

LAWS1104 – Contract Law Summary

1st Element; Offer & Acceptance

- A **Contract** is an agreement between two or more parties under which legal rights and obligations are created which are enforceable in court ie = **Agreement + Enforceability**
 - **Unilateral Contracts** is when acceptance is by performance of the act.
 - **Bilateral Contracts** is when acceptance is by a promise.

(Whether it was an **offers**, **mere puffs** and **invitation to treat** under common law)

- An **Offer** is an expression by one party of a willingness to enter into a contract on specified terms, that if agreed (**agreement** = when offeree accept the offer) by the other party (offeree) results in a legally binding contract (3.20).
- **Mere Puffs** are exaggerated claims where no person would think are contractual terms (3.30). E.g., **Leonard v PepsiCo**
 - Advertisements (**invitations to treat**) may be an offer if it demonstrates sincerity in its terms ie contains definite terms – **Carlill v Carbolic Smoke Ball Co**
- **Invitations to Treat** is inducing someone to make an offer ie the person is willing to enter into the negotiations that may or may not result in a contract (3.70). E.g., **Gibson v Manchester City Council**
 - **Shop displays are invitations to treat and not offers** (**Pharmaceutical Society of Great Britain v Boots Cash Chemists [southern] Ltd**) – Getting the item and bringing it to the cashier is an offer by the customer, where cashier processing the transaction under the supervision of a pharmacist is the acceptance.
 - **Advertisements on a newspaper are invitations to treat not offers** (**Patridge v Crittenden**).
 - **Advertisements for an auction are invitation to treat and not offers** (**Harris v Nickerson**).
 - In regards to **Auctions**; Calls for bids are invitations to treat, Bids are offers and when an auctioneer knocks down the property to the bidder this is acceptance of the offer (3.140).
 - Auctions can be held with a reserve (minimum price set in advance) and reserves the right not to sell the property until the reserve price is reached (3.140).
 - Auctions can be held without a reserve – where there is an implied promise to sell to the highest bidder (**Barry v Davies**).
 - In regards to **Public Tenders**; they are invitations to treat, a party submitting the tender makes the offer and when the person that called for the tenders accepts the tender there is acceptance (3.200).
 - No obligation to accept tender but there is to consider all tenders that meet submission requirements (**Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council**).

(Whether there was **Valid Acceptance** of an offer)

- An offer can only be accepted if there is a **Valid** offer in the first place. An offer becomes **Invalid** if;
 - **Revoked** any time before acceptance and is only effective when it is communicated to the offeree and they are aware of revocation (3.240). E.g., **Byrne & Co v Leon Van Tienhoven & Co**
 - **Lapsed** (ie expired) because it is not accepted within time specified or by a reasonable period (3.340). E.g., an offer does not remain open indefinitely (**Goldsborough Mort & Co Ltd v Quinn**).
 - You can keep the offer open by offering something (consideration) to the offeror.
 - **Rejected by Counteroffer** as it becomes the new offer that materially changes the terms of the original offer and the old offer becomes void (3.300). E.g., **Hyde v Wrench**
 - **Clarification of the terms is a request for information and not a counteroffer** (**Stevenson Jacques & Co v McLean**).
- In regards to communication of **Acceptance**, it must be;
 - **Person must be aware that the offer existed when having performed/accepted the contract** (3.220). E.g., **R v Clarke** ie acceptance in response to the offer. But if they are aware that the offer existed, then their motive doesn't matter (**Williams v Carwardine**).
 - **Must be communicated, can't be inferred from silence** (**Felthouse v Bindley**) – (3.430).
 - **Acceptance must be communicated to the offeror in the way it was specified, and the offeror must be made aware** (3.360).

- Postal rule, if acceptance is sent by post (and post is a reasonable mode of acceptance), the contract is formed when the letter is posted not when received (*Adams v Lindsell*).

