LAW171 – Contracts I – Tri 1, 2015

Agreement (Week# 1)

Name and case reference: *Gibson v Manchester City Council* [1979] 1 WLR 294 House of Lords – Appeal from the Court of Appeal

Court: House of Lords

Facts: Gibson (offeree) – Council (Offeror) - P was a council tenant and received a letter from D inviting an application to but the council house - D's letter stated: '...*The corporation may be prepared to sell the house to you at the purchase price of £2,725...If you would like to make a formal application to buy your Council house, please complete the enclosed application form...*'- P completed the application - D was a newly elected council and refused to accept P's application - P sued for breach of contract

Legal principle: Did D make an offer or an ITT?

The court's decision (application of the legal principle to the facts): The Court held that D's letter was not a contractual offer, which P could accept - formal application by P was an offer, that D did not accept - it was an ITT - Lord Diplock: *'The words 'may be prepared to sell' are fatal ... [D's letter is] setting out the financial terms on which it may be the council will be prepared to consider a sale and purchase in due course...*

Name and case reference: *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 Court of Appeal - Appeal from Hawkins J

Court: Court of Appeal - QB

Facts: D's advertisement stated: £100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball... £1000 is deposited with the Alliance Bank, showing our sincerity in the matter... - P's claim was refused and D argued that the advertisement: was mere puff, had not been addressed to specific persons and that the P had not communicated notice of her acceptance

Legal principle: Was D's advertisement an offer or ITT?

The court's decision (application of the legal principle to the facts): advertisement was not mere puff as D had explicitly stated money had been set aside to make such payments - a reasonable person reading the advertisement would take it to be a serious offer which amounted to a binding obligation - although an offer must usually be addressed to specific person or class of persons, the advertisement was being made to anyone who met the criteria set out and this was sufficient - the wording of the advertisement meant P did not have to communicate acceptance, as clearly D did not expect every customer to contact them on purchasing the item, rather only those who used the product as directed and then caught influenza - case established that advertisements can constitute an offer to the public at large and can be worded to waive the need to communicate acceptance prior to a claim

Background and context: Leading case in negligence and also gave rise to the 'neighbour principle'.

Name and case reference: *Pharmaceutical Society of Great Britan v Boots Cash Chemists (Southern) ltd* [1953] 1 QB 401 Court of Appeal – Appeal from Lord Goddard CJ

Facts: regulations required a registered pharmacist to supervise sale of certain drugs - customers select items from shelves and take to specific pay point to purchase - D had suitably qualified persons at the pay point in stores

Legal principle: When was the contract of sale concluded?

The court's decision (application of the legal principle to the facts): It was held that a contract is not concluded until the same at pay point - D not committing an offence

Name and case reference: *Goldsborough Mort & Co Ltd v Quinn* (1910) 10 CLR 674 HCA – Appeal from the NSWSC

Court: HCA

Facts: D gave P an option with regard to the purchase and lease of 2590 acres of land. The option was to last for one week. Before the expiry of that time, D repudiated the option, saying it had resulted from a mistake. P accepted the offer within the week. P sought specific performance of the sale. D claimed that the contract for sale was not complete and hence damages only were payable.

Legal principle: revocation of an offer

The court's decision (application of the legal principle to the facts): A mere promise to leave an offer open for a period of time is not enforceable - the promise without consideration is *nudum pactum.* But if there is consideration for the promise, it becomes binding. It is often said that "*an option given for value is not revocable*". The true principle is that an option is an offer to sell upon condition - a conditional contract. If the promise were only not to withdraw the offer ie an irrevocable offer, then a breach could be compensated for in damages [thus implying that there could be no specific performance of the sale].

HELD O'Connor J

The undertaking may be viewed as an agreement to sell subject to a condition subsequent - the acceptance by the other in the time provided for. Withdrawal of the undertaking is a breach - the remedy for which is damages or specific performance. Alternatively it may be viewed as an option for value, in which case the correct approach is to ignore a purported withdrawal before acceptance and treat it as still open for acceptance. From either view, there is nothing to prevent the party from obtaining specific performance of the sale.

HELD Isaacs J

He viewed the situation in terms of two contracts, the first of which requires the vendor to keep open the offer of the second contract to sell the land. The defendant is not entitled to breach the first contract merely by offering damages. The option is irrevocable and an attempt to withdraw it

will be ignored. During the period of the option an injunction could be obtained preventing the sale to another. An acceptance turns the position of optionee to that of vendee. That has been done here, so that specific performance of the original agreement is not only inappropriate but also unnecessary and impossible.

Name and case reference: *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* (1998) 81 FCR 475 Federal Court of Australia – Appeal from Wilcox J

Facts: Mobil represented to dealers that any dealer who performed at a set level for six years would be given a franchise for a further nine years at no cost. Mobil subsequently discontinued the scheme and a number of dealers alleged (amongst other things) breach of contract.

Legal principle: When can a unilateral contract be revoked?

