

CONTRACTS ONE EXAM REVISION

Break up of marks – 50-mark question

1) 10	24 mins
2) 5	12 mins
3) 2	5 mins
4) 10	24 mins
5) 6	14 mins
6) 10	24 mins
7) 2	5 mins
Part 2 – 5 Marks	12 mins

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- READ WHAT YOU ARE ASKED AND ONLY ANSWER WHAT YOU ARE ASKED
- Only use dot points for lists of things
- Where are the issues and what are they?
- ONLY address what is needed EG if you are told there is a contract, you do not talk about contract formation
- Do not try and perfect it, accept there will be mistakes
- Always do a rough plan of each answer
- CASES AND LAW ARE INTEGRAL
- NO headings just think IRAC
- Relate law and cases to the actual question EG ... and this is seen here with ...
- Do not relate the facts of the question and cases and legislation, just imply them
- Leave a space between paragraphs
- Leave a margin
- Do not regurgitate content!! Demonstrate understanding of the content

Week 1: Types of Contracts

Unilateral

- 'if' contracts, only one party assumes obligation on the contract. One party has already executed obligation in formation EG Reward sign for lost dog - Offer is sign, Acceptance is returning dog
- For consideration - Doesn't have to promise, just preform the deed
- Executed

Bi-lateral

- Both parties assume an obligation under the contract. Obligations of both parties are executory (not yet fully performed by the parties) EG Sale of car - Seller has to provide car, buyer has to provide \$\$
- For consideration-Exchange of promises
- Executory

Week 2: Offers

I2T: Adverts are usually invitations to treat *Partridge v Crittenden*, *Grainger v Gough*

Exceptions:

Where an ad is detailed: So, clear, definitive and explicit that it leaves nothing open for negotiation
Lefkowitz v Great Metropolitan Surplus Store

Where the ad is an offer or reward: Provided it is sufficiently detailed

Where the ad is for a limited stock and limited acceptances

Fisher v Bell- Price tag in a shop window is an I2T

Pharmaceutical society v Boots Cash Chemists – Display of goods in a self-serve store is an I2T

Auctions: *Payne v Cave*

Bids = Offer

Fall of hammer = Contract

Call for bids is an I2T

Tenders: *Pratt Contractors v Palmerston North City*

Call for tenders = I2T

Submissions = Offers

Auto Ticket Cases:

Display of auto machine: Offer

Driver puts money in machine: Acceptance

Ticket issued: T&C's on ticket do not apply unless stated before hand

An offer - A clear statement of terms upon which an offeror is prepared to be contractually & legally bound while the offer remains alive *Nielsen v Dysart Timbers*

- An offer must be communicated: *Fitch v Snedaker*
- An offer can be made to the world at large: *Carlill v Carbolic Smoke Ball Co*
- Sometimes no clear offer and acceptance but there can be a contract if the parties have reached final agreement *Clarke v Dunraven* – (contract by T&C's of the yacht club)

Australian Woollen Millis v Cth:

- Announcement of the subsidy was simply a statement by the gov. not an offer for acceptance
- No intention to be legally bound
- No consideration from AWM

Harvey v Facey: Request for information

Termination of offers:

1. Withdrawn/Revoked - Withdrawn/revoked any time before acceptance e.g. offer for sale of a house can be communicated by words or by sale to someone else *Dicienson v Dodds*
2. Rejected - If rejected that offer cannot be revived, only as a new offer
3. Counter Offer - Not acceptance. Strikes the original offer by offeror
4. Failure of condition
5. Death *Carter v Hyde*
6. Lapse of time *Ramsgate Victoria Hotel v Montefiore*

Offers can be rejected by another sale

Conditional Contracts

- Offeree must show reasonable effort to meet these conditional terms and the offeror can say no, even if offer has done what necessary

Finance: Sale of land - Has to show considerable effort to obtain the finance

Contract: Can't use these conditionals to get out of a contract

Week 3: Acceptance

Acceptance - The final and unqualified assent to the terms of the offer, made in the manner specified by the offeror *Nielsen v Dysart Timbers*

General rule: can only be accepted by the person/s to whom it has been made *Reynolds v Atherton*

- Can only accept what was offered
- Cannot accept a reward you had no knowledge of
- Once email has reached inbox is the acceptance not once read

Counter offers:

Counter offers are not acceptance *Hyde v Wrench*

Acceptance must be unqualified:

- Offeree must only agree with the terms proposed but sometimes an acceptance is conditions EG 'subject to contract' *Masters v Cameron* 'subject to finance' *Meehan v Jones*

Acceptance must be communicated:

General Rule: An offeree must communicate acceptance to offeror, no agreement until the acceptance is communicated *Felthouse v Bindley*

Exception 1: Offeror can stipulate method of acceptance

Exception 2: Acceptance by Conduct

Exception 3: Postal rule

Postal Rule

- Acceptance complete as soon as it is posted *Adams v Lindsell*
- parties must have contemplated that post be used for acceptance *Henthorn v Fraser*

Exceptions to the postal rule:

