

## Contents

|                                                                                                                                                                                                                                              |    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| cause of actions checklist .....                                                                                                                                                                                                             | 3  |
| contract formation .....                                                                                                                                                                                                                     | 4  |
| introduction .....                                                                                                                                                                                                                           | 4  |
| 1. agreement .....                                                                                                                                                                                                                           | 4  |
| (1) has an offer been made?.....                                                                                                                                                                                                             | 4  |
| (2) has the offer been accepted? .....                                                                                                                                                                                                       | 5  |
| (3) has the offer been revoked? .....                                                                                                                                                                                                        | 6  |
| (4) nonconventional approach re finding agreement (esp. if there is some doubt in offer/acceptance framework) .....                                                                                                                          | 6  |
| 2. consideration .....                                                                                                                                                                                                                       | 6  |
| (1) bargain requirement: is there an exchange/quid pro quo? ( <i>AWM; Beaton</i> ) .....                                                                                                                                                     | 7  |
| (2) benefit/detriment requirement: is the consideration legally sufficient? ( <i>Currie</i> ).....                                                                                                                                           | 7  |
| (3) workarounds to consideration.....                                                                                                                                                                                                        | 8  |
| 3.certainty (NOTE: if certainty is issue, intention could be as well).....                                                                                                                                                                   | 8  |
| Intro for certainty:.....                                                                                                                                                                                                                    | 9  |
| (1) is the agreement (or provision) incomplete?.....                                                                                                                                                                                         | 9  |
| (2) is there agreement to agree (i.e. matters left to be decided between the parties).....                                                                                                                                                   | 10 |
| (3) is there illusory promise? (i.e. matters left to be decided by one of the parties).....                                                                                                                                                  | 11 |
| (4). CF agreement to negotiate. ....                                                                                                                                                                                                         | 11 |
| (5) is there unclear language? .....                                                                                                                                                                                                         | 12 |
| (6) if incomplete, uncertain, or illusory, could it be severed or waived?.....                                                                                                                                                               | 12 |
| 4. Intention (NOTE if intention is issue, certainty could be as well) .....                                                                                                                                                                  | 12 |
| intro .....                                                                                                                                                                                                                                  | 13 |
| (1)the test: an objective approach.....                                                                                                                                                                                                      | 13 |
| (2)the High court doubted the use of presumptions in <i>Ermogenous v Greek Orthodox</i> . at most, presumptions only help identify the burden of proof, but they should not lead to heightened standard of proof ( <i>Ermogenous</i> ). .... | 14 |
| (3) what is the nature of the parties' relationship? who bears the burden of proving intention? (2 and 3 combined, see structure).....                                                                                                       | 14 |
| (4) applying the Ermogenous test: the circumstances (4 and 5 combined, see structure) .....                                                                                                                                                  | 14 |
| (5) use of categories (not as presumptions, but as context to 'the circumstances').....                                                                                                                                                      | 14 |
| (6) special rules on preliminary agreements.....                                                                                                                                                                                             | 15 |
| (7)special rules re other contingencies .....                                                                                                                                                                                                | 16 |
| 5. Capacity.....                                                                                                                                                                                                                             | 16 |
| 6. Formalities.....                                                                                                                                                                                                                          | 16 |
| (1) Does the type of contract under examination have formality requirements in s 126 Instruments Act 1958 (Vic)?.....                                                                                                                        | 17 |
| (2) Have the formality requirements been complied with? .....                                                                                                                                                                                | 17 |
| (3) What are the consequences of non-compliance? .....                                                                                                                                                                                       | 18 |
| 7. Privity .....                                                                                                                                                                                                                             | 19 |
| intro .....                                                                                                                                                                                                                                  | 19 |
| (1) is the person in question a joint promisee (i.e. a party) or a third-party beneficiary? .....                                                                                                                                            | 19 |

