

# CONTRACTS LAW EXAM NOTES

## 2018

Introduction.....	2
Remedies.....	4
Intention .....	12
Uncertainty.....	15
Agreement.....	17
Consideration .....	23
Privity.....	26
Express, Implied and Exclusion Terms .....	31
Interpretation.....	43
Performance .....	46
Dependency of obligations .....	50
Termination.....	52
Vitiating factors .....	62

## Contributory negligence

Damages may be reduced under *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)* to extent that plaintiff has contributed to own loss

- Only where, duty which has been breached was a contractual duty to take reasonable care

Example: contract to give legal advice, contractual duty to take reasonable advice. Sue lawyer. If it can be shown you were careless, then court can reduce damages

## Mitigation of loss

No enforceable duty to mitigate loss

### LOSS WAS AVOIDABLE

No recovery for loss that defendant proves could reasonably have been avoided by plaintiff taking appropriate steps *British Westinghouse v Underground Electric Railways*

- Example: same as above, but D proves you could have found another tenant but failed to do so, then damages will be reduced by what could have been mitigated by

### LOSS WAS AVOIDED

No recovery, or reduced damages, for loss actually avoided by plaintiff

- Agree to buy car from A, A refuses to deliver, B selling car for same price, suffered no loss. Nominal damages – unless can show costs of finding alternative
- Example: agree to rent land to someone, they break lease and just lease. Find new tenant, right away, there is no loss. If they are paying a lower amount, damages will be the difference in rent for the remainder of the contract + advertising.

### MITIGATION INCREASES LOSS

Can recover for loss incurred in taking reasonable steps to mitigate the loss even if it is greater than had nothing been done.

- Where a plaintiff does take reasonable steps to mitigate his or her damage but, in so doing, actually increases the losses suffered, the plaintiff can recover damages to compensate for those additional losses *Simionis Vischer & Co v Holt & Thompson [1979]*

Example: club sacks coach, who had a year left on contract. Coaches rarely can't easily find another similar job.

- Duty to reasonably find another job

## Punitive or gains-based damages (exemplary)

Cannot gain exemplary or punitive damages for breach of contract

- If the breach is particularly bad

Damages are not measure by any gains made by defendant

- *Hospitality Group v ARU*: tickets resold. Cannot claim damages for the profit they made.

## Agreed damages and the rule against penalties

### NOT IN EXAM

HCA has made this very difficult to understand – courts will often refer to the HC's decision, but then ignore it – cannot do this if you are advising someone

Often, if one party fails to perform, an agreed value will be paid

- Valid if it is an agreed and is genuine
- Not valid if it is designed to punish or scare the defendant into fulfilling the contract

## Getting around the doctrine – non-application of privity

Two scenarios:

1. One party involved acted as an agent for the non-involved party
2. One involved party transfers K benefits to the non-involved party (via assignment or novation)

### Agency arrangements – see seminar

Privity does not apply if person promised the benefit under a K can show if one party involved in the K was their agent.

- Agency relationship is developed expressly or by implication
- It is necessary to show that the principal (person they're acting for) expressly or impliedly consented with the agent acting on their behalf.
- Actions and past relationship scan be used to determine if there is an agency relationship (*Pola v Commonwealth Bank of Australia unreported*; *Perpetual Trustees Australia Limited v Schmidt* [2010] VSC 67)
- It's also necessary to establish that the agent was, at the time, acting for the principal, and not on their own personal behalf unless later ratified (*Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers (Underwriters) Pty Ltd* [2007] FCAFC 194)

If B contracts with A, with A acting as an agent for C, then the contract is really between B and C:

- Making purchase at the shop – making a contract between the shop and you, not the checkout person
- A (the agent) must have authority to contract on behalf of C (the principal)
- authority may be actual or ostensible (implied – appearing to have the authority)
  - Being sold something by a very junior person who was not permitted to sell something. Is the contract of sale void? no, as far as I knew, I assumed he had authority to sell it
  - Look at if they knew about the promise – if they didn't, then how can they have given authorisation to someone
- compare facts in *Harris v Burrell & Family*
  - B loaned H money. Contract drawn up was to be signed by a director of H, signed by Harris himself. clear on these facts that he is not privy to contract – he is an agent
  - BUT: part of agreement was promise that if company didn't repay the loan, then Mr H accepted personal liability.
  - SASC held: when looking at terms, even though signature said signature of director, held that H was signing in two capacities. He was signing as director, acting as agent, committing his company, but also signing under personal capacity holding himself to the contract.

