

**LAW5005**

**PRINCIPLES OF CONTRACT LAW B**

**EXAM CASE SUMMARIES**

TRIMESTER 3, 2017

## Week Four Cases

### Attempts at Mitigation that Increase Loss

<b><i>Simonius Vischer &amp; Co v Holt &amp; Thompson 1979 NSWLR</i></b>	
Court	Court of Appeal of the Supreme Court of New South Wales
Facts	<ul style="list-style-type: none"> <li>-Simonius were a firm of wool brokers in Switzerland</li> <li>-Staff in the Sydney office of the firm consistently did unauthorised speculative operations and hid it from head office</li> <li>-Simonius also decided to hold on to their excessive contracts because they thought it would be the best way to minimise losses (based on market predictions) -The market moved against them and they lost more money</li> <li>-They sued Holt (the auditors), alleging it was their breach of duty in failing to discover the improper operations in Sydney</li> </ul>
Held	Plaintiff was able to recover damages despite the mitigation making the loss worse
Rationale	Samuels JA: -Where a plaintiff does take reasonable steps to mitigate his damage, but in doing so actually increases the losses suffered, the plaintiff can recover damages to compensate for those additional losses
Key Legal Principle	-A plaintiff can recover for loss incurred in taking reasonable steps to mitigate her or his loss, even though the resulting damage is greater than it would have been had the mitigating steps not been taken

### Disappointment, Distress, Loss of Reputation

<b><i>Baltic Shipping Co v Dillon 1993 CLR</i></b>	
Court	HCA on appeal from the Supreme Court of NSW.
Facts	<ul style="list-style-type: none"> <li>-Mrs Dillon was a passenger on a cruise ship owned and operated by Baltic</li> <li>-Nine days into a fourteen day cruise the ship sank</li> <li>-Mrs Dillon lost her belongings and suffered injuries</li> </ul>
Held	Mrs Dillon could recover damages for distress, but not restitution for the fare.
Rationale	-Damages were available as the object of the cruise was to provide enjoyment and relaxation
Key Legal Principle	-Damages for disappointment and distress can be recovered only if they result from physical inconvenience caused by the breach or if the object of the contract is to provide enjoyment or relaxation

### Loss of Bargain Damages and Termination under a Term

<b><i>Shevill v Builders Licensing Board 1982 CLR</i></b>	
Court	High Court of Australia
Facts	See above
Held	<ul style="list-style-type: none"> <li>-Shevill could rely only on a contractual right to terminate and not a common law right</li> <li>-Thus they were entitled to receive arrears in rent but not entitled to loss of bargain damages</li> </ul>
Rationale	-If a plaintiff exercises a common law RTT, then the plaintiff can claim loss of bargain damages However, if the plaintiff exercises a contractual RTT, then the plaintiff cannot claim loss of bargain damages unless the contract entitles the plaintiff to so do
Key Legal Principle	-Established the Shevill principle and the development of 'anti-Shevill clauses' that require the payment of damages calculated by reference to loss of bargain damages - Compare this to PMH v Tabali where the lessor had a common law right to terminate and thus was entitled to claim loss of bargain damages

## Week Five Cases

### Collateral Stipulations Designed as Security for Performance of a Primary Stipulation

<b><i>Andrews v ANZ [2012] 247 CLR 205</i></b>	
Court	HCA
Facts	-Andrews argued that certain bank fees were void and unenforceable as penalties.
Held	Relief against penalties is available even if event triggering penalty is not a breach of contract
Key Legal Principle	-There does not have to be a breach for relief against penalties Shift from UK position

<b><i>Paciocco v ANZ [2016] HCA 28</i></b>	
Court	HCA
Facts	The appellants held credit card, savings and business deposit accounts with ANZ and was charged various 'exception fees' -These were challenged to be penalties
Held	-Majority held that late payment fees charged by the Bank were not unenforceable as penalties
Key Legal Principle	-Accepted test from Ringrow: "out of all proportion" -Affirmed the correctness of Andrews v ANZ -Established Gordon J's six-step test for determining penalties

### Specific Performance

<b><i>Dougan v Ley (1946) 71 CLR 142</i></b>	
Court	High Court of Australia
Facts	-Dougan agreed to sell a taxi along with the registration and operating licence -Dougan then refused to complete the transaction, and the respondents sought specific performance -The appellant claimed that an award for damages at common law would adequately compensate the respondents
Held	Specific performance was granted
Rationale	-Specific performance was appropriate because the number of taxi licences was limited
Key Legal Principle	-Specific performance is discretionary -Ask, does the value of the item exceed what money may compensate?