|                                                                                                                                             |    |
|---------------------------------------------------------------------------------------------------------------------------------------------|----|
| (2) has the person provided consideration? .....                                                                                            | 20 |
| (3) non application and workarounds of privity rule .....                                                                                   | 20 |
| EQUITY .....                                                                                                                                | 21 |
| (1)key ideas about Equity:.....                                                                                                             | 21 |
| (2)Types of equitable jurisdiction (confusion of jurisdictions leads to ‘fusion fallacy’). 21                                               |    |
| (3)equitable doctrines: .....                                                                                                               | 22 |
| Estoppel .....                                                                                                                              | 22 |
| introduction and preliminary steps .....                                                                                                    | 24 |
| step one elements of equitable estoppel (for both promissory and proprietary estoppel) .....                                                | 24 |
| 1. induced assumption ( <i>Brennan J in Waltons Stores; Mason CJ and Wilson J in Walton Stores; W v G; Priestley JA in Silovi</i> ) .....   | 24 |
| 2. detrimental reliance ( <i>Brennan J in Waltons Stores; Mason CJ and Wilson J in Walton Stores; W v G; Priestley JA in Silovi</i> ) ..... | 25 |
| 3. legal relationship ( <i>Brennan J in Walton Stores; Mobil</i> ).....                                                                     | 26 |
| 4. knowledge/intention ( <i>Brennan J in Walton Stores</i> ) .....                                                                          | 27 |
| 5. reasonableness ( <i>seems required by Mason CJ and Wilson J in Waltons Stores; discussed but not required in W v G</i> ) .....           | 27 |
| 6. unconscionability ( <i>Mason CJ and Wilson J in Walton Stores</i> ) .....                                                                | 28 |
| step two remedies .....                                                                                                                     | 28 |
| 1. estoppel remedies depends on whether it is common law estoppel or equitable estoppel.....                                                | 28 |
| 2. General rules re equitable estoppel remedies. ....                                                                                       | 29 |
| 3. does the plaintiff get expectation based remedies or reliance based remedies? .....                                                      | 29 |
| 4. if expectation relief granted, what is the appropriate mechanisms? .....                                                                 | 29 |
| Restitution .....                                                                                                                           | 30 |
| Introduction .....                                                                                                                          | 30 |
| step one is there a valid and enforceable subsisting contract governing these matters?..                                                    | 30 |
| step two what is the nature of the claim? money had and received or QM? .....                                                               | 30 |
| step three defences.....                                                                                                                    | 34 |
| step four remedies for QM (for money had and received, just recover the money if successful) .....                                          | 37 |
| Essay component.....                                                                                                                        | 39 |
| general tips .....                                                                                                                          | 39 |
| ideas.....                                                                                                                                  | 39 |
| contract formation .....                                                                                                                    | 40 |
| beautiful general quotes.....                                                                                                               | 40 |
| nonconventional approach re finding agreement.....                                                                                          | 41 |
| on the insistence upon consideration .....                                                                                                  | 41 |
| on why the law has little interest in the adequacy/equality of the bargain .....                                                            | 42 |
| on the rationale of bona fide compromise and practical benefit.....                                                                         | 42 |
| on the rationale of existing legal duty rule and practical benefit.....                                                                     | 42 |
| on the tension b/w upholding bargains and not interfering with contractual freedom ....                                                     | 42 |
| on certainty and intention ( <i>Kirby in Pace</i> ).....                                                                                    | 43 |
| should formality requirement be abolished since it can be circumvented in so many                                                           |    |

|                                                                                                                    |    |
|--------------------------------------------------------------------------------------------------------------------|----|
| ways? .....                                                                                                        | 43 |
| whether the doctrine of privity should be abolished? .....                                                         | 44 |
| on Indigenous people perspective .....                                                                             | 48 |
| equity .....                                                                                                       | 49 |
| beautiful general quotes.....                                                                                      | 49 |
| the history of equity.....                                                                                         | 49 |
| the nature of equity .....                                                                                         | 50 |
| equitable jurisdiction .....                                                                                       | 50 |
| equity maxims .....                                                                                                | 51 |
| estoppel.....                                                                                                      | 51 |
| the category of estoppel.....                                                                                      | 51 |
| background: the history of equitable estoppel (pre and post Waltons House).....                                    | 52 |
| three models of promissory estoppel – A Robertson: is promissory estoppel an<br>independent cause of action? ..... | 53 |
| the unified basis of equitable estoppel and the remedies.....                                                      | 55 |
| restitution.....                                                                                                   | 56 |
| beautiful general quotes.....                                                                                      | 56 |
| basis/underlying doctrine of restitution .....                                                                     | 57 |
| relationships.....                                                                                                 | 59 |
| equitable estoppel and contract.....                                                                               | 59 |
| discuss restitutionary claims and its relationship with contracts .....                                            | 60 |
| contract, estoppel and restitution .....                                                                           | 61 |
| obligations and property .....                                                                                     | 62 |

#### shopping list

- ☐ notes
- ☐ textbook (CCM + PCL)
- ☐ two articles (three models and the history of equity)

#### cause of actions checklist

- Common law:
  - contract formation
  - restitution
- equity
  - equitable estoppel
  - other equitable remedies: part performance; constructive trust

## contract formation

formation checklist

1. agreement
2. consideration
3. certainty
4. intention
5. capacity
6. formalities
7. privity

## introduction

the essence of a contract is a voluntary assumption of a legally enforceable duty (*AWM*). to establish a contract, [the party] seeking to enforce it must prove that they have reached an agreement, exchanged valuable consideration, intended to be legally bound and that the terms is sufficiently clear and certain. In addition to meeting formality requirements, the contract has to be made between persons of legal capacity and sought to enforce by a party to it.

### 1. agreement

first, the parties must reach an agreement. the traditional approach to finding an agreement is the offer and acceptance approach, although courts have noted the need to depart from the traditional approach in exceptional cases (*Diplock in Gibson; Heydon J in Brambles*).

#### (1) has an offer been made?

an offer is a proposal on sufficiently certain terms with an intention to be legally bound upon acceptance (*Gibson; Mobil*).

an objective test: the offeror will be bound if it appears to a RP that the proposal amounts to an offer to enter into a contract (*Brambles*), i.e. determined by reference to the offeror's objective manifestation of intention.

- does it use the language of command? (*Brambles*)

there is no offer when language of command is used and no choice to accept/reject (Heydon J).

