are immediately bound by the agreement and neither party may withdraw. In such cases, the 'subject to contract' clause does not create a condition precedent.

Second , where the agreement falls within the second class of case, the parties are also regarded as having reached finality in negotiating the terms of their bargain. They are therefore immediately bound. However, their obligation to perform the contract is postponed until the execution of the formal document.

Third , where the agreement falls within the third class of case there is no contract unless and until the formal contract is executed. Accordingly, either party may resile from the negotiations without being in breach of contract.

Geemaz Management Pty Ltd v Geelong Motors Pty Ltd [2013] VSC 571 (discussed a 4th category)

"the so-called fourth category of cases involving an agreement which contemplates that the matter will be dealt with by a formal contract. That is, the parties intended to be bound immediately by the terms agreed, but expected to make a further contract in substitution for the first, containing additional terms."

Subject to Finance

Meehan v Jones (1982) 149 CLR 571

Where the expression 'subject to finance' (or a similar expression) is used, the agreement may have the effect that:

(a) satisfaction of the clause is a condition precedent to either or both of the parties' performance obligations;
(b) satisfaction of the clause is a condition precedent to contractual formation.

The meaning and effect of the expression 'subject to finance', including whether the party for whose benefit the provision operates is required to take reasonable steps to obtain finance, depends on the intention of the parties and is a question of construction.

In the absence of an express agreement to the contrary, the presumption is that satisfaction of a 'subject to finance' clause is a condition precedent to the obligation to perform of the party for whose benefit the provision operates.

Where satisfaction of a 'subject to finance' clause includes an element of personal satisfaction of the party for whose benefit the provision operates:

1. that party must act honestly in deciding whether satisfactory finance has been offered; and
2. whether that party must also act reasonably is a question of construction or implication.

III. CONSIDERATION

Consideration

- price stipulated by the promisor for a promise.
- what the promisor asks the promisee to 'pay' in exchange for receiving the promise
- Consideration means that there is an exchange between the parties to the contract. This makes a contract different to a gift. Usually a gift is not enforceable - no consideration (exceptions may include a charitable pledge).

Consideration not required in:

- a promise made in a deed under seal,
  Deed – formal written document that is signed, sealed (or deemed to be) and delivered, and which is intended to operate as a deed.
- Doctrine of promissory estoppel.

Consideration is sometimes classified into 'executed' and 'executory' consideration; either is sufficient.

- *Executed consideration* takes the form of performing an act rather than a promise of performance.
- *Executory consideration* consists of a promise to do something. Most contracts take the form of executory consideration; thus they comprise of initial promises.

Payment - can take the form of :

i. Performing an act (executory)
   - Promise to reward $100 to anyone who finds a dog
ii. Forebearing from performing an act (executory)
   - Promise to pay $100 if you stop smoking
iii. Promising to do something in return (executed)
   - Offer to sell goods for $100 and other accpts.

CONSIDERATION MUST MOVE FROM THE PROMISEE
BUT NEED MOVE TO THE PROMISOR.

Therefore a third party cannot provide consideration. But a third party can receive consideration.

For example, if promisor (A) asks promisee (B) to pay (C) a sum of money as consideration for A's promise to B, that will be good consideration. However, if promisor (A) asks (C) to provide a payment as consideration for A's promise to B, that will not constitute good consideration (there is no detriment to B in such as case).

In the case of joint promisees, it is sufficient if consideration moves from one of the parties.

Coulls v Bagot's Executor & Trustee Co Ltd (1967) 119 CLR 460

Mr Coulls entered into a contract to allow O'Neil Constructions to quarry part of his land. In exchange, O'Neil was to pay royalties to Mr Coulls and his wife as joint tenants. Following Mr Coulls' death, his executor sought to determine whether O'Neil was required to pay the royalties to the estate or to Mrs Coulls.

A majority of the High Court held that the royalties were payable only to the estate on the ground Mrs Coulls was not a party to the contract. In discussing the issue of consideration, a majority of judges (concurring with Barwick CJ) concluded that where a promise is made to joint promisees then either promisee can enforce even though consideration only moved from one.

3 essential elements:

1. Must be something of value in the eyes of the law
2. Must be nominated by the promisor
3. be given in exchange for the promise (quid pro quo)

MUST BE SOMETHING OF VALUE

- Consideration: does not have to be money
- Consideration does not need to be "fair" – but it has to have some level of value.

