

Week 3

The Law of Contract

Intention to create a contract

- For a contract to exist the parties must intend for their agreement to be legally binding (i.e. either could sue if it is breached)
- Usually the parties do not indicate what they intended—so objective test to determine if the parties intended to make a contract.
- Two general presumptions apply... can be rebutted ('set aside') if evidence indicates to the contrary

Domestic Agreements

- Presumption that there is no intention to create a legal relationship
- Husbands and wives
E.g. Balfour V Balfour (Married)

Husband and a wife living together in Sri Lanka. They then returned to England while the husband was on leave. The husband then returned to Sri Lanka to work but the wife couldn't accompany him as she was unwell. He promised to pay her 30 pounds a month for maintenance. The relationship fell apart and they got divorced. The wife claimed the 30-pound entitlement. The issue the court had to consider was whether there was an intention to create a legal relationship. The court said no in this situation as it was an ordinary domestic agreement, there was no intention for it to form a contract. Therefore, you cannot seek remedy based on the laws of contract. Married

Merritt V Merritt (Separated)

Separated couple. The husband agreed to pay the wife a monthly allowance so she can pay for the mortgage on the family home. The family home was co-owned so they both owned it. The husband signed a document saying in consideration of her paying all of her charges in connection with the home, until the mortgage was paid off, he would transfer the house into her sole ownership. The court said yes there was an intention to create a legal relationship because there was a couple that were separating. Separated

- It depends on the circumstances that the parties have agreed
e.g. Todd V Nicol

Nicol was living by herself. Her husband had passed away so she sent a letter to her sister in law and asked for her and her daughter to move to South Australia to live with her. They were currently living in Scotland. Nicole said in the letter that if they came to

live with her, it'd be rent free and the house would be left to them if she passed away, Todd agreed and moved. They arrived and ended up in a dispute with Nicol. Nicol wants to remove the Todd's but the Todd's sue claiming there was a contract. The court said yes, there is enough evidence to rebut the presumption in this case. The evidence was the cost and inconvenience to the plaintiff. The court said in this case, where it is possible to show significant commercial consequences that flow from the particular social or domestic agreement, the presumption can be rebutted. There was a legally binding agreement.

Rebut presumption?

- Clarity of terms
Are the rights and obligations spelt out clearly (f not – indicates parties did not think that the agreement was contractual)
- How much cost and inconvenience did the promise suffer (e.g. Todd and Nicol)
- The flavour of the agreement – is it really a commercial agreement – just happens to be between family members or friends?
e.g. Rupert M agrees with Lachlan to return to NY from Australia to take control of News International. Promises him \$ etc. L moves. R changes his mind

Commercial agreements

- Presumption that the parties intended their agreement to be legally enforceable
- Rebuttal possible
Rose and Frank v Crompton
'not a formal or legal agreement... parties honourably pledge themselves... carried through the mutual loyalty and friendly cooperation' It was clear that there was not an intention to enter into a legal agreement. It was clearly stated in writing that this was not supposed to be a formal or legal agreement.

Jones v Vernon Pools

Coupon agreement is 'binding in honour only'. The court said this was enough to show that parties did not intend to create a legal relationship.

Government policy proposals

- Different if it is a **normal commercial transaction** e.g. Govt buying computers or fleet of cars or sign a contract to build a road/tunnel/airport/employment contract.
- Then normal presumption applies
- Courts reluctant to get involved in **policy commitments** – courts say '*promises can't bind a future government*':
- "No cuts to the ABC, education and health": ex-PM Abbott before last election.

- e.g. Australian Woollen Mills V Commonwealth of Australia

After World War 2, government wanted to encourage more manufacturing of wool in Australia. They said they would pay a subsidy. AWM received a subsidy for the first year but the second year the government didn't want to give them the subsidy and announced they had terminated the scheme. The High Court said it was an administrative scheme not a contractual obligation. The commonwealth expressly reserved the right to vary the subsidy and there was no formal agreement between government and manufacturers.

