

FORMATION: OFFER & ACCEPTANCE

AGREEMENT

Contract: legally binding agreement, must have consideration

Bilateral: both parties agree to something (X offers to buy Y's house, money and house)

Unilateral: one person makes a promise, other just acts as requested (X promises to give money if not satisfied with product)

Nature of agreement: meeting of the minds (*consensus ad idem*) determined objectively (reasonable person test)

Offer and acceptance:

An offer is a promise by the offeror to do/not do something, if the offeree (person who the offer is addressed) responds.

Acceptance is an affirmative response to an offer by the offeree. Any form or words or conduct can amount to an acceptance, provided there is intention by the offeree to accept the offer on the stated terms (silence is not an effective response).

Nature of offer:

An offer is any communication that is promise to do something if the person to whom the offer is directed makes a promise or does something in return.

- Can be made to an individual, a group or the world at large. *Carlill v Carbolic Smoke Ball Company* [1893] Court of Appeal (UK)
- An invitation to deal or invitation to treat is not an offer (e.g. stores selling items).
- Difference between offer and invitation is a question of intent – whether the offeror intended that an affirmative response would give rise to an agreement, or result in further negotiation.

Invitations to deal are not offers:

- Buying goods is an offer.
- Auctions of houses are invitations to deal, however online auctions are offers.
- Advertisements are an invitation to deal
- Calls for tender (make me an offer) are usually invitations to deal

Duration and termination of offers:

- Lapse of time – offer lapses on the expiry of the specified time, if no time specified, lapses after a reasonable time
- Death of offeror: once the offeree is notified of death, the offer lapses
- Revocation (take back) by offeror: for bilateral contracts, an offer is revocable at any time prior to its acceptance, effective when communicated to the offeree.
- Rejection by offeree: an offer terminates on rejection by the offeree (a counter-offer is considered rejection)

ACCEPTANCE

Form of acceptance:

- No set form. However, an offeror cannot impose a contract by saying acceptance has occurred unless positive steps are taken to reject the offer.

Counter-offers: the words/conduct of offeree must indicate assent to all the terms of the offer.

- If response is expressed as acceptance but introduces new terms, counter-offer, and original offer is terminated.
- Passing of documents back and forth is called battle of the forms.

Communication acceptance:

- Acceptance by instantaneous modes of communication (email or fax) is deemed to be received when it is given to offeror.
- Where post (instantaneous methods of communication) are used, postal rule applies (effective on posting whether or not received by offeror).
- Estoppel – the doctrine designed to protect a person who has acted on assumption induced by another person (if offeree believes they communicated acceptance, but offeror didn't catch the words of acceptance in a phone call and didn't ask for a repeat, then offeror is bound because he is estopped from saying he didn't receive the message of acceptance) *Entores Ltd v Miles Far East Corporation* [1955] English Court of Appeal.
- Can use a general comment about estoppel: helps to achieve fairness where application of contractual principles will produce unfairness

No identifiable offer and acceptance – *Clarke v Earl of Dunraven* [1897] HL. (regatta rules put the competitors into contract)

- Not possible to analyse dealings in terms of offer and acceptance
- Contract between participants in a yacht race.
- When applying for race, only dealt with organisers, not each other.
- Agreed to be bound by race rules, therefore contract between them.

Cases:

- *Carlill v Carbolic Smoke Ball Company* [1893] Court of Appeal UK
 - Smoke Ball company manufactured and sold a medicinal preparation called the carbolic smoke ball, used to prevent users contracting the cold or flu.
 - Advertisement published saying \$100 reward paid by company to anyone who does catch a cold, with \$1000 deposited to bank to show sincerity in the matter.
 - Held: an offer can be made to the world at large, possible for an offeror to waive the need for communication and should the offer be accepted it is not necessary to communicate that decision, unilateral contract

FORMATION: CERTAINTY & CONDITIONAL CONTRACTS

Types of uncertainty:

An agreement will fail on the grounds that it is uncertain where:

1. Terms are too vague or ambiguous: meaning cannot be given. Courts will strive to resolve uncertainty where possible.
2. Agreement is illusory: not real, will not be enforceable where a party's performance is entirely at their discretion.
3. Incomplete: not enforceable if it does not deal with all essential matters. Parties can leave essential matters to be determined in the future, so long as it does not become an agreement to agree in future.
4. Agreement to agree: agreement to agree in future will not be enforced. Agreement to negotiate the terms of a contract in the future may be enforceable. Agreements not to agree with a third party are enforceable (lock-out agreements).

Vague or ambiguous

Cases:

- *Scammell v Ouston* [1941] HL

Parties (motor dealer and a purchaser) entered into an agreement for sale of a motor on "hire purchase terms". Hire purchase terms are seen as too vague to have a contract, therefore no concluded contract. Can be used as long as the terms are very clear.

- *Raffles v Wichelhaus* (1864) UK – Court of Exchequer

Contract to sell cotton, to be transported on ship. Two ships sailing, one in October and one in December. Plaintiff intended to sell cotton from December ship, defendant intended to purchase from October. No contract because of ambiguity. No meeting of the minds as there was no clarity.

- *Council of Upper Hunter County v Australian Chilling & Freezing Co Ltd* (1967) HCA

Council entered into contract to supply ACF with electricity. Clause stating supplier's can vary charge if their costs vary. Sought to increase charges, ACF alleged cl void for uncertainty. Held, no uncertainty, even though there may be scope for disagreement about what constitutes as supplier costs in individual cases.

Illusory agreements

A promise is illusory if one party has the discretion to abandon their obligations altogether

- Example: Bob promises to supply Jill with apples if Jill pays Bob a price to be determined at her absolute discretion. Jill could set a price of \$0. Illusory because if Jill sets the price at \$0 then she removes a promissory obligation.

- The difference between illusory terms and uncertain terms can be seen in: *Biotechnology Australia Pty Ltd v Pace* (1988) NSWCA

P entered into contract of employment with B, which provided he would have the option to participate in a scheme which in fact did not exist. P sued for breach, as he would have been given opportunity to acquire shares in the company.

Held: promise did not create any contractual obligation to Pa which he may enforce. It was rather a provision for future arrangements. Alternatively, if it was a term of the contract, it was vague and uncertain and so unenforceable.

Placer Development Ltd v The Commonwealth (1969) HCA: a promise to pay an unspecified amount of money is not enforceable where it expressly appears that the amount to be paid is to rest in the discretion of the promisor. Promises of this character are treated not as vague and uncertain promises, for their meaning is only too clear, but as illusory promises.

Incomplete

Usually an essential term is price: but if *Sale of Goods* legislation applies (s13(2) of the *Sale of Goods Act* 1923 (NSW) and s13 of the *Sale of Goods Act* 1958 (Vic)) if the price is not fixed, the buyer must pay a reasonable price (work out what the market value is).

Cases:

- *ANZ Bank v Frost Holdings Pty Ltd* [1989] Supreme Court of Vic (FC)

Contract for production of calendars incomplete as parties had not agreed on style, design, quality, content or number of copies. Contracts can leave certain decisions to a later date (such as the precise location of delivery) so long as this does not require further agreement between themselves but the important details must be sorted straight away.

Formula - a formula provision is designed to settle the content of an essential term without the need for further negotiation between parties.

Machinery - a machinery provision is agreed upon by the parties to resolve the precise content of a term in the future. May be used when the parties do not know what would be appropriate at the time.

Agreements to agree

Agree in future: not binding

Agreement to negotiate in future, may be binding: *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) NSWCA. Agreement to execute joint venture in future. Basic law is that courts will not enforce an agreement to agree. However, an agreement to negotiate in good faith may be enforceable because of the doctrine of freedom of contract.

Lock-out agreements: not to deal with a third person for a specified time. *Walford v Miles* [1992] HL. Mr. and Mrs. M agreed to negotiate with W for sale of a business. Agreed to terminate negotiations with other purchasers, provided W confirmed they were financially able to purchase. M decided not to proceed and sold to third party. This case was an agreement to negotiate in good faith.

Severance

- If the uncertain parts of the agreement can be severed from the rest, the remaining parts of the agreement will be enforceable.
- To determine whether severance is possible, look at intention of parties and whether to contract is divisible.
- *Life Insurance Co of Australia Ltd v Phillips* (1925) HCA
- Phillips purchased two life assurance policies. After four years sought to rescind policies or declare void, and recover premiums paid.
- Held: stipulations in the case are divisible, therefore the rest remains.

Conditional contracts

- A contract where obligations may be qualified or suspended until a condition is fulfilled.
- Enter into conditional contract to protect a party who, contracting on the understanding that a particular condition will be met, wishes to ensure they are not obligated if that condition is not fulfilled, or to put off their obligations until a certain date or time.
- Condition precedent – must be fulfilled before it becomes binding. Until that happens, nothing is in play. Unless A happens, I am not bound to anything.
- Condition subsequent – if A happens, I am no longer bound.

Subject to contract:

- C agrees to sell a farm to M, provided that the sale was subject to the preparation of a formal contract of sale which shall be acceptable to solicitors.
- Decision to make a formal contract from negotiations and agreement can fall under three categories outlined in *Masters v Cameron* (1954) HCA
 1. Parties have reached finality in arranging all the terms of bargain and intend to be immediately bound, but at the same time propose to have terms restated in a more precise form but not different in effect.
 2. Parties have completely agreed upon terms and intend no departure from or addition to what their agreed terms imply, but have made performance of one or more of the terms conditional upon execution of a formal document.
 3. Intention of the parties is not to make a concluded bargain at all, unless they execute a formal contract.
- *Geemaz Management Pty Ltd v Geelong Motors Pty Ltd* [2013] Supreme Court of Vic discussed a 4th category - parties content to be bound immediately while expecting to make a further contract in substitution for the first containing by consent, additional terms.

Subject to finance:

- Enables a purchaser to withdraw from the transaction should they be unable to obtain the finance needed to pay the purchase price.
- *Meehan v Jones* (1982) HCA
- J agreed to sell land to M. Agreement made subject to receiving the finances.

FORMATION: CONSIDERATION

An agreement will amount to a contract only if the promises were made in exchange for 'consideration'. To be enforceable, promises must be bargained for.

Consideration not required:

1. Promise contained in a deed (formal written document) is enforceable even though given without consideration.
2. Allows certain promises to be enforced where they have been relied upon and circumstances are such that it would be unconscionable (not right) for the promisor to be able to renege on the promise (promissory estoppel applies).

Consideration:

- Price stipulated for the promise by the promisor, or in other words, what the promisor asks the promisee to 'pay' in exchange for receiving the promise.
- Payment can be: performing an act, forbearing (restrained) from performing an act, or promising to do something in return.
- Promising to do something in return: bilateral
- Consideration must be a benefit to the promisor, or a detriment to the promisee
- Consideration is executory whilst waiting for the promisee to perform. Once performed, referred to as executed.

Elements of consideration:

- Must be something of value in the eye of the law
- Must be nominated by to promisor
- Must be given in exchange (often referred to as *quid pro quo*) for the promise
- *Chappell & Co Ltd v Nestle Co Ltd* [1960] HL (UK), Nestle advertised it would supply a record to anyone who sent money together with 3 chocolate wrappers.
- Issue: whether chocolate bar wrappers formed part of the consideration, or, whether wrappers were a condition qualifying the person delivering them to buy the record.
- **Lord Somervell:** Consideration can be anything stipulated by the promisor. The 3 chocolate bar wrappers were not a condition precedent – rather – the wrappers formed part of the consideration. This was clear from the description in the offer – to get the record, send the wrappers plus money. It did not matter whether the wrappers were of no value to Nestle.