- is the language sufficiently clear and certain? (*Gibson; Mobil*)

a promise to 'find a way' to 'extend...' is simply too vague and uncertain (Mobil).

speech, marketing: 'perhaps', 'may', 'hope'.

- is it a mere 'invitation to treat'? (*Gibson*)

'We may be prepared to sell the house to you at the price of...' is an invitation not to accept the offer, but an invitation to treat.

- is it mere puffery? (*general newspapers; cf Carlill*)

puffery is part of the ordinary stuff of commerce (general newspapers) and is not meant to be taken seriously.

the sincerity in the promise, by stating that \$100 was deposited in the bank, negates the suggestion that it is mere puff (Carlill).

- is it mere announcement of (administrative) policy? (*AWM*)

It is clear that the basis for the policy is administrative, not contractual.

## (2) has the offer been accepted?

acceptance is the unqualified assent to an offer.

an objective test: would a reasonable person, in the circumstances, think that the offeree has given their unqualified consent? (*Empirnall; Brambles*)

- is the offer unilateral or bilateral?
  - a bilateral offer is a request for promises. a bilateral offer is made to one party at a time. acceptance and performance are separate. acceptance to bilateral offer must be communicated (either expressly, or implicitly by conduct) (*Felthouse*).
  - a unilateral offer is a request for certain conduct. a unilateral offer could be made to the world but only forming contracts with those who performed the acts. same conduct constitutes acceptance and performance by the offeree, thus communication of acceptance is dispensed with. (*Carlill; Mobil*).
- is it unqualified acceptance?
  - a counter-offer is **a rejection** that kills the original offer (*Brambles*)
  - rejection **cf enquiry of terms** ('create a platform for further negotiation') (*Brambles*)
- does the offeree's conduct amount to acceptance (objective test)?
  - **Mere** silence cannot be or mandated as acceptance (*Felthouse*).
  - express statements
  - acceptance by conduct (*Empirnall; Brambles*)
    - » an objective test
    - » where an offeree with a reasonable opportunity to reject...takes the benefit of them...in accordance with the offer, it is open to conclude that the offer was accepted (*McHugh in Empirnall*)
    - » when regard is had to the indivisible nature of the offer... by accepting those benefits the appellant accepted the Council's offer in accordance with its terms (*Ipp in Brambles*).

- Has the acceptance been communicated in a manner specified by the offeror and when?

In unilateral contracts, notification of acceptance is implicitly waived/dispensed with

(*Carlill*).

In bilateral contracts, there are location and timing rules as to acceptance.

- postal *acceptance* rule: when it is expressly or impliedly allowed/intended as a method of acceptance, acceptance by post is effective 'once posted in the mailbox'.
- **step one: instantaneous messages: the communication was generally effective at the time and place it was received:** *Brinkibon* (telex of acceptance sent London → Vienna was effective in Vienna)
- **step two: Electronic Transactions Act (Vic) gives the definition of what and when is 'receipt'**
  - » S13A(1)(a): In situations where the addressee has designated (specified) an address as the manner in which to communicate, acceptance is effective when it

becomes capable of being retrieved by the addressee (e.g. when the email hits the inbox)

- » S13A(1)(b): If an address was not designated, then acceptance is effective when it is capable of being retrieved AND the addressee is aware of the communication
- » **‘Designated’** is not defined in the ETA. By ‘designated’ information system’, the UNCITRAL Model Law (not binding in Aus) is intended to cover a system that has been **specifically** designated by a party, e.g. in the case where an offer expressly specifies to which acceptances should be sent. Mere letter head or email posted on the website is not designation.
- is the offer still ‘open’/available to be accepted?
  - has it lapsed?
  - has it been rejected?
    - » a counter-offer is **a rejection** that kills the original offer (*Brambles*)
    - » rejection **cf enquiry of terms** (‘create a platform for further negotiation’) (*Brambles*)
    - » note the possibility that agreement could still be found using a ‘mutual assent’ test i.e. departure from offer/acceptance framework (*per Heydon in Brambles*).
  - has it been revoked? (*Mobil*) (See below)

### (3) has the offer been revoked?

- bilateral offer can be revoked any time before acceptance
- unilateral contract can be revoked any time before **completion of performance** (*Mobil*)
  - *unless there is an implied promise not to revoke (the criteria is fairness), or the offeror is estopped from revoking (Mobil)*
- has revocation been communicated to the offeree and when?
  - revocation is effective upon receipt (no postal rules; for electronic ones, ETA also applies).
- compare the time when the acceptance took effect and when the revocation took effect
- the ‘manifestation of mutual assent’ test:

### (4) nonconventional approach re finding agreement (esp. if there is some doubt in offer/acceptance framework)

‘Manifestation of mutual assent’ test: in all the circumstances can an agreement be inferred? **Has mutual assent been manifested?** What would a reasonable person...think as to whether there was a concluded bargain? (*Heydon in Brambles*).

## 2. consideration

there is no enforceable contract unless there has been an exchange of legally valuable consideration (*AWM; Currie*). the court requires sufficiency, but not adequacy of consideration (*Kirby in Woolworths*).