

OFFER

Has an offer been made?

An offer exists where one person indicates to another a willingness to enter into a binding agreement on certain terms.

Distinguished from: **Harvey v Facey**

An offer or statement of present intention?

Indication of possible future conduct

Harris v Nickerson: advertising at an auction was not an offer, but a statement of intention

An offer or an invitation to treat?

Advertisements: **Partridge v Crittenden**

Retail: **Fisher v Bell**

Catalogues: **Grainger & Sons v Gough**

Ecommerce: **Smythe v Thomas (pg 174)**

Withdrawing the offer

Can be revoked prior to acceptance: **Routledge v Grant**

Must tell offeree about revocation: **Bryne v Van Tienhoven**

Cannot unilateral offer until offeree has had opportunity to complete: **Carlill v Carbolic Smoke Ball**

Rejecting the offer

Counter offer acts a rejection: **Hyde v Wrench (pg 180)**

A request to clarify the terms is not a counter offer: **Stevenson Jacques v Mclean.**

A reasonable person test is used to determine whether an offeree's response ought to be regarded as a counter offer or as a mere request for clarification

ACCEPTANCE

Accepting the offer

Only offeree may accept (expressly/ by implication)

Must be final and unqualified (bound by agreement): **Masters v Cameron**

Battle of the forms: **Butler Machine Tool v Ex-Cell-O Corp**

Courts determine how the courts determine intention by an objective standard.

Has acceptance been communicated?

Method must conform to offeror's requirements

Timing of acceptance must conform to offeror's requirements

The contract has not been made until acceptance has been communicated to the offerer: **Tallerman v Nathan's Merchandise (pg 186)**

Postal acceptance rule

Only applies where post is a valid method of acceptance

Acceptance occurs when the letter is posted

Lapse of offer

Death of a party terminates offer: **Fong v Cilli (pg 189)**

Where no time limit is mentioned, the offer remains open for a reasonable time: **Ramsgate Victoria Hotel v Montefiore**

Lapse due to failure of condition precedent

The agreement must be certain

General rule: for agreement to be binding it must be sufficiently certain in all its essential elements (not ambiguous or contradictory), otherwise it is void.

An agreement to agree is not binding because it is uncertain

An agreement to negotiate in good faith is unenforceable

INTENTION

Did the parties intend to contract?

The courts use the reasonable persons test to decide whether parties intended to contract: **Taylor v Johnson**

Social or domestic agreements

Balfour v Balfour (pg. 203): domestic agreement had not intended to be legally binding

Commercial agreements

Courts try to enforce commercial arrangements (presumably legally binding)

Rose and Frank v Crompton: no contract due to clear intention to not create legal relations

Letters of comfort or support

Kleinwort Benson v Malaysia Mining Corp (Pg. 206)

The standard letter of comfort is unlikely to be binding

CONSIDERATION

Parties must provide something of value- does not have to be equal
Consideration is something of value provided for a promise

Two types of enforceable agreements:

Simple contracts, which require consideration: **Rann v Hughes**

Deeds (contracts under seal), which do not require consideration

Examples of consideration

A promise to do something

A promise not to do something

Doing something: **Carlill v Carbolic Smoke Ball**

Refraining from doing something

Only parties to the contract can sue

Privity of contract rule

If the promise is made by the promisor to two or more persons jointly, only one of those persons needs to provide consideration: **Coulls v Bagot's Executor**

Consideration may not be past

Warranties must be sought and given prior to the making of the contract: **Roscorla v Thomas** (pg 215)

Consideration may be present or future but cannot be past

Consideration must be sufficient



Renegotiating contracts

Mitchell v Pacific Dawn (pg. 220)

Traditional view: a promise to perform contractual duty already owing will not be good consideration unless there is something in addition: **Stilk v Myrick**

Modern developments: **Williams v Roffey Bros & Nicholls**- Roffey was ordered to pay Williams agreed extras

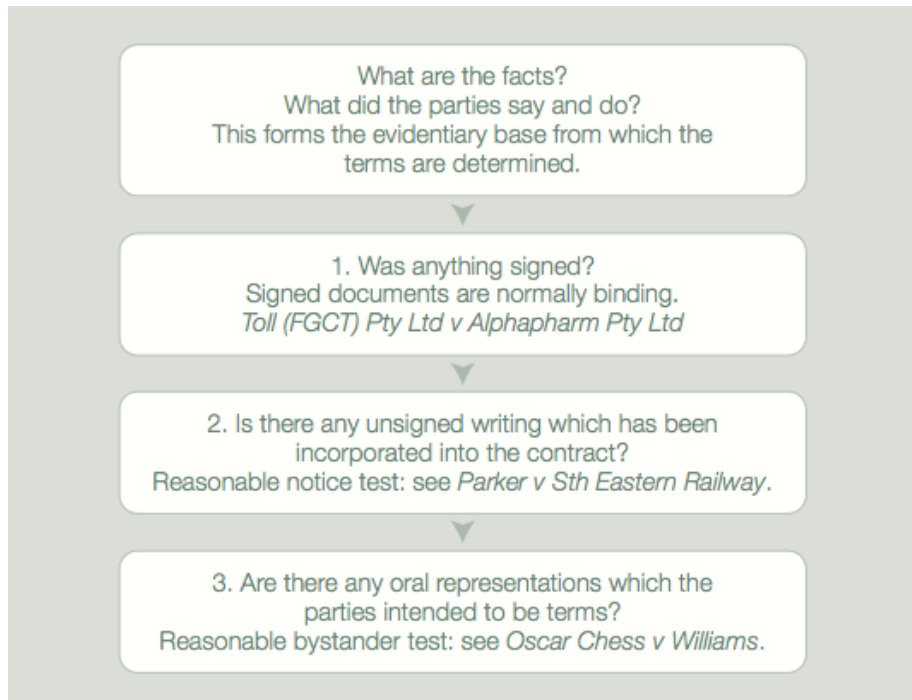
Exception from Stilk v Myrick rule remains unclear

Renegotiating a debt

Rule in **Pinnel's case**: As the parties agreed that the debt was to be repaid prior to the due date this amounted to something extra.

