

• CONTRACT

Contract

- A contract is an agreement between two or more people which is legally enforceable.
- A valid contract is a legally binding agreement.

Elements of a valid contract:

1. Intention to enter into a legal relationship
2. Agreement: offer and acceptance
3. Consideration (parties must agree to buy each other's promises with something of value)

Other factors which could affect the enforceability (validity) of a contract are:

(the contract has been formed because the essential elements are there) but can be set aside by one of the parties (the innocent party because:)

4. Whether the parties have a capacity to make the agreement
5. Whether the consent to the agreement is **free or voluntary**
6. Whether the terms of the contract are **sufficiently clear and certain (certainty of terms)**
7. Whether the **required legal formalities** were complied with;
8. Whether the agreement was **legal**

Kinds of contract

Simple contract:

- To formal a simply contract, there must be: **Consideration, agreement** (offer and acceptance) and **intention**. (unless it's a deed)
- if one of the element is missing, there is no contract
- can be made **verbally** or in **writing**, or **implied by the conduct** of the parties. (ex: getting a coffee)
- Most simply contract has at least **two parties**.

Formal contract

- requires **legal formalities** and is valid only when it is made according to the form which is required by the law. There are two kinds of formal contracts: **deed** (formal contract that has to be signed and witnessed by the parties) and **contracts of record** (court disclaims that certain contract exist).
- **Deed** is always **in writing** and signed by the party against whom it will be enforced
- Formal contract Does **not** require **consideration** (a deed) like simply contract.
- **Unilateral contract** (p111): a contract in which one party promises to do something in exchange for the second party's actual completion of a separate action.
 - Ex: a unilateral contract is created when a person offers a reward to any other person who find and returns their lost property.
- **Bilateral contract**: a contract under which both parties undertake to perform part of an obligation

Source of contract law

(in formation of the contract today we focus on judge made law.)

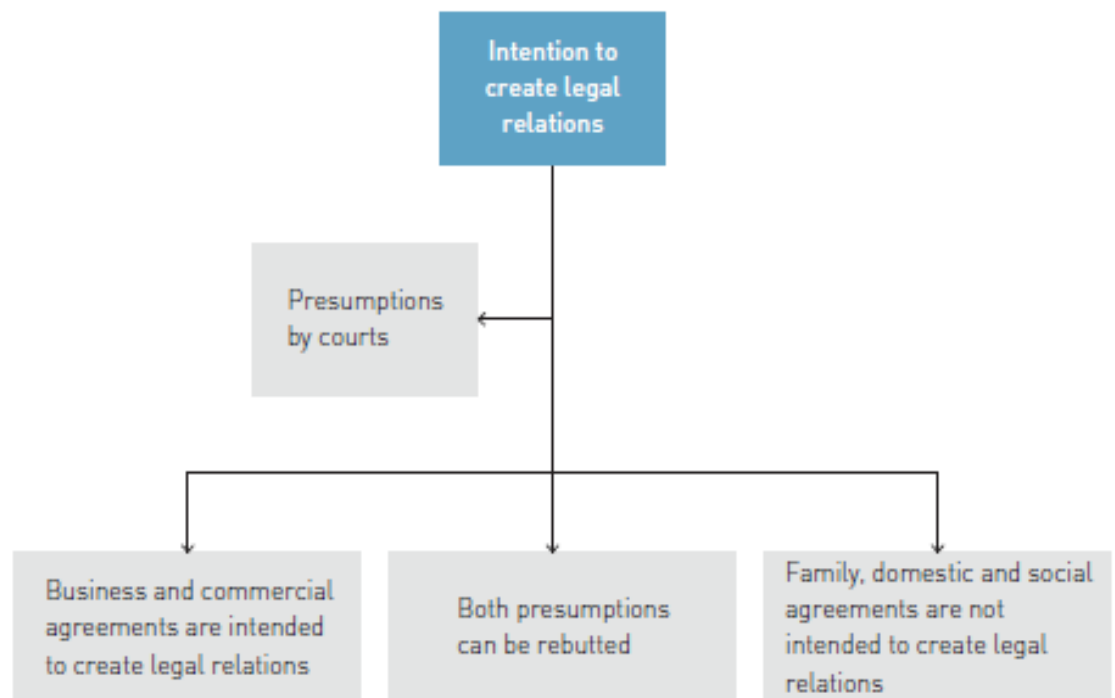
Statute law

- Law made by parliaments of the states, territory and Commonwealth
- Referred to as Acts of parliaments/ legislation.