The court's decision (application of the legal principle to the facts): In a unilateral agreement the act of acceptance is also the consideration and act of performance. In this case Mobil's revocation of its scheme made it impossible for the dealers to complete the act of acceptance. The trial judge held that once an offer was made, requiring performance as the act of acceptance, the offeror could not revoke the offer once the offeree has embarked upon acceptance. The Full Court disagreed. Although in some cases there may be an 'implied ancillary unilateral contract' in which the 'offeror promises not to revoke once the offeree' commences performance, that is not the same as saying that the original offer cannot be revoked - and there is no 'universal proposition that an offeror is not at liberty to revoke the offer once the offeree 'commences' or 'embarks upon' performance of the sought act of acceptance …'

Name and case reference: *Felthouse v Bindley* (1862) 11 CB (NS) 869; 142 ER 1037 Court of Common Pleas – Rule nisi for nonsuit

Facts: Felthouse negotiated to purchase a horse from his nephew - there was a mix up with the price, as the uncle offered less than the nephew desired - the uncle gave a definite offer to the nephew in Jan, however no response was given, and no actions were performed as the horse remained in the possession of the nephew - Felhouse informed his nephew that "If I hear no more about him, I consider the horse mine at £30 and 15s." - In Feb the nephew sold all of his farm stock in an auction, and the horse, despite the nephew's instructions that it be reserved, was sold. Felthouse sued the auctioneer, Bindley, in conversion to recover the horse - Felthouse was successful at trial, receiving £33, which Bindley appealed.

Legal principle: Communication of acceptance – silence and acceptance inferred from conduct – silence cannot be a form of acceptance

The court's decision (application of the legal principle to the facts): appeal allowed - The court ruled that Felthouse did not have ownership of the horse as there was no acceptance of the contract. Acceptance must be communicated clearly and cannot be imposed due to silence of one of the parties. The uncle had no right to impose a sale through silence whereby the contract would only fail by repudiation. Though the nephew expressed interest in completing the sale there was no communication of that intention.

Name and case reference: *Brinkibon Ltd v Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 House of Lords – Appeal from the court of Appeal

Facts: Brinkibon was a London company that bought steel from Stahag, a seller based in Austria. Brinkibon sent their acceptance to a Stahag offer by Telex to Vienna. Brinkibon later wanted to issue a writ against Stahag and applied to serve an out of jurisdiction party. They would only be able to do so if the contract had been formed in England.

Legal principle: The question at issue was where the contract was formed.

The court's decision (application of the legal principle to the facts): The Judges decided that the contract was formed in Vienna. They accepted the principle in *Entores v Miles Far East Co* where in the case of instantaneous communication, which included telex, the formation generally occurs in the place where the acceptance is received.

Lord Wilberforce, however, did not see the rule as applying in all circumstances:

Since 1955 the use of Telex communication has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or on the assumption that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variants may occur. No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgement where the risks should lie.

Background and context: This is a leading decision of the House of Lords on the formation of a contract using telecommunication. The Lords largely accepted the earlier leading decision of *Entores v Miles Far East Co.* [1955] 2 QB 327 on acceptance via telex.

Consideration (Week # 2)

Name and case reference: *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424; Privy Council (1955) 93 CLR 546 HCA – Action

Court: HCA

Facts: In June 1946 the Commonwealth Government announced that it would pay a subsidy to manufacturers of wool who purchased and used it for local manufacture after 30 June 1946. The Plaintiff purchased and used wool for local manufacture between 1946-48 and received some payments. The Government subsequently stopped its subsidy scheme and the Plaintiff sued the Government for subsidies it claimed it was due.

(1) There was a contract between it and the Government under which Commonwealth promised to pay subsidies if wool was bought for domestic consumption/manufacture.

(2) The plaintiff made purchases of wool in pursuance of the agreement.

The court's decision (application of the legal principle to the facts): There was no contract. The statement made by the Commonwealth was not offered as consideration for the plaintiff buying the wool. The Court stated that in cases such as this:

'… it is necessary, … that it should be made to appear that the statement or announcement which is relied on as a promise [here the subsidy statement] was really offered as consideration for the doing of the act, and that the act [buying and using the wool as directed] was really done in consideration of a potential promise inherent in the statement or announcement.'

There must be a relationship of *quid pro quo* between the statement and the Act. Here there was no promise offered in consideration of doing an act.

Buying the wool was merely a condition precedent to entitlement to the subsidy. It was not intended as the consideration for a promise to pay the subsidy. In this respect the Court also noted that there was no offer or request or invitation to purchase wool or anything else suggesting that 'payment of subsidy and the purchase of wool were regarded as related in such a way that the one was a consideration for the other.'

The Court also concluded that there was no intention on the part of the government to create legal relations; it was instead a government scheme to promote industry. In this respect the Court noted that 'It is of the essence of contract … that there is a voluntary assumption of a legally enforceable duty. … it is necessary that what is alleged to be an offer should have been intended to give rise, on the doing of the act, to an obligation. …'

Name and case reference: *Beaton v McDivitt* (1987) 13 NSWLR 162 Court of Appeal of the Supreme Court of NSW – Appeal from Young J

Facts: McDivitt owned land, which he expected to be rezoned - He gave some of that land to Beaton where he could work and live (rent free), and promised to transfer it once rezoning took place - Beaton occupied the land (built a house and a road) for several years - Rezoning never actually took place and McDivitt ordered Beaton off the land.

The court's decision (application of the legal principle to the facts): Bargain requirement not satisfied - Beaton did not make a promise or perform any action which could be considered as his consideration in exchange for McDivitt's promise - Beaton's reliance on McDivitt's promise did not constitute consideration

Ratio:

- Acts performed in reliance on a promise will not constitute good consideration for that promise.
- A person who relies on a promise should seek a remedy in estoppel, not contract.