Foakes v Beer (224): refused to overrule principle

EXPRESS TERMS



Relevant evidence

Parol evidence presumption: the courts are reluctant to permit one of the parties to subtract from, add to, vary or contradict the language of the written instrument.

Post-contractual statements are not terms: a party cannot be bound by statements, promises or representations made after the contract has been formed, unless fresh consideration is provided: **Roscorla v Thomas**

1. Was anything signed?

A person who signs a document that has a contractual appearance about it is bound by the contents of the document, even if they did not read document. **Toll v Alphapharm** (pg 248)

Are there any factors that prevent the party from being bound?

- The document didn't appear to be contractual: no reasonable person would have realized the document they signed was a contract: **Le mans Grand Prix circuit v Iliadis**
- Misrepresentation: misleading or deceptive conduct: **Curtis v Chemical Cleaning** that found that although innocent, a false impression was created
- Condition precedent: (subject to) bound only if a particular event occurs
- The document does not accurately record the agreement

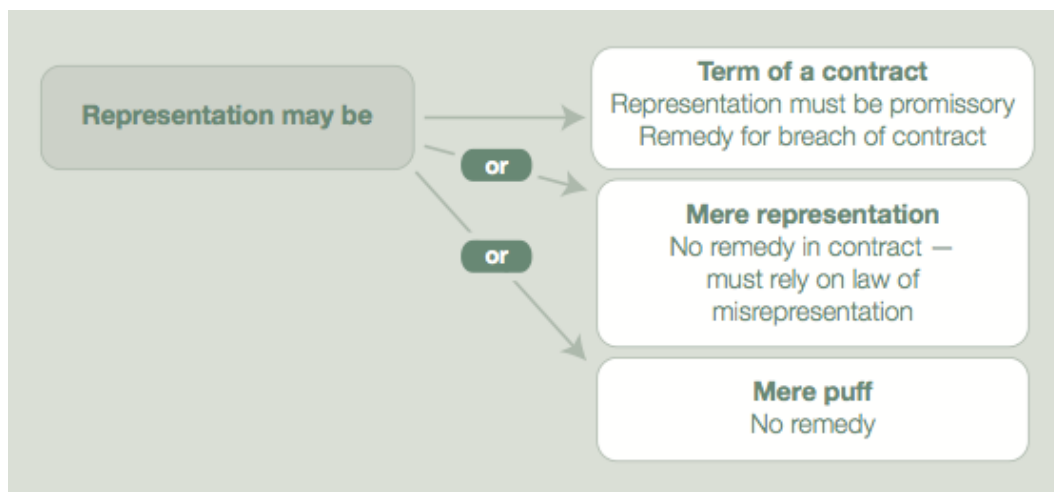
2. Anything unsigned?

Statements in unsigned documents may be terms of the contract
Unsigned terms may be incorporated into the contract by **reasonable notice**: whether document is contractual in nature, whether term was unusual, whether parties discussed matter.

If reasonable notice has been given, it does not matter whether the other party read the clause or not: **Parker v South Eastern Railways**

3. Are there any oral representations, which were intended to be terms?

Oral statements must be promissory in nature to be binding (classified as term of contract).



The reasonable bystander test

If an intelligent bystander would reasonably infer that a term was intended, that will suffice

Purpose: to determine which oral statements are promissory: As demonstrated in **Oscar Chest v Williams**.

Collateral warranties (promises)

Operates in conjunction with a main contract

Must be promissory: **JJ Savage & sons v Blakney**

Must not contradict main contract: **Hoyts v Spencer**

What is the meaning of a term? (Reasonable person test)

Test determines whether a reasonable person in a similar situation would have interpreted the meaning of the terms in the same way: **Reardon Smith Line v Hansen-Tangen**

If the contract is in writing, the parties cannot introduce evidence to show that the contract meant something other than its literal meaning. Extra evidence is permitted if ambiguities need to be clarified or if errors need to be corrected

Exemption clause

- A form of a term
- Limits or excludes liability
- When examining, step 1. Is a clause a term of the contract? (Same as deciphering other terms e.g. Binding signatures, bystander test). Step 2. If it is term of contract, does it cover the breach that has occurred?