2nd Element; Intention

(Whether an agreement is supported by **Intention to Create Legal Relations**)

- To determine whether parties had intention to create legal relations, we need to do an **Objective Test** of what is objectively conveyed by the words and conduct of both parties, having regard to the circumstances – what a reasonable man would objectively conclude (not based off uncommunicated subjective intentions (4.10) FROM OUTSIDE PERSPECTIVE.
- Originally this was based off of presumptions that;
 - **Social/Domestic Agreements** are usually created with no legal intent.
 - **Commercial Agreements** are usually created with legal intent

But these are now mere aides and not determinant, ie both situations can have/not have legal intent following *Ermogenous v Greek Orthodox Community of SA Inc*.
- In regards to agreements between **Husband and Wife**;
 - Agreements do not have legal intent if it was made before the marriage broke down and is unenforceable as it was an ordinary domestic arrangement (*Balfour v Balfour*) – (4.50).
 - Agreements have legal intent if it was made at a time where the relationship has broken down and is enforceable (*Merritt v Merritt*) – (4.70).
- In regards to other **Family/Social Agreements**; if one of the parties must have significantly changed their position (ie incurred a cost/inconvenience) in reliance to the agreement then there is legal intent (*Todd v Nicol*) – (4.90).
- In regards to **Commercial Transactions**;
 - When agreement is reached in course of business dealings, the circumstances generally indicate parties intended to create legal relations (Rogers CJ in *Banque Brussels Lambert SA v Australian National Industries Ltd*) – (4.130).
 - Inclusion of an express statement (stipulation) that something is not intended to give rise to legally enforceable obligations (ie not a contract, instead **Honour Clauses**) or is subject to further negotiation is usually given effect by the courts (*Rose & Frank Co v JR Crompton & Bros Ltd*) – (4.150).
 - **Letters of Comfort** are usually not contractual, but are written by a parent company to a lender giving comfort to the lender about a loan made by the lender to a subsidiary (company under) the parent – ie provide comfort to the lender that the subsidiary is able to fulfil its obligations.
 - Usually construed as commercial intent and not guarantees
 - Sometimes Letters of comfort has legal intent if it contains definite, clear and promissory language (*Banque Brussels Lambert SA v Australian National Industries Ltd* and *Anglican Development Fund Diocese Bathurst v Palmer*).

3rd Element; Consideration

- All, valid **Simple Contracts** need to be supported by consideration (5.20).
- **Consideration** means exchange of goods – ie something of value is exchanged for a promise;
 - Promise becomes enforceable by promisee if they promise to give something of value or incurred a detriment for the promisor in return for their promise (5.30).
- Promise contained in **Deeds** are referred to as **Contracts under Seal** and hence does not need to be supported by consideration (5.20).

(Whether there was a **Lack of or Good Consideration**)

- The requirements of **Good Consideration** involves;
 - **Consideration must move from the Promisee** ie promisee has to provide the consideration (however it doesn't need to move to the promisor directly, ie can be indirect and move from promisee to third party to promisor) – (5.80).
 - **Consideration must be sufficient but does not need to be adequate** ie as long as consideration exists (has recognised legal value – even if it's a dollar), the court is not concerned with its adequacy, ie the equivalency in value to the promise being paid for (**Thomas v Thomas**) – (5.50).
 - **Consideration can't be vague/illusory** – must have recognised legal value (**White v Bluett**) – (5.60).
 - **Consideration can't be past consideration** (acts done before the promise is made). It must be executed (unilateral contracts) or executory (bilateral contracts) – (**Roscorla v Thomas**) – (5.90).
 - **Exception** is if act was (a) done at request of person making the promise with (b) the understanding that the act was to be rewarded in the future and (c) had promise occurred in advance of the act it would be enforceable (**Pao on v Lau You Long**) – (5.110).
 - **Consideration can't be performing an existing public duty** as they are doing nothing more than what they are already legally entitled to do (**Collins v Godefroy**), appearing in court under subpoena – (5.120).
 - **Exception** is if promisee promises to do something additional or to perform something they were not bound to do, there will be consideration – e.g., police setting up a mobile patrol (**Glasbrook v Glamorgan County Council**).
 - **Consideration can't be performing an existing contractual obligation** as they are doing nothing more than what they are already contractually entitled to do (**Stilk v Myrick**) – (5.145).
 - This also applies to the **Part-Payment of Debt**, ie the part payment of debt is not a good consideration for a promise to forgive the whole debt (**Foakes v Beer**) – (5.165).
 - Exception is if debtor agrees to do something additional or different and the creditor accepts (5.175).
 - Earlier Payment, Payment in different currency, Something additional is added, Debt is paid to a third party
 - **Exception** is if promisee promises to do something additional or perform something they are not contractually bound to do, there will be consideration– e.g., unlike *Stilk v Myrick* the ship becomes unseaworthy and now there is a contractual right for the employees to terminate the contract (**Hartley v Ponsonby**).
 - Another exception is the **Practical Benefit Test**, ie performing the same contractual obligation can be consideration if it provides practical benefits. (**Williams v Roffey Bros & Nicholls (contractors) Ltd**) – (5.180). This requires that
 - A enters contract with B to do work/goods/services, where B pays for.
 - At some stage B has reason to doubt A will complete their side of the bargain.
 - At initiative of either party, B promises A additional payment in return for completing contractual obligations on time.
 - As result, A giving this promise, B obtains a practical benefit/obviates a disbenefit such as (*Williams v Roffey Bros & Nicholls (contractors) Ltd*)

- No need to find replacement, avoid significant penalty for late work, avoid litigation.
- Bs promise is not given as result of economic duress or fraud on part of A.