### Transfer of contractual rights

Someone who was not original party but has since become one

Contractual rights and/or obligations may be transferred to a third party but only non-personal rights can be transferred.

Transferring obligations cannot occur EXCEPT via novation where original K is terminated and a new one is established. Original K may authorize transfer to another party without the need for further agreement.

### Enforcement by the promisee

Promisee (A) may obtain order for specific performance against promisor (B) in favour of third party (C)

*Beswick v Beswick*

- Uncle sell business to nephew. Deal is nephew buys it and operates it but continues to share profits of business with uncle and if uncle dies, aunt will be paid to her.
- No suggestion that aunt was privy to the contract.
  - So; action brought in her own name failed.
- After uncle dies, wife becomes administratrix (female administrator) of his estate
  - Everything he owned, she now owns and has to deal with it in accordance with his will
- He left behind a right to enforce the contract with the nephew
  - She could seek enforcement of the contract – granted specific performance against nephew

## 2 – Implied terms

Three classes: in fact, in law, custom

### A – In fact (ad hoc)

Based on the presumed intentions of the parties

Terms implied in circumstances of the particular transaction

**TEST (Formal contracts):** *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* – to be implied, term's must be:

- reasonable and equitable – not imposing unreasonable burden on a party
- must be necessary to give business efficacy the contract so that no term will be implied if the contract is effective without it
- so obvious it 'goes without saying' (*Hospital Products Ltd v United States Surgical Corporation*)
- capable of clear expression
- consistent with express terms

You need everything in the Australian approach THEN Said to be implied and so incorporated into contract.

**TEST (Oral contracts):** test for contracts not wholly in writing (*Byrne v Australian Airlines*):

- Less strict use of rules in *BP* (Rules still apply) when the contract is partly oral, not in writing or oral.
- *First step*: find express terms in writing or implied from course of dealings
- *Second step*: any so obvious that it goes without saying, parties would say "of course"? *Hospital Products Ltd v United States Surgical Corporation*
- *Third Step*: Is the term necessary for the contract to work?
  - Only when YES, will term be implied (*Hawkins v Clayton*)
  - STRONG focus on necessity
- *ESSENTIALLY*: that if you can find one of the five categories that aren't satisfied it can be found to have not been implied.

Example: *The Moorcock (1889) 14 PD 64 (is an eng court of appeal)*:

- Contract between ship owner and wants to load ship at a jetty. Vessel is on Warf, during low tide, vessel rests on mud and suffers damages (under mud is hard surface). Are owners of jetty liable? Found to be liable. In breach of a term implied in fact – owners had to have a reasonable inspection of the jetty. Met all five criteria
- Emphasises business efficiency – important to make contract work.

Example: *Codelfa v State Rail Authority*:

- Parties have contracted on assumption that construction work can be done all day and night to have something built by a date. Built around residential area, residents sought injunction preventing nightworks and Sunday works. Price increased.
- State did not pay extra costs. C tried to imply term to get compensation.
- HCA said: no implied term because:
  - It was not so obvious it goes without saying that they would receive compensation for something like this.

Example: *Regreen Asset Holdings v Castricum Bros*:

- Sale of land. C was owner of land with several buildings and equipment attached to land. R bought land, parties entered into separate agreement for the equipment. Land never reached settlement as R failed to secure financing land. R wanted damages for the equipment.
  - Found: there was implied term. Equipment contract was subject to the land agreement and therefore subject to obtaining finance for the land.
- On appeal: *precontractual conduct is admissible* is when you're trying to imply term in fact – when it is objectively known, and language used makes it clear.
  - Obiter discussed post contractual conduct – may be admissible

### ANTICIPATORY BREACH

- when one party repudiates his/her obligations under the contract prior to the time set for performance of those obligations.
  - Aggrieved party entitled to terminate and sue for damages for breach of contract.
  - Does not affect measure of damages so much – aggrieved can mitigate its loss

Example: *Laurinda v Capalaba (HCA)*:

- Serious refusal or inability to perform lease – ability to terminate

### BEFORE PERFORMANCE TIME RULE:

Termination BEFORE performance IS justified if it is inevitable that when the time for performance comes, the innocent party would have had the right to terminate. *Universal Cargo Carriers Corp v Citati [1957] 2 QB 401*

- What does inevitable mean:
  - *Devlin J*: If you are wholly incapable of doing it, if it is dead-set 100% certain that you can't do it ...
- Facts: ship was unable to be literally loaded in time.

### CONTINUED BREACHES RULE:

Continued breach of contractual obligations does not automatically constitute repudiation.

