Business Law - Contract Law Study Notes

Comprehensive unit study notes as per Victoria University.

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Unit topic: Formation of Contract: including offer, acceptance, revocation, counter-offer, postal rule of acceptance.

Elements of a contract

There are six essential elements necessary for legally binding contract formation:

(1) an agreement (offer and acceptance);

(2) consideration (generally, the supply of money, property or services however anything will suffice as consideration be it money, or a promise to undertake, or not undertake a particular act);

(3) Capacity to enter legal relations. E.g. Of sound mind and legal age

(4) Intention by the parties to enter into legal relations (private non-commercial agreements between family members may not necessarily constitute a contract as intention to create legal relations is often not present) and

(5) Formalities - In most jurisdictions contracts do not need to be represented in writing however exceptions apply.

(6) Certainty.

Agreement –Two things are necessary: promise and consideration

Promise

Offer – an expression of willingness to contract on the terms stated

Invitation to treat – an invitation to make an offer

Provision of information

A declaration of intention

Offer

A willingness to be bound on particular terms without further negotiation (carter et al)

Self-Serve basis – sale is complete when the person takes the goods (offer to buy) to the counter and the pharmacist accepts the sale (acceptance) – *Pharmaceutical Society of Great Britain v Boots Cash chemists (Southern) Ltd*

A mere statement as to the price at which land, goods or services may be sold or provided is not an offer

Consideration must be given (*Australian woollen mills v Cth)*

Onus of proof on intention to create legal relations is on the party trying to disprove (*Australian woollen mills v Cth)*

An offer is available for acceptance until the time (if any) specified for their currency, unless previously withdrawn by the offeror and provided that the offeree has not already rejected the offer

Death (offeror or offeree) may terminate an offer

An offer is terminated by rejection or a counter-offer. (there are exceptions) (Hyde v Wench)

An offeree does not reject an offer or make a counter offer, merely by requesting further information about the offer. *Stephenson Jaques v McLean*

The word offer, does not necessarily mean an offer in contractural terms. Depends also on intent *Seppelt v Commissioner*

The offerer must be unequivocal – the offer and the acceptance must correspond.

Option

Once an option is agreed, the offerer cannot withdraw the offer except in accordance with the option itself.

Isaacs J has stated that the only feature that distinguishes an option for a mere offer is the consideration. In his view, it's still an offer. The consideration merely ensures its continuance, by creating a relation in which the law forbids the offeror retracting it.

Death (offeror or offeree) does not necessarily mean the option has ended. The person responsible is the executor of the

Revocation

Revocation – an offer may be revoked at any time by the offeror prior to acceptance – even if a time frame has been given, and that time frame has not expired. *Goldsborough v Quinn, Dickinson v Dodd*

Revocation only takes affect on receipt *Byrne v Van Tienhoven*

Acceptance

Acceptance must be unequivocal, unconditional and in terms identical to the offer.

For an acceptance:

1. The offerer may stipulate what is necessary for an offer to be accepted'
2. Offer and acceptance must exactly correspond
3. Acceptance need not be express: it may be inferred from a party's conduct
4. Only the entity to 'whom the offer is made may accept it

An offeror can not deem an offer to be accepted by mere silence. *Felthouse v Bindley*

Acceptance was done by doing of the act - *Carlill v Carbolic Smoke Ball Co.*

Is a contract formed by the exchange of a promise for an act or an offer is an expression of willingness to contract on the terms stated in the offer – *Carlill v Carbolic Smoke Ball Co.*

When reviewing offers, counter offers and acceptance, they can be viewed in entirety. *Butler Machine Tool v Ex-Cell O Corp*

Postal Acceptance – Acceptance is concluded when the acceptance is sent. The address of the offerer has to be correct and acceptance can be received by post. *Bressan v Squires.* Places the risk on the offerer.

Postal Rejection – are effective when they are received.

Knowledge of Offer is required for acceptance – *R v Clarke*

Acceptance is not effective unless and until communicated to the offeror.

An offeror is entitled to specify the manner of acceptance – *Carlil v Carbolic Smoke Bomb*

Telephone and instantaneous communication acceptance – acceptance is complete only when heard by the offeror.

Acceptance must be in reliance to the offer.

Agreements to Negotiate are not, generally, considered binding - *Coal Cliff Collieries v Sijehama*

Subject to finance clauses are for the protection of the purchaser – and are valid - *Meehan v Jones*

<u>Conditional Acceptance</u> -preliminary agreements, requiring analysis of the case of Masters ***v Cameron***

Masters v Cameron [1954] 91 CLR 353

Facts:

Cameron and Masters had an agreement for the selling of Cameron's farm worth 17,500 pounds. In the agreement between the two parties, a detail description of the farm was included.

Another detail, considered as provision in the agreement, is that the agreement first signed by the parties is pre-contract for the final contract for the sale which will be accepted by the solicitor of Cameron if the terms and the conditions are not altered.

Issue(s):

The issue of the Masters v Cameron (1954) was whether or not the pre-contract can already be considered as the final contract since the terms and the conditions were not altered.

Analysis:

The reasoning behind the ruling of the court is anchored on the following, which will still depend on the circumstances of the case.

First, in order for the agreement to take effect immediately, it must only contain the terms and conditions agreed upon by the parties.