Rules for interpreting exemption clauses

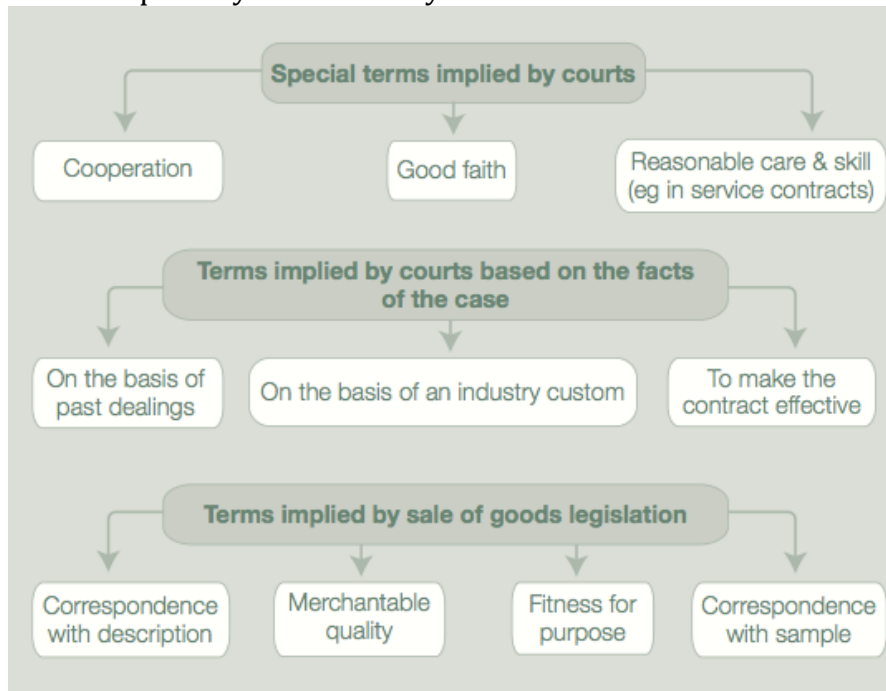
General rule for interpreting exemption clause: to be understood according to their natural and ordinary meaning.

Guidelines in applying general rule:

- Ambiguity rule: has to be specific or clear for breach to be covered: **Photo production v Securicor transport**
- Negligence rule: exemption clause doesn't cover breach if person is careless: **White v John Warwick**
- Four corners rule: exemption clause can only cover an event that occurs within the boundary of the actual contract: as seen in **Sydney corporation v West**
- Deviation rule: if carrier strays from authorized route, they are liable and exemption clause does not cover breach.

IMPLIED TERMS

Terms implied by courts and by statute



Cooperation

Term that is reasonably necessary to enable the other party to have the benefit of the contract

Good faith

Relational contracts: concerned with establishing ongoing relations (rather than one-off transaction)

Important amongst franchising agreements

Burger King v Hungry Jacks: BK breached its implied obligation of good faith when it withheld approval for new AUS restaurants (part of franchising agreement)

Specific types of contracts

- Professional person and clients: there is an implied term that the professional person carries out contractual duties with reasonable care and skill (service contract)
- Work and materials: imply terms that the contractor use reasonable care in performing the work; the service is reasonably fit for the purpose; materials supplied are of good quality and fit for purpose. **Helicopter sales v Rotor-Work** (pg. 293)
- Hire contracts: goods are hired out with implied obligation to ensure that the goods are reasonable fit for the purpose for which they are hired.
- Landlord/tenant
- Employment: employer has to provide safe system of work

Implied as a matter of fact

Court will imply term if it reflects the intention of parties

Cannot be in conflict with express terms, or general tenor of contract

- Past dealings: **Henry Kendall & Sons v William Lillico & sons**: consistent course of past dealings. **D J Hill v Walter H Wright**: court refused to imply a term based on past dealings (one or two dealings not sufficient)
- Custom or trade: so well known and widespread throughout industry that all contracts of the same type can be said to have that term: **Bell group v Herald & weekly times**
- Necessary to make contract effective: what the parties via their actions and words intended: **The Moorcock** (pg. 298)

REMEDIES IN CONTRACT CASES

Terminating the contract

- By performance (obligations have been met)
- By agreement (agree to discharge obligations)
- By a term of the contract (if event/term occurs)
- By frustration

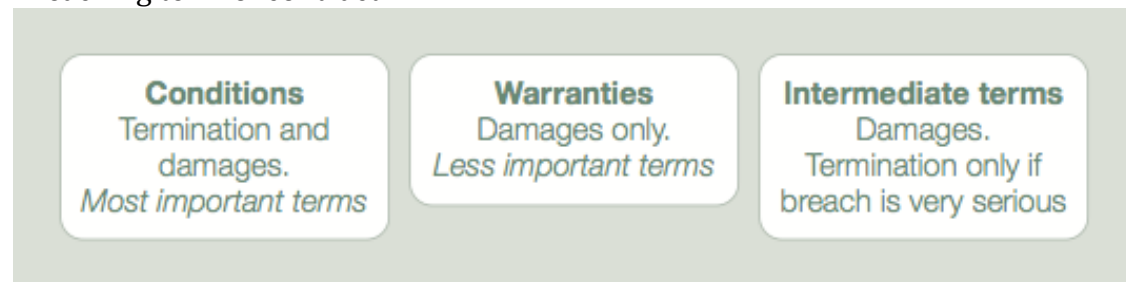
Terminated by frustration

When an event occurs that makes it impossible to perform the contract as contemplated by the parties. e.g. Law change, injury or illness, destruction, natural disaster, property taken by government, **unforeseeable delay**.

Taylor v Caldwell: hall burnt down, destruction, neither parties faults

Davis Contractors v Farenham Urban Council: not frustrated contract, because commercial disappointment and delay was foreseeable.

Breaching term of contract



Examples of terms in a contract:

- Time clauses in mercantile/ commercial contracts
- Tie clauses in other contracts
- Terms referring to quality

When is a term a Condition?