Common law

- Law developed by the courts in Australia
- Referred to as common law/case law

Simply Contract



For a contract to be legally binding, there must be:

1. Intention to create legal relations

- Intention to be legally bonded by what what has been agreed to.

Whether the courts believe there is an intention to create legal relations:

- Whether 'a reasonable person would have believed that the agreement was legally binding under the circumstances of the parties'.

Commercial agreements(p117)

- There is a presumption that parties have an intention to enter into legal relations.
- This presumption can be rebutted by presenting evidence to the contrary.
- **Honour clauses:**

- In commercial agreements, parties can expressly **intend not to be bound** by the agreement
- an 'honour clauses' **rebutts the legal presumption** in relation to intention in business and commercial agreements.
- i.e. 'This agreement is not intended to be legally binding';
'This agreement is binding *in honour only*';
'It is a conditional agreement';
'This agreement is subject to a formal agreement'.

Husband and wife agreements (p117)

- **NOT intended** to be **legally enforceable** unless the presumption is rebutted by evidence to the contrary. Ex: arrangement is commercial in substance.
- Partners can make legally binding agreements before marriage (pre-nuptial) or after marriage (post-nuptial) to mainly deal with their personal or financial matters before or during their marriage, or after divorce or separation.

Social, family and domestic agreements (p116)

- Sometimes friends and family members make **voluntary agreements** by which they **do not necessarily intend to be legally bound**. Means their friend or family member would not take the, to court if they breached the agreement.
- However, this presumption can be rebutted by parties by presenting evidence to the courts to the contrary intention. Like arrangement is commercial in substance.
- Family domestic and social agreements are contracts between family members and friends. These contracts are not intended to be legally binding unless proven otherwise.

2. Agreement (offer and acceptance)

Agreements to agree and 'subject to contract'

- A contract has not yet been formed or there was no intention to create legal relations until a later stage:
 - 'subject to contract'
 - 'subject to finance approval';
 - 'preliminary agreement';
 - 'non-binding agreement';
 - 'informal agreement';
 - 'agreement to agree'.

Masters -v- Cameron (1954) 91 CLR 353

- The High Court held that in this case, the parties did not intend to be bound by that agreement as the bargain was not concluded until they executed a formal contract.

i. Offer

A proposal made by one party (offeror) to another party (offeree) to enter into a legally binding contract.

- **Objective test: To determine whether an offer has been made**

- Whether a reasonable person in the circumstances of the offeree believes that an offer has been made and that a legally binding agreement will be made when the offer is accepted.
- **An offer has been made if:**
Intention of an offer is decided by the court based on whether a reasonable person standing in the shoes of the recipient would believe the statement to be a promise in the form of an offer
- **A valid offer must be:**
 - Must be firm
 - Must be certain
 - Must be communicated to the offeree
- **An offer can be made to:**
 - The world at large
 - One person
 - Group of people
- **An offer can be:**
 - Revoked before it is accepted (once accepted cannot be revoked)
 - A counter offer can be made
 - Rejected, and the offer will be terminated
 - Accepted
- **An offer can be made by:**
 - In writing
 - Verbally
 - By conduct
- **Termination of an offer:**
 - Revocation
 - Rejection
 - Counter-offer
 - Lapse of time
 - Non-occurrence of an event
 - Death
- **To determine whether a statement is an offer:**
 - Whether a valid offer has been made by one party to the other will depend on the words used or the conduct engaged by the offeror.
 - Courts use the objective test to determine whether an offer has been made.
 - The objective test requires the court to ask whether a reasonable person standing in the shoes of the recipient would believe the statement to be a promise in the form of an offer (the reasonable person test).

Invitation to treat VS offer

- Invitation to treat is when sometimes parties to a contract do not make an offer, but rather invite the others to make an offer or deal with them. An invitation to treat is not an offer because it represents only an **invitation to make an offer**.

Invitation to treat examples:

- Good displayed in stores with or without price tags (p144)
 - The offer to buy is made by the customer at the point of handing money to the cashier. At this point it is open for the shop owner to either accept the

money and form a valid contract, or to not accept the money and keep the item.

