Semester 1, 2016 – LAWS1075

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1. Express Terms

1.1. The effect of signature

- A party will be bound by the terms contained in a contractual document which they have signed, whether or not they have read or understood the terms (***L'Estrange v F Graucob***, reaffirmed in ***Toll (FGCT) v Alphapharm***).
  - The ***L'Estrange v Graucob*** rule will not apply where the signature was induced by misrepresentation or fraud (***Curtis v Chemical Cleaning & Dyeing Co***).
  - The ***L'Estrange v Graucob*** rule will not apply to documents, which cannot reasonably be considered as contractual in nature, such as a receipt or an acknowledgement of the delivery of goods (***Curtis v Chemical Cleaning & Dyeing Co***).

1.2. Incorporation by notice

- Whether or not the other party will be bound depends upon whether:
  1) The terms were available to the party to be bound by those terms before the contract was made; and
  2) Reasonable steps were taken to bring the terms to the notice of the party to be bound.

Element 1: Timing

- For delivered or displayed terms to form part of a contract, they must be made available to the party to be bound by the terms at a time before the contract is made (***Oceanic Sun Line Special Shipping Company Inc v Fay***).

Element 2: Notice

- The party seeking to incorporate the terms must take reasonable steps to bring those terms to the notice of the other party (***Thornton v Shoe Lane Parking***).
  - In the absence of actual knowledge, a party will be bound by delivered or displayed terms if the terms have been made available in such a form that the party to be bound can be taken to have been given reasonable notice of them (***Thornton v Shoe Lane Parking***).
- Courts have suggested that where the terms to be incorporated into a contract are unusual, special notice, such as will fairly and reasonably bring the terms to the attention of the party to be bound, must be given (***Baltic Shipping Co v Dillon***).

1.3. Incorporation by course of dealings

- Where parties have had a history of dealings, contractual terms introduced in earlier contracts may be incorporated into a subsequent contract (***Balmain New Ferry Co Ltd v Robertson***).
  - For a term to be incorporated by a course of dealings, the course of dealings must have been regular (***Chattis Nominees Pty Ltd v Norman Ross Homeworks***) and uniform (***Hardwick Game Farm v Suffolk Agricultural Poultry Association***).
  - The document relied upon in previous transactions must reasonably be considered a contractual document, rather than having the appearance of a mere receipt or docket (***Rinaldi & Patroni v Precision Mouldings***).

1.4. Pre-contractual negotiations

- In assessing whether an oral or other statement forms part of a written contract, the first issue to consider is whether evidence of the purported term is admissible to the court.
  - The rule of evidence known as the parole evidence rule limits the extent to which extrinsic evidence is available to "add to or vary" the terms of a contract.
- Secondly, courts must consider whether the parties would have intended the statement to form part of the contract.

5.3. Termination for breach

- Whether or not there is a common law right to terminate for breach depends primarily on the classification of the term breached.
  - If a term is a condition, the aggrieved party will be entitled to terminate for any breach of that term by the other party regardless of the gravity or consequences of the breach. Damages to compensate for any loss suffered by the aggrieved party will also be available.
  - If a term is an intermediate or innominate term, the aggrieved party's right to terminate depends on the gravity and consequences of the breach of the term. If the breach is likely to have serious consequences for further performance of the contract then the aggrieved party will be entitled to terminate the contract in addition to claiming damages for any losses caused by the breach.
- Accordingly, the first step in deciding whether or not an aggrieved party has a right to terminate for breach of a term of the contract is to classify the term in question.

Breach of a condition

- Where a term is classified as a condition, any breach of the term, regardless of its gravity, will give the aggrieved party a right to terminate the contract.
- The test of essentiality is whether it appears from the general nature of the contract, or from some particular terms, that the promise is of such importance to the promisee that they would not have entered into the contract unless they had been assured of a strict or substantial performance of the promise and this ought to have been apparent to the promisor (***Tramways Advertising v Luna Park***).
  - The way in which the parties describe an obligation may be relevant in assessing the importance to the parties of strict performance of that obligation (***Tramways Advertising v Luna Park***).
  - An obligation described in clear and precise language is more likely to be a condition than one expressed in more general or vague terms (***Tramways Advertising v Luna Park***).

Breach of an intermediate term

- If *every* breach of a term is likely to have serious consequences for an aggrieved party – depriving the aggrieved part of "substantially the whole of the benefit" which it was intended he or she should obtain from the contract – then the term is likely to be classified as a condition.
  - Conversely, a term which may be breached in a variety of ways, from the trivial to the significant, is more likely to be an intermediate term than a condition (***Hongkong Fir Shipping v Kawasaki Kisen Kaisha***).

- For a breach of an intermediate term to give rise to a right to terminate, the breach must be serious or deprive the aggrieved party of "substantially the whole benefit which it was intended that [they] should obtain from the contract" (***Ankar v National Westminster Finance (Australia)***).
- Where a term is intermediate, the right to terminate depends on the nature of the breach and its foreseeable consequences (***Hongkong Fir Shipping v Kawasaki Kisen Kaisha***).
  - It has been said that the breach must deprive the innocent party of "a substantial part of the benefit for which it contracted" (***Koompahtoo***).

