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TOPIC 03 – TERMS AND INTERPRETATION

3.1 – EXPRESS TERMS

Nature of express terms

- Express terms are those expressly agreed by the parties. They can be oral or written, and can be negotiated or in standard form.
- Issue arises where party wishes to incorporate standard terms in a document as part of the contract.

Incorporation of Written Terms

- There are three ways to incorporate written terms: signed acceptance, reasonable notice, or prior course of dealings

1. Signed acceptance

- A signature is conclusive evidence of acceptance, regardless of whether the terms have been read or understood – *L'Estrange v Graucob*
 - Electronic acceptance (clicking 'I agree' or 'yes') is equivalent to signature – *eBay v Creative*
 - Rule reaffirmed in Australian court in *Toll v Alphapharm*.

Signature of a document may incorporate another document by reference

- Includes documents that refers to conditions of sale in another document
- So long as the first document is signed, it does not matter whether terms have been read

Signature not effective where misrepresentations made

- Signature is not effective where misrepresentations are made about the terms and their effect – *Curtis v Chemical Cleaning and Dyeing*
 - Misrepresenting breadth of term amounts to misrepresentation (e.g. exclusion clause applies to specific damage, when it applied to any damage) – *Curtis*

2. Display or delivery of terms

- The general test for the display or delivery of terms is that of reasonable notice; one party must have given the other party 'reasonable notice' of the term before the contract was made – *Causer v Browne*

Time at which terms are available

- Only terms that have been made available to the party before the contract is made can be incorporated into the contract – *Oceanic Sun Line v Fay*

Reasonable notice

- The form of reasonable notice required to incorporate delivered or displayed terms into a contract is that which is likely to come to the party's attention – *Causer v Browne*
 - Contractual document
 - If a document is one that would reasonably be expected to contain the terms of a contract, mere presentation of the document will suffice – *Parker v South Eastern Railway Co*

TOPIC 05 – TERMINATION

5.1 – ENDING A CONTRACT

- Termination is only relevant when a party has an obligation that has not yet been fallen due for performance.
- You cannot terminate a contract when all the relevant obligations have already fallen due.

A contract can be terminated by:

- Performance – most common method, both parties have performed all obligations
- Mutual agreement – parties agree to terminate
- Automatically by operation of law – frustration
- Unilateral termination – one party purports to terminate (due to repudiation, breach)
- Statute – statute confers express or implied right to terminate

Reasons for termination

- To escape from a contract and be relieved of unperformed obligations
- Parties may no longer want to deal with the other party
- **To claim 'loss of bargain' damages**
 - these damages reflect the loss from not having a contract at all
 - Can claim if party has a right to terminate at common law
 - *e.g. Landlord leases premises to tenant. Rent paid late gives landlord the right to terminate. If landlord has a common law right to terminate, and they do so, the landlord can sue the tenant not only for loss suffered (interest on money), but for loss for the whole contract.*
 - Relevant factors for calculating loss of bargain damages:
 - Period of the lease and time left on lease – if six months remaining on lease, landlord can claim for six months rent
 - Subject to principle of mitigation of loss – if landlord found another tenant after three months who pays same amount of rent, loss of bargain damages would be three months rent

5.2 – TERMINATION FOR BREACH

Common Law Rights of Termination

- At common law, one party can terminate for one or more of these grounds:
 - Breach of essential term (condition)
 - Fundamental breach of an intermediate term
 - Repudiation
- These are the default rules, and are rarely ever excluded by the express terms.
- Parties can exclude these rights by express terms in the contract, although the court will often regard any expressed statement as being additional to the common law rights.

TOPIC 06 – VITIATING FACTORS

- Vitiating factors are factors that affect a person's assent to a contract or intention to confer a benefit on another.

6.1 – MISINFORMATION

- This covers a range of legal principles in the situation where: A enters into a contract with B, and A is under some misapprehension at the time they enter into the contract. After A discovers the truth, A may take a number of actions.
- The two remedies under this section are rescission (rescission ab initio) or damages (only when a tort of deceit or negligence is established) (or both).

Possible remedies

- Breach of contract
- Rescind contract at common law
- Damages in tort or statute
- Contract is voidable for mistake
- Rectification
- Plead non est factum

Choosing an action/remedy

- Depends on what the parties can prove
- Can party prove that an oral statement has been incorporated into a written contract – if so, breach
- If the parol evidence rule will bar such proof – argue misrepresentation

1. Breach of contract

- There will be occasions where a party has made a statement which will be incorporated as a term of the contract
- If the statement turns out to be false, then a breach of contract has occurred

Before entering the contract, B promised or guaranteed to A that something was true ('warranty'):

- See Topic 03: Terms and Interpretation, p 14

The warranty became part of the contract, or a collateral contract:

- See Topic 03: Terms and Interpretation, p 14

The statement turned out to be false:

- A must be able to prove that the statement turned out to be false

- **Remedy:** Seek damages for breach of contract for any loss suffered as a result of the false statement.

6.2 – ABUSE OF POWER

- Where one party's judgement or consent is impaired, because of abuse or exploitation of a position of influence or advantage by the defendant at the plaintiff's expense.

What are the possibilities?

- Duress
- Undue influence

1. Duress

- A contract is voidable if it is procured by coercion or wrongful threats
- Under the modern doctrine of duress, the contract is voidable for duress

Duress originally applied to:

- **threats of physical harm against a person, or member of their family – *Barton v Armstrong***
 - The threat need not be the only reason for entering contract, doesn't matter if there are other reasons for entering contract – *Barton*
 - As long as the threat contributes to the decision to enter contract, it will amount to duress – *Barton*
- **duress of goods**
 - threats directed at someone's property

Under the modern doctrine, duress now extends to:

- **economic duress – *North Ocean Shipping v Hyundai Construction***
 - threat of breach of contract that would cause economic loss

Elements:

- The elements of duress require:

An illegitimate threat;

- Threat needs to be unlawful to be illegitimate – *ANZ v Karam*
- An unconscionable threat may be illegitimate – *Thorne v Kennedy*
- Position unclear in Australia, a number lower courts have agreed with *Karam*, but High Court left this question open in *Thorne*, noting it was a 'difficult question'
- It is generally accepted that lawful acts may be dealt with under undue influence and unconscionable dealing.

That 'overbears the will'

- The victim feels no practical choice other than to submit
 - *In Thorne, the plaintiff had no choice but to sign grossly inequitable pre-nuptials – without the marriage, she would have no income, no home, and no right to stay in Australia*

Remedy:

- With all vitiating factors, a contract is voidable, and can be rescinded, provided there are no bars to rescission
 - Remember doctrine of election