

## W6 Contracts III

### Learning objectives

1. Recap: Formation of contracts
2. Contents of a contract – express terms & implied terms
3. Exemption clauses
4. Operation of contract – assignment, privity, etc
5. Classification of terms
6. Termination
7. Remedies

### Recap – Contract

- Contract – definition, requirements, types and theory
  - Formation of contract – agreement (offer & acceptance), intention to create legal relation, consideration, estoppel, capacity, legality, formalities, consent (mistake, misrepresentation, duress, undue influence, unconscionability)
1. Offer
    - Statement of terms on which offeror prepared to be bound without further negotiation
    - Distinguish from invitation to treat, supply of information
    - Unilateral offer VS Bilateral offer
    - Revocation rules!
    - Counter-offers
  2. Acceptance
    - Revocation rules!
    - Clear and unequivocal/final and unqualified assent to terms of offeror in a manner proposed
    - Reliance on offer
    - Communication
    - Rules regarding silence
    - Postal acceptance
    - Conditional acceptance
  3. Intention to create legal relation
    - Social/family relationships (presume no intention) – commercial agreements (presume intention)
    - Rebuttal or presumptions through objective evaluation of circumstances
  4. Consideration
    - Act or forbearance or promise thereof as price for which promise of other is bought (bargain price)
    - Move from promisee, but not necessarily to promisor
    - Sufficient but not adequate

- Cannot be illusory, past, existing obligation, part payment of debt or legal duty
- 5. Estoppel: equitable doctrine if no contract
  - Assumption
  - Reliance
  - Detriment
- 6. Capacity: minors, incapacitated persons (intoxication, mental impairment), corporations → capable to enter into the contract?
- 7. Legality: statutory and common law
- 8. Formalities: writing requirements, etc
- 9. Consent (mistake, misrepresentation, duress, undue influence, unconscionability)
  - Mistake – *Non est factum* (unaware of nature of doc), common (both parties mistaken about the same thing), mutual (both parties mistaken about different things), unilateral (one party mistaken about fundamental terms; takes advantage of this)
  - Misrepresentation: false statement of fact during pre-contractual negotiations that induces entry to contract (types – innocent, negligent, fraudulent)
  - Duress (duress of the person, economic duress)

#### **Recap of outcomes** – void contract, voidable contract, unenforceable contract

- Void contract: contract that cannot be enforced by the law. Void contracts are different from voidable contracts which are contracts that may be nullified
- Voidable contract: may be either affirmed or rejected at the option of one of the parties. At most, one party to the contract is bound and the unbound party may reject the contract at which time the contract becomes void
- Unenforceable contract: one that is valid but one the court will not enforce. Used in contradistinction to void and voidable

#### **Terms of the contract**

- Terms of the contract encapsulate what the parties have agreed to
- Terms are either
  - **Express**: those actually agreed to by the parties (the terms and their agreement being **objectively determined**); or
  - **Implied**: those not agreed to by the parties, those implied by contract law (common law) OR by statute

- If you sign something that you know to contain contractual terms, you are deemed to have read and agreed to them: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) (case)

## Terms or Representation?

### Express terms & Implied terms

- **Express terms**
  - Those actually agreed to by the parties (the terms and their agreement being **objectively determined**)
  - Parties have expressly agreed to the terms
  - i.e. Parties have intention to be legally bounded by the terms, and have agreed to the terms, whether or not it is verbally spoken, physically signed, expressly stated or written down
  - (google) terms that have been specifically mentioned and agreed by both parties at the time the contract is made, which can be either oral or written
    - Written: very simple, apply *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) (case)
    - Oral/Verbal: Would the party intend to be to become part of the contract or not
- But what about the oral statements made during negotiations of the contract?
- The important thing here is to distinguish what is the term of the contract and what is not the term of the contract from the oral communication
- During negotiations of the contract, you must distinguish objectively between:
  - Representation: statements made to induce (유도) entry into the contract
    - If something that I say to you during negotiation is representation (not a term), and that turns out to be false or has an issue, then my remedy is to sue this representation
  - Terms: statements meant to be obligations under the contracts
    - If what I say to you during negotiation is actually a term of the contract, and there is a problem or failure with the statement, then the remedy is now a breach of contract
- To distinguish between these, examine the intention of the parties → 'Would a reasonable person consider that the statement was intended to become part of the contractual obligation?'
- i.e. Pre-contractual statements may or may not be terms depending on the objectively determined intention of the parties
- Factors to consider:
  1. Importance of the statement: e.g. is it an opinion or a solid undertaking?
  2. Time between statement and contract
  3. Special knowledge/skill or access to truth of one party

4. Inclusion of statement in any subsequent document
- Recall from last week: Damages cannot be awarded for statement that is an innocent misrepresentation inducing the contract (representation)
    - Why? Representations outside the contract are not obligations under the contract so cannot use for breach of contract
    - But these representations/pre-contractual statements may be actionable outside the contract law
      - Tort: negligent or fraudulent misrepresentation
      - Statute: misleading or deceptive conduct
      - Statute: unconscionable conduct
      - Statute: false representation about good or service
  - Damages can be awarded for breach of a term of the contract
  - While misrepresentation during pre-contractual statements cannot initiate a lawsuit in contract law, they may be actionable outside the law of contract (e.g. tort, statute)
  - Description of subject matter – **is it a statement of belief (misrepresentation) OR promise that it is true (term)?**
  - *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 (case)
    - W sold his car described as 1948 Morris Minor to car dealer
    - Log book indicated car was registered in 1948 but car dealer later discovered it was a 1939 model (car was more older than initially stated) and W honestly believed statement was true. Car dealer sued.  
(Only thing he was able to sue was) **Innocent misrepresentation NOT a term** bc:
    - W had no specialist knowledge or expertise to determine year/model of the car – all he could rely on was the log book which recorded the wrong information
    - Statement of his belief was not a promise that the year was true
  - If the party making the statement has more knowledge or expertise about the subject matter than the other party (so can ascertain the accuracy of the statement), then the statement is probably a term:
 

*Dick Bentley Productions v Harold Smith Motors* [1965] 2 All ER 65 (case)

    - Plaintiff buys luxury car from defendant car dealer
    - During negotiations before the contract of sale, car dealer states that car had done 20,000 miles since new engine and gearbox fitted
    - Plaintiff later discovers that car had done over 100,000 miles. Is the statement a term?

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