1. Where it is stated offeror will not be bound until actual receipt of offeree's acceptance
 - a. *Bressan v Squires*
 - b. *Nunin Holdings v Tullamarine Estates*
2. Where negotiations are complex and highly contentious
 - a. *Tallerman v Nathan's Merchandise*
3. Where communication is instantaneous, rule is not applicable
 - a. *Olivaylle v Flottweg*

Week 4 Certainty & Completeness:

Certainty: Certainty - In order to constitute a valid contract, parties must express themselves so that their meaning can be determined with a reasonable degree of certainty *Scammell v Ouston*

Illusory promises: Something that looks like a promise for the other party but is in fact giving them no obligation to carry out this promise *Placer Development v Cth*

- Not illusory if the K provides who should determine important matters *Godecke v Kirwan*

Saving uncertain contracts:

- Link to external standard *Hillas v Arcos*
- Imply a term based on reasonableness *Hall v Busst*

An invalid term will be severed if the K can survive without it, if it can't, K is void

Fitzgerald v Masters & Whitlock v Brew

Completeness: Need ID of parties, subject matter of K and price. Whether a term is essential depends on facts of each case *Hall v Busst*

- Agreements to agree or negotiate are incomplete contracts and will not be enforced
Booker Industries v Wilson Parking

Section 11 *Sale of Goods Act* – Reasonable price

Sometimes acceptance is conditional:

'Subject to contract' – *Masters v Cameron*

'Subject to finance' – *Meehan v Jones*

- Purchaser has to take all steps necessary to obtain finance approval

Week 4: Intention to be Legally Bound

Intention to be legally bound: To create a K there must be a common intention of parties to enter into legal obligations *Rose and Frank v JK Crompton*

Mere agreement does not constitute contract, must be intention to be legally bound

Intention is determined objectively: Would a reasonable person regard the agreements as intended to be binding? *Merritt v Merritt*, Lord Denning

Domestic & social relationships:

- Presumption that there is no intention to be legally bound
 - o Marriage: Never an intention as a marriage is 'love & affection' *Balfour v Balfour*
 - o Separated couples: Less likely presumption *Merritt v Merritt*
- Presumptions can be rebutted if the matter is serious, there is detriment suffered and significant life changes *Todd v Nicol – Won*
 - o *Roufos v Brewster* – they were family but the contract was for their business so the arrangement was considered commercial = intention to be legally bound

Commercial & business relationships:

- Presumption that there is intention for the parties to be bound by agreements

ERMOGENOUS: HCA said: No presumption that agreement between minister of religion and church was like a social relationship agreement and not intended to be binding

Current status of presumptions: ERMOGENOUS

In determining whether or not there is intention to be legally bound, courts may take account of:

1. Subject matter of agreement
2. Status of parties to it
3. Relationship to one another
4. Other surrounding circumstances
 - a. Language used by parties
 - b. Conduct of parties
 - c. Context of argument

Court simply looks at intentions now, the objective approach, to identify whether or not there was the intent to contract

Week 5: Consideration

Consideration - Act or promise of an act which is done in return for a promise, including benefit and/or detriment to parties *Dunlop Pneumatic Tyre v Selfridge*

Consideration must move from the promisee: *Dunlop Pneumatic Tyre v Selfridge*

Not necessary that it moves to the promisor: *Bolton v Madden*

Consideration need only flow from one of joint promisees: *Coulls v Bagot's Executor & Trustee*

Consideration must be bargained for: *Australian Woollen Mills v Cth*

Consideration may be a benefit (promisor) or detriment (promisee)

Bolton v Madden

Hamer v Sidway – Unilateral

Forbearance to sue?

Hercules Motors v Schubert

Consideration must be sufficient:

1. Must hold value in the eyes of the law
 - a. *Chappell & Co v Nestle*
2. Need not be adequate (just sufficient)
 - a. *Chappell & Co v Nestle*
3. Can be nominal (\$1/\$400)

What is not good consideration

1. Moral obligations/worthwhile motive

Eastwood v Kenyon

- Promises made out of love and affection are not legally recognised

Dunton v Dunton

- A promise by an ex-wife to conduct herself with sobriety WAS good consideration
 - o Wife gave up legal right to drink

White v Bluett

- A promise by a son to stop complaining about how his father conducted his business was NOT good consideration
 - o He had no legal right

2. Past consideration

Consideration may be executed (unilateral) or executory (bilateral) BUT not past *Roscorla v Thomas*

Exception: *Lampleigh v Braithwaite* – Promise to pay after services rendered is good consideration

3. Performance of existing contractual duties

Public duty & existing duty & No additional benefit/detriment is not good consideration

Acts/forbearances of an existing duty to the promisor *Stylk v Myrick*

- 2 crew members deserted, Capt. Said he would pay the others more to sail
- Crew did not go outside their original duties and so no fresh consideration

Exceptions:

A. Fresh consideration - Doing more than original obligation

- *Hartley v Ponsonby*
 - o Crew did more work than inside their original contract so there was fresh consideration and so entitled to payment
-