### Injunctions

<b><i>Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337</i></b>	
Court	New South Wales Court of Appeal
Facts	-Tracey Curro a TV presenter entered into contracts with Beyond Productions -Clause 2(iii): Exclusivity clause which stated Curro would not engage in other presentation activity without the consent of the plaintiff -Curro signed with 60 minutes without consent -Injunction sought preventing breach of Clause 2(iii)
Held	The injunction was granted
Rationale	-The contract was entered into freely and fair -Different to specific performance (they would not force her to work)
Key Legal Principle	-An injunction may be granted at the discretion of the court

## Week Seven Cases

### Illustrations: Disappearance of the Basis of the Contract

<b><i>Krell v Henry 1903</i></b>	
Court	UK Court of Appeal – Kings Bench Division
Facts	<ul style="list-style-type: none"> <li>-Contract to hire apartment in Pall Mall for two days (not nights), when the coronation procession of Edward VII was to take place and pass along Pall Mall</li> <li>-The procession was cancelled due to the King's illness</li> <li>-The Defendant refused to pay the balance of the agreed rent</li> </ul>
Held	The contract was frustrated
Rationale	<ul style="list-style-type: none"> <li>-The coronation procession <b>was the foundation of this contract</b></li> <li>-The coronation procession's cancellation <b>prevented the performance</b> of the contract</li> <li>The cancellation of the <b>procession couldn't reasonably be supposed to have been in the contemplation</b> of the parties when they made the contract</li> <li>-It was the only reason that the parties went to hire the room, there was no other reason to fall back on at all</li> <li>-When that reason no longer existed, the contract would be frustrated</li> </ul>
Key Legal Principle	<p>Looking to the intention of the parties, and the basis for the contract, the court can ascertain what was reasonably within the contemplation of the parties and the purpose for which the contracted?</p> <ul style="list-style-type: none"> <li>-If that basis is not longer available, then the contract will be considered frustrated</li> <li>-Outlines a three-step test to determine whether the contract will be frustrated</li> </ul>

<b><i>Herne Bay Steamboat Co v Hutton 1903</i></b>	
Court	Kings Bench
Facts	<ul style="list-style-type: none"> <li>-Hutton contracted to hire a steamship</li> <li>-This was following a public announcement that a Royal naval review was to take place at Spithead on that day</li> <li>-The contract was "for the purpose of viewing the naval review and for a day's cruise round the fleet" to observe King Edward VII's coronation celebrations</li> <li>-Following the cancellation of the coronation, and of the naval review, the defendants refused payment, claiming frustration</li> </ul>
Held	Contract not frustrated – the purpose of the contract (taking the passengers on a cruise) was still possible
Key Legal Principle	<ul style="list-style-type: none"> <li>-Only if the outcome is substantially different to the purpose, will an argument based on frustration succeed</li> <li>-Looking at the basis of the contract, if there is more than one basis see if they are all frustrated, or some are available</li> </ul>

<b><i>Brisbane City Council v Group Projects Pty Ltd 1979</i></b>	
Court	The High Court of Australia
Facts	<ul style="list-style-type: none"> <li>-Group Projects owned 19 acres of land which they wished to develop</li> <li>-BCC agreed to make the necessary application to have the land zoned residential</li> <li>-BCC undertook certain obligations relating to footpaths, water and sewerage</li> <li>-Before the re-zoning was approved, the parties were advised that the land was to be resumed by the Crown for school purposes</li> <li>-Group Projects no longer owned the land and could not proceed with subdivision</li> <li>-Council argued Group Projects obligations and the bond remained in force</li> </ul>
Held	The contract was frustrated
Rationale	-The purpose of the contract was wholly destroyed once the land was rezoned
Key Legal Principle	Authority on disappearance of the basis of the contract

## Week Eight Cases

### Predatory State of Mind

<b><i>Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392</i></b>	
Court	High Court
Facts	<ul style="list-style-type: none"> <li>-Kakavas was a problem gambler who had previously been excluded from Crown, but years later was permitted to return after giving assurances he no longer suffered from a gambling problem</li> <li>-In the course of a little over a year he turned over almost \$1.5 billion</li> <li>-Kakavas claimed Crown engaged in unconscionable conduct</li> <li>-First by exploiting his gambling problem and entrapping him into becoming a regular visitor</li> <li>-Second by unconscientiously allowing and encouraging him to gamble at Crown while the knew or ought to have known that he would forfeit his winnings</li> </ul>
Held	There was no unconscionable conduct or predatory state of mind
Rationale	<ul style="list-style-type: none"> <li>-Kakavas' gambling problem did not meet the requirements of a special disability</li> <li>-He was able to make rational decisions in his own interests</li> <li>-Crown did not knowingly victimise the appellant by allowing him to gamble</li> <li>-The knowledge element of unconscionable dealing required stronger party to have actual knowledge – constructive knowledge not sufficient</li> </ul>
Key Legal Principle	<ul style="list-style-type: none"> <li>-Special disability must have been sufficiently evident</li> <li>-Equitable intervention to deprive a party of the benefit of its bargain requires proof of a predatory state of mind</li> </ul>