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

Nestle advertised that it would supply a record to anyone who sent it money together with 3 chocolate wrappers. The issue was whether the chocolate bar wrappers formed part of the consideration, or, whether the wrappers were a condition qualifying the person delivering them to buy the record.

Lord Somervell: Consideration can be anything stipulated by the promisor. The 3 chocolate bar wrappers were not a condition precedent – rather – the wrappers formed part of the consideration. This was clear from the description in the offer – to get the record, send the wrappers plus money. It did not matter whether the wrappers were of no value to Nestle. Lord Somervell: "A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn."

Dunton v Dunton (1892) 18 VLR 114: giving up a freedom constituted good consideration

The parties entered into a written agreement whereby Mr Dunton agreed to pay his former wife an allowance so long as she behaved 'with sobriety, and in a respectable, orderly, and virtuous manner' or committed an act whereby she or Mr Dunton could be subjected to 'hate, contempt, or ridicule'. The question arose as to whether this agreement was legally binding. Was there consideration for Mr Dunton's promise to pay the allowance?

HELD: The terms of the agreement did imply a promise by Mrs Dunton and this was good consideration. Though promising not to do something which cannot lawfully be done *is not* good consideration, a promise not to do something which can be lawfully done *is* good consideration.

NOTE: In Wigan v Edwards: The court held that giving up a legal right was held to be good consideration.

NOMINATED BY THE PROMISOR

- Consideration can be anything stipulated by the promisor provided it is not illegal. The consideration must, however, have 'value' in the eyes of the law - that is to say, it must exist, it must be real, it need not be adequate. Consequently, an illusionary undertaking cannot be good consideration.

QUID PRO QUO

- Must be given in exchange for the promise
- Carlill case – consideration was the inconvenience suffered by Mrs Carlill at the request of the Smoke Ball Co (using smoke ball according to directions)
- Consideration= a bargain

Australian Woollen Mills Pty Ltd v the Commonwealth (1954) 92 CLR 424

a government announcement made in 1946 that it would pay a subsidy to manufacturers who purchased and used wool for local manufacture. Australian Woollen Mills received large subsidies under the scheme. In 1948 the government announced that it was ending the scheme. Australian Woollen Mills argued that the subsidy scheme gave rise to a contract and the government owed it subsidies.
HELD: it is impossible to hold that any contract was established at any stage binding the Commonwealth to pay subsidy in consideration of company's purchase of wool. No relation of quid pro quo between a promise and an act can be inferred.

Beaton v McDivitt (1987) 13 NSWLR 162

McDivitt promised to transfer a portion of his land to Beaton when a proposed rezoning occurred, if, in the meantime Beaton moved onto the land and worked it as required. Did Beaton provide valuable consideration?

Held: It was found that Beaton had provided consideration for McDivitt's promise to transfer the land. Beaton worked on the land in the manner required by McDivitt – and this was a detriment sufficient for consideration. (but the case was decided adversely on another issue)

CONSIDERATION MUST BE CONTEMPORANEOUS WITH THE PROMISE

General Rule: Past consideration is not good consideration. The promise is coextensive with the consideration.

Roscorla v Thomas (1842) 3 QB 234

Roscorla purchased a horse from Thomas. After the sale was completed, Roscorla asked Thomas to give an assurance that the horse was sound. Thomas gave the assurance, but the horse actually was not sound. Roscorla sued Thomas for breach of contract.

HELD: the only promise that would result from the consideration was the delivery of the horse. The precedent sale, without warranty, imposes no duty or obligation upon him.

Harrington v Taylor (1945) 36 SE 2d 227

There was a fight between husband and wife. Where in the act of decapitating him, another person intervened and saved him. The other person's hand got mutilated. The husband promised orally he will pay her damages but after paying small sum, failed to pay more

HELD: there was no consideration to support the promise. It is not consideration as would entitle her of recovery by law.

EXCEPTION: (where past consideration can be good)

1. Service performed in the past, good consideration for a subsequent promise to pay for that service, at promisor's request and understood to be paid for.
2. Debt incurred by an infant for a promise to pay made after the comes of age
3. Revival of liability in statute barred debt if theres a subsequent promise to pay amount owed.
4. In bills of exchange

Pao On v Lau Yiu Long [1979] 3 WLR 435.

Note: the law has begun to realise that business relationships can be more complicated – and provided certain conditions are met – there may be an exception to the rule.

