

PART 1

REMEDIES 1

Self help

- **Withhold performance**
- **Termination**
- **Deposits and advance payments**

Enforcement

- **Specific performance**
 - Order that the contract be performed
 - Discretionary; usually only for sale of land; usually refused as damages are more appropriate, or there is a continuing obligation or personal service involved
- **Injunction to restrain breach of contract**
 - Used to enforce negative stipulations
- **Action for debt or money due**
 - Used to recover sums of money due under a contract
 - No need to prove loss, only that money is owed and hasn't been paid
 - Two requirements:
 - 1) 'The debt has accrued' e.g. A has done his part, yet B hasn't paid money
 - 2) The amount of money must be stipulated

Compensation

The rules – any time there is a breach of contract, a party will be entitled to seek damages; these damages will only be nominal unless plaintiff can prove they have suffered loss

Types

Expectation damages – putting the party in the position party would have been in had contract been performed

Reliance damages – putting the party in the position they were in before contract was formed

- **Expectation damages**
 - Purpose of damages: 'where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation had the contract been performed' (Parke B) – *Robinson v Harman* (1848) – Harman agreed to lease house to Robinson, then resiled as the house was more valuable than thought
 - High Court endorsed *Robinson* in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) – Tabcorp leased Bowen's premises and renovated it, despite

clause forbidding renovation

- But, loss is often very difficult to quantify
 - For uncompleted work > the cost of having someone else complete it
 - For undelivered goods > additional cost (if any) of having to buy replacement goods – *Sales of Goods Act 1895 (SA) s 50*
 - If goods cost more, the difference between the two prices; if the goods cost less the damages will be nominal
 - For defective goods > compare value of goods promised and goods supplied - *s 52*
- Calculating damages is the difference between what happened, and what ought to have happened – *Clark v Macourt [2013]* – Macourt sold frozen sperm to Clark, but were unusable, in violation of warranty
- **Damages for loss of chance**
 - Forms part of expectation damages
 - Damages must be quantified, no matter how difficult – *Chaplin v Hicks [1911]*
 - beauty contestant missed out on the chance to compete for acting contract; was held that she lost chance
- **Reliance damages**
 - The loss (e.g. expenditure) incurred in preparation of a contract
 - Where expectation damages are too difficult to calculate, reliance damages may be awarded - *McRae v Commonwealth Disposals Commission (1951)* – man attempted marine salvage on ship that didn't exist
 - Very rare
- **Consequential loss**
 - Additional loss that results from the breach of contract
 - Limitations: causal link must be established ('but for' test); damages must not be too remote
 - Established test for remoteness – *Hadley v Baxendale [1854]* – crank shaft broke; Baxendale was meant to deliver it to repairer in two days but did not; Hadley missed out on 5 days of work and profits
 - In *Hadley*, loss is not too remote if it:
 - 1) Arises naturally, according to the usual course of things, or;
 - 2) Was in the reasonable contemplation of the parties at the time of the contract
 - ◆ **(1) Concerns the type of loss (objective test), (2) concerns the actual knowledge of the parties**
 - Test applied in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949]* – Newman delivered a boiler 5 months late; Victoria Laundry missed out on everyday loss (damages allowed) and a lucrative government contract (no damages allowed)
 - High Court endorsed *Hadley* in *European Bank Ltd v Robb Evans [2010]* – European Bank conducted operations in Vanuatu which

engaged in fraud; money of Evans moved to Sydney bank; Evans sought money back

- **Non-pecuniary loss**

- Generally, damages aren't available for mental distress, unless:
 - (1) They are result of a physical injury, or;
 - (2) if the purpose of the contract was to provide happiness/relaxation/freedom from stress – *Baltic Shipping Co v Dillon* (1993) – the Mikhail Lermontov crashed part way into a 14 day cruise; Dillon sought to recover for disappointment/distress

- **Mitigation**

- Reduction of damages where loss was either: (1) avoided, or (2) avoidable (objective test – onus of proof on defendant)
- No reduction of damages where additional loss is incurred in an attempt to mitigate loss

- **Date of assessment**

- Loss usually assessed from date of breach – *Ng v Filmlock* [2014] – incorrect calculation of damages from a repudiated contract for purchase of land
- Otherwise, loss is calculated when loss becomes apparent

- **Punitive damages**

- Exemplary or punitive damages not awarded for breach of contract – *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) – a ticket for a sporting game contained a condition that if resold at higher price, admission to venue could be barred

ESTOPPEL

Equitable estoppel

The rules – is an equitable remedy; available at the discretion of the courts; not a remedy in contract law; supplements common law; often will involve reliance loss; damages will almost always be superior

Types

Proprietary estoppel – precludes a party from acting inconsistently with a promise to confer an interest in land (not sell or lease)