The nature of consideration:

- Consideration can be anything stipulated by the promisor – that is not illegal or illusory
- Must be real but not need be as valuable as the promise – real in the sense of not being illusory.
- Must be contemporaneous (existing/occurring at the same time) with the promise – what is asserted to be consideration must be given in return for the promise.
Past consideration cannot be a good consideration. Exceptions:
 - a service performed in the past if it was understood that it would be paid for

- a debt incurred by an infant, to pay after the person has become an adult
- debt

- Consideration must move from the promisee but it need not pass to the promisor
- Performing an existing duty may be consideration
- Part payment of a debt is not consideration for a promise to forgo (waive) the balance
- Settling a legal dispute or giving up a claim can be consideration

Criticism of the doctrine of consideration:

Serves no purpose that is not already covered by the requirements that parties must have reached an agreement, and must have intended that agreement to be binding.

Promissory estoppel:

Promisee can enforce a promise, even though no consideration has been provided, where it has been relied upon and it would be inequitable to allow the promisor to renege.

- *Waltons Stores (Interstate) Ltd v Maher* (1988) HCA
- W entered into negotiations with Mr. and Mrs. M for lease of a new building to be constructed on W's site, demolition of old building first.
M's solicitors informed W's that demolition had begun therefore important to conclude lease quickly. W instructed solicitors to go slow as he was beginning to have doubts. Later said they did not want to proceed with lease, even though building was 40% complete.
Held: although formal contracts had not been exchanged, M was entitled to assume the exchange was a mere formality and therefore estoppel applies.
- *Central London Property v High Trees* [1947] KB (doctrine first developed)
- *Sidhu v Van Dyke* (2014) HCA (requirement of detrimental reliance discussed)

Consideration = a bargain

- *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) HCA
- Gov said it would pay a subsidy to manufacturers who purchased and used wool for local manufacture. AWM received large subsidies under the scheme.
- In 1948 gov announced it was ending the scheme.
- Held: scheme did not give rise to a contract between gov and AWM, gov does not owe subsidies.

Bargain theory of consideration

- *Beaton v McDivitt* (1987) 13 Supreme Court NSW
- M promised to transfer a portion of his land to B when a proposed rezoning occurred, if, in the meantime B moved onto the land and worked it as required.
- One issue that arose (note this was not the point the case was decided on) was whether B had provided valuable consideration.
- Found that B had provided consideration for M's promise to transfer the land. B worked on the land in the manner required by M – and this was a detriment sufficient for consideration.

Consideration moves from the promisee

- Consideration must move from the promisee.
- If you want someone to owe you an enforceable contractual duty – then you have to pay the consideration.
- A third party cannot provide consideration, but can receive consideration. This position can be shown with 3 examples:
 1. S promises to deliver goods to B if B pays S \$100 = good consideration.
 2. S promises B to deliver goods to B if A pays S \$100 = not good consideration (no detriment to the promisee (B)).

3. S promises B to deliver goods to B if B pays A \$100 = good consideration (there is detriment to B (promisee) and there does not need to be a benefit to S).
4. S promises B and A to deliver goods to them if P pays S \$100. Joint enterprise, A can enforce promise. - *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) HCA

Consideration cannot be in the past

- *Roscorla v Thomas* (1842) QB
- R purchased horse from T. After sale was completed, R asked T to give an assurance that horse was sound. T gave the assurance, but the horse actually was not sound. R sued T for breach of contract.
- Held, not in breach because R did not provide consideration.
- May be an exception to the rule that consideration cannot be in the past: *Pao On v Lau Yiu Long* [1979] Privy Council (UK)

Consideration and existing duties

Performance of an existing contractual obligation is not good consideration unless some *additional* benefit is conferred.

Existing duty can be 1. Promisee already owes to promisor 2. Promisee already owes to third party 3.

Duty may be a public duty

- *Stilk v Myrick* (1809) KB – S contracted to work as one of 11 seamen for the voyage. 2 seamen deserted ship, captain said the rest could get their wages. S sued for his share of wages. Held: agreement not enforceable because there was no consideration given by plaintiff for promise to pay. The remaining crew were already bound to work the vessel.
- *Hartley v Ponsonby* (1857) KB – same facts as above, however many seamen left, meaning it was unsafe to continue. Therefore, as the nature of the duty was changed, seamen entitled to extra pay.

Musumeci v Winadell Pty Ltd (1994) NSWSC

- Duty that the promisee performed, or promised to perform, may be one that they are already contractually bound to perform.
- Mr. and Mrs. M leased shop in shopping centre operated by W.
- W leased another shop to a business that would compete.
- M believed this would damage their business, asked for reduced rent, which was agreed to.
- Was there consideration for W's promise to reduce rent.
- Practical benefit for W, therefore consideration.

Existing public legal duty: mere performance of a duty imposed by law is not good consideration, however if promisor does more than merely perform existing duty then will be good consideration.

- *Glasbrook Bros Ltd v Glamorgan County Council* [1925] Court of Appeal England
- G sought police protection for its premises during a miners' strike, paying for the costs involved.
- G refused to pay.
- Held: there is an absolute and unconditional obligation already binding police to take all steps necessary to keep peace, and the public who pay through rates and taxes for this protection should not have to make further payment. Must be proved that they acted beyond their normal duty.

Pinnel's case

Part payment of a debt is not good consideration for the discharge of the whole debt.

- Example: a promisor owed a debt agrees to accept a lesser sum, and promises to forgo (waive) the balance....

- In *Pinnel's case* ((1602) 77 ER 237) it was held that “payment of a lesser sum on the day cannot be good consideration for a promise by the creditor not to claim the rest of the money due”.

Summary of consideration

- The criteria for consideration are generally:
 - must be bargained for (quid pro quo);
 - must move from the promisee;
 - must not be past consideration; and
 - must not constitute an existing duty.

FORMATION: INTENTION

Intention:

- Intent to create a contractual agreement, and intend that if it is not honoured, the aggrieved party can seek redress
- Determined objectively.
- What a party subjectively thought in their mind may not be relevant, if actions (objectively) says differently.
- Will be binding even if you do not have subjective thoughts of intention, but actions say you do. Courts look at what is objectively going on.
- Can submit evidence of subjective intention e.g. dramatic performance

Intention in practice:

- Party asserting existence of contract bears burden on proving.
- What the parties said or wrote, relationship, nature and terms of the agreement are all assessed objectively by asking whether a reasonable person would conclude that both parties intended the agreement to be enforceable.

Domestic, family and social agreements – include those between husband and wife or friendly activities such as joint lottery tickets, generally not intended to be legally binding, therefore when asserting that they did have the intention, would need to show there were unusual circumstances present.

Case examples: *Balfour v Balfour* [1919] Court of Appeal England – arrangements between husband and wife do not result in contracts

Jones v Padavatton [1969] Court of Appeal England – mother and daughter, no contract

Commercial agreements - those made in the course of business, intend to have contractual effect. However, some parties may not wish to be a contract, but rather to be binding only 'in honour'. One way of doing this is to include a provision in the agreement called an 'honour clause'. This will make it almost impossible to establish a presence of an intention to create contractual relations. Can also avoid by letters of comfort. Includes a third party, I think they're good for the money (no guarantee)

Agreements with a government – likely to intend to create legal relations when entering into normal commercial agreements. However, may not have such intention where the agreement is designed to implement a policy initiative.

Case examples: *Australian Woollen Mills* (1954) HCA

Above traditional key indicators all went out the window by case *Ermogenous v Greek Orthodox Community of SA Inc* (2002) HCA: Presumption distracts from main issue. There must be intent and

the plaintiff must prove it, use of presumptions could lead to wrong result.

Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1989) Supreme Court NSW

- Parties entered into agreement for sale of airline business
- AGL alleged agreement had been repudiated by Easter
- Easter alleged no intention for document to be legally binding
- Held: binding agreement, where parties conduct themselves so that a reasonable person would think he was intending to contract, a subjective intention by a party not to contract will not prevent a contract existing.

FORMATION: CAPACITY

Void: never existed. **Voidable:** you can choose if you keep it.

Contractual incapacity and the consequences:

MENTAL INCAPACITY:

- Able to avoid contract if, at the time it was entered into, they
 1. lacked the mental capacity to understand its nature and
 2. this was known, or should have been known, by the other party.
- Onus of proof on party wishing to withdraw from contract.
- If the party wants to go ahead with the contract - may ratify (consent to, make valid) it when you are no longer mentally ill.
- Sales of goods exception - a person lacking mental capacity to contract must still pay for necessities they purchase
- Example cases: *Gibbons v Wright (1954) HCA* - G and two sisters became owners of land as joint tenants. Once sisters died, G argued documents were ineffectual as sisters lacked mental capacity therefore she was the sold owner. Held, two sisters would have been capable of understanding if the matter was explained to them.
- *Hart v O'Connor [1985] Privy Council* – vendor, 83 and of unsound mind, sold farm to H. H did not know this and negotiated fairly with vendor's solicitors. O, vender's brother, took proceedings to have contract set aside as it was unconscionable. Held, not unconscionable.

INTOXICATION:

- Intoxication or the influence of drugs makes a contract voidable, only where it impaired their judgement so they did not properly understand what they were doing, and this was known to the other party.
- 1. Party is intoxicated. 2. Known by the other party. 3. Other party took advantage
- Example cases: *Blomley v Ryan (1956) HCA*
- B purchased property from R. R was 78 and impaired from prolonged and excessive alcohol consumption. R did not proceed with sale and B commenced proceedings to seek specific performance or damages. R sought to avoid contract.
- Held: mere drunkenness affords no grounds for resisting a suit to enforce a contract. However, where there is real ground for thinking that the judgment of one party was, to the knowledge of the other, seriously affected by drink, and this has been taken advantage of, contract may be set aside. Unconscionable transaction, which no court of equity could possibly enforce.

BANKRUPTCY:

- Have the capacity to contract.

- Does not invalidate any contracts that were made by the bankrupt person before the event occurred.
- However, the trustee in bankruptcy may avoid such contracts if they are unprofitable, or with the consent of the court.
- It is an offence for a bankrupt person to enter into certain types of contract without disclosing their bankruptcy.
- Limited amount of credit can be obtained.

THE CROWN:

- Contracts can be enforced against the Crown in most cases/legislation.

Limitations:

- Crown's power to contract restricted by statute
- Crown cannot contract in a manner that disables itself from performing a statutory duty or from exercising a discretionary power
- Damages requires parliamentary appropriation: even if you win, in order for any money to be paid, a Bill must be passed to pay the damages

MINORS:

- At common law, general rule is that a contract made by a minor is voidable.
- Valid exceptions:
 - A contract obtained by minor to obtain necessities is binding on both parties.
 - Contracts of employment are binding on a minor provided they are for the minor's benefit; not unfair. Unlike contracts for necessities, the minor can repudiate (reject) that contract upon achieving adulthood.
- Contracts that do not fall within the above are voidable.
- Contracts in which the minor acquires permanent property, or which involve ongoing obligations, are binding unless avoided (voidable) by the minor.
- Parties remain bound until the minor elects to avoid the contract.
- Minor is relieved only from the obligations that would arise from the contract in the future, remains bound by those that have arisen prior to the date of termination.
- All other contracts are not binding unless made officially valid by the minor upon becoming an adult within a reasonable time of adulthood being achieved, otherwise contract is not binding.
- Who must prove contract for necessity - party seeking to enforce (the supplier)
- Not all contracts of necessity are binding, not if minor is already well provided

Example cases: *Nash v Inman* [1908] Privy Council

- N entered into contract to supply I with 11 fancy waistcoats and other clothes. I was an infant and was amply supplied with proper clothes by his father. N claimed costs of clothes and was met with a defence based on infancy.
- Held: infant is incapable of making a contract of purchase, and the waistcoats were not necessities.

NSW Minors: Generally, a contract made by a minor is binding if, under *Minors (Property and Contract) Act 1970*:

- It was for minor's benefit when it was entered into (s19); and
- Minor knew they were making a legally binding agreement (s18).