- Because statute says so
- Because the parties have expressly provided that the term be condition: **L Schuler AG v Wickman machine tool sales**
- Goes to the heart of the contract: **Associated Newspapers v Bancks**
Determined by essentiality test: **Tramways advertising v Luna park**

Termination for Repudiation

Occurs when one party indicates they will not perform contractual obligations. Entitles the innocent party to terminate the contract

Penola Trading v Sunny Springs (pg. 343)

Termination for anticipatory breach

Form of repudiation- before the time for performing the contract is due

National engineering v Chilco Enterprises

Process and consequences of termination

- Election to terminate must be unequivocal (clear)
- Not reversible
- Party terminating must prove ready, willing and able to perform process
- Parties relieved of all future obligations
- Affirmation means the contract is proceeding and gives the other party chance to rectify breach: **Foran v Wright**

Damages

- Purpose: Compensate the innocent party for losses suffered: **Addis v Gramophone; Tabcorp Holdings v Bowen Investments**
- Losses must be caused by breach: **Reg Glass v Rivers Locking Systems**
- Agreed damages: must be genuine estimate of damages and not a punishment.
- Duty to mitigate losses (plaintiff must take reasonable steps to limit losses)
- Not be too remote: **Hadley v Baxendale**: two limb rule:
 1. Losses which flow from breach: **Koufos v C Czamikow**
 2. If loss not in usual course of things, damages can only be claimed within reasonable contemplation of parties at time contract is made: **Victoria Laundry v Newman Industries**

Damages may be claimed for:

- Expectation losses: **Commonwealth v Amann Aviation**
- Personal injuries
- Disappointment, distress, discomfort: **Jarvis v Swans**

Specific Performance (discretionary remedy)

An order by the court requiring one party to carry out contractual duties
Only ordered if damages are not an adequate remedy, as seen in **Dougan v Ley**.

Not available if it requires ongoing supervision by the courts

Not available where such an order would require the defendant to undertake some personal service: **Lumley v Wagner**

Injunction (discretionary remedy)

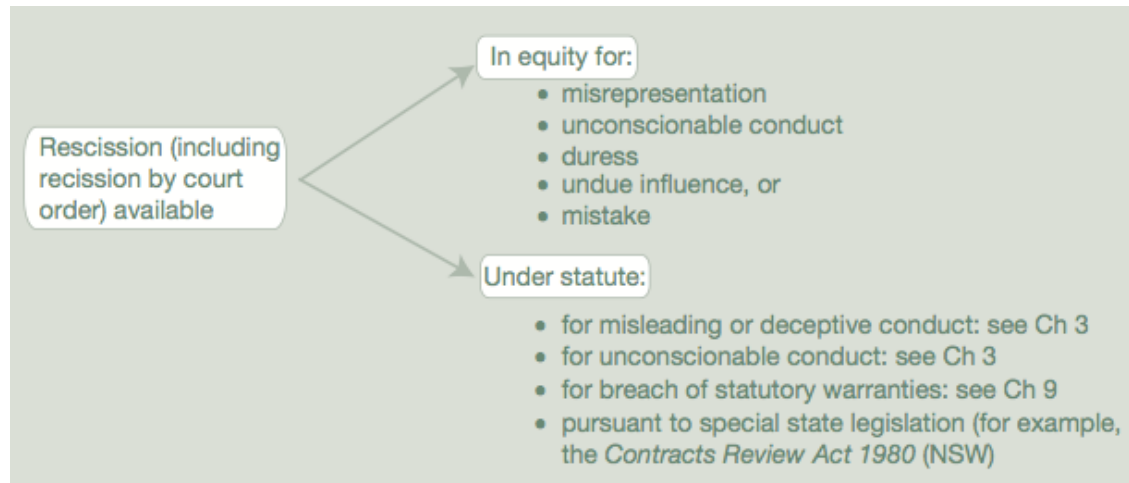
An order restraining a person from doing something

Not to be granted unless necessary

Other remedies

- Ratification: altering the contract an error
- Restitution: separate body of law: **Pavey & Mathews v Paul**

Rescission



Nature of rescission in equity

- return parties to position prior to contract
- cancels contract from beginning, whereas termination for breach cancels contract from moment of termination.
- innocent party may make binding election to proceed
- rescission is act of innocent party

- substantial restitution not always possible
 - *Academy of Health & Fitness v Power*
 - not permitted if legal rights of innocent third party adversely affected.
 - *Car & Universal Finance Co Ltd v Caldwell*

CONSUMERS' RIGHTS AND THE SUPPLY OF GOODS AND SERVICES

ACL (Australian Consumer Law)

The buyer of a good has certain rights against suppliers

Necessary to understand: Step 1. What is meant by a 'consumer'. Step 2.

What the guarantees are. Step 3. What the remedies are.

Section 3(1): defines consumer (Step 1).

(a) The amount paid did not exceed

(i) \$40,000 or

(b) Goods were **ordinarily acquired** for personal, domestic or household consumption. Not proven in: **Crago v Multiquip**. or

(c) A vehicle or trailer acquired for use principally to transport goods on public roads.

Section 3(2): Defines what is not a consumer contract.

(a) Acquired good for purpose of re-supply or

(b) Acquired for purpose of using them up or transforming them in trade or commerce:

(i) In course of production manufacture or

(ii) In the course of repairing or treating other goods or fixtures on land.

