Contracts Final Exam Notes

Note: the page numbers in the sample document do not correspond with the table of contents, because they are randomly collated, out of order pages from the full notes.

Express terms

Incorporation by **signature**: A party is generally bound by the terms contained in a contractual document which they have signed, whether or not they have read the document (*L'Estrange*).

> EXCEPTIONS: misrepresentation, fraud, non-contractual document (*Curtis*), mistake/non est factum, ACL unfair contract terms.

Incorporation by **notice**: Written terms, even if they aren't signed upon, can still be incorporated into a contract by notice. There are several requirements: timing, actual knowledge or reasonable notice of terms.

> Timing: incorporation by notice is only possible if the terms were available to the party before the contract was made (*Oceanic Sun Line Special Shipping Co. v Fay*)
> Actual knowledge: the party is bound by terms if they know the notice contains the contractual terms, whether or not they read them (or if a reasonable person would expect it to contain the contractual terms).
> If contained in a non-contractual document, the other party must take reasonable steps to bring terms to notice of the party to be bound.
> Reasonable notice means doing what is reasonably sufficient to give the other party notice of the term (*Thornton v Shoe Lane Parking*). Essentially, was it in a form that was reasonably likely to come to the attention of the other party or was it hidden away and difficult to access before formation?
> If the terms are unusual for that type of contract, the party seeking to incorporate them must take extra measures to bring those terms to the other party's attention (*Baltic Shipping Co v Dillon*).

Incorporation by a **course of dealings**: This requires uniform (consistent) course of conduct, regular course of conduct, and a contractual document. The term in question must have also been included consistently in the prior dealings - if the terms varied from time to time, it's unlikely it will be incorporated on this basis (*McCutcheon v David MacBrayne*).

The term must have been used often enough that the parties must have intended (objectively) to contract on that basis (*Balmain New Ferry v Robertson*).

Finally, the term must have been contained in a previous contractual document, not a mere invoice or receipt (*Rinaldi & Patroni v Precision Mouldings*).

ACL unfair terms

Part 2-3 of the Australian Consumer Law (ACL) regulates unfair contract terms in consumer, and small business, standard form contracts. This is called the unfair contract terms law (UCTL).

A term is void under ACL s 23(1) if:

1. no exception applies to that term;
2. it is in a "consumer contract" or "small business contract";
    - "Consumer contract" is defined in ACL s 23(3) as a contract for:
        - a supply of goods or services, or a sale or grant of interest in land;
        - to an individual;
        - whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. (this is about the buyer's use of the item)
        - (Note: The supplier may be a corporation or an individual).
    - "small business contract" = the contract is for a supply of goods or services, or a sale or grant of an interest in land;
        - at least one party to the contract satisfies either or both of the following conditions:
        - (i) the party makes the contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons;
          (ii) the party's turnover, worked out under subsection (6) for the party's last income year (within the meaning of the Income Tax Assessment Act 1997) that ended at or before the time when the contract is made, is less than $10 million: see ACL s 23(4).
3. the contract is also a standard form contract; and

   There is a rebuttable presumption that a contract is a standard form contract where a party to the proceeding makes that allegation: ACL s 27(1).

   If the other party attempts to prove the contract is not a standard form contract, the court may take into account such matters as it thinks relevant in determining whether there is a standard form contract, but must take into account the matters listed in ACL s 27(2), including:

   whether one of the parties has all or most of the bargaining power relating to the transaction;
   whether one of the parties has made another contract, in the same or substantially similar terms, prepared by that party, and, if so, how many such contracts that party has made;
   whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
   whether another party was, in effect, required either to accept or reject the terms of the contract (other than upfront price/main subject matter) in the form in which they were presented;
   - whether another party was given an effective opportunity to negotiate the terms of the contract (other than upfront price/main subject matter).
4. the relevant term is unfair.
    - A clause is "unfair" under ACL s 24(1) if:
        - it would cause a significant imbalance in the parties' rights and obligations arising under the contract;

- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Each of these factors must be proven on the balance of probabilities.

The court must take into account extent to which the term is transparent and the contract as a whole: ACL s 24(2).

An unfair contract term under these provisions is automatically void: it cannot be enforced. Further, it is a contravention to make a relevant contract with an unfair term or to apply or rely on an unfair term: ACL ss 23(2A), 23(2C).

A company that contravenes the law in this way can be liable for a range of remedies (ss 236, 237, 239)

and substantial pecuniary penalties (ACL s 224(3)-(4)). The maximum penalty for companies who contravene these provisions is the greater of $50 million or 3 times the value derived from the breach or –

if that value cannot be determined – 30% of adjusted turnover during the breach turnover period.