Second, the intention to be legally binding can be carried so long as the current agreement does not indicate that a suspension of a term or condition will be made once a formal document has been signed.

Lastly, the circumstance/s indicate that the parties do not want to be bound by the contract before a formal document has been executed.

With this on hand, considering that a term in the pre-contract of Cameron and Masters indicating that is subjected to preparation, therefore, Cameron does not consider the contract to be legally binding.

Holding:

no binding agreement had been made. therefore the deposit had to be returned.

Subject to approval by solicitors are not binding clauses - *Masters v Cameron*

Subject to contract may have one of three *effects Masters v Camersons*

1. Concluded contract and the purpose of the document is simply formal – the contract is not conditional
2. Although here is a concluded contract, it is conditional because there is an obligation to perform once the document is signed.
3. The clause may postpone the formation of the contract. Neither party is bound to proceed with the transaction since formation of the contract is conditional on execution of the document

<u>Consideration</u> -existing contractual duty as in ***Stilk v Myrick, Williams v Roffey Bros & Nicholls*** and past consideration

existing contractual duty:

Case: - Williams v Roffey Bros and Nicholls (Contractors) Ltd (1990) 1 All ER 512

Summary:

P contracted to perform carpentry work for D. When it became apparent he could not complete on time, D promised to pay P extra money to ensure it was completed on time. D would incur liability to a third party if the work was not completed on time. Was D liable to pay the extra amount? *Is D liable pay extra to complete task on time ?

Outcome:
D was liable. per Glidewell LJ - If

(1) A enters into a contract with B for the supply of goods or services in return for payment by B; and

(2) Prior to completion B has reason to doubt whether A will complete; and

(3) B then promise A additional payment in return for B promising to perform on time; and

(4) As a result of this promise B obtains a benefit or obviates a dis-benefit [eg, liability to third party]; and

(5) B's promise is not given as a result of A's economic duress or fraud

Then - (6) The benefit to B (or obviation of disbenefit) is capable of being good consideration for B's promise

Case: - Stilk v Myrick - 1809 2 Camp 317; [1809] EWHC KB J58, 170 ER 1168

Summary:

Before the start of a voyage, plaintiff contracted to work as one of 11 seaman for the voyage for $5 a month. During the voyage 2 seamen deserted; Captain then made an agreement with the rest of the crew that they should receive the wages of the deserters if they continued to work the ship back to London.

Plaintiff sued for his share of the wages of the two deserters.

Outcome:

(1) The agreement was not enforceable because there was no consideration given by the plaintiff for the promise to pay.

(2) The remaining crew were already bound to work the vessel back to London. The desertions were merely an emergency of the voyage and the rest of the crew remained bound by the terms of the original contract to bring the ship back to London.

(**i) This case is authority for the proposition that promising or performing a duty you are already bound to the other party to perform is not good consideration for any promise he makes you.**

(ii) One good reason for this rule is that it prevents contractual blackmail – where a party threatens not to perform his contractual obligations unless he gets more consideration than was originally agreed to.

Consideration

Consideration is an act of forbearance or promise therefore, which is the price for the promise *Dunlop Pneumatic v Selfridge & Co*

Consideration needs to be given for a contract to be completed – *Australian Woollen Mills Pty Ltd v Cth*

"that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement of announcement"

Contracts in the form of deeds do not require consideration

Consideration must be related to the promise – *Australian Woollen Mills v Cth*

Promises for which consideration has been given are contracts – but they have to be related – see above.

Consideration must move from the promisee (but not necessarily to the promisor) – *Coulls v Bagots*

Consideration must be sufficient – but need not be adequate – *Chappell v Nestle*

Past consideration is no consideration

Executed consideration is enforceable – *Re Casey Patents: Stewart v Casey*

Illusory – whether the law can countenance as consideration a promise which is illusory in the sense of being impossible to enforce – *Dunton v Dunton*

Condition is illusory if what B is going to do what B promises is entirely at B's discretion (*Placer Developments v Commonwealth*)

Illusory – 2nd concept, the promise sought to be enforced is entirely discretionary – *Placer developments v The commonwealth*

Consideration only exists if duty is exceeded (contract voided if illegal) *Glasbrook Bros v Glamorgan, Popiw v Popiw*

Right to interest cannot be given up if it is not supported by consideration *Foakes v Beer*

Part payment does not mean that person does not have to pay full amount (*Foakes v Beer*)

Nominal Consideration can be:

- Bringing forward the date for the payment
- Changing the place of payment to suit the creditor
- The addition of something in kind to the money

Extra consideration can be given if both parties benefit and it's not done under economic duress or fraud – *Williams v Roffey*

Existing duty can also be exceeded (*Ward v Byham*)

It is the agreement to compromise the dispute which is the source of the fresh consideration, rather than what the parties have agreed to do under the compromise. For that reason, even if one party has, in performing the compromise agreement, in fact done exactly what it was contractually bound to do there is still consideration – contract of compromise. *Wigan v Edwards*

Practical Benefit – if Williams provided a practical benefit it could be good consideration for the extra money (*Williams v Roffey*)

Part payment of a debt can not be discharge of the debt (*Foakes v Beer)*

Public duty has two cases that are quite different *Ward v Byham* (taking care of child) and *Glasbrook Bros v Glamorgan County Council*

Concluded Agreements

It can be a binding agreement, if it's a settlement or compromise

Depends on establishment of agreement, intention to create legal relations and consideration.