Promissory estoppel – precludes a party from acting inconsistently with an assumption that the other party has been encouraged to adopt

3 elements

- (1) Representation – A induces B to adopt an assumption (*Legione*)
- (2) Detrimental reliance – B acts on that belief, such that B would be worse off if A departed from that assumption (*Je Maintiendrai*)
- (3) Unconscionability – knowledge of detrimental reliance (*Austotel*)

Walton Stores discusses all elements

Advantage – Estoppel can be used as an alternative to contract, where a contract would not stand up e.g. for lack of consideration

Disadvantages – must prove detrimental reliance
– available at discretion of court
– relief may be limited to extent of reliance

- **Proprietary estoppel**

- Proprietary estoppel can be used to enforce gratuitous promises to an interest in land – *Riches v Hogben* [1985] – son agreed to emigrate in return for Mother's promise to purchase and put house in his name; she put it in her own name, he left under pressure and sought the house

- **Promissory estoppel**

- Assumption (1) must come from clear representation – *Legione v Hateley* (1983) – purchase for sale of land requested to be extended by a week; secretary said it should be okay; purchase later denied; no estoppel
- Where there has been detrimental reliance (2), B cannot then seek to turn back on a promise to A not to enforce existing rights (estoppel as a shield) – *Je Maintiendrai v Quaglia* (1980) – hairdressers requested a rent reduction; landlord was experiencing difficulty filling shops and agreed; landlord later requested lump sum of money back; was estopped
 - Estoppel can also be used to create rights (estoppel as a sword) – *Walton Stores (Interstate) v Maher* (1988) – Maher went ahead with building in anticipation of a contract; Walton Stores later said they did not intend to proceed with lease; was estopped
- In order for there to be unconscionability (3), there must be knowledge of detrimental reliance – *Austotel v Franklins* (1989) – Austotel was opening a

shopping centre; Franklins did not sign tenancy agreement but was incurring liabilities that Austotel knew about; Austotel negotiated elsewhere; Austotel was estopped

- No presumption of reliance – party raising estoppel must prove detrimental reliance – *Sidhu v Van Dyke* [2014] – in anticipation of being granted a home, Van Dyke stayed living on the property and carried out work on it; after council approval for subdivision was not granted Sidhu then attempted to withdraw promise

PART 2

PRIVITY

I. Issue: Plaintiff is not party to the contract

LAW: The doctrine of privity states that a 3rd party cannot enforce the contract – *Coulls v Bagot's Executor and Trustee Co.* This was also found in *Wilson v Darling Island Stevedoring*

DEFENDANT will argue that, as per *Coulls* and *Darling Island*, P is unable to enforce the contract, as they were not a party to it

A. IF the contract is of insurance

LAW: As established in *Trident General Insurance v McNiece Bros*, the doctrine of privity does not apply to insurance contracts, and the person who intended to benefit from the insurance policy can enforce it. This is now enshrined in the *Insurance Contracts Act 1984* (Cth) s 48(1), which is legislative authority for the fact that **P** is able to recover from the insurer despite being a 3rd party to the contract

PLAINTIFF would argue that as the contract is one of insurance, they are able to enforce the contract

B. IF there is an agency agreement

LAW: The doctrine of privity will not apply if a person promised a benefit under a contract can show that one of the parties entered into the contract as their agent. **P** must expressly or impliedly consent to the agent contracting on behalf of them: *Pola v Commonwealth Bank*. As per *Harris v Burrell and Family*, that authority must be actual or ostensible

PLAINTIFF would argue that there was an agency agreement. If ostensible – look to the objectivity test – whether a reasonable person would believe that **X** was acting as an agent for P?

DEFENDANT, if agency is ostensible, would likely argue that a reasonable person would not find an agency agreement exists

C. Enforcement

LAW: As established in *Beswick v Beswick* the promisee may obtain an order for specific performance against the promisor, in favour of the 3rd party

PLAINTIFF could argue this, however, a problem is that when seeking specific performance, any damages for a failure to confer a benefit on **P** would be measured according to promisee's loss, rather than **P**'s: *Coulls v Bagot's*

CONCLUSION: If P were to seek enforcement of the promise, then the damages they would receive would reflect the loss of the promisee

D. IF a trust can be inferred

LAW: The promisee may hold the benefit of a contract on trust for the 3rd party. *Trident v McNeice* establishes 2 ways in which a trust may be inferred. The more strict approach requires that both parties have had a discussion that suggests an intention for a trust. The broader approach is stated by Deane J: 'intention should be inferred if it clearly appears that it was the intention of the promisee that the 3rd party should himself be entitled to insist on performance of the promise and receipt of the benefit and if trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention'

PLAINTIFF will argue for the broader approach discussed by Deane J as it is easier to satisfy

DEFENDANT will most likely argue that there is not trust, or that the stricter approach should be adopted