Termination

Termination operates *in future* (in the future), whereas rescission operations *ab initio* (from the beginning).

Termination by **agreement** can be done in three different ways:

The original contract may include an express term providing for its termination.

Parties may make a subsequent agreement expressly terminating their original contract

Courts may find an implied agreement by the parties to terminate their contract, either in the original agreement or a subsequent agreement.

First, consider whether termination is even possible. If the contract has been performed, you cannot terminate. If it has only been partly performed, decide whether to sue for breach or to rescind for a vitiating factor (to restore parties to pre-contract positions, but check for bars to rescission).

Vitiating factor: Mistake

This is about where a party is mistaken about an aspect of the agreement (who it's with,

what it's about, what the obligations are). Usually, courts dgaf if someone was mistaken, but there are rare cases.

(Tips: In an answer, be clear as to what the obligations are and what the misapprehension is. Pay careful attention to the facts in the scenario, especially as to

what the parties did and what the parties know and try to be realistic in evaluating their

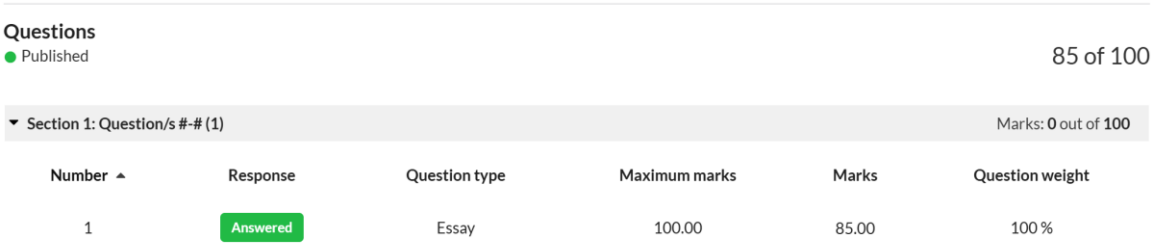
chance of success.)

The main forms of argument in mistake are:

- **Common mistake** = both parties have the same mistake about an aspect of the contract (i.e. that a sunken oil tanker exists at a particular spot)
    - For contracts involving the sale of goods, the *Sale of Goods Act 1923* (NSW) s 11 states that if the specific good has perished before the contract is formed and the vendor doesn't know, then the contract is void. If the good perished after the contract was formed, it is an issue of frustration NOT mistake. Here, consider whether the supervening event is such that the contract is frustrated.
- **Mutual mistake** = each party has a different mistake about an aspect of the contract.
    - The likely outcome of this is that one party was correct, or otherwise, the contract was insufficiently certain such that no contract was in fact formed.
- **Unilateral mistake** = only one party is mistaken about an aspect of the contract. The issue is whether the other party knew about the mistake and takes advantage of it in an unconscionable manner.
    - There are three ways this argument is usually made:
        - Serious mistake as to a fundamental term in the contract (*Taylor v Johnson*). The other party needs to know about the mistake and act unconscionably so the first party doesn't discover the mistake (without this element, no remedy).
            - For electronic input errors - see s 14D of the *Electronic Transactions Act 2000*- basically you can withdraw part of a contract if you made an input error and you attempt to correct or notify them of the error asap AND that you haven't received any material benefit from it.
        - Mistake as to the identity of a party to the contract. This is like where one party is mistaken about the other party's identity.
            - Did you meet in person?
                - If no, were they pretending to be a specific person? If yes, no contract formed. If no, contract formed (rogue has title to transfer property if that's the scenario).
                - If yes, contract formed but it is voidable so if you can find the rogue, you may still be able to sue them for breach of contract or fraud.
        - Mistake as to the nature of the contract (non est factum) (*Petelin v Cullen*). This is a specific and narrow common law remedy with a limited chance of success. It might apply to a party who is blind, illiterate, or otherwise has limited understanding. A key aspect of this argument is that the other party must be aware of the first person's misunderstanding about the nature of the contract (or that they at least suspect the person's misunderstanding).

Remedies for mistake

Equitable remedies: rectification (court changing the words of the agreement according to evidence of the common intention of the agreement), rescission. The main barrier to rectification is that the party seeking it must bring clear evidence that what they're alleging was in fact the common intention of the parties.



Questions

Published

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Section 1: Question/s #-# (1) Marks: 0 out of 100

Number	Response	Question type	Maximum marks	Marks	Question weight
1	Answered	Essay	100.00	85.00	100 %