B. Where promise confers practical benefit on modifying party

- Doing more than original obligation EG incentives
- *Musumeci v Winadell* where rent
 - o Reduction in rent given as it would guarantee a tenant = benefits both
- *Williams v Roffey Bros*
 - o Extra money for contractor to build more flats = more consideration by both

C. Promise to 3rd party

- *Scotson v Pegg*:
 - o Good consideration as there was valid consideration to Pegg and Detriment to Scotson
- *Shadwell v Shadwell*
 - o Entitled to \$150/yr. as he married and never earned over the threshold

Performance of public duty

Glasbrook Brothers v Glamorgan County Council

- Police tried to charge for public duties to protect an area
- They lost as they were not acting outside of their existing public duty as an police officer

4. Part payment of debt

Not good consideration to forgo the balance of a debt

- *Pinnel's Case*
 - o Doctrine: Payment of a lesser sum on the day cannot be satisfaction for the whole sum due
- *Foakes v Beer*
 - o Payments through installments are not good consideration

Except:

1. *Where parties enter into a deed:*
 - a. Run out of \$ OR bankruptcy/settlement of what you have
2. *Circumstances altered to benefit creditor:*
 - a. Payment in different manner, time, place
 - i. *DC Builders v Rees*
3. *Where amount owing disputed:*
 - a. Meet in middle
 - i. *HBF Dalgety Ltd v Moreton*
 1. No genuine dispute about what was owed, just reluctance to pay
4. *Payment made by 3rd party:*
 - a. Enough to discharge full balance owing by a relative etc.
 - i. *Hirachand Punamchand v Temple*
 1. Father settles son's debt, enough to settle son's account

Week 6: Capacity

Minors cannot bid/make offers

PEOPLE WITH LIMITED CAPACITY TO CONTRACT

Difference between mental capacity and legal capacity

Mental Cap.

- Minors
- Convicted criminals
- Aliens
- Bankrupts

Legal Cap.

- Mentally ill
- Under influence

Minors: Under 18 - Law Reform Act 1995 (Old)

MINORS

- To protect minors
- To protect adults who could be taken advantage of

Binding

- For necessities
- Beneficial contracts of service

Voidable

- Contracts which **are binding unless repudiated** by a minor during minority or within a reasonable time after turning 18.

- Contracts which are **not binding unless ratified** by the minor within a reasonable time after attaining adulthood.

General rule: Voidable at option of the minor (but adult is bound)

Exceptions: *BindingS*

NECESSARIES

(*Chapple v Cooper [1844], Alderson B*)

(*Nash v Inman (1908) 2 KB 1*)

Can vary according to state of the minor

- Food, water, clothing, housing
- Transport? Yes if required to get to work EG
 - *Scarborough v Sturzaker (1905) 1 Tas LR 117*
 - *Mercantile Credit v Spinks [1968] QWN 32*
- Not a necessary if only for convenience

Services can be necessities: EG

McLaughlin v Darcy (1918) 18 SR (NSW) 585

SEE SECTION 5 OF SALES OF GOODS ACT 1896 (QLD)

QUESTIONS TO ANSWER:

Is the item capable of being a necessary?

Can the thing be properly regarded as necessary for this particular minor?

BENEFICIAL CONTRACTS OF SERVICE

- Minors are bound by contract of employment or apprenticeship provided contract is for minors benefit EG. Employment
- Won't be binding if harsh or oppressive
 - *De Francesco v Barnum*

If only a few harsh/oppressive clauses they may be severed and rest prevails

- *Bromley v Smith (1909) 23 O.R. (2nd) 193*

- *Harsh terms severed and the rest remained on foot*

Minor can repudiate (get out of) a contract of service on attaining majority

CONTRACTS VOIDABLE BY THE MINOR

- Some contracts **are binding** on a minor **unless repudiated** by the minor.
(ie are binding unless)

- Most contracts **are not binding** on a minor **unless ratified** by the minor
(ie not binding unless)

- Some contracts, binding unless repudiated (refuses to recognise, accept)
- Some contracts, not binding unless minor ratifies (intentional and clear acceptance)
- Minor cannot get money back if they repudiate a contract, unless total failure of consideration

Give the law, state the general rule, state exceptions, find appropriate legislation and establish case facts

MENTALLY ILL AND UNDER INFLUENCE

- Treated same way as minors
- May be voidable if:
 - Did not have the mental capacity to enter into the agreement at time of contract
 - That the mentally ill person has elected to avoid the contract/transaction

- The party who claims there is mental incapacity has the burden of pleading and proving it.

