

Certainty

A. Incompleteness resulting from an omission

Hall v Bust : Courts will not substitute a 'reasonable' price for land, items of sentimental value or items without a 'going rate'.

For the sale of land, the contract must specify a price. Time is not an essential term, except in leases. (**Hall**)

Goods Act the price in a contract for the sale of land must be fixed. Rent is a vital term of a lease (**Whitlock**).

B. Agreements to agree

- **Godecke**: Leaving essential terms to be fixed in the future by one of the parties will generally means that the term is uncertain
- Leaving a term to be settled by future agreement between the parties themselves is traditionally regarded as an unenforceable 'agreement to agree; it would undermine the expressed intention of the parties which is to set the price/term themselves
- However, Leaving a term to be fixed in the future by an independent third party is sufficiently certain (**Godecke**)
 - Where the additional terms are to be added by a third party and are consistent to the contract terms as a whole and reasonable, the contract is enforceable (**Walsh J** in **Godecke**)
 - Does not matter if third party is your solicitor (**Gibbs J**, obiter, **Godecke**)
 - If the third party is unable or unwilling to act, the court may appoint or act as a substitute (Obiter of **Gibbs J** in **Godecke**)
- Does not apply to parties leaving inessential 'subsidiary matters' to be decided (**Gibbs J**, obiter, **Godecke**)
- **Meehan**: not an 'agreement to agree' because the finance needed to be 'satisfactory' only from the perspective of M, and therefore did not leave the vital matters to be decided between parties.
- **Allsop J** in **United Group** courts will not enforce an agreement to agree but will enforce an agreement to negotiate
- **United Group** Where the interpretation of a clause is determinable and not lacking in essential terms, Courts will enforce. (good faith of negotiating was easy to interpret)
- **Upper Hunter** The Arbitrator could make a 'final and binding' decision, *allowance for interpretation on the term 'supplier's costs*
- **Whitlock** However, the authority of third parties cannot extend beyond what the terms imply — arbitration cannot cure uncertainty, must be a basis to reasonably discern.

C. Is the provision too vague/unclear to be enforced?

- Rule: a contract may fail because a particular term is so vague or imprecise that courts cannot attribute meaning to it (**Upper Hunter**)
- If the terms of a contract have been formulated in ambiguous language or devoid of meaning, the court will do its best to supply a meaning if the parties manifestly intended to make a contract (**Upper Hunter**)
- If there are multiple meanings of a term, the courts will choose between these competing meanings when construing or interpreting the contract (**Upper Hunter**)
- *'suppliers costs' had several meanings that the Court could give. Referred to arbitrator to make it alright*
- **Uncertainty of meaning, as opposed to absence of meaning, is resolvable, courts can supply meaning. Uncertainty reserved for meaningless terms. (Upper Hunter)**
 - Look to the intention of the parties: 'no narrow or pedantic approach is warranted' (**Upper Hunter**)
 - Courts will look to external objective criteria to help impute meaning to a term (**Upper Hunter; Whitlock, Biotech**)
 - **Upper Hunter**: clause 5 provided external objective criteria by reference where term 'supplier's costs' could be given meaning
 - **Whitlock**: 'upon such terms as reasonably govern such a lease' - no readily ascertainable objective criteria to determine this
 - **Biotech**: Even if the provision had not been illusory, the contract still would have been unenforceable because there is no way to quantify a 'reasonable' or 'usual' equity sharing scheme
- **Whitlock** if there are no 'reasonable' essential terms that are discernible, uncertain. Only essential = function of agreement dependant on it

D. Is the provision an Illusory promise?

- Where an agreement gives complete discretion to one party to determine its content it may be an illusory promise and render the contract unenforceable (**Placer**)
 - **Placer**, the Cth had complete discretion as to whether it would carry out the promise to pay the subsidy and what amount it would pay. Subsidy unenforceable because of absolute discretion (**Kitto J and Taylor and Owen JJ**)
 - **Biotech**, the promise was illusory because **Biotech** retained complete discretion as to whether it would implement such a scheme (**Kirby J, McHugh J**)

Discretionary terms do not make a contract illusory/void. If the discretion can be measured and judged, if it is not too imprecise and indefinite, can be satisfied. Many meanings does not render it illusory. 'only when court is unable to put any definite meaning' (**Gibbs CJ** in **Meehan**)

- Giving **Meehan** the discretion obtaining finance and entering into the agreement was not the basis of the contract (contract still at work). The term 'satisfaction' was discernible.
- To get around illusory/discretionary terms:
 - Reasonableness: Adds that a buyer must make an 'reasonable attempt to obtain finance' + examine intent (Mason J in **Meehan**)
 - **Gibbs CJ, Wilson and Mason JJ** establish honesty principle, Court can determine whether party empowered with a discretionary term is acting with honesty and in good faith. (**Meehan**)
 - condition not illusory if there exist some specific parameters/external standards providing guidance for enforceability (**Biotech**)

