

CONTRACTS A

EXAM NOTES

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Sample from: **INTENTION TO CREATE LEGAL RELATIONS**

Definition: the parties must **manifest an intention** to create legal relations in order for a contract to be legally binding.

STRUCTURE

- State which parties will be arguing for and against intention (issue)
- Party X will be arguing for commercial transaction
 - Presumption – for intention (*Banque Brussels; Kleinwort*)
 - Party Y has the onus of rebuttal.
- Party Y will be arguing for a social/domestic arrangement
 - Presumption – no presumption either way (*Ermogenous*)
 - Party X has the onus to prove intention.
- Despite the presumption, each case turns on its facts (*Ermogenous*)
- Apply objective test (*Shahid*)
- Weigh up factors, keeping the onus in mind – three factors for each side, ideally.
- Conclude

(1) PRESUMPTIONS:

- Make statement whether the context is prima facie Commercial or Social:
 - Prima facie, this appears to be a commercial transaction because of _____. Therefore it is strongly presumed that the parties intended to create legal obligations (*Banque Brussels*).
 - OR
 - Prima facie, this appears to be a social and/or domestic arrangement because of _____.
- If Commercial:
 - X will therefore argue Y bears the onus of disproving this presumption.
 - However, Y will argue the presumption can be rebutted with consideration of the particular facts of this case. Go on to *Shahid's* objective test.
 - IF LETTER OF COMFORT:
 - However, Y will argue that the presumption of intention in commercial does not apply to letters of comfort (*CBA v TLI*). Rather, the question is whether the letter prima facie indicates a promise. Y will argue there is no such indication and therefore the onus will lie on X to establish that the letter was sufficiently promissory to be contractual.
 - **Kleinwort Benson:** 'it is our policy' was a mere statement of present fact, not a promise to future conduct.
 - **CBA v TLI:** Here, terms such as 'injection', 'sufficient capital' and 'as soon as legally possible' created ambiguity as 'it [was] far from clear that what [was] meant [was] the deposit of money to the bank account.'
 - EXAMPLES of promissory language = 'We undertake, we confirm that we will, we agree, we promise'
 - X will argue the present facts don't satisfy such a high threshold of ambiguity because of the wording _____.

- X will argue the letter is indicative of a serious acknowledgment by Y of its understanding of a commercial transaction between X and Z, and that X is relying on the letter to determine whether she'll do _____ for Z.
 - Y will argue X wasn't wholly reliant on Y's letter of comfort.
 - **Banque Brussels:** Here, ANI sought a 'strong' letter of comfort from ANI:
 - Y will argue their lack of careful correspondence with X in negotiating letters of comfort indicates it was solely intended as a moral commitment
 - X will argue along his honour, Roger J's lines, that the letter shouldn't be subject to a 'minute textual analysis' and construed holistically, should be enforced on the basis that it's a commercial transaction.
- IF PRELIMINARY AGREEMENT:
- Are there phrases like 'subject to contract', 'preparation of further agreement'?
 - Presumption that it is not binding (*Masters v Cameron*)
 - Y will argue they don't intend to make a concluded bargain until they execute a formal contract.
 - *Masters v Cameron* 3 SCENARIOS:
 - 1) The parties have reached finality with all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated more fully or precisely but not different in effect. ✓
 - **The parties are contractually bound to perform the terms of the preliminary agreement whether or not the formal agreement comes into existence.**
 - 2) The parties have completely agreed upon all terms of the bargain and have no intention to depart from or add to them, but have still made performance of one or more of the terms conditional upon execution of a formal document. ✓
 - **The parties are contractually bound to join in bringing the formal contract into existence and then to carry that formal contract into execution.**
 - 3) The Parties do not intend to make a concluded bargain, unless and until they execute a formal contract. ✗
 - **The terms of the agreement have no effect.**
 - In *Masters*, **the solicitors** also had **discretion** in including terms they deemed **appropriate** – preliminary agreement therefore not binding (category 3).
 - *Baulkham* 4th SCENARIO:
 - "One in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms." ✓
 - Ask: have the parties ascertained the essentials terms? Are additional terms to be inserted by mutual consent in the future?
 - In *Baulkham* the correspondence expressed legal language and a final mutual assent by both parties.
 - *Godecke v Kirwan*:
 - Preliminary agreement that said further agreement would contain terms as the vendor's solicitors may reasonably require was held legally binding BUT NOTE solicitors could only insert additional terms consistent with the original contract.