

## EXAM NOTES

**CONTRACT LAW 2018**

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## 1. PRIVITY - IS THE PERSON CLAIMING/SEEKING A REMEDY A PARTY TO THE CONTRACT?

- If yes, doctrine of privity is satisfied
- If a third party, can they avoid the doctrine of privity?
  - Is it an insurance contract? *Trident v McNiece* and *Insurance Contracts Act 1984* (Cth)
  - Is there an agency arrangement?
    - i. Is there actual or ostensible authority?
  - Can a trust be inferred?
    - i. Is there intention to create a trust (narrow view) OR is there intention to confer benefit a benefit on a third party (broad view)
  - Can/will the promisee enforce the promise in favour of the party?



## 2. INCORPORATION - HAVE THE TERMS BEEN INCORPORATED INTO THE CONTRACT?

### EXPRESS TERM?

- **Written terms**
  - Is there agreement by signature? (*L'Estrange v Graucob*)
    - Was there any reason to preclude it being binding, e.g. misrepresentation?
  - Is there reasonable notice for terms displayed/delivered i.e. has the party done all that is reasonably necessary to bring the term to the other party's attention?
    - Reasonably understood to be a contractual document? (*Causer v Browne*)
    - Notice before the contract was made? (*Oceanic Sun Line v Fay*)
    - Onerous or unusual terms? Specific notice! (*Interfoto Picture Library*)
  - Is there otherwise a prior course of dealing that may suffice as notice? (*La Rosa v Nudrill*)
- **Oral terms**
  - Is the statement a warranty or a mere representation? Is there something to suggest that the party was promising the statement to be true? (*JJ Savage and Sons v Blakney*)
    - Is one party more knowledgeable? (*Oscar Chess v Williams*)
    - Is it on an important matter? (*Van den Esschert v Chappel*)
  - If written terms also exist, the Parol Evidence rule may preclude incorporation
    - Only applies once established contract is wholly in writing (*State Rail Authority*)
    - Is there an 'entire agreement' clause?
    - Can a collateral contract be established?

## IMPLIED TERM?

- **In fact**
  - Is the contract wholly in writing?
    - Apply *BP Refinery* test
      - Reasonable and equitable
      - Necessary to give business efficacy
      - So obvious 'it goes without saying'
      - Capable of clear expression
      - Consistent with express terms
  - Is the contract only partly in writing?
    - Apply *Byrne* test - is the term necessary for reasonable or effective operation of a contract in the circumstances of the case
- **In law**
  - Common law
    - Is it necessary (for all contracts of the same type), such that rights under the contract would otherwise be rendered nugatory? (*Liverpool City; Byrne*)
  - Statute
- **Of custom**
  - Apply *Con-Stan Industries* test
    - A question of fact in every case
    - Custom must be so well known all affected parties must be presumed to have included it
    - Term must not be contrary to express terms
    - Party may be bound even if ignorant of the custom (just need to prove custom actually exists)



## 3. INTERPRETATION OF TERMS

1. What would each party, by words of conduct, have led a reasonable person in the position of the other party to believe? (*Toll v Alphapharm*)
2. Does the parol evidence rule operate?
  - Admissible to identify subject matter or resolve ambiguity
    - But do you actually need ambiguity?
3. Is it an exclusion term?
  - For serious breach
    - Interpret according to natural and ordinary meaning (*Darlington v Delco*)
  - For negligence
    - Expressly states negligence
    - States a synonym of negligence
    - General words that are not intended to cover any other type of liability (*Davis v Pearce Parking*)
4. Any ambiguities to be solved *contra proferentem* (*Darlington v Delco*)

## 4. PERFORMANCE AND BREACH - HAVE THE PARTIES PERFORMED THEIR OBLIGATIONS UNDER THE CONTRACT?

1. Is it an entire or divisible obligation?
  - Lump sum payment creates presumption of entirety
  - Even if divisible, cannot receive payment for each divisible obligation until each divisible obligation has been entirely performed
2. Substantial performance may suffice entire performance (*Bolton v Mahadeva; Hoenig v Isaacs*)
  - Performance IS substantial - entitled to recover the full amount/no breach
  - Performance IS NOT substantial - not entitled to recover/breach
    - May recover 'reasonable amount' under quantum meruit \*see *restitutionary remedies*
- NB For time stipulations, anything outside of this will give rise to a breach
  - If no time stipulation, then 'reasonable' time