Consideration

Assume there is an offer and an acceptance of the offer = agreement. However, the agreement is not enforceable unless the next element is present – consideration

Consideration is required for every simple contract

'Simple' contract may be:

- oral,
 - written or
 - partly oral, partly written
- *Not required for a formal contract (or deed)

What is 'consideration'?

- The 'price paid' for the promise.
- *In the common law a 'bare promise' is not enforceable
- *Promisee must show there was a 'bargain' or 'exchange':
- "I did something or promised something or refrained from doing something in exchange for the promise"

The 5 rules of consideration

- 1- Must be of 'sufficient value' but need not be 'adequate'
 - Courts are not concerned to ensure you got a 'fair deal' (as long as not infected by misrepresentation or misleading conduct or duress etc.)
 - E.g. Thomas V Thomas

John Thomas said to his wife verbally, I want you to have this house. After he passed away, the executor went about actually entering into the agreement, in consideration of John's desires, pursue into which she would stay in the house and pay 1 pound per year. The executor refused to complete the conveyance, claiming the agreement was unenforceable because no valuable consideration was paid. It is of sufficient value. The court will not look at the adequacy of the consideration or the motivation for entering into the agreement, provided there is a real bargain for both parties.

- 2- Consideration must be certain – not vague or illusory
e.g. White V Bluett

Father loaned his son some money, Father dies. The executor sues the son when he refused to pay back the money. The son argued that he didn't need to pay it back because his dad said if he stopped complaining about how he distributed his property he didn't have to pay back the money. The court said the reason why it wasn't sufficient consideration was because the son had no legal right to complain. When you look at how property is distributed, the person who owns the property can give the property to whomever they pleased so not complaining was entirely intangible and vague and did not amount to consideration.

- 3- Consideration can be executed or executory but cannot be past
- Executory Consideration – promise given in exchange for a promise
 - Executed Consideration – promise then the act – unilateral contract
 - Past Consideration – act done (e.g. work overtime) then promise to pay is made
e.g. Anderson V Glass

Glass promised to increase the pay for the future and for the past period. The court said it was unenforced in regards to the period that had past because there was no consideration. The person doing the work hasn't done it yet. Past consideration can be viewed as consideration but there are 3 factors that have to be demonstrated. The act must have been done in the promisor's request, the parties must understand that the act was to be remunerated either by payment or the conferring of some other time of benefit, that the payment or conferring must be legally enforceable.

- 4- Promise to not sue in exchange for promise to pay

- 5- A promise to perform an existing contractual or public duty
- Basic rule – a promise to do no more than previously obliged to do is not of 'value'
 - E.g. Stilk V Myrick

Stilk was working on a ship that was sailing between London and the Baltic. He was under a contractual duty and was being paid 5 pounds per month, during this particular voyage, two of his crew members deserted the ship. The captain of the ship promised the remaining people that if they continued to sail the ship, they could divide the wages of the two crew that abandoned the voyage. The court said Stilk was under a contractual duty to provide his services. He was doing nothing more than what his contract of employment obliged him to do. So There was no exchange of promises. He was only doing what he was required to do under the agreement

Glasbrook V Glamorgan CC

A group of miners were striking at their coal mine. Police were called. Police made a determination that the best way to protect the mine was to conduct a patrol, the mine company however offered 2200 pounds if the police were to be permanently stationed at the mine. The company refused to pay the money stating the police were doing nothing more than their public duty. The court said yes the police are under a public duty to provide protection, however the police formed the view that an appropriate way to provide the protection was to do so by mobile patrol. The promise to provide more protection was the consideration. They were doing more than what they were required to therefore the coal mine was obliged to pay.

