

LAWS1075 FINAL EXAM NOTES

PROBLEM QUESTION CHECKLIST

DETERMINING OBLIGATIONS

1. Identify contingent conditions subsequent and precedent;
2. Identify collateral contracts;
3. Identify express and implied terms of all kinds;
4. Identify successfully incorporated terms;
5. Categorise all terms into essential terms, intermediate terms, and non-essential terms;
6. Interpret the contract, resolve ambiguities, and identify breaches of contract.

IDENTIFYING VITIATING CIRCUMSTANCES

Vitiating circumstances are circumstances that alter the legal effect of the contract. They include:

1. Termination;
2. Frustration;
3. Mistakes;
4. Misrepresentation;
5. Unequitable conduct.

MISCELLANEOUS

1. Identify any breaches of the Australian Consumer Law;
2. Consider penalty clauses/liquidated damages.

REMEDIES

ACTIONS FOR DEBT

DAMAGES

1. Begin with the compensatory principle from *Robinson v Harman*. All categories of damages are variations of this principle.
2. Classify damages into the *Commonwealth v Amann Aviation* categories (expectation, reliance, loss of chance), non-pecuniary damages, and rectification damages.
3. Apply the law of each class of damages to the facts.
4. Identify limitations upon damages (remoteness, causation, mitigation).

EQUITABLE REMEDIES

1. Rectification of mistakes (see mistakes);
2. Rescission (**vitiating**) for mistakes, misrepresentation, and unconscionable conduct.
3. Relief against forfeiture for unconscionable conduct in property rights.

The consequences of breach of an intermediate term must be concrete, not merely hypothetical (*Koompatoo v Sanpine*).

IMPLIED TERMS

Non-essential terms (or **warranties**) are terms that are not essential to the contract and hence severable. Breach of a warranty does not give rise to a right to terminate the contract. Non-essential terms are terms of a nature such that there is “no possible way that a breach of it would deprive the aggrieved party from the main benefit of the contract” (*Hong Kong Shipping Co v Kawasaki Kisen*).

MISTAKE

The doctrine of mistake applies when one or both parties, without inducement by the other party, has entered the contract under the influence of a mistake. There are three types of mistake: **common mistake**, **mutual mistake**, and **unilateral mistake**.

As well as specific remedies for each type of mistake, construction of the contract may lead to certain outcomes:

1. If the contract is found to be subject to an implied contingent condition that the facts are as understood by the mistaken party or parties, performance may be excused (*Bell v Lever Brothers*);
2. If the promises of parties are unconditional, the contract may stand despite the mistake (*McRae v Commonwealth Disposals Commission*).
3. Where a mistake results in absurdity or inconsistency, the mistake may be resolved by construction of the contract to avoid absurdity (*Fitzgerald v Masters*: “usual conditions of sale...shall so far as they are inconsistent herewith be deemed to be embodied herein”).

COMMON MISTAKE

Common mistake arises when both parties make the **same** false assumption about the subject matter or terms of the contract. Common mistakes may be as to the **subject matter** of the contract, or as to the **terms** of the contract.

Remedies for common mistake include:

1. Voiding of the contract – can only apply if the common mistake is “as to the existence of some quality which makes the thing without the quality essentially different from the thing that it was believed to be” (*Bell v Lever Brothers*).
2. Rescission in equity (setting aside contract and restoring parties to original position) – applies if the enforcement of legal rights amounts to unconscionable conduct in the circumstances. The common mistake must be fundamental, and the party seeking to set the contract aside not be at fault (*Solle v Butcher*).
3. Rectification in equity (rewriting the contract to reflect the true intentions of the parties – applies because it is unconscionable for a party to seek to apply the contract inconsistently with what they **know** to be the common intention of the parties at the time of formation (*Franklins v Metcash*).
 - a. The party seeking rectification must provide “clear and convincing proof” of the common intention, which must continue up until the time of execution (*Pukallus v Cameron*).
 - b. Rectification is not available where both parties are aware of the failure to record common intention (*Maralinga v Major Enterprises*).
 - c. Rectification is an equitable exception to the common law parol evidence rule and entire agreement clauses.

(b) The contract as a whole.

ACL ss 24(3): A term is **transparent** if the term is:

- (a) Expressed in reasonably plain language; **and**
- (b) Legible; **and**
- (c) Presented clearly; **and**
- (d) Readily available to any affected party.