A concluded agreement will not be effective if what the parties agreed upon cannot be determined objectively with a reasonable degree of certainty.

Last one who fired the shot for T & Cs is the one in the contract – *Butler v Ex-cell*

Auction – acceptance occurs when the hammer is knocked down

A contract may be found in the conduct of the parties

A contract can be severed if clauses are unenforceable. Importance of clause has to be determined first - *Whitlock v Brew*

Estoppel

Two areas: 1) where there's a contract and something not working and 2) where there's no contract (*Hightree Case*)

Estoppel relies on (*Walton Stores v Maher* & *Legione v Hateley*)

1) a promise – which must generally be both clear and unequivocal (*Legione v Hateley*)
2) Reasonable and detrimental reliance by the person claiming the estoppel
3) Unconscionable conduct – circumstances which make it unequitable, unconscionable or unconscientious for the person who made the promise to retract it

Estoppel can occur with and without contract

Estoppel was used as a sword in *Waltons v Maher*

(b) Estoppel

Traditional estoppel is a long established legal concept whereby a person will be prevented from denying the factual truth in a previously made statement that has led the other party to act on the statement in the legal relations between them. It did not apply to statements of future intention.

(c) Promissory Estoppel

In 1947 Lord Denning established the principle of promissory estoppel in the *High Trees* Case. He stated the basic concept in *Moorgate* v *Twitchings* (1976) "…when a man by his word 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." Implicit in the concept is also that the promisee must act on the promisor's promise to his financial disadvantage or detriment.

Historically, promissory estoppel could only be used as a defence (*Combe* v *Combe*). However, the Australian cases have expanded the concept. The first acceptance of the principle was in *Quaglia's Case* (1980) where the court held that the promisee need not act to his actual detriment but potential financial loss will suffice.

In *Waltons* v *Maher*, the High Court relied heavily on the element of unconscionability to find that, in a pre-contractual situation where the promisor had remained knowingly silent thereby inducing the promisee to act on the assumption of a concluded contract to his detriment, the promisor would be estopped from the implied promise to complete the contract.

The current law of promissory estoppel can be summarised as follows:

1) Some form of pre-existing legal relationship between the parties either existed or was expected to be created. That relationship can be contractual (*HighTrees*) or pre-contractual (*Waltons*) or simply a relationship that exists between the parties (*Verwayen*);

2) A clear promise (express or implied) by one party that he will not insist on his legal rights;

3) That promise must be given in circumstances that raise in the other party's mind an expectation that the promise will be honoured – even though it is not supported by consideration;

4) Actual reliance by the other party on the promise in that his subsequent actions show that he has assumed that the promise will be honoured;

5) An element of actual or potential financial detriment or disadvantage (*Quaglia's Case*) in that, because he acts on the assumption that the promise will be honoured, (when in fact it will not), the promisee is placed in a worse position than he would have been if the promise had never been made at all. Detriment in promissory estoppel is a disadvantage that arises naturally from the promisee acting in faith of the promise and not at the promisor's direct request – which would amount to good consideration;

6) An element of unconscionable or inequitable or unfair behaviour on the part of the promisor;

In the event that all the elements of promissory estoppel are proved, the promisor will be estopped (prevented) from going back on his promise not to insist on all his legal rights being suspended under the contract.

Intention -to create legal relations

General rules

For a contract to exist the parties to an agreement must intend to create legal relations. Usually, the presence of consideration will provide evidence of this - if the promisor has specified something as the price for the promise this - in most cases - carries with it an intention that the parties be bound. Intention remains, however, an independent requirement and must be separately demonstrated and there are cases in which consideration has been present but no contract found to exist because this pre-condition has not been fulfilled. In determining if there is contractual intent and objective approach is taken.

If there's consideration, there's intention

Usually, family agreements are not considered to be contracts. There are exceptions - *Jones v Padavatton*

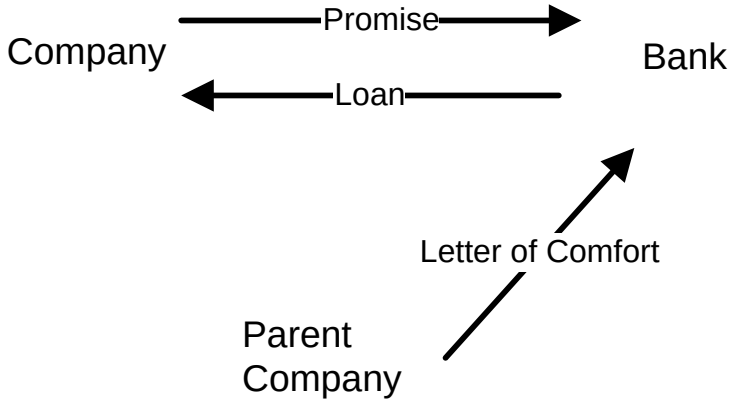
Party that wants to enforce the contract has to prove the intention

Usually, in commercial situations – the contracts are intended to be binding

An express term of the agreement to the contrary must usually be present before the conclusion can be reached that there is no intention to create legal relations (*Rose & Frank v JR Crompton*)