4th Element; Legal Capacity

- **Void** means there never was a contract, neither party can continue or enforce the contract.
- **Voidable** means one party (the disadvantage/vulnerable one) can decide to vitiate (cancel) the contract or continue it.
- Both terms means the contract is **Unenforceable**.
- **Contractual Capacity** refers to the legal competence of an individual or organisation to enter into binding agreements.

(Whether there was party had **Legal Capacity** to enter into a contract)

- **Adults** have full legal capacity to enter into contracts. MINORS ARE PEOPLE UNDER 18 [6.20]
- **Minors** do not have capacity to enter into contracts (contract becomes unenforceable), except for;
 - **Contract for Necessaries** (goods and services essential for/beneficial to the minor). Minors are liable to pay for goods and services that are necessary to maintain their standard of living & benefits (**Scarborough v Sturzaker**) – ie bicycle was needed to get to work (6.40).
 - Gamble [6.40], payment for a flight to Australia, not a necessary as not needed to maintain standard of living or maintaining life.
 - **Contract for Employment**. Minor are liable to employment, training or education, but the overall contract as a whole has to be for the benefit of the minor (**De Francesco v Barnum**)- (bound her to work exclusively for him for 7 years, restricted her from marrying without permission, and allowed him to send her anywhere (even overseas) with little protection or pay)
 - Even if there is one contractual term that isn't beneficial, if the overall contract as a whole is, then minor is bound to the contract (**Hamilton v Lethbridge**) ie overall beneficial to the minor even though there was a contractual term for the restraint in trade – (6.50).
- **Corporations** generally have all legal capacity of a natural person and can enter into contracts (**Corporations Act 2001(Cth) S124**) – (6.85).
 - But corporations can have internal rules prohibiting it from entering into certain types of contracts called **Ultra Vires** (action done without proper authority e.g., entering a contract without signatures of all board directors) – (6.160).
 - Traditionally this allowed the possibility of challenging contracts, but now this is only binding internally and third parties are only bound if they are aware of the internal rules (**Corporations Act 2001 (Cth) s128 & 129**).
- (6.170) **Mentally Incapacitated & Intoxicated Persons** may be liable under contracts for necessities. All other contracts are voidable given that if they can show;
 - They were incapable of understanding the nature of what they agreed to at the time AND
 - Other party was aware/should have been aware of their incapacity.

5th Element; Genuine Consent

- [7.10] Contracts requires **Genuine Consent** – ie parties must voluntarily and intentionally consent the terms of the contract. *Elements that can vitiate genuine consent are below highlighted in blue;* (Whether a party/parties made a **Mistake** that vitiated genuine consent)
- Only **Operative** mistakes can vitiate genuine consent and make a contract unenforceable [7.20].
 - **Common Mistakes** occur when both parties make the same mistake about a fundamental fact e.g., the subject matter [7.40], making the contract void. For example life insurance for the deceased was mistakenly thought was alive (**Scott v Coulson**).
 - **Common Mistakes of quality/attributes of subject matter** rarely will operate to set aside a contract such as the authenticity of a famous painting (**Leaf v International Galleries**).
 - If contract was conditional on something being true (ie subject matter being available), then if it is not, contract may be void (**McRae v Commonwealth Disposals Commission**).
 - [7.110] **Unilateral Mistakes** occur when one party made a mistake. Contracts voidable when;
 - One party makes a mistake about a fundamental term (ie subject matter, price, etc) AND
 - Other party is aware of the mistake/ought to have known AND
 - Subsequently, other party seeks to take unfair/unconscionable advantage of mistake. Example is **Taylor v Johnson**, where party made a mistake about the price, and the other (Taylor) knew and deliberately took steps to ensure that they were unaware.
 - **Obvious mistakes**, the buyer is ought have been aware of it (**Hartog v Colin & Shields**).
 - [7.130] **Unilateral Mistakes to the Identity of Contracting party** may/may not be fundamental. Mistakes of identity occur when party is deceived by a rogue.
 - When seller deals with person via correspondence (**does not meet face to face**), then contract may be void (**Cundy v Lindsay**) as party only seeks to deal with a certain person.
 - So if the rogue sells the good to an innocent third party, the innocent third party cannot receive a title to the good.
 - [7.150] When a seller deals with a person **face to face**, the strong presumption is that they intended to contract with that person, hence the contract is only voidable for fraudulent misrepresentation (**Phillips v Brooks Ltd**), however if the rogue sells the good to an innocent third party, the innocent third party may receive a title to the good if the seller doesn't rescind the contract before the rogue sells the good (**Lewis v Avery**).