- Where one party has not complied with the terms of the contract, but the other party has been happy to continue on with the contract despite the breach(es), such conduct is unlikely to sustain an inference of repudiation: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61*.
- Multiple breaches have significance – might reveal an intention not to be bound – repudiation *Carr v JA Berriman Pty Ltd (1953)*
  - Providing that the aggrieved has not affirmed the contract

### WRONGFUL TERMINATION / INTERPRETATION

Wrongful termination usually amounts to repudiation

- Thereby giving the other party the right to terminate
- Eg – firing based off wrongful misconduct, serious breach of the basis of employment contract
  - Employee – seek to have contract enforced or seek loss of bargain damages
- BUT not necessarily where based on good faith misrepresentation of contract
  - Eg: *DTR Nominees v Mona Homes*:
    - Contract for sale of land. Purchaser wanted to terminate as vendor had failed to lodge plans to council. Vendor argued that was not in the contract. Buyer tried to repudiate the contract
    - Court found: both wrong, yes obligation to lodge plans, but breach wasn't serious enough to justify termination. Vendor was not entitled to terminate, as he had been in breach of contract – he was not ready, willing or able to perform.
    - RULE: to terminate, you must be ready, willing or able to perform
    - Purchaser was not in fact repudiating – they were acting on a good faith interpretation on the contract. If purchaser believed that vendors position was correct, vendor would have gone ahead and vice versa.
    - HCA found: both parties agreed to **abandon** the contract – the land had been sold to someone else.

### INDICATION PARTY WILL NOT PERFORM OBLIGATION

Breach of *condition or fundamental breach* may also be a repudiation:

- but no overlap where refusal before performance due (anticipatory breach) – where one party indicated prior that they will not or be unable to perform obligations (if failure to perform hasn't occurred yet – time for performance hasn't occurred) – technically no breach yet
  - *Hochster v De La Tour (HCA)*:
    - Employment contract. P to work for D for three months. D changed mind to not employ them anymore. Sought damages for three months wage. D argued that this is not allowed – can't bring an action before time for performance (might change my mind). Court dismissed this.

## Vitiating factor: Abuse of power

Where party's judgment or consent is impaired – because of abuse / exploitation of a position, influence or advantage by defendant at expense of plaintiff

- Judge made law more concerned with: with *procedural fairness* (way contract is brought about) the contract was made, not the *substantive fairness* of the contract

Possibilities:

- Duress
- Undue Influence
- Unconscionable conduct: equitable doctrine, and statutory prohibitions (Australian Consumer Law) \*not covered in this course\*
- Unfair terms (Australian Consumer Law) \*not covered in this course\*

## Duress

Contract *voidable* if procured by coercion or wrongful threats (set aside if no barriers to recession)

Applies to:

- Threats of physical harm
  - eg *Barton v Armstrong [1976]* (Threatened to murder if he didn't sign)
    1. Onus lie on the defendant (once the pressure is unlawful) to prove that the pressure in fact contributed nothing to Barton's decision to sign
    2. Need to establish legitimate pressure
    3. Causation between behaviour and what was done
    4. When the threat is so serious you only need to prove it is a cause
  - NOTE: doesn't matter if the person wanted to enter the contract for another reason.
    - As LONG AS the threat was a contributing factor, that will constitute duress.
  - *Crescendo management Pty Ltd v Westpac Banking Corp* – once found illegitimate the onus is on the threat giver to prove he didn't take it seriously or it didn't affect the decision.
- 'Duress of goods'
  - Threat directed at someone's property
  - Money actually paid under compulsion for the release of goods (chattels) can be claimed back in an action in restitution for unjust enrichment
  - The promise to pay money made under compulsion for the release of goods can be avoided (voidable) on the basis of duress
- Economic duress, eg threat of breach of contract that would cause economic loss
  - New contract procured should be:
    - Voidable?
    - Valid compromise in course of dealing?
  - This will largely depend on whether there was a threat to discontinue performance or merely a stating of one's position and whether the threat was a factor causing the plaintiff to renegotiate the contract.
  - Legitimate pressure:
    - If the renegotiation was to avoid the inconvenience of litigation
  - Illegitimate pressure:
    - If the plaintiff entered into the contract to do what was necessary to avoid the pressure and the following through by the defendant on the threat whilst insisting that the matter was still unresolved.
  - Factors the court will consider:
    - Was there an alternative remedy available?
    - Was there a protest at the time of the pressure?
    - How quickly the victim sought to have the contract set aside after the pressure was lifted