Hart v O'Connor [1985] 1 AC 1000

- Proof of a total inability to understand what was happening is not necessary: all that needs to be proved is that the person was incapable of forming a rational judgment *Blomley v Ryan (1956) 99 CLR 362*

- Intoxication that does not prevent understanding of a transaction is not a ground for avoiding liability.
Blomley v Ryan (1956) 99 CLR 362

Week 7: Formalities and Estoppel

Formalities are a mixture of case law and legislation

General Rule: In common law, contracts do not have to be in writing or evidenced in writing

Exceptions:

- Where the parties agree that writing is required
- Where a statute requires a non-verbal contract EG Sale of Land

Main types of formalities

Contracts made by deed

- EG creditors
- Contracts under seal “signed sealed and delivered”
 - o Must be witnessed by someone not party to the contract
- Gratuitous promises
 - o If no consideration, contract can be enforceable by deed

Some contracts must be in writing

- Derives from statute e.g. Insurance, construction, land etc.
 - o QLD Building and Construction Act

Some contracts must be evidence in writing

- If a contract is not in writing but there is written evidence the pieces of paper can be joined together to for a K provided all required info is provided
- Statute of Frauds 1677 (UK)

Guarantees

Property Law Act 1974 s56

- When you cannot pay and so someone is asked to be guarantee for you. E.g. Parents pay and you pay them back

Sale of Land

Property Law Act 1974 s59

- Mortgages, leases, sales, trusts
- Written K

Powercell v Cuzeno [2003] NSWSC 600

Notes or Memoranda: Complying with formalities:

What documents are permissible?

- Emails, letters, faxes, notes
- Notes and memo do not have to be written for the purpose they are used for

What terms must the document contain?

All material terms of the agreement *Harvey v Edwards Dunlop and Co*

- IDENTITY OF PARTIES *Rosser v Austral Wine* [1980] VR 313
 - o ‘my client’ is not sufficient enough
- SUBJECT MATTER *Pirie v Saunders* (1961) 104 CLR 149
 - o Settlement date of land **IMPORTANT**
- CONSIDERATION *Ram Narayan v Shah* [1979] 1 WLR 1349
 - o A to give house to B in exchange for money

Who must sign and what is required for signature?

- Initials are sufficient
- Name on document is sufficient provided it is authenticated as the final doc

Electronic Signature:

Name on document = sufficient

When must the documents come into existence?

- Notes and memo must provide evidence on document claimed and all essential terms on it

Can a number of documents be taken together?

Two different approaches:

Must refer to some other document to be joined

- *Thomson v McInnes*
- *Tonitto v Bassal*

Must refer to a transaction to be joined

- *Harvey v Edwards Dunlop*
- *Todrell P/L v Finch*

When a contract is not void but is unenforceable

Leroux v Brown (1852) 12 CB 801

VOID - never an effective source of legal rights or obligations

VOIDABLE - not properly formed - innocent party may be able to set the contract aside

UNENFORCEABLE - contract exists but it cannot be enforced by one or both parties

But - can still give rise to equitable remedy

Doctrine of Part Performance

Need to satisfy four things:

1. The acts relied on must unequivocally point to an agreement like the one alleged
2. The acts must be done in reliance on the agreement, and with the knowledge of the other party
3. The acts must be done by the party seeking to enforce the contract
4. The agreement must be concluded so that, if the contract were in writing, it would be specifically enforceable.

Equitable Estoppel

Development of estoppel:

Walton Stores v Maher (1988) (AUS)

Equitable estoppel arises where

1. P assumed a particular legal relationship existed between the parties (or expected that it would)
2. D has induced that assumption in P;
3. P acts (or abstains from acting) in reliance on the assumption;
4. D knew or intended him to so act;
5. P's action/inaction will cause him/her detriment if the assumption is not fulfilled
6. D has failed to act to avoid that detriment (e.g., by fulfilling expectation)
7. It would be unconscionable to allow the promisor to go back on the promise or representation

As per Brennan J in Walton Stores v Maher

1. Assumption or expectation
 - a. Assumption or expectation must be clear or unambiguous and show legal intention
 - i. *Australian Crime Commission v Gray*
2. Assumption adopted must have been INDUCED by promisor
 - a. Silence MAY be sufficient in some circumstances
 - i. *Skywest Aviation v Cth*
3. Reliance
4. Knowledge
5. Plaintiff must suffer DETRIEMENT if assumption is not fulfilled
 - a. Must be a link between the detriment and the assumption
 - i. *Thompson v Palmer*
6. Defendant failed to avoid detriment
7. Unconscionability – key element of estoppel –

Relief based on E.E

Cth v Verwayen

- Collision of 2 navy boats
- Survivor thought they couldn't sue
 - o Changed later
- Cth allowed people to sue saying statute of limitations doesn't apply here
- Cth estopped from going back on what they said

Week 8: Privity

General Rule: Only parties to a contract can enforce it

Coulls v Bagot's Executor and Trustee

ATTEMPTING TO BURDEN A THIRD PARTY

At common law, the privity doctrine will prevent parties to a K from imposing or enforcing obligations against a third party

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co

- Dunlop not entitled to sue Selfridge as their contract was with Dew

ATTEMPTING TO CONFER BENEFITS ON A THIRD PARTY

At common law, even if a 3rd party is specifically intended to benefit from a contract, that 3rd party cannot sue to enforce the promise if the promisor fails to honour the promise

Tweddle v Atkinson

BUT

Trident General Insurance v McNiece

- McNiece Bros Pty Ltd was principal contractor for construction work carried out at Blue Circle Southern Cement's plant.
- C had insurance contract with Trident
- Trident agreed to cover BC, subsidiaries, contractor and suppliers re personal injury.
- • McNiece sought indemnity from Trident
- • Trident denied liability – McNiece not party to insurance K.
- • Held
- – McNiece not a party to insurance contract
- – McNiece was still entitled to be indemnified under the policy.