(Whether a party/parties made **Misrepresentations** that vitiated genuine consent)

- [7.260] **Misrepresentation** is an untrue statement of past or present that induced the other party to enter into the contract. Types of misrepresentation include;
 - [7.270] **Fraudulent Misrepresentation** exists when the misrepresentation is made;
 - **Knowingly OR Without Belief in its Truth OR Recklessly** (careless whether it be true/false).

Causes contract to become voidable. Fraudulent Misrepresentation establish ALL six elements;

- The representation must be one fact [7.280] – oral, written, communicated through silence or conduct about the past or present. This can include;
 - **Statements of Intentions**, can be categorized as misrepresentation if representor doesn't hold the intention (**Edginton v Fitzmaurice**).
 - **Statement of Opinions**, can be characterized as misrepresentations if representor doesn't hold opinion – however if representor doesn't have expertise to make opinion, may not be taken as factual guarantee (**Bisset v Wilkinson**).
 - **Prediction of Future**, can be characterized as misrepresentations if representor doesn't have reasonable grounds to make prediction.

- Representation that is true when made but subsequently becomes false due to change in circumstances, there is a duty to inform the other of this change, failure to do so amounts to misrepresentation (**With v O'Flanagan**).
- Representation must be false [7.290]
- Party who made misrepresentation must have made it **Knowingly OR Without Belief in its Truth OR Recklessly** (careless whether it be true/false) - [7.300]
- The party who makes the representation must intend the other party to rely on the statement to enter the contract [7.310].
- Other party relied on the representation (induced party to enter the contract) - [7.320].
- Plaintiff must have suffered damage (personal, property, financial) - [7.330]
- [7.350] **Innocent Misrepresentation** exists when party makes an untrue statement of fact which was intended to and in fact did induce the other party to enter the contract but without any intention of the representator to deceive that is party genuinely believed it to be true.
 - If this exists contract is voidable; able to be rescinded (go back to before contract was entered into) but no damages can be awarded (**Oscar Chess v Williams**).
 - Innocent Misrepresentation must satisfy five elements;
 - Representation of Fact.
 - Representation is False.
 - Representator intended the other party to rely on the statement to enter contract
 - Other party relied upon the representation.
 - Representator did not know and had no duty to find out the statement was true.

Note; [7.430] Duress, Undue Influence and Unconscionable conduct vitiate consent and render contract voidable at the “weaker” party. They all involve an element of coercion/pressure applied to affected party. (Whether a party entered a contract under **Duress** that vitiated genuine consent)

- [7.437] **Duress** is actual or threatened violence to, or the deprivation of liberty of, a person or their family members or their property to pressure or coerce such person into entering into a contract.
 - If there were other reasons motivating a person to enter the contract it doesn't matter, contract is still voidable (**Barton v Armstrong**).
 - [7.450] **Economic Duress** involves threats to one's economic interests. Involves 2 conditions;
 - Party made applied pressure (more than normal contractual negotiations ie no reasonable alternative but to enter the contract) AND
 - Pressure was illegitimate (doesn't necessarily have to be unlawful – eg., breaching contract, but can be lawful e.g., undue influence, unconscionable conduct).
 Example is **North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd** where there was unlawful pressure ie no legal right to terminate the contract.

