

## CAPACITY

### Minors

- In Australia, a minor is defined by legislation as **a person under the age of 18 years**.
- In most cases, a minor **lacks** the legal capacity to enter into a contract. Thus, such contracts are voidable except for cases of:
  - **Necessaries**
  - **Beneficial contract of service**

### *Necessaries*

- Includes **those things essential to the maintenance of the minor's life** such as: food, clothing, shelter - *Bojczuk v Gregorcowicz* [1961] SASR 128, 131.
- 'Things necessary are those without which an individual cannot reasonably exist.' - *Chapple v Cooper* (1844) 153 ER 105, 107.
- The difficulty with this concept of 'necessaries' is that society changes and so does what is considered necessary. Hence, each case must depend on its own facts.
- For necessities to be established, it must be shown that the services were required at the time they were delivered – *Scarborough v Sturzaker* (1905) 1 Tas LR 117.

### *Bojczuk v Gregorcowicz* [1961] SASR 128.

- Defendant was under the age of majority and living in Poland. The plaintiff, a relative, lent the defendant money to come to Australia but she never repaid the loan. The plaintiff sued for recovery of the money and the defendant pleaded infancy.
- Court held that the contract of loan was not a contract for necessities. The defendant had employment and accommodation in Poland and there was no compelling requirement for her to come to Australia.

### *Beneficial contract of service*

- Employment agreements – **where the minor holds a greater advantage or benefit** of the employment contract, it will be valid (to ensure the contract does not contain unusual or prejudicial clauses) – *Roberts v Gray* [1913] 1 KB 520. If the employment contract does not benefit the minor overall, then it is not binding and the contract will be void.

### *Hamilton v Lethbridge* (1912) 14 CLR 236.

- High Court held that a contract of **employment** was binding upon a minor notwithstanding the presence of a restraint of trade clause within the agreement.
- (i.e. A contract is **valid** where minor is trained by employer and minor is not permitted to trade within some condition – eg within 50 mile radius).

### *De Francesco v Barnum* (1890) 45 ChD 430.

- A minor entered into a contract with the plaintiff as an apprentice to be taught stage dancing. The minor agreed to serve the plaintiff for 7 years, but there was no obligation on the plaintiff to provide employment. The plaintiff had the right to terminate the contract, but there was no similar right in the minor. The minor left the plaintiff and took up with the defendant. The plaintiff sued the defendant in tort of inducing a breach of contract.
- Court sided with the defendant. The contract between the plaintiff and the minor was one-sided and unreasonable that it could not be considered a valid contract.

### ***Minors (Property & Contracts) Act 1970 (NSW)***

- Abolished the application of common law principles relating to minor's contracts in NSW.
- Provides that **a minor is presumptively bound to a civil act which is made in accordance with the provisions of the Act.**

#### **s 18**

- 'This Part does **not** make presumptively binding on a minor a civil act in which the minor participates, or appears to participate, while **lacking**, by reason of **youth**, the **understanding necessary** for his or her participation in the civil act.'
- 2 circumstances under which a contract is not binding: if it is not for the minor's benefit, or the minor lacks the necessary understanding (s 19).

Under this statute, a minor cannot be held accountable for any contracts entered into except for civil acts (s 19).

Civil acts that are presumptively binding on a minor include:

- A contract for the acquisition or disposal of a property where consideration is respectively, paid or payable, or received in part by the minor and is not respectively manifestly excessive or inadequate (s 20).
- Where the minor makes a reasonable gift (s 21).
- A contract of investment in government securities (s 23).
- A contract with a consideration not exceeding \$100,000 that has prior approval by the Local Court and is for the minor's benefit (s 27).

### **Persons suffering a mental disability**

- A contract with a person who has been legally declared insane is void. (However, contracts for the purchase of necessities may be binding under sale of goods legislation.)
- The difficulty arises in situations where a person has not been declared insane, but who lacks the necessary mental capacity to give genuine consent to a commercial transaction.
- This lack of capacity may be permanent or temporary and can arise from mental illness, sickness, age, or because of the consumption of alcohol or drugs.
- In these situations, a court will not enforce a contract against a party who 'lacks such soundness of mind as to be capable of understanding the general nature of what [he] is doing' - *Gibbons v Wright* (1954) 91 CLR 423, 437.

