

CONTRACT A

SHORT NOTES

Semester One 2017

Unilateral and Bilateral Contracts

Unilateral Contracts	Bilateral Contracts
<p>The consideration on the part of the offeree is completely <i>executed</i> by the doing of the very thing which constitutes acceptance of the offer (promise)</p> <p>[A's promise is executory and B's obligation has been executed at the moment of formation]</p>	<p>An <i>executory</i> promise or set of promises are exchanged by both parties to do something in the future</p>

OFFER

Offer: Indication by one person to another of his or her willingness to enter into a contract with that person on certain terms (*AWM v The Commonwealth*)

Note: It will leave nothing to be negotiated

Must be:

Of language that is sufficiently certain and promissory – objective test (*Gibson v MCC*)

Must Not Be:

- **Mere Puff:**
 - Exaggerated sales talk, not intended by the speaker, or intended to be taken by the reasonable person, as literally (Objective test)
 - Unilateral contracts are generally not considered 'mere puffs' where language is sufficiently promissory;
 - Nor where a deposit is made (*Carlill v Carbolic Smokeball Company*)
- **Invitation to Treat:** An invitation to enter into negotiations which lacks sufficient indication of a willingness to be bound

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CONSIDERATION

Consideration: An act of forbearance (executed), or the promise thereof (executory), which is the price paid by the promisee for the promisor's promise (*Dunlop Pneumatic Tyre Co Ltd v Selfridge*)

- Something of value given in exchange for a promise
- Often the promisor of a bilateral contract will also be the promisee and vice versa – however the **promisee** is the party seeking to enforce the promise
- An agreement without consideration is *nudum pactum*
- In unilateral contracts, consideration is performance of the act which constitutes acceptance in accordance with terms of the offer (*Carlill*)

Not Required –

- For International Sale of Goods under CISG
- When a promise is made under deed (under seal) (*Ballantyne v Phillott*)

Specifically –

- For one joint promisee– where two parties are joint promisees, consideration may be provided by one of them on behalf of the other (*Coulls*)

Elements

The Benefit / Detriment Requirement	The Bargain Requirement
<p>The promisee must incur a detriment or confer a benefit on someone (not necessarily the promisor) in the sense of giving something or undertaking an obligation (<i>Beaton v McDivitt</i>)</p> <p>In most cases, both a benefit conferred and detriment incurred will be made</p>	<p>The benefit or detriment must be given <i>in return/in exchange for/as the price paid for</i> the promise. It is a requirement of “quid pro quo”: (<i>Australian Woollen Mills (AWM) v Commonwealth</i>)</p> <p>A request (implied or express) from the promisor is relevant but not conclusive in establishing quid pro quo: (<i>Australian Woollen Mills (AWM) v Commonwealth</i>; <i>Beaton v McDivitt</i>)</p>

Must

- **Move from the promisee** (*Beaton v McDivitt*)
 - Consideration does not have to reach the promisor, but must leave or move away from the promisee.
 - Especially relevant in joint-promisee situations where the party who receives the benefit from the promisee is not the one who performs the act
- **Be Sufficient** –

Sufficiency

(1) Past Consideration

Consideration which precedes the promise it purportedly supports
 Something given by the promisee before the promise is made is not sufficient consideration
 (*Rascorla v Thomas*)

Exception

Past services are good consideration for a subsequent promise to pay for those services if:

- they were performed at the request of the promisor and
- there was an implication they would be paid for by the promisor
(*Ipex Software; Lampligh*)
- and the promise would have been legally enforceable had it been promised in advance
(*Pao On v Lau Yiu Long*)

(2) Existing Legal Duty

A promise to perform, or actual performance of, an existing legal duty (public or contractual) is not sufficient consideration
 (*Stilk v Myrick; Foakes v Beer*)

Part Payment of a Debt / The Rule in *Pinnel's Case*

A promise to pay part of a debt will not constitute good consideration for a promise to accept the payment in satisfaction of the debt (e.g. where x owes y \$80,000 and x pleads with y to accept only \$74,000 in satisfaction of the debt, the payment of the \$74,000 will not constitute good consideration for y's promise to accept that payment in satisfaction of the debt)
 (*Foakes v Beer*)

Exceptions to the Rule in *Pinnel's Case*

- Where part payment is also accompanied by some additional consideration, separate from the debt, even if nominal
(*Foakes v Beer*)
- Where the debtor pays before the due date or in a different form
- Composition: where several creditors jointly agree to forgo part of each of their debts and pay a dividend to the debtor (*Whitehead*)
- Where payment is made to the creditor by a third party (*Welby v Drake*)
- Where the debtor gives something non-pecuniary

* *Note*: Equitable Estoppel may evade the existing legal duty rule, including the rule in *Pinnel's Case*. Where someone has promised to forgo the balance of a debt in return for a promise to pay part of that debt and then reneges on that promise by enforcing the rule in *Pinnel's Case*, the debtor may seek remedy on the basis that the representation that the debt is cleared has been departed from

Exceptions

- Fresh Consideration: Where the beneficiary provides to do something more than originally promised: (*Hartley v Ponsonby*)
- Practical Benefit:
 - Where a practical benefit is conferred on the promisee for doing nothing more than already promised: (*Williams v Roffey Bros; Musumeci*)
 - e.g. *Musumeci* – practical benefit said to be ‘enhanced capacity of [the *Musumeci*’s] to stay in occupation, able to carry out their future reduced lease obligations’ notwithstanding the new competition.
 - Persuasive – Inapplicable to the discharge of a debt, for to do so would forsake *Foakes v Beer* (*Re Selectmove Ltd (UK)*)
 - Applies in Australia to cover situations:
 - Where the modifying party makes a concession and the party therefore accepts less rather than paying more (e.g. accepting reduction in the beneficiary’s obligations) AND
 - Only where the promisee has not been induced by unfair pressure AND
 - Only where the beneficiary’s performance is capable of being regarded as worth more than a remedy against the beneficiary OR
 - Only where there is a detriment to the promisee because of a loss of opportunity to not perform, where such opportunity was worth more to the promisee than performing (*Musumeci* [persuasive])