An intention that the agreement is not to create legal relations may sometimes be inferred (*Esso v Commissioner*)

The HC is sceptical of the ability to formulate acceptable rules to prescribe the kinds of cases un which absence of intention to create legal relations should be found (*Ermogenous v Greek Orthodox Community*)



Letters of Comforts are letters given by a third party to the promisee to help in the decision of contracting

Bulk of cases say that letters of comforts are not binding. However, in *Banque Brussels v Australian National Industries* it was found to be binding

Exclusion Clauses

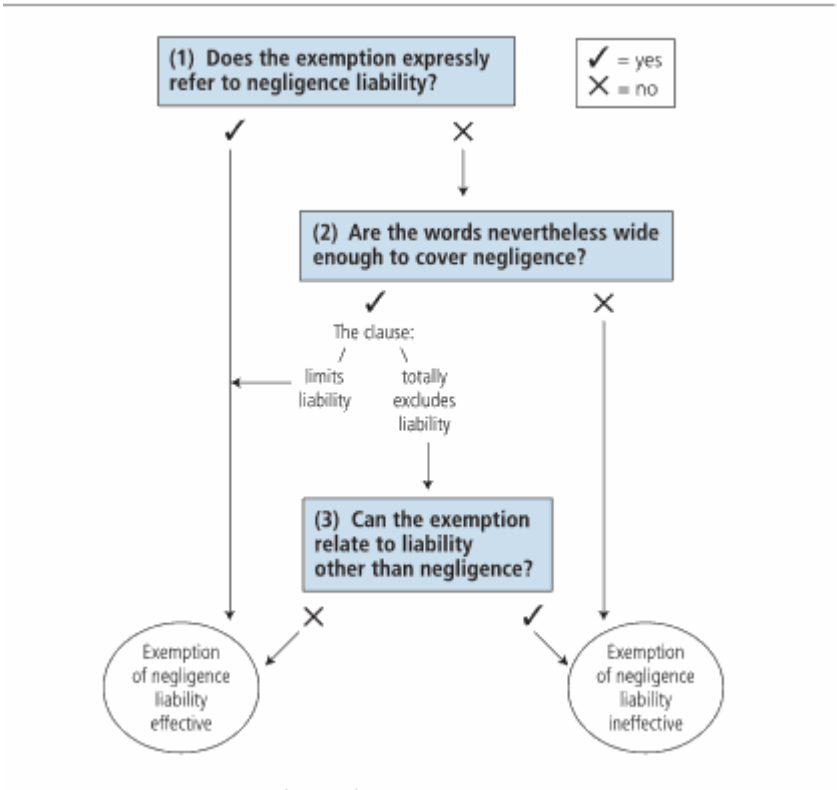
Generally means that the party admits it's liable – but there is this clause as a defence. Historically, there have been really big exclusion clauses. Statutes have been introduced to limit the exclusion clause

Nowadays, the courts tend to assume there is statute to protect the consumer, therefore except in major commercial contracts, the main permitted use of exclusion clauses today is in relation to the breach of express contractual terms

Main principles (*Darlington Futures v Delco Australia*):

1. Exclusion clauses are to be interpreted in sensible, ordinary meaning, in light of the surroundings
2. When there is ambiguity – read it contra-proferentum – read it against the person who is trying to protect themselves – courts lean towards making people liable
3. Guidelines & rules of thumb
    a. The four corners rule: When a clause is very broad, you tend to interpret it in a way that is inside the contract – the exclusion clause doesn't apply outside the contract (*City of Sydney v West*)

b. Deviation rule – old principle – comes from shipping cases and carrying goods for someone else. Exclusion clause works when you're following the agreed route, but not if you deviate from it. (*Thomas National Transport v May & Baker*)



Canada SS Rules (from above):

1. if a clause expressly excludes liability for negligence (or an appropriate synonym) then effect is given to that. If not,
2. ask whether the words are wide enough to exclude negligence and if there is doubt that is resolved against the one relying on the clause. If that is satisfied then
3. ask whether the clause could cover some alternative liability other than for negligence, and if it can it covers that.

HC has said that if a contract states "The following terms will cause termination, that's fine – but HC still determines substantial damages (*Shevill v Building Board*)

Herron J stated, dissenting, in *Thorne* – Before applying the parol evidence rule it must be determined whether the parties have agreed that the document embodies the bargain

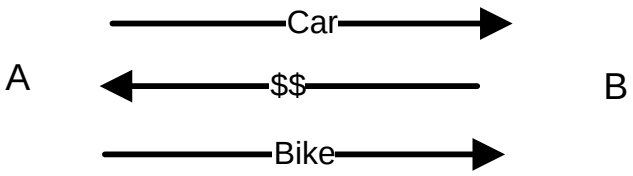
Main Principles for Parol Evidence Rule:

1. First – meaning of the words is the meaning a reasonable person in the position of the party to whom the words are addressed would place on them
2. Second – In a commercial situation, a court will stive to achieve a commercially sensible concultion
3. Third – extrinsic evidence is not generally admissalbe in the interpretation
4. Evidence of the factual matrix is not regulated by the parol evidence rule

Privity

Only a party that is part of the contract can sue.

