

# CLAW1001 - Exam Companion

## CONTRACTS

### I. Agreement - Offer and Acceptance

#### A. Parties

#### B. Mutuality – Clear statement of terms

**Mushroom Composters v IS & DE Robertson** (what would the average bystander think)

#### C. Supply of information

#### D. Invitation to treat

**Fisher v Bell** (switchblade)

#### E. Acceptance

##### 1. Unconditional, final and unqualified

##### 2. On reliance

**R v Clarke** (reward for murder info in ignorance)

#### F. Communication of acceptance (conditional – in way offeror indicates)

##### 1. NOT by silence unless unilaterally waived by offeror (*Carbolic*)

**Felthouse v Bindley** (horse)

#### G. Acceptance by performance (Unilateral contracts)

**Carlill v Carbolic Smoke Ball Co**

#### H. Termination by **revocation** before acceptance

**Goldsbrough Mort v Quinn**

##### 1. Option contracts (promise to keep open)

#### I. Privity of contract – only parties to contract can acquire rights or liabilities

#### J. Acceptance by email

**La Forrest v Ford**

### II. Condition precedents

**Perri v Coolangatta Investments** (precedent to obligation vs precedent to contract)

### III. Subject to contract

**Masters and Cameron**

### IV. Intention to create legal relations

#### A. Presumption of business and commercial context

**Ermogenous v Greek Orthodox Community**

### V. Consideration

# CLAW1001 - Lecture 6

## CHAPTER 6 – CONTRACTS III

### TERMS OF THE CONTRACT

Terms are either **express** or **implied**.

#### EXPRESS TERMS

- Agreed to by the parties – can be objectively determined (ie by a third party) and clearly exchanged
- When there is no vitiating element, no equity claim / statutory relief, anyone who signs a doc which is known to contain contractual terms is bound by those terms regardless of if they've read it
  - (from **Toll v Alphapharm**)

#### IMPLIED TERMS

Terms deemed to be in a contract by courts on the basis of common law or statute

- I. Previous consistent course of dealings
  - **Hillas & Co v Arcos** – contracted for supply of 22,000 standards over season 1930 and further 100,000 standards in 1931. Held: enforceable since the meaning could be implied from previous dealings
- II. Business efficacy (ability to produce a desired result)
  - **The Moorcock** – ship called the Moorcock was contracted to unload at a wharf. Tide went out and the ship was damaged but a rock in the seabed. HELD: contract contained **implied term** that the harbour was safe for shipping and that this was necessary to give business efficacy
    - Must be: (*BP Refinery v Hastings Shire Council*, restated in *Hospital Products v United States Surgical Corp*)
      - reasonable
      - necessary to give business efficacy
      - such that "it goes without saying"
      - capable of clear expression
      - not contradict any express terms

III. Custom / trade usage (*Goodman Fielder Consumer Foods v Cospak International*)

IV. Statute

### Implied term of good faith:

- May apply with ongoing **relational contracts** (eg franchising) as opposed to transactional contracts.
  - **Burger King v Hungry Jacks** – HJ was granted sole franchisee of BK in Australia. BK attempted to make amendments to the franchise agreement, one of which required them to open four new stores a year subject to discretionary approval of BK. BK was looking to force HJ to sell out to BK and so stopped granting approvals. HELD: BK's conduct prevented HJ in performing the contract and so BK had acted in breach of its duty of good faith

### TERM OR REPRESENTATION?

- If the party making the statement has more **knowledge** about the subject matter then it is a **term** (Promise that it is true)
- If the party has LESS knowledge the statement is a **representation** (Statement of belief)

**Dick Bentley Productions v Harold Smith Motors** – defendant told plaintiff a car had 20,000mil when in fact it had 100,000mil. Since the dealer has special knowledge and the buyer relied on this it was held that the statement was a **term**.

the opposite:

**Oscar Chess Ltd v Williams** – defendant sold car to dealer with log books indicating a 1948 model (Williams believed this to be true). These log books had been (unknown to both) fraudulently altered by a previous owner. Held: this was an innocent misrepresentation NOT a term as Williams had no specialist knowledge and Oscar could have more easily discovered the truth.

### INTERPRETATION & PAROL EVIDENCE RULE

- Oral / verbal evidence rule
- When a contract is reduced to writing, it is presumed that the writing contains all the terms (*Mercantile Bank of Sydney v Taylor*)
  - A written representation of the contract **overrides the oral version**
  - Generally evidence of oral negotiations will NOT be admitted
  - No term can be implied which is inconsistent with the express terms

