

**CONTRACTS – EXAM NOTES**

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## SECTION 1: TERMS

### Incorporation

Terms can be incorporated in 3 ways:

1. Terms incorporated by signature: Signature or manifestation such as clicking I agree (*L'Estrange*) (*Toll*) (*Curtis*)
2. Terms incorporated by reasonable Notice (*Oceanic*) (*Thornton*)
3. Verbal statements during negotiations that are contractual promises (*JJ Savage*) (*Oscar Chess*)

**Threshold requirement: all terms of a contract must be promissory in nature.**

- NOTE: After arguing an incorporation defence, you should also argue **Unfair Contract Terms Legislation** (UCTL) and **Consumer Guarantees**.

1. Terms Incorporated by Signature
<p><u>RULE:</u></p> <ul style="list-style-type: none"> <li>• Signature is binding regardless of whether the document was read or understood – (<i>L'Estrange and Toll</i>) <ul style="list-style-type: none"> <li>○ The meaning of the terms is considered objectively - would a reasonable person in the position of the parties believe they were being bound by the terms. (<i>Toll</i>)</li> </ul> </li> </ul> <p>Signature considered <b>Objectively</b></p> <ul style="list-style-type: none"> <li>• The Test is what would a reasonable person in the position of the parties believe (<i>Toll</i>) <ul style="list-style-type: none"> <li>– This includes assessment of the text, surrounding circumstances and purpose of transaction (<i>Toll</i>)</li> </ul> </li> <li>• Subjective intentions of the parties are irrelevant (<i>Toll</i>)</li> <li>• Immaterial whether the party who signed did not trouble to discover the terms (<i>Oceanic</i>) <ul style="list-style-type: none"> <li>– <b>NOTE:</b> If terms are unreasonably stringent and onerous – <i>Thornton Parking</i> suggests that special notice is required for onerous terms ('Large red text with a Red Arrow pointing to it') however this is in tension with <i>Toll</i></li> </ul> </li> </ul> <p><u>Exceptions to signature Incorporation</u></p> <ul style="list-style-type: none"> <li>• Where contract is partly oral and partly written (<i>State Rail</i>)</li> <li>• Document is not intended or <b>made known to affect legal relations</b>. For example if titled RECEIPT or intended to be a record of previous agreement (<i>Toll</i>)</li> <li>• Where <b>misrepresentation</b> to the existence or extent of an exemption, party cannot rely on it (<i>Curtis</i>)</li> </ul>
<p><b>RELEVANT CASES</b></p> <ul style="list-style-type: none"> <li>○ <u>L'Estrange</u>: P was bound by the Sales Agreement for a cigarette vending machine even though she had not read the document.</li> <li>○ <u>Toll (FGCT)</u> – transport of temperature sensitive vaccine. Conditions exempted carrier to damage, and were brought to respondent's attention with document reading 'please sign conditions over</li> </ul>

## Unfair Contract Terms Legislation (UCTL)

View here: [http://www5.austlii.edu.au/au/legis/cth/consol\\_act/caca2010265/sch2.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/caca2010265/sch2.html)

NB: ensure that the terms you are arguing are unfair are actually incorporated – eg if reasonable notice was not given, then the terms are not incorporated: no need to argue they are unfair.

### RULE from Legislation:

23(1) A term will be void under the UCTL if:

- 1) The UCTL is not excluded; and
- 2) contract is either a **consumer** or **small business contract**; and
- 3) The contract is a **standard form contract**; and
- 4) The term meets the definition of **unfair**; and

### Does the UCTL apply? – Step 1 and 2

#### 1) UCTL is excluded in some contracts:

- S28: sea contract:
  - (a) a contract of marine salvage or towage; or
  - (b) a charter party of a ship; or
  - (c) a contract for the carriage of goods by ship.
  - \*\* Or **investment scheme** or constitutions of a company
- S26: Terms that define the **main subject matter** or **upfront price** are not covered by the UCTL
  - Subject matter – define the goods or service the consumer is purchasing. Considered narrowly by the courts
  - Upfront price - a price disclosed at or before the contract is entered into. Upfront price does not include anything that is dependent on the occurrence or non-occurrence of a particular event
- s26: UCTL does not apply to a term required or expressly permitted by a law of the Cth/State/Territory

