

## CERTAINTY

Agreement between the parties must be **certain** and **complete**

- It is **not** necessary for the parties to **provide every possible contingency** **OR** articulate terms so they can only be interpreted one way
- Courts when interpreting contracts will apply the maxim *ut res magis valet quam pereat* (it is better for a thing to have effect than to be found void)
- The real question is whether something is *sufficiently certain* and *sufficiently complete*

### Completeness:

An agreement will be sufficiently completely if the parties have reached agreement on essential or critical terms

#### 1. Essential Terms:

- A term, without which the contract cannot be enforced
    - *Thompson v White 2006*
  - “**No contract** is concluded until the parties negotiating **are agreed upon all the terms** of their bargain-- unless indeed the terms left outstanding are “**such as the law will supply**””
    - *Milne v Attorney-General (Tas)*
  - There can be **no binding** and enforceable obligation unless the terms of the bargain, or at least its **essential or critical terms, have been agreed upon.**
    - *ANZ v Frost Holdings Pty Ltd*
  - There is **no concluded contract** where an essential or critical term is expressly left to be **settled by future agreement of the parties**
    - *ANZ v Frost Holdings Pty Ltd citing Thorby v Goldberg*
  - It is for the parties not for the courts to decide which terms are essential to the contract
    - *Pagnan SpA v Feed Products Ltd 1987*
  - Whether a particular absent term is essential depends on the **nature of the contract and circumstances**
    - *Vroon BV v Fosrters Brewing Group 1994*
- **Lease Agreements** – Commencement Date, Rental to be paid *Harvey v Pratt*
- **Sale of Land** – parties, dates, price **OR** effective mechanism for determining price, do not have to agree on settlement date (title transfer date) typically 60-90 days *Hall v Busst*
- **Sale of Goods** – **No price needed** but necessitates **a reasonable price is paid**, this term may be implied to an agreement **only where** the parties have reached agreement on all other essential contractual terms
  - *Sale of Goods Act 1954 s.13(2)*

#### 2. Agreement to Agree

- An agreement to agree on an essential term will **result in an unenforceable contract** due to incompleteness
- *Even* when the court could imply such a term
- Obligation to pay a **reasonable price** will have **no application** where the party had **deliberately deferred agreement on price**
  - *May and Butcher Ltd v The King*

### Exceptions:

- ✓ Courts are **less likely** to find an agreement incomplete **if it has been wholly or completed**
  - *Foley v Classique Coaches Ltd* ask have the parties completed so much of the contract it would be commercial unviable to unwind?
- ✓ If an **appropriate mechanism** has been provided for the **determinacy of the essential term** in the event of failure to reach an agreement
  - *George v Roach*
- **BUT** if that **machinery fails or is inadequate** the contract may be void for uncertainty
- ✓ A **formula** may be used in **place** of a mechanism such as CPI

## Certainty:

A particular term may be **so vague and imprecise** that a court cannot give it any meaning, the term is not missing but there is uncertainty as to its meaning

- Uncertainty is **more likely** to be an issue if the parties are **yet to perform their obligations**, where parties **have been performing** courts are **reluctant to find the contract unintelligible**
  - *York Air Conditioning and Refrigeration v Commonwealth*
- Courts avoid taking the pedantic approach and will attribute meaning to the language used by the parties unless it is impossible to do so
- So long as it is not “**so obscure and so incapable of any definite** or precise meaning that the Court is unable to attribute to the parties any particular contractual intention” **the contract cannot be held** to be **void** or uncertain or meaningless (citing *Scammell v Ouston*).
  - *Upper Hunter Council v Australian Chilling & Freezing Co*
- No narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.
  - *Upper Hunter Council v Australian Chilling & Freezing Co*
- Courts cannot enforce a contract if they cannot identify the obligations of the contract with some degree of precision

**Reasonableness, Objective Testing of Certainty:** “reasonable” or “fair” can sometimes be impossible to work out, especially if objective standards are elusive

- Inability to ascertain “reasonable terms in common use” will render a **contract void**
    - *Whitlock v Brew*
  - “The value of all additions and improvements” is **not sufficiently certain** to give rise to an enforceable contract. There could be **no external standard of value** of additions and improvements, no standard yielding a figure reasonably fixed or ascertainable. **Unenforceable**
    - *Hall v Busst*
- NB Jason does not like the argument** of this case seems it would be possible to ascertain values of depreciation and value added

## Agreements to Negotiate

- Agreements to agree or negotiate have been **held as inherently repugnant** to the adversarial positions of the parties thus **will not amount to certainty**
- It is counter intuitive where parties disagree to hold agreements to negotiate to agree to be certain and binding
- **BUT** where negotiations have been formally agreed to be **undertaken in good faith** (honestly and reasonable) or to mediate disputes then **the law should up hold this**
  - *United Rail Services Limited v Rail Corp NSW*
    - Upheld: “agreement to meet and undertake genuine and good faith negotiations with a view to resolution”
    - **BUT the parties are not forced to resolve with a harmonious outcome**, simply upholding the process by which the parties have clearly committed to.