Name and case reference: *Roscorla v Thomas* (1842) 3 QB 234; 114 ER 496 Court of Queen's Bench – Rule Nisi for Arrest of Judgement

Facts: P purchased a horse from D. D then promised the horse was sound. The horse was in fact not sound and P sued for breach of contract.

Legal principle: Sufficiency of consideration – past consideration

The court's decision (application of the legal principle to the facts): There was no consideration for the promise that the horse was sound. The only consideration that had been alleged was the contract for the sale of the horse – this, however, had preceded the defendant's promise – it was not part of the bargain – not given in exchange for the promise. Consequently it was not good consideration.

Name and case reference: *Foakes v Beer* (1884) 9 App Cas 605.

Facts: Beer obtained a judgement against Foakes for a debt owed and costs in 1875. Over a year later the parties entered into an agreement to the effect that in consideration of Foakes paying Beer $500 in part satisfaction of the judgement debt and on condition that the balance be paid in instalments, Beer would not take proceedings on the judgement. In 1882 Beer took proceedings to enforce the judgement so as to recover interest on the judgement debt. It was established that the whole debt had now been paid off.

Legal principle: Was Beer prevented by the agreement from enforcing the judgement?

The court's decision (application of the legal principle to the facts): (1) The agreement could only be enforced if there was consideration.

(2) The only consideration expressed was the payment of $500 – which was part of a larger debt already due. The payment of instalments could not be consideration unless payment of the $500 was consideration

(3) The doctrine of Pinnels case is that payment of a lesser sum on the day cannot be satisfaction for the whole sum. *i.e. payment of a lesser sum on the day cannot be good consideration for a promise by the creditor not to claim the rest of the money due*.

This rule is still the law and therefore there was no consideration provided here. As a result Beer could recover the interest

Background and context: Part payment of a debt on or after the date the debt is due is not good

consideration for the creditors promise not to claim the balance.

This case was affirmed through *Pinnel's* case

Name and case reference: *Williams v Roffey Bros and Nicholls (Contractors) Ltd* (1990) 1 All ER 512.

Facts: P contracted to perform carpentry work for D. When it became apparent he could not complete on time, D promised to pay P extra money to ensure it was completed on time. D would incur liability to a third party if the work was not completed on time. Was D liable to pay the extra amount?

The court's decision (application of the legal principle to the facts): D was liable. Per Glidewell LJ:

If: (1) A enters into a contract with B for the supply of goods or services in return for payment by B; and (2) Prior to completion B has reason to doubt whether A will complete; and (3) B then promise A additional payment in return for B promising to perform on time; and (4) As a result of this promise B obtains a benefit or obviates a disbenefit [eg, liability to third party]; and (5) B's promise is not given as a result of A's economic duress or fraud

Then: (6) The benefit to B (or obviation of disbenefit) is capable of being good consideration for B's promise.

Name and case reference: *Musumeci v Windell Pty Ltd* (1994) 34 NSWLR 723.

Facts: The Musumeci's leased a shop in a shopping centre run by Winadell. Winadell subsequently leased another shop in the centre to a competing business. Musumeci's asked for a rent reduction to compensate for this and Winadell agreed. When a dispute later arose Winadell sought to terminate the lease and Musumeci sought damages for breach, relying in part on Winadell's promise to charge a reduced rent.

The court's decision (application of the legal principle to the facts): Noted parties relied on the decision in *Williams v Roffey Bros*(he noted that unless the Musumeci's could rely on this exception, the *Stilk v Myrick* decision would apply and prevent the establishment of 'consideration' here – although he also notes the similarity of that case with *Roffey* – in that it might have been argued that not deserting obviated a disbenefit!)*;* here it was argued that Winadell obviated a disbenefit by reducing rent, even though not obliged to do so.

Santow J then considered whether *Williams v Roffey* should be followed in Australia. He noted there are three reasons why a contract to perform existing obligations should not be enforced:

(1) To protect the promisor from extortion (threatening breach to extract promise)

Santow J considered duress was sufficient protection (combined with fraud, undue influence and unconscionable conduct) against this sort of extortion

(2) Because the promisee suffers no *legal* detriment in performing what was already due and promisor receives no *legal* benefit in receiving what was already due

Here Santow J considered that the fact that a concession is given to P without extortion supports an inference that *real and practical* consideration has been provided for that concession.

(3) Because a 'benefit which is merely the hoped-for end result of the performance cannot constitute consideration.

Santow J did not accept that – as it would be an argument against consideration in any form.

Santow J then indicated that he would add an element to Glidewell's criteria in *Roffey Bros*. The fourth element should make it a requirement that as a result of giving this promise, A suffers a practical detriment (or obviates a benefit) '*provided that A is thereby foregoing the opportunity of not performing the original contract in circumstances where such non performance, taking into account B's likely remedy against A (and allowing for any defences or cross-claims) is being capable of being viewed by A as worth more to A than performing that contract, in the absence of B's promised payment or concession to A.*' With those clarifications, *Williams v Roffey* 'should be followed in allowing a practical benefit or detriment to suffice as consideration'.

In this case, applying *Roffey*, the practical benefit Winadell gained by promising lower rent was said to be the 'enhanced capacity of [the Musumeci's] to stay in occupation, able to carry out their future reduced lease obligations' notwithstanding the new competition. This enhanced the capacity of Winadell to keep a full shopping centre. Santow J concluded that there was a practical benefit; there was valid consideration for varying the lease.