Statutes of Privity:

S 48 *Insurance Contracts Act* 1984 (Cth)

Entitlement of named persons to claim

(1) Where a person who is not a party to a contract of general insurance is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends, that person has a right to recover the amount of the person's loss from the insurer in accordance with the contract notwithstanding that the person is not a party to the contract.

S55 *Property Law Act* (Qld)

(1) A promisor (s55(6) who, for a valuable consideration (common law) moving from the promisee (s55(6), promises (s55(6) to do or to refrain from doing an act or acts for the benefit (s55(6) of a beneficiary (s55(6) shall, upon acceptance (s55(3,6) by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise

S55 (3) UPON ACCEPTANCE

S55 (4) DEFENCES

S55 (6)

BENEFICIARY: a person other than the promisor or promisee, and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified and in existence at the time when the promise was given"

- The beneficiary must assent, through words or conduct, to the promisor or to an authorised person
- Upon acceptance, the beneficiary shall **be entitled in the beneficiary's own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor**, and relief by way of specific performance

ACCEPTANCE:

PROMISOR: Means a person to whom a promise is made or given

PROMISEE: Means a person by whom a promise is made or given

PROMISE: A. which is or appears to be intended to be legally binding

B. Which creates or appears to be intended to create a duty enforceable by a beneficiary and includes a promise whether made by deed, writing, orally

S55 (7) COMMON LAW

S18 *Australian Consumer Law*

Misleading or deceptive conduct

A person must not, in trade or commerce, engage in a conduct that is misleading or likely to be of that nature

So-called Exceptions:

Agency

A legal relationship where one person (principal) gives another person (agent) the authority to create legal relations between the principal and a 3rd party *Trident General Insurance v McNiece Bros*

Exception clause: *Scruttons v Midland Silicones*
Clause to limit liability

“Himalayan Clause” - Lord Reid

3rd parties can be covered through agency if:

1. The K makes it clear there is intention for 3rd party to be protected
2. The K makes it clear the carrier is acting as an agent of the contractors
3. The contractors authorized carrier to do this
4. Beneficiary provided consideration for the promise

Lord Reid: *NZ Shipping v Satterthwaite*

HCA: *Port Jackson Stevedoring v Salmond and Spraggon*

Trust

A trust is a legal mechanism under which one person (trustee) holds property on behalf of another (beneficiary)

Unjust Enrichment

- Where a person receives a benefit at the expense of another, and it is unfair, unconscionable or inequitable for the 1st person to keep the benefits. The other person can take action on the grounds of unjust enrichment, to recover the benefits *Pavey & Matthews v Paul*
- Where the promisor has received consideration for the promise to perform an act for the benefit of a third party, but then refuses to perform the act (*Trident General Insurance v McNiece Bros Pty Ltd* per Gaudron J) (EG has to pay for fall at work)

APPLICATION IN HYPOTHETICALS

1. What is the prime issue
2. What is the general rule
3. What are the statutory exceptions
4. What are the (so called) common law exceptions

Week 9: Identifying Express Terms

Incorporating Written Terms

BY SIGNATURE – *L'Estrange v Graucob*

General Rule: If the contract is in writing, signed by both parties and the words on the document are incorporated as terms of the contract then the parties will be bound by all the terms contained in the agreement *L'Estrange v Graucob*

- Even if you do not have time to read the contract, once a person signs a document they are deemed to have read, understood and agreed to the terms

Exceptions:

- Document signed is not contractual in nature
Curtis v Chemical Cleaning and Dyeing
DJ Hill v Walter H Wright

- Contents are misrepresented
Curtis v Chemical Cleaning and Dyeing

Plea of non est factum

- People who are blind or illiterate
- People who are unaware of what they are signing
Petellin v Cullen

L'Estrange v Graucob ONLY APPLIES TO SIGNED CONTRACTS

BY NOTICE – *Balmain New Ferry Co v Robertson*

General Rule: Terms on a sign, docket, ticket etc. cannot be part of a contract unless the other party is given reasonable notice of the incorporated term *Balmain New Ferry Co v Robertson*

Reasonable notice must be given before or at the time of entering into the contract

- *Oceanic Sun Line Shipping v Fay* – Brochure not contractual in nature
- *Oiley v Marlborough Court* – Notice for no responsibility for lost items in hotel room, contract was formed in lobby though the sign in excluded from the contract
- Also, ticket machine case; only a contract if the term on back of ticket is stated before ticket dispensed