E. Can the incomplete/vague/illusory provision be severed or waived?

- A clause can be severed if the parties would have agreed to a contract without it, and its removal does not change the nature of the contract. Depends on the intention of the parties 'gathered from the instrument as a whole' (**Whitlock, Kitto J**)
- Missing or unclear inessential terms can be severed and the contract still enforceable (**Upper Hunter**)
 - **Upper Hunter**: clause not severable because it would fundamentally alter the contract
- The part for whom the illusory/uncertain provision is of benefit may waive the clause and enforce the remainder (**Whitlock**)
 - **Whitlock**: clause cannot be waived as it would drastically alter the contract the parties intended to enter into

(4) Who is the AUDIENCE being misled?

--> S 18 will only be contravened if members of that audience are likely to be misled or deceived, used to determine standard

1. Conduct directed at a class of person

(1) Who is the class the representations are being made to?

- TGP: broad class of persons- Australian consumers around mainland capital cities who were users of broadband internet (DID NOT include people who knew little about broadband)

(2) Would a reasonable member of this class be misled by the representation?

TPG: (French CJ, Crennan, Bell and Keane JJ):

First, look to the 'ordinary or reasonable consumer taking in only the dominant message'

A reasonable member of the class identified would conclude that no conditions were attached.

Context/Balance: Looking on the balance, the audience 'cannot have been expected to pay close attention to the advertisement.' (TV)

- *ads on TV are an "unrequested intrusion" so consumers are less likely to inspect them carefully like they would a brochure (as in Butcher)*
- Consumers absorb only the 'general thrust' or 'dominant message' in advertising, this is enough to be misleading
 - Misleading in that it selected some words for emphasis and relegated the balance into relative obscurity
 - Conduct can still be misleading even if consumers subsequently become aware of the true position prior to entering into the contract. (*induced into negotiations with TPG*)
 - *Obiter: different types of media - ads in brochures or newspapers are read actively and more carefully, thus a higher threshold is required to show that they are misleading.

Google: Looking at the reasonable ordinary class of persons engaged by Google, they would understand and differentiate sponsored links to organic search results and know that Google had not endorsed them and were merely passing it on.

Look at the users, the context of the use of service and the way it is designed. Applicable to fact scenario.

2. Conduct directed at identified individuals

Where the representations are made to identified individuals, of which the plaintiff is one, they are considered apart from the class in which they fall (*Butcher* per Gleeson CJ, Hayne and Heydon JJ)

-The likelihood of the conduct to mislead or deceive is generally assessed by reference to the individual to whom that conduct is directed (*Butcher*)

Whether the conduct is misleading depends on the perspective of the misled in the totality of the circumstances: including the nature and sophistication of the parties, the character of contemplated transaction and parties' knowledge of each other (*Butcher*):

*B characterised intelligent, shrewd, self-reliant business people; real-estate agent, small staff and incapability (*Kirby disagrees). Nature of transaction \$1M waterfront property purchase, 12 day period, short brochure with disclaimer.*

(Note* **Kirby J** in a dissenting view said that the nature of an individual (being shrewd) does not take them outside the relevance of the act, nor was it clear that they were nuanced in land law to be immunised from the categorisation + **McHugh J** dissent that the broader/objective view of class of persons was preferred)

(5) Was the CONDUCT 'misleading or deceptive'?

Conduct is misleading when it has the capacity to lead those whom it is directed to into error (*Henjo*)

(ii) Silence

Rule: S 2(2) definition of "conduct" includes 'refraining (otherwise than inadvertently) from doing an act.'

1st TEST: R: Reasonable expectation test: Silence will amount to misleading and deceptive conduct when a person in the position of the person affected by the conduct would have a reasonable expectation in the circumstances that if some fact existed it would be disclosed (determined by reasonable member of class of persons or individual acting reasonably.) (**Gummow J in Demagogue**)

- there was a reasonable expectation that D would inform R a license would need to be obtained to access the road
- Look to accompanying conduct, the plan had a driveway marked on it and the real estate agent affirmed the access

2nd TEST: Silence = misleading when it 'suffices that it leads into error' + reasonable inference that x would be raised (*Miller* per **French CJ**)

- Does not require disclosure of all information to the other party in a commercial transaction because an element of secrecy is part of the bargaining process. Erroneous to rely upon high more expectations. holding back things does not always amount to concealment. Rather silence that pertains to withholding information (concealment) that would strictly result in deception is what is relevant. *Miller* per **French**

- *Conduct not misleading since it was a short document and BMW possessed it for a long time. On the basis of the document, was clear.*

Additional Conduct: (positive representation of falsity (*Demagogue*))

Intention: words 'otherwise than inadvertently' in s 2(2)(c)(i) of the ACL suggests that silence needs to be deliberate in order to be misleading

- In *Demagogue*, the FCAFC found that 'otherwise than inadvertently' equates with 'deliberately chosen to be silent'

(i) **Knowledge of the parties' reliance** on the representation

- *Demagogue*: party made it clear that access was important to them and otherwise would not have entered the contract.

