

SUMMARY GUIDE SAMPLE → THIS DOCUMENT CONTAINS A FEW EXTRACTS OF WHAT THE SUMMARY GUIDE COVERS. THE FULL VERSION CONTAINS ALL ISSUE AREAS OF ALL TOPICS.

CONTRACTS

ISSUE 2: INTENTION TO CREATE LEGAL RELATIONS

In order for a contract to exist, the parties must have intended to create legal relations.



1. Onus lays on party seeking to have contract dismissed
 - a. This is true for commercial agreements which have a presumption that parties did intend to create an enforceable agreement. **Banque Brussels**
 - b. However – for social agreements there is a presumption that parties did not intend to create a legally enforceable agreement **Balfour v Balfour** (married couple – presumption when domestic in nature) – onus lays with party seeking to enforce contract. And **Ashton v Pratt** (Escort goes into agreement with rich guy to stop sleeping with others)
 - i. This presumption was rebutted in **Todd v Nicol** (family agreement) and **Wakeling v Ripley** (family agreement – sold house and moved in reliance) and **Ermogenous v Greek Orthodox** (religious context – employment contract) and **McKeand v Thomas** (social agreement – were neighbours agreement was in an informal manner)
2. Objective appearance not the subjective intention. What their words and conduct would have led a reasonable person in the position of the other party to believe. **Toll v Alphapharm**
3. Parties may also expressly state their intention e.g. stipulate that there is 'no intention to be legally binding'
 - a. **Jones v Vernons' Pools** – Coupons for a sales promotion that had 'binding in honour only' and 'did not give rise to any legal relations'. Rebutted commercial assumption.

Acceptance by email is capable of establishing legal relations. **La Forrest v Ford**

'Without prejudice negotiations' (generally used when party doesn't want their statement to be admissible in court) these negotiations are capable of being an offer (**Tallerman & Co v Nathan's Merchandise**) – **Needlework Warehouse v Chansonette** – Intention to be bound in the circumstances – terms of settlement were sufficiently certain to constitute an offer.

ISSUE 3: CONSIDERATION

Consideration is 'an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought' **Dunlop v Selfridge**

Quid pro quo (this for that)

A consideration is a detriment or liability voluntarily incurred by the promisee or a benefit conferred on the promisor at the instance of the promisee in exchange for the promise.

Is not required for formal contracts – as opposed to simple.



1. Must move from the promisee/offeree (but not necessarily move to the promisor)
2. Past consideration is invalid **Roscorla v Thomas**

- a. Exception → Performance of services at request of promisor who subsequently promises to pay is good consideration if it was assumed at the time of the request that services would be paid for. Recipient of the benefit may be obliged to make restitution. **Re Casey's Patients**
 - b. Exception → if act done at promisor's request, parties understood it would be remunerated in some way and promise had been given in advance of the act **Pao On v Lau Yiu Long**
3. Consideration must be sufficient (must have some value) but need not be adequate ('price' is actual value). A party can stipulate whatever consideration it chooses.
 - a. **Chappel & Co v Nestle** – Nestle offered song in exchange for chocolate wrappers. Despite that they were of no value – it was stipulated as consideration.
 - b. Consideration must be clear – not illusory
 - i. **White v Bluett** – Consideration was to 'stop complaining' is too vague.
 - ii. **Dunton v Dunton** – agreed to pay his wife for her to remain 'sober' – 2/3 judges held this was sufficient
 4. **NB:** Not good consideration
 - a. Existing duty
 - i. Existing legal duty
 1. **Glasbrook Bros v Glamorgan County Council** paying for additional police protection – did the police provide fresh consideration rather than duty to serve – found yes they did go above – public duty exceeded.
 2. If the promise is to do something that goes beyond the obligations imposed by law, the additional performance may constitute sufficient consideration.
 3. **Stilk v Myrick** pay additional wages if crew sailed ship home shorthanded – shortage of staff more an emergency they were all bound to do under original contract
 - b. Existing contractual duty
 - i. Can't threaten to break an existing obligation **Wignan v Edwards**
 - ii. Where continuing to do what you are obligated to provides a commercial benefit to the other side such as remaining as a tenant by them paying reduced rent – valid consideration. **Musumeci v Windadell**
 - iii. May be valid if paying more for something that requires a party to do something different to the original agreement **Harlfev v Ponsonby**
 - c. Part payment of debt **Foakes v Beer** (similar to existing contractual duty)

ISSUE 4: GENUINE CONSENT

For a contract to be enforceable, the parties must have intended to enter the contract. Genuine consent must be given, so that it is a real expression of their intentions.