#### *Hart v O'Connor* [1985] AC 1000.

- An aged farmer agreed to sell his farm to the defendant on terms that were less than fair. The farmer died and his beneficiaries sought to rescind the contract. The facts showed that although the farmer probably lacked the necessary mental capacity, the defendant did not know this.
- The Privy Council held that a **person seeking to void a contract on the ground of mental incapacity** had to **prove that there was a mental incapacity** and that **the other party knew or should have known of the incapacity.**

## REQUIREMENT OF WRITING

### The requirement of writing

- There is no general requirement for contracts to be written.
- Some contracts need to be in writing, (sometimes due to statute).
  - Formal contracts.
  - Deeds.
  - Sometimes, simple contracts - where statute requires it (e.g. contracts for the sale of land, insurance contracts, etc.).
- Written contracts promote certainty.
- Contracts that are required to be in writing:
  - May be valid if they are oral, but are unenforceable (until it is put into writing).
  - Must be varied in writing, in order to be enforceable.
  - May be discharged verbally.

**Contracts for Sale of Land** - an example of a statutory requirement of writing.

***Conveyancing Act 1919 (NSW) s 54A.***

(1) **No action or proceedings** may be brought upon any contract for the **sale or other disposition** of land or any interest in land, unless the agreement upon which such action or proceedings, is brought, or some **memorandum or note** thereof, is in writing, and **signed by the party to be charged** or by some other person thereunto **lawfully authorised** by the party to be charged.

- Sale or disposition of land – meaning the exchange of property for a consideration of money. – *Sun World Inc v Registrar, Plant Variety Rights* (1977) 148 ALR 446, 458.
- Interest in land – meaning leases, mortgages, easements, and other rights of way. It does not mean a licence to occupy land. – *Radaich v Smith* (1959) 101 CLR 209 217.

This legislation requires that for a contract to be enforceable, it is to be recorded in a written contract or '**note or memorandum**' of the contract. In order for a contract to be deemed enforceable, certain essential terms must be specified in the written contract – as per *Hall v Busst* (1960) 104 CLR 206, 222:

1. A description of the **parties** to the contract.
2. The contract must set out the **price** and **consideration** for the law or interest in land – this cannot be implied.
3. The contract must describe the land or interest in land that is the subject of the contract.

*Pirie v Saunders* (1961) 104 CLR 149, 155: holds an addition term that should be added where:

4. There must be acknowledgement of the agreement in writing (express or implied) – to show the parties intention to contract.

The contract must be **signed** by the party 'to be charged' or by someone on his behalf. – *McLaughlin v Duffil* [2010] Ch 1, 7–8. '**A signature is a distinct and personal act that identifies the party to be charged and evidences his or her intention to be bound by the contents of the document.**' – *Welsh v Gathell* [2009] 1 NZLR 241, 253–4. The signature does not need to be hand written; it can be a name, initial, rubber stamp, electronic signature (clicking on a button that shows the intention of that person to adopt the content as set in the contract). – *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, 362; *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450, 464.

## Enforcement in equity of contracts

Where the contract required to be in writing as per statute law, is not, it does not necessarily mean that the contract will be unenforceable. Under **equitable principles**, the contract may still be enforced under the remedy of **specific performance**. This can occur where:

1. The courts have recognised that the non-compliance on statutory requirements is due to fraud on the part of the defendant. Principle of equity used to prevent fraud. – *Wakeham v MacKenzie* [1968] 2 All ER 783.
2. The elements of the **doctrine of part performance** are established (where the contract has been partially performed).

### Doctrine of part performance

The notion of part performance holds that ‘a contract, initially unenforceable because of the statute, could become enforceable by virtue of acts which the plaintiff did afterwards’. – *Actionstrength Limited v International Glass Engineering IN. GL. EN SpA* [2003] 2 All ER 615, 622-3. This notion was justified under 2 reasons:

- *Estoppel* – where a party allows the other party to incur expense or prejudice on the basis that the agreement will be valid, the party cannot change his mind or render the agreement unenforceable. – *Steadman v Steadman* [1976] AC 536, 540.
- Acts done by the plaintiff in which could be deemed acceptable as a substitute for the note or memorandum required by statute.