The minor can repudiate the contract by serving a signed written notice on the other party if (s31):

- The contract is not for the minor's benefit (s31);
- The minor did not affirm the contract after turning 18 (s30); and
- The repudiation occurs before the minor turns 19 (s31).

Courts can affirm a contract under s30

VIC Minors: The following contracts entered into by a minor are void (wiped out as if they never existed, under s49 *Supreme Court Act 1986 (Vic)*) —

- (a) contracts for the repayment of money lent or to be lent;
- (b) contracts for payment for goods supplied or to be supplied, other than necessities;
- (c) accounts stated.

COMPANIES

Contractual capacity under the *Corporations Act 2001 (Cth)*

- Section 124(1) gives corporations the same legal capacity and powers as an individual, including the power to make contracts.
- Companies may make contracts in two ways: under s 126(1) by acting through an individual who has the company's authority to contract on their behalf, or under s 127(2) by formally affixing the company's common seal.

Pre-incorporation contracts

- A contract entered into by a person on behalf of a company before it has been created (incorporated). Made when, for commercial reasons, it is not possible or desirable to wait until that time.
- Not binding at common law. Binding under statute if company ratifies it when formed (s131(1)), not if they don't but parties making contract may be personally liable.

FORMATION: FORMALITIES

General rule: no formal requirements necessary to create a binding contract. As long as elements of the agreement, consideration and intention are present, parties with contractual capacity can choose to make contracts orally, by conduct, in writing, or by a combination of these methods.

Exceptions (formalities) take the following forms:

- Essential terms of a contract are required to be recorded in writing and the document signed.
- Contract required to take a particular written form.
- Contract required to be in writing and other formalities are prescribed.

Formalities are adopted for various reasons:

- To reduce fraud by making it more difficult for a person to falsely claim that a contract existed (Statute of Frauds)
- To protect consumers by ensuring that the contract contains terms for their benefit and that they receive a copy
- To make proof of a contract and its terms easier and thereby assist any court that may have to adjudicate upon a dispute between the parties
- To increase the formality of the transaction with the objective of enhancing the awareness of the parties of the obligations they are undertaking

Statute of Frauds: adopted from England. In all Australian Jurisdiction except WA the statute was repealed or replaced by local legislation.

Core exception

- Contracts for sale of land must be in writing (including memo or note)
- Must contain material terms. *Fauzi Elias v George Sahely & Co (Barbados) Ltd* [1983] Privy Council – E sought specific performance of an oral contract for sale of land. Alleged it had

been recorded in a letter written by lawyer containing material terms and a receipt. Held: this satisfied formality requirements.

- Consumer contracts eg. s14 of the National Credit Code

Contracts for which formalities are prescribed

Certain agreements not enforceable unless the agreement, or some part of it shall be in writing and signed by the party against whom it was being enforced.

1. Contracts for the sale of land, or an interest in land: must be in writing.
2. Contracts for the sale of goods: Tas and WA retain requirement that contracts for the sale of goods, valued at or above a specified amount (\$20), will be enforceable only if the buyer accepts and receives them, or gives them something in earnest, or if there is a written note of the contract, signed by the party to be bound.
3. Contracts of guarantee: QLD, TAS, VIC, WA and NT contracts of guarantee enforceable only if the contract is evidenced by a note, signed by the party to be bound.
4. Consumer contracts: to protect consumers, legislation sometimes prescribes that a particular contract must be in writing and that it must contain certain terms designed to safeguard the consumer's interests. The signature of both parties is required and a copy of the contract must be given to the consumer.

Satisfying the formalities

What is required to satisfy a provision is determined by reference to the provision itself.

1. A note or memorandum is sufficient
Not necessary for the contract itself to be in writing. The written note must contain the following:
 - All essential terms of the contract, including identity of parties
 - Clear description of the property
 - Consideration, except in the case of a contract of guarantee
 - An acknowledgement that there was an agreement
2. The document must have been created before proceedings commenced
3. Signature: only by the party against whom it is being used.

The consequences of non-compliance

Contract is not made void, merely unenforceable. It remains valid so that if the parties chose to abide by its terms, the contract can still operate.

However, some statutes make a non-compliant contract void, so that it cannot operate at all. Other statutes go further and make non-compliance an offence.

1. Common law rights independent of the contract
A party who has performed part or all of an unenforceable contract may have remedy under the law of restitution. Case example: *Pavey & Matthews v Paul* (1986) HCA
 - Pavey, a licensed builder, made oral building contract with Paul. Paid for in part.
 - Paul refused to pay rest of balance, claimed contract was unenforceable due to failure to comply with formalities (a building contract must be in writing and signed).
 - Action for quantum meruit (a reasonable sum of money to be paid for services rendered or work done when the amount due is not stipulated in a legally enforceable contract) does not require proof of contract, but is a claim to restitution arising as a result.
2. The equitable doctrine of part performance: where obligations under alleged contract have been partly performed equity may enforce. The doctrine exists to prevent reverse fraud by a party using statute as defence to performing obligations under a contract they have in fact

made. Specific performance is the remedy. Case examples: *JC Williamson Ltd v Lukey & Mulholland* (1931) HCA

- W agreed to grant L&M exclusive right to sell confectionery in theatre.
- Legislation requires that a note or memo record the agreement – none was made.
- W repudiated agreement, L&M sought remedies to enforce agreement.
- W relied on non-compliance with formalities.
- Specific performance was not an available remedy, therefore doctrine of part performance not applicable.

Regent v Millet, McBride v Sandland

3. Estoppel: may also enable a contract to be enforced even though prescribed formalities were not complied with. Case example: *Walton's Stores (Interstate) Ltd v Maher* (1988) HCA

SCOPE & CONTENT: PRIVACY OF CONTRACT

What is privity: only a party to the contract can enforce the contract and is bound by it.

The doctrine of privity states that third parties to a contract cannot enforce the contract, or have the contract enforced against them.

UK; *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] HL - only a person who is a party to a contract can sue on it

Example 1: contract benefiting a third party

- Agreement between A and B requiring B to confer (give) a benefit on C.
 - eg. "A" promises "B" (for consideration moving from B to A) to pay "C" \$100.
- If A does not pay, C cannot do anything.

Example 2: contract obligating a third party

- Agreement between A and B for the sale of property or services, which requires C to abide by restrictions in relation to the property or services sold.
- eg. there is a sales agreement between B and C, obligating C to act in the way A and B have agreed in a contract between A and B. Can A sue C if it doesn't comply? No, has no contract with C.

Example 3: contract protecting a third party

- Agreement between A (shipper) and B (carrier) with an exclusion clause protecting B and any independent contractors, eg. stevedore, it engaged (C). Can C rely for protection on an exclusion clause in a contract between A and B? No

Privity of contract has been the subject of sustained criticism - abolished in England and parts of Australia

Contracts for the benefit of third parties

- A contract made for the benefit of a third party can be enforced directly by the promisee, or can create other contractual rights which the third party can enforce directly.
- If A was not party to the contract (contract between B and C), consideration has moved from B to C, then A cannot sue.
- Can overrule this by getting A to sign the contract.

ENFORCEMENT BY THE PROMISEE

The party (A) who has made a contract to grant benefit on third party can enforce that contract against B by either obtaining an order for specific performance or an injunction, or by recovering an award of damages for breach of contract.

These remedies are limited for the following reasons:

- No third party rights should be acquired unless given by the express terms of the contract
- The promisor should be able to raise against the third party any defence available against the promisee
- The right of the promisor and promisee to cancel the contract at any time should be preserved unless the third party has received notice of the agreement and has adopted it

Beswick v Beswick [1968] HL specific performance was available.

- Defendant received the whole benefit of the contract – “it is a matter of conscience for the court to see that he now performs his part of it.”
- Parties to the agreement were intending a fixed sum of money paid each year for a widow, and a lump sum of damages didn’t accord with this.

ENFORCEMENT BY A JOINT PROMISEE

If A makes a promise to B and C jointly, C can take action to enforce the promise against A, although it will be necessary for C to join B as a party to such an action.

Coulls v Bagot’s Executor & Trustee Co Ltd (1967) HCA – central issue was whether Mrs C was a party to agreement her husband had made with other party. Found she was not, therefore her estate was entitled to royalty payments made by O’Neil, rather than her.

ENFORCEMENT BY A THIRD PARTY

- Contract between A and B pursuant to which B promises not to take proceedings against C.
- Common when an employer seeks to obtain protection for their employees or sub-contractors.
- A may be able to obtain an injunction restraining B from suing C. However, this remedy is limited.
- Exclusion clause as protection. Doctrine of vicarious immunity in which employees, agents or subcontractors enjoy the same immunity from liability as their employer.
- This doctrine encountered difficulty with privity of contract when the HC and the House of Lords decided that as the third party was not privity (having interest) to the contract between A and B it could not rely on an exclusion clause, even though the clause was expressed in its favour.

Finding a contract between B and C:

C not being able to rely for protection on an exclusion clause contained in a contract between A and B. Lord Reid in *Midland Silicones Ltd v Scruttons Ltd* [1962] HL said that if four conditions were fulfilled a contract could be created between B and C that put protection on C.

Protecting third parties: exclusion clause

- Exclusion clause in the contract between A and B
- C can be protected under contractual clause through agency if certain pre-conditions are met
- *Midland Silicones Ltd v Scruttons Ltd* [1962] HL noted the commercial inconvenience (shipping case) of C not being able to rely for protection on an exclusion clause in a contract between A and B. Lord Reid: the stevedores could be covered under the contractual clause through AGENCY if certain pre-conditions were met.

Contracts obligating third parties

- A and B seek to impose an obligation on C.
- As a general rule, the privity doctrine prevents A in this situation from enforcing the obligation A and B have prescribed for C, or from enforcing the promise C has made to B.
- C is a third party, therefore not bound.

Exceptions to the privity doctrine

Inconvenient in many situations – abolished in UK, New Zealand.

Abolished in WA, QLD and NT: *The Property Law Act* in each of these jurisdictions has abolished the doctrine in relation to all contracts.

Specific exceptions

Insurance contracts – Section 48 of the *Insurance Contracts Act 1984* (Cth) enables a person who, in a contract of general insurance, is specified as someone to whom the insurance cover extends, to recover their loss from the insurer even though they were not a party to a contract. A similar outcome is created in respect of marine insurance.

Conferral of rights on third parties – A variety of statutes grant third parties a right of action against a person with whom they have no contract, but who has indirectly supplied them with goods or services. These provisions do not create an exception to the privity doctrine: the right being enforced is a statutory one.

Way around privity

- Common law and equitable circumventions of privity, particularly from the judgments of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1987-1988) HCA - allowed a third party to enforce an insurance contract expressed in its favour:
 - but decision was confined to insurance, and
 - s48 of the *Insurance Contracts Act 1984* (Cth) had recently abolished the privity rule in respect of certain insurance contracts.

Common law and equitable circumventions

Common law and equity have adapted established devices (exceptions) to enable the privity doctrine to be avoided.

- Agency: agent for the third party, what needs to be established in an agency relationship (4 conditions below)
- Trust: promisee is a trustee for the promise as a benefit for the third party
- Unjust enrichment: getting an insurance that covers everyone, however then not covering everyone when injured
- Estoppel principles

Agency – If A, when contracting with B, did so as an agent for C, then a contract will be created between B and C which C can enforce.

Four pre-conditions to an agency:

1. Bill of lading makes it clear that C is intended to be protected by provisions in it which limit liability.
2. Bill of lading makes it clear that B, in addition to contracting for these provisions on its own behalf, is also contracting as agent for C (so the provisions should apply to C).
3. B has authority from C to do that, or later ratification by C would suffice.
4. Any difficulties about consideration from C were overcome.