## 5. TERMINATION - DOES EITHER PARTY HAVE A RIGHT TO TERMINATE THE CONTRACT?

1. Do the facts give rise to a right to terminate?
  - Has there been a breach of an essential term?
    - Would the parties not have entered into the contract unless assured of strict compliance with the term (*Tramways*)
  - Has there been a fundamental breach of an intermediate term?
    - A breach which substantially deprives the other party of the benefit under the contract (*Hongkong*)
  - Has one of the parties repudiated? (*Laurinda*)
  - Is there an express term to termination within the four corners of the contract?
2. Are there any restricting factors on termination
  - Has the party affirmed the contract? NB Rights to terminate will be lost, however new rights may arise (*Tropical Traders v Goonan*)
  - Is the party purporting to terminate ready and willing to perform themselves? (*Foran v Wright*)
3. Has the contract been frustrated? (*Codelfa*)
  - a. Supervening event
  - b. Rendering performance wholly incapable
  - c. Causing fundamental change in circumstance
  - d. No fault of either party
  - e. Neither has assumed the risk (*Ooh! Media*)

## 6. VITIATING FACTORS - IS THERE ANYTHING ON THE FACTS TO MAKE THE CONTRACT VOID OR VOIDABLE?

- Misinformation
  - Breach of contract
  - Action at common law for misinformation
  - Actions in tort
    - i. For deceit
    - ii. For negligent misstatement
    - iii. For innocent misrepresentation as if fraudulent
  - Mistake
    - i. Common mistake - in agreement but equally mistaken
    - ii. Mutual - at odds about the terms and both parties are wrong
    - iii. Unilateral - one party mistaken as to the terms
  - Non est factum - plea that a document has not been made
- Undue pressure
  - Duress
  - Undue influence
    - i. Actual - can the weaker party show that the stronger party exerted undue influence over them in entering the transaction? (*Thorne v Kennedy*)
    - ii. Presumed - is there a special relationship of trust and confidence between the parties that is one of the established automatic categories or might be argued on the facts?
- Other vitiating factors



## 7. REMEDIES - WHAT REMEDIES ARE AVAILABLE TO THE AGGRIEVED PARTIES?

- **Self-help**
- **Enforcement**
  - Action for debt
    -
  - Injunction
- **Restitutory remedies**
  - Action for money had and received
    - Total failure of consideration (*Baltic Shipping*)
  - Quantum meruit
    - No recovery for partial performance of an entire obligation (*Cutter v Powell*)
    - Except where:
      1. There is free acceptance (*Sumpter v Hedges*)
      2. New contract is implied (*Steele v Tardiani*)
      3. Full performance wrongfully prevented (*Sopov v Kane Constructions*)

- **Any breach of contract entitles the injured party to seek damages**
  - Damages will be nominal unless the plaintiff can prove they suffered loss
  - Damages are compensatory, not punitive or exemplary
  - Plaintiff may claim consequential loss, but must establish that
    - The breach caused the loss, and
    - The breach was not too remote from the loss
  - May claim non-pecuniary loss (*Baltic Shipping*)
  - Mitigation of loss
  - Damages for breach of obligation to build
  - Must be assessed in all situations, no matter how difficult
    - For a lost chance
    - And in rare cases where expectation losses cannot be ascertained, reliance loss may be awarded

## REMEDIES

### Self-help

**Withholding performance** (e.g. goods delivered aren't satisfactory, withhold payment for goods)

**Termination** (e.g. firing someone from their job)

**Deposits and advance payments** (lump sum: advantages consumer, upfront: disadvantages consumer, deposit: incentive to complete contract, instalment payments: balances the interests of the two parties)

### Enforcement

#### Specific performance

Generally only for contracts involving land (because land is unique), will not award specific performance where

1. Damages would be adequate
2. Continuing obligations involved
3. Obligation is one of personal service

#### Smythe v Thomas

Man sells unique vintage plane on eBay for less than what he wanted for it/thought it was worth, court ordered specific performance because the item was very unique.