Trade or commerce

Goods must be supplied 'in trade or commerce' for guarantees to apply

(s 54-59)

Can include second hand goods: **Atkinson v Hastings Deering**: not a consumer contract

Can include online auction (like ebay)

Traditional auctions excluded: defined by s(2)

Section 54: Guarantee of acceptable quality:

(2) Goods are of acceptable quality

(3) Supplier is not responsible for all defects (if pointed out to consumer before sale): **Grant v Australian Knitting Mills**: not merchantable quality

Section 55: Guarantee of fitness for any disclosed purpose:

(2) The goods are fit for any disclosed purpose, and for any purpose in which the supplier represents that they are reasonably fit for

(a) Consumer must make known purpose

Does not apply if the consumer has no reliance: **Carpet Call v Chan**

Section 56: Guarantee that goods correspond with description

Consumer has action against supplier if the goods do not correspond with the description by which they are sold: **Beale v Taylor** (pg. 394): car did not match description.

Section 57: Guarantee that goods respond with sample

Consumer has action against supplier if the goods do not respond with the sample or demonstration model in quality, state or condition.

Section 64: Guarantees may not be excluded

Attempt to do so is void

Section 64A(1): Liability may be limited in certain circumstances

Seller can limit liability if contract for the sale of a good was not purchased for personal, household or domestic purposes.

Limited liability:

- (a) Replacement of goods
- (b) Repair of goods
- (c) Paying for replacement of goods
- (d) Paying for repair of goods

Limitation must be fair and reasonable: **64A(3):**

- The relative bargaining strengths
- Did buying have opportunity to acquire without limitations clause
- Whether the buyer knew of term
- Whether the goods were specifically adapted for buyer

Remedies for breach of statutory guarantees

Major failure: **s260:**

- The goods depart significantly from the description or sample or model by which they were sold.
- The goods are substantially unfit for normal purposes or any disclosed purpose, and can not be fixed (fit for purpose) at all or easily or in a reasonable time
- Goods are not acceptable quality because they are unsafe

Minor failures: **s259(2):**

If failure to comply with guarantee can be remedy within a reasonable time and is not a major failure

Time limits on the right to reject goods

Starts: when goods are bought, finishes: when defect has become apparent

Factors that determine when defect should have become apparent, set out in **s262(2)**

Remedies for major failure (**ss 259, 261, 263**)

- Reject or return good (within a reasonable time)
- Seek refund (**s261**)
- Seek replacement
- Seek compensation for reductions of price paid
- Seek damages for any reasonably foreseeable losses caused by the failure of guarantee

Remedies to minor failures

- Repairing the goods
- Replacing the goods with goods of an identical type
- Providing consumer with refund ([s261](#))

Retailers right of indemnity: [s274](#)

When manufacturer is at fault, they are liable

Manufacturer can limit liability (limitation clause) to replacing or repairing goods: [s276A](#)

PARTNERSHIP

Types of business organisations:

- Sole trader
- Partnership
- Companies
- Trustee

Main types of business:

	Sole trader	Partnership	Proprietary company	Public company
Number of possible owners	One	20 (except for certain professional partnerships)	50 (excluding any employees share-holders)	Unlimited
Owner has personal liability for business debts	Yes	Yes	No	No
Owner's degree of control over business	full	Shared with other partners	Very limited	Very limited
Public disclosure about business	Very little (business name reg'd)	Very little (business name reg'd)	Company details on public record	Considerable
Regulatory control over business	Very little	Very little	Some reporting requirements to ASIC*	Significant reporting requirements to ASIC*
Administrative costs of setting up and maintaining structure	Small	Not significant	Greater than for partnership	High

* Australian Securities and Investments Commission

Advantages and disadvantages:

	Sole trader	Partnership	Proprietary company	Public company
Advantages	<ul style="list-style-type: none"> • Few legal issues • Set-up costs – low • Maintenance costs – low • Full control • Very little regulatory oversight 	<ul style="list-style-type: none"> • Set-up costs – low • Maintenance costs – relatively low • Control – shared with partners (may be a disadvantage) • Very little regulatory oversight 	<ul style="list-style-type: none"> • Limited liability • Control can be maintained by retaining a majority of shares 	<ul style="list-style-type: none"> • Limited liability • (If listed on stock exchange) it is easy to sell shares • Equity raising
Disadvantages	<ul style="list-style-type: none"> • Only available where one owner • Personal liability 	<ul style="list-style-type: none"> • Personal liability • Size – limited to 20 partners (except for professional partnerships) • Control – shared with other partners 	<ul style="list-style-type: none"> • Control is limited unless majority shareholder • Can be difficult to dispose of shares when a dispute arises • Regulatory requirements 	<ul style="list-style-type: none"> • Very little control as a shareholder • Set-up costs are very high • Maintenance costs are high • Regulatory oversight is high

Business names:

- May need to be registered
- Business Name Register is public record
- Some names restricted e.g. 'Bank'

Does a partnership exist?

The creation of a partnership requires no formalities whatsoever. The existence of a partnership depends on the true relationship between the persons.

Elements of an existing partnership:

- Two or more people
- Carrying on a business: **Goudberg v Herniman Associates** (planning a partnership or carrying on a partnership), **Ferguson v Federal Commissioner of Taxation** (business or hobby)
- Mutual rights and obligations ('in common'): **Momentum Productions v Lewarne, Checker Taxicab Co v Stone**
- With a view of profit

Are there any issues between partners?

