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## Non Est Factum

An argument that there has not been a contract made due to severe differences in understanding of the contract between the parties.

The contract is not understood at all,  
Fundamental Mistake as to the subject matter and terms, and,  
Has not been careless. *Pettily v Cullen*

**Remedy:** The Contract is void and rescinded.

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## Unconscionable Bargains

At common law, where one party has unconscionably taken advantage of another party.

Must fulfil the following;

1. When entering into the contract with the other party, the plaintiff was under a special disability in dealing with the defendant, with the consequences that there was an absence of any reasonable degree of equity between them; and

2. the disability was sufficiently evident to the defendant to make it prima facie unfair or unconscionable to contract using the plaintiffs consent.  
(*Turner v Windever & Armadio*)

A special disability is: 'The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other' (*Blomley v Ryan*). Full notes contain more principles.

Knowledge for the disability is also central; 'The disability was sufficiently evident to [the defendant] to make it prima facie unfair or "unconscientious" that he procure, or accept, [the plaintiff's] assent to the impugned transaction in the circumstances in which he procured or accepted it' (*Armadio*).

### Defences

Prove that the terms were fair and equitable or they have received 3rd party advice

Can also argue that they were unaware of the disability; *ANZ v Alirezai*, *Kakavas v Crown Melbourne*.

**Remedy:** Contract is void.

**Married Women's special equity:** *Garcia v NAB* introduced the following criteria;

- she didn't understand the transaction
- transaction was voluntary (no gain to her)
- bank knew she was married and must have expected trust and confidence in her husband
- bank did not ensure transaction explained to her

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## Unconscionable Conduct - s 20/21

This is the statutory controls over unconscionable conduct.

**s 20** - prohibits unconscionable conduct within the meaning of the unwritten law. Limited to in trade and commerce.

Narrow view: Only *Armadio* style special disabilities

Broad View: Anything involving unconscionable conduct (Unresolved)

Remedies: Broad base of Australian Consumer Law remedies

**s 21** — prohibition of unconscionable conduct in the sale of goods or provision of services.  
Relates to consumer contracts. Again unconscionable has not be defined, but s 22 provides a series of factors to consider.

Remedies: Broad base of Australian Consumer Law remedies

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## Unfair Terms - s 23

s 23 regulates unfair terms in standard form consumer contracts.

A term is unfair if it meets the criteria of s 24(1).

Examples of unfair terms are given in s 25(1).

Remedy: The term is void and the contract continues without the term (s 23(2)).

A declaration can be sought from a court that the term is unfair (s 250).

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## Action for Debt/Money Due

Where there is money due. This is not a compensatory measure, but one to compel payment.

Only have to prove that money is owing: *Young v Queensland Trustees Ltd.*

**Remedy:** The court will order the sum owed to be paid.

# Formation

To have a contract, numerous components need to exist and be constructed in a fashion which allows for clarity and legal binding. Below are a list of the basic elements of a contract. These elements are merely based on generalised areas, and as such, it is not a definitive list.

- Legally Binding, an intention for the contract to be legally enforceable
- Agreement between the parties
- Terms are certain and complete
- Consideration from each party
- No vitiating factors

When looking to establishing these factors, the court will always take an objective approach. How would a reasonable person in the position of the contractees have interpreted the actions, behaviour and contract.

## Intention

Intention is central to the contract making process. Without the intention to create legal relations from both parties, there is not contract, merely an agreement. The court will look beyond the contract itself to identify the intention of the parties (*Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd*) which includes the surrounding circumstance and the 'subject matter of the agreement, the status of the parties to it, their relationship to one another and the surrounding circumstances' (*Ermogenous*).

In simpler times, there were presumptions of Intention to Create Legal Relations (ItCLR) which could be used and applied to specific circumstances which had to be refuted by a party contending that there was no valid contract on the ground of ItCLR. A sample of these presumptions is below;

- Commercial Dealings: There is an intention to create legal relations between commercial entities (*Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235.)
- Domestic Relationships: There is a presumption against an ItCLR in domestic circumstances (*Balfour v Balfour* [1919] 2 KB 571). *Sion v NSW Trustee & Guardian* established a principle of diminishing effect of this presumption when family relationships begin to branch out to extended family.

More recently, the High Court, as well as the New South Wales Court of Appeal have taken an alternative view of presumptions as to ItCLR. In *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95). In this case the High Court said that there was no presumption as to the state of the applicants employment. This, prima facie, is correct, but the High Court then went further and said that they shouldn't be any presumptions at common law.

Under the impression that this was merely a misstep by the High Court, the New South Wales Court of Appeal ruled, in *Shahid v Australasian College of Dermatologists* that presumptions exist and that they can be applied to the facts. This continued with *Sion v NSW Trustee & Guardian* which expanded on the *Balfour v Balfour* principle.

Recently, the New South Wales Court of Appeal has changed their opinion again, ruling, in *Ashton v Pratt*, that the approach of *Sion* and *Shahid* were incorrect, and reinforcing the 'anti-presumption' opinion of contract formation, supporting the earlier proposition of the High Court.

This has left the current status of presumptions a bit uncertain. When discussing the concept of the presumptions, discuss the more commonly accepted principles as well as the uncertainty.

The best way to avoid issues with the intention of create legal relation is for a terms to be explicitly placed within the contract to overcome the presumption against legal relations, or to specifically include legal relations.

# Agreement

Agreement is simply based on the parties agreeing to the terms to be incorporated into the contract. This is covered in more detail in the topic 'terms'.