Void → Never came into existence

Voidable → Contract valid in every respect except one party has the right to rescind the contract.

Unenforceable → Contract treated as valid in every respect except one party (or sometimes both) cannot be sued in court for breaking the contract.

Consider one of the following:

1. Misrepresentation

A false statement of fact (past or present) made by the representor to the representee during pre-contractual negotiations, which induces the representee to enter into the contract.

- Action depends on whether the misrepresentation was:

- **Innocent misrepresentation**
 - False representation made by a person who at the time of making it believed it to be true.
- **Negligent misrepresentation**
 - False representation made innocently but without reasonable care as to its truth or falsity.
 - Gives rise to tort in negligence.
- **Fraudulent misrepresentation**
 - False representation made by a person who at the time of making it had no honest belief in its truth.
 - Gives rise to an action of tort in deceit.
- Statement of opinion is not to be relied on *Bisset v Wilkinson*. However, a statement of opinion may be regarded as implying statement of fact if opinion is genuinely held.
- Effect → **Voidable**
 - Party has the right to **rescind** the contract – however loses this when:
 - Has knowledge of facts and elects to continue with contract
 - Unable to restore parties to their original position
 - A third party, in good faith, has acquired an interest in the contract.
 - There has been a long delay. *Leaf v International Galleries* statement about authenticity of a painting was incorrect however it was left for 5 years
 - Party may also claim for damages
 - If made under trade or commerce – ACL
 - Or will have to resort to tort (deceit for fraud or negligence)

2. Mistake

Void → contract is a nullity and no rights can be transferred under it

Voidable → contract remains on foot until it is set aside and rights under it can be transferred prior to that.

- a. **Common mistake** – Where both parties made the same mistake.
 - i. A common mistake as to quality, nature or value of contract will not render it void. Remedy of rectification is available to rewrite contract with party's real intentions.
 - ii. **Elements** *Great Peace Shipping v Tsavliris Salvage*
 1. A common assumption as to the existence of a state of affairs
 2. The non-existence of that state must not be attributable to the fault of either party
 3. Neither party has promised the other that the state of affairs existed
 4. The non-existence of the state must render the performance impossible
 5. The state of affairs must be something which must exist if performance of the contract is possible.
 - iii. The mistake must be sufficiently fundamental
 1. If not, remedy is available in equity where rights of third party are not unjustly prejudiced. The party seeking to avoid must not be at fault and it would be unconscionable to allow the other party to benefit from the mistake.
 - iv. Subject matter → *McRae v Commonwealth Disposals* Commission Oil tanker didn't exist
- b. **Mutual mistake** – Where the parties are at cross-purposes
 - i. Effect → **Void** it is not possible to determine the subject matter of the contract.

- ii. Court will first objectively determine if there is a 'real' interpretation of the contract. If yes, that interpretation applies. If not, void for mutual mistake.
- iii. **Raffles v Wichelous** – Both talking about a different ship arriving same port same day. There was evidence that pointed equally to each interpretation of the contract.
- c. **Unilateral mistake** – Where one party is mistaken and the other party is aware of the mistake.
 - i. Generally, can also go under fraudulent misrepresentation, however mistake allows contract to be void, FM merely voidable.
 - ii. **Identity Cases**
 - iii. **Face to face** (presumption intend to deal with person in-front of them) or written dealings (presumption only intends to deal with genuine person).
 - iv. **Cundy v Lindsay** – mistaken identity sold handkerchiefs to someone thinking they were proper business people sued third party for them back. Because he makes the contract void for unilateral mistake the fraud obtained no title to the goods and could not pass this onto D – therefore D(TP) liable.
 - v. **Lewis v Avery** – sold car to a rogue posing as someone famous. Could not claim void for mistake (but rather voidable on fraudulent misrepresentation) because he made the contract with the person in front of him. Title to car passed to TP
 - vi. **Ingram v Little** – case criticised in L v A. Unless there are exceptional circumstances, a mistake to identity will be misrepresentation only. This was the exception because there was a clear intention to only contract with a particular person.
 - vii. **Not identity**
 - viii. **Taylor v Johnson** – Acres of land 15k for whole or per acre. Evidence that they deliberately set out to ensure the other party did not become aware of the mistake.