(Whether a party had exploited **Undue Influence** over a more vulnerable party that vitiated genuine consent)

- [7.510] **Undue Influence** involves the improper use of power and influence over another when a special relationship exists where one party has ascendancy over the other (more vulnerable party).
 - **Special relationships** where undue influence is presumed (onus of proof rests on the party with dominant position to show there was no undue influence) involves; **Parent/Child, Solicitor/Client, Religious Advisor/Devotee, Doctor/Patient, Trustee/Beneficiary**.
 - To overcome presumption parties must prove vulnerable party made transaction voluntarily and not subject to undue influence e.g., received independent legal advice before entering the transaction (**Lloyd's Bank Ltd v Bundy**) ie Bundy had not been advised to seek legal advice.
 - **Outside special relationships**, undue influence can qualify if there is a relationship of trust and confidence (onus is on the claimant however).
 - Johnson had special relationship with Buttress since he relied on the advice of Johnson for any matters of business (**Johnson v Buttress**).

(Whether a party engaged in **Unconscionable Conduct** towards the other party, vitiating genuine consent)

- [7.550] Innocent party must be subject to special disadvantage which seriously affects ability of the innocent party to make a judgement and ability to safeguard their interest (ie illness and illiteracy for example) and other party must unconscientiously take advantage of this
 - **Note:** Mere difference in bargaining power (ie disparity in information, experience, expertise & resources) or harsh terms may not be unconscionable conduct.

- Generally, weaker party must prove;
 - They were under a special disadvantage in relation to the transaction so they could not decide what was in their best interests.
 - The other party knew or should have known of disadvantage.
 - Nevertheless the other party took advantage of their superior position.
- (**Commercial Bank of Australia v Amadio**) – Fact sensitive, look at facts of your case and see similarities and differences. Important facts of this case;
 - No mistake about fundamental term – knew it was a bank guarantee.
 - No misrepresentation – bank did not make statement that was untrue.
 - No undue influence, guarantee contract was between bank and Amadio's.
 - No Duress – voluntarily signed the agreement with no pressure.
 - Reliance and confidence in the son
 - Old age with limited command of written English (special disadvantage in which the bank manager knew of)

However

- Bank did not take advantage of Amadio's – their son did.
- Bank had no reason to provide assistance or explanation, in all guarantees the guarantor would have nothing to gain.
- Bank knew the company was not doing well financially and did not inform Amadio's.
- Bank must have known the transaction was very bad for Amadio's.
- Bank made no further inquiry to whether Amadio's understood the transaction – wilful ignorance.

Unconscionable Conduct was met because;

- A having actual knowledge that B has a special disadvantages and cannot make judgement to what is in their own interest.
- A takes an unfair advantage of their superior position by entering into the transaction – is unconscionable conduct.
- Instead of actual knowledge, A is aware of possibility that B may have special disadvantage or aware of facts that would raise the possibility in the mind of a reasonable man – is unconscionable conduct.

6th Element; Legality

(Whether or not a contract is **illegal** under **Statutes** or the **Common Law** and hence unenforceable)

- **Statutory Legality** – contracts must be legal under statutory law, otherwise it is unenforceable. To determine illegality and its effects, we look at the statute itself and apply statutory interpretation [8.20].
- **Legality under the Common Law** – Courts refuse to enforce agreements that are contrary to public policy [8.190]. Agreements may be;
 - **Illegal under the Common Law** [8.200], ie makes contract void, involves;
 - Contracts to commit crim, a tort or a fraud on a third party.
 - Contracts prejudicial to public safety (ie threatens public safety).
 - Contracts prejudicial to the administration of justice, involves;
 - Agreements to stifle prosecution, e.g., **Public Services Employees Credit Union Co-operative Ltd v Campion**, contract for credit union to not report his son.
 - Agreements for maintenance of a suit and champerty.
 - **Void under the Common Law** [8.330], not categorised as illegal, but still makes contract void;
 - Contracts to oust the jurisdiction of the courts (ie lets agree to never go to court), except for commercial arbitration.
 - Contracts in **Restraint of Trade** – are restrictions on freely exercising ones trade, business or profession. This is enforceable only to the extent necessary to prevent the employee from using knowledge, trade secrets or connections, and not to prevent the employee from using own skill, knowledge in their trade/profession even if acquired in the previous employer's service [8.370]. Enforceable to protect trade connections, confidential information or trade secrets, but not to prevent an ex-employee from working for a competitor [8.360].