### Third Party Impropriety

<b><i>Yerkey v Jones (1940) 63 CLR 648</i></b>	
Court	HCA
Rationale	<p>The principle to protect wives who guaranteed their husbands' debts:</p> <ul style="list-style-type: none"> <li>-1<sup>st</sup> type of case – actual impropriety by husband – undue influence</li> <li>-2<sup>nd</sup> type of case – wife does not understand transaction</li> </ul>
Key Legal Principle	<ul style="list-style-type: none"> <li>-Outlined the two categories</li> <li>-Affirmed by the High Court of Australia in <i>Garcia v National Australia Bank Ltd</i></li> </ul>

### Modern Application of Yerkey v Jones

<b><i>Garcia v National Australia Bank Limited (1998) 194 CLR 395</i></b>	
Court	The High Court of Australia
Facts	<ul style="list-style-type: none"> <li>-Mrs Garcia guaranteed the debts of a company controlled by her husband</li> <li>-She signed the guarantee in front of a bank officer, who did not explain the transaction to her</li> <li>-Mrs Garcia did not understand the transaction and thought it was 'risk-proof'</li> <li>-Mrs Garcia argued that the guarantee should be set aside on the basis of the Yerkey v Jones principle</li> </ul>
Held	The argument relying on the Yerkey v Jones principle was successful
Rationale	-Mrs Garcia did not know the "purport and effect" of the transaction
Key Legal Principle	<ul style="list-style-type: none"> <li>-The financier must know, or ought to know, that the guarantor is married to the borrower and the guarantor must be a volunteer</li> <li>1. Wife's consent is procured by husband's undue influence</li> <li>-Wife will be entitled to have mortgage/guarantee set aside against the lender unless the lender can show that she received independent advice</li> <li>2. Wife fails to understand the effect and significance of the document</li> <li>-Wife may be entitled to have the transaction set aside unless the lender took steps to inform her about the transaction and reasonable supposed she understood</li> <li>-The principle only applies if the wife is a volunteer (has no self interest)</li> </ul>

## Week Ten Cases

### Misleading and Deceptive Conduct – In ‘Trade or Commerce’

<b>Concrete Constructions v Nelson 1990 CLR</b>	
Court	HCA
Facts	<ul style="list-style-type: none"> <li>-CC was constructing a building and Nelson was employed on the building site</li> <li>-He sustained injuries after falling down an air-conditioning shaft</li> <li>-He alleged the injuries were caused by the company's foreman who told him that the grate was secured</li> <li>-The worker instituted proceedings alleging that the conduct, which caused the injuries, was in breach of the Act for MDC</li> </ul>
Held	There was no contravention of the act as it was not ‘in trade or commerce’
Rationale	-A distinction was drawn between conduct that is of the essence of a corporations trade or commerce, and conduct that is merely incidental to it
Key Legal Principle	-In trade or commerce means activities that refer to the central conception of trade and commerce and not incidental business activities

### Misleading and Deceptive Conduct – The Relevant Audience (The General Public)

<b>Campomar v Nike 2000 CLR</b>	
Court	High Court
Facts	<ul style="list-style-type: none"> <li>-Campomar had a trademark for the use of the word Nike on its perfumes</li> <li>-Campomar began marketing it in Australia, calling it 'Nike Sport Fragrance'</li> <li>-Nike commenced proceedings alleging Campomar's distribution of the fragrance was likely to mislead or deceive members of the public</li> </ul>
Held	Campomar contravened section 18 (misleading and deceptive conduct)
Rationale	-Placing the fragrance in the sports section was likely to mislead and deceive
Key Legal Principle	<ul style="list-style-type: none"> <li>-Outlined the test for ascertaining the audience when it relates to the public, as ‘ordinary and reasonable members of the public’</li> <li>-When the product is low value, people are less inclined to study the packaging for any disclaimers and are more likely to be deceived</li> </ul>