Knowledge or Reasonable Notice

- A party must have either knowledge or notice of terms if they are to be bound
 - o *Causer v Brown*
- If doc is one a reasonable person would expect to contain contractual terms, it is enough if the doc if just presented – this will be considered sufficient notice
 - o *Mendelssohn v Normand*
- If the doc is NOT one a reasonable person would expect to contain contractual terms, the other party MUST take responsible steps to bring the terms to the notice of the other party in order to be bound
 - o *Causer v Brown*
- What constitutes reasonable notice will depend on circumstances of each case BUT the notice must be likely to come to the attention of the other party
 - o ***Thornton v Shoe Lane Parking***
- Unusual terms require special notice EG harsh clause
 - o *Interfoto Picture Library v Stiletto Visual Programs*

Electronic documents and websites: If you tick an ‘agree’ box = signature

Incorporating Oral Terms

Oral statements can be:

Sales puff	<i>not promissory</i>
Mere representations	<i>not promissory</i>
Terms	<i>promissory</i>
Collateral Contracts	<i>promissory</i>

During negotiations, things said to influence the other to agree have generally no contractual significance. Sometimes statements can be part of the contract however.

Sales Puff:

Exaggerated statements not intended to be taken literally EG “best car ever made”

But ... *Australian Consumer Law (ACL)* – Cannot mislead a consumer

Mere Representations:

A statement made to induce a party to enter a contract, but the truth of the statement is not guaranteed (warranted) *Oscar Chess v Williams*

But ... ACL

Representation or Term?

Intention = overall guide as to whether a statement is a term of the contract, determined by the courts

Helibut, Symons & Co

Oscar Chess v Williams

Entire Contract Clause: States the written document contains the entire agreement of the parties

YES: Usually conclusive evidence of intention of entire contract

NO: Courts determine objectively

How to determine if a statement is a contractual promise

Courts will consider:

1. **Words used** *JJ Savage and Son v Blankely*

- a. “estimated speed is...” = representation

2. **Relative expertise of the parties**

- Where one party has more knowledge or skill on the matter a statement made in relation to their knowledge may become a term of the contract *Dick Bentley v Harold Smith Motors*

BUT

- If the degrees of knowledge are equal, or the person to who the statement is made has greater knowledge, the statement will probably be a representation *Oscar Chess v Williams*

Dick Bentley v Harold Smith Motors: Statement was a term - Car salesman had special knowledge

Oscar Chess v Williams: Statement was a representation – Owner of car had no special knowledge but car dealer should have

3. **Importance of statement**

- The more important the statement, the more likely the parties intended it to be a term

Statements important to the promisee:

- o EG *Van den Esschert v Chappell* - Seller said there were no termites ... there was
- o EG *Harling v Eddy* – Cow sold sick

4. **Timing**

- The shorter the time between statement and contract, more likely that the statement induced - parties to enter the contract and therefore is a term of the contract *Harling v Eddy*
- Lapse of time = representation NOT a term *Routledge v McKay/Van den Esschert v Chappell*

5. **Whether written contract later replaces the oral contract**

- If an oral statement is not included in a contract reduced to writing, it is probably not a term
 - o *Routledge v McKay*

Collateral Contract

- Sometimes statements clearly intended to have contractual significance but for some reason have been precluded as a term of the contract
 - o The statements may, however, form a collateral contract
 - May seem like no consideration, BUT a collateral contract could be the consideration for one contract entering into another contract
 - EG Amazon, corkscrew as free gift
 - o *De Lassale v Guildford*
 - *In lease neg. said would not sign until drains deemed working well*
 - *SO – agreement to lease was the acknowledgement drains were working*

To show a collateral contract exists, have to prove the statement was held as a promise, guarantee or assurance, the consideration for which is the entry into the main contract *Saveage v Blakney*

Three things must be satisfied before a statement will give rise to a collateral contract:

1. Statement made to induce entry into contract
2. Statement relied upon
3. Statement relied upon was promissory in nature
4. Collateral contract cannot be inconsistent with the main contract *Hoyts v Spencer*
 - a. **IMPORTANT:** Statement is made before entering into main contract as the main contract is the consideration for the collateral one

Parol Evidence Rule

Only applies where the contract is completely in writing, for certainty

“By the general rules of common law if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract”

- Excludes extrinsic evidence in order to ass or subtract from or in any way qualify the written contract
EG *Identifying the terms*
- Excludes extrinsic evidence to assist in the interpretation of the written contract EG *Interpreting the terms*

The rule won't apply (exceptions):

1. To a collateral contract
2. To a contract not yet in force
3. To evidence to imply a term
4. Partly written/oral contracts
5. Invalidity or rectification

Week 10: Implied Terms

Terms implied in Fact

- Terms implied to reflect presumed intentions of the parties
- Focus on the contract before the court
- Include terms implied:

FOR BUSINESS EFFICACY TO THE CONTRACTUAL ARRANGEMENT

- Term needs to be implied so that the contract can be carried out effectively *The Moorcock* – Boat, jetty, damaged, implied jetty owner would not allow low water levels for damages
 - *The Moorcock* applied in *Eyre v Measday* –Gynecologist never stated there was a 1% chance she could fall pregnant

Formal written contracts

BP Refinery (Westernport) v Hastings Shire Council

5 conditions must be satisfied before a term can be implied for business efficacy