- Advertisement (P147)
- Tender: (p147)
 - Reason: The party placing the bid makes the offer and this is either accepted or rejected by the party placing the tender.
- Price lists (p149)
- Auction sales (p148):
 - It is up to the auctioneer to accept or reject the offer (bid). The bidder can revoke their bid any time before the fall of hammer.
- Preliminary enquiries (p149):
 - Usually arise in the pre-contractual phase of a contract

ii. Acceptance

A final and unqualified assent to all the terms of the offer.

- Whether or not there has been an acceptance will be decided objectively by reference to the words or actions of the offeree, not by their thoughts.
- **Acceptance can be made by:**
 - Spoken of words
 - written of words
 - conduct, such as in a unilateral contract ex: returning a lost dog for a advertised reward.
 - Performance of an act
 - Unilateral contracts: made by taking the form of undertaking the act
 - Bilateral contracts: made by a verbal/written response by the parties, or engaging in a conduct.
- **No acceptance:**
 - Silence (below explain about it)
 - Ignorance of the offer
- **Revocation of acceptance:**
 - it is possible to revoke the acceptance provided the communication of the revocation is made to the offeror before they receive the acceptance.
- **Rules of acceptance:**
 - Offer must be in force before it may be accepted
 - Acceptance is final and unqualified
 - Acceptance must be communicated to the other party unless waived
 - Silence cannot constitute acceptance-
 - Acceptance is a deliberate act and silence is not, therefore the offeror cannot impose silence as an acceptance (Felthouse v Bindley)
 - Acceptance must be made within a reasonable time
 - Acceptance must be in reliance upon the offer
 - Can only be accepted by the person to whom the offer was made to
 - Acceptance with conditions, additions or deletions will be nothing more than a **counter-offer**.
- **Counter offer:**
 - **mirror approach:** in order to be valid, the offeree's acceptance must mirror the terms of the offer. Any departure from the terms of the offer, may not constitute a valid acceptance.

- **Postal acceptance rule: (p153)**
 - the acceptance occurs at the time the letter is posted and not when the letter is delivered.
 - cannot be revoked.

3.Consideration

Consideration:

Is the price paid by parties to buy each other's promise. Generally, a person who sues another for a broken promise under a contract should prove that they paid the price and seek remedies from the other party through the court for the broken promise or breach of contract

Rules of consideration:

- Consideration is an essential element in every simple contract.
- It applies to all contracts other than contracts under seal (deed).
- There must be an **exchange of promises** between the parties or a promise for performance at the time of forming the contract.
- The promise or performance given in exchange must have **value**.
- A person who gives a **legally binding promise** is not allowed to go back on the promise even if the promise is not supported by sufficient consideration.

Consideration can take the form of:

- the payment of money,
- the provision of goods,
- the provision of a service,
- the undertaking of an onerous obligation,
- refraining from doing something, such as agreeing not to sue, or
- a promise to do any of these things.

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256

Kinds of consideration

- **Executed:** one party pays the price. Ex: fulfils his/her obligation under the contract.
- **Executory:** both parties still have to pay the price. Ex: still have to fulfil their obligation.

Consideration must be

- Must be sufficient, clear and certain (p159)
- NOT a vague promise/ must move from the promisee (p160)
- NOT past consideration (p159)
- NOT performance of an existing legal obligation (p161)
- NOT be adequate. (p157)
- NOT be illusory(p160)
- Not be illegal (p159)

Performance of an existing duty (p158)

- Performing existing contractual obligations does not amount to **good consideration** to enforce a promise (*Stilk -v- Myrick* (1809) 2 Camp 317; 170 ER 1168). (cuz it's in the past)
- However, where the promisor receives *something extra* in exchange for his/her additional promise, that promise may be enforced (*Williams -v- Roffey Bros & Nicholls* [1991] 1 QB 1).

Pinnel's Rule (renegotiating debts)

- Payment of a lesser sum in lieu of the full amount on the day it is due (due date) does not constitute satisfaction of the whole debt as the agreement to accept lesser sum is not supported by any consideration. (Pinnel's case (1602) 5 Co Rep 117a; 77 ER 237).
- This rule was applied in the following case:
Foakes -v- Beer (1884) 9 App Cas 605.

