

CONTRACTS MICRO NOTES

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Topic 2: Contract Formation

2(a)(b): Agreement: Offer and Acceptance

- *Consensus ad idem* = meeting of the minds - essential (*Smith v Hughes (1871)*).

Offer

- An offer can be bilateral (between two people) or unilateral (made to the world) (*Carlill*).
- Only valid if it:
 - Identifies a valid **consideration**
 - Manifests an **intention** to create a legal obligation
 - Has element of **certainty** = no further negotiation needed (*Woollen Mills (1954)*)
- Offer must be definite → **objective test**: would a reasonable person in the position of the offeree believe that an offer was intended and that a binding agreement would be made upon acceptance? (*John Howard v J P Knight [1969]*)
 - Motive of acceptor is immaterial (*Williams v Carwardine (1833)*)
 - Knowledge essential; offer must be in mind of acceptor at time of accepting (*R v Clarke*).
- If the offeree is unaware of an offer, then it would be impossible to accept it (*Fitch v Snedaker*).
- An offer must be distinguished from:
 - 'Mere puffs' (exaggerated statements a reasonable person would know to be false)
 - (*Leonard v Pepsico Inc 88 Supp 2nd (1999)*).
 - Request for information (*Harvey v Facey (1893)*).
 - Invitation to treat (*Partridge v Crittenden (1968)*).
 - Advertising goods for sale in brochures w/prices (*Grainger v Gough (1896)*).
 - Display of goods for sale (*Pharmaceutical Society of Great Britain v Boots (1953)*).

Auctions

- Bidder makes an offer, the owner accepts at the fall of the hammer
 - No legal relationship prior to the fall of the hammer (*Payne v Cave (1789)*)
 - Codified under **s59 of Sale of Goods Act 1923 NSW**
- No claim if the auction is cancelled (although auctioneer may be at risk). (*Harrison v Nickerson (1873)*)
- **Auctions with a reserve**: call for bids = invitation to treat (otherwise every bid = contract)
- Makes no difference (*AGC v McWhirter 1977*) BUT may claim against auctioneer (*Warlow 1859*)
- Online auctions were simply a different form of auction, with same standard set of rules that applied to a conventional auction - usually terms and conditions (*Smythe v Thomas (2007)*)

Tenders

- Tender does not usually constitute an offer (*Spencer v Harder (1870)*) BUT liability may arise if:
 - If wording indicates highest or lowest bid may assume there is an offer
 - (*Harvela Investments Ltd v Royal Trust Co of Canada Ltd (1986)*).
 - Failure to comply with agreed tendering process (NB: does not mean you will win tender)
 - (*Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council (1990)*).

Options

- Form of offer which contains a promise not to withdraw the offer for a certain time.
- Offeree must provide a consideration for the benefit of being given the exclusive right to accept for a certain period (usually a nominal sum of money)
- Breach of option = breach of contract = remedy for breach of main contract should be applied

Tickets

- Ticket may be an offer but is not evidence of a contract (*MacRobertson Miller Airline Services v Commissioner Of State Taxation (WA) (1975)*).
 - Airline ticket is NOT a contract; at best it is a VOUCHER (*MacRobertson (1975)*)
- Automatic vending machines = offer and passenger accepts when taking ticket
 - Terms on the ticket that were not drawn to the passenger's attention beforehand cannot be regarded as part of the contract (*Thornton v Shoe Lane Parking Ltd (1971)*)

TERMINATION

Revocation

- Offer may be revoked by the offeror any time before it has been accepted
 - Even if they promised to keep it open for certain period
- Revocation of offer is ineffective until it is communicated to offeree
 - Postal rule does NOT apply to withdrawal (*Byrne v Leon Van Tienhoven (1880)*)
- Does not need to be express or actual withdrawal of offer – can communicate through 3rd party
 - (*Dickinson v Dodds (1876)*).
- Revocation in unilateral contracts:
 - No decided Australian cases on the subject.
 - Can withdraw offer prior to performance as long as it is publicised as prominently as the original offer (*Shuey v United States (1875)*).
 - Cannot be withdrawn once offeree has partly performed requested act (*Daulia v Four Milbank Nominees [1978]; Errington v Errington (1952)*).
 - **NO** general principles preventing revocation of offers in unilateral contracts (*Mobil Oil Australia Ltd v Wellcome International Pty Ltd (1998)*).

Rejection

- Request for information about an offer does not amount to rejection
 - *Stephenson Jacques v McLean (1880)*

Topic 4: Illegality

- Based on latin maxims
 - **Ex turpi causa non oritur actio** = court will not allow party to base a cause of action upon an illegal act
 - **Ex dolo malo non oritur actio** = no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act
- If a court finds illegality, there are 4 possible outcomes:
 - 1) Contract is void
 - 2) Severance (term of the contract is void)
 - 3) Contract is void in certain circumstances
 - 4) Contract is valid, but unenforceable subject to rights of innocent 3rd parties

Contracts Illegal at Common Law

- Common law may invalidate certain contracts against public policy (*Brooks v Burns Philip Trustee*).
- Change with public opinion, but grounds below are soundly established

Contracts to commit crimes or torts

- If the central purpose of a contract is to commit a crime or a tort (including fraud) = illegal
 - Crime (*Allen v Rescous (1676)*) – Fraud (*North v Marra Developments Ltd (1981)*)
- Has to be **central purpose** of contract = court looks at centrality/crime's severity

Contracts to defraud the revenue

- If central purpose of a contract is to defraud revenue (ATO) = illegal (*Alexander v Rayson*).