1. Must be reasonable and equitable (fair on both with no imposed detriment on either)
2. Must be necessary to give business efficacy of the contract so that no contract would be effective without it
3. Must be so obvious it “goes without saying”
4. Must be capable of clear expression
5. Must not contradict any express term of the contract

THE BP CRITERIA APPLY TO FORMAL WRITTEN CONTRACTS

+ *The more formal a contract the less likely there is going to be an implied term*

Informal verbal contracts

- Necessary for reasonable or effective operation of the K in the circumstances
 - o *Byrne v Australian Airlines*

Parol evidence rule? When in writing it is assumed everything should be there *Goss v Nugent*

From course of dealings

General Rule: Where the parties have concluded several contracts with similar terms agreed in the same matter, this may have the effect of incorporating the terms into a subsequent contract between the parties *Henry Kendall and Sons v William Lillico and Sons* – After first dealing, had well notice

Examples:

A consistent and sufficiently long course of dealings

The course of dealings is regular and uniform

Evidence to assent to the terms (usually not objecting)

FROM CUSTOM OR USAGE

The custom must be so well known or followed so that parties to a contract can reasonably be presumed to have imported that term into the contract *Con-Stan Industries*

Examples:

Sagar v Ridehalge & Con-Stan v North & Winterthur Insurance

Principles for implying a term based on custom:

1. Question of fact
2. Evidence that the custom is so well known
3. Not contrary to express terms
4. Can be bound even if no knowledge of custom

TO COMPLETE K

Terms implied in Law

- Terms implied regardless of intention – public policy reasons
- Focus on a class of contracts
- Include terms implied:

AS A MATTER OF LAW IN A PARTICULAR CLASS OF CONTRACTS

Contracts for:

Goods and services	Fit for purpose
Professional services	Take reasonable care
Employment	Provide safe place of work
Employee	Work with reasonable care
Building	House must be fit for habitation
Franchise agreements	Good faith, fair dealing

Bailment Contracts: The possession of goods of someone else with their permission

- Car service
- Banker would not disclose the state of your accounts

What are common law examples?

Liverpool City Council v Irwin - Apartment rented, in bad state, implied common area would be maintained, implied based on general consideration

What will courts consider when implying a new term?

1. Can the term be applied to all contracts of a particular class?
2. Is it suitable for implication?
3. Is it a necessity?

Breen v Williams

Term was not necessary

Hughes Aircraft Systems Int v Airservices Australia

Term was necessary & example of overlap between the categories of terms implied in fact and law

GENERAL DUTY TO COOPERATE

General rule to every contract that each party do all things necessary to enable the other party to have the benefit of the contract *Butt v McDonald*

Implied duty only requires the parties to act reasonably – don't need to completely disregard their own interests *Secured Income Real Estate v St Martin's Investments*

DUTY OF GOOD FAITH

Good faith to ensure an acceptable level of co-operation and fairness in the performance of a contract

Hughes Aircraft (Finn J) & Renard (Priestly J)

EG: If a contract for sale of land is subject to subdivision approval and the land becomes more valuable so owner doesn't seek to sub-divide, there is an implied duty of good faith to follow through

Reasonableness:

Burger King v Hungry Jacks

- HJ was to open a certain amount of stores
- BK had to approve
- HJ didn't open up enough stores
- HJ claims fault due to BK not approving stores presented

Legitimate Interests:

South Sydney District RL v News Ltd

- Only a breach if intentional bad faith is evident/revealed

BY STATUTE

Sale of Goods Act (Qld)

Australian Consumer Law

Week 11: Interpretation of terms and construction of contracts

Construction is the process by which a court determines the meaning and legal significance of the terms of the contract

Constructing a K:

1. Is there a K (and when did it come into being?)
2. What are the terms?
3. What do the terms mean/how do they operate here?

Objective approach

Basic Rule: A contract is to be given the meaning intended by the parties

I.E intention is determined objectively

Brambles Holdings v Bathurst City Council

What is the meaning of what parties said? NOT What did the parties mean to say!

- Words are to be given their natural and ordinary meaning and read in light of the context in which the clause appears in the contract as a whole

Darlington Futures v Delco Australia

IF WORDS ARE AMBIGUOUS:

Meaning determined objectively

Life Insurance v Phillips

Reasonable interpretation is preferred

ABC v Australasian Performing Right Assoc.

Contra preferentum interpretation

Darlington Futures

Consider the factual matrix

Codelfa

Contra Preferentem: Where the meaning of an exclusion clause is ambiguous, the ambiguity is interpreted AGAINST (contra) the party relying on the clause (proferens). Proferens is the person for whose benefit the clause is inserted *Darlington Futures v Delco Australia*

Factual Matrix: Contract is considered in context and as a whole

- Background
- Commercial purpose of the transaction
- Context
- Market in which parties are operating

Surrounding circumstances CANNOT be considered if there is no ambiguity

Parol evidence rule?