Trust – If a contracting party enters into contract as a trustee for a third party, then the third party can enforce the contract in equity, provided the trustee is joined as a party to the action.

Legislating against privity

There are now differing statutory provisions that may allow a third party to enforce a contract, eg. legislation regulating insurance (*Insurance Contracts Act 1984* (Cth), s48);
Review of Australian Contract Law - privity doctrine should be uniformly in Aus

Arguments for retaining privity

Mason CJ and Wilson J in *Trident* identified three justifications for privity:

1. If both the promisee and the third party can enforce a promise to benefit the third party, double recovery from the promisor is possible.
2. Privity protects a promisor from exposure to liability to a large number of potential plaintiffs.
3. Most importantly – the entitlement of a third party to enforce a contract might constrain the freedom of action of the promisor and promisee.

Kincaid: privity protects the bargain

Peter Kincaid (academic who has written on privity) argues:

- it is not unjust to deny third parties the right to sue on contracts made for their benefit. It is unjust to allow third parties to sue on a bargain between independent parties to a contract.

SCOPE & CONTENT: TERMS OF A CONTRACT

Express terms: articulated by the parties during the formation process.

Implied terms: those not referred to by the parties but nevertheless form part of the contract through the operation of law.

When seeking to determine the rights and obligations of the parties to a contract, consider:

- What are the express terms?
- Are any terms implied into the contract?
- What do these terms mean and how important are they?
- Are there any exclusion clauses that alter what would otherwise be a party's obligations?
- Has the conduct of the parties given rise to non-contractual rights and obligations?

Express terms

- Terms that parties articulate as they negotiate their contract.
- Done orally, or written, or both, or making reference to a ticket or sign containing terms
- Issue with express terms: identifying what pre-contractual discussions/documents form part of the contract.

Pre-contractual statements

During pre-contractual negotiations, statements relating to the subject matter will often be made that influence the decision making of one of the parties.

Categorisation will determine the remedies available. Categories of statements:

- Sales puff
- Terms of the contract
- Collateral contracts
- Misrepresentation

Sales puff - a hyperbolic statement that the speaker does not intend to be taken literally and that a reasonable person would recognise as exaggerated sales talk. No remedy is available should the statement prove to be false.

Term of the contract - if a statement under this category should be proved to be false, the party that made it will be guilty of breach of contract and the other party will have a remedy.

Collateral contract - a secondary contract that exists collaterally to the main contract. Will consist of only one term. Should it prove to be false, the party that made it will be guilty of breach and the other party will have access to the usual remedies for breach of contract. Not guilty of breaching the main contract.

Misrepresentation - statement made by one person to another that was not intended or understood by the parties to be a promise. As it is not promissory, it will not form part of any contract.

Only remedy available is to revoke the contract on the ground of misinterpretation. Damages cannot be recovered unless also guilty of the tort of negligence.

On the other hand, if the statement comes within the scope of s18 of the *ACL*, the representee will have remedies under the *ACL* which include being able to recover damages.

The test – contractual intention

- Test used by courts to determine which category
- Test as to whether there is evidence of an intention by one or both parties that there should be contractual liability.
- Also considered: the time elapsed between making the statement and the final manifestation of the agreement, importance of the statement in the minds of the parties, and if the statement was followed by the execution of a formal contract in writing.

Express terms: *Ellul and Ellul v Oakes (1972)* Supreme Court of SA

Test prescribed in this case is OBJECTIVE (“reasonable person”). Parties must have intended the term to be promissory.

Collateral contracts

A pre-contractual statement, becoming a secondary contract that exists collaterally to the main contract. Usually oral.

To avoid the parole evidence rule that prevents the statement being added to the contract, it is regarded as a collateral contract.

Statement must be:

- Promissory (parties intended a promise and not a mere representation)
- Not contradict the main contract
- Be made in exchange for consideration (usually the consideration for the collateral contract is entering into the main contract)

Two collateral contract cases are:

- (1) *Sheppard v The Council of the Municipality of Ryde (1952)* HCA
pre-contractual discussions amount to a collateral contract
- (2) *JJ Savage & Sons Pty Ltd v Blakney (1970)* HCA

- B engaged S to build him a motor boat of a certain speed, however not written in contract.
- Did not deliver this speed, sued for breach.
- HC found this statement constituted a collateral contract.

Tripartite collateral contracts

A collateral contract may be made between one of the parties to the main contract and a third party. Found to exist when a third party has made a statement about a product that has induced the representee to enter into a contract to acquire it from a supplier.

Signed documents

As a general rule, the signatory of a contractual document is bound by its terms whether or not they have read and understood the document in question.

Important qualifications to the rule:

- Applies only when document is understood
- Does not apply where the party offering the documents misrepresents its terms
- Does not apply where the signatory was mistaken about the nature of the document and so can invoke the plea of *non est factum* (mistaken about nature when signing)
- Statutory exceptions have been created in connection with provisions dealing with unconscionable conduct, duress or unfair terms

A party is only bound by the terms of an unsigned document if he is aware of them, or ought to have been aware of them (eg. "ticket" cases referred to by Scrutton LJ in *L'Estrange v F Graucob* [1934] 2 KB 294).

Cases: (1) *L'Estrange v F Graucob* [1934] 2 KB 294: In cases which the contract is contained in unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions.

(2) *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) HCA

T entered into a signed contract with B to store and transport goods being imported for A. Alleged that T performed contract negligently, causing loss to A. T sought to escape liability by relying upon an exclusion clause in its contract with B. Found that B was bound by signature, and B acted as A's agent so A was also bound by exclusion clause.

Terms displayed or delivered

- Terms can be incorporated into a contract without being mentioned during pre-contractual negotiations or included in a signed document.
- Frequently referred to as 'ticket cases'. E.g. terms displayed at the entrance to premises that seek to reduce the liability of the owner.
- The terms will be incorporated into the contract only if the party seeking to do so did all that was reasonable to bring them to the attention of the other party before the contract was concluded.
- *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) HCA
- F booked a cruise ship owned by O. Shown a brochure that said transportation of passengers was governed by terms and conditions printed on ticket.
- F did not read that part of the brochure and travel agent did not have tickets to show.
- Travel agent gave F an exchange order to be exchanged for a ticket in Athens that provided that any action against O must be brought in Athens.
- Held; too late after original contract was made to add conditions. Cl 13 could not alter terms of contract already made.

Course of dealing

Terms may be incorporated into a contract without being discussed, referred to, or displayed at the time the contract was concluded if parties have done previous dealings in which they are relevant to the issue.

Preconditions: - regular prior dealings – over a reasonable time period.

Henry Kendall & Sons v William Lillico & Sons Ltd [1969] HL: issue was whether an exclusion clause in a “contract note” formed part of a contract. Over the course of three years, the parties have used over 100 similar contract notes – and they knew of the existence of the conditions on the back of the contract note.

Implied terms

- Terms that form part of a contract even though they were not mentioned, or referred to, by one or other of the parties during the formation process.
- Statutory implied terms normally protect the weaker party.

Common law:

Two grounds upon which terms are implied at common law:

1. To give effect to the intention of the parties - implied because determined that the parties would have agreed to it had they thought about the matter when contracting. Sometimes referred to as 'ad hoc', designed specifically for the kind of contract in discussion. Determined objectively.
2. Implying standard implied terms because they are regarded as 'a legal incident of a particular class on contract' - courts are not concerned about the intention of the parties but rather what it is appropriate to imply into that type of contract.

In *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, Lord Hoffman noted the pre-conditions to a common law term being implied that were prescribed in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) HCA:

1. Must be reasonable and equitable
2. Must be necessary to give business efficacy to the contract
3. Must be so obvious that it “goes without saying”
4. Must be capable of clear expression
5. Must not contradict an express term

Terms needed to give a contract 'efficacy' - where necessary, courts will imply a term based on the presumed intention of the parties.

Standard implied terms

- Certain standard terms will be implied into particular categories of contract unless the parties have made it clear that this is not to happen.
- Implied on the basis that the parties would have agreed to them had they thought about the matter.
- Examples: contract for work materials (implied they are good quality and fit for purpose), distribution agreement for goods (implied term that the supplier and distributor would use their best efforts to respectively supply or sell goods)

Terms to make the contract work as intended - where a contract cannot operate unless one or both parties act in a certain way, a term will be implied that they take reasonable steps to act as required.

Terms implied by custom -

Requirements for a term to be implied because it is customary in the particular trade or profession were set out in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985-1986) HCA:

1. Must be a custom or usage justifying implication of a term as a question of fact.
2. Must be evidence of a custom so well known it can be presumed the parties intended it to be a term. Universal acceptance is not required

3. Implied term must not be contrary to express terms.
4. Not essential that party/parties were aware of the custom.

Statute

- Statutory implied terms are used to make certain types of contracts more equitable where the legislature, because of the unequal bargaining power of the parties, believes this could not be achieved by the negotiation between them.
- Under the *ACL*, non-compliance with consumer guarantees gives rise to statutory remedies (rather than an action for breach of contract).
- Key consumer guarantees are:
 - s54 Guarantee as to acceptable quality
 - s55 Guarantee as to fitness for any disclosed purpose

SCOPE & CONTENT: CONSTRUCTION & CLASSIFICATION OF TERMS

CONSTRUCTION OF TERMS

Basic rule of construction: contract to be given the meaning intended by parties. However, determined objectively.

Parol evidence rule

- Operates where parties have recorded contract in writing
- Deals with admissibility (acceptable) of extrinsic evidence (evidence of matters external to the document) to determine what the terms of the contract are and their meaning.
- Extrinsic evidence cannot be given to add to, subtract from, vary or contradict a document intended to record the parties contract
- *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) HCA summaries purpose and operation of rule.
 - C contracted with Rail Authority to excavate railway tunnels within specified period of time.
 - Injunction made to restrict time work, after contract made.
 - Contract frustrated.
- *Gordon v Macgregor* (1909) HCA
- Written agreement, G was to supply M with logs of certain measurements.
- G did not deliver logs, M claimed damages for breach.
- G argued the contract did not record two essential terms agreed upon, failed.

Exceptions to Parol evidence rule

- Operates only when parties intended the document to include entirely the agreement made.
- Doubted that it should be a rule at all.
- Rule does not operate in the following situations:
 - Where the evidence goes to the validity of the contract (extrinsic evidence can be given to establish that there is no binding contract e.g. fraud or mistake).
 - Where the evidence shows the true nature of the agreement (extrinsic evidence may be given to show that a party was really contracting as an agent for another person (*Giliberto v Kenny* (1983) HCA))
 - Where the evidence establishes a collateral contract (written contract is not altered, collateral contract adds to the contractual relationship between parties)

- Where the evidence is of surrounding circumstances (should only be given when there is ambiguity).

Aids to construction

Non-exhaustive list of some of the aids courts use when interpreting a contract:

- Words are given their ordinary meaning
- Words are interpreted to promote validity
- Words are not read in isolation
- Intention of parties
- Words are construed *contra proferentum* (interpreted against the person responsible for its drafting).

CLASSIFICATION OF TERMS

Nature of term

- Terms classified according to nature whether promissory or adjectival.
- Only promissory terms can lead to breach and claim for damages.
- Adjectival term e.g. a clause indicating which jurisdiction will govern the contract.

Nature of operation

- Conditions precedent or conditions subsequent.
- Important in determining whether parties are contractually bound
- Condition precedent: a term that regulates the commencement of the contract or obligations. For example, may say unless and until certain events occur, contract not binding
- Condition subsequent: term providing for the contract, or parts, to be brought to an end in specified circumstances. Unless and until circumstances operate, parties are bound.

Importance

- Classified according to importance, whether a condition, warranty or intermediate term.
- Most important classification as it will determine remedies available.