Name and case reference: *Re Selectmove Ltd* [1993] EWCA Civ 8

Facts: Selectmove Ltd owed the Inland Revenue substantial sums in outstanding tax and national insurance. The managing director, Mr ffooks, met with Mr Polland, from the Inland Revenue and said he would pay future tax as it fell due and the arrears at £1000 a month. Mr Polland said he would have to check and would contact the managing director if it was unacceptable. Selectmove Ltd heard nothing till a £25,650 notice came in and a threat of a wind-up petition. Mr ffooks subsequently claimed that the Revenue had said he could repay less. The High Court held that even if that were found to be true, Mr Polland had not bound the Revenue, and there was no consideration for the varied agreement anyway.

The court's decision (application of the legal principle to the facts): Peter Gibson LJ (Stuart-Smith and Balcombe LJJ concurring) observed that *Foakes v Beer* precluded any variation of the agreement to repay the debt without good consideration, despite the recent decision in *Williams v Roffey Bros Ltd*. Peter Gibson LJ stated that 'it is clear… that a practical benefit of that nature is not good consideration in law'. As his Lordship put it, in forceful language,

> if the principle of *Williams v Roffey Bros Ltd* is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v Beer* without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing. In the absence of authority there would be much to be said for the enforceability of such a contract. But that was a matter expressly considered in *Foakes v Beer* yet held not to constitute good consideration in law. *Foakes v Beer* was not even referred

to in *Williams v Roffey Bros Ltd*, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of Williams's case to any circumstances governed by the principle of *Foakes v Beer*. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.

Name and case reference: *Wigan v Edwards* (1974) 1 ALR 497.

Facts: Edwards purchased a new house from Wigan. The contract did not contain any promise that the house was in a good condition etc. The house was defective in certain ways and E said that they would not finalise the contract unless these were attended to. As a result of this pressure, Wigan promised:

(a) to remedy minor defects set out within one week of finance being approved.
(b) to correct an major defects occurring within five years.

Wigan did none of these things. E sought to recover the cost of the work.

Legal principle: was there consideration for the promise made by Wigan?

The court's decision (application of the legal principle to the facts):
General rule: a promise to perform an existing contractual duty is not consideration.

But this is qualified - when the promise to do what the promisor is contractually bound to do is given by way of a benefit / compromise of a legal claim, the promisor having asserted that he is not obliged to perform his side of the pre existing contract or that he has a cause of action under it.

But the claim must be honestly made. This prevents unfair advantage being obtained by unscrupulous threats to withhold performance under a contract.

However, it does not matter that the court considers that the promisor's claim would have failed had it been litigated.

Here Edwards honestly belied that they did not have to complete the contract and although they may have been wrong regarding this, their claim cannot be described as frivolous or vexatious.

Background and context: If one party has a bona fide belief (which is not frivolous) that he is excused from performing a pre existing contractual obligation, then performing or promising to perform this obligation will be good consideration for a new promise by the other party.

Intention to create legal relations (Week# 3)

This element operates on two presumptions concerning the intention to be bound. Whether they can be rebutted depends upon the facts and circumstances of a case. The nature of the case will determine which presumption should be applied.

Before knowing what these presumptions are, we should take into account what the court has to say about then in *Ermogenous v Greek Orthodox Community of SA*. It observed:

> Because the search for the intention to create contractual relations requires an *objective* assessment of the state of affairs between the parties (distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules....
>
> In this context of intention to create legal relations there is frequent reference to 'presumptions'. It is said that it may be presumed that there are some 'family arrangements' which are not intended to give rise to legal obligations and it was said in this case that it should not be presumed that there was an intention to create legal relations because it was a matter concerning the engagement of a minister of religion. For our part, we doubt the utility of using the language of presumptions in this context. At best, the use of that language does no more than invite attention to identifying the party who bears the onus of proof.

Two inferences can be drawn. First, the correct question to be asked is whether the parties *manifested* an intention to create legal relations, *not* whether the parties actually intended to create legal relations. Second, the court expressed concerned about presumptions and guidelines hardening into rigid principles of law.

Despite this concern, courts have continued to apply the presumptions, because they are a useful starting point in terms of discerning the intentions of the parties. So while several cases since *Ermogenous* have avoided the presumptions (*Jakobkeiwicz v Dickson Catering Pty Ltd* [2002] ACTSC107; *Seiwa Australia Pty Ltd v Beard* [2009] NSWCA 240), in others the presumptions have been applied (*Shortall v White* [2007] NSWCA 372).

So, the presumptions can be considered to be useful approach to the issue of intention to create legal relations. However, we should treat them with caution and should remember that they are simply a tool for ascertaining the intentions of the parties.

Presumptions (marital relationships)

What are the presumptions? With respect to contracts made within a family, social or domestic setting, the presumption is that the parties do not intend to be legally bound. But, the presumption is very weak and can be easily rebutted or displaced with the evidence that the parties were operating in a more serious, commercial type setting.

For cases involving agreements that are made in the commercial context, the presumption is that the parties intend to be legally bound, or met with legal consequences should they breach the

contract. This presumption can be rebutted, but very strong evidence is required to show that the parties did not intend to be legally bound in a commercial setting.