(ii) **Existence of common practice** between the parties or in the industry

- **French and Kiefel JJ (Miller)** reasoned that in commercial dealings, a party to commercial negotiations cannot be **required** to volunteer information which will be of assistance to the decision-making of the other party.
- **Heydon, Crennan, and Bell JJ** reasoned that Miller's failure to draw to BMW's attention a circumstance that the document itself disclosed was not misleading or deceptive. The onus was on BMW to read the document
- **Gummow J:** distinction between obligations of a vendor disclosing defects in title (must tell) and quality of property (no need).

3) Reliance of assumption

Expectation for the reliance. The inducement created an expectation that the promise could be relied upon. This expectation necessarily links the action to the assumption *Inwards: the father allowed an expectation to be created in the son's mind that this bungalow was to be his home... for as long as he wished it to remain his home.'*

Alternatives: Look for the possibility for alternatives. In *Quaglia, Giumelli and Sidhu*, the possible alternatives (*work opportunities*) were foregone on the basis that there was a strong reliance on the assumption. Giving them up shows reliance.

Knowledge of the Reliance: (contributing to unconscionability)

Brennan J (Walton) --> They must have known of or intended to induce reliance — can be implied (Can be an act or abstention.)

In *Verwayen*, V relied upon the Cth to withhold their defence. The legal fees and the undue stress. Cth aware of it.

Quaglia Promisee must alter their position on the faith of the promise

4) Reasonableness

Mason CJ, Wilson and Brennan JJ: Promisee must reasonably expect to be able to rely on promise. (Extra step. Not fundamental)

- generally, it is not reasonable for parties to rely on a voluntary promise, that is not part of a binding contract, in a commercial setting.
- a reasonable person would have made sure they were in a contractual relationship before relying on the promise, especially where both M and WS were represented by solicitors. However, once WS found out about the construction and did nothing, it made it unconscionable.

No evidence showing it is unreasonable: *Hodgson J in W v G* states that while it is unnecessary to prove 'reasonability', an absence of evidence that shows reliance was unreasonable should be taken into consideration.

- Involves two separate questions:
 - i) Whether the relying party acted reasonably in adopting the relevant assumption and
 - ii) whether the relying party acted reasonably in taking the relevant detrimental action on faith of the assumption

IT is contextual. Must Consider:

- nature of the assumption
- conduct engaged in by the representor
- identity of representor
- relationship between the parties
- **Link this to the manner of the inducement.**

Walton Stores: it was reasonable to rely on the assumption because the defendant thought that the signing of the contract was a mere formality

Sidhu: it was reasonable to rely on the assumption because of the reassurance that S was continuously given

5) Have they suffered Detriment, arising from reliance?

There must be detriment arising from reliance upon a promise if the assumption is not fulfilled (Walton)

The detriment needs to be substantial or significant (*Verwayen, Giumelli*) and it must not merely be speculative (*Quaglia*)

Mason J's dissenting view struck out the stress, failing of the case. The only detriment was the 'significant expense and inconvenience' of legal proceedings.

Rule: The plaintiff will have suffered detriment if he or she changes his or her position in reliance on the promise and would suffer a material disadvantage if the promisor were allowed to resile from the promise (*Sidhu; Walton Stores; Quaglia*)

Identify Detriment --> Type of Detriments:

Walton Stores: Knocking down the old building and beginning construction

Quaglia: Having to pay a lump sum of money instead of in instalments. *Subjective, dissenting view that it might easily not be detrimental (conjecture), should rely upon valid and objective ways of looking at detriment (money). PE is a corrective tool and not to be used liberally.

Mobil: Detriment had been avoided by the inducing party and the promisees in the nature of the conduct: the increased expenditure by the applicants was of nature that might reasonably be expected to lead to increased profitability and efficiency in day to day operation.

Sidhu: Lost the opportunity to search for other work and make other money, she had made improvements to the property.

Giumelli: lost job opportunity (offer from father-in-law) and the foregone wages and opportunity cost in wages.

Verwayen: The detriment need not be financial. *Verwayen's* detriment went further than that of legal costs; also included 'stress, anxiety, inconvenience and effort' of litigation. (per *Deane and Gaudron JJ*). Though dissenting views hesitant to go beyond legal costs which are measureable. Even majority judgment preferred to go with reliance-based detriment instead of expectation-based detriment.

W v G Expenditure associated with raising children

Inwards Baker had made expenditure building the bungalow (his own expense)

(*Verwayen*) Link --> The detriment must flow from a reliance on the assumption — there must be an element of Causation