(Whether or not an agreement in **Restraint of Trade** is unenforceable or enforceable under common law)

- Contracts for restraint in trade are usually enforceable if is designed to protect trade connections, confidential information on clients (ie to prevent solicitation) or trade secrets, where the more senior the employee, the greater access the sensitive information and hence the more likely agreement is enforceable (**Jardin v Metcash**) – [8.380], Jardin, an ex-CEO had sensitive information and trade connections that could be used against Metcash.
- Terms that unduly limit the circumstances of an employee – e.g., **Positive Endeavour Pty Ltd v Madigan**, restraint in trade for an indefinite amount of time (in this case forever), this is usually not enforceable.
- **Buckley v Tutty**, Where there were terms that indefinitely limited Tutty's transfer to another club (transfer could only occur at the consent of the club) and charged an indefinite amount of money for the transfer (the club charged a fee that was at their own discretion) even after expiration of the contract.

(Whether or not a term has been legally **Incorporated** into the contract)

- Terms can be **Express** (clearly stipulated and agreed by both parties) or **Implied**.
- Contracts can be entirely written (which does not have to be a single contractual document, ie can involve email, text messages etc), part written & part oral, or entirely oral.
- Entirely written contracts follow the **Parol Evidence Rule**, ie if a contract is entirely written - all terms are set out in the written document, it is very hard to add/change/delete terms [9.40].
- **Incorporation** involves determining what terms are incorporated. 2 methods of incorporation;
 - **Signature** - a person who has signed the document, even if they did not read or understand all the terms, is bound by it [9.50]. "The person who signs either has read and approved the contents of the (contractual) document or is willing to take the chance of being bound by those contents... whatever they might be." (**Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd**). Same principle applies to online contracts when clicking "I agree" or "I accept" [9.440]. There are exceptions;
 - The signed document must be a contractual document (**Le Mans Grand Prix Circuits Pty Ltd v Illiadis**) – Where Illiadis had signed an application/registration/talent release form and was not given time to fully read it and realise it was a contractual document.

- There must be no misrepresentation about the terms (*Curtis v. Chemical Cleaning & Dyeing Co Ltd*), ie a dry cleaner employee misrepresented that the term excluded liability for damage to beads/sequin, when on the contract it excluded all liability.
- **Notice** – terms not found on the signed document may be incorporated by giving reasonable notice [9.120]. However providing notice must fulfil three criteria;
 - Terms in a document can only be incorporated if it is a contractual document (*Causser v Browne*), ie a docket/voucher/receipt contained an exclusion of liability clause, not contractual. Tickets can be contractual documents.
 - Party must provide reasonable notice of the term in the contractual document (*Thornton v Shoe Lane Parking Ltd*), ie Thornton collected a ticket, which stated in small print that it was issued subject to conditions displayed at the park – exclusion of liability of injury. Conditions displayed at the park was not convenient to locate.
 - Notice must be brought at or before time of contracting (*Olley v Marlborough Court*), Olley booked into the hotel room, in the room was a notice excluding hotels liability for stolen items – notice was not incorporated since the contract was made in the lobby.
- [9.180] Just a note on **Harsh Terms**, the more harsher and unusual, the more must be done to bring relevant clause to notice (*Interfoto Picture Library v Stiletto Visual Programs Ltd*), ie the terms were unusually harsh, the only notice was a delivery note at the bottom of a bag. Interfoto did not do enough to draw Stiletto's attention to the terms considering the harshness of terms.

(Whether or not when a term is **Interpreted** applies to the situation to be legally enforceable)

- [9.340] **General Principles to Contractual Interpretation** involves;
 - **Objective Approach** of what a reasonable person (outsider) would have understood those terms to mean based on words and conducts (as opposed to insider thoughts).
 - **Natural & Ordinary Meaning of the Word** (But is not necessarily literal – look at the context and commercial purpose) – (*Insight Vacations Pty Ltd v Young*), ie exclusion clause only applied when the passenger was seated, the passenger on the bus was standing.
 - **Contra Proferentem** means if you are the one who drafted the contract, & the contract is too ambiguous, interpretation is adopted against you (see next bit).
- [9.350] **Exclusion Clauses** are terms that seek to limit or exclude liability. Is interpreted in the same way as any term, ie interpretation in context of the contract as a whole and giving words their natural and ordinary meaning.
 - E.g., *Aldemeddine v Glenworth Valley Horse Riding Pty Ltd*, ie waiver form had exclusion clauses that excluded liability, it was ambiguous, found that “negligence of others” did not extend to Glenworth or its staff, only to other participants – contra proferentem.
 - E.g., see *Insight Vacations Pty Ltd v Young* – natural and ordinary meaning of words.

