

Contents and Interpretation of the Contract

COLLATERAL CONTRACTS

- **Hoyt's Pty Ltd v Spencer [1919]**- Defendant sub-leased certain premises to plaintiff. Contained proviso entitling defendant to terminate it on giving four week's notice in writing. Verbal agreement that he would not terminate unless required to do so by head lessors. Subsequently terminated. Held that the defendant's verbal agreement not to terminate the sub-lease and the proviso in the written sub-lease giving him unqualified right to terminate were inconsistent therefore verbal agreement was unenforceable.

CONDITIONS, WARRANTIES AND INNOMINATE TERMS

- **Bettini v Gye [1876]**- G contracted B for 3 months. Provision that B would be in London at least 6 days before rehearsals. Through illness B arrived only 2 days earlier. G refused to accept services. Held the term was not a condition but a warranty and accordingly G was entitled to damages.

EXCLUSION CLAUSES

INCORPORATION

- **L'Estrange v F Graucob Ltd [1934]**- L bought machine from G and signed document headed "Sales Agreement". L did not read agreement contained another clause including an exclusion clause. Machine failed to work properly. L sued for breach of the implied term that goods should be fit for purpose. Held that because L signed the contract the exclusion clause was effective.
- **Olley v Marlborough Court Ltd [1949]**- Plaintiff booked into hotel. Sign in room excluded liability. Furs were stolen as a result of negligence by staff. Defendants were liable as exclusion clause was not incorporated in the contract.
- **Causer v Browne [1952]**- Dress for dry cleaning. Deposit docket, excludes liability. Dress damaged. Docket is not reasonably understood to contain conditions. Onus on firm to prove person receiving docket was aware or should have been that it was not merely a receipt.
- **Curtis v Chemical Cleaning & Dyeing Co Ltd [1951]**- Receipt signed with clause limiting liability for damaged beads or sequins. Dress comes back stained. Exclusion clause does not cover.

Remedies

DAMAGES

MEASURE

- **Commonwealth v Amann Aviation Pty Ltd [1991]**- A entered 3 year contract with C to conduct aerial surveillance. In order perform contract spent lots of money fitting out aircraft. On day performance was due only 7 out of 11 planes were ready. As a result C terminated the contract for repudiatory breach. However did not follow procedure set out in contract. A sued for wrongful termination. Held that A would receive damages for expenditure in reliance upon C's promise.

REMOTENESS

- **Hadley v Baxendale [1854]**- H worked mills with steam engine. Part breaks, hires B to transport to another firm to be fixed. B took longer than expected to deliver and H suffered loss of profits as they could not operate without the part. Held that no damages will be awarded as it is not reasonable to assume that profit loss would occur directly as a result. If the importance of profits had been communicated to B then damages may have been awarded under special circumstances.

DISAPPOINTMENT OR DISTRESS

- **Falko v James Mc Ewan & Co Ltd [1977]**- J made contract with F to install an oil heater. J installed heater and engaged an electrician to connect it. Electrician informed F that it would cost and extra \$5 to install a power point. F wouldn't pay. F runs lead from kitchen to heater. F sues J claiming damages for cost of electrical installation and inconvenience. Held that F was not entitled to claim for inconvenience damages were limited to full installation of heater.
- **Baltic Shipping Co v Dillon [1993]**- D paid \$2,205 in advance for cruise. Ship struck rock and sank. D was awarded \$5,000 for distress in addition to compensation for loss of belongings and personal injuries sustained in the shipwreck.

SPECIFIC PERFORMANCE

WHERE CONSTANT SUPERVISION WOULD BE REQUIRED

- **Ryan v Mutual Tontine Westminster Chambers Assoc [1893]**- Lessor of block of flats agreed to provide porter that would be in constant attendance. Porter also had job as a chef so was absent for several hours each day. Tenant sought to order specific performance. Could not be awarded as the court could not guarantee that the porter would remain in constant attendance without constant supervision.

RESTITUTION

- **Pavey & Matthews Pty Ltd v Paul [1987]**- PM were builders who carried out work for P under oral contract. Under s 45 of Builders Licensing Act 1971 building contract unenforceable unless in writing. Work completed, dispute arose P refused to pay. PM sued P for reasonable amount based not on the contract but on the amount earned. Held that although contract is unenforceable PM was entitled to reasonable remuneration the basis of

UNCONSCIONABLE CONDUCT IN CONNECTION WITH GOODS AND SERVICES (SECTION 21)

- **Section 21(1)**- A person must not in trade or commerce in the connection with:
 - a) the supply or possible supply of goods or services to a person (other than a listed public company);
 - b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

Engage in conduct that is, in all circumstances, unconscionable.

- **Section 21(3)**- For the purpose of determining whether a person has contravened subsection (1):
 - a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- **Section 21(4)**- It is the intention of Parliament that:
 - a) This section is not limited by the unwritten law relating to unconscionable conduct; and
 - b) This section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
 - c) In considering whether conduct to which a contract is unconscionable, a court's consideration of the contract may include consideration of:
 - i) The terms of the contract; and
 - ii) The manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to the formation of the contract.
- **Section 22(1)**- In determining whether there has been unconscionable conduct the court may have regard to the following matters:
 - a) The relative strengths of the bargaining positions of the parties;
 - b) Whether conditions imposed upon a customer were not reasonably necessary for the protection of the legitimate interests of the supplier;
 - c) Whether the customer was able to understand any documents relating to the supply of the goods or services;
 - d) Whether any undue influence or pressure was exerted upon the customer or any unfair tactics used against the customer;
 - e) The amount and terms for which the customer could have acquired equivalent goods or services from another supplier;
 - f) The extent to which the supplier's conduct was consistent with their conduct towards other customers in similar transactions;
 - g) The requirements of any applicable industry code;
 - h) The requirements of any other industry code where the customer acted on the reasonable belief that the supplier would comply with the code;
 - i) The extent to which the supplier unreasonably failed to disclose intended conduct that might affect the customer or any risks to the customer arising from the supplier's intended conduct;
 - j) The extent to which the supplier was willing to negotiate with the customer the terms and conditions of the contract; the terms and conditions of the contract; the conduct of the supplier and customer in complying with the contract; and any conduct of the