Promises that do not need consideration

- Contracts under seal
- The doctrine of **promissory estoppel** (equitable estoppel)

Promissory Estoppel (p163)

- '...when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.' Lord Denning in *Moorgate Ltd -v- Twitchings* [1976] QB 225
- Promissory estoppel will allow a promise to be enforced even though the promisee has not provided consideration for that promise.
- Is based on equity principle of 'fairness, justice and good conscience', to enforce voluntary promises.
- **Elements of Promissory Estoppel:**
 - Promisor made a promise/representation/assumption to the promisee
 - Reliance by the promisee
 - Material detriment suffered by the promisee
 - Unconscionability of the promisor if (allow the promisor to break their promise)
- **Remedies available with promissory estoppel (p166):**
 - Maximum remedy: giving effect to the expectation
 - Minimum remedy: reliance based

Ex gratia p 138

Certainty of terms (p169)

The Parties

Capacity to contract

- Certain individuals and entities are prohibited by law from entering into legal contracts.
- One reason for the existence of such laws is to protect vulnerable individuals from being exploited.
- The following individuals may not have the required legal capacity to contract:
 1. **minors;**

2. **drunkards**
3. **bankrupts.**

1.Valid contracts with Minors (p186)

Minors are any persons below the age of 18 years. Contracts with minors can be **valid/voidable/void**.

Two types of valid contracts:

- contracts for **necessaries**
 - Necessaries are defined as goods suitable to the condition in life of a minor and to the minor's actual requirements at the time of sale and delivery.
 - Food; housing; education; medical expenses; legal expenses
- contracts for **beneficial services**.
 - The service provides a benefit to the minor. A contract that provides a clear tangible benefit to a minor is valid and binding.

Voidable contracts with minors:

- Voidable contracts are those can be avoided by the minor before they turn 18 or within a reasonable time after they turn 18.

Void contracts with minors:

- Contracts that not classed as contracts for necessaries, beneficial contracts of service or voidable contracts are **void** against the minors

Rights of affirmation, repudiation and ratification (p191)

2.Drunkards (p191)

- The law treats drunkards as being of unsound mind when entering into a contract with another. The person who has contracted with the drunkard will be deemed to have taken advantage of a person with insufficient legal capacity to contract.
- If drunkards wish to proceed with the contract, they can affirm the contract within reasonable time when they sober up.
- The contract will be **voidable** at the option of the person who has been taken advantage of when undertaking the transaction if the following condition exists: (191)

3.Bankrupts (p192)

- Bankrupts do not have full legal capacity to enter into contracts (*Bankruptcy Act 1966* (Cth)).
- The contract may be **voidable** at the option of the bankrupt. However, bankrupts will have the opportunity to affirm the contract if they wish to do so after they have been discharged from bankruptcy.

4.Mentally incapacitated

Contract with mentally ill persons will be **voidable** if:

- The person is incapable of understanding the nature of the contract; AND
- the other party is aware of their condition.

(such a contract may be affirmed by the individual concerned if they regain their sanity)

5.Legal Capacity of Other Entities (p192)

- Corporations have full legal capacity
- Governments

Privity rule

Privity

- Although a contract between two or more parties may provide a benefit to a party that is not privity to the contract, that **third party has no right** to commence an action if the benefit fails to materialise.
- In other words, the doctrine of *privity* affects the right of a third party to enforce their expected benefit.
- Contracting parties A and B, and a third party C: both contracting parties have provided consideration for each other's respective promises. However, the third party is not a party to the contract between A and B. C is expecting a benefit from the contract, even though they have not provided any consideration to either A or B
 - ISSUE: CAN C SUE?

Exceptions to the Privity rule:

- The courts have used the following exceptions to the *privity* rule:
 1. trusts;
 2. joint promises; and
 3. agency.

1.Trusts

- The trust is made between two contracting parties A and B, and is for the benefit of the beneficiary, in this case the third party C. the main advantage with characterizing the relationship between A and B as a trust arrangement is that it provides C with an **equitable interest** in the subject matter of the trust. That is because C is now a beneficiary under the trust.
- So if C does not receive their expected benefit, they would be entitled to claim their beneficial interest in equity.

2.Joint promises

a contractual device that is used to circumvent the privity rule is the joint promisee rule.

- Although A's promise may be made only to B, the circumstances may be such that A's promise may be deemed to be made to both B and C.
- This case, both B and C can enforce A's promise.
- In this case C is not really a third party to A's promise, but is instead a joint promisee.

3.Agency

A so-called third party C may in fact be a party to the contract because one of the contracting parties was acting as an agent for and on behalf of them.