Possible ways to 'soften' the strict rule about consideration

1- Flexible approach to consideration

- Payment earlier than promised
- Payment of something different

2- Equity to the rescue

The role of equity is to try litigate the harshness of the common law. It's about justice and fairness

- If the promisee has

- *Relied on the promise of the promisor; and would

- *Suffer detriment (disadvantage) if the promisor changed his/her mind then

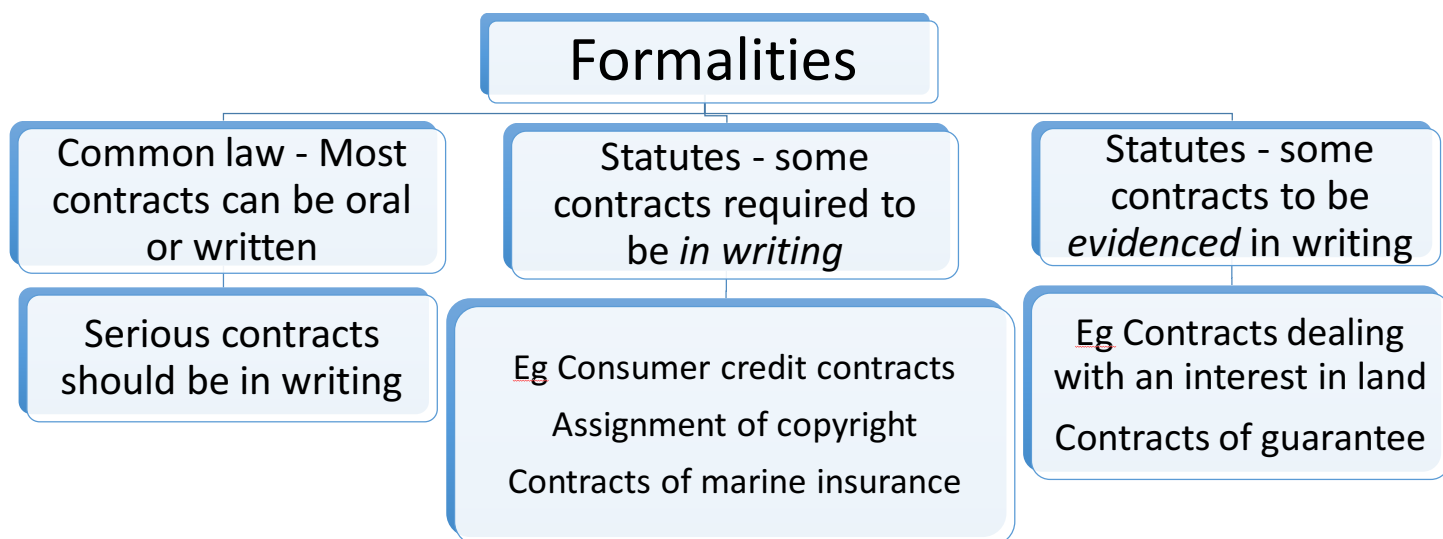
- *The promisor is 'estopped (prevented)' from changing his/her mind even if no consideration

e.g. Crown Melb V Cosmopolitan

The court said that cosmopolitan could not establish that they had acted on the basis of the expectation. The case failed because they had not relied on the expectation that they would be looked after at renewal time. They weren't able to demonstrate they had suffered a detriment. No reliance and no detriment, no equity could be applied