FACTS: Pao On agreed to sell shares to Fu Chip (controlled by Long) in consideration for certain shares. To protect the share value, Pao On and Fu Chip agreed that Pao On would retain 60% of the acquired shares until April 1974. However, in April 1973, Pao On refused to proceed with the contract unless Long agreed to indemnify him against the value of the retained shares falling below a set level. Long agreed, but only to ensure public confidence in the company. The sale proceeded an Pao On sought to enforce the indemnity.

HELD: There was consideration here – an act done prior to a promise can be good consideration in some cases; in particular, it will be good consideration if the act done was done at the promisor's request, the parties understood that the act would be remunerated in some way and, if the promise had been given in advance of the act it would be legally enforceable. In this case all three elements were present. In particular, the defendant had requested that Pao On retain 60% of shares and the parties understood at that time that that act would be compensated by the provision of a guarantee.

CONSIDERATION AND EXISTING DUTIES

If you are already following an existing duty (whether contractual or a public legal duty, such as a road rule) – you are usually not giving consideration.

Existing contractual duty: performance of an existing contractual obligation is not good consideration unless some *additional* benefit is conferred.

a. Contractual duty the promisee already owes promisor

Where the promisee is already contractually bound to the promisor, the *general rule* is that performance of an existing contractual obligation will not be good consideration unless some *additional* benefit is conferred. However, it is sometimes difficult to determine whether an additional benefit is conferred; in particular, a benefit may exist if performance of the existing duty avoids problems that are associated with non-performance.

Stilk v Myrick (1809) 2 Camp 317

Before the start of a voyage, plaintiff contracted to work as one of 11 seaman for the voyage for $5 a month. During the voyage 2 seamen deserted; Captain then made an agreement with the rest of the crew that they should receive the wages of the deserters if they continued to work the ship back to London.

HELD: The agreement was not enforceable because there was no consideration given by the plaintiff for the promise to pay. The remaining crew were already bound to work the vessel back to London. The desertions were merely an emergency of the voyage and the rest of the crew remained bound by the terms of the original contract to bring the ship back to London. Promising or performing a duty you are already bound to the other party to perform is not good consideration for any promise he makes you. (One good reason for this rule is that it prevents contractual blackmail – where a party threatens not to perform his contractual obligations unless he gets more consideration than was originally agreed to)

Williams v Roffey Bros and Nicholls (Contractors) Ltd (1990) 1 All ER 512

P contracted to perform carpentry work for D. When it became apparent he could not complete on time, D promised to pay P extra money to ensure it was completed on time. D would incur liability to a third party if the work was not completed on time. Was D liable to pay the extra amount?

HELD: D was liable. Per Glidewell LJ:

If A enters into a contract with B for the supply of goods or services in return for payment by B; and prior to completion B has reason to doubt whether A will complete; and B then promise A additional payment in return for B promising to perform on time; and as a result of this promise B obtains a benefit or obviates a disbenefit [eg, liability to third party]; and B's promise is not given as a result of A's economic duress or fraud THEN The benefit to B (or obviation of disbenefit) is capable of being good consideration for B's promise.

Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723

The Musumeci's leased a shop in a shopping centre run by Winadell. Winadell subsequently leased another shop in the centre to a competing business. Musumeci's asked for a rent reduction to compensate for this and Winadell agreed. When a dispute later arose Winadell sought to terminate the lease and Musumeci sought damages for breach, relying in part on Winadell's promise to charge a reduced rent.

HELD: In this case, applying *Roffey*, the practical benefit Winadell gained by promising lower rent was said to be the 'enhanced capacity of [the Musumeci's] to stay in occupation, able to carry out their future reduced lease obligations' notwithstanding the new competition. This enhanced the capacity of Winadell to keep a full shopping centre. Santow J concluded that there was a practical benefit; there was valid consideration for varying the lease.

Popiw v Popiw [1959] VR 197

Helga Popiw left her husband and, in an effort to entice her back, her husband orally promised that if she returned he would put the title to the home in their joint names. Helga returned (for a few weeks only) and left after a dispute. Was she entitled to enforce her husband's promise to her?

HELD: Hudson J: Even if it could be said that Helga was under a duty to cohabit with the respondent *there was no remedy in law which would compel her to do so.* Thus, in exchange for his promise the husband, from a practical viewpoint, obtained something more advantageous than the 'right of cohabiting with his wife' which he could not enforce; Helga suffered a detriment by 'placing herself in apposition which she could not have been compelled to occupy' – there was good consideration.

b. Contractual duty the promisee already owes a 3rd party

The position is different where the promisee contractually bound to a 3rd party to perform the obligation. In a case where the promisee's contractual duty is owed to a third party, performing (or promising to perform) that duty is good consideration for the promisor's promise. See : Pao On v Lau Yiu Long [1979] 3 WLR 435.

c. Public duty owed.