### Exceptions:

- When there is **ambiguity** in the written contract
  - If necessary to avoid inconsistency, words may be omitted / corrected
  - Court may hear evidence of surrounding circumstances if context is uncertain
- Whether terms can be **implied** in to the contract
- Evidence of **common mistake** when reducing to writing
- Evidence of oral agreement to suspend written doc (**condition precedent**)
  - if an event doesn't happen the contract will not be effective
- Evidence that contract is not **"entire"** (most contracts do not include this)
  - Often the written doc can be supplemented with oral information (**partly written, partly oral**)
    - **Van den Esschert v Chappell** – immediately before signing a contract purchasing a house the purchaser (Chappell) asked whether it was infested by ants. HELD: the oral assurance constituted a term of the contract even though it was not evidenced in writing
  - Some contracts may include an **"entire agreement"** claim or clause or **"four corners"** clause which limits to the written terms
    - Excludes liability for representations / statements made prior to formation of contract
- Evidence of **prior collateral contract**
  - Oral statements may be given contractual effect as a **collateral oral warranty** – a separate collateral contract – must not be inconsistent with the express terms of the main contract
  - **Hoyts v Spencer** – Spencer was the lessee to Hoyts under a contract that said Spencer could terminate with 4 weeks notice. Hoyts argued that Spencer gave a collateral oral contract that he wouldn't use this clause unless forced to do so by the premises owner. HELD: this promise could not constitute a collateral oral contract as it was **inconsistent** with the express terms.
- Contracts may include a **anti-oral variation clause** – the agreement may only be amended in writing signed
  - Protects against effectiveness of accidental variations (e.g. casual conversations)
  - Courts will however consider if the oral variation was clearly intended to be binding
- Other contracts may contain a **variation provision** e.g. loan documents which permit increase in the interest rate

## ELEMENTS OF A TORT OF NEGLIGENCE

### I. Establish duty of care

- A. The defendant **owed** the plaintiff a **duty of care**

### II. Breach of duty of care

- A. Defendant's actions fell below the required **standard of care** (identifiable act or omission)

### III. Factual **Causation** – unbroken causal link

- A. Did the act/omission cause the damage (is it fair that the defendant be held responsible for the damage?)

### IV. **Scope** of Liability – **remoteness**

- A. Ensure the damage is not too remote and could have reasonably been foreseen by the tortfeasor

## CIVIL LIABILITY REFORMS

These elements **MUST** be established but they have been supplemented by **Civil Liability Reforms** (e.g. Civil Liability Act 2002 NSW) which:

- narrow the scope of potential liability in certain circumstances
- reducing (capping) damages which may be awarded in negl. personal injury actions

## NO-FAULT COMPENSATION

- **Negligence** is a system based on **fault** – the plaintiff must be able to prove that the tortfeasor breached a duty of care
- Australia doesn't have **no-fault accident schemes** (unlike New Zealand) which cover all personal injury through accident irrespective of fault
- Some do exist however – eg. statutory **worker's compensation** where the cost of injury is shifted from the worker to the employer (their insurer) regardless of fault

## ELEMENT I – DUTY OF CARE

- Filters the scope of liability for negligent conduct
- *"liability for negligence cannot arise at all until it is established that the many who has been negligent owed some duty to the person who seeks to make him liable"*a

To establish a duty of care use either a **PRECEDENT** or **SALIENT FEATURES**.

## I. PRECEDENT

Established categories of duty of care:

- Manufacturer to consumer

**Donoghue v Stevenson** OR **Australian Knitting Mills Ltd v Grant**

- Employer to employee
  - Example of a **non-delegable duty** – cannot be discharged by delegating responsibility for the safety of the plaintiff to another

**Czatyрко v Edith Cowan University**

- *"An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury"*
- reasonable care to avoid risk by devising method of op. to eliminate the risk or by the provision of adequate safeguards
- *"possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work"*

(Lec9 Vicarious Liability) – **Deatons Pty Ltd v Flew** AND **New South Wales v Lepore** AND **Sprod bnf v Public Relations Oriented Security Pty Ltd**

- School to pupil

**Sanchez-Sidiropoulos v Canavan:** 10yo attending school hurt during tag as a PE class warm-up when colliding with another child

- HELD: school owed a DoC but there was no breach of this duty (*"schools must strike a balance between meticulous supervision [...] and encouraging sturdy independence"*)

**New South Wales v Lepore** (Lec9 vicarious liability)

- Driver of vehicle to other road users

**March v E M H Stramare:** truck in middle of road (see Lec9 III. causation)

- Occupier of land to user of land / trespassers OR  
Owner of premises to persons invited / lawfully on

**Adeels Palace v Moubarak:** DoC owed by proprietor of licensed premises to protect patrons from tortious/criminal of a fellow patron. FACTS: NYE function attended by public on payment of admission price. Dispute occurred on dance floor; one person of the fight returned with a gun and shot Moubarak and Bou Najem (neighbour case).

# CLAW1001 - Lecture 11

CHAPTER 19-20 (110PGS)

AUSTRALIAN CONSUMER LAW (ACL)

## CH2 MISLEADING OR DECEPTIVE CONDUCT ACL s18

ACL s18

- 1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Applying s18 (8 steps total)

- I. A person
- II. In trade or commerce
- III. Engage in conduct
- IV. Misleading or deceptive OR likely to mislead or deceive
  - A. 4 steps here (proving that a reasonable person in class of persons targeted would be misled)

FINANCIAL SERVICES

ASIC Act 2001 12DA

- **Financial services** is defined in ASIC s12BAB
  - financial product advice, deal in financial product, make a market for fin. prod., registered scheme, custodial or depository service, financial market, clearing and settlement facility
- **Corporations Act 2001 s1041H** also legislates financial acts

COMPARATIVE ADVERTISING

Misleading advertising is not restricted to consumers / regulators:

- **Trade rival litigation** – Trader may seek injunctive relief to restrain rival trader from falsely describing attributes of their (rival) product
  - Credence by scientific tests and surveys: