

LAWS4103

CONTRACT

- I. Identifying the Parties
- II. Express Terms
- III. Statutory Consumer Protection
- IV. Construction of Express Terms
- V. Implied Terms
- VI. Discharge of Contract
- VII. Frustration
- VIII. Claims and Remedies
- IX. Vitiating Factors

1. Identifying the Parties

CONSIDERATION AND PRIVITY

- The General Rules
 - The Consideration rule
 - Consideration must be provided by a promisee
 - Note: doesn't have to be to the promisor
 - The Privity rule
 - A contract is only enforceable by a party to the contract
- *Coulls v Bagot's Executors and Trustees*: Mr and Mrs Coulls agreed with a company for them to quarry and remove stone from the Coull's property in return for the payment of money including royalties. Both Mr and Mrs Coulls signed the contract. Only Mr Coull was named as providing consideration. The majority found that the quarry company was entitled and bound to pay it to Mr Coulls executor as the contract was between Mr Coulls and the company.
 - Mrs Coull was not a party (or joint promisee) to the contract therefore Mr Coulls' executor, not Mrs Coulls, was the proper person to receive the royalties.
 - If she was a party, she would be entitled to receive royalties, even though she did not provide consideration (*obiter*)
 - The minority found Mrs Coulls was a joint promisee

PRIVITY RULE

- *Tweedle v Atkinson*; *Coulls v Bagot's*; *Trident v McNiece*; contract only enforceable by person who is party to it
 - Only parties to contract are:
 - Bound by it (take on the burden);
 - Able to enforce it (take the benefit).
 - Windeyer J, minority judgment in *Coulls*, also concludes that the weight of authority points to two rules

EXCEPTIONS

- Statutory Exceptions
 - s.11(2); (3) *Property Law Act* (WA): third party beneficiary named in a contract may be able to enforce a promise conferring a benefit on them where they have not provided consideration for the promise.
 - *Westralian Farmers Co-operative*: A contract between a buyer and seller of cattle stated that the buyer was to pay the purchase price to the stock agent. Court held that Section 11(2) of the PLA applied so the stock agent was able to enforce the clause.

- s.48(1) *Insurance Contracts Act 1983*: third party named in contract as having cover extend to them has right to recover amount of loss from insurer.
- Common Law Exceptions
 - *Trident v McNiece Bros*: Blue Circle, as ‘the Assured’, was entitled to indemnity from Trident under an insurance policy. “Assured” was defined as Blue Circle, all subsidiaries and associates and related companies, contractors, subcontractors or suppliers. McNiece was a subcontractor for Blue Circle McNiece became liable to an employee, H, in damages (work injuries) McNiece sought indemnity against Trident under Blue Circle’s insurance contract. McNiece was not a party to the insurance contract. HCA found that there was common law exception to the privity rule for contracts of insurance. Therefore, McNiece could recover under the insurance contract.
 - Majority found that a third party beneficiary can enforce intended benefits under an insurance contract.
 - Minority said there was no exception, no recovery.
 - NOTE: *Insurance Contracts Act* amended after case arose.
- Non-application of the rule
 - Agency: person has power to enter contract on behalf of another, provided:
 - Principal consented to agent acting on his/her behalf
 - Agent was acting on behalf of principal in making the contract
 - *Picwoods*
 - Assignment: where party transfers his/her rights under the contract to another person;
 - Novation: transfer of rights and obligations;
 - ‘Himalaya clauses’: using agency and unilateral contracts to enable third parties to a contract to rely on exclusion clauses in the contract
 - *Scruttons Ltd v Midland Silicones Ltdn*: Tom sells ticket to go on a ship. Tom doesn’t have a ship. Tom asks Stephen to take the passengers on his ship. Stephen can be covered by properly constructed exclusion clause even though not privy to contract between Tom and the passengers.
 - *Port Jackson Stevedoring v Salmond & Spraggon The “New York Star”*
 - Estoppel
- Circumventing the Rule
 - Party is agent for 3rd party
 - Party holds rights trust for the beneficiary
 - Estoppel
 - Beneficiary may be entitled to assert estoppel against the promisor
 - Tort
 - Beneficiary may be entitled to claim damages in tort

- Misleading and deceptive conduct
- Joint promisee
- Assignment of contractual benefits