ISSUE 8: TERMS OF THE CONTRACT

1. Implied terms: Terms may be implied through:

- a. Previous consistent course of dealings **Hillas & Co v Arcos**
 - i. If there has been incompleteness or uncertainty – usually unenforceable. But courts can enforce agreement by reference to previous dealings.
 - ii. Need to identify previous terms + sufficient number of past dealings to establish 'course of dealing'
 - 1. **Hillas & Co v Arcos** issue about size of timber in contract could relate to previous contract, dealings gave rise to expectation same terms should be included.
- b. Business efficacy
 - i. **Hospital Products v United States Surgical Corp**: The term must be:
 - 1. Reasonable and equitable
 - 2. Necessary to give business efficacy – so that no term will be implied if contract is effective without it.
 - 3. Be so obvious that 'it goes without saying'.
 - 4. Capable of clear expression.
 - 5. Not contradict any express term (term to exclude implied terms).
 - ii. **The Moorcock**: Although the matter was never discussed, the contract included an implied term that the harbour bottom was safe for shipping – necessary for business efficacy.
 - iii. **Canterella Bros v Andreason**: Contract for coffee supplier and shop, supplied the machine, contract didn't stipulate the amount of coffee to be bought from supplier – implied term that it would be all of their coffee – necessary for business efficacy – why would they supply free machine.

c. Good faith

- i. Implied term of parties to act in good faith for business efficacy. Not just by fact of business efficacy but by law as a necessary incident of the contract.
 1. **Burger King Corp v Hungry Jacks**: In contract new stores needed approval, one went ahead without approval with a selfish intent. Withholding of approval was a breach of implied duty of good faith.
 2. **Overlook v Foxtel**: No breach if acting in their legitimate commercial interest as expressly provided for in contract. Foxtel changed price on Overlook's content because of poor ratings.

d. Custom/trade usage

- i. A custom must be sufficiently well known so that it could be objectively assumed that all persons in the industry would consider themselves bound by it.
- ii. **Con-stand Industries of Australia v Norwich Winterthur Insurance**
 1. Existence of custom is a question of fact
 2. Custom is well known and generally acquiesced
 3. Custom must not contradict express terms
 4. Party may be bound by a custom even if it had no knowledge of it (Actual knowledge not required)

ISSUE 12: CONTRACTUAL REMEDIES

Common Law

Damages → To place the plaintiff in the position they would have been in had the contract been performed (includes actual loss, reliance damages loss of profit, expectation loss). It is to compensate and not punish.

Plaintiff must prove

1. The breach caused the loss (causation) and the damages claimed are not too remote (remoteness). Plaintiff bears the legal burden of proving causation.
 - a. Types of damages claimed **Hadley v Braxendale**
 - i. **1.** Loss that arises naturally from the breach according to the usual course of things. Compensates the innocent party for losses that are reasonably foreseeable.
 - ii. **2.** Loss that may reasonably have been in the contemplation of the D at the time when the contract was made, as a probable result of the breach. Compensates the innocent party for a loss attributable to special circumstances known to the defendant at the time of contracting.
 - b. E.g. **Victoria Laundry v Newman Industries**: Delivery of a boiler was late. Plaintiff claimed lack of boiler meant they were unable to undertake general business and a number of lucrative contracts for a government department. Awarded damages for general loss of business because this is reasonably expected but not for contracts as D did not know about the,.
2. They took all reasonable steps to minimise the loss suffered (mitigation).
 - a. Plaintiff can't claim for loss that reasonably could have been avoided.
 - b. E.g. **Burns v MAN Automotive**
 - i. Driver caused further loss to engine which broke down because he kept driving it. Damages awarded until the defect was discovered but not after this because it falls into the second limb of Hadley v Baxendale – there was a duty to mitigate.

Difficulty in assessing damages does not mean they won't be assessed, the award will merely be a rough estimate of the likely loss. **Howe v Teefy**.