Condition

- Terms that are fundamentally important to contract.
- Innocent party will have option to rescind (cancel) contract and claim damages.
- Mere use of the term 'condition will not necessarily make it a condition.
- *Associated Newspapers Ltd v Bancks* (1951) HCA
- B, an artist, would prepare weekly comic drawings for newspaper and they would appear on front page.
- After two years, moved to third page. B rescinded contract. Newspaper sought injunction.
- Found that newspaper breached.
- Whether a term is a condition or not depends upon:
 - Whether term is made a condition by statute
 - Whether courts have characterised the term as a condition
 - Whether parties made term a condition
 - Whether it is fundamental to contract

Warranty

- Term that is of secondary importance.
- Breach will not entitle innocent party to rescind, can only claim for damages.
- Could be a pre-contractual statement that has become a term of the contract.

Intermediate term

- Could not be classified as either of the above when contract was made.
- Rescinding will depend upon seriousness of the consequences of the breach.

SCOPE & CONTENT: EXCLUSION CLAUSES

Exclusion clause: clause used to protect a person from what otherwise would be their liability.

Types of exclusion clauses

- Clauses that seek to reduce, or eliminate altogether, the duty that would otherwise be owed to another person (substantive exclusion clause).
- Clauses that provide a guilty party with a defence (procedural exclusion clause).
- Clauses that seek to protect the guilty party by imposing restrictions on a claimant's ability to bring an action against him.
- Clauses that require a successful claimant to indemnify (compensate) guilty party.

Use of exclusion clauses

- Consumer contracts: courts have interpreted clauses to prevent them being used unconscionably. Reinforced by statutory provisions. *ACL s64*.
- Commercial contracts: clauses are recognised as a deliberate attempt by parties to allocate risks and costs between themselves, therefore should be given full effect.

Preconditions to effectiveness

Exclusion clauses will protect a party only if:

- Clause was incorporated into contract
- Exclusion clause is wide enough (in terms of construction) to cover the breach

Construction of exclusion clauses

- General approach: courts interpret clauses as parties intended, giving words ordinary, grammatical meaning assisted by reference to the context
- Aids to construction: same as earlier, with additional aids
- *Contra proferentum*: requires ambiguity to be resolved against the author of the document, or party seeking to rely upon document. *Insight Vacations Pty Ltd v Young* [2011] HCA
- Y, whilst travelling on bus, got out of set to get something from bag. Fell when bus stopped suddenly and suffered personal injury.
- Exemption clause did not apply as she was not sitting in her seat.
- Main purpose rule: clause will not be construed so as to conflict with main purpose of contract
- Negligence only rule: clause can exclude liability for negligence. To do so, must use words that make it clear this is the intention. However, does not mean that negligence must always be mentioned expressly.
- Four corners rule: clause will grant protection only in respect of conduct that occurred in the performance of the contract. In other words, will not protect defendant while acting in a manner that is outside its four corners.
- Deviation: in numerous shipping cases it has been held that a clause designed to protect a ship-owner will do so only while vessel was sailing on agreed route. Also applies to land. *Thomas National v May & Baker Pty Ltd* discusses land, and extends to shipping cases.

AVOIDANCE: MISLEADING OR DECEPTIVE CONDUCT

Prohibitions of misleading or deceptive conduct

- Statutory prohibition contained in s18 of ACL (within Schedule 2 of the *Competition and Consumer Act 2010*)
- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive
- Courts reject all attempts to exclude liability of misleading and deceiving by the use of exclusion clauses.
- First introduced into Australian law in 1974 by s52 of the *Trade Practices Act*.

Preconditions to liability

- Defendant must be a corporation or person
- Defendant must engage in conduct: defined broadly
- Conduct must occur in trade or commerce (*Bevanere Pty Ltd v Lubidineuse* (1984) FedC of A)
- Conduct must be misleading or deceptive, or likely to be so

Remember to elaborate further on these preconditions.

Application of misleading or deceiving to contracts

False representation of fact

- May be made by one party to another during pre-contractual negotiations, amounts to misleading conduct if party was in fact misled.
- Regardless of whether it was made incorrectly and representor tried to ensure it was correct (*Greco v Bendigo Machinery Pty Ltd* (1985) ATPR)
- A correct statement can also amount to misleading conduct when it misled person to whom it was directed (*Ward v Premier Ice Skating Rink Pty Ltd* (1986) FCA)

Expressions of opinion or law

- Expression contained a representation that it was based upon research and this was not the case (*Thompson v Ice Creameries of Australia Pty Ltd* (1998) FCA)
- Can be misleading or deceptive if speaker did not hold the opinion (*Amadio Pty Ltd v Henderson* (1998) FCA)

Sales puff

- Exaggerated statements of fact or opinion that a reasonable person would not take literally will not amount to misleading conduct.
- If quantifiably measurable, not a sales puff: *Byers v Dorotea Pty Ltd* (1987) FCA
- Cases found to be actionable and not mere puff: *Byers v Dorotea Pty Ltd* (bigger and better than an existing building), *Petty v Penfold Wines Pty Ltd* (1994) FCA (getting the best deal).

Silence or non-disclosure

- Only if contract falls within one of the limited categories of contracts that are *uberrimae fidei* (of utmost good faith) can the non-disclosure have this effect.
- Silence: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 HCA
- M negotiated a loan to a client from BMW. Loan not fully repaid and BNW suffered loss.
- Argued M engaged in misleading and deceptive conduct by not disclosing certain info.
- M's non-disclosure found not misleading.

Statements about the future

- To persuade party to conclude a contract, person may make statements about the matter in the future e.g. shop being sold could achieve a certain level of sales if managed properly.
- Problems arise when such statement does not come true.
- S4 of ACL – if person making the future statement does not have reasonable grounds for it, it is taken to be misleading.
- *Bowler v Hilda Pty Ltd* (1998) 80 FCA – H sold unit to B and said it would be possible to use unit as a residence in future, did not happen.

Contractual promises

- A party's failure to perform a contractual promise amounts to misleading or deceptive conduct.

Relaying information

- Where it is made clear information is being relayed from a third party, liability for misleading or deceptive conduct cannot arise even though the information itself is false.
- *Butcher v Lachlan Elder Realty Pty Ltd* (2004) HCA
- B purchased property at auction. Before bidding, brochure showed pool, when in fact entire pool did not fit. Also said info obtained was from other sources.
- Relayed information

Failure to exercise care

- Where misleading or deceptive conduct is established, it is no defence for the guilty party to show that the plaintiff would have discovered error and avoided loss by exercising reasonable care.
- *Henville v Walker* (2001) HCA – failure to verify accuracy of representation, even though it could have been done easily.

Vicarious liability

- A person or corporation engaged in trade or commerce will be liable for the misleading or deceptive conduct of their employees or agents when acting on behalf of corporation.
- Section 139B(2).

Remedies: Damages

- Section 18 of ACL provides remedies that are more extensive than those at common law.
- Statutory right to claim damages under s236(1). Section 236(2) requires actions to be commenced within six years of the date upon which the cause of action occurred.
- Damages recoverable by anyone who suffers loss as a result of misleading conduct.
- Where a person does not take reasonable steps to mitigate their loss, may be unable to recover damages, as the required causation will not be present.
- Loss cannot be too remote from defendant's conduct (casual connection must be shown).
- Damages reduced when failure to take care.
- Tort measure applies (what's been lost as a result).

Injunction

- ACL s232, 233 and 234.
- S 233 – consent injunctions (grant an injunction by consent of all the parties)
- S 234 – interim injunctions (if application made under s232)

- Only to stop someone from doing something, or to refund money, transfer property, honour a promise or destroy or dispose of goods under subsection 6
- May restrain contracting party from acting in a manner breaching the Act.
- May compel a person to act in a certain way to prevent breach.

Other remedies

- Section 237(1) *ACL* gives court a broad discretionary power to make orders against a person who has contravened, where this will compensate, prevent or reduce the plaintiff's loss.

Misrepresentation at common law

- Where not acting in trade or commerce, non-commercial context.
- Pre-contractual misrepresentation is a false statement of fact that induces the representee to enter into contract.
- For statement to give rise to an actionable misrepresentation, following preconditions:
 - Must be a false representation: determined by reference to the sense in which it would be understood by a reasonable person.
 - Representation must be one of fact: one that a court can find to have been true or false at the time it was made.
 - Must be made to the other party
 - Must induce the contract: must be made before the contract made.
- Principal remedy is rescission of contract (voidable).
- Representee will not be able to rescind in the following circumstances:
 - If restitution (restoration) is not possible
 - If representee affirms contract
 - If lapse of time constitutes affirmation
 - If a third party would suffer
 - If contract has been performed: however, abolished in VIC
- Damages (puts representee in the position they would have been in if not for the contract) not recoverable unless representation becomes a term of the contract.

Remedies at common law and equity depend on the type of misrepresentation:

- Fraudulent (*Derry v Peek* (1889) 14 App Cas) no honest belief in the truth of the statement = rescission and/or damages in tort
- Innocent but negligent (*L Shaddock v City of Parramatta*) = rescission and/or damages in tort
- Innocent = rescission only, no damages

AVOIDANCE: MISTAKE

Common mistake: occurs when both parties are mistaken about the same thing

Common mistake at Common Law

- Rarely provides remedy for common mistake
- Where an operative mistake exists, contract void (treated as if no contract ever existed)
- Potential to affect third parties, therefore important to define scope of operative mistake
- Elements required for common mistake to avoid a contract at common law:
 - Must be a common assumption as to the existence of a state of affairs
 - Must be no warranty by either party that that state of affairs exists
 - Non-existence of the state of affairs must not be attributable to the fault of either party
 - Must render performance of the contract impossible

- State of affairs may be the existence, or vital attribute, of the consideration or circumstances which must subsist if performance is to be possible
- (Elements articulated by English Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage* [2003])

Types of common mistake

Mistake as to the existence of the subject matter

- e.g. J contracts to sell car to L. Unbeknown to parties, car was destroyed in a fire prior to the conclusion of the contract.
- Authority: *Associated Japanese Banks Ltd v Credit du Nord SA* [1988] QB
- If one party makes a promise that the subject matter exists, that party cannot rely on mistake to terminate if they later discover the subject matter does not exist.
- Party may not rely on mistake if they have caused the mistaken belief of the other.

Mistake as to quality

- Both parties mistaken about some aspect of the subject matter.
- E.g. age of an antique piece
- Common law held that avoidance for mistake will only be granted where mistake renders subject matter essentially different from what the parties believed it to be. High threshold, rarely satisfied.
- Test and reasons behind it pg. 373

Mistake as to the terms of a contract

- Where mistaken only relates to terms of the contract, no remedy available at common law.
- May give rise to the remedy of rectification in equity.

Mistake as to title

- Two situations may give rise to a mistake as to title.
- A may contract to buy property from B, both parties believing B owns the property, only to later discover that it is already owned by A.
- Authority: *Bell v Lever Bros* [1988] HL
- Second situation, same scenario, but property actually owned by C.
- Authority: *Svanosio v McNamara* (1956) HCA
- In the case of personal property supplied to consumer, s51 ACL provides a guarantee. Pg. 376

Mistake as to law

- Traditionally, no grounds for avoiding a contract.
- Now, may be possible to recover moneys paid under mistake of law.

Common mistake under equity

Equity: a branch of law that developed alongside common law and is concerned with fairness and justice, formerly administered in special courts.

Rescission

- Court has power to set contract aside from common mistake in wider circumstances than those permitted by common law (Authority: *Solle v Butcher* [1949] Court of Appeal England)
- Equity does not require mistake to render the contract something radically different from what the parties intended.
- Following the decision of *Great Peace Shipping Ltd v Tsavliris Salvage* [2003] QB, circumstances in which rescission will be available at have become less.