Where a duty is imposed by law to perform a certain task, mere performance of that task is not good consideration. This seeks to prevent corruption - public officials extorting money from the public for performing tasks they are already required to perform. However, if the promisor does more than merely perform an existing duty this will be good consideration.

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

Glasbrook promised to pay Council for special police protection during a strike (after requesting police protection and being refused). The protection Glasbrook received was more than the police thought necessary. Glasbrook refused to pay and Council sued.

HELD: The public cannot be called upon to pay the police for performing their obligations and any promise to do so will be unenforceable (in this case there is an obligation to keep the peace, prevent crime, protect property etc) But if individuals require services of a special kind, not within their obligations, then a promise to pay for these will be enforced (this was the case here and legislation permitted the 'lending' of police for purposes of extra-service)

NOTE: Whether a promise has been done over an existing public duty is question of fact decided according to the circumstances of each case.

PARTIAL PAYMENT OF DEBT

- GR: part payment of a debt is not good consideration for the creditor's promise to forgo the balance. In paying part of the debt the promisee is doing no more than performing an existing contractual duty owed to the promisor.
- This rule, that payment of a lesser sum on the day cannot be satisfaction for the whole – known as the rule in Pinnels case – was finally established by Foakes v Beer.
- In *Pinnel's* case ((1602) 77 ER 237) it was held that "payment of a lesser sum on the day cannot be good consideration for a promise by the creditor not to claim the rest of the money due".

Foakes v Beer (1884) 9 App Cas 605.

FACTS: Beer obtained a judgment against Foakes for a debt owed and costs in 1875. Over a year later the parties entered into an agreement to the effect that in consideration of Foakes paying Beer $500 in part satisfaction of the judgment debt and on condition that the balance be paid in installments, Beer would not take proceedings on the judgment. In 1882 Beer took proceedings to enforce the judgment so as to recover interest on the judgment debt. It was established that the whole debt had now been paid off.

HELD: The agreement could only be enforced if there was consideration. The only consideration expressed was the payment of $500 – which was part of a larger debt already due. The payment of installments could not be consideration unless payment of the $500 was consideration. The doctrine of Pinnels case is that payment of a lesser sum on the day cannot be satisfaction for the whole sum. i.e. payment of a lesser sum on the day cannot be good consideration for a promise by the creditor not to claim the rest of the money due. This rule is still the law and therefore there was no consideration provided here. As a result Beer could recover the interest.

RATIO: Part payment of a debt on or after the date the debt is due is not good consideration for the creditors promise not to claim the balance.

EXCEPTIONS:

part payment will be good consideration where:

(a) Earlier payment is made

Receiving the lesser sum earlier is good consideration.

(b) Payment is made with something else

The additional factor provides consideration. This is one of the sources of criticism of the general rule: payment of $999 out of $1,000 will not be good consideration for a promise to forgo the $1 balance. However, payment of $10 plus book worth $5 will be good consideration (provided stipulated by the promisor) for the promise to forgo the balance of $990)

(c) Where it arises from a composition Agreements

Where a debtor agrees with all his creditors and they agree to accept a dividend, payment will discharge the debtor from further liability to the creditors. This is to prevent fraud between the other debtors.

(d) Where payment is made by a third party

This exception is explained on the basis that it would be a fraud on the 3rd party to allow the creditor's claim

(e) Where the claim is unqualified

Rule does not apply to unliquidated or disputed claims.

PROMISSORY ESTOPPEL

- operates where it would be inequitable for the promisor not to be held to the promise *Central London Property v High Trees* [1947] KB 130 (doctrine first developed)

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

This case establishes the following pre-conditions for promissory estoppel:

(1) Defendant must make a promise of some kind

(2) Defendant must also create or encourage an assumption on Plaintiffs part that promise will be performed

(3) Plaintiff must rely upon this to its detriment; and

(4) It must be unconscionable, having regard to the Defendant's conduct, for the Defendant to be free to ignore the promise.

Sidhu v Van Dyke (2014) 251 CLR 505 : Requirement of detrimental reliance discussed