- Reliance damages
 - **McRae v Commonwealth Disposal Commission**:....

TORTS

ISSUE 2: BREACH OF DUTY (STANDARD OF CARE)

Once a duty has been established, in order to be liable, the defendant's actions must fall below the standard of care of a reasonable man. Standard of care is the response of a reasonable person to a foreseeable risk.

To be determined objectively - what would the reasonable person do?

- Weigh up a range of factors.
 - The defendant need only take precautions against not insignificant risks that a reasonable person would take precautions to avoid.
1. **Seriousness of the risk** – the more serious the likely injury, the more significant the risk and greater precautions the defendant must take. The practicability of precautions is measured in terms of expense, difficulty and inconvenience.
 - **Paris v Stepney Borough Council**: Defendant had been negligent in not providing the plaintiff with goggles which would have protected him against injury to his good eye. The duty to take reasonable precautions against injury is one which is owed by the employer to every individual employee. But where to employer's knowledge, an employee has a particular condition that increases the seriousness of the risk, it is the duty to take additional precautions for the safety as may be reasonable.

NEGLIGENT MISSTATEMENTS/ACTS AND PURE ECONOMIC LOSS

PEL refers to financial loss that is not consequential (a result of direct physical injury or property damage) and is more commonly associated with business and commercial activities.

General rule → Can't recover for loss that is purely economic. Courts have initially been reluctant to compensate for this due to the 'flood gates' argument/issue of indeterminate liability. They have also upheld that this is largely the function of contract law and you can contract to prevent this loss.

1. Economic loss caused by **negligent misstatement** is recoverable where: **Hedley Byrne**
 - a. A **special relationship** exists between the parties
 - i. 'If someone possessed of a special skill undertakes (irrespective of contract) to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise' **Lord Morris Hedley Byrne**
 - ii. The HCA in **MLC v Evatt** (and then in **Shaddock**) widened this scope that the relationship doesn't require the speaker to possess special skill or judgement just that the speaker must have realised it was being trusted by the recipient in respect of something that was serious or special in nature.
 - iii. This is not limited to professional advisers **Shaddock v Parramatta City Council** (Council was accustomed to providing advice to the public concerning road widening proposals)
 - b. **Knowledge**:....

CONSUMER LAW

ISSUE 1: is the person in question a Consumer? (for the purposes of ACL) s3

2. A person is a consumer if:

- a. the goods were less than \$40,000 OR
- b. the goods were a kind ordinarily acquired for personal, domestic or household use or consumption; OR
 - i. Test → What the goods and services are *ordinarily* used for rather than what they are actually used for.
 1. E.g. **Crago v Multiquip Pty Ltd (1998)** not egg incubator
 - ii. This may include business-to-business transactions involving goods or services which households might commonly acquire.
 1. E.g. **Carpet Call Pty Ltd v Chan** domestic carpet to a nightclub fell within definition because it was a good 'ordinarily acquired' for domestic consumption.
 2. E.g. **Bunnings**
- c. The goods were a vehicle or trailer acquired for principal use in the transport of goods on public roads.
- d. BUT: Above does not apply if.....

Specific Protections → Consumer Guarantees

Guarantee	s	Elements/Threshold	Example
Acceptable quality <u>Supplier then indemnified by manufacturer (s 271)</u> <u>both</u>	54	<p>Goods have to be:</p> <ul style="list-style-type: none"> • Fit for all the purposes for which goods of that kind are commonly supplied (s54(2)(a)) • Acceptable in appearance and finish (s54(2)(b)) • Free from defects (s54(2)(c)) • Safe (s54(2)(d)) • Durable (s54(2)(e)). <p>Factors identified in s54(3)</p> <p>(a) the nature of the goods; and (b) the price of the goods (if relevant); and (c) any statements made about the goods on any packaging or label on the goods; and (d) any representation made about the goods by the supplier or manufacturer of the goods; and (e) any other relevant circumstances relating to the supply of the goods.</p> <p>This covers latent defects that manifest at a later</p>	<p>'Acceptable quality' from statutory interpretation covers same meaning from merchantable quality from TPA'.</p> <p>Merchantable quality → Dixon J Australian Knitting Mills v Grant: in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms</p>