The rights and liabilities of the partners with respect to each other are determined by three factors:

- **The contract between the partners.** Contract supreme in determining rights and liabilities of the partners between themselves. There are certain terms normally implied into a trading partnership agreement. Terms included:
 - A partner has the right to sell the firm's trading stock
 - A partner has the right to buy stock
 - A partner has the right to receive payments owing to the partnership
 - A partner has the right to make, accept, and issue cheques
- **The Partnership Act.** The Partnership Act 1958 (Vic) contains rules that will apply to the partnership if the partners have not agreed amongst themselves.
- **Partners' duties of good faith.** The relationship between partners is one of trust and good faith; partners owe fiduciary duties to each other.
Chan v Zacharia
United dominions Corp v Brian

Partnership property?

According to s 24, partnership property includes:

- Items bought into partnership **Harvey v Harvey**
- Items acquired on the account of the firm
- Items acquired for the purposes of and in the course of the partnership business

A partner has beneficial interest in each and every asset of the partnership. **FCT v Everett, Canny Gabriel Castle Jackson Advertising v Volume Sales (Finance)**

Liability to third parties:

In normal partnerships, each partner is:

- Jointly for debts and obligations **Young v Lamb**
- Jointly and severely for wrongful acts **Walker v European Electronics**
- Jointly and severally for misapplication of money or property

Assignment of a partnership interest:

- A partner cannot sell a partnership interest
- A partner may assign his/her right to the profits or, on dissolution, the assets of the partnership
- Assignment of a partnership interest does not give the assignee rights to participate in the management of the partnership or to inspect the books of the partnership

A partnership may be terminated by:

- Partners by agreement (s 30) or expiration of agreed fixed term (s 36)
- Operation of law; a partnership is dissolved by the death or bankruptcy of any partner (s37)
- Supervening illegality; any event which makes it unlawful for the business of the firm to be carried on (s38)
- The courts (s39);
 - Insanity of a partner
 - Permanent incapacity of one partner
 - Prejudicial conduct of a partner
 - Willful or persistent breach of the partnership
 - Partnership can only be carried on at a loss
 - If it is equitable that the partnership be dissolved

INTRODUCTION TO COMPANY LAW

The nature of a company:

A company is an independent legal entity with rights and powers of its own.

Characteristics of a company:

- The powers of a company: s124(1) provides that from the date of registration, a company has the full legal capacity of a natural person
- The types of companies:
 1. Proprietary company
 2. Public company
- The notion of a company's separate identity

Principle of a separate identity

Salomon v Salomon: case established the principle that control and management of a company remain distinct from its ownership

Lee v Lee's Air farming: strictly applied principle established in Salomon's case, that a company is a separate legal entity with independent existence from its shareholders

Salomon v A Salomon & Co Ltd

[1897] AC 22 (House of Lords)

Facts

Salomon was a boot manufacturer who originally operated the business as a sole trader. He converted the business into a company, as several of his sons worked in the business and he wished to give each a share. The subscribers to the memorandum were Salomon, his wife and five children. They each took up one share. However, evidence was raised to show that the wife and five children held their shares as nominees for Salomon with the result that Salomon & Co Ltd was in reality a 'one man' company. He was also appointed the managing director of the company and two of his sons were appointed as directors.

Salomon sold his business to the company and received more shares and securities in the form of debentures and secured loans from the company in payment. The company then experienced financial difficulties and eventually went into liquidation. The creditors of the company sued Salomon for the company's debts. They argued that Salomon should be liable for the company's debts as the company was just an alias for Salomon himself. Salomon, on the other hand, argued that he was not the company and therefore could not be made liable for its debts.

Issue

Who was responsible for the debts owed to the creditors? Can the company be considered a separate entity when the major shareholder and office bearer are the same person?

Decision

The court held that the company was a separate entity from its shareholders. It had conducted business in its own right and was not just an alias of Salomon. The debts belonged to the company, not to Salomon personally, and Salomon was not liable to indemnify the company.

Pioneer Concrete Services Ltd v Yelnah Pty Ltd

(1987) 5 ACLC 467 (Supreme Court of New South Wales)

Facts

A corporation (the subsidiary) executed a deed. Later the plaintiff alleged that the terms of the deed had been breached by the actions of the subsidiary's holding company. The court was asked to treat the holding company and the subsidiary company as one and the same.

Issue

Should the holding company and the subsidiary company be treated as one entity (and therefore both bound by the deed), or as separate entities?

Decision

The court rejected plaintiff's submission. The holding company and its subsidiary were separate legal entities and must be treated as such. The holding company was not acting as agent for the subsidiary. There were good commercial reasons to have separate companies and, therefore, it could not be said that a separate corporation had been established for the sole or dominant purpose of evading a contractual or fiduciary obligation.

How do companies create contract?

Companies have full legal capacity to contract
Company constitution: s125(1 & 2)

How does a company sign?

Section 127: provides manner in which a company may execute a document, including a contract.

- (1) May execute a document without using a common seal
- (2) May execute document using common seal

THIRD PARTIES

Section 126: situations where a person has actual authority to act on behalf of the company.