### **Illusory Promises:**

A promise will be illusory if the promisor has an unfettered discretion in relation to the performance of that promise

- “promise accompanied by words showing the promisor's discretion or option as to if he will carry out that promise.. results that there is no contract” NB illusory promise
  - *Placer Development Ltd v Commonwealth*

### **Terms will not be Illusory Where:**

- ✓ A party is given a latitude of choice, which does not amount to complete and unfettered discretion
- ✓ The discretion relates to the fulfillment of a condition (*Conditional Contract*) upon which the performance of the contract depends (i.e. there is no discretion as to the performance of the contract once the condition is satisfied).
- ✓ Conditional contracts are perfectly valid, just because the condition is discretionary does not make the contract void
  - *Meehan v Jones* – argued the contract was void for want of certainty re satisfactory financing, HELD no not illusory
- ✓ A term will not be illusory where the discretion is to be exercised by a third party
  - *Godecke v Kirwan*

### **Essential Principles of Uncertainty, Incompleteness and Illusory Promises**

*Biotechnology Australia Pty Ltd v Pace – Held, invalid for uncertainty and illusory promises, Pace lost*

- The courts strive to uphold, and not frustrate, a contract but only so far as the terms may be ascertained from the agreement between them
- The courts are unwilling to uphold contractual terms that are unacceptably ambiguous or uncertain
  - Where they are asked to spell out to an unacceptable extend that which the parties could not decide for themselves
  - Clarify irredeemably obscure terms
- Ambiguity, vagueness or uncertainty may be resolve through consultation of extrinsic materials
- Agreements are to be discovered objectively speaking (the reasonable person test)
- Courts will consider features to the agreement such as relationship between the parties and relevant external references to resolve uncertainty
- The courts will draw back from filling in terms which the parties did themselves not fill

### **Consequences of Uncertainty:**

- **Void:** The whole contract may be void if the term is essential or material to the contract
  - Essential terms may be omitted and the court is unwilling to supply it
  - If it can be inferred there would be no agreement without the term
- **Waiver the Terms:** by the party for whose benefit that term was stipulated
  - The ineffective term is not essential
  - Agreement could be inferred to remain valid without the term
  - Performance of other terms have been partly or wholly completed
- **Sever the Term:** legally cut out from the contract – same reasons as above
  - *Upper Hunter Council* – wanted the term severed because they still needed electricity

## FORMALITIES

The common law does not require a contract to be in any particular form

- *Beckham v Drake (1814)*

This means, at common law, a contract could be constituted by:

- Written agreement
- Verbal/ oral agreement
  - Valid at common law if its existence can be established by oral testimony

There may be more difficulties in proving an oral agreement

Must distinguish between *proving a contract* and the *enforceability of a contract*

- P will always be required to prove the existence of a contract by adducing evidence
- If P proves the contract the court can then enforce it

### Formal Written Contracts:

- The sale and purchase of land: *Instruments Act 1958 (Vic), s 126* Certain Agreements to be in Writing
- “An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person upon a contract for the sale or...”
- i.e. *Sale of land and Contracts of Guarantee cannot be bought in court unless you can produce the written contract*

### Reasons for Writing:

- Reliable evidence of an agreement
- Promotes caution
- Protects vulnerable consumers

### Two Categories of Contract – *Instruments Act (1858) s.126*

#### 1. Contract of Guarantee:

- A special *promise to answer for the debt*, default or miscarriage of another person
- Debtors obligation is primary and *guarantors debt is secondary*
- If the debtors obligation is discharged then the guarantors is too

#### 2. Disposition of interest in land:

- Includes, land sale, lease, tenant, mortgage, options to acquire interest in land

Statute infers for the above types of contract cannot sue unless it is in writing and one party has signed the contract. *As soon as you see an interest in a disposition in land query if it is a s.126 issue?*

### Required Formalities:

“An action shall not be brought on a contract of a particular type (*s.126 contract*) unless the agreement, or a memorandum or note of agreement, is in writing and signed by the party to be charged on the contract”

1. A contract in writing
2. A verbal contract that has supplementary memorandum or note of the agreement i.e. documents providing proof of the agreement