- A and B are contracting with each other, it may be possible for C to argue that B was actually contracting for and on behalf of C.
- This would make C the principle and B their agent.
- C could argue that the contract between A and B was in fact a contract between A and C.
- There may be an **exclusion clause** in the contract that attempts to protect C for any loss or damage that occurs when C performs the work under the contract.
(p199)

Vitiating Factors

Factors that affect genuine contractual consent are called 'vitiating factors'. These factors 'vitate' a contract and allow the innocent party to set it aside. The innocent

party may set aside the contract and/or sue for damages or the courts may declare the contract void due to lack of genuine consent.

Void and voidable contracts (p255)

- A transaction is said to be void when it is of no contractual effect.
- A transaction is described as voidable when it is capable of being either set aside or confirmed at the option of one party to it (the innocent party).
- Until set aside or avoided, the transaction is a valid contract and is legally binding on the parties.

Lack of free and voluntary consent may arise from:

1. Mistake
2. Misrepresentation
3. Duress
4. Undue influence
5. Unconscionability

1.Mistake (p255)

A mistake occurs when one or more of the parties to a contract misunderstand each other about a *fact*.

- Mistake prior to or at the time of the contract
- Mistake is fundamental
- Mistake, not misrepresentation
 - *David Securities Pty Ltd -v- Commonwealth Bank Ltd* (1992) 175 CLR 353
 - *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377

Types of Mistakes

- **Common mistake:** shared mistake i.e. both parties make the same mistake as to a fundamental fact.
- **Mutual mistake:** both parties are mistaken though there appears to be an agreement between them. Both parties misunderstand each other and make different mistakes.
- **Unilateral mistake:** one party makes a mistake as to the terms or effect of the contract or to the identity of the other party. The other party knows or ought to be aware of the mistake made by the innocent party.
- Results in: **common law**- contract is void
Equity- contract is voidable
Statute law: contract is voidable and innocent party can sue for damages and other remedies under the CCA

2.Misrepresentation

A **false statement** of fact is made by one party (representor) to the other party (representee) before the contract is concluded.

- The statement leads the party to enter into the contract.
- Whether or not pre-contractual statements are promissory in nature, the court will judge the intention of the parties by using the 'reasonable bystander test' '...whether the person making the statement is taken to have warranted its accuracy'

For conduct to be actionable as a misrepresentation:

1. A false representation is made by one party (**representor**) to the other (**representee**)
2. With regard to some existing fact or past event
3. Intended to induce and which in fact induces the representee to enter the contract

Test (p260)

Applying 'reasonable bystander' test. : what would a reasonable person, aware of the circumstances, believe was the intention of the parties with regard to the contractual force of the statement.

What does not constitute misrepresentation? (p261)

The legal definition of a misrepresentation does not include the following:

- honest statements of opinion
- puffs or exaggerated statements
- statements of future intention.
- mere silence, unless one or more of the following applies:
 - A statement, previously truthful, subsequently becomes untrue.
 - The representor does not correct a previous statement after discovering it is untrue.
 - A failure to disclose distorts a statement previously made so that it becomes a half-truth.
 - There is a legal obligation of full disclosure by parties during negotiations.

Types of Misrepresentation

Innocent misrepresentation(p264):

- when the representor does not intend to deceive anyone and was **unaware** that the statement was untrue. The misrepresentation is made unintentionally
- No damages
- innocent party has the choice of **rescinding** or continuing with the contract.

Negligent misrepresentation(p264):

- the representor makes an **honest but incorrect statement** negligently and carelessly.
- Damages in negligence,
- Innocent party affected by negligent misrepresentation can **rescind** the contract and sue for damages.

Fraudulent misrepresentation(p263):

- the representor knows or believes that the statement is untrue and presents it to be true or accurate. The aim of the representor is that the other party enters into the contract with the representor.
- The **elements** of fraudulent representation:
 - A false statement of fact is made by one party to the other.
 - The statement is made with a lack of belief in its truth.
 - The statement induces the other party to enter into the contract.
 - The statement results in damage to the innocent party.
 - Parties affected by fraudulent misrepresentation may rescind the contract and sue for damages.
- Innocent party can rescind the contract and sue for damages.