PLAINTIFF would get two main benefits from arguing for a trust. Firstly, the measure of damages will be calculated according to their loss, rather than the promisee's (as in enforcement), and secondly, P can require the promisee to enforce the contract. If the promisee refuses, P may sue the promisee for breach of trust, as well as the promisor for breach of contract

CONCLUSION: If P is successful in establishing a trust, then they will be able to sue for damages based on their loss

E. IF doctrine of privity applies – look to estoppel

If P cannot circumvent the doctrine of privity then the promisor may be estopped from relying on lack of privity

LAW: the possibility of P using estoppel is stated in *Trident v McNeice*. **IF** concerning an interest in land, *Riches v Hogben* is authority that proprietary estoppel is available

The elements of estoppel are, as per *Walton Stores v Maher*:

(1) the promisor induced P to adopt an assumption. This representation must be clear:

Legione v Harteley

(2) P detrimentally relied on that promise, so that P would be worse off if D departed from the assumption. P's detrimental actions must also be reasonable, and it is not sufficient that there is a disappointed expectation

(3) It was unconscionable for D to depart, or threaten to depart, from the assumption

Sidhu v Van Dyke is authority that P has the **burden of proof** in establishing detrimental reliance, and that the conduct of the other party need not be 'the' contributing cause. Rather, it is sufficient that it is 'a' contributing cause

APPLICATION

CONCLUSION: State likelihood of estoppel

REMEDY: *Sidhu* is authority that the minimum equity principle is not the automatic process for determining the remedy. The relief granted is usually that which reflects the value of the promise. Thus, as suggested in *Guimelli v Guimelli*, the usual remedy for proprietary or promissory estoppel will involve enforcing the promise

NOTE: However, if the value of promise is out of proportion to the detrimental reliance – then the minimum equity principle will apply

F. IF no estoppel is possible – the rule in doubt

LAW: In *Trident v McNiece* the High Court came close to extending an exception that was created for insurance contracts, where the intended beneficiary to *any* contract can enforce it.

PLAINTIFF would as a result, try to push the case to the High Court, and ask them to reconsider this proposition

CONCLUSION: hard to say

G. IF the contract imposes a burden on 3rd party

LAW: Contracts may also not impose a burden on 3rd parties: *Tulk v Moxhay*. An exception stated in *Tulk* is where there are restrictive land covenants affecting use (e.g. promise that all future title holders will not cause issues for neighbours)

H. IF assignment of contractual rights or novation

LAW OF ASSIGNMENT: *Law of Property Act 1936* s 15 lists the requirements of the transfer of property rights. Such an assignment is required to be in writing

LAW OF NOVATION: Obligations cannot be assigned without the consent of the other party and the assignee. A novation involves the termination of the old contract, and creation of a new contract, which effectively substitutes the original party to contract with a 3rd party

TERMS

- 1) Can the terms be **incorporated** in the contract?
 - 1a) Are the terms express?
 - 1aa) Are the terms written or oral?
 - 1b) Can terms be implied?
- 2) How should the terms be **interpreted**?

II. Issue: whether an express term can be incorporated in the contract

A. IF the terms are written

1. IF there is a signature

LAW: A signature is conclusive of acceptance, even if the terms are not read or understood. This general rule was established in *L'Estrange v Graucob* and affirmed in Australia recently

in the decision in *Toll v Alphapharm*. All that a signer must be aware of is that a document contains contractual terms that affect legal relations.

PARTY 1 will argue that signature is conclusive of acceptance

PARTY 2 could try to argue that a signature will not be binding if the terms have been misrepresented as per *Curtis v Chemical Cleaning and Dyeing*

Alternatively, party 2 could try to argue that the document could not reasonably be expected to be a contractual document (e.g. receipt or voucher) as per *Chapleton v Barry Urban District Council*

a) IF there is electronic acceptance

LAW: A signature is conclusive of acceptance, even if the terms are not read or understood. This general rule was established in *L'Estrange v Graucob* and affirmed in Australia recently in the decision in *Toll v Alphapharm*. All that a signer must be aware of is that a document contains contractual terms that affect legal relations. However, the law in relation to electronic acceptance is somewhat unclear, and the decision Federal Court decision in *eBay v Creative* is somewhat at odds with the High Court in *Toll*

PARTY 1 will argue that *eBay* is to be equated to the decision in *Toll*, and thereby should be classed as a signature. They will try and argue this because, even if there are onerous or unusual terms in the contract, clear and specific notice is not required in the case of signature

PARTY 2 will be trying to argue that electronic acceptance should be equated with the requirements of display or delivery, which requires reasonable notice of terms *Causser v Browne*. Another advantage of arguing this is that onerous or unusual terms must be clearly notified: *Interfoto Picture Library v Stiletto Visual Programmes*