

Contract

S Semester 1

2017 (exam)

TOPIC 1: FORMATION

INTENTION

(remember that this comes after Offer/Acceptance)

PRESUMPTIONS OF INTENTIONS

1. **Social/Familial contracts**- Presumption of no intention of legal relations *Cohen v Cohen*. Criticism of Presumption: In *Ermogenous* we saw that this presumption can be overcome by looking at the particular facts and if the facts indicate a contract. In *Balfour v Balfour* it was held that an agreement between spouses to pay 30 pounds per month was not a contract as agreements between spouses 'are not contracts because the parties did not intend that they should be attended by legal consequences'.
2. **Commercial context** – Presumption of intention *Helmos Enterprise v Jaylor* this had been previously conserved in *Ermogenous*.
3. **Promises made by separating couples** – are deemed contractual *Shorthall v White*
4. **Letters of support**- Give no rise to contractual obligations *Atco Electronics*
5. **Advertisements** - It has not been determined whether advertisements are intending to be legally bound. However, in *Carlill v Carbolic Smoke Ball Co*, the court found that as there was a deposit created to pay any people who accepted the offer, they found there was a legally enforceable duty.
6. **Government transactions** - where the government is implementing a policy through subsidies, grants and the like *Australian Woollen Mills*

1. Social/Familial Contracts

- The relation of husband and wife in no way prevents the formation of a contract. There is no legal rule that domestic/social/familial agreements are not intended to be binding- *Ermogenous*. The Minister of Religion (Ermogenous) was 'employed' by the Greek Orthodox Church in South Australia for 25 years. Upon leaving asked for long service pay. Ermogenous argued that there was no contract of employment as it was a spiritual relationship.

- In *Pettitt v Pettitt* it was observed that though many agreements between husband and wife are not intended to be legally binding performance of such agreements may well give rise to legal consequences.
- Rights over property may be generated by agreements that don't meet the requirements of contract but are nonetheless enforceable.
- In *Balfour v Balfour* it was held that an agreement between spouses to pay 30 pounds per month was not a contract as agreements between spouses 'are not contracts because the parties did not intend that they should be attended by legal.
- In *Cohen v Cohen* (Australian case) the P alleged that her ex-husband had promised to pay her a yearly dress allowance. After their separation, the wife sought arrears of this allowance. HCA refused to endorse this due to the presumption of non-binding nature.
- Obviously Ermogenous has thrown doubt on the role of presumptions. So look at the facts in each case to determine. Be careful to use 'presumptions' in the exam, instead think of it as a 'strong indication in favour/against' in a commercial/family relationship respectively.

2. Commercial Context

- Presumed intention
- The test for sham agreements is subjective as an objective test would usually indicate an intention to contract
- If an agreement is found to be a sham, then there is no contract
- If a plaintiff is induced to buy goods based on the claims of the sales pitch and these claims turn out to not be factual and the plaintiff sues, the defendant may claim there was no intention to create legal relations and only a gullible customer would think so
Carlill v Carbolic Smoke Ball Co
- Offers of free gifts also cause issue *Esso Petroleum Ltd v Commissioners of Customs and Excise; Le Mans Grand Prix Circuits Pty Ltd v Illiadis*

Exclusion of intention in commercial agreements

- Honour clauses: parties may make agreements on something usually part of contract law, but expressly declare or declare through negotiations that it is not to be binding
- Atkinson J in *Jones v Vernon's Pools Ltd* stated "The plaintiff has got to trust the defendants and if something goes wrong it is his funeral not theirs"

3. Letters of Support

In *Atco Controls v Newtronics* it was said that issues of intention can arise in relation to letters of support given by a parent company to its subsidiary. Letters of support at face indicate the existence of an agreement and continued conduct based off these agreements further evidence this. Promissory language in letters of support combined with decisions by the subsidiary company that show a correlation with the letters of support can lend weight to it being legally binding. May give rise to a case of estoppel if the subsidiary believed on reasonable grounds that the parent company would honour their letter of support, detriment suffered would be the subsidiary not meeting their obligations (like re-paying debt) – In *Warran CJ, Nettle and Mandie JJA judgment*.