Remedies for misrepresentation (p266)

- For Innocent Misrepresentation
 - Rescission possible; and/or
 - No damages, only nominal damages

- For Negligent Misrepresentation
 - Damages in negligence
 - Rescission possible
- For Fraudulent Misrepresentation
 - Innocent party can rescind the contract
 - Can sue for damages

3. Duress (p269)

Pressure exerted by one party to coerce another to contract on particular terms

- Physical, mental psychological duress to a person/relative to the person (duress to person)
- Duress to goods
- Economic duress
 - *Barton v Armstrong* [1976] AC 104
- Duress makes the contract voidable at the option of the innocent party.

4. Undue influence (p267)

'Undue influence occurs where a person with influence and power dominates the will of another person. In special relationships, there is a presumption that undue influence may occur.

- Every case where influence is acquired and abused, where confidence is reposed and betrayed.'
 - *Allcard -v- Skinner* (1887) 36 Ch D 145
 - *Tate -v- Williamson* (1866) LR Ch 55

Relationships of trust and confidence

- **Other relationships:**
 - Husband-wife, university lecturer-student, gf-bf
 - **No** undue influence has been exercised
- **Special relationships**
 - Parent and child, guardian and ward, doctor and patient, solicitor and client, religious adviser and disciple.
 - Under influence may have been exercised
- Presumption of the court can be rebutted by presenting facts to the contrary. (ex: Mr J failed to present it)
 - Lyon -v- Home* (1868) LR 6 Eq 655
 - Johnson -v- Buttress* (1936) 56 CLR 113-'their relationship was a special relationship that gave rise to the presumption of undue influence. Since Mr J could not rebut the presumption, the gift should be set aside. – the presumption of the court can be rebutted by presenting facts to the contrary

5. Unconscionable Conduct (p271)

Unconscionable conduct is a conduct that is unfair, unjust and against good conscience. Unconscionable conduct occurs when the stronger party takes advantage of the weaker party's special disadvantage. (ex Amadio case)

- At common law, mere **harshness** of a clause is **not** an **adequate** ground to set aside the contract.

- Unless the contract was induced by fraud, duress, undue influence, mistake, misrepresentation or illegality, the common law will be reluctant to give redress to the innocent party.
- The problem with the common law's reluctant treatment of the harsh and oppressive clauses in contracts led to an attempt in the 1970s by courts to mount a new defence of 'inequality of bargaining power'.
- The equity stepped in to fill in the gap to remedy for harsh and oppressive contracts.
- Lord Denning, the chief proponent of this new development, held in one of his judgments that in unconscionable contracts 'there runs a single thread. They rest on 'inequality of bargaining power'.
 - *Commercial Bank of Australia -v- Amadio* (1983) 151 CLR 447 (p271)

The equitable doctrine of Unconscionability

(The requirements necessary to frame a plea for 'unconscionability')

- **Special disability:** The weaker party must have been under a **special disability** vis -a- vis the stronger party so that there was no real equality between them;
- **Knowledge of special disadvantage:** The stronger party must have **been aware of** that special disability; there is no equality of bargaining power between them. And the innocent party is therefore unable to protect its own best interest.
- **Takes unfair advantage of special disadvantage:** Nevertheless, the stronger party **takes unfair advantage** of the party with special disability.
- **Unconscionability:** the actions of the defendant must be unconscionable; that is, unfair, unjust and against good conscience.

Statute law in Australia has adopted the common law principles of 'unconscionability' (For example, see ss. 20-22 of the Australian Consumer Law provisions relating to Unconscionable conduct).

Onus of proof (p273)

The Terms

Terms VS representations (p206)

- The question of whether a statement made by a party is a **Term** or mere **Representation** is important one because the statement's classification has implications when determining the issues of breach and remedies.
- The essential difference between terms and representations is that terms contain a **promise** and therefore have promissory effect, whereas representations do not involve promises.
- Representation examples: sales talk/ opinions/statement of fact

How do the courts distinguish between a term and a representation? (p207)

- The courts attempt to give effect to the parties' intentions, and they do this using the objective test.
- The courts ask: **'What would a reasonable person believe to be the parties' intentions in relation to the contractual nature of the statement?'**
- The courts look at the following factors
 - the language used by the parties;
 - the context in which the statement was made;
 - the time the statement was made;

- the maker of the statement; and
- the importance of the statement.