The issue of determining the intention to create legal relations has also arisen in cases involving contracts that cannot be placed into either of the two categories. We are going to analyse these cases later during the lecture. They involve government arrangements. An example of such a contract can be found in the *Australian Woollen Milles* case. In some cases, it is presumed that certain government arrangements do not give rise to an intention to be legally bound – although, of course the government can enter into normal contracts with the presumption that they are bound in the commercial sense.

Name and case reference: *Merritt v Merritt* [1970] a All ER 760

Facts: before the parties divorce but when they were separated, the husband and wife agreed that once they are divorced, the wife will continue to pay the mortgage on the formal matrimonial home – and once the mortgage was finished, the husband will transfer his share of the house to her – he also signed the document – wife paid the mortgage but husband refused to transfer the house to her – court rebutted the presumption

Legal principle: Was there no intention to create legal relations?

The court's decision (application of the legal principle to the facts): held that the parties possessed pre-requisite legal intentions when agreeing on the conditions of the house – if you are not in love anymore and your marriage has broken down, then there is no room for the presumption and you will be taking them to court – presumption did not apply

Background and context: parties were in the process of separating and they hated each other at the time of the agreement

Name and case reference: *Belfour v Belfour*

Facts: husband promised his wife an allowance of 30 pounds per month as maintenance as he was going overseas (Sri Lanka) to work – and the allowance had to be paid to her until the time when she joined him in Ski Lanka – She decided to remain in England as doc advised her against travel due to some health reasons – Mr and Mrs Belfour never ended up being reunited and soon separated the divorced – she sued for maintenance and the issue was raised as to whether the parties were in the agreement and whether there were legal consequences

Legal principle: Was there no intention to create legal relations?

The court's decision (application of the legal principle to the facts): court held that the agreement was made when they were living together on the term that he will keep paying her until they are reunited – this was in a family and domestic setting and in a setting where the parties did not intend to be legally bound – as they were still in love with each other, so there was no intention to create legal relations – even though Mrs. Belfour then sued him but as at the time of agreement the intention to create legal relations was not present, thus there is a presumption

Background and context: presumption will apply when the spouses are living together at the time they make an agreement

NOTE: all the other elements were present – offer, acceptance = agreement – consideration – BUT there was no intention to create legal relations

The time of the agreement is also important – parties are coming to an agreement but they are free from liability at the time

Name and case reference: *Cohen v Cohen*

Facts: Similar points to *Belfour* – husband promised to pay his wife dress allowance – 100 pounds per year to be paid in quarterly instalment (25 pounds every 3 months to buy new dresses) – husband stopped paying and wife left him soon after that

Legal principle: Presumption present?

The court's decision (application of the legal principle to the facts): Lack of intention to create legal intentions at the time of the agreement - parties had no intention to sue each other at the time that the agreement was made

Presumptions (family & other social settings)

For agreements entered in a family, social and domestic setting, traditionally, the presumption is that the parties do not intend to be legally bound. The basis of the presumption is that although parties might intend to have an agreement with one another, but they may not intend to create legal relations with one another. That is, at the time of making an agreement, they may not intend to sue the other party if the agreement was breached. This becomes clearer form Windeyer J's observation in *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353 at 367. He observed:

> Social and domestic arrangements are outside the realms of contract law simply because the parties to them must be regarded as intending that the mutual promises whether kept or broken are not to land them in court

For example, what if your parents or spouse promise to pay you $100 if you achieve a High Distinction in contract law? Is it reasonable to expect that such a transaction is one which is intended to be met with legal consequences?

Having said that this presumption is very weak and parties can rebut it by bringing evidence to the contrary that there was in fact an intention to be legally bound, or to create legal relations. A common example of such a situation is where husband and wife are getting divorced. Courts have been more willing to find an intention to create legal relations where parties are separated or about to separate. The situation existed in *Merritt v Merritt* [1970] 2 All ER 760.

In this case after the parties to the marriage separated, but before their divorce, they agreed that the wife would continue to pay off the mortgage over the former matrimonial home, and when that had been fully paid, the husband would transfer his interest in the house to her. The husband also

signed a document to that effect. The wife paid off the mortgage but the husband refused to transfer his interest to her.

In finding for the wife, the court held that the parties possessed the requisite legal intention when agreeing on the arrangements for the house. WidgeryLJ explained:

> Once that natural love and affection has gone, as it normally has when the marriage has broken up, there is no room at all for the application of such a presumption

Name and case reference: *Jones v Padavattan*

Facts: Mother (Mrs. Jones) was a resident in Tronadad and invited her daughter (Padavattan) who lived and worked in US to move to England to study in the Bar to then become a lawyer in Tronadad – Jones promised to pay her daughter 200 pounds per month for maintenance – She agreed and left a well paid job in US and moved to England – subsequently they changed the agreement and she agreed to live in the house rent free and she will keep any income that she earns – dispute arose and mother brought an action against the daughter to evict her – she argued that they had a contractual agreement as she has not yet finished her studies

The court's decision (application of the legal principle to the facts): It was suggested that while it is complicated in such cases, being evicted from the house – but it was an agreement made in good faith and not one that attracted any legal implications – Atkinson J, suggested that the agreement lacked contractual and written agreement – also daughter's emotional response to being sued "a normal mother will not sue her daughter" – Atkinson J said that this comment put weight on the fact that at the time of contract, there was no intention for them to enter in legal relations

Background and context: This case shows that when parties do not have the intention at the beginning of the agreement, then it is considered family, social and domestic and will not be subject to legal relations

What is in the mind of the parties at the time they enter the contract?