Thus, equitable relief will be granted on this doctrine where ‘acts or part performance are circumstances that make it unconscionable for a defendant to rely upon the statutory defence of a lack of writing’. – *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382. ‘In order that acts may be relied on as part performance of an unwritten contract, they must be done under the terms and by the force of that contract and they must be unequivocally and in their nature referable to some contract of the general nature of that alleged.’ – *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 431.

For this doctrine to apply, there are 3 matters that must be established:

1. The acts must be completed by the party (or an authorised agent) to the contract who wishes to rely upon this doctrine. – *McBride v Sandland* (1918) 25 CLR 69, 79.
2. The acts completed must be authorised by the oral contract (although not necessarily required) – *Regent v Millett* (1976) 133 CLR 679, 683; *Khoury v Khouri* (2006) 66 NSWLR 241, 268. The act done in reliance cannot be considered as an act in performance. – *TA Cellaca Pty Ltd v PDL Industries Ltd* [1992] 3 NZLR 88.
3. The acts done must be unequivocally referable to a contract of the general nature of the alleged oral agreement. The acts done must be consistent with the type of contract being alleged; i.e. painting a wall for the sale of land – *McBride v Sandland* (1918) 25 CLR 69, 78.

Payments of money do **not** generally amount to an act of part performance. – *Khoury v Khouri* (2006) 66 NSWLR 241, 268. (Page 153 of textbook).

- ‘Acts on the land can much more readily be seen as unequivocally referable to the contract than payments of money.’
- Payments of money do not amount to an act of part performance, unless authorised otherwise by the other party, or the court – because there is not evident link between money and land.

Note: The sending of a cheque in combination with another action is sufficient to satisfy the doctrine of part performance. – *Francis v Francis* [1952] VLR 321. (See page 153 of textbook).

## EXPRESS TERMS

### Representations

- 'A statement or assertion, made by one party to the other, before or the time of the contract, of some matter or circumstance relating to it' – *Behn v Burness* (1863) 122 ER 281, 282.
- Intended to **induce**, but not be made binding.
- Merely representational with **no promissory intent**.
- Misrepresentation does **not** amount to breach.
- Legal action is **limited** to action in negligence or fraud, or misleading or deceptive conduct.
- **Rescission** may be available for misrepresentation.

### Terms

- **Binding** parts of a contract, indicating parties' obligations.
- Terms specify what the parties are to do in performance of the contract.
- A breach of a term may give right to **termination**, and **damages** for breach.

### *Ellul & Ellul v Oakes* (1972) 3 SASR 377.

- Courts consider the importance and timing of the statement, any special skill or knowledge on the part of its maker, and whether it was included in any subsequent written document.
- This case set out a number of **factors that may influence whether a statement is a term or a representation**:
  - a. **Importance** of the statement - the more important it is, the more likely it is a term.
  - b. The **time that has lapsed** between the making of the statement and the making of the agreement - the longer the time, the more likely the statement is a representation only. (See: *Brewer v Mann* [2010] EWHC 2444 {QB} at [129]).
  - c. Whether the party making the statement was, compared to the other party, in a better **position** to ascertain the truth of the statement - if so, the more likely it is that the statement is a term.
  - d. Whether the statement was **subsequently omitted** when the agreement was embodied in a more formal written document - if so, the more likely it is that the statement is a representation only. (See: *Brewer v Mann* [2010] EWHC 2444 (QB) at [129]).

### *Oscar Chess Ltd v Williams* [1957] 1 All ER 325.

- Highlights the **difficulty in finding intention**.
- Williams traded in his motor vehicle with Oscar Chess for a new car. Williams told Oscar Chess that the car was a 1948 model. On that basis, Oscar Chess gave it a trade-in value of £290. However, it was a 1939 model with a lower value. Oscar Chess sued Williams for damages for breach of contract, claiming that the statement that the vehicle was a 1948 model was a term of the contract.
- By majority, the English Court of Appeal held that the statement was not a term.
- Lord Denning - An objective analysis of facts indicated that Williams could not have intended the statement be a term of the contract (he was 'in fact innocent of fault in making [the statement]'). The court held it was a mere misrepresentation.
- Lord Denning - 'If a representation is made in the course of dealing for a contract for the