Contracts promoting sexual immorality

- Prostitution generally makes a contract illegal (*Upfill v Wright*).
- De facto relationships/same sex partnerships now allowed (*Ashton v Pratt 2012*)
 - Due to changing public opinion = *Property (Relationships) Act ss44-52*

Contracts promoting corruption in public life

- Contracts which prejudice administration of a state/nation = illegal (e.g. selling public offices)
- May also include selling honorifics (*Parkinson v College of Ambulance Ltd and Harrison*).

Contracts prejudicial to the administration of justice

- Covers contracts to conceal criminal offences/stop investigations, etc. (*A v Hayden (1984)*)
- Only applicable to criminal matters not civil (*Keir v Leeman*)

Contracts prejudicial to foreign relations or public safety

- Any contract which:
 - Benefits an enemy country, or may seriously damage national security:
 - Australia was at war with country when contract was entered into → illegal
 - *Hirsh v Zinc Corp Ltd (1917)*
 - Australia declared war after contract formed → contract suspended until the end of the war.
 - Jeopardises existing relations with another country = illegal (*Regazzoni v KC Sethia*).

Modern Approach

- Shouldn't decide it is automatically unenforceable, but look at consequences, and if consequence of not finding it illegal is excessive then we should not find it illegal (*Nelson v Nelson*).
- ***Nelson v Nelson*** = should enforce a contract (or at least allow a claim for return of money/property) unless:
 - Statute expressly indicates the intention of parliament is to make the contract unenforceable in all circumstances
 - Non-enforcement is proportionate to the seriousness of the unlawful conduct
 - Non-enforcement is necessary to protect the object of the legislation
 - Statute by implication discloses an intention that the sanction under the statute is not to be the sole sanction
- Principles confirmed in *Fitzgerald v F J Leonhardt Pty Ltd (1997)*= circumstances of finding illegality due to common law public policy are not closed

Topic 7: Discharge/Termination

- Also known as Termination
- The process of ending a **valid and enforceable** contract, where no further obligations are imposed upon the parties.
- Contract no longer on foot.

Termination	Rescission (Vitiating Factors)
Contract ok up to the point of termination. E.g. If title already passed then new owner gets good title.	Contract NOT okay from the beginning. E.g. title cannot pass – purchasing party does not get good title (innocent 3 rd party MAY)
Terminated prospectively	Terminated retrospectively

- When a contract is terminated prospectively, some clauses will survive after termination → exclusion clauses, restraint of trade clauses, agreed damages clauses, etc (*Heymans v Darwins*)

7(a): Performance

Entire Contract (Exact Performance) Principle

- **General rule** = a party will only be discharged from the obligations under a contract if complete performance has taken place (*Cutter v Powell*).

EXCEPTIONS

- Where contract does not expressly provide for exact performance as a condition precedent to payment of the price 'the courts will lean against a construction which would deprive the party of any payment' (*Hoenig v Isaacs*).

Divisible (Severable) Performance

- A contract may stipulate that performance is to be completed in stages or segments and consideration is apportioned to each stage.
- If so, performance of less than the entire contract whole may be sufficient to confer partial rights on the performing party (*Government of Newfoundland v Newfoundland Railway Co*)

De Minimis Rule

- Law does not concern itself with trivialities (*de minimus non curat lex*)
- Law is unlikely to punish a party who fails by an insignificant margin to complete the exact performance of a contract (*Shipton v Anderson v Weil Brothers*)

Substantial Performance

- A party will usually be considered to have substantially performed a contract where the defects in the services or goods are of a minor nature (*Hoenig v Isaacs*).
- Substantial performance is a question of degree to be determined by the court after consideration of all relevant facts (must be near completion = *Bolton v Mahdeva*)

Acceptance of Partial Performance

- If a party accepts the part performance of a contract, this acceptance may constitute a discharge of the contract (*Steele v Tardiani*).
 - Except where a party has no option but to accept the part performance of the contract (*Sumpter v Hedges*).

Obstruction

- If one of the contracting parties is prevented or obstructed by the other party from performing the contract, the Court may order the contract discharged (*Startup v Macdonald*).

Statute Law:

- SoGA: - specifies when things should be delivered – controls situations like *Startup*.
 - **s32(4)**: delivery ineffectual unless made at a reasonable hour (question of fact).
 - **s33**: if less than agreed quantity is delivered, buyer has the option to reject all the goods or accept and pay on a pro rata basis.
 - **s34**: buyer not bound to accept delivery by instalment (unless agreed).

