

3. Contract Formation

3.1 Consideration

- Consideration is something the law regards as valuable, given in return for a promise — it is the "agreed price of the promise"
- Without consideration the agreement is a "naked agreement" which is unenforceable
- Two elements: (1) **Benefit/detriment requirement**; (2) **Bargain requirement**

Benefit / Detriment — Currie v Misa (1875)

- "May consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other"
- *Carlill v Carbolic Smoke Ball Co* [1893] — purchase was a benefit to the promisor; using the smoke ball was a detriment to Carlill

Bargain — Australian Woollen Mills Pty Ltd v The Commonwealth (1954)

- Must be a "this for that" causal link between consideration and promise
- Acts performed in *reliance on* a promise (not *in return for* a promise) are not good consideration — *Beaton v McDivitt* (1987)
- Consideration must move from the promisee

Sufficiency of Consideration

- Consideration must be sufficient but need not be adequate — *Woolworths Ltd v Kelly* (1991)
- Courts will not inquire whether it is proportionate to the promise

"Past" Consideration

- Past consideration is **not** good consideration — *Roscola v Thomas* (1842)
- **Exception:** promise to pay for past services where there was an understanding throughout the transaction that services were to be paid for — *Re Casey's Patents; Stewart v Casey* [1892]

Existing Legal Duties — Stilk v Myrick (1809)

- Performance of an existing legal duty is not sufficient consideration
- Remaining crew already bound to work the ship back; desertions were an "emergency of the voyage"

Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] (UK)

- Practical benefit exception: a practical benefit obtained by the promisor from performance of an existing duty can be good consideration
- Gildwell LJ's criteria: A entered contract with B → A may not complete → B promises more payment → B obtains practical benefit → promise not induced by economic duress → practical benefit is good consideration

Musumeci v Winadell Pty Ltd (1994)

- NSW: practical benefit exception accepted in Australia
- Santow J's three modifications: (1) also applies where modifying party *accepts less*; (2) not where induced by unfair pressure; (3) only where benefit exceeds future damages claim

3.2 Intention to Create Legal Relations

- Courts seek to identify whether the parties *manifested* an intention to create legal relations — objective approach
- *Ermogenous v Greek Orthodox Community of SA Inc (2002)*: "intention" describes what would objectively be conveyed by what was said or done, having regard to the circumstances

The Use of Presumptions (post-Ermogenous)

- Party claiming contract exists bears the onus of establishing intention to create legal relations
- Commercial arrangements: strong presumption that legal relations were intended → party denying must show otherwise
- Social/family arrangements: no presumption either way; determined objectively on the facts

Commercial Arrangements

- **Letters of comfort**: Generally not binding (*Kleinwort Benson v Malaysian Mining [1989]*); can be binding if contractual promises included (*Banque Brussels Lambert v ANI (1989)*)
- **Honour clauses**: Courts give effect to express stipulations that an agreement is binding in honour only — *Rose & Frank v Crompton [1925]*

Masters v Cameron (1954)

- Three categories of "subject to contract":
 - a. Parties bound immediately but propose formal document (binding)
 - b. All terms agreed; performance conditional on formal document (binding)
 - c. Intention not to make concluded bargain until formal contract executed (not binding)
- Fourth category (*Baulkham Hills Hospital v GR Securities (1986)*): parties intend to be bound immediately and exclusively, with expectation of substitution by future formal contract

Family / Social Transactions

- *Balfour v Balfour [1919]* — domestic agreements between spouses generally not intended to create legal relations
- *Merritt v Merritt [1970]* — courts more willing to find intention where parties are separated or about to separate
- Intention requirement usually satisfied in commercial agreements between family members — *Roufos v Brewster (1971)*

3.3 Completeness & Certainty

The fourth requirement of contract formation: the agreement must be **certain and complete**.

Three aspects: (1) sufficiently complete; (2) agreed terms sufficiently certain and clear; (3) promises not illusory.