- Court held that where contract is valid and enforceable at common law, a court has no jurisdiction to grant rescission in equity. HOWEVER, decision not binding on Aus.

Rectification

- Permits terms of a contract to be altered to give effect to intent of parties where written contract has erred in recording intent.
- Remedy in limited circumstances.
- In order for remedy to be available, necessary to find a contractual intention that a particular term should be included in written document.
- Key elements, summarised in *Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd* [2005] NSWCA, of rectification:
- By mutual mistake, common intention has been incorrectly recorded in written contract
- Requirements must be established by convincing proof; mere suspicion is not enough.

Mutual mistake

- Both parties mistaken, but about different aspects of the contract
- Objective test now prevails on issues of intent
- Unlikely that equity will intervene
- Where such a mistake exists for which an objective intention cannot be determined, contract likely to be void for ambiguity or uncertainty.
- *Borg v Howlett* (1996) NSWSC: parties at cross-purposes regarding sale of horse, each believing sale was for a different horse. Court held objectively that there was a contract, had to determine which horse the contract referred to.
- No contract: *Raffles v Wichelhaus* UK – Court of Exchequer. Contract to sell cotton, to be transported on ship. Two ships sailing, one in October and one in December. Plaintiff intended to sell cotton from December ship, defendant intended to purchase from October. No contract.

Unilateral mistake

- One party mistaken
- Remedy only when unmistaken party at fault

Unilateral mistake at common law

- Rare for common law to render contract void
- Mistake as to terms and quality will not render contract void
- Only will render contract void where mistake relates to identity of other party and their identity if of vital importance, however can be misleading and deceptive conduct.

Unilateral mistake at equity

Remedy available depends on type of mistake and conduct of unmistaken party.

Rescission

- Contract voidable if:
 - Mistake was about important matter
 - Unmistaken party was aware, or ought to have been, of the mistake
 - Unmistaken party acted in a manner designed to ensure other party did not become aware of mistake
- However, mere silence as to a material fact will not provide mistaken party with a remedy
- *Smith v Hughes* [1871] QB
- S contracted to sell oats to H. H believed they were old oats.

- S tendered new oats and H refused to complete sale. Evidence conflicted as to whether reference was made to the oats being old at time of arrangement. H must take oats.

Rectification

- Where available, will amend a contract to give effect to true intention.
- Prerequisites must be established:
 - One party mistaken about particular term of contract (or about exclusion of term)
 - Unmistaken party aware of other party's mistake
 - Unmistaken party must have drawn the mistake to other party's attention
 - Unmistaken party must benefit from resisting rectification
 - Unmistaken party must be guilty of some fraud in not revealing the mistake

Non est factum

- Where party is mistaken about nature of document they are signing, defence of *non est factum* (it is not my deed) may be available to relieve them of obligations
- Successful plea will result in contract being void
- Preconditions must be satisfied:
 - Defendant must be unable to read due to blindness or illiteracy and dependent on others for advice about what they are signing, or through no fault of their own are unable to understand meaning of document
 - Defendant must show that when they signed they believed it to be radically different from what it was in fact
 - Defendants failure to read or understand must not have been due to own carelessness.

AVOIDANCE: DURESS

Duress

Illegitimate pressure applied by dominant party to weaker party, pressure induces a contract

Elements of pressure

- Illegitimate pressure: onus rests upon party seeking to avoid contract, sufficient if pressure went beyond what the law sees as legitimate
- Inducing the contract: if weaker party succeeds in establishing pressure, burden moves to dominant party to prove that pressure was not a cause of weaker party entering contract. Pressure does not need to be sole cause of entering contract. Weaker party's response to pressure will be relevant.

Types of duress

Duress of the person

- Duress of the victim or close relative of the victim involved.
- Violent and lawful threats also constitute as duress.
- *Barton v Armstrong* [1976] Privy Council
 - Complex business agreement between B and A.
 - B alleged agreement was product of duress in the form of a threat by A to have him killed.
 - Found to be duress of the person.

Duress of goods

- Stronger party applies pressure in relation to the property of weaker party.
- *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) NSWCA
 - HC engaged with HP to repaint its helicopter. Helicopter painted by not to HC's satisfaction.

- Further work, when picking up presented with a document for signing to pay less but release HP from liability in relation to helicopter.
- HC claimed agreement was void for duress.

Economic duress

- Wide variety of forms, most commonly threatening not to perform contract or threatening to take legal action.
- *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) NSWCA - no pressure from Westpac
- Threat to break a contract: not all will constitute as economic duress, important to distinguish with requests to renegotiate terms of contract
- *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB
 - HC entered into contract to build a tanker for NO. Payment to be made in 5 instalments.
 - US dollar devalued after first instalment, HC claimed an increase on remaining instalments.
 - NO refused. Eventually paid, later claimed it under economic duress.
 - Claim denied.
- Threats to institute legal proceedings: bona fida (party honestly believes they have a legal claim) will not enable threatened party to avoid contract. Mala fide (in bath faith) may.

Effect of duress at common law

- Contract voidable at option of victim
- If victim wishes to avoid contract, should do as soon as threat has been removed, as failure to do so may constitute affirmation
- Party who engaged in wrongful conduct has no right to avoid contract on basis of duress
- Where contract set aside, property or money that has passed must be returned

Statutory duress

- Section 50 *ACL* – harassment and coercion. Page 417
- Where s50 is breached, remedies include injunction's, damages or rescission

AVOIDANCE: UNDUE INFLUENCE

Domination or express undue influence

- Burden of demonstration dominant party exerted undue influence is upon weaker party
- Weaker party must also demonstrate it was this influence that brought about contract
- Express undue influence overlaps with duress
- Undue influence is normally accompanied by several of the following elements:
 - Discussion of transaction at unusual place or inappropriate time
 - Finalise transaction in an unusual place
 - Insistent demand
 - Extreme emphasis on consequences of delay
 - Use of multiple persuaders
 - Absence of third party advisers
 - Statements that there is no time to consult financial advisers or attorneys
- Courts will consider adequacy of consideration provided.

Presumed undue influence

- If a relationship of trust and confidence exists prior to contract, undue influence presumed.
- Dominant party has burden of rebutting presumption.
- Weaker party should ensure to get third party independent advice when contracting in these situations

Relationships deemed to give rise to presumed undue influence

- Solicitor and client, parent and child, doctor and patient, trustee and beneficiary, and cases where there is a religious influence.
- Not husbands and wife.
- *Johnson v Buttress* (1936) HCA
 - B (deceased) was 67, illiterate and of less than average intelligence. Owned land.
 - B had known J for many years, therefore relation of trust and confidence.
 - Transferred land to J, not receiving independent advice.
 - Ruled J has failed to justify the transfer by showing that it was the result of free exercise

Other relationships of trust and confidence

- Where relationship does not fall under one of the recognised categories, weaker party may still be able to demonstrate relationship was of such nature that undue influence ought to be presumed.
- Situation commonly arises where dominant party experiences conflict of interest.

Third parties

- Husbands and wives are not in a presumed relationship of undue influence, but
- A third party creditor should not that actual undue influence by husband will invalidate contract
- *Garcia v National Australia Bank* (1998) HCA
- Mrs. G and husband executed mortgage in favour of bank for purposes of securing guarantees under husband's business.
- Husband assured G there was no danger in transaction. No explanation of transaction given by bank.
- Court found G understood nature of guarantee but not extent.
- Parties divorced and G sought declaration guarantees void as a result of undue influence.
- G entitled to succeed.

AVOIDANCE: UNCONSCIONABLE CONDUCT

Nature and effect of unconscionable conduct

- Concerned with the abuse of a dominant position by one party over a weaker party
- Overlaps with duress and undue influence
- Difference – in unconscionable conduct, will of innocent party, even if independent and voluntary, is the result of the disadvantageous position he is placed and other party taking advantage of that position.
- Possible for same conduct to give rise to an action for undue influence and unconscionable conduct, and often both are pleaded.

Equitable doctrine of unconscionable conduct

Abuse of position

- Key requirement of equitable unconscionable conduct is that stronger party has taken advantage of a special disability of another party.
- Most commonly age, illiteracy, lack of education, drunkenness.
- Authority: *Commercial Bank of Aus v Amadio* (1983) HCA

- A was a managing director of a building company. Limit of the bank accounts was repeatedly exceeded.
- Bank agreed to increase overdraft limit if overdraft was secured by a property owned by A's parents.
- A's parents had limited understanding of written English. A said mortgage would be limited to \$50,000 and a duration of six months, however it was not so limited.
- Parents executed deed without reading it. Bank manager did not make any attempt to explain document to them.
- Parents were mistaken about extent of liability and would not have executed deed had they known the truth.
- Age alone will not constitute a special disability. *Davey v Challenger Managed Investments Ltd* [2003] NSWCA
- Less permanent disabilities, such as drunkenness can be a special disability. *Blomley v Ryan* (1956) HCA p.g 9 of notes
- Also possible for a professional person to be classified as being in a position of special disability in appropriate circumstances. *Louth v Diprose* (1992) HCA.
- D, a solicitor, infatuated by L. Bought house for her after lies about committing suicide.
- When relationship broke down, D sought an order that property be transferred to him.
- Succeeded on unconscionable conduct.

Harsh and oppressive transaction

- Does not need to be harsh and oppressive for unconscionable conduct

Remedies for unconscionable conduct in equity

- Contract voidable in equity, weaker party rescinds contract.
- Return parties to the position they were in at the time of contracting
- Precise restitution (restoration) is not essential, but must be possible to place parties in same position

Statutory unconscionability – ACL

- Contained in part 2-2.
- Extends the range of remedies available.
- Section 20(1): a person must not in trade or commerce engage in conduct that is unconscionable
- S20 will not apply where s21 applies.
- Section 21 prohibits unconscionable conduct in connection with the supply or acquisition of goods or services by or from a person.
- S22 sets out factors a court may consider when determining whether conduct is unconscionable:
 - Relevant strengths of the bargaining positions
 - Whether customer was required to comply with conditions that were not reasonably necessary
 - Whether customer was able to understand any documents relating to the supply of goods or services
 - Whether any undue influence or pressure was exerted on the customer by supplier
 - Amount customer could have acquired equivalent goods or services from elsewhere
 - Extent to which the supplier's conduct was consistent with conduct in similar transactions
 - Requirements of any applicable industry code
 - Extent to which supplier failed to disclose to customer intended conduct of supplier that might affect customer interests, and any risks to customer arising from supplier's conduct
 - If there is a contract between supplier and customer

- Extent to which supplier and customer acted in good faith

Remedies

- Any person may apply for an injunction (ACL Part 5-2 Div 2)
- Any person who has suffered loss or damage may seek damages under s236 of ACL.
- Remedial orders s327 ACL

Time Limits

- A claim for damages must be brought within six years of when suffered or likely to suffer

Australian Securities and Investments Commission Act (Cth)

- Unconscionable conduct provisions under ACL do not apply to conduct relating to financial services or financial products.

State and territory legislation

- Only applies to retail leases.
- A landlord or tenant suffering loss by virtue of unconscionable conduct may recover that amount by lodging a claim with VCAT. Pg. 463

AVOIDANCE: UNFAIR TERMS

Unfair terms: substantive unfairness, whereas unconscionable conduct is procedural unfairness

Australian Consumer Law

- Section 23 – (1) a term of a contract is void if the term is unfair, and contract is standard form contract. (2) contract continues to bind parties if capable of operating without unfair term
- Section 24 – a term is unfair if:
 - a) Would cause significant imbalance in the party's rights and obligations
 - b) Not reasonably necessary in order to protect interests of the party who would be advantaged by the term
 - c) Would cause detriment to a party if it were applied or relied on
- Section 24 – (2) in determining whether a term is unfair, court must take into account:
 - a) Extent to which term is transparent (transparent if expressed in plain language, legible, presented clearly and readily available)
 - b) Contract as a whole
- Section 28 – contracts that do not apply: contract of marine salvage or towage, a charter party of a ship, contract for the carriage of goods by ship, or a contract that is the constitution of a company, managed investment scheme or other kind of body

ACL - Standard form consumer contracts

Consumer contract

- Defined as a contract for a supply of goods or services or sale or grant of an interest in land, to an individual whose acquisition of it is wholly for personal, domestic or household use or consumption.
- To determine actual use of the goods or services, courts will look at the purpose of the agreement, rather than the subjective intention.
- Not essential that the goods be acquired solely for personal use, provided they are acquired substantially for that purpose.