Non-marital rebuttal of presumption

Name and case reference: *Todd v Nichol*

Facts: Mrs. Nichol (defendant) and her sister-in-law and niece (Todds) were the plaintiffs – Todds live in Scotland originally and Mrs. Nichol wrote to them and said to come and live in Australia with them – she also promised to Todds that she will change her will so that her house be theirs after she dies – she also visited her solicitor and added the clause into her will – and advised them by letter that she has done that – they accepted the offer – started to sell their furniture and gave up their house in Scotland – niece also quit her job and they paid for the boat to come to Australia – living arrangements were not working out – their relationship started getting bad – Todds started to enforce the contract for them to stay in the house – Nichol said no, as their relationship should be one of trust not legal obligation – she didn't have to keep them in the house

Legal principle: Was there an intention to create legal relations?

The court's decision (application of the legal principle to the facts): It was held that yes, there was

an intention to create legal relations – it was also started that, at the time of the contract, it did not come to thoughts of any of the parties that legal sanctions be called in a plan which was proposed and followed – in the communication between the parties, there was no intention – the next step is to consider whether there is any material from which an inference must be drawn – circumstances that was taken into out were: expenses to come from Scotland to Australia, the lack of provision for the Todds to leave the home before death or marriage, the sale of the plaintiff's belongings, the testamentary adjacent to give security to the plaintiffs – all of these are facts that rebut the presumptions and are facts that create an intention to be legally bound

'weight that must be given to an interpretation that does not place the future of the plaintiffs so largely subject to what would be no more than the whim of the defendant in so material an aspect'

BUT... the plaintiffs were in breach of an implied term – the implied term was that they would behave in a decent manner and that Mrs. Nichol was able to terminate the contract on that basis – the reason that the agreement was changed was because the niece did not behave in a good manner

Background and context: Similar case: *Wakeling v Ripley* – whether decision was in favour of the plaintiffs – here the defendant was an old and wealthy man and he invited his sister and brother-in-law to come and live with him in Australia until his death and in return he will provide them with an income for life and to leave them his property upon his death – the brother-in-law agreed and gave up his secured job in England and came to Australia – dispute arose between the siblings and the court held that the agreement was something more than a mere family or social agreement – the court took into account the fact that the brother-in-law gave up his job to move to Australia which would have left the couple in bad financial situation had the agreement not be legally enforceable

The more serious the consequences are, the more chances that the contract exists...

Commercial

One way in which commercial intention may be rebutted is where there is a specific clause in the contract that says something along the lines of 'this is not intended as a contract'. These are known as 'gentleman's' clauses or honour clauses. In the prescribed text, this topic is discussed under the heading non-binding commercial agreements. In *Rose and Frank Co v J R Crompton & Bros Ltd*, this was the precise issue considered. In this case, the parties entered into a right of sale agreement, which contained the following 'Honourable Pledge' clause:

> This agreement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either in the United States or England, but it is only a definite expression and record of the purpose and intention of the 3 parties concerned to which they each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the 3 parties with mutual loyalty and friendly co-operation.

When one of the parties broke the right of sale agreement, another sought to enforce the contract. However, the court held that the honour clause was effective, and that the presumption of intention was rebutted. In other words, the parties had not entered into a contract.

Name and case reference: *Rose and Frank Co v J R Crompton & Bros Ltd*

Facts: Crompton were manufacturers of tissue paper and they granted exclusive rights to sell their products in certain areas to Rose and Frank – however, the agreement had the following clause

" This agreement is not entered into ... as a formal or legal agreement ... it will be carried through by each of the three parties with mutual loyalty and friendly co-operation"

Disputes arose between the parties and Crompton ceased the contract without any notice and Rose and Frank sued

Legal principle: intention to be legally binding? Presumption?

The court's decision (application of the legal principle to the facts): the court held that the honour clause was present and the presumption was rebutted – and there was no contract - the parties did not enter into a contract or legal intention

Name and case reference: *Roufos v Brewster*

Facts: Brewsters run a motel in Kopapedi where it gets very hot – their son-in-law and daughter Roufos ran the general store – Mrs. Brewster agreed with her daughter Mrs. Roufos that she would allow some stock to be delivered to the motel on the truck that was delivery goods to the general store – they reached an agreement but some of the stock was damaged in transit and Brewsters sued Roufos for damages

Legal principle: Whether or not this was a family arrangement or a commercial one?

The court's decision (application of the legal principle to the facts): Brewsters were unsuccessful in their action – but the court held that the parties did have a binding contract – the arrangement was commercial and not family or social and an agreement had been binding between the parties and the legal intention was present

Bray CJ, the whole setting of the arrangement is commercial rather than social or domestic.

Background and context: Authority in relation to a nature of a contract

Name and case reference: *The Administration of the Territory of Papua New Guinea v Leahy*

Facts: There was a tick eradication scheme which was established by the govt – this scheme involved govt offices conducting necessary work to eradicate tick on landholders – the landholder was responsible for their cattle to the point where the govt can apply the tick eradication – one landholder argued that the govt authorities breached the agreement and did not spray his cattle properly for tick eradication

Legal principle: The govt can enter into contracts, but what of administrative schemes arising from policy, e.g. welfare?