However in this case the formal debenture overrode the informal letter of support where the debenture allowed for Atco to call upon the repayment of its debt whenever it wanted. There was no contract as there were none of the formation elements. Newtronics tried to assert a contract through conduct. Atco would not intend to bind itself to a subsidiary which it could not recover money from and that Newtronics as a subsidiary was formed to take the liability for any issues that would arise.

LOOK AT THE GATE GOURMET CASE FOR MORE ON LETTERS OF SUPPORT.

4. Letters of comfort

- Used where a lender is seeking security from the defendant for a prospective loan to a third party (e.g. a company that the defendant is taking over) but the defendant refuses and offers a letter of comfort instead e.g. *Commonwealth Bank of Australia v TLI Management Pty Ltd*
- A person who provides a letter of comfort has made it clear that she does not intend to attract any liability
- Finding that a letter of comfort generates contractual liability is not the usual case
- Parties negotiating for a contract wish to make use of a document that does not appear as a contract but contains detailed clauses and undertakings
- E.g. document to aid negotiations, attempt to make commitment, something to show a financier

- Problem = one party thinks it legally binding the other does not
- **Test = what is the objective intention of the parties**
- Generally not binding but can generate liability through estoppel as it can make one operate on an assumption.
- Common in construction to give letter or intent for work to go ahead before formal contract is drawn up.
- In *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* raises questions as to how the objective test should be applied i.e. is the evidence ONLY the letter or the conversations and dealings that took place before and after its issuing?

5. Government Agreement

- when governments enter into relations with citizens, companies or other governments as part of the process of implementing policies or programs, the treatment of the relationship as contractual may be inappropriate
- government to government agreements are less often contractually enforced by courts
- “Undertakings that are political in character- using the word ‘political’ as referring to promises and undertakings of governments, either to their own citizens or to other states or governments – are therefore often not enforceable by processes of law”
Windeyer J *South Australia v Commonwealth*
- An agreements between govt. and a commercial org. or individual will be enforceable as a contract unless it is part of a scheme to help a particular sector of people or economy- **this is expressed in some form in AWM.**
- Depends whether transaction is part of commercial agreement or implementation of policy: *AWM* it was held to be the latter. (look at case summary on next page or two). Cth had no commercial interest, it was merely responding to post-war policy needs. Cth had discretion to vary amount or stop the subsidy at any point. Privy Council at time held it was more administrative than contractual.
- *Administration of Papua New Guinea v Leahy*: held to be latter. Leahy sought APNG to deal with ticks on cattle property. Eradication work not carried out properly, L sued. HCA held that the department was providing gratuitous assistance only, it was a social service, which is not indication of intention for contract so therefore not binding.

General note on intention: *Air Great Lakes Pty Ltd v KS Easter*: In deciding whether a binding contract comes into existence, the court will consider all the circumstances leading up to the date of the alleged contract, with the essential query to answer being 'did the parties intend that the consensus at which they arrived should constitute a binding agreement?'

THE FOUR CLASSES OF CONTRACT

- In any correspondence leading up to the informal finalisation of agreement the words "subject to contract" can be used to mean the parties are only bound once formal exchange of contracts is made, even if offer and acceptance appear to have been completed
- However The High Court in *Masters v Cameron* pointed out that:
 - a) the parties may intend to be bound immediately though wanting formal contracts drawn up later – **There is a binding agreement**
 - b) the intend to be bound immediately but wish the operation of a particular clause or term to be delayed until a formal contract is drawn up – **There is a binding agreement**
 - c) they intend to postpone the creation of contractual relations until a formal contract is drawn up and executed – **There is no binding agreement**
- *Helmos v Jaylor*
 - d) parties intend to be bound immediately by the terms which they have agreed upon whilst expecting contract in substitution of the first contract, containing additional terms – **Determined objectively on the facts**
- if the parties negotiations appear to fall into either category a or d then the parties are immediately bound and there is the contemplation of a further, more formal or more elaborate agreement

CONDITIONAL/ PRELIMINARY AGREEMENTS

- Intention to create legal relations may be dealt with by making it clear that any agreement that has been reached will not come into contract until a specified condition has been satisfied e.g. "subject to..."