TORTS

WRONGS ACT 1958 (Vic)

DUTY OF CARE

- **Donoghue v Stevenson [1932]**- Friend purchased ginger beer. Poured from opaque bottle. D drank then discovered decomposing snail within bottle. Doctor diagnosed her with gastro and state of nervous shock. No contract between D and café owner as she was not the purchaser so could not sue for breach. Sued the manufacturer, S, in tort for negligence. Alleged that S owed a duty to take reasonable care that the ginger beer he manufactured did not contain substances likely to cause injury.

ACTS CAUSING PHYSICAL HARM

- **Chapman v Hearse [1961]**- C drove negligently and crashed, rolled his car and lay unconscious on the road. Cherry was a doctor, whilst attending to C was struck and killed by H, who was also driving negligently. Cherry's estate sued H.C was also found liable as it is reasonably foreseeable that driving negligently could easily result in someone being run over.
- **Romeo v Conservation Commission (NT) [1998]**- R, a 16 year old girl was drinking near Dripstone Cliffs. Area managed by C. She mistakenly walked too close to the edge and fell down cliff face causing serious injuries. Sued C for breach of duty of care in that it had failed to prevent the risk of accident by providing a fence around the cliff face.

NEGLIGENT ACTS CAUSING MENTAL HARM

- **Jaensch v Coffey [1984]**- C's husband was on duty riding motorcycle when he collided with a vehicle driven negligently by J. C was brought to hospital and saw Allan in severe pain and believed that he would die. It was not until 4 weeks after the accident she realised he would survive. C suffered severe anxiety and depression causing gynaecological problems and a hysterectomy was later performed. Held that C could recover damages for 'nervous shock', as although she was not present at the accident she witnessed the immediate aftermath.

LIABILITY FOR OMISSIONS

- **Rogers v Whitaker [1992]**- W had been almost totally blind in right eye for 40 years. Consulted R, an ophthalmic surgeon who advised that an operation would not only improve its appearance but probably restore sight. Following surgery W suffered condition in left eye causing loss of sight, despite the operation being conducted with due care and skill it failed to restore sight and left her almost totally blind. W sued R alleging his failure to warn her of the risk of the condition. Held that, except in cases of emergency or necessity, doctors have a duty to warn patients of the risks associated with a surgical procedure.

NEGLIGENT ACTS CAUSING PURE ECONOMIC LOSS

- **Perre v Apand Pty Ltd [1999]**- A manufactures potato chips. Negligently introduced bacterial wilt onto Sparnon's land in SA by importing uncertified seeds. S and potato growing neighbours (including P) have very profitable business selling potatoes to WA. WA law prohibits import of potatoes from infected farms or within 20km of infected farms. P sued A for economic loss suffered as a result of loss of WA market. A was aware of WA law. Held that A owed a duty of care to the P.

Corporations Law

CORPORATIONS ACT 2001 (CTH)

- **Salomon v Salomon & Co Ltd [1897]**- Aaron Salomon was sole proprietor of shoe business. Made it into a limited company and took 20,001 of the 20,007 shares. Shortly after business struggled, Salomon loaned additional money to the company. When company was liquidated assets were not sufficient to discharge secured creditors (including Salomon). Unsecured creditors (employees and creditors) argued that Salomon and his company were in essence the same person and that he should be liable for the debts. Held that there was no basis for holding Salomon personally liable.

DIRECTORS DUTIES

- **Section 180- Duty of care and diligence**
 - 1) **Care and diligence—directors and other officers**

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

 - a) Were a director or officer of a corporation in the corporations circumstances; and
 - b) Occupied in the office held by, and had the same responsibilities within the corporation as, the director or officer.
 - 2) **Business judgement rule**

A director or other officer of a corporation who makes a business judgement is taken to the meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgement if they:

 - a) Make the judgement in good faith for a proper purpose; and
 - b) Do not have a material personal interest in the subject matter of the judgement; and
 - c) Inform themselves about the subject matter of the judgement to the extent they reasonably believe to be appropriate; and
 - d) Rationally believe that the judgement is in the best interests of the corporation.
- **Section 181- Duty to act in good faith and for a proper purpose**
 - 1) A director or other officer of a corporation must exercise their powers and discharge their duties:
 - a) In good faith in the best interests of the corporation; and
 - b) For a proper purpose
- **Section 182- Duty not to misuse the director's position to gain an advantage or cause detriment**
 - 1) A director, secretary, other officer or employee of a corporation must not improperly use their position to :
 - a) Gain an advantage for themselves or someone else; or
 - b) Cause detriment to the corporation
- **Section 183- Duty not to misuse the director's position to obtain and use information**
 - 1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use information to:
 - a) Gain an advantage for themselves or someone else; or
 - b) Cause detriment to the corporation.