### Misleading and Deceptive Conduct – The Relevant Audience (Targeted Individuals)

<b>Butcher v Lachlan Elder 2004 CLR</b>	
Court	HCA on appeal from Supreme Court of NSW
Facts	<ul style="list-style-type: none"> <li>-Butcher won an auction for a Sydney waterfront property</li> <li>-Prior to the auction he was given a brochure which make it look like there was a pool within the boundaries of the property</li> <li>-The brochure had a disclaimer, stating that Lachlan Elder did not guarantee the accuracy of the brochure</li> <li>-Prior to the auction Butcher inspected the property with the architect, and with a representative of the real estate agent, to discuss moving the pool</li> <li>-After entering into contract for sale they found out the pool was not within the confines and refused to complete the sale</li> </ul>
Held	Lachlan Elder was not liable for misleading or deceptive conduct
Rationale	<ul style="list-style-type: none"> <li>-Must consider the nature of the parties, transaction and what they knew about each other</li> <li>-This was a small real estate agency which relied on outside resources</li> <li>-The purchasers were intelligent, shrewd and self reliant business people</li> <li>-The character of the transaction was an extremely expensive one which required further inquiry</li> <li>-Although the disclaimer was small, it was there to be read and Butcher had no issues with vision</li> </ul>
Key Legal Principle	<ul style="list-style-type: none"> <li>-Outlines the two perspectives that MDC can be analysed from</li> <li>-Outlined the test when it concerns individuals</li> <li>-Illustrates that in some cases a disclaimer could rebut an argument for MDC</li> </ul>

## Week Ten Cases

### Misleading Conduct: Silence

<b><i>Demagogue v Ramensky 1992 FCR</i></b>	
Court	Federal Court of Australia
Facts	<ul style="list-style-type: none"> <li>-Sale of land contract for a multi-level residential home unit building for \$405k</li> <li>-The purchasers upon inspection noticed there was no driveway</li> <li>-They asked about it and were told there would be a driveway accessible</li> <li>-In reality access to the property was subject to a road licence that was not granted</li> </ul>
Held	Contract void ab initio due to misleading conduct – they should have disclosed
Rationale	<ul style="list-style-type: none"> <li>-Where a person remains silent on a particular matter that silence will be considered in the context of the person's overall conduct to see if it is MDC</li> <li>-There is no general duty of disclosure (mere silence is not enough)</li> </ul>
Key Legal Principle	<ul style="list-style-type: none"> <li>-Silence must be viewed in context</li> <li>-Omitting something can be just as deceptive as giving false information</li> <li>-Outlined the test for silence as MDC</li> </ul>

<b><i>Miller v BMW Australia 2010 CLR</i></b>	
Court	High Court
Facts	<ul style="list-style-type: none"> <li>-Miller gave BMW documentation in support of Consolidated's loan application</li> <li>-It included a memorandum which gave the impression insurance policy was cancellable (it was not)</li> <li>-BMW lent Consolidated \$3.975 million, of which only \$1.26 million was repaid</li> <li>-BMW sued Miller for failing to disclose that the policy was not cancellable</li> </ul>
Held	Miller had not engaged in misleading or deceptive conduct
Rationale	<ul style="list-style-type: none"> <li>-Miller had supplied BMW Finance, an experienced lender, with a copy of the policy</li> <li>-Miller's failure to draw BMW Finance's attention to a circumstance disclosed by the policy document was not misleading</li> <li>-There is no requirement to volunteer information that will assist the other party with their decision making, especially when there is equal bargaining power and competence</li> </ul>
Key Legal Principle	A reasonable expectation of disclosure will be less likely in a commercial context between arm's length parties

### Misleading Conduct - Promises

<b><i>Futuretronics v Gadzhis 1992 VR</i></b>	
Court	Supreme Court of VIC.
Facts	<ul style="list-style-type: none"> <li>-Futuretronics put up a commercial building for sale by public auction</li> <li>-Conditions of sale stated that whoever won had to sign the contract immediately</li> <li>-If this was not done within 20 mins the vendor could recommence auction</li> <li>-Shortly after Gadzhis won the auction, he informed the auctioneer that he did not intend to sign contract off sale</li> <li>-Auctioneer attempted to persuade defendant that he was obliged to sign</li> <li>-Vendor argued that in bidding Gadzhis engaged in misleading or deceptive conduct</li> </ul>
Held	Mr Gadzhis didn't engage in misleading or deceptive conduct in representing that his bid was genuine – the bid was genuine at the moment it was made
Rationale	<p>Ormiston J:</p> <ul style="list-style-type: none"> <li>-The promise can only be said to be misleading or deceptive if it was in some way inaccurate</li> <li>-There was some reliance by the plaintiff on the defendant's implied representation, by way of bid but not to the contractual promise implicit in its acceptance</li> </ul>
Key Legal Principle	<ul style="list-style-type: none"> <li>-Failure of a promise will not necessarily be MDC</li> <li>-The burden of proof on the defendant who made the representation to show it was not MDC</li> </ul>