2. Express Terms

IDENTIFYING TERMS

- Terms (clauses, stipulations, provisions, covenants, clauses) can be express (stated, orally or in writing) or implied (part of contract though have not been stated)
- Pre-contractual statements can be classified as:
 - Puffery
 - Statements not intended to be taken seriously – sales talk
 - e.g. “best views in town”, “most succulent seafood in Perth”
 - Puffs will never form a term in the contract
 - Mere Representations
 - Statements which induce entry into the contract but are not guaranteed by the maker of the statement
 - i.e. more than a puff, but less than a contractual term
 - s.18 ACL: *is the statement merely a representation of a fact which the seller believes to be true, or is it a guarantee that the statement is true & therefore a term of the contract?*
 - If untrue → recession of the contract
 - Contract Terms
 - Guarantee or promise that the statement is true
 - Breach of a term → damages
 - *Oscar Chess Ltd v Williams*: the test is whether reasonable person would perceive it as a such → OBJECTIVE
 - Look to the parties conduct, words and behaviour (but not their thoughts)
- Factors to Distinguish between Representations and Terms:
 - (1) **TIMING**
 - Look at the time when the statement is made, how close to the formation of the contract?
 - A statement is likely to be a term if close in time
 - *Van den Esschert v Chappel*: just before signing asked if house had white ants was told was ant-free
 - *Dick Bentley*: made to induce a sale item
 - (2) **CONTENT OF THE STATEMENT**
 - *JJ Savage*: not promissory likely to be representation.
 - *Kleinwort Benson*: vague language could not be held to be a term
 - (3) **RELATIVE KNOWLEDGE AND EXPERTISE OF THE PARTIES**
 - Where made by a party with relative expertise it's likely to be a term.

- *Oscar Chess*: man with no personal/professional knowledge of cars and relying on (incorrect) date in registration book. Held that innocent misrepresentation not a term.
 - Cf *Smythe v Thomas*: where seller alone had the information
 - that was relied upon;
 - Cf *Dick Bentley*: where dealer gave incorrect information about mileage in order to induce a sale
- (4) EXISTANCE OF A WRITTEN MEMORANDUM
 - *Thorne v Thomas Borthwick*: where there is a WM which does not include the statement, unlikely to be a contract term
- Other (non-contractual) doctrines giving effect to representations
 - Collateral contract (e.g., HOL in *Heilbut Symons*)
 - One party makes promise, connected to, but independent, of main contract; and, As consideration for that promise, other party agrees to enter into main contract
 - Estoppel

CLASSIFICATION OF TERMS

- Conditions
 - A condition essential term that goes to the root of the contract
 - Breach of condition → right to terminate contract and damages
 - (1) WOULD PARTY HAVE CONTRACTED UNLESS THEY WERE ASSURED OF STRICT PERFORMANCE?
 - *Tramways v Luna Park (HCA)*: Tramways ‘guaranteed’ that advertising boards would be on the track at least eight hours a day during the season. HCA considered that, as matter construction contract required boards to be on view for min 8hrs/day.
 - (2) DOES IT GO TO THE ROOT OF THE CONTRACT?
 - *Bettini v Gye*: “... such that a failure to perform would render performance of rest of contract a thing different in substance to what had been stipulated”
 - (3) ARE THERE ANY OTHER RELEVANT FACTORS?
 - Look at the words used
 - *Shevill*: Parties may expressly designate as ‘condition’
 - HOL, *L Schuler AG*: Use of word ‘condition’/‘essential’ not determinative
 - *Gumland Property*: However, where clear parties intended to use term in strict legal sense court must give effect

- Where contract says breach gives rise to terminate
 - This doesn't make it a condition
 - i.e. for damages
 - *Idameneo*: right to terminate is enforceable
 - *Hong Kong Fir; DTR Nominees*: where there is no express designation is a matter of construction
 - *Tramways*: the language in which the obligation is described
 - e.g. "we guarantee" are strong words of obligation which emphasise the importance of the term to the parties
 - Likely character of the breach
 - if every breach of a term is likely to have serious consequence
 - i.e. depriving the party of substantially the whole benefit would likely make the term classified as a condition
 - if a term may be breached in a variety of ways – more likely to be an intermediate term
 - *DTR Nominess; Bunge Corp*: parties' probable intentions are to be determined objectively
 - Having regard to nature of contract and surrounding circumstances
 - *South Dowling*: consideration at time contract entered into, not at time of breach
 - *Dowling*: relevant decisions. If the term has been classified in a previous judicial decision, the classification is likely to be follow in subsequent cases
 - Others terms of the contract
 - e.g. if there are express rights to terminate the contract in respect to certain breaches, but not other breaches
 - Adequacy of damages as a remedy
 - If damages would not adequately compensate the breach or would be difficult to prove, the term is more likely a condition
- Intermediate Terms
 - Less important than an essential term but more important than a warranty
 - Capable of both serious and trivial breaches
 - Remedies depend the effect of the particular breach, not the classification of the term
 - Serious breach → termination and damages
 - Trivial breach → only damages (if appropriate)
 - *Hong Kong Fir Shipping (UK)*: Contract had a 'seaworthiness clause'. This clause could be breached in many ways (e.g. engine could blow up or nail from a plank on the deck could come out). Court found that it was an intermediate term because you don't know what type of term it is until there is a breach.