#### 2) Is it a consumer Contract or Small Business Contract - S23(3)

- **Consumer Contract – s23(3)**
  - a contract for the supply of goods or services, or a sale or grant of an interest in land;
  - to an individual whose acquisition of the goods, services or interest is **wholly or predominantly for personal, domestic or household use or consumption**. This is a **subjective test of the actual use of the goods, not their ordinary or expected use**.
- **Small Business Contract? – s23(4)**
  - the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
  - at least one party employs fewer than 20 employees; and
  - The 'upfront price' payable under the contract is no more than \$300k or \$1 million over a 12mth period

## Section 2: Termination & Unenforceability

### Frustration

#### Mistake or Frustration?

- Mistake relates to facts existing at the time of formation = mistake
- Subsequent events change after formation = frustration

Types of Frustration: Examples	Case
Destruction of subject matter	Music Hall burned Down ( <i>Taylor</i> )
Disappearance of the basis/purpose of the contract	Coronation cancelled ( <i>Krell</i> ) Acquisition of land ( <i>Brisbane CC</i> )
Change in state of affairs that were essential to performance	Injunction issued ( <i>Codelfa</i> ) Rezoning never happening ( <i>Beaton</i> )
Performance is impossible or commercially unfeasible	Death of a party to an employment contract ( <i>Blackburn – cited in Codelfa</i> )
Illegality	Law changes and performance becomes illegal ( <i>Codelfa</i> )
Mere delay (does not frustrate)	Mere delay is not sufficient for frustration ( <i>Ringstad</i> )

Frustration
<p><u>Description:</u></p> <ul style="list-style-type: none"> <li>• A '<b>frustrating event</b>' must bring about a situation that is '<b>radically</b>' or '<b>fundamentally</b>' differing from that which was undertaken by the contract which makes obligation <b>incapable</b> of being performed - (<i>Davis Contractors, approved by HCA in Codelfa</i>)</li> </ul> <p><b>TEST:</b></p> <ul style="list-style-type: none"> <li>• Compare the original circumstances to the new situation produced by the frustrating events: Are the new circumstances <b>radically</b> or <b>fundamentally different</b> from that what was contemplated by the contract? (<i>Codelfa; Brisbane CC</i>) <ul style="list-style-type: none"> <li>○ It is legitimate to look at extrinsic evidence unless the language is so plain that doing so would vary terms of the contract (<i>Codelfa per Mason CJ</i>)</li> <li>○ <b>Hardship</b> or <b>inconvenience</b> or <b>material loss</b> is not enough to evoke frustration (<i>Brisbane CC</i>) Frustration is Not intended to protect your potential level of gain from the bargain (<i>Davis Contractos</i>)</li> <li>○ <b>Mere delay</b> is not sufficient (<i>Ringstad – delivery of nuts</i>) Rather, the contract must stipulate a completion time as a term in the contract, and that date becomes impossible (<i>Codelfa – completion of tunnel not possible due to injunction</i>).</li> </ul> </li> <li>• <b>EXAMPLE Brisbane CC:</b> Cth had acquired a portion of land to be developed under the contract. While it was still possible to complete the building, the land acquisition had "wholly destroyed GP's purpose in undertaking any obligations at all" [p517]</li> </ul>

## SECTION 3: ABUSE OF POWER

Doctrine	Test	Remarks
<b>Duress</b> ( <i>Barton</i> ) ( <i>Hawker</i> )	<ul style="list-style-type: none"> <li>- Illegitimate pressure/intimidation/force amounting to <b>compulsion of will</b></li> <li>- Victim submits against their will</li> </ul>	
<b>Undue Influence</b> ( <i>Johnson v Buttress</i> )	<ul style="list-style-type: none"> <li>- Subtle use of position of power to gain consent, yet the transaction not a free and voluntary act because <b>will is overborne</b></li> <li>- Focus is the quality of consent</li> </ul>	<ul style="list-style-type: none"> <li>- Presumption confers advantage on the plaintiff</li> </ul>
<b>Unconscionable dealing</b> ( <i>Amadio</i> ) ( <i>Bridgewater</i> ) ( <i>Louth</i> )( <i>Kakavas</i> )	<ul style="list-style-type: none"> <li>- Special disability or disadvantage</li> <li>- Knowledge by defendant</li> <li>- Unfair advantage taken</li> <li>- Impaired judgment about best interests</li> <li>- Focus is conduct of stronger party</li> </ul>	<ul style="list-style-type: none"> <li>- Overlap with Non Est Factum</li> <li>- More difficult to show than under influence, as there must be exploitation (evil act)</li> </ul>
<b>Statutory Unconscionability</b> ( <i>Berbatis</i> ) ( <i>Lux</i> )	<ul style="list-style-type: none"> <li>- Possibly extends to a wider range of unconscionable conduct</li> </ul>	<ul style="list-style-type: none"> <li>- Introduces procedural unfairness</li> <li>- Wide range of remedies</li> </ul>