Exception – was made to apply to liability insurance (*Trident Insurance v McNiece*)

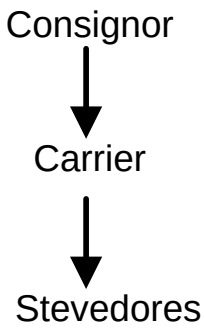


Each of the ways to do this doesn't break the privity rule:

1. Argue that C is a party, C sues
2. B sues A for breach
3. Specific performance
4. trust – trustee B sues on C's behalf

Contracts that attempt to burden a third party –

Himalaya Clause – the carried excludes liability, this also extends to stevedores –



The Eurymedon – an exclusion clause that worked. Need to show four things:

1. Text of the clause covers the stevedores
2. Carrier enters the clause as the stevedores agent
3. Carrier has authority to act as the stevedores agent
4. Stevedores provide consideration to the consignor

Performance

The order of performance depends on the intention of the parties and is therefore a question of construction

If not stated in contract, assumption is that it's concurrent

Concurrent obligations – when the performance of the obligations is at the same time – presumption is that the parties are ready, willing and able to perform

Where a party cannot perform without the co-operation of the other, a tender is sufficient to make the other party liable. The offer to perform is treated as equivalent to performance to the extent that the party refusing to co-operate will be liable in damages (*McKay v Dick*)

Severable Contract

Payment obligations are apportioned in accordance with performance.

Often a seller is entitled to receive payment in respect of goods delivered, even though the contract has not been completed.

Discharge by Performance

Where there is a lump sum payment, there has to be complete performance by the other side to be paid (*Cutter v Powell*) and (*Sumpter v Hedges*)

Substantial Performance can sometimes be used to recover full or part of the price of the part (*Hoenig v Isaacs*) and (Bolton v Mahadeca)

Breach

Any failure to discharge a contractual obligation is potentially a breach

For a breach to occur, two preconditions must be met:

1. The breach must be serious, go to the root of the contract
2. The innocent party must elect to discharge the breach

Negligence and intention are irrelevant (unless accounted for in contract)

Types of terms: conditions, intermediate, warranties

Terms are classified by the construction of the agreement.

	Nominal	Sustantial	Terminate
Conditions – express or implied term	Yes	Depends on Loss	Yes
Intermediate	Yes	Depends on Loss	Depends

Warranties	Yes	Depends on Loss	No
Repudiation	Yes	Depends on Loss	Yes

Condition – A term will be construed as a condition where it can reasonably be inferred from the contract that the promisee would not have entered into the contract but for an implied assurance of strict compliance with the term.

Intermediate – terms that can be breached in a number of ways and sometimes it can be serious and sometimes not. Comes from *Hong Kong Fir Shipping*

Intermediate Term – the right to terminate the contract will depend upon the nature and extent of the breach of the intermediate term. If the breach is serious or continuing, the innocent party has the right to end the contract. If the breach is minor, or is capable of simple rectification, then the innocent party retains the right to claim damages but must continue with the performance of the contract.

Tripariate system of conditions comes from *Ankar v National Westminster Finance*

A court will not construe a term as a condition if that would produce an unreasonable result unless that result was clearly intended by the party (*Ankar v National Westminster*)

A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. Lord Roskill (*Bunge v Tradax*)

Always get damages if there's a breach other damages depends.

Onus is on plaintiff to prove the loss. (*Luna Park v Tramway Advertising*)

Can't sue for warranties.

Usually termination is separated from breach.

Only way to terminate a time clause is to be late (*Bunge v Tradax*)

The question to consider is whether a court will allow a party to rely on an exclusion clause that excludes or limits liability for a fundamental breach. The answer to this question is found in a rule of construction and not in a rule of law

Breach for Defective Performance

Usually it's a question of construction as to wether strict performance is required or reasonable care.

Has to be fit for purpose (*Greaves & Co v Baynham Meikle*)

Breach for Late Performance

If the contract doesn't specify when something has to be done, then it can be done in a reasonable time

Look at industry standard

Courts err on the generous side because if you get it wrong, then the consequences can be very great

If time clause is put in contract, then time is considered to be of the essence. (Canning v Temby) – Need to find out about this case

Breach for Failure to Perform

Consequences of the breach must be very serious for the promisee to be entitled to terminate for breach of an intermediate term (*HK Fir Shipping*)

Termination

Stops the contract where it is and any other obligations are discharged (This includes future payments)

Repudiation/Renunciation

"An attitude problem"

Occurs when the promissor has an absence of willingness, or readiness, or capacity to perform.

Two kinds:

1) Inability – harder to prove
2) Words or Conduct

It's anticipatory if one of the parties calls it off before the other one has a chance to perform. If it happens after the other person has performed, then it's still repudiation, but not anticipatory.

Just repudiation does nothing, the other party has to accept it. Once B accepts the repudiation, it's called anticipatory breach by A.

One party is not going to perform obligation x, and obligation x is a condition of the contract – then it's repudiation.

Level of seriousness is the same as breach, the consequences and impact needs to be serious. Ie, not going to perform contract at all (*Federal Commerce v Molena Alpha*)

Intention is not important but some courts do not talk about it.

Persistent misrepresentation of the contract can amount to repudiation

Only get damages when you accept and terminate the contract.