8. Limits on Damages

8.1. Causation

- In order to recover damages for a breach of contract, a plaintiff must show a causal connection between the defendant's breach and the loss for which the plaintiff is seeking compensation (***Alexander v Cambridge Credit Corp***)
  - The 'but for' test is often relied upon but ultimately, causation must be a matter of 'common sense' (***Alexander v Cambridge Credit Corp***).

8.2. Remoteness

- The general rule as to remoteness of damage is that the plaintiff is entitled to recover for losses that:
  (1) Arise naturally, according to the usual course of things, from the breach; or
  (2) May reasonably have been in the contemplation of both parties at the time they made the contract (***Hadley v Baxendale***).

SECOND LIMB of *Hadley v Baxendale*

- It is sufficient that the parties have contemplated both the general nature of the loss or damage and the general manner of its occurrence (***Alexander v Cambridge Credit Corporation; Victoria Laundry (Windsor) v Newman Industries***).
- It is sufficient that the event gave rise to the loss would have appeared to the defendant 'as not unlikely to occur' (***Stuart v Condor Commercial Insulation***).

- An assumption of responsibility may usually be inferred from a defendant having sufficient knowledge of a particular risk of loss to be in an informed position to decide whether to accept that risk and taking no steps to exclude liability for the risk (***Stuart v Condor Commercial Insulation***).
  - In order to rebut the presumption implied by actual knowledge of the special circumstances, the defendant must show that there was no acceptance of the risk of liability for the damage (***Stuart v Condor Commercial Insulation***).

8.3. Mitigation

- The principles of mitigation are:
  1. The plaintiff must take all reasonable steps to mitigate the loss and cannot recover for avoidable loss (***Burns v Man Automotive***).
  2. Where the plaintiff does take reasonable steps to mitigate the loss, they can recover for loss incurred in reasonable attempts to avoid loss (***Simonius Vischer & Co v Holt & Thompson***).
  3. Where the plaintiff does take reasonable steps to mitigate the loss and these steps are successful, they cannot recover for avoided loss (***British Westinghouse Electric and Manufacturing v Underground Electric Railways***).

First rule – Reasonable steps in mitigation and the impecunious plaintiff

- Courts have stated that damage resulting from a breach of contract that was reasonably within the contemplation of the parties, when the contract is made, is recoverable even though the plaintiff's impecuniosity contributed to the loss (***Burns v MAN Automotive***).
  - Regardless of the plaintiff's impecuniosity, a plaintiff's duty to mitigate their damage does not require them to do what is unreasonable (***Burns v MAN Automotive***).

Second rule – Attempts at mitigation which increase loss

- A plaintiff can recover for loss incurred in taking reasonable steps to mitigate their loss, even though the resulting damage is greater than it would have been had the mitigating steps not been taken (***Simonius Vischer & Co v Holt & Thompson***).

15. Duress

- A contract procured by duress is *voidable* not void (except perhaps in extreme cases);
- It is material how and why the deflection of freedom occurred.
  - It is necessary to distinguish between legitimate and illegitimate pressure.

15.1. Elements of Duress

- The two elements in the wrong of duress are: (1) pressure amounting to compulsion of the will [impaired consent]; and (2) the illegitimacy of the pressure exerted (***Universe Tankships Inc of Monrovia v International Transport Workers Federation***).
  - If it is unlawful, it amounts to duress.

- The proper approach is to ask whether any applied pressure induced the victim to enter into the contract and then ask the pressure went beyond what the law is prepared to countenance as legitimate.
  - Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct.
  - Even overwhelming pressure, not amounting to unconscionable conduct or unlawful conduct, however, will not necessarily constitute economic duress (***Crescendo Management v Westpac Banking Corp***).

15.2. Duress and Coercion of the Person

- If illegitimate pressure is shown, the onus is on the party to show that it 'contributed nothing' to the other party's decision making (***Barton v Armstrong***).
  - It is unnecessary, however, for the victim to prove that the illegitimate pressure was the sole reason for him entering into the contract (***Crescendo Management v Westpac Banking Corp***).
  - It is sufficient that the illegitimate pressure was one of the reasons for the person entering into the agreement (***Crescendo Management v Westpac Banking Corp***).
  - Once the evidence establishes that the pressure exerted on the victim was illegitimate, the onus lies on the person applying the pressure to show that it made no contribution to the victim entering into the agreement (***Crescendo Management v Westpac Banking Corp***).

16. Undue Influence

16.1. Presumed undue influence

- The principle of presumed undue influence applies 'one party occupies or assumes towards another a position of ascendancy or influence' or 'a dependence or trust' on the part of the weaker party (***Johnson v Buttress***).

16.2. Rebutting the presumption

- In determining whether the presumption has been rebutted, the court will consider whether P was given competent advice by an independent and well-informed advisor.
  - The test is whether the confidant has rebutted the prima facie presumption by showing that the 'client' acted of their own free will and was not materially affected by the confidence reposed in the confidant, and each shows that the giving or recommending of advice is not the only way of proving that the relevant acts were the uninfluenced acts of the client (***Westmelton (Vic) v Archer and Schulman***).