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ESTOPPEL

Available where a relying party has relied on representations made by the representing party (representor) and the representor acts inconsistently to the relying party’s detriment

Operates where relief for a breach of contract is not available through common contract law because *non-contractual promises* or representations have been relied upon (*Walton Stores*)

- No consideration is given
- Formality requirements are not met
- Revocation of a unilateral offer prior to acceptance (*Mobil Oil*)
- Post-contractual variation
- No intention to create legal relations (*Ashton v Pratt*)
- Barred by Privity

Common Law Estoppel (*Estoppel by Representation; Estoppel in Pais*): A representation and assumption of *fact*, the remedy for which is estopping the representing party from departing from the representation: the party is held to the representation

Equitable Estoppel (*Proprietary and Promissory Estoppel*): A representation and assumption made about *future conduct*, the remedy for which will vary among cases:

- Compensation
- Reasonable Notice of the Representor’s Intention to Depart

<u>Proprietary Estoppel</u> : Where a party has been induced by a landowner to believe they would have some interest in land	<u>Promissory Estoppel</u> : Where a party to a contract promised that certain contractual rights would or would not be enforced, or more currently, any application of equitable estoppel that does not relate to an interest in land
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Elements of Equitable Estoppel

- Need not be a pre-existing contractual relationship, and can now be used as a sword as well as a shield (*Walton Stores*)
- Assumption *may* have to relate to an existing or expected legal relationship, not necessarily contractual in kind, between parties – remains unclear
 - *Waltons* per Brennan J – Legal relationship established on negotiations of sufficient certainty
 - *Mobil Oil* – Unilateral contract – legal relationship unestablished because there was no certainty or detail as to the proposal
 - cf. *W v G* – Social/domestic relationship rather than legal or contractual led to estoppel as its own cause of action – however, there was no statutory recognition or other means of action available to the plaintiff

1. Assumption

- Of fact (common law) or future conduct (equitable)
- Factual analysis
- For a contract required to be in writing, the assumption must be that the contract exists or will exist with the formality requirements met for that specific contract

2. Inducement

- For a representation to found an estoppel it must be clear. The language must be precise and unambiguous.
- The words must be able to be understood in a particular sense by the person to whom the words are addressed (although the words used may be open to different constructions). (*Crown v Cosmopolitan Hotel*; *Legione v Hateley* overruled *Walton Stores*)
- “An equivocal or objectively ambiguous representation may found a promissory estoppel” (Nettle J, *Crown v Cosmopolitan Hotel*)
- May be relevant in determining the reasonableness of adoption
“the equivocal or objectively unambiguous nature of the representation is but one important consideration in the determination of whether and to what extent the assumption or expectation is fairly and reasonably to be attributed to the representation”
(*Crown v Cosmopolitan Hotel*)

3. Detrimental Reliance

- The onus rests on the claimant for estoppel (*Sidhu v Van Dyke*)
- The relying party must have detrimentally *changed their position* on the basis of the assumption such that they will suffer a detriment if the representor does not adhere (*Legione v Hateley*)
 - Detriment should only be assessed at the *time of departure* or threatened departure from the assumption (*Je Maintiendrai* (SA) cf. *Grundt* (UK))
 - Party’s conduct need not be the sole inducement leading to detrimental action – sufficient that it “played a part” so as to discharge the onus for detrimental reliance (*Sidhu v Van Dyke*)
 - Detriment may include non-pecuniary loss (*Verwayen*)
 - May include the payment of a lump sum (*Je Maintiendrai*)
- Must be substantial detriment and must not be an existing legal duty (*Mobil Oil*)

4. Reasonableness

- Relying party must have:
 1. Acted reasonably in adopting the assumption
 2. Acted reasonably in taking the relevant detrimental action on the faith of that assumption
- Expressed in *Sidhu v Van Dyke* as ‘no room for doubt’
- It was ‘reasonable in the circumstances’ for Maher to make her assumption in *Walton Stores*
- Considered in: *Legione*; *Sidhu* and *Crown*
- Obiter in *W v G*: Reasonableness is not required

5. Unconscionability

- Must have been unconscionable, in the the circumstances, for the representor to depart from the assumption, i.e. done more than ‘change their mind’
Consider:
 - The nature of the inducement and the role of the representor in the assumption (urgency of negotiations – *Walton Stores*)

- The reasonableness of the relying party's actions
 - The representor's knowledge of the detrimental reliance
 - Including knowledge of debt
 - The extent of the detrimental reliance
 - Encouragement by the representor
- The mere exercise of legal right (the failure to fulfil a non-contractual promise) is alone insufficient to constitute unconscionable action

There must be *for example*:

Representor's:

 - Silence

AND

 - Knowledge of the detrimental reliance

(*Waltons Stores*)

In relation to Formalities

- There is nothing unconscionable about relying on the law of the land (*Obiter* in *Powercell*)
- Requirements of writing cannot be circumvented by relying on an alternative source of rights
- The estoppel must be based not on the assumption that a contract exists, but on the assumption that a contract existed and that requirements of writing have been complied with

6. Departure

- May be actual or threatened departure (*Waltons Stores*)

Remedies

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