- Commercial Impact

- * If you make promise you may be bound even if there is no consideration

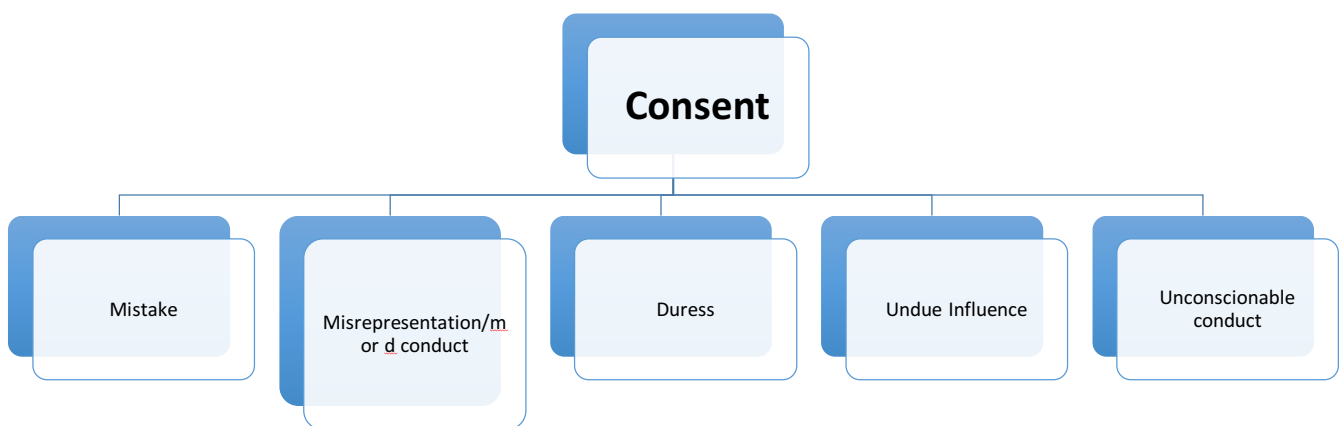
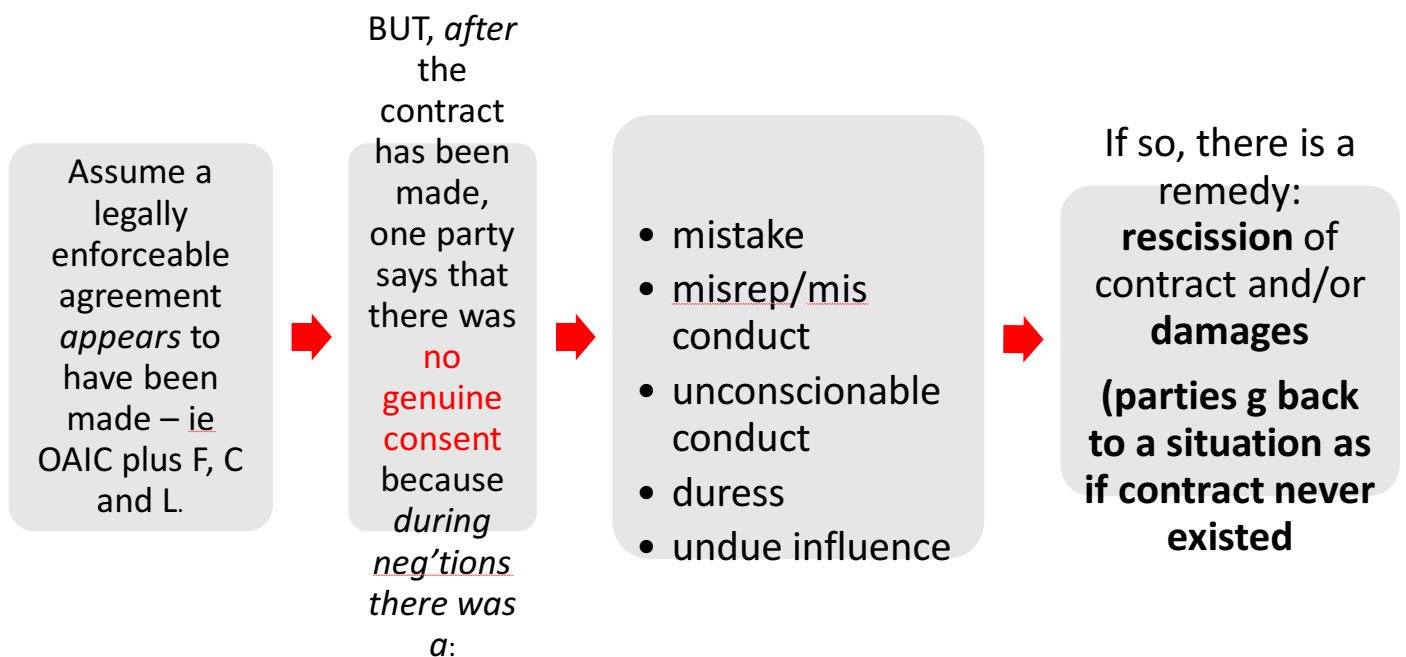