(Whether or not a term has been **Implied** into the contract)

- [9.480] **Implied Terms** are terms ‘added’ to the contract by the courts/statutes to supplement the express terms – to fill the gap or to make the contract work better ie improve business efficacy.
 - [9.500] **Implied in Fact** ie are terms implied in a particular contract to give business efficacy. Based on **Prima Facie Test**, that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, a bystander were to suggest some express provision for a term, they would suppress him with a common “Oh, of course” (*Shirlaw v Southern Foundries*). For example;
 - *The Moorcock*, ie P contracted with D to unload his ship at a jetty, the ship became damaged at low tide by riverbed conditions. No express term that the jetty would be safe for the ship to unload at low tide, but it was held that this was an implied term.
 - (*BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council*) For courts to imply a term in a specific contract, the term must be;
 - Reasonable & Equitable to both parties.
 - Necessary to give business efficacy (make contract workable) to the contract
 - So obvious it goes without saying.
 - Capable of clear expression &

- Not contradictory with any express term (this requires interpretation).
- [9.485] **Implied in Law** ie terms may be implied by the common law or statute (e.g., consumer contracts, goods are reasonably fit for purpose, although ACL is technically not implied it has the same effect etc).

Remedies & Termination of the Contract

(Whether or not **Remedies** can be obtained from a **Breach** of contract)

- **Breaches** occur when a party does not perform a contractual term (whether express or implied). It is not dependent on good or bad intention ie **Strict Liability** – a breach is a breach.
- **Remedies** are legal consequences to breaches - tells you what you can/cannot get when contract has been breached and is what makes an enforceable contract enforceable.

Remedies are available to the **Innocent Party** when there has been a breach of contract. Some remedies can include (sometimes entitled to multiple remedies too) – **Damages** (compensation), **Specific Performance**, **Injunction** (ie don't do this) and **Termination** (of the contract – note that not every breach allows you to terminate the contract – you have to continue your contract until it has been legally terminated).

- **Damages** (compensation) is the usual remedy of a breach. Any breach of a contractual obligation entitles the innocent party to seek compensation by awarding damages [12.10]. Can be nominal (even if no loss occurred, damages can be awarded) - [12.290]. In terms of the measure of damages, it either seeks to put the innocent party to where they would have been had the contract had been performed? (**Future looking**) or restore the innocent party to their original position before entering into it (**Past Loss** – **Robinson v Harman**).
 - **Past Loss** – aims restore the innocent party to their original position before entering into contract (**Robinson v Harman**).
 - **Expectation Loss** – aim to place the innocent party in the position they would had been had the contract had been properly performed (**Robinson v Harman**) ie compensation is the difference between the position they are because of the breach and the position they would have been if the contract was performed.
 - **Reliance Loss** – based on cost reasonably incurred in reliance of the defendants promise to perform the contract (**Commonwealth v Amann Aviation Pty Ltd**).
 - Reinstatement cost takes precedence over loss of value as contractual promises must be followed (**Tabcorp Holdings Ltd Bowen Investments Pty Ltd**).
 - **Limitations** to remedies to damages.
 - **Causation** [12.100], But for test, but for the breach, would the loss have occurred (**Reg Glass Pty Ltd v. Rivers Locking Systems Pty Ltd**). If the loss would have occurred even without the breach, then the loss is not claimable. That is if an intervening event breaks the chain of causation between the wrong complained of and the loss or damage suffered, defendant will not be/will only be partially responsible (**Alexander v Cambridge Credit Corp Ltd**).
 - **Remoteness** [12.130], whether or not the loss was reasonably foreseeable (**Hadley v Baxendale**). Damages are not recoverable if the loss suffered is too remote and not reasonably foreseeable. For damage to be reasonably foreseeable, it must be that losses;
 - Arise naturally from the breach (ie imputed knowledge – the defendant is assumed to know of the loss as a potential even if they didn't know)
 - OR**
 - Were in the reasonable contemplation of the parties at the time the contract was made as the probable result of the breach – ie actual knowledge. Only a possibility of a consequence (not the exact thing) needs to be contemplated (**H Parsons Ltd v Uttley Ingham & Co Ltd**).
 - **Duty to Mitigate** [12.190], ie whether the loss have been avoided if the plaintiff took reasonable steps. Law imposes a duty on innocent parties to take all reasonable steps to mitigate (ie reduce/minimise) their loss caused by the breach (**Payzu Ltd v Saunders**).