Section 128: people having dealings with a company are entitled to make a number of assumptions about the company and its officers, unless they know or suspect that the particular assumptions are not correct

- (1) person is entitled to make assumption in s129 in relation to dealings with a company
- (2) person is entitled to make assumption in s129 in relation to dealings with another person who has entitled property from a company
- (3) assumption can be made even if officer from company acts fraudulently
- (4) A person is not entitled to make an assumption in section 129 if at any time of the dealings they knew or suspected that the assumption was incorrect

Section 129: lists assumptions that persons dealing with the company may undertake

- (1) A person may assume that the company's constitution have been complied with
- (2) A Person may assume that anyone who appears to be a director or a company secretary (a) has been appointed and (b) has authority to exercise powers: **Brick & Pipe industries v Occidental Life Nominees; Panorama Developments v Fidelis Furnishing Fabrics** (pg. 521)
- (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company has (a) been appointed and (b) has authority to exercise powers: **Freeman & Lockyer v Buckhurst properties** (pg 432)
- (4) Assume that agents and officers properly perform their duties
- (5) Document duly (properly) executed without seal in accordance with 127(1)
- (6) Document duly executed with seal in accordance with 127(2)
- (7) Officer or agent of company with authority to warrant that document is genuine or a true copy

Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd

[1971] 2 QB 711 (UK Court of Appeal)

Facts

Bayne, the company secretary of Fidelis Furnishing, hired some expensive cars from Panorama Developments in the name of Fidelis. Bayne told Panorama Developments that the cars were to be used to carry important customers of Fidelis. In fact, Bayne used the cars for his private purposes and lacked any actual authority to hire the cars. When Fidelis refused to pay the account, Panorama sued Fidelis Furnishing, claiming that Bayne had apparent authority to enter into the contract.

Issue

Was the creation of this contract within Bayne's apparent authority?

Decision

It was held by Denning LJ that a company secretary would be regarded as having the apparent authority to hire cars on behalf of its company. Hence, Bayne's actions bound the company to the contract and made it liable for the payment of the account.

Decision

Furst had not been appointed as secretary of Brick & Pipe Industries. However, Occidental was entitled to assume that he had been validly appointed as secretary if the company held him out as secretary. The person who expressly informed Occidental that Furst had been validly appointed did not have actual authority to do so, although he may have had ostensible authority. This was not enough. A person who only has ostensible authority cannot confer ostensible authority on another person.

Goldberg, on the other hand, was the managing director with very broad powers. He had implied actual authority from the company to give the assurance that Furst was validly appointed. By remaining silent, he had impliedly given the assurance that Furst was validly appointed. Therefore, Brick & Pipe was bound by the guarantee. In line with the common law approach towards ostensible authority of agents (see 10.29–10.33), there must be some holding out by the company (or someone with actual authority to perform the actions involved). Section 129(3) would not apply where it was only the individual who held himself or herself out as being an agent or employee of the company: *NCR Australia Pty Ltd v Credit Connection Pty Ltd* [2004] NSWSC 1.

DUTIES OF COMPANY DIRECTORS AND OTHER OFFICERS

Functions of a director

- Policy and strategy
- Monitors company's performance
- Accountable to members
- Elects, evaluates, dismisses executive officers
- Statutory functions, eg. Financial reports

Source of director's duties

Fiduciary duties

Act with reasonable care and diligence: s180 as seen in **South Australia v Clark**

Section 181:

Section 182:

Section 183: Duty not to use information improperly

Company owned information includes:

- Invention
- Innovation
- Customer/ supplier information
- Financial, and
- Marketing information

Green v Bestobell: Breached fiduciary obligation not to use inside information for personal gain

Section 184:

Section 191: Disclose interests

What sections have been breached?

Consequences of breach

Civil consequences: breach of ss 180, 181, 182 or 183

- Civil penalty order up to \$200,000
- Prohibition from managing companies in future
- Orders to compensate the company

Criminal consequences: breach of s 184

- Involves recklessness or intentional dishonesty
- Fine up to \$220,000 and/or five years imprisonment

- Company is insolvent at time of incurring debt, or becomes so by incurring that debt
- Reasonable grounds for suspecting company insolvent, or would become so
- S95A

Defences to insolvent trading: s588G

INTRODUCTION TO TRUSTS

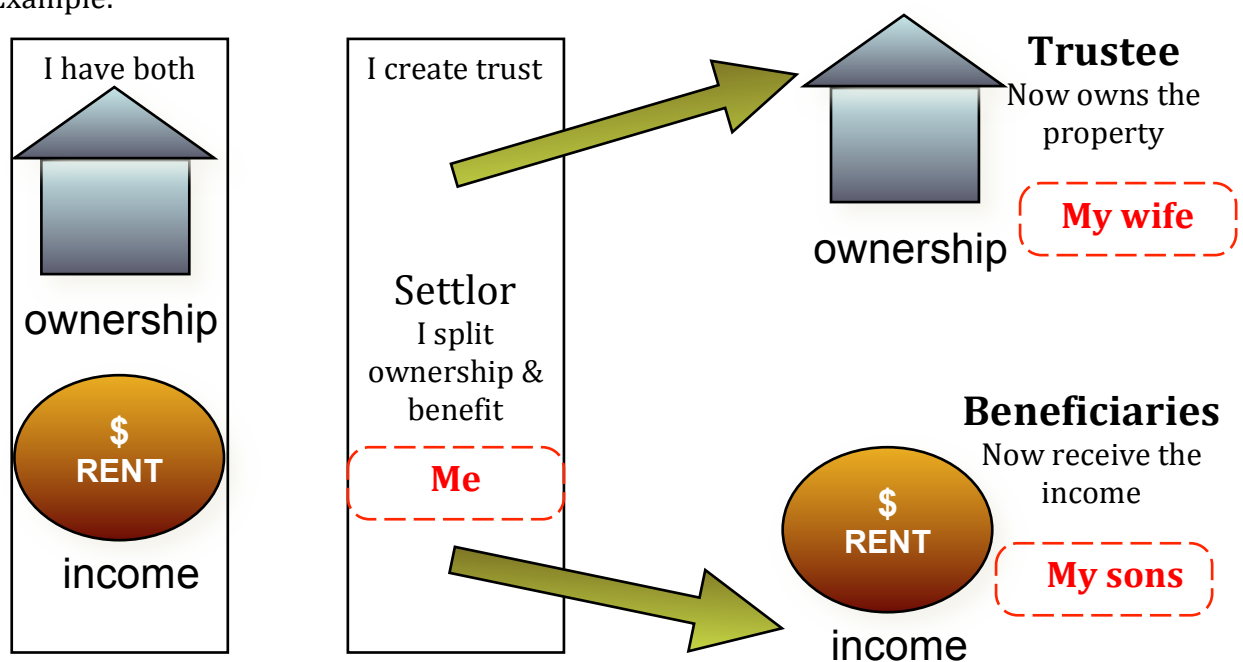
What is a trust?