Effect of performance

- **Performance** = entitled to the contract price
- **Failure to perform** = breach
- **If contract is entire** (must perform it all) = no entitlement to contract price
- **Substantial performance** = under a lump sum contract where obligation is not entire, contract price less set off for the cost of rectification.
- **Substantial performance of a divisible contract** = contract price for divisible part less set off for rectification of defects.
- **Part performance** = difficult to get remedy.

Matters Impacting on Performance

Time

- If time for performance is in the contract you will need to assess whether this is a condition, warranty or intermediate term.
- **If time not specified**: reasonable time (objective test); treat as a warranty.

Dependent v Independent Obligation

- **Dependant**: one party must perform his or her obligations before the other.
- **Independent**: one person must perform, regardless of whether the other does so.
- **Dependent & concurrent obligations**: perform terms at the same time.
- Generally failure to perform one of these terms will amount to a breach.

Entire and Divisible Contracts

- Question arises when party is seeking to claim partial performance under contract before being entitled to contract price/performance of other party
- **Divisible** = when separate obligations in the contract can be divided up
- **Entire** = when all parts of contract are linked/indivisible – no severance

7(b): Agreement

- Parties may vary or discharge an existing contract 'by agreement': by a term within the original contract, by a subsequent contract, or by giving reasonable notice of termination.

Discharge v Variation

- **Variation of a contract** will ordinarily leave the original intact, but modify some particulars
 - If contract needs to be in writing, variation also needs to be in writing (*Morris v Baron*)
- **Termination/Discharge by agreement** means agreeing to end the contract.
 - An oral agreement to discharge will be enforceable.
- To distinguish between the two, need to look at intention of parties and apply subjective test (*Tallerman and Co Pty Ltd v. Nathan's Merchandise (Vic) Pty Ltd (1957)*).
 - Must determine whether parties agreed to end or vary contract → question of degree (*Morris v Baron & Co [1918]*).
 - **Large degree** of change about material terms suggests intention of parties to discharge and form a new agreement.
 - **Small degree** of change in material terms so that 'new' terms cannot stand alone without reference to original contract suggest intention of parties to vary only.

Discharge by Term in the Original Agreement

Express Term

- A contract may provide for its own termination either by:
 - Fixed time period (e.g.: lease – had commencement & end date);
 - 'At will' (broad discretionary right to end at any time – express right to terminate);
 - Fixed period of notice where no breach;
 - Fixed time period where breach (If there is a breach of contract, the party that made the breach may be given a specified period of time to fix the breach or the contract will be terminated).

Implied Term

- Indefinitely continuing contract and reasonable notice of termination is given (*Crawford Fitting v Sydney Valve* – enough time) & *State Bank of NSW v Commonwealth* – not enough time).

Contingencies

- Where there is a failure of a contingent (i.e. conditional) condition [failure = voidable]

Condition Precedent

- Term that provides either that no contract arises until a specified event occurs or that performance of agreement must wait until the specified event occurs (*Perri v Coolangatta*).

Condition Subsequent

- A contractual term specifies that a contract will end, or be varied, upon the happening of a nominated event (aka sunset clause)

Other Remedies

Restitution

- **Aim** = return a benefit = unlike contract law which aims to compensate for expected loss
 - Restitution (the remedy) is grounded in unjust enrichment (the principle)
- Prevents unjust enrichment where contract is void/unenforceable (*Pavey & Mathews v Paul*)
- **Elements** of a restitutionary claim:
 - D is enriched;
 - At P's expense;
 - The enrichment is unjustified.
- **Main causes of action** in restitution are recovery of:
 - Money paid under the mistake (*David Securities v CBA*).
 - Money paid under ineffective contract (total failure of consideration) (*Fibrosa Spokla*).
 - Compensation for work done in anticipation of a contract.
 - Compensation for work done under an unenforceable, void or partially completed contract (*Pavey & Mathews v Paul*).
 - **Quantum meruit** ('as much as he had earned') → P is entitled to be paid in proportion for work done.
- P may bring alternative claims in contract law or restitutionary law but is only entitled to one remedy (*Baltic Shipping Co v Dillon*)

Statutory Remedies

- To gain damages for breach of a statutory provision you must prove that loss suffered (s 236 ACL) or likely to be suffered (s 237/8 ACL) was caused by conduct prohibited by the Act
- Main Statutory Remedies
 - **Contracts Review Act 1980 (NSW)**
 - Vitiating factors (esp. unconscionable conduct, undue influence and duress).
 - **Frustrated Contracts Act 1978 (NSW)**
 - Frustration
 - **Minors (Property and Contracts) Act 1970 (NSW)**
 - Capacity
 - **Sale of Goods Act 1923 (NSW)**
 - Vitiating factors
 - **Restraints of Trade Act 1976 (NSW)**
 - Illegality
 - **Supreme Court Act 1970 (NSW)**
 - Equitable remedies
 - **Australian Consumer Law 2010 (Cth)/Competition and Consumer Act 2010 (Cth)**
 - Vitiating factors (esp. misrepresentation and unconscionable conduct)