The court's decision (application of the legal principle to the facts): however, it was found that the tick eradication was not a contract – no contractual agreement – the scheme was more of a social service and it was administrative

Name and case reference: *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353.

Facts: Agreement between the Cth and Placer, the Plaintiff, to form a timer company in PNG - Clause 14 said that Cth will pay a subsidy at their discretion to cover the excise duty charged to the timber company when importing to Australia

The court's decision (application of the legal principle to the facts):

Illusory promises

Majority opinion:

- The promise was illusory, as the Defendant had complete discretion to determine the amount to be paid.
- "…words showing that the Promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract

Dissenting judges:

- Defendant has an enforceable obligation to determine amount, and then pay it
- The discretion is only to the amount, reasonable sum intended, could be determined by the court.
- However, in this case, court cannot determine a reasonable sum
- Nevertheless, the Defendant has an obligation.

Legal Intention

Majority opinion:

- decided not to examine because of illusory promise.
- Dissenting opinion:
- Language was that of legal obligation of a commercial nature
- The Commonwealth approved the agreement and appropriated funds to meet its obligations
- Therefore, this agreement has legal basis and is to be distinguished from the unenforceability of a purely political arrangement.

Completeness & Certainty

1. Completeness: an agreement must contain all the essential terms. There are three main matters when considering completeness
    i. The essentiality of terms that are missing = without this term, the contract cannot exist, it cannot be generalised and the parties decide which term is essential. At a minimum, your contract needs to include the essential terms. For example, for a

land sale contract, the essential terms are parties, land and price. For a lease agreement, the essential terms are commencement date and rental

ii. Why any essential terms are missing (did the parties forget to include them, deliberately omit them? Etc) = generally it might be to create a contract later on and you don't want the agreement to be binding yet

iii. Whether the contract is wholly executory, partially executed or wholly executed? = an executory contract is a promised contract which will be performed in the future. Both parties provided a promise and none of them have fulfilled the promise yet. There still is an agreement and still consideration. Generally done in the future with the date set [slide#22 week 3]

2. Certainty: each term must be precise and clear enough that a court can attribute a meaning to it. Certainty is an issue when a term is so vague that it becomes difficult to find a meaning for it

There are two main components of the certainty requirement: Completeness and Certainty. Completeness refers to the concept that an agreement must identify the key or essential terms of the contract before it is enforceable. Certainty refers to the concept that terms must be precise and clear enough that courts can attribute meaning to them. McClure JA in *Australian Goldfield NL (in Liq) v North Australain Diamonds* observed:

> There are two limbs to the uncertainty doctrine. A contract (or a term thereof) is void for uncertainty if (1) all the essential and critical terms of the bargain have not been agreed upon or (2) the language used is so obscured and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention. Under the first limb, the contract is incomplete. Under the second limb, the court is unable to attribute a meaning to the language used by the parties. I refer to the latter as linguistic uncertainty. Both limbs apply only to essential terms.

Neither concept requires absolute compliance. In other words, no agreements can exhaustively deal with every potential issue that could arise in the myriad of facts situations that might evolve. These are concepts of degree – agreements may not be totally clear and complete, but are the complete and clear enough? Enough to be enforceable, that is.

This is an area where the discretion of courts has produced some inconsistent outcomes in the cases. Because the requirement itself is not wholly clear and objective, much will depend on the interpretation of the particular judge or judges, as can be seen in the cases.

Also, the courts are operating in the context of two competing principles, which are in tension. On the one hand, courts try to give effect to agreements entered into voluntarily, if that is possible. That means they should try to find certainty and completeness. On the other hand, contract theory relies for its legitimacy on the fact that the agreements which courts enforce are those entered into voluntarily by the parties, so that militates against the courts intervening and 'rewriting' agreements, or fashioning terms based on reasonableness. This tension is not easily resolved, and probably contributes to a sense that the case outcomes are difficult to reconcile.

Completeness

There are three main matters that are taken into account when looking at completeness:

1. The essentiality of terms that are missing
2. Why any essential terms are missing (did the parties forget to include them, deliberately omit them? etc)
3. Whether the contract is executor?

Essentiality of terms

An "essential term" means a term without which a contract cannot be enforced. Essential terms cannot be generalised. The parties decide what is important to them, not courts.

At a minimum, a contract must contain all the essential terms. Whether a term is essential depends on the nature and circumstances of the agreement. In contracts of a kind where there is a history of experience and a broad understanding of common practice, the essential terms have been fairly clear identified by the courts. For example, in contracts for the sale of land, the essential terms are the parties, the land and the price. Other matters, if omitted, can be implied because of the frequency of occurrence of contracts for the sale of land. Courts are very familiar with the usual practices that typify such agreements. Where the contract is of an unfamiliar kind, it will more difficult to assess whether an essential term has been omitted.

Familiar Contracts - examples

- Sale of land
- Lease
- Sale of goods

Contracts for sale of land have been mentioned as an example of a kind of contract where there is widespread agreement about which terms are essential. The agreement must at a minimum identify the land to be sold, the parties to the agreement, and the price of the sale. However, if a specific price is not agreed, the contract will still be enforceable if it contains some mechanism or formula by which a price can be arrived at.

For a lease, essential terms are the commencement date and the rental payable.