### Duress

Duress
<p><b>Types of Duress</b></p> <ul style="list-style-type: none"> <li>- 1. Duress to person (<i>Barton v Armstrong</i>)</li> <li>- 2. Duress to goods (<i>Hawker Pacific v Helicopter Charter</i>)</li> <li>- 3. Economic duress (<i>Crescendo Management</i>)</li> </ul> <p>Can involve <b>intimidation or violence</b>. Concerns <b>coerced agreements</b> and Illegitimate pressure amounting to <b>compulsion of will</b> exerted to induce a party to enter/modify contract.</p> <ul style="list-style-type: none"> <li>• Duress = <b>voidable in equity</b>, at election of the party who was subject to the duress (<i>Hawker</i>) <ul style="list-style-type: none"> <li>○ Not bound to elect immediately, but cannot prejudice the other party through delay</li> <li>○ Words and conduct must be unequivocal (<i>Hawker</i>)</li> </ul> </li> <li>• Money paid under a contract procured by duress can be recovered in <b>restitution</b></li> </ul> <p><b>1. Duress to Person</b> (<i>Barton</i>)</p> <ul style="list-style-type: none"> <li>• Actual or threatened <b>violence</b> or unlawful imprisonment <ul style="list-style-type: none"> <li>○ Armstrong threatened to have Barton murdered (<i>Barton</i>)</li> <li>○ Includes actual or threatened duress exerted by or on behalf of the promise, applied to the person or property or a right (<i>Hawker per Priestley JA</i>)</li> </ul> </li> </ul>

## Illegality

### Illegality

If a contract involves illegal conduct or is against public policy its performance is excused

#### Express Prohibition

- Where statute expressly **prohibit the making** of a specific contract, the contract is **void**
  - Eg legislation prohibiting sale of goods or unregistered builders
- Where statute does not prohibit the making of a contract, but provide that the type of **contract is unenforceable**
  - Eg statute of Frauds renders contracts for land not in writing unenforceable

#### Public Policy Heads

- Common law recognises ‘public policy’ as an independent ground to refuse enforcement
- **Heads of public policy** – define contract types that are prima facie illegal
  - 1. Involving unlawful conduct
  - 2. Unreasonable restraint of trade

### UNLAWFUL CONDUCT *(Fitzgerald – water boring)*

- Two heads of unlawful conduct
  - **1) Construction:** does the act expressly or impliedly render parts of the contract illegal such that they are **void** and therefore unenforceable
  - **2) Public Policy:** even if not expressly or impliedly illegal and void, does **public policy** prevent a court from enforcing the contract *(Fitzgerald per Kirby)*

#### 1) Construction Consideration

- If legislation expressly provides for illegality then public policy is NOT RAISED: simply matter of statutory interpretation, and no reference to parties’ good faith or knowledge should be made.
  - If not, court should ask if illegality is implied, noting courts will be slow to imply
- If the statute details sanctions for breach, court will **require a good reason to add to those express provisions with additional civil penalty**, being the deprivation of contractual rights.
- If a contract can be **performed in 2 ways** – one illegal and one not – then it is not an illegal contract, though it may be unenforceable by the party who chose to perform it illegally *(Fitzgerald)*
  - Each party must do what is required to ensure benefit of performance *(Secured Income)*
  - Implied undertaking to to procure required licences as required by the Act

#### 2) Public Policy Consideration

- should the court decline to enforce because of association or permitting the carrying out of illegal activity is against public policy
- Public policy point is not “so inflexible and harsh as to produce...an offensive result” *(Fitzgerald per Kirby J)*
- Courts pay close attention to the effect of the decision toward statutory purpose *(Fitzgerald)*
  - In *Fitzgerald* (boring water holes) if they upheld a strict interpretation of the legislation the contract is void and the wrongdoer would benefit from not paying. This **frustrates the purpose of the act and provides incentive not to get a permit**. If the contract is