#### Injunction

- Equitable, discretionary and rarely granted

#### Action for debt

- No need to prove loss, merely that money is owed and has not been paid
- Not a discretionary remedy, because not an equitable remedy
- Two requirements:
  1. Contract must impose an obligation to pay a certain or ascertainable sum of money'
  2. Right to payment must be accrued, i.e when consideration has been provided by the other party (*Westralian Farmers Ltd v Commonwealth v Agricultural Service Engineers (in liq)*)

## Compensation (Damages)

The general rule: where a party sustains loss by reason of breach of a contract he will be so far as money can do it, placed in the same position with respect to damages as if the contract had been performed (*Robinson v Harman* endorsed in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*)

### Consequential loss (causation and remoteness)

Plaintiff may claim additional losses aside from promised benefits such as physical injury caused by defective goods or loss of profit by not having goods delivered on time. Loss must be 'but for' the breach, and only if not too 'remote.'

#### *March v Stramare*

Authority for 'but for' test

#### *Hadley v Baxendale* endorsed by *European Bank v Evans*

Loss is not too remote if it is either:

1. Kind of loss arising naturally... according to the usual course of things
2. Losses as may reasonably have been supposed to be in the contemplation of the parties at time of contract, as a probable result of this kind of breach

#### *Victoria Laundry v Newman*

Boiler and lucrative dye contracts case. Application of the test depends on the knowledge of the defendants. Plaintiffs could recover damages for general loss of profit, because defendants must reasonably be presumed to foresee some loss of business, however to recover for the particularly lucrative contracts the defendants would have to know of the prospect of those contracts.

**Non-pecuniary loss** (damages which are not readily quantified or valued in money, such as proposed compensation for pain and suffering)

Not usually recoverable unless the specific aim of the promise breached is to create happiness or avoid distress, or for mental distress/pain and suffering arising from physical injury consequent of breach (*Baltic Shipping v Dillon*)

### Mitigation of loss

- A plaintiff may not recover damages for losses that might have been avoided if the plaintiff had taken reasonable steps to minimise that loss (*Chand v Commonwealth Bank of Australia*)
- Plaintiff cannot recover for losses actually diminished or avoided by the plaintiff's actions; e.g. new turbines saved plaintiff money and increased profits, therefore award of damages diminished (*British Westinghouse v Underground Electric Railways*)
- \*NB There is no actual duty for a plaintiff to mitigate their losses



**For breach of an obligation to build or repair** - for uncompleted work, cost of having someone else complete it or rectify any defects, unless that cost would be unreasonable

*Bellgrove v Eldridge*

Where the defects are so extreme as to make the house unstable, damages will be awarded for the cost of rectification; in this case the court held it was the only measure that would truly compensate the owner

*Ruxley v Forsyth*

An award of damages for the cost of rectification will be unreasonable where it would be wholly disproportionate to the benefit obtained; swimming pool could still be used for diving, damages to be based on the diminution in value of the pool caused by the breach

*Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*

Lessee broke covenant in lease arrangement prohibiting alterations to the subject property without consent of the landlord; trial judge awarded damages for the diminution of the building following the works, though on appeal these were increased to the cost of restoring the foyer and compensation for rent loss incurred during the restoration period

**Loss of a chance**

*Chaplin v Hicks*

Damages must be assessed no matter how difficult. Damages for loss of a chance awarded for loss of chance to succeed in a contest or game; plaintiff's application for competition not properly considered, prize being acting work

*Commonwealth v Amann Aviation Pty Ltd*

Also for loss of chance to pursue potentially commercial opportunity; considered that the prospect of renewal of the contract was of real commercial value therefore took this into account in quantifying damages

**Reliance damages**

*McRae v Commonwealth Disposals Commission*

Oil tanker case. No actual tanker. Could not measure the value of their loss. Contract also expected to incur a loss. But just because difficulty does not mean court will not award damages. Court held McRae were entitled to recover damages measured by expenditure reasonably incurred in reliance on the promise.