- Parties may resist contractual obligations on the basis that they had only reached preliminary agreement and did not intend that preliminary agreement to be given legal contractual force *Masters v Cameron*.
- Barwick CJ (*Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd*) suggested that it is possible to make a pre-contractual arrangement that will ripen into contract on the happening of a given event.
- An offer may be conditional in that it does not come into being until a condition is satisfied *Buhrer v Tweedie*
- An offer can be subject to an implied condition the failure of which has the effect of terminating the offer *Financing Ltd v Stimson*
- The onus of proving contrary intention rests with the party seeking to rebut. That party must establish the fact of contrary intention by reference to:
 - Circumstances surrounding the agreement; or
 - The express terms of the agreement

MODERN APPROACH – THE OBJECTIVE TEST/*Ermogenous*/*Shortall and White*.

- The modern approach looks **objectively** at the totality of the agreement to decide the intentions of the parties.
- ‘The search for the intention requires an obvious assessment of the state of affairs between the parties...the circumstances which might properly be taken into account in deciding whether there was a relevant intention’ *Ermogenous*
- The role of presumptions is solely to determine who bears the onus of proof – i.e. the party attempting to enforce the promise *Ermogenous*
- (Objective test is that of the ‘objective bystander’ and what they think if viewing the relationship). Only mutually known facts can be used to construe the objective intentions of the parties *Shortall v White*. *Ashton v Pratt*: gives list of objective factors: nature of the agreement; language used by the parties; whether the agreement was oral or written; whether it was expressed in the language of obligation; whether legal advice has been sought.
- Additionally as given in *Shortall v White*: The focus of the courts should be on the intentions of the parties as evidenced by:

- Subject matter of the agreement
- Status of parties to the agreement
- Relationship of the parties to one another
- Other salient circumstances

CASES ON POINT

Case Note: *Australian Woollen Mills Pty Ltd v Commonwealth (1954)*

Facts

Conference held in March 1946, representatives of the Committee, Commission and wool manufacturers attended. Conference drew attention to the shortage of wool and the need to protect consumers from rising prices as a result of this.

In letters of August 1946 from the Aust. Wool Realization Commission to manufacturers (one of which being AWM) it was announced that a subsidy would be paid to maintain the price of wool purchased for domestic use by Australian manufacturers.

Australian Woollen Mills bought huge purchases of wool 1946 and 1948.

In June 1948 the government announced this practice would cease as at June 30.

By June 30 1948 Australian Woollen Mills had not been paid a subsidy on the wool it purchased in April, May and June of 1948 to a total of £108 871.

Commission letter stated that stocks in excess of this period that already had a subsidy paid would be refunded by the manufacturer and calculated AWM to owe £67 282.

May 1949 AWM paid the £67 282.

June 1954 case appealed to High Court

Held

Judgement for the defendant. AWM will not receive a refund of £67 282 and will not be paid the £108 871 it sought.

Reasoning

No contract was constituted as a quid pro quo relationship was not in place. The government was not selling wool to manufacturers at a lower cost so that they would buy it, rather they were trying to counteract a war-time issue (policy requirement).

There was also no statutory authority i.e. act of parliament that allowed the Crown to pay companies with public money.

Furthermore, a provision that allowed the government to change or revise the amount of subsidy paid was issued to AWM with every cheque, hence the Commonwealth is not liable to pay the £108 871.

As for the £67 282, this was a claim for monies 'held and received' which is concerned with a payment made in error. **The court held that 'the company paid it voluntarily and with full knowledge of all the material facts'** (466) and so AWM will not receive a refund.