ACL s 27: In considering if a contract is a **standard form contract**:

- (1) It is presumed to be so unless another party to the proceedings proves otherwise.
- (2) A court may consider any matters it thinks relevant, but **must** consider the following:

- (a) Whether one party has all or most of the bargaining power in the transaction;
- (b) Whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- (c) Whether another party was effectively required to either accept or reject the terms of the contract in the form in which they were presented;
- (d) Whether another party was given an effective opportunity to negotiate the terms of the contract;
- (e) Whether the terms of the contract take into account the specific characteristics of another party, or the particular transaction.

ACL s 26(2): The **upfront price** payable under a contract is the consideration that is:

- (a) Provided, or to be provided, for the supply, sale or grant under the contract; **and**
- (b) Disclosed at, or before, the time that the contract is entered into;

But does not include any other consideration contingent on the occurrence or non-occurrence of a particular event.

EXCEPTIONS

ACL s 26(1): Section 23 **does not apply** to a term to the extent that the term:

- (a) Defines the main subject matter of the contract; **or**
- (b) Sets the **upfront price** payable under the contract; **or**
- (c) Is required or expressly permitted by another law.

CONSUMER GUARANTEES

DAMAGES

DAMAGES INTRODUCTION

Robinson v Harman restorative principle (“place back in the position they would have been in if the contract has been performed as promised”).

Damages may be sought for **any breach of contract**, whether or not it gives rise to termination.

Generally, the plaintiff must prove loss or only nominal damages are awarded (*Commonwealth v Amann Aviation*). In most cases, damages are assessed at date of breach (*Johnson v Perez*).

Categories of damages (*Commonwealth v Amann Aviation*):

- Expectation damages;
- Reliance damages;
- Loss of chance damages.

Other types of damages:

- Rectification damages (*Bellgrove v Eldridge*);
- Damages for non-pecuniary loss (*Baltic Shipping Co v Dillon*);
- Loss of bargain or loss of profit damages (*Progressive Mailing House v Tabali*);

EXPECTATION DAMAGES

Expectation damages are damages for the loss of value of the promised performance. These include **direct loss** (for the loss of contractual performance) and **consequential loss** (for other losses resulting from the direct loss). Consequential loss may include loss of interest or investment profits, or losses caused by debts, on withheld money (*Hungerfords v Walker*).

When the contract is **not** terminated, damages will represent the difference in value between what the defendant provided and what they should have provided (*Clark v Macourt*).

When the court **is** terminated, damages will represent the value of the **benefit** promised under the contract.

A common type of expectation damages is **loss of bargain** damages, awarded **upon contract termination** based on the price that the plaintiff would have received had the contract been performed **minus** the price that they would receive by entering into a substitute transaction. Loss of bargain damages are available when the plaintiff terminates the contract following a breach giving rise to a common law right to terminate (as opposed to a right granted by a contractual term – *Shevill v Builders Licensing Board*).

RELIANCE DAMAGES

RELIEF AGAINST FORFEITURE

In some property cases, termination of contract may lead to forfeiture of a proprietary interest or right. The court may grant **relief against forfeiture** of the interest in the property and decree **specific performance** of the contract.

Relief against forfeiture requires (*Tanwar Enterprises v Cauchi*):

1. The plaintiff has a proprietary right under the contract; **and**
2. The defendant **unconscientiously** exercised their legal rights against the plaintiff; **and**
3. The exercise of legal rights led to forfeiture of the proprietary right.

Conduct that will generally be considered unconscientious includes (but is not limited to – *Shiloh Spinners v Harding*):

- a. If the object of the transaction and the right to forfeit is to secure the payment of money, relief against forfeiture may be granted if the money is fully paid;
- b. If fraud, accident, mistake, or surprise (see *Legione v Hateley* test) were involved.

The following factors are relevant in considering whether conduct is unconscientious (*Legione v Hateley*):

1. Did the conduct of the aggrieved party contribute to the other party's breach?
2. Was the other party's breach:
 - a. Trivial or slight?
 - b. Inadvertent?
3. What damage or other consequences did the aggrieved party suffer by reason of the other party's breach?
4. What is the magnitude of the aggrieved party's loss, and the other party's gain, if the forfeiture is to stand?
5. Is specific performance, with or without compensation, an adequate safeguard for the other party?