Wholly and Finally disabled – Devlin J (*Universal Cargo Carrier v Citati*) It's about the facts, not what a reasonable person would thing.

Brennan J is too demanding a test (*Foran v Wight*)

Factual Inability - Back to *Universal Cargo Carrier v Citati*

What was the seriousness - - couldn't have loaded by 21/7 but there was debate on how much longer

Was loading term a condition or warranty? Devlin said warranty – if it was condition it would have been serious

It's up to the innocent party to accept the repudiation, though they don't have to – but kinda silly if they don't

If repudiated party continues to perform, it has to be exactly to the terms of the contract (*Bowes v Chalayer)*

Discharge regarding Time

1) Express contractural term – if A is late then B can terminate, this does not make the above a condition
2) Time is of the essence term" is a condition, based upon commercial certainty (*Bunge v Tradax*)"

Commercial Certainty – parties need to know at any time where they stand (*Bunge v Tradax*)

Discharge regarding time - breach

Can discharge for the following:

1) Express contractual term – if A is a late, then B can terminate
2) Time is a conditions – "Time is of the essence"
3) Time is an intermediate term – has the breach been so severe to deprive the party with the substantial benefit

4) Notices to Perform – way to get around time is of the essence
5) Frustrating Delay

Notice to Perform - Once in breach by being late, innocent party sends a letter saying – you're late,, but I'm going to give you an extension, if you don't perform, I'm going to terminate the contract. By the party not complying with that time, it's a repudiation by the other person, so then the innocent party can terminate (*Louinder v Leis*)

If a party does not terminate/repudiate/discharge, they lose the right to.

Election

After repudiation, once a person terminates, or affirms, they can't go back.

Giving extra time after an election, is not an affirmation. HC said no, it's an extension of time to election again (*Tropical Traders v Goonan)*

If payments have been done, with time is of the essence term, person is not estopped from using time is of the essence again. (*Tropical Traders v Goonan)*

Termination

Termination:

1) The parties are discharged from performance in the future
2) Rights that have accrued unconditionally remain

Legitimate interest – If the defaulting party can prove the innocent party had no legitimate interest in performing, then damages can be limited (*White & Carter Council v McGegor*)

Legitimate interest – can only be applied in extreme cases, it's a hard argument to make

Can do termination in a way that has not been communicated – A agrees to sell to B, B repudiates, A sells house to C. A's contract with B has been terminated

If you pick the wrong reason for terminating, it's ok if you can find another correct reason for terminating (*Rawson v Hobbs*)

Termination has occurred, parties are discharged from performance in the future, and also from obligations. There are some exceptions, like arbitration clauses. (*Heyman v Darwins*)

Courts often require deposit as being unconditional, but the buyer would most probably not get I1 and I2 back.

Discharge by Frustration

Frustration

Discharge by Frustration

In some cases a contract will be brought to an end because of a supervening event that is beyond the control of the parties; for example, a contract between A and B, whereby B agrees to hire A's theatre on a particular night may be frustrated if, as a result of a terrorist act the theatre is destroyed prior to the date for performance of the contract (see *Taylor v Caldwell*(1863) 3 B & S 826).

Application of the doctrine of frustration

The doctrine of frustration applies only in a limited range of circumstances - generally where the event renders performance of the contract something fundamentally different from that anticipated by the parties. The courts are likely to be unsympathetic if the event could have been anticipated and therefore provided for by the parties in their contract.

Effect of frustration

At common law, where frustration is established the contract is terminated automatically (in futuro); there is no option to discharge or to perform and, at common law, the loss resulting from the termination lies where it falls (although there are limited exceptions to that rule).

Statutory modification

Statutory modification means that in most cases the harshness that might result from that common law rule is avoided (see eg, Fair Trading Act 1999 (Vic) Part 2C)

The event brings the contract to an end.

The frustrating event must be an unforseen event that is not caused by any of the parties, often called acts of god", the event wasn't planned for.

From Davis: Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract ratified in *Codelfa v State Rail*

The technique is two fold:

a. The contract must be constructed to determine the scope of the parties contractual duties
b. The factual circumstances which are alledged to amount to frustration must e considered. When looking at the factual circumstances the issue is the degree to which the event or events affected the contract

Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being prepared because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by contract (Lord Radcliffe in *Davis Contractors v Fernham Urban District Council*)

Frustration occurs when there is destruction of subject matter of the contract (*Taylor v Caldwell*)

Frustration of Purpose – controversial category) – non-occurrence of event which is the basis of the contract (*Krell v Henry*)

If contract is not rendered entirely or substantially pointless, then it's not frustrated (*Herne Bay Steam Boat co v Hutton* and *Scanlon New Neon v Tooheys)*

In *Codelfa*, the HOL distinguished this from *Davis v Farenham* because one was foreseeable and the other wasn't.

Sometimes, terms provide for termination on the occurrence of events which might frustrate the contract. Usually this is to avoid the uncertainty involved in predicting if a court would conclude the contract has been frustrated. However, this is not frustrating, rather, it's termination by the terms of the contract.

Forseable can be reasonable as long it's not far fetched or fancifull.

If, when reading the contract, one party took the risk, by adding something in the terms, then frustration does not apply.

