

Topic 6: Formalities

Introduction

- ❖ Common law has no form requirements for contracts, however legislation imposes formal requirements for certain types
 - Consumer credit
 - Sale of motor vehicle
 - Residential tenancy
 - Building contracts
- ❖ This is due to evidence issues and for protection of the vulnerable
- ❖ Historical source of written requirements is *Statute of Frauds 1677* which has made its way into most common law jurisdictions

The Statute of Frauds and its Australian equivalents

- ❖ This Act provided that no action could be brought on contracts of particular types unless the agreement or some note of it was in writing and signed
- ❖ Created to prevent fraudulent claims
- ❖ Statute covered a strange mix of contracts and as such has been widely criticised
- ❖ Key aspect is that it requires a document to be signed by the party to be charged

Instruments Act 1958 (Vic)

Section 126: Certain agreements to be in writing

(1) An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person or upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note.

(2) It is declared that the requirements of subsection (1) may be met in accordance with the *Electronic Transactions (Victoria) Act 2000*.

Guarantee vs. indemnity

- ❖ It has been held that there is no form requirement for an indemnity
- ❖ “An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of

another who is to be primarily liable to be promisee" (**Holroyd Pearce LJ** in *Yeoman Credit Ltd v Latter*)

- ❖ Guarantee is a promise to pay another person's debt if they default, and so guarantor is only liable if the principle debtor is
- ❖ Indemnity is a promise to ensure that someone suffers no loss arising out of a transaction, and so the indemnifier's liability is primary, not secondary to debtor's
- ❖ Indemnities are more onerous and so perhaps they should be covered in *Statute of Frauds*

Yeoman Credit Ltd v Latter [1961] 2 All ER 294

Re: guarantee vs indemnity

- *Latter was a minor and entered into a contract in 1959 with Yeoman which was a hire-purchase agreement for a motor car*
- *Parent signed a "hire-purchase indemnity and undertaking" to protect Yeoman against loss, however the agreement itself was void under the Infants Relief Act*
- *Repayment depended whether the agreement was a guarantee or an indemnity*
- *A valid contract of indemnity here formed*
- *Latter did not pay any instalments, and indemnity refers to protection from loss entirely*
- *Wording and circumstances suggested that the contract was meant to be more than a guarantee*
- *Davies LJ dissented: issue with the argument that an indemnity was required simply as all parties knew Latter was a minor*

Formalities required

Requirements generally

- ❖ Contract should be in writing and signed by the party to be charged; or
- ❖ The contract is oral but there is a memorandum or note of the agreement
 - Memorandum/note must contain all essential terms
 - Time of creation must be ascertainable
 - Signature also required

Joinder of documents

- ❖ A memorandum may consist of several documents if they can be connected together by reference