Standard form contract

- Not defined in the ACL, list of factors court uses to determine if a contract is one
- Includes whether or not one party was required to either accept or reject terms of contract and whether another party was given an opportunity to negotiate terms
- If a consumer alleges that a contract is standard form, it will be presumed unless the other party proves otherwise (s27(1))
- 27(2): factors in determining a standard form contract:
 - A. Whether one party has all or most of bargaining power relating to transaction
 - B. Whether contract prepared by one party before any discussion with other party
 - C. Whether another party was required to accept or reject terms
 - D. Whether given opportunity to negotiate terms
 - E. Whether terms of contract take into account the specific characteristics of another party
 - F. Any other matter prescribed by regulations

ACL - Unfair term

- Section 24
- Term that may look unfair in isolation may appear fair when other terms in contract are considered
- To determine whether term is unfair, necessary to refer to s25 ad s26 of ACL p.g. 488

Effect of including an unfair term

Term void

- Unfair term contract is void
- Remainder of contract will operate if able to without term

Other remedies

- Party may apply to relevant court for:
 - A declaration that a term or a consumer contract is an unfair term
 - An injunction and/or
 - Compensation.
- ACCC or state regulator may apply to the relevant court for:
 - Declaration
 - Injunction
 - Compensation on behalf of one or more injured parties by the contravention
 - An order to redress loss or damage suffered by non-party consumers
- Limitation of six years applies to applications for compensation and orders to redress.

Unfair terms in contracts for the supply of financial products or services

- ACL unfair contracts regime does not apply to the supply of possible supply of services that are financial services, or of financial products.

PERFORMANCE: PERFORMANCE

Most contracts come to an end as a result of parties performing their contractual obligations.

Nature of performance

General rule

- Parties must perform their contractual obligations strictly and completely.
- Determination of whether this has occurred involves comparison between contractual obligations assumed by parties and acts that they have performed.

- Only when they match that complete and exact performance will be achieved and contractual relationship ends.

Exceptions to the general rule

- General rule subject to modification by parties either expressly or by implication
- E.g. parties may agree that exact compliance with contractual obligations is not required or a court may be willing to imply a term to this effect.
- *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938) HCA*
 - T entered into contract with L by which T agreed to display 53 roof boards advertising L for at least 8 hours a day for a min of 52 weeks over three seasons.
 - Did not have them on for 8 hours, therefore had no performed obligations fully.

Entire and severable contracts

Entire contracts

- Performance of one party's obligations is dependent on performance of other party's obligations.
- First party's obligation is viewed as condition precedent.
- Whether a contract is an entire contract is determined objectively.
- *Cutter v Powell (1795) Court of KB*
 - Sailor agreed to work on ship, died before journey complete. Wife of sailor claimed payment for proportion of his pay.
 - Claim failed because contract was entire, had not been performed exactly as agreed as he died.

Doctrine of substantial performance

- Developed in response to consequences resulting from entire contracts.
- Permits recovery of contract price where plaintiff has substantially performed their obligations under a contract.
- Defendant will still maintain right to claim damages for any loss suffered as a result of plaintiff's failure to adhere to their contractual obligations.
- *Hoening v Issacs [1952] Court of Appeal England*
 - I entered into contract to decorate H's flat. H refused to pay left over payments at end as some work was defective.
 - Cost of remedying defects only 56 pounds.
 - Held that contract was substantially performed, therefore damages awarded to I.

Apportionment legislation

- In place due to harsh and unfair consequences of entire contract
- *Supreme Court Act 1986 Vic, s54, p.g 549*

Severable (or divisible) contracts

- Rights and obligations of parties are not dependent on complete performance of their contractual obligations
- Includes contracts consisting of a number of smaller entire obligations.
- Also for contracts which payment is not dependent on the performance of any obligation by other party.
- One party must sue other for breach even if they are also in breach.

Time for performance

- Contractual obligations must be performed in the time stipulated, express or implied.
- Where no time is stipulated, must occur within reasonable time.

- Equity - parties could not rescind because of late performance unless the lapse of time was substantial. This approach is now in legislation.
- S 41 *Property Law Act 1958 Vic*
- S 15 *Goods Act 1958 Vic* p.g. 551
- *Tanwar Enterprises Pty Ltd v Cauchi* (2003) HCA
 - C (vendors) entered into contracts for sale of land with T.
 - Original completion date amended and time stated as of the essence. T paid deposit.
 - T did not pay on time.
- Where time is not stipulated to be of the essence and one party does not perform within time, that party will be in breach but other party will not have an automatic right to terminate contract.
- If non-breaching party gives notice to other party requiring performance of their obligations within a reasonable time, that new time will be considered of the essence and failure to comply will enable non-breaching party to rescind the contract and recover damages.
- *Louinder v Leis* (1982) HCA
 - Appellant contracted to sell respondent property. No completion date stated.
 - Later gave notice that it would be complete in 21 days. Did not complete on time.
- Where a date for performance is stipulated in a contract, parties have until midnight that date to perform unless that contract or trade usage provides otherwise
- *Afovos Shipping Co SA v Pagnan (The 'Afovos')* [1983] HL

Prevention of performance

- If promisee prevents promisor from performing obligations this will excuse promisor from performance and promisee cannot rely on non-performance as a claim or as a defence.

TERMINATION: DISCHARGE BY AGREEMENT

Termination by separate agreement

- May wish to terminate due to change of circumstances.
- New agreement must meet all criteria of a binding contract.
- Unless contract made by a deed, consideration must be provided by both parties.
- Wholly executory contract: neither party has fully performed their obligations, consideration of each party will be the promise to release the other from its obligations.
- Accord and satisfaction agreements: one party has fully performed, performing party's consideration will be releasing the non-performing party. Non-performing party must provide separate consideration.
- Abandonment: agreement to terminate may be inferred as a result of delay in performance
- *Fitzgerald v Masters* (1956) HCA concerned with abandonment, however found was none in this case. Time for payment had not arrived.

Termination provisions

- Existing contract will provide a mechanism for termination either expressly or by implication.
- Contract may contain a provision giving one or both parties right to terminate upon occurrence or non-occurrence or a specified event, or may provide for automatic termination in certain circumstances.
- Termination clauses may be implied into a contract.
- Authority: *Crawford Fitting Co v Sydney Valve and Fitting Pty Ltd* (1988) NSWCA
- CF (manufacturer) appointed SV (distributor) as exclusive agent for indefinite period
- SV breach agreement by distributing competing products

- Issue: could a termination provision be implied by providing agreement could be terminated on reasonable notice.
- Held: SV failed to discharge their onus of proving that notice given by C was unreasonable.

Consequences of discharge by agreement

- Will relieve both parties from their obligations under the contract.
- Includes obligations that had already accrued as well as future obligations.
- Where unconditional rights have accrued (already risen) for benefit of the non-breaching party, those rights continue.

TERMINATION: DISCHARGE FOR BREACH

Breaches that allow a contract to be discharged

Contractual provisions

- Contract may provide in the event of a particular breach, innocent party can elect to bring it to an end.
- Also possible, but uncommon, for a contract to make discharge automatic.
- What kind of breach will have this effect is a matter for agreement.
- Party's can provide what the consequences of discharge are to be.
- Authority: *Holland v Wiltshire* (1954) HCA
 - H contracted with W to purchase house, paid deposit of 2 pounds.
 - Forfeiture clause that if H did not pay contract price, W could sell land, rescind contract and forfeit any money paid.
 - W able to sue for unliquidated damages.
- *Shevill v The Builders Licensing Board* (1982) HCA
 - Over rent on lease. Clear words to allow landlord to claim damages.
 - Landlord entitled to rent that was not paid for two years, however not other years.

Repudiatory breach

Nature of repudiatory breach

- Any form of conduct by a party that indicates an intention not to be bound by contract.
- Examples include:
 1. expressly refusing to perform part or all of contract
 2. insisting other party perform contract in a manner that it does not require/inconsistent with terms
 3. continued failure to perform contract.
- Not essential that guilty party intends to repudiate contract.
- Objective test
- If innocent party wants to discharge contract on grounds of guilty party's breach and it is determined breach is not sufficiently serious to justify such action, innocent party's conduct may amount to a repudiatory breach entitling other party to discharge contract.
- Authority: *Federal Commerce and Navigation Ltd v Molena Alpha Inc* [1979] HL
- *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1988-1989) HCA
 - L entered into a deed of agreement with C where C agreed to lease premises within shopping centre that was under construction.
 - C did not register lease in time stipulated. L allowed to not be bound by contract.

Anticipatory breach

- Occurs when guilty party repudiates (rejects) contract before date where they were due to perform obligations and innocent party elects to discharge contract as a result.
- Guilty party is not in actual breach of contract, as date set for performance has not arrived.

- Law allows innocent party to rescind (cancel), will usually be in the interest of both parties.
- Breach will only occur if innocent party elects to rescind contract.
- If contract is affirmed, innocent party cannot claim damages unless and until guilty party is in actual breach.
- This breach can also be constituted by guilty party being unable to perform when performance is due.
- Innocent party must be able to show that performance would have been impossible.
- Authority: *Taylor v Johnston* (1975) Supreme Court of California
- J contracted to have her horse breed with T's, but repudiated contract by selling horse.
- T insisted upon performance and arranged her horses to meet at third parties house.
- Breeding not successful, T sued for breach. Not successful, no evidence to prove J did not perform contract.
- *National Engineering Pty Ltd v Chilco Enterprises Pty Ltd* [2001] NSWCA
- N hire crane from C. N formed view C would not be able to deliver crane on time.
- Terminated contract, wanting to recover deposit paid.
- Held: C had not breached, N's termination amounted to repudiation which entitled C to damages.

Serious breach of contract

- Actual breach of contract, either non-performance or defective performance, will entitle innocent party to discharge contract where breach is serious.

Characterisation

- If a condition (not a warranty) is breached, serious breach (test used in *Luna*)
- Test of essentiality – promise is so important that party would not enter contract otherwise
- Authority: *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) HCA
- T entered into contract with L by which T agreed to display 53 roof boards advertising L for at least 8 hours a day for a min of 52 weeks over three seasons.
- Did not have them on for 8 hours, therefore had no performed obligations fully.
- Not always possible to characterise term, therefore have to focus on nature of breach.
- Authority: *Hongkong Fir Shipping Co Ltd v Kawaskaki Kisen Kaisha Ltd* [1962] English CA
- Question is whether breach substantially deprived innocent party of benefit under contract
- No reasonable grounds for thinking ship could be fixed, but it could be.
- Held that no, the breach was not serious enough to justify terminating contract.
- Would get the benefit of the ship in the end.