If you bring about the cause of frustration – then you can't rely on it. (*Maritime National Fish v Ocean Trawlers*)

Consequences: Frustration discharges the whole contract automatically. – Not like repudiation, where the other party has to accept it.

Frustration is stopping the contract;, the rights that have accrued automatically still remain

Common Law – people paid money in advance – want money back – people used restitution – total failure of consideration – Restitution – did you actually get what you bargained for – it the answer is no – you can get money back

Damages

As soon as someone breaches, the innocent party has right to damages

Put party in position they would have been if the contract had been completed (Robinson v Harman (1848))

Plaintiff is not entitled to be placed in a superior position to what they would have been in, if the contract had been performed (Albert v Armstrong Rubber)

Whether an action is brought in tort or contracts, the damage will be assessed in the most favourable test (Parsons v Utley Ingham)

Nominal Damages

Damage a party gets because the law recognizes someone has been wrong – it's pidly – if no loss is proved as in Luna Park v Tramways (1938).

Party can claim as soon as there's a breach – but because of small amount, one doesn't go to court for this

Substantial Damages

Need to prove that there's been a loss due to the breach

Issues are:

How do you draw a boundary around what the loss is?

Does the loss fall within the boundary?

How do you value what the loss is?

Causation

There has to be some sort of connection between the breach and the loss

The "but for" test is a useful guide, but is not used today. Today we use common sense. The cases have broadened the concept so that, in both tort and contract, it is generally sufficient that the breach was a cause of the loss.

The question asked is if the defendants breach was connected with the plaintiff's loss that "as a matter of ordinary common sense and experience it should be regarded as a cause of it" (March v E & M H Stramare Pty Ltd)

Causation is a question of fact

If there are concurrent causes, it is sufficient that only one of these is the cause of the breach (Simonius Vischer & Co v Holt (1979))

Remoteness

It's about drawing a line (can't lose a kingdom over a lost horse nail)

In remoteness of damage there is a difference between contract and tort.

In the case of breach of contract, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the contract would contemplate them as being a very substantial degree of probability. In tort the court has to consider whether consequences were of such a kind that a reasonable man, at the time the tort was committed would forsee them as being of a much lower degree of probability.

There are components to remoteness: 1) Knowledge and 2) probability

Knowledge – there are two types of knowledge – 1) common knowledge that everyone is presumed to have; 2) knowledge of special circumstances. (Koufas v Czarnikow (1969))

Probability: Lord Reid "loss needs to be not unlikely". Lord Morris "likely + liable", "Liable", ""real danger or serious possibillity" – in Australia we haven't stated a preference for them. (Koufas v Czarnikow (1969))

- Whichever test it can be less than 50$ - this standard is higher than in tort "not far-fetched or fanciful"
- It was not unlikely that they would onsell the sugar, so relevant degree of probability was there (Koufas v Czarnikow (1969))

Terms v Misrepresentations -as in ***Oscar Chess Ltd v Williams*** and related cases

Case: - Oscar Chess Ltd v Williams **[1957] 1 WLR 370** Court of Appeal

Sumamry:- Mrs Williams purchased a second hand Morris car on the basis that it was a 1948 model. The registration document stated it was first registered in 1948. The following year her son used the car as a trade in for a brand new Hillman Minx which he was purchasing from Oscar Chess. The son stated the car was a 1948 model and on that basis the Oscar Chess offered £290 off the purchase price of the Hillman. Without this discount Williams would not have been able to go through with the purchase. 8 months later Oscar Chess ltd found out that the car was in fact a 1939 model and worth much less than thought. They brought an action for breach of contract arguing that the date of the vehicle was a fundamental term of the contract thus giving grounds to repudiate the contract and claim damages.

Outcome:-

The statement relating to the age of the car was not a term but a representation. The representee, Oscar Chess ltd as a car dealer, had the greater knowledge and would be in a better position to know the age of the manufacture than the defendant.

Mistake

I did not intend to agree to that = objective test of intentions, implied terms, incorporation

You induced my mistaken assumption = misrepresentation, occasionally mistake as to the facts

You took unfair advantage of my mistake = unconscionability, equitable unilateral mistake

We contracted on a different assumption = common mistake

We did not anticipate such a change of circumstances = frustration

I thought our agreement was allowed = illegality

Lots of overlap between mistake and fraudulence

Common Mistake

Common mistake occurs when both parties make the same mistake about the same thing

A common mistake rendes a contract void ab initio

HC likes the implied contract price approach over the rule of law approach – is there an implied term

The implied term school has long denied that any mistake doctrine even exists (Contract Law By Mindy Chen-Wishart, Oxford UniversityPress)

Common law for common mistake is very narrow. In Australia we go with Lord Denning, implied term and equitable mistake – this allows for leeway for the court and is more generous.

In Solle v Butcher – Lord Denning came up with a three part test for common mistake in equity 1) where the parties are under misapprehension; 2) the error is fundamental; 3) the party

wanting to get out must be at fault. Later cases have added an element of unconscionability in Taylor v Johnson.

Solle v Butcher (Denning J) – "A contract is … liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relatice and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault"

Great Peace Shipping v Tsavliris 92003) – has said that Solle v Butcher is wrong, there is no scope for common mistake to apply in equity, the contract is either void or not void at common law and equity will not intervene whatsoever.