- Performing and existing contractual duty does not amount to good consideration
- Performing and existing contractual duty may amount to good consideration provided
 - 1- There is some kind of practical benefit to the promisor
 - 2- There is no duress from promisee

Capacity

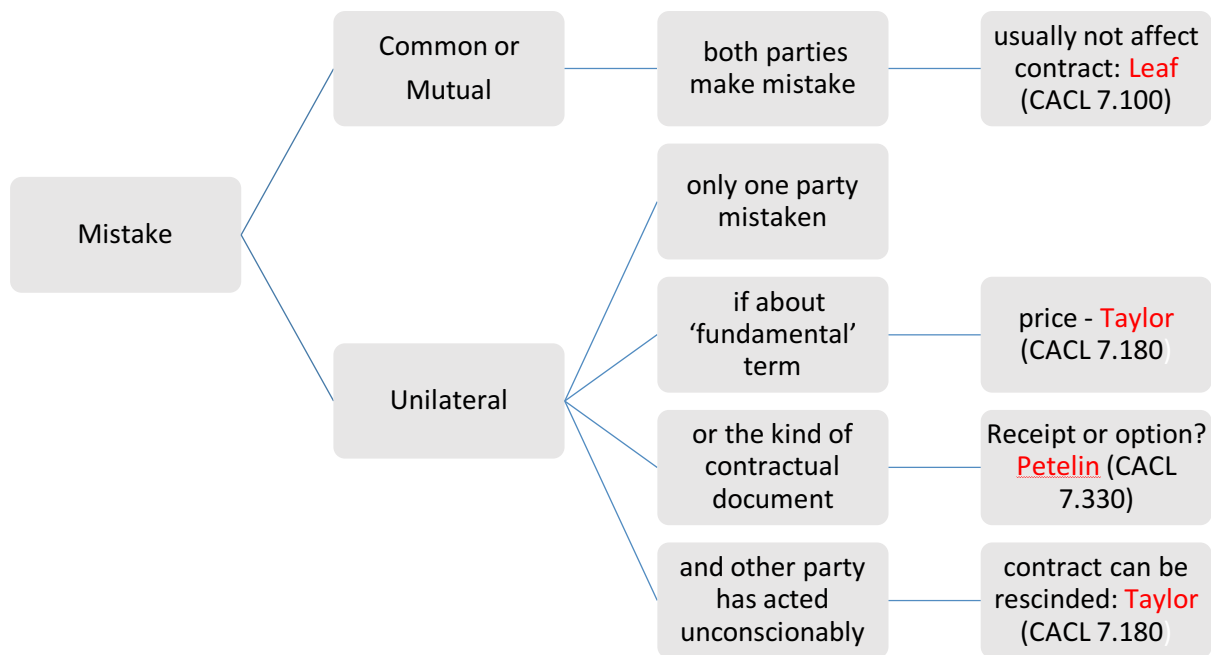
- Certain classes of persons are regarded by law as incapable of entering into contracts. The main ones of relevance are
 - Minors
 - Mentally incapacitated/ intoxicated persons

Genuine Consent



Mistake

- E.g. 'I thought I was buying a unit that would rise in value'
- The key – mistake irrelevant unless it is about a fundamental fact about the subject matter of the contract



Common or mutual mistake

- Must be about a fundamental fact
But courts are very reluctant to say a fact is fundamental
e.g. Leaf V International Galleries