## Preliminary Agreements

There are a number of ways parties can construct contracts. Some are constructed and agreed upon instantly, while others are created over a much longer period of time. As such, there can be the creating of agreements which are only partially binding, or binding from a specific period in time. These are commonly known as preliminary agreements and are not always the final contract between the parties.

Some negotiations produce contracts that are binding morally or ethically only (*Rose & Frank v J R Crompton*), while others are much more complex in nature.

The case of *Masters v Cameron* introduced three categories of preliminary agreement.

- I. Agreement is immediately binding as a contract, but the parties will draw up a further, formalised version. This is reinforced in the case of *Stirnemann v Kaza Investments*
- II. No performance until the agreement is formalised. It is legally binding though. It is essentially involving the delay of the onset of the requirement for action.
- III. No binding contract exists until the formal agreement is concluded.

More recently, there has been a suggestion of a fourth category. An agreement is immediately binding, but parties will draw up a formalised agreement with further terms as agreed. This is essentially saying that there is an agreement in place and further terms will be agreed upon later. This was introduced by *Lucke v Cleary*.

What must be reiterated is that these categories only apply to contracts which have been agreed upon, not on those still being negotiated.

## Certainty

Summarily, terms in a contract must be sufficiently complete, certain, clear and not illusory. (*Thorby v Geldbery* (1964) 112 CLR 597)

### Interpretation

An uncertain clause in a contract will attempted to be read into a certain fashion. The court will always attempt to uphold a term in the face of uncertainty. This interpretation based resolution method was introduced in *Upper Hunter County District Council v Australian Chilling and Freezing*. The Court may also resolve uncertainty by severance or rectification. A term will only be severed if it is an essential term which is uncertain (*Whitlock v Brew*). Rectification is where the court will correct the wording of an in-dispute contract.

Where there has already been performance of a contract with uncertain terms, the court will be reluctant to find the contract as uncertain or unintelligible. (*York Air Conditioning & Refrigeration (A/sia) Pty Ltd v Commonwealth* (1949) 80 CLR 11, 54)

*'When the parties have shown by their conduct that they understand and can apply the terms of a contract without difficulty, a court should be very reluctant indeed to pay no attention to such conduct by holding that the terms of the contract are unintelligible by reason of uncertainty.'*

Other specific cases are that the term 'reasonable' has no definition unless clarified. Illusory promises are those which are uncertain because they allow one party unfettered discretion as to consideration or obligations under a contract.

### Completeness

A contract is not complete unless all essential terms are provided for, or if there is no machinery within the contract to allow the gap filling for incomplete terms. (*NZI Insurance Australia Ltd v Baryzcka*)

An essential term is '*a term without which the contract cannot be enforced*' (*Thomson v White* [2006] NSWCA 350 [100]). Is essentially a term regarding whether a contract can exist without the particular term.

Again, as above, a contract that have been acted upon is less likely to be found incomplete. (*Husain v O&S Holdings*).

### Agreements to Agree

Agreements to agree are contractually unenforceable (*Mushroom Composters v IS & DE Robertson*) and will be severed from any contracts. This is because there can be no contracts which explicitly control the ability of another party to agree.

An agreement to renegotiate specific terms in 'good faith' may be enforceable, but only if the criteria for the good faith are clear. Examples of this include; *Coal Cliff Collieries v Sijehama* (Term to regulate further contractual relations in terms of the contract at hand) and *United Rail Group Services v Rail Corp NSW* (Negotiating in good faith if a dispute arises).

### Unilateral Contracts

Unilateral contracts are those which involve one party making a promise to provide something for the performance of an act which the promisee is not bound to complete. *Carlill v Carbolic Smoke Ball*. For an unilateral contract to be accepted, the promisee must act in knowledge of the offer, and an intention to accept the offer. *New York Star*. There is a presumption here, one which can be rebutted, that a party is acting in knowledge of the unilateral offer at the time of performance. *R v Clarke*.

Revocation of a Unilateral Contract can be done immediately after offering. These offers can be revoked at any time unless it has already been performed to completion or a specific time period for completion has been indicated (*Mobil Oil v Lyndel Nominees*).

## Consideration

This is the element of bargain. This process differentiates the concepts of gifts from actual contracts. Only exception is a Deed.

The promisor must reasonably be understood to be seeking something in return for the promise they are made (*Australian Woollen Mills*) and reliance on the promise is not merely enough (*Beaton v McDivitt*).

The value of consideration need only be sufficient, not adequate (*Chappell v Nestle*). This has leant itself to the concept of a peppercorn consideration.

Consideration needs to have some value though, as purported by *Currie v Misa*; '*some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other*'.

A promise to perform an existing contractual duty is insufficient consideration (*Stilk v Myrick*, *Wigan v Edwards*). Furthermore, this means that a contractual variation is also unenforceable if it only effects one of the parties. This means that the easiest way to proceed is to replace the contract. A variation of a contract, coupled with consideration, is enforceable, subject to economic duress (*North Ocean Shipping v Hyundai*).

### Practical Benefit

A way of avoiding the cancellation and recreation of a contract for variation, or having to provide consideration for a variation, is to make a modification under practical benefit. The principles of practical benefit have been introduced through numerous cases such as *Williams v Roffey Bros*, and *Musumeci v Winadell & DPP (Vic) v Le*. The primary criteria for Practical Benefit is found in *Musumeci*.

- I. There must be a real risk that the beneficiary of the promise - i.e. the person bound to undertake the pre-existing duty or pay the full sum of money. - will default on their contractual obligation
- II. The Practical benefit must be worth more to the 'modifying party' (promisor, i.e. person receiving the PB) than any remedy available on an action for breach of contract. Benefit does not necessarily have to mean money.