Completeness

- A binding contract requires agreement on all essential terms — *Thornby v Goldberg* (1964)
- Essential term = "a term without which the contract cannot be enforced" — *Thomson v White* [2006]
- An "agreement to agree" is generally not binding; an agreement to negotiate in good faith *may* be sufficiently certain
- *Masters v Cameron* (1954): courts examine intention disclosed by language used

Certainty

- Need to distinguish *difficulty of interpretation* from *absence of meaning* — Barwick CJ in *Upper Hunter v Australian Chilling* [1968]
- A term with more than one meaning is not necessarily uncertain
- *Whitlock v Brew* (1968): contract void where term "upon such reasonable terms as commonly govern such a lease" was too vague
- *Meehan v Jones* (1982): "satisfactory terms and conditions" was not uncertain as it leaves determination to purchaser who must act honestly
- *United Group Rail Services v Rail Corp NSW* [2009]: "genuine and good faith negotiations" valid and enforceable

Illusory Promises

- A promise is illusory if the promisor retains unfettered discretion as to performance
- *Crown Melbourne v Cosmopolitan Hotel* [2016]: promise to renew lease illusory if it leaves terms to offeror
- *Placer Developments v State Commissioner of Taxation* [1975]: airline ticket giving right to cancel without liability = illusory
- *Godecke v Kirwan* (1973): illusory where important matters left for third party determination — not illusory

3.4 Formalities & Capacity

Formalities

- No common law requirement that a contract be in writing
- Statute of Frauds 1677 (UK): certain contracts must be in writing or evidenced in writing
- Contracts of guarantee: *Statute of Frauds* s 4 — must be in writing and signed
- Contracts creating interests in land: s 34 *Property Law Act 1969* (WA) — must be evidenced in writing
- Sale of goods above threshold: s 4 *Sale of Goods Act 1895* (WA) — note or memorandum, or acceptance of goods, or deposit

Capacity

- A contract made with an individual who lacks contractual capacity may not be legally binding
- General rule: contract cannot be enforced against person who lacks capacity
- Exception: contracts for "necessaries" — binding on minors unless harsh or oppressive

Capacity of Minors — Four Categories

1. **Binding:** contracts for necessaries (food, drink, suitable goods — *Nash v Inman* [1908])
2. **Voidable** (binding unless repudiated): leasehold, share subscriptions, employment contracts that are beneficial
3. **Only binding if ratified:** all other contracts
4. **Void:** under statute (e.g. *Supreme Court Act 1986* Vic)

Capacity of Mentally Incapable Persons

- Contract may be voidable if: (1) party incapable of understanding the contract at time of making; AND (2) other party knew or ought to have known
- *Gibbons v Wright*: question is whether party was incapable of "understanding the general nature of what he is doing"
- *Blomley v Ryan* (1956): same test applies for intoxicated persons

4. Unjust Enrichment, Estoppel & Privity

4.1 Unjust Enrichment

Four-limb formula (Pf must show):

5. A transfer of value from Pf to Df ("enrichment")
6. A causal link between Df's enrichment and Pf ("at Pf's expense")
7. Existence of one of the previously recognised restitution categories (mistake, undue influence, duress, invalid tax)
8. Absent a defence (e.g. change of position)
 - *Pavey & Mathews Pty Ltd v Paul* [1987]: quantum meruit remedy of \$27K awarded based on unjust enrichment where contract was unenforceable due to writing requirements
 - *Redland City Council v Kozik* [2024]: Council could not retain improperly levied charges as this would result in unjust enrichment

Difficulties with Unjust Enrichment

- Defendant apparently does no wrong
- Doctrine overlooks important variations and differentiations between traditional categories
- The "at the expense" element establishes an overly loose link

4.2 Estoppel

By Representation / Common Law Estoppel

- One person (inducing party) induces another (relying party) to adopt and act upon an assumption of fact
- Inducing party then asserts rights inconsistent with that assumption
- Estoppel prevents the inducing party from denying that fact/state of affairs
- Relying party must suffer detriment if the inducing party does not act in accordance with the assumption

Equitable Estoppel

- Relates to promises to do something in the future
- *Crabb v Arun District Council* [1976] — Lord Denning: "Equity comes in, true to form, to mitigate the rigours of strict law"
- Not only prevents enforcing legal rights but may *create new rights* against the inducing party

Three Types of Equitable Estoppel

9. **Proprietary estoppel by encouragement** — active action by inducing party (*Kramer v Stone* [2024])
10. **Proprietary estoppel by silence or acquiescence** — inducing party's knowledge of relying party's mistaken belief (*Kramer v Stone* [2024])
11. **Promissory estoppel** — applies to all equitable estoppels not involving land

Detrimental Reliance

- Detriment (actual or potential) necessary to establish estoppel is reliance loss
- Includes wasted expenditure, improvements to inducing party's land, expenditures in preparation for a contract, loss of opportunity

"Farm Cases"

- *Kramer v Stone* [2024]: relying party continued share farming for 23+ years believing they would inherit inducing party's property
- *Guest v Guest* [2022]: relying party worked on farm for many years for minimal wages believing they would inherit substantial portion of property