Legal arrangement splitting the legal ownership (to trustee) and the benefit (to beneficiaries) of property.

Essential elements of trust:

- The trustee; natural person or body corporate. Law recognizes the trustee as the legal owner of the trust property.
- The trust property; real property (land), personal property (money, accounts receivable), intellectual property
- The beneficiary; the person for whose benefit was created

Example:



Parties to creation of express trust:

- Settler – person who creates trust
- Trustee(s) – carry out settler's instructions and hold the trust property for the beneficiary
- Beneficiary (or beneficiaries)
 - Or trust may be created for a purpose e.g. charity

Duration of a trust:

- May be stated in or implied from trust deed
- Cannot last indefinitely
- Cannot exceed 80 years

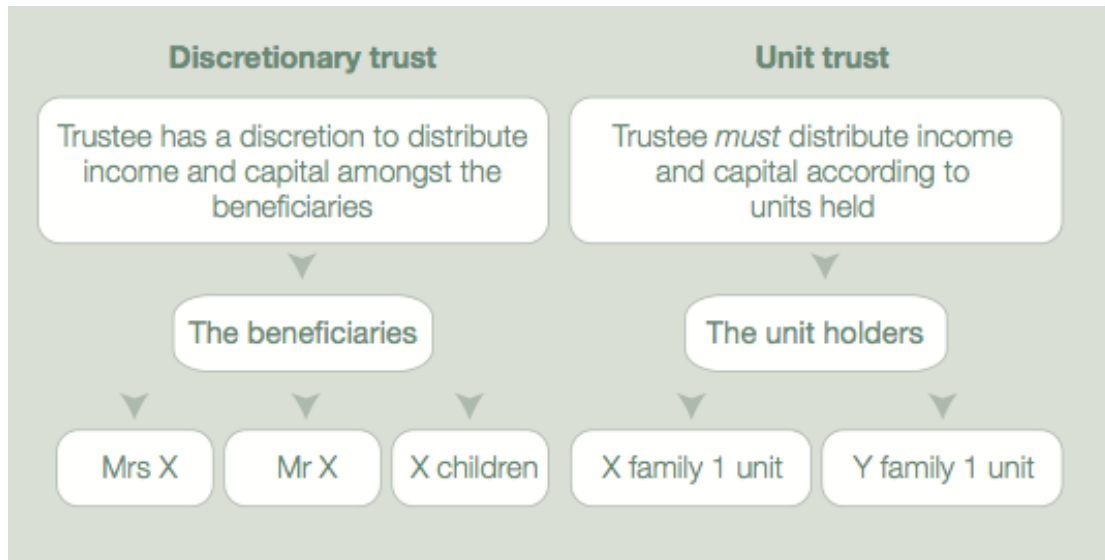
Trust compared with other entities

- Merely a legal arrangement; not separate legal identity

- Unlike partnerships, don't involve contractual relationships between parties
- The trustee owns trust property, contrast to company and partnerships

Type of trust:

- Fixed (Unit)
- Discretionary



Trustees' powers

Source of powers:

- Express powers; trust deed usually lists powers of trust, could be broad or narrow
- Implied powers; the (implied) power to do anything and everything that is required to realize, protect or administer the trust property. Cannot contradict express powers
- Statutory powers; trustee has various powers conferred by the Trustee Act 1958 (Vic). Statutory powers are:
 - Power to invest trust funds s5
 - Power to mortgage trust property s20
 - Power to insure any insurable trust property s23
 - Power to employ agents s28
 - Power to give receipts for money or securities received in relation to the trust s 18

Trustees' duties, rights and liabilities

Trustee has a duty to act diligently, prudently, honestly and in accordance with the terms of the trust.

- Fiduciary duties
- Express duties
- Statutory duties;
 - Be familiar with and observe the terms of the trust
 - To make only authorized investments

- To exercise care and skill **Bartlett v Barclays Bank Trust Co**

Trustee is liable for trust debts.

Trustee liable for breach of duties.

Trustee has right to indemnity; although trustee is liable for debts of a trust, trustee can argue that the transactions that gave rise to the liabilities were authorized by the trust deed.

Beneficiaries' rights and liabilities

Personal right of action against trustee for:

- Breach of duty
- Wrongful distribution of funds

Proprietary action against trust property:

- Used to recover misapplied trust property
- The trust property must still exist, although it may exist in a different form

Beneficiaries may be liable to creditors **Hardoon v Belilios**

Termination of trust

- Beneficiaries' consent (beneficiaries must all be full age and legal capacity)
- Court order
- Distribution of trust property (once trust property distributed, trust no longer exists)