Rules

Consideration

1. Intention to offer a promise
2. Promise must be offered as the consideration for the doing of an act
3. Doing the act signals both acceptance of an offer and the consideration of a promise

In other words, once someone has extended an offer, someone doing an act signals that they accept the promise and complete the required action to grant the end result.

If the end result was to occur anyway then there is no consideration to be made and therefore no legally binding contract. – This is also in *Crown v Clarke* where the P was going to the act anyway as he was under arrest and wanted to save himself.

- In this case there was no relationship of quid pro quo. There was no promise in exchange of doing the act. Buying the wool was a condition precedent to eligibility for the subsidy. It was not intended as the consideration on the part of AWM for a promise from the Cth to pay.
- HCA also concluded that there was no intention on the part of the government to create legal relations; it was instead a gov scheme to promote post-war industry. Court noted 'it is of the essence of contract that there is a voluntary assumption of a legally enforceable duty it is necessary that what is alleged to be an offer should have been intended to give rise, on the doing of the act, to an obligation.'

Case Note: *Masters v Cameron* (1954) 91 CLR 353

Facts

The appellant was suing the respondent for the £1750 deposit made for the intended purchase of the farming property at Bowelling. The intention for this purchase was considered as the respondent's memorandum made on 6 December 1951 stated that the respondent agreed to sell the property she inherited along with a promise for the

completion of fencing. The issue of contention is whether this is a binding contract as the respondent had included a stipulation that meant there was no contract until one deemed acceptable by her solicitor came into effect.

Rules

In any correspondence leading up to the informal finalisation of agreement the words “subject to contract” can be used to mean the parties are only bound once formal exchange of contracts is made, even if offer and acceptance appear to have been completed

Additionally, the High Court in this case pointed out that:

- a) the parties may intend to be bound immediately though wanting formal contracts drawn up later
- b) the intend to be bound immediately but wish the operation of a particular clause or term to be delayed until a formal contract is drawn up
- c) they intend to postpone the creation of contractual relations until a formal contract is drawn up and executed.
- d) Don't forget the Baulkham Hills 4th category and 4th class was applied in Helmos (both in Maddies notes).

Held

The appeal was allowed.

Reasoning

This case fell into the third category (c), which means no legally binding contract was created. The stipulation made by the respondent that the ‘agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to [her] solicitors’ [359] created an overriding condition that means that the agreement does not constitute a legally binding contract, instead it becomes the intended basis for a future contract. [363] The High Court also notes that this form of agreement allows both parties to reserve a right to withdraw at any time until the formal document is signed. [361] The money did not take the form of a deposit as a contract was not formalised, therefore it was not the property of the vendor. [364]

Case Note: *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* (2005) NSWCA 235

Facts

Helmos offered to buy the Steak House from Kingsley but only if it could also buy Jaylor's 50% stake in the Crab House. Jaylor offered it in a letter to Helmos via its solicitor on Jan 15 2002. This letter stipulated the terms of agreement including when a formalised contract would be sent. Helmos accepted this offer but subsequently Jaylor's solicitors denied any binding agreement. Helmos sued for breach of contract at which the primary judge held that no binding contract was made because too many points were left to still be worked out.

Held

Court of appeal found the trial judge to have erred in his judgement and the appeal was allowed.

Rules

1. There is a fourth class in addition to those found in *Masters v Cameron*
 - Parties intend to be bound immediately by the terms which they have agreed upon whilst expecting contract in substitution of the first contract, containing additional terms – [Baulkham Hills Private Hospital](#)

Reasoning

Because the two transactions flowed into one another it is acceptable to state the agreement fell into the fourth class. Furthermore, uncertainty or incompleteness did not hold up as a) **this only relies on essential elements (price, parties, property from *Godecke v Kirwan*)** and b) **the key players were all in the restaurant business and so any other important terms were implied to have been known to exist.**

[48] 'there is a strong presumption in favour of an intention to create legal relations' in a commercial context.