

## **Contracts: The 4 Areas**

### **1. Entering into a contract**

- a. Formation**
  - i. Intention**
  - ii. Agreement**
  - iii. Consideration**
  - iv. Miscellaneous**
- b. Completeness**
  - i. Essential Terms Missing (Complete?)**
  - ii. Agreements to agree**
  - iii. Severance**
- c. Estoppel**
- d. Privity**
- e. Transfer of Contractual Rights**

### **2. Performing the contract**

- a. Incorporation of Terms**
- b. Interpretation of Terms**
- c. Performance**

### **3. Getting out of a contract**

- a. Termination**
  - i. Common law rights to terminate**
    - 1. Breach of essential term**
    - 2. Breach of innominate term**
    - 3. Repudiation**
  - ii. Express rights to terminate**
  - iii. Implied rights to terminate**
  - iv. Other terminations**
    - 1. Frustration**
    - 2. Agreement**
    - 3. Performance**
- b. Rescission**
  - i. Common Law rights to rescind**
    - 1. Bars to rescission**
  - ii. Statutes giving right to rescind**
- c. Illegality**
- d. Incapacity**

### **4. Remedies for Breach and Restitutionary remedies**

- a. Breaches**
- b. Restitution**

## **ISSUES THAT MAY ARISE in the Exam:**

### **Incorporation of Terms:**

- Standard terms contained in a document that one party wishes to make part of the contract
- Ways to incorporate:
  - o Signed acceptance
  - o Display or delivery
  - o Prior Course of Dealing

### **Interpretation of Terms:**

- To ascertain what parties must reasonably be taken to have intended!

### **Misinformation:**

- A enters into a contract with B under some sort of misapprehension at the time they make the contract
- After discovering the truth, what can they do about it?
  - o Breach of Contract via incorporating oral statement
  - o Estoppel
  - o Rescind/avoid/cancel contract at common law on the basis contract was induced by a misrepresentation
  - o Sue for damages in tort, or under the Misrepresentation Act
  - o Seek relief against misleading or deceptive conduct under the ACL
  - o Argue that the contract is void /voidable for mistake
  - o Seek rectification of written contract on basis that contract does not correctly record parties agreement

## 1. Entering into a Contract

- Formation
- Completeness
- Estoppel
- Privity
- Transfer of Contractual Rights

### Formation- Is there a contract?

Intention

Agreement

Consideration

Miscellaneous Requirements:

- Contracts don't generally have to be in writing, except, below must be otherwise they will be invalid:
  - o Contracts for the sale/interest of/in land: Law of Property Act 1936 (SA) s 26 (1)
- If writing is required, electronic equivalent is sufficient,
  - o But doesn't apply to s 26 of Law of Property Act
  - o Electronic Transactions Acts 1999 (cth), 2000 (SA)

### Completeness: Is the contract complete and Certain?

- Essential Terms are Missing (Contract Incomplete):
  - o Contract will be void if essential terms missing or not agreed upon:
    - Rent amount must be agreed: *NZI Insurance Australia Ltd V Baryzcka*
    - Court will imply wage amount, and price of goods on sale not essential
    - Unless there is a mechanism to cure that incompleteness in place
- Agreement to agree:
  - o Cannot have them: *May & Butcher v R*
  - o Promise to negotiate in good faith?: *Coal Cliff Collieries v Sijhema*
- Severance:
  - o Courts will strive to uphold an agreement in face of uncertainty
  - o A non-essential term will be severed so that the contract reflects the intention of the parties if interpretation of uncertain terms (see below) is difficult
  - o Recall that courts can rectify( see below)

### Equitable Estoppel:

If there is no contract (no consideration), is there still reliance on promise?

- Representation
  - o A encourages B to adopt an assumption: *Legione v Hately*
    - Must be clear and unequivocal: *Legione*
    - A's conduct only has to be a contributing cause, but not sole reason: *Sidhu*
- Detrimental reliance
  - o B acts on that behalf, such that B would be worse off if A departs from that assumption: *Je Maintiendrai v Quaglia SASC*
    - Party seeking must show detrimental reliance, there is no presumption: *Sidhu v Van Dyke*
- Unconscionability
  - o It would be unconscionable for A to depart from that assumption: *Walton Stores v Mahor*
    - Look for **knowledge** of what B has done in this situation

### Effects/Remedies of finding a party is estopped:

- Majority in *Sidhu* appears to reject 'minimum equity', although they do say that the court should 'go no further than is necessary to prevent unconscionable conduct'
- There may be cases where it is unjust to make good the promise, but usually 'where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise'
  - o In other words, enforcing the promise is suitable in most cases: *Sidhu v Van Dyk or Giumelli v Giumelli*

## Privity:

### **The Doctrine of Privity:**

Third party cannot enforce the promise: *Coulls v Bagot's/ Wilson v Darling Island HCA*

### **Ways of Getting around the Doctrine:**

- Agency
  - o Agent (A) must have authority to act on behalf of C (the principal)
  - o Authority may be actual or apparent (someone who reasonably appears to have authority)
- Infer a Trust: *Trident v McNiece HCA*
  - o One person has a right or property, gives it to a trustee to give (usually at a later date) to a beneficiary
    - Trustee is the legal owner of the property at that time!
  - o Third party can require promise (A) to enforce the promise/contract
  - o Third party can sue A for breach of trust if they don't ask
  - o Loss can be measured at third parties
  - o Insurance Contracts Act 1984 (Cth) ss 48, 49, 51 says
    - Means that as long as third party is specified or referred to as a person to whom the cover extends, then a third party
- Estoppel
  - o Promisor may be estopped from relying on lack of privity if: *Trident v McNiece HCA*
    - B leads C to believe that B will confer the right over to C
    - C relies to their detriment
    - It would be unconscionable for B to renege from that promise
      - B must have knowledge of what C has done in reliance on promise
- Enforcement by the promisor
  - o Promisee (A) may obtain order for specific performance against promisor (B) in favour of third party: *Beswick v Beswick*
  - o Can sue for damages for failure to confer benefit but only measurable at promisees (A's) loss: *Coulls*
- Note: Contracts Imposing a Burden on Third Party
  - o Cannot impose burden on third party
  - o Unless bound by a restrictive covenant (promise to not use land in certain way)- property

### **Transfer (assignment) of Contractual Rights:**

Two ways in which rights (such as right to sue or right to collect a debt) can be assigned:

- **Section 15 of the Law of Property Act**
  - Contract must be in writing
- **Equitable Assignments.....**

Ways in which obligations can be assigned (novation= process of making new contract with new parties):

- Need consent from both parties
  - o Transfer of business: all 3 parties need to agree with change of a lease!
- Involuntary assignment on death or bankruptcy:
- Negotiable instruments:
  - o Cheque