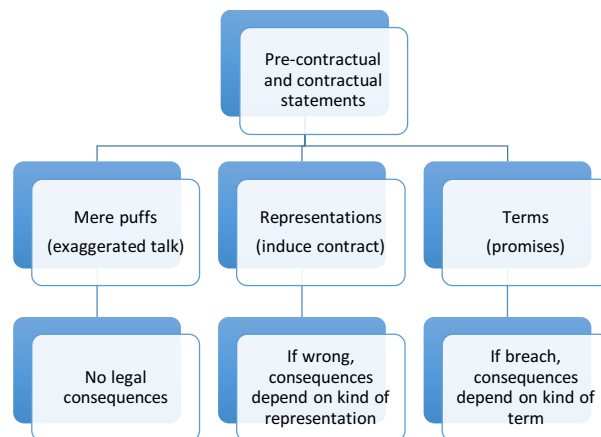
Plaintiff purchased a painting. Both parties mistakenly believed it was by a famous artist but turns out it wasn't. The court said the mistake was about the quality of the subject matter. The court said that this type of mistake does not avoid the contract because there no mistake about the actual subject matter. The parties agreed on the same terms regarding the same subject matter, this was enough to make a contract.

Unilateral mistake

- Only 1 person mistaken but mistake must be about a fundamental term and contain some element of unconscionable conduct
e.g. Taylor V Johnson

The High Court said where a party has entered into a written agreement under a serious mistake about its content in relation to a fundamental term, they will be entitled to rescind the contract if the other party is aware that there is a mistake and they don't attempt to correct the mistake.

Misrepresentation



- When there is a claim of **misrepresentation** P argues the parties have agreed but 'I was misled so my (apparent) consent is not genuine and therefore I should be able to get out of the contract'.

Innocent misrepresentation

Requirements

- False statement of fact
- Made before or a time of contract
- Intended to induce or aid induce contract

Remedy

- No damages
- Rescission possible (also remedies under ACL for misleading conduct)

e.g. Redgrave V Hurd

There was an honest belief that the car being sold was a 1948 model. This honestly held belief was based on the cars registration documentation. It was unknown to both parties that the cars registration papers were a fraud, it turned out to be a 1939 model. The party unknowingly made an untrue statement. This is an example of innocent misrepresentation

Fraudulent misrepresentation

Definition

- Statement of fact
- False
- Known to be so or reckless as to whether it is or not
- Intended to induce the other party to act
- And other party did act
- Damage results

Requirements

- Did the defendant make a false representation of fact?

- Did the representation induce the plaintiff to act in some way?
- Did the defendant act dishonestly or recklessly?
- Did the plaintiff suffer losses as a result of the false representation?

Remedy

- Rescission
- Damages
- Resist enforcement of contract against them

Negligent

Requirements

- Negligent advice/information
- Special relationship
- Information sought for serious purpose
- Reasonable reliance

Remedy

- Damages in tort for negligence
- Rescission possible

Unconscionable conduct

- Common Law

- 3 factors

- One of the parties has to be suffering from a special disadvantage at the time the contract was made,
- That particular disadvantage must have affected the ability of that individual to make a judgement about what was in their best interest,
- The other party knew or should have known the special disadvantage and took advantage of it in an unconscionable way.

e.g. Commercial Bank V Amadio

An elderly Italian couple. Mr and Mrs Amadio had very little formal education and they had a limited ability to read and speak English. They agreed to sign over a property to a commercial bank. Their son wanted his parents to put up one of their properties as security for his debt. They're not taking a loan out from the bank, they are providing security for their son's debt. There was very little discussion between the manager and Amadio's. The manager didn't explain and the Amadio's didn't read the contract. The son's company goes into liquidation and the debt owned by the son, the bank now wants to use the security to pay back that debt. Amadio's are arguing unconscionable conduct. The High Court gave us 3 factors that need to be considered. One of the parties has to be suffering from a special disadvantage at the time the contract was made, that particular disadvantage must have affected the ability of that individual to make a judgement about what was in their best interest, the other party knew or should have known the special disadvantage and took advantage of it in an unconscionable way.