Why is the distinction between term and representation important? (p208)

- major reason is the type of remedy that is available
 - breach of a term, damages (money granted to plaintiff) are available as remedy
 - a false representation (misrepresentation), damages generally not.
- Also, a party who is the victim of misrepresentation may also be entitled to the equitable remedy of **rescission**.

Terms of Contracts contains:

1. **Express Terms**
2. **Terms implied by court (implied terms)**
3. **Statutory terms**

1. Express Terms: oral or written

- The terms of a contract will be determined by the words (written or verbal) actually used by parties at the time of making, or immediately before making the contract.

Oral contracts:

- How would one know what was said (expressed) by parties to each other?
- This is a **question of fact** and will be determined by the courts by calling in the witnesses and the people present at the time of the formation of the contract.

Written terms: Parol evidence rule

- When the contract is reduced in writing, it is presumed that writing contains all the terms of it. No other evidence may be admitted to vary or add to the terms of the contract.
- There are a number of **exceptions** to the parol evidence rule. (p210)

2. Implied Terms

- Terms can be implied into a contract through the following ways:
 - common law(court);
 - custom or trade usage; and
 - statute.
- The following requirements should be present before a term will be implied by the courts:
 - The implied term must be reasonable and equitable.
 - It must be necessary to give business efficacy to the contract.
 - It must be so obvious that it goes without saying.
 - It must be capable of clear expression.
 - It must not contradict any express term of the contract.

Express VS Implied terms

- In a contract, terms can be expressly agreed by parties in words (verbally or in writing) or terms may be implied by law (common law or statute law).
- Once it is established that a particular statement is a term, courts determine the importance parties may have attached to them.
- Thus terms may be:

1. **Conditions**
2. **Warranties; or**
3. **Innominate terms.**

1. Conditions (p213)

major terms of the contract breach of which will entitle the innocent party to rescind (terminate) the contract and sue for damages

- *Poussard -v- Spiers and Pond (1876) 1 QBD 410*

2. Warranties (p214)

minor terms of the contract breach of which will entitle the innocent parties to sue for damages only.

- *Bentini -v- Gye (1876) 1 QBD 183*

3. Innominate (p216)

hybrid term that is capable of being a condition or a warranty

- *Hong Kong Fir Shipping Co. -v- Kawasaki [1962] 2 QB 26 (p217)*

How do courts determine whether a term of a contract is a condition or warranty?

- The courts apply the test of *essentiality*.
- Whether the statement is of such importance to the innocent party that it would not have entered into the contract unless the promise by the defendant was made.
 - *Tramways Advertising -v- Luna Park (1938) 38 SR (NSW) 632*

Exclusion Clauses

An exclusion clause is a term of the contract that limits, excludes or restricts liability of one party against the other.

- The function of the exclusion clause is to limit or exclude liability for breach of an express or implied term, or to exclude liability for negligence in a contract.

Exclusion clause in a signed document (p218)

- When the exclusion clause is included in a signed document, the person generally is bound by it.
 - *L'Estrange -v- Graucob Ltd [1934] 2 KB 394*
- Ex: This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition, statement or warranty, statutory or otherwise, not stated herein is hereby excluded.

Exclusion clauses in unsigned documents (p219)

- With an unsigned document, an exclusion clause will be binding only if the clause was brought to the notice of the customer. This notice must be reasonable, and reasonableness is determined objectively by the courts.
- Where the terms of the contract are contained, or referred to, on a ticket or another document. For example: airline, train, car park, dry cleaner's tickets
- The exclusion clause is binding only if it was brought to the notice of the customer at the time of entering into contract or prior to entering into contract.

- Is the ticket or other document of such a nature that one may reasonably expect it to contain contractual terms? IF NOT,
- Did the person relying on the terms do what was reasonable to bring notice of the existence of the terms to the attention of the other person? IF NOT,
- Party may not rely on that clause.
- The notice must be reasonable notice and is determined objectively by the courts (*Thornton -v- Shoe Lane Parking Ltd* [1971] 2 QB 163).
- Ex: [Shoe Lane Parking Ltd shall not be liable for] injury to the Customer... howsoever that loss, misdeliver, damage or injury shall be caused.

Time of notice(p222)

- Notice of the exclusion clause may be express or implied (constructive).
- If the notice of the exclusion clause is given **until after the contract** has been completed, the exclusion clause **will not be binding**.
 - *Olley -v- Marlborough Court* [1949] 1 KB 532
 - *Oceanic Sun Line Special Shipping Co -v- Fay* (1988) 165 CLR 197
- Ex: The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the manageress for safe custody.