Mutual Mistake

The two parties are mistaken about the same matter. Come back for a cuppa – I mean tea, he thinks I mean sex. The parties are so mistaken as to a fundamental part of the contract that there is no meeting of the minds, there is no agreement between the parties and thus there can be no contract.

The contract is void ab initio, not because the subject matter didn't exist at the time of the contract, but because the parties have not reached a contract about the same subject matter. (Raffles v Wichelhaus)

We interpret things objectively. If the reasonable person can interpret the contract reasonably– then that's the interpretation

Raffles v Wichelhause – was a mutual mistake where both parties were thinking of two different ships. It was not possible to say that a reasonable person may have interpreted one side of the deal differently, therefore, definitely mutual mistake and contract was void ab initio

Goldsbrough Co Ltd v quinn – NOT mutual mistake. Court found that a reasonable person would interpret the words as meaning that the land was to be sold to the company at the price mentioned etc. Accordingly the court found that mutual mistake did not operate and the contract did exist.

Unilateral Mistake

Mistake as to identity or mistake as to term.

One person is right, and they know they're right and one person is wrong.

If it's fraudulent – then it's unilateral as one person knows the truth and they're lying about it.

As a general rule, one person being wrong is not enough – so have to look for something else – look for wrongdoing by one of the parties

Mistake as to identity: you thought they were x and they turn out to be y (they know the truth and you don't)– seller sells to the 2nd buyer and disappears from sight (the rogue) , once the 3rd party acquires the rights it's too late for the seller to recind

Lewis v Averay – case parties met face to face – remedy – voidable. Judgement was held for the defendant (3rdparty) with the court saying that the contract was only voidable and not void, and because of this unless and until the plaintiff took steps to rescind the contract, the rogue had title to the vehicle which he was able to pass on to an innocent 3rd party in good faith.

Cundy v Lindsay – parties distant – contract void. Court held that since the plaintiff intended to enter into a contract with Blenkiron and CIA, and not with the criminal Blenkarn, the contract was void, the innocent defendant (3rd party) was therefore liable to the plaintiff in tort.

Common Law – contract are void., especially if there's a third party for the property to go back to the original owner as if no contract had ever been entered.

Equity – you can only get the contract voidable and not void.

Mistake as to Term: One person knows the truth about the terms

Term 1 – Did the seller thing that the buyer thought that the oats were old

Term 2 – Did the seller think that the buyer thought that the seller was promising to sell old oats

Term 1 – the buyer is mistaken about what the oats were like

Term 2 – There was a mistake in terms – therefore, in this situation the contract was void

HC has a different approach now (Taylor & Johnson). There needs to be 1) written contract; 2) a party is under a serious mistake; 3) about a fundamental term;

From Wayne: In Taylor, the particular aspects were expressed as being (1) awareness that the party was mistaken; and (2) deliberately setting out to ensure that the mistaken party does not realise the mistake.

The HC in Taylor v Johnson indicated a distinct preference for the equitable approach (renders the contract voidable/rescinded) vs the mistake at law (renders the contract void)

Taylor v Johnson was not void for unilateral mistake, yet was held that the contract should be rescinded on equitable grounds, because this was a case of special circumstances – because the other party was aware that there was a serious mistake and added unconscionable.

Non est factum

Used historically by people who didn't know what they were signing. So used as a DEFENSE

Can't claim non est factum just because of a mistake in a term, it must be a fundamental mistake that ultimately causes the signatory to think it is a complete different contract.

It's very narrow – allows people to get out of something they didn't really understand

Applies when the following can be satisfied: 1) class of people is very limited – blind, illiterate , or though no fault of their own they fail to understand the nature of the document 2) The error must be big – there must be a radical difference between what the plaintiff thought they were signing and what they signed; 3) Carelesness – it is for the defence to show that they weren't careless

This doesn't apply to drunkenness, it's about inherent characteristics.

A successful plea of non est factum renders the document void ab initio; it does not create rights and it does not create obligations. As such, non est factum operates as an exception to the rule that a party is bound to a contract that they have signed.

Misrepresentation

Conduct before formation of the contract might affect the viability of the contract – court considers the contract to have never been made - rescission

Not unusual to find misrep and mistake coming up at the same time

Misrep is defined as: 1) false statement of fact; 2) that is intended to induce or does induce the party to enter into the contract; 3) materiality

Because statement is made to induce, it's not a term of the contract. If it was a term of the contract, it would be a breach.

<u>False statement of fact</u>:

- **Usually unproblematic**
- **Court does take a common sense approach – so puffery is distinguished**
- **"My opinion" is not a fact – it's subjective. Assumption is that it really is your opinion. (Edington v Fitzmaurice (1885))**
- **If an expert in the area, they wouldn't say it unless they had reasonable basis/grounds for holding that opinion**
- **Can infer from conduct if it's a statement of fact**
- **When someone says they intend to do something, the presumption is that they really do intend to do it**

Silence can't be a misrepresentation (traditionally). You're expected to do your own work to verify things However there are some exceptions (duty of disclosure): 1) Special relationship between parties where the other person is expected to speak (insurance – if you've had lots of accidents); 2) half-truths or literal truths, where half of the story has been told – ex: yes it's fully tenantable, but fail to mention that tenant has given notice