For a sale of goods, price might not be essential, because under the Sale of Goods Act, a reasonable price will be inferred if no actual price is agreed. There has been some debate about whether this only applies to 'executed contracts', which I will examine in a moment.

Why are the terms omitted?

When looking at the completeness, the second main issue that courts determine is Why any essential terms are missing (did the parties forget to include them, deliberately omit them? etc). The issue can arise in different situations.

Agreements to Agree

Sometimes the parties omit essential terms inadvertently. Parties may also deliberately omit certain terms that are expressed to be agreed at a later date. An agreement with essential terms to be agreed in the future will not be enforceable. Having looked at *Masters v Cameron*, you can see that it is not unusually for parties to reach agreement on some issues but this will not be binding if it is expressed to be 'subject to contract.'

Executed contracts

The issue may arise is situations involving executory contracts. You may now be familiar with the meaning of an 'executory' contract. An *executory* contract is an exchange of promises, which are to be performed in the future. In other words, both parties have provided a promise, but neither has performed that promise as yet. An example would be a contract for the sale of land. At the time the contract is made, one party still has to transfer the land and the other party has to pay the price. This is to be done at a date in the future which is already agreed on.

An *executed* contract is where one or both parties have performed their obligations. For example, if you hire a plumber, the usual course is that he or she does the work then sends out an account. When the work is completed, the plumber has performed his or her obligations – they have executed their part of the contract. Until you pay for the services, the contract is only partially executed. One party has performed; the other party has yet to perform.

Finally, once both parties have fully performed their obligations, this is a wholly executed contract. Eg once you have paid the plumber's account, both parties have fulfilled their promise.

The courts are more likely to uphold an executed agreement than one which is executory.[1] Probably this is for two reasons. First, it is difficult to argue that an agreement is incomplete when it has already been performed. Second, the consequences of upsetting the agreement which is executed are likely to be more serious. The court would need to undo what had been done under the contract. Obviously, there are situations where that might be more difficult.

Certainty

As said above, certainty is an issue if a term (usually an essential term) is so vague or imprecise that it is difficult to discern a meaning for it. The casebook commentary puts the issue quite well:

> Uncertainty may exist because deficiencies in expression, semantic or conceptual difficulties prevent the court from understanding what the parties are trying to say. It may exist because, although what the parties said seems to be clear enough, the application of the language to persons or things is not intelligible, either because no facts exist which fit the contractual description or because more than one set of facts exists, all of which fit the description.

Examples that come up in the case extracts from the casebook are where the contract is expressed to be 'subject to finance' of the purchasers (*Meehan v Jones*) or where an option to lease is granted

'upon such terms as commonly govern such a lease' (*Whitlock v Brew*) or the purchase price for land is a particular amount plus 'the value of all additions and improvements to the said property since date of purchase by the granter … [and minus] the value of all deficiencies in chattel property and a reasonable sum to cover depreciation…' (*Hall v Busst*). In *Biotechnology Australia Pty Ltd v Pace*, the uncertainty was caused by the lack of fit between the clear words of the contract and the actual existing facts. In that case, Mr Pace, as part of his employment offer, had been promised an annual salary plus 'the option to participate in the Company's senior staff equity sharing scheme.' The problem was that no such scheme existed at the time of the contract, and none was ever established during the period of employment, to the knowledge of both parties. The court held that the reference to the scheme did not give rise to an enforceable contractual obligation.

Examples of vague expressions which have been determined to be certain enough are promises to pay 'handsomely', 'a substantial sum', a 'substantial cut on all work done', a 'bonus', 'a fair and equitable price', 'supplier's costs' and 'current bank overdraft rates'. By contrast, the courts have struck down as too uncertain a promise to 'well reward' a housekeeper.

Reasonableness

A moderating principle which assists in deciding whether a term is too uncertain is the question of whether a 'reasonable' interpretation of the term is possible. So, for example, in a contract for the purchase of '22,000 standards of Russian softwood goods of fair specification' containing an option to purchase in the following year '100,000 standards', the House of Lords held that the standard of 'fair specification' also applied to the option. In adopting 'reasonableness' as a standard, the courts will consider business or industry practice as a guide. However, in cases such as *Whitlock v Brew*, where a term of the contract provided for a grant of lease 'on such reasonable terms as commonly govern such a lease' the court found that there was no evidence that any standard of reasonable terms existed and therefore no terms could be identified as standard. Also, as noted above, such a term does not contain all the essential terms of such a lease, i.e. commencement date, and rental. So that agreement was void for both incompleteness and uncertainty. In *Hall v Busst*, a term provided for re-purchase of land at a specific price less "a reasonable sum to cover depreciation of all buildings and other property on the land'. It failed for uncertainty because there is no agreed standard for measuring depreciation. Or rather, there are several standards, all of which are reasonable. The court held that the option to purchase was void because the price was not stated with sufficient certainty.

Illusory promise

An illusory promise is where the promisor has an unfettered discretion in relation to performance. In *Meehan v Jones*, a term of the contract was contingent on the purchasers receiving approval for finance 'on satisfactory terms and conditions.' This is an example of uncertainty crossing over with what is referred to as 'illusory' promises. In *Biotechnology v Pace*, Kirby J discusses these concepts, and whether they are distinct or simply different approaches to the same problem

> Some commentators urge that it is essential to maintain a 'sharp distinction' between terms which are vague, uncertain or ambiguous and those which are illusory...Other suggest that