Previous course of dealings

- If the customer has had previous course of dealings with the defendant, the court will infer that the customer has the knowledge of the exclusion clause.
- if the customer knows about the exclusion clause through his/her previous dealings with the party, the customer will be bound by the exclusion clause.
 - *Balmain New Ferry Co -v- Robertson* (1906) 4 CLR 379
- Ex: A fare of one penny must be paid on entering or leaving the wharf. No exception shall be made to this rule whether the passenger has travelled by ferry or not.

Effect of misrepresentation (p225)

- If the person seeking to rely on the exclusion clause misrepresents the clause or its effect, **the full protection of the clause will be lost**.
- In other words, if the effect and scope of the exclusion clause has been misrepresented to the customer then the exclusion clause is not binding on him/her.
 - *Curtis -v- Chemical Cleaning & Dyeing* [1951] 1 KB 805

Contra Proferentum (against the person producing) Rule (p228)

- Allow the courts to interpret the exclusion clause against the person who is relying on the clause.
- Any **ambiguities** in the clause will be constructed against the person relying upon it.
 - *Elder Smith Goldsborough Mort Ltd -v McBride* [1976] 2 NSWLR 631

Negligence Rule

An exclusion clause that attempts to exclude liability for negligence must do so expressly or by necessary implication and the words must be plain, clear and unambiguous.

Scope of the exclusion

- The scope of the exclusion clause is limited to only acts performed within the scope of the contract.
- The exclusion clause will not exclude liability for acts occurring outside the contract.
- The scope of the exclusion clause is a matter of interpretation by the court.
 - *Sydney City Council -v- West* (1965) 114 481
 - *Darlington Futures Ltd -v- Delco* (1986) 161 CLR 500

Rescission

Generally, the term means the rightful termination (end) of a contract for breach of condition or the repudiation of a contract not performed.

- The term refers to the restoration of the parties to the positions they occupied before the transaction because of the presence of one of the vitiating factors.
- Rescission is an **equitable remedy**. It looks to the conduct of the party seeking the remedy.

The right to rescind the contract is lost if(p281):

- substantial restitution of the rights/contract is impossible
- the contract is affirmed
- there is delay/lapse of time
- there is intervention of third party rights (a bona fide third party purchaser would suffer if rescission were allowed)
- the contract is executed/completed (in the case of innocent misrepresentation)
- unconscientious conduct of party seeking relief.

These factors are the **bars** to rescission of contract.

Discharge

'Discharge' refers to a process whereby a **valid and enforceable contract** can be brought to an end, thereby releasing the contracting parties from all further obligations.

How may a contract be discharged?

- Contracts may be discharged in the following way:
 1. By consent
 2. By operation of law: frustration
 3. By breach/repudiation
 4. By performance
 5. By lapse of time

1.Discharge by consent

Both contracting parties may simply agree that the existing agreement should come to an end, and that both parties should be discharged from their obligations under the contract

2.Discharge by operation of law: Frustration (p242)

A contract may be discharged because it has become impossible to perform. The reason maybe because one of the parties is no longer alive or has become permanently incapacitated. Sometimes there may be an intervening act, which makes the contract virtually impossible to perform.

- Examples of acts of frustration:
 - Fire
 - Illegality
 - Delay
 - Death or incapacity of either party.

Taylor -v- Caldwell (1863) 3 B & S 826

3. Discharged by breach of contract

Two main types of breach of contract

- Where the other party to the contract breaches a condition (essential term), this entitles the innocent party to treat the contract as **terminated** and is termed '**repudiation**' (p243) of the contract.
 - If this occurs, the innocent party has an option to either accept the breach and keep the contract alive (on foot) or treat the contract as discharged.
- If one party breaches a warranty (non-essential term), then the innocent party is only entitled to claim **damages** for the breach.

4. Discharge by performance (p244)

A contract may be discharged because both parties have completely performed their respective obligation under the contract. However, there may be instances when a contract may come to an end even if performance by one party has not been fully completed. --- **substantially performance of lump sum contracts**

- As a general rule, performance must be exact.
- The doctrine of performance also applies when a lump sum contract has been **substantially performed**.
- Any remedial work that needs to be completed will be deducted from the contract price by way of a set off.
- **Implied dispensation** from full performance (p247)