Admissible evidence

AMBIGUITY (patent and latent)

Patent: Can be interpreted multiple ways

Latent: Clear word becomes ambiguous

Can use extrinsic evidence to assist in the ID of the subject matter

White v Aust. & NZ Theatres Ltd

ID of the parties

Edwards v Edwards

ID of the consideration

Yaroomba Beach Development

BUT

The P.E.R will exclude:

- Evidence of actual subjective intention
- Prior negotiations that reflect parties' actual intention
- Subsequent conduct

Types of Terms:

It is necessary to determine what type a term is to understand the effect that breach of term will have

PROMISSORY TERMS

Three classes:

1. **Fundamentally important** to the contract; breach entitles innocent party to terminate
"conditions"

"Conditions" Test:

Is the statement so important that the person would not have agreed otherwise?

Associated Newspapers v Bancks – (Page 6 not 1)

2. **Not all that important**; breach entitles one to compensation, not termination
"warranties"

"Warranties" Test:

A term that is subsidiary to the main purpose of the K

Ellul v Oakes

3. **Importance depends** on the consequences of the breach
"innominate" or "intermediate" - remedy depends on severity of breach

Where an innocent party is deprived of a substantive part or all of the benefit of the contract, the breach is serious and the innocent party can end K or sue or both.

BUT where the breach is not serious, innocent party will only be able to claim damages

SO: 3 Step Approach

1. Is the term essential or inessential?

- a. TEST: How important to the promise?
 - i. Would they have entered into K unless term going to be adhered to?
2. If NOT essential, is it a warranty or intermediate term?
 - a. Is the term capable of a variety of breaches?
3. If so – Intermediate term... seriousness of breach?

CONTINGENCY TERMS

Condition precedent: An event that must occur before K comes into existence. No event = no contract

EG: Lottery ticket pool with friends

EG: *Pym v Campbell*

Condition subsequent: An event that may give rise to a right of termination of further performance of contract
EG 'subject to...' – sale of land etc.

Exclusion/exception clauses

Approach to interpreting exclusion clauses: *Darlington Futures v Delco Australia*

Purposes of exclusion/limitation clauses:

1. To exclude one party's liability
2. To limit extent of liability to a maximum amount
3. To make liability subject to certain preconditions
4. To limit one party's rights

Exclusion Clause: To avoid responsibility for loss of, or damage to, goods or services

EG *Davis v Pearce Parking Station*

Limitation Clause: To limit the extent of liability to a max amount

EG *Alderslade v Hendon Laundry* – if damage that shall be paid is x20 price of the cleaning

Interpreting exclusion clauses (generally):

1. Had the D breached a term in the contract? Terms
2. Is the exclusion clause part of the contract? Incorporation of terms
3. Does it cover the issue in dispute? Interpret the clause

General Approach: Exclusion clause to be construed in its natural/ordinary meaning, in light of the contract as a whole, if ambiguous (where appropriate) ... construing clause *contra proferentem*

Case authority: *Darlington Futures v Delco Australia*

- The effect is to apply the meaning least favorable to the party relying on it (proferens)
 - o EG *Duncombe v Porter*

Four corners rule:

- Exclusion clause will only operate to exclude liability within the 'four corners' of the contract
- Will not operate where proferens has acted in a way "quite alien to the contract"

Thomas National Transport v May and Baker

- Parties acting outside the 'four corners' WILL NOT be protected by the exclusion clause

Sydney City Council v West

- Denies exemption to the proferens because they acted outside the contract

Excluding Negligence: *Darlington v Delco*

1. Person has duty of care
2. Breach of that duty
3. Breach causes damage and the damage was reasonably foreseeable

Causation (causing) element and the actual harm

Concurrent liability: *Lister v Romford Ice*

- It is 'old/over used' law that a single act of negligence may give rise to a claim either in tort or for breach of an express or implied term in contract

Interpreting Negligence Clauses:

Follow the *Darlington* Approach

1. Natural/ordinary meaning considering context and purposes at play
2. If ambiguous, interpret against inserting party

***Canada SS Lines v R* [1952] All ER 305**

If a clause does not **specifically** refer to 'negligence' and instead 'howsoever', court must consider whether the words used are wide enough, in ordinary meaning, to cover negligence.

- **If doubt** arises at the point, must be resolved **against** proferens
 - o 'Whatever the cause' & 'howsoever caused'

Clear words are required to exclude liability for negligence:

Davis v Pearce Parking Stations NOT sufficient

Glenmont Investments OL v O'Loughlin WAS sufficient "excluding all liability"

IF an exemption clause is inconsistent with an oral undertaking given before or at time K was made, exemption clause will be **OVERRIDEN** by oral promise and therefore will not apply

- BUT in deciding whether exemption clause or oral promise should prevail it is a question of construction. Court to look at what parties intended

EG: *Evans v Merzario & Mendelssohn v Normand* – Verbal promises made exemption clauses dead

STATUTE

Australian Consumer Law s 64 – **Most important section**

(1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

- (a) the application of all/any of the provisions of this Division; or (b) the exercise of a right conferred by such a provision; or
- (c) any liability of a person for a failure to comply with a

guarantee that applies under this Division to a supply of goods or services.

BUT – s 64A