- **Disappointment or Distress**, damages are not ordinarily claimable for mere inconvenience, disappointment or distress unless the contract was specifically intended to provide pleasure, relaxation or enjoyment (*Baltic Shipping v Dillon*) – cruise ship holiday case.
- **Equitable Remedies** including;
 - **Specific Performance**, ie an order requiring the breaching party to perform its obligations. [12.370].
 - **Injunctions** are orders for restraining/preventing a person from doing/continuing to do a wrongful act [12.380].

These remedies are not normally granted if damages are an adequate remedy or if the contract is for a personal service EQUITY DOES NOT ORDER THE IMPOSSIBLE TO BE DONE!

(Whether or the contract can be legally **Terminated**)

- **Performance**, ie when all contractual obligations/terms have been performed, the contract become terminated (usual course of things). **Substantial Performance** may occur where a party has done enough to trigger the other party's obligation to pay (*Hoenig v. Isaacs with Bolton v. Mahadeva*)
- **Agreement** to terminate the contract based on its terms, ie contract gives one or all parties the power to terminate (if only one party has power to terminate, that may be an unfair contractual term) or it states that it will terminate after a fixed period of time. If contract does not contain a provision to its duration, the court may imply a term giving a right to terminate on giving reasonable notice (*Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd*) – [11.110].
- **Operation by Law**, without actions from either party and regardless of the parties' wishes. Such as if a party becomes bankrupt they are relieved from their obligations under existing contract (*Bankruptcy Act 1966 (Cth)*) – [11.670].
- **Breach** also entitles an innocent party to terminate the contract, depending on if term breached was;
 - **Condition** allows for termination and damages [11.280]. Conditions are terms that goes to the root of the contract (an essential term such as the subject, price etc).
 - It is a term without which the party would not have entered the agreement.
 - There is substance over form, ie how the parties labelled the term is not determinative but still relevant (*L Schuler AG v Wickman Machine Tool Sales Ltd*).
 - *Associated Newspapers Ltd v Bancks*, D news company agreed that cartoon would be a full page feature on the front page, it was instead put on page 3. The promise to publish on front page was a condition so people would see it.
 - **Innominate** terms, if breached, whether termination occurs depends on the nature and effects of the breach (*Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd*) - [11.360]. Sufficiently serious breaches can give a right to terminate, ie if the breach deprive the substantial part of the benefit of the contract a breach may occur (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*) – the number of days lost was 148 compared to the total contract of two years for the ship.
 - **Warranty** are less essential terms, breach only allows for damages but not termination [11.270]. Ie *Bettini v Gye*, Gye was an opera singer contracted to sing for 3 months by Bettini, term existed that Bettini must be in London at least 6 days before performance for rehearsal, she arrived 2 days before. Held this was a warranty, arriving late would only effect performance for the first week out of the 3 months – no termination.
- **Repudiation** (refusal) is when one party has no intention to contract (not just one term, it is the whole contract). If you wrongfully terminate a contract, you said are to have repudiated and breached it.
 - Where a party's conduct (e.g., reported breaches) shows an intention to repudiate the contract, innocent party has right to terminate or affirm the contract. Once choice is made, the innocent party cannot change its mind (*Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd*).
- **Frustration** is when due to an external event (not at the hands of either party), performance of the contract becomes radically or fundamentally different (*Codelfa Construction v State Rail of NSW*)

and *Davis Contractors Ltd v Fareham Urban District Council*). Not just because it is more difficult or expensive (the threshold is very high).

- **Supervening Illegality**, the change in law which makes further performance illegal.
- **Death or Illness** ie If contract for personal service and party dies/suffers serious disability or illness that makes performance impossible.
- **Destruction Subject Matter**, when performance rendered impossible by physical destruction of subject matter before performance falls due (*Taylor v Caldwell*), ie contract for hire of a Music Hall for concerts. Before concerts began, music hall burned down. No fault of either party.

Davis Contractors Ltd v. Fareham Urban District Council where a lack of skilled labour meant the work too longer – not a frustration.

Tsakiroglou & Co Ltd v. Noblee Thorl GmbH, closure of Suez Canal meant alternative route would have to be taken, which is more expensive and would have taken longer – not a frustration.

Note that a **Force Majeure Clause** applies, ie if parties made specific provision for the event in question. The event cannot frustrate the contract because the event was foreseen

[11.580]. If the event was one that the parties could have reasonable have foreseen [11.600], no frustration. If the event was caused by either party, no frustration [11.610].

If **Frustration** occurs, a contract is automatically terminated (neither party can continue). The future obligations of the parties are discharged BUT past rights and liabilities not affected (*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*).