Determining the effect of a breach in practice

- By adopting nomenclature (choosing names for things) of conditions and warranties, legislation makes it clear that breach of certain terms will allow innocent party to rescind.
- Authority: *Hongkong Fir v Kawaskaki*

Election to discharge contract

Requirement and nature

- Unless contract provides otherwise, breach will not discharge it automatically.
- Innocent party is presented with choice of rescinding, or affirming and insisting guilty party performs as promised.
- If innocent party elects to rescind, must be communicated to guilty party and will not be effective until this has occurred.
- Innocent party's decision to affirm is final and cannot change mind. Rescission will only be possible after affirmation.
- Authority: *Holland v Wiltshire* (1954) HCA

- H contracted with W to purchase H. Paid 2 pound deposit.
- H repudiated contract and W responded by saying unless they completed the transaction by date he would take action for breach.
- When H did not pay by date, W sold property to another party and sought to recover from H difference between price paid by third party and contract price.
- Issue: what is required before election to terminate will be regarded as having been made
- Clear that he no longer wanted to be bound by advertising and selling property.
- *Immer Pty Ltd v Uniting Church Aus* (1992-1993) HCA
- Trust owned air space rights. Rights transferable if approved by Council.
- Trust sold right to I, completed to be 7 days after Council approval. If council not approve by certain date, I can rescind.
- Letter sent by mistake believing council had approved. I rescinded on date when council did not approve.
- Issue: could trust seek declaration that contract remained in force and an order for specific performance. Held; right to rescind a continuing right.

Limitations on the right of election

- 1. Particular circumstances may be such that they have no choice but to rescind.
- 2. Even when choice remains, may be required to exercise it in a particular manner.
- Principal limitations of this nature are as follows:
 - Fair conduct - *White and Carter v McGregor*
 - Where the guilty party's co-operation is required: affirmation may not be possible where where participation of guilty party is required for innocent party to perform.
 - Contractual restrictions
 - Statutory restrictions

Consequences of discharge for breach

General effect

- Terminates *in futuro* (in the future).
- Authority: *Heyman v Darwins Ltd* [1942] HL
- Agency contract provided if there was dispute it would be submitted to arbitration.
- H alleged D had repudiated contract and contract had been discharged
- Arbitration clause can still operate even though contract had been discharged. Certain clauses can still apply. If you don't want this, write it in contract.

Effect on payments made or due

- Money can be recovered provided there has been a total failure of the consideration.
- Installments on goods recoverable.
- Deposits not recoverable when reasonable (deposit is entry into contract itself).
- Authority: *McDonald v Dennys Lascelles Ltd* (1933) HCA
- M guaranteed payment of an instalment due to D under contract for sale of land
- Instalment not paid when due. Contract of sale discharged due to breach.
- Held that D could not have land and money, instalments repayable on discharge of contract
- *Hyundai Heavy Industries v Papadopoulos* [1980] HL
- H contracted to build ship for P. Contract to be paid in 5 instalments.
- As 1st and 2nd instalment did not equal 10% of total price, P still had to pay third instalment as a debt.
- *Bot v Ristevski* [1981] Supreme Court of Vic
- B to sell house/land to R. Contract required deposit on signing and balance later.
- Only part of deposit was paid when R repudiated contract.
- B can claim remainder of deposit.

Relief against forfeiture

- Equity has power to grant relief against forfeiture (loss of something as a penalty for wrongdoing) of payments made as instalments of purchase price, even where contract provides that they are to be forfeited (*McDonald*).
- Does not apply to payments made as deposits (*Bot*).
- Consequence of difference between treatment of instalments and deposits is that vendors may be tempted to characterise payments due under a contract of sale as a deposit so payment can be retained should there be a breach.
- Unconscionable exploitation of the above possibility was prevented by the Privy Council in *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] Judicial Committee of the Privy Council, which decided that payment will be treated as deposit only if amount is reasonable (usually not to exceed 10 per cent of the purchase price).
- Vic and NSW provide statute for further relief against the forfeiture of deposits.

Recovery under quantum meruit

- If contract discharged for breach, innocent party can choose to sue on a quantum meruit (reasonable sum of money to be paid for work done when the amount due is not stipulated in contract) for the value of any benefit conferred on guilty party or of the work they have carried out.
- Guilty party cannot similarly recover the value of the benefit conferred (granted) on the innocent party prior to termination unless a fresh contract to pay for this work can be recognised, or contract is divisible, or doctrine of substantial performance operates.

TERMINATION: DISCHARGE BY FRUSTRATION

Frustration

- Generally arises when a contracting party refuses to perform or has failed to perform obligations because performance has become either physically impossible, illegal or is no longer commercially viable.
- Court will terminate the contract and discharge both parties where unjust to hold parties bound.
- Whether changed circumstances will amount to a frustrating event will be a matter of construction.
- If performance rendered radically different to what was intended, doctrine of frustration will operate.
- Contract will be automatically discharged. Rights and obligations accrued up to the point of frustration will remain enforceable.

Development of the doctrine of frustration

- Modern doctrine had its foundation in decision of Queen Bench in *Taylor v Caldwell* [1873] Court of QB.
 - T hired hall for concerts but hall burnt down before concerts. Plaintiff sued for breach.
 - Could rely on destruction of hall as an excuse for non-performance. Total failure of consideration
 - Court did not use term frustration; it was prepared to imply a term that certain supervening events should terminate contractual obligations.
- Modern formulation of the doctrine of frustration was expressed by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] HL

Current position in Australia

- Adopted modern doctrine expressed in *Davis Contractors Ltd v Fareham Urban District Council*
- '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.'
- HC considered the doctrine of frustration in *Codelfa Construction Pty Ltd v State Rail Authority NSW* (1982) HCA,
 - C contracted with Rail Authority to excavate railway tunnels within specified period of time.
 - Injunction made to restrict time work, after contract made.
 - Contract frustrated.

Events that may frustrate a contract

Consideration must be given to terms of contract, nature of the event and type of contract.

1. Destruction of something essential: Music Hall in *Taylor v Caldwell*
2. Non-occurrence of an essential event: *Krell v Henry* [1903] English CA coronation case: processions did not take place as planned due to King's serious illness.
3. Impossibility of performance: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] HL, outbreak of war rendered performance of the contract illegal
4. Events causing delay or making performance more expensive: *Codelfa*
5. Changes in the law: does not have to render performance illegal, just substantially makes contract different in nature. *Fibrosa* – prior to the delivery of goods to an area, became an illegal place to deliver goods. Was frustrated.

Situations preventing frustration

Where contract makes provision for the supervening event

- If a provision is made for supervening event, no scope for the doctrine of frustration
- Authority: *Bank Line, Limited v Arthur Capel and Company* [1919] HL
- Could not claim damages for non-delivery as it was in the contract that if not delivered by a certain date, other party could cancel.

When frustrating event is caused by one party

- Will not operate to frustrate contract.
- Authority: *Maritime National Fish Limited v Ocean Trawlers Limited* [1935] Privy Council
- Appellants chartered a steam trawler from respondents, provided that the trawler was only permitted to be used in the fishing industry.
- Canadian legislation made it an offence to leave a Canadian port with intent to fish using this type of vessel unless a license was obtained.
- Appellants were only able to obtain three licenses and they had them on other vessels, so could not get a license because they chose to put them on other vessels, therefore frustration does not apply.
- *J Lauritzen AS v Wijsmuller BV (the 'Super Servant Two')* [1990] English CA
- Carry drilling rig. Ship sank, therefore cannot transport rig as other boat contracted to someone else. Ship sinking does not constitute a frustrating event.
- Contract gave alternative to use either ship, and one sank, which meant could have used the other ship.

Application of the doctrine to leases

- In the UK, it has been recognised that should a supervening event take place which deprives the lessee of substantial use of the property, doctrine is capable to apply to bring lease to an end, however, rare.

- Authority: *National Carriers v Panalpina (Northern) Ltd* [1981] HL
- Local authority closed street which provided only access to the warehouse leases by N from P
- HL agreed frustration could apply to leases but did not apply in present case because the continuance of term after interruption made it impossible for lessee to contend lease has been bought to an end.

Consequences of frustration

Common law

- Terminates contract automatically.
- No need for a party to elect to terminate.
- Terminated *in futuro*.
- Law now permits recovery of moneys due and paid prior to a frustrating event.
- Authority: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*
- Fair contracted to sell and install machinery to Fib in Poland. Payments made.
- War broke out. Poland become enemy-occupied territory. Illegal for Fair to deliver goods.
- The above case represents Australian common law position.
- This position may produce harsh results where there has only been partial failure of consideration.
- Can protect against this harshness by making a provision in contract for what should happen in the event of frustration.

Statutory modification

- Three Aus states have introduced legislation modifying rights of party's following frustration.
- In Vic, provision is made for return of all or part of moneys paid and for payment services rendered in a wide range of circumstances. Also permits severance of parts of a frustrated contract in limited circumstances.
- *Australian Consumer Law and Fair Trading Act 2012* (Vic) Part 3.2

REMEDIES: DAMAGES & LIQUIDATED CLAIMS

Damages – compensate plaintiff by placing it in the same positive as if contract were performed

Liquidated damages – award plaintiff sum stipulated as liquidated damages in contract

Compensatory damages

- Damages for breach of contract are compensatory in nature.
- *Robinson v Harman* [1848] - object of an award of damages is to place plaintiff in position they would have been in had contract been performed and not to punish defendant for their breach. Affirmed in *Clark v Macourt* [2013] HCA
- Following preconditions must be established before a plaintiff will be awarded damages:
 - Plaintiff suffered loss
 - A causal connection between defendant's breach and plaintiff's loss
 - Loss suffered is not too remote from breach of contract
 - Loss suffered is of a kind recognised by law

Restitutionary damages

- For breach of contract in cases where loss is not easily ascertained, or where compensatory measure of damages would not do adequate justice between parties.
- Prerequisites for obtaining an award of damages including:
 - Types of loss commonly recognised by courts
 - Manner in which damages are assessed

- Possibility of obtaining restitutionary damages in exceptional circumstances
- Availability of other common law remedies for breach of contract

Loss

Plaintiff must prove loss

- In order to recover damages for breach beyond nominal damages suffered, loss must be demonstrated.
- Loss need not necessarily be physical or monetary in nature.
- Requirement of proving loss discussed in: *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA
 - Mining case, relationship broke down. Claiming payments resulting from breach.
 - Profit that should have been calculated.
- In this case, it was made clear that it is not essential for loss to be demonstrated with exact precision.
- However, where extent of a breach cannot be demonstrated, a calculation of loss will be impossible and plaintiff will be entitled to receive only nominal damages. Authority: *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd*: only partial failure to perform contract, therefore impossible to calculate damages. Only granted nominal damages.

Plaintiff's loss is recoverable, not the defendant's profit

- Where defendant obtains a profit as a result of breach, profit is generally not recoverable by plaintiff unless a measureable amount of loss can be proved.
- However, recent move towards allowing restitutionary damages in exceptional cases which may permit plaintiff to recover profits gained through defendant's breach.

Difficulty of assessment

- Damages recoverable even when extent of loss difficult to assess.

Losses by a third party

- Plaintiff can only recover loss suffered by them personally.
- Loss suffered by a third party to contract as a result of defendant's breach cannot be recovered by plaintiff.
- However, where breach exposes plaintiff to liability of third party, loss will be demonstrated.
- In very limited cases a plaintiff may directly enforce a contract on behalf of third parties who might suffer loss as a result of a breach.
- Authority: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] HL
 - Plaintiff sold rights of property to third party. Work on property by defendant's found defective. Plaintiff and third party sought to recover loss.
 - Plaintiff did not result in direct financial loss from defendant's breach and third party had no contract with defendant's.
 - Falls under exception to general rule. Plaintiff able to enforce contractual rights for third party, and is entitled to substantial damages.

Causation

- Must prove loss was caused by defendant's breach of contract.
- Becomes difficult when loss can be attributed to more than one cause.
- Where this is the case, plaintiff must prove defendant's breach was at least one of the causes of the loss suffered and defendant could foresee that loss would arise as a result of breach.
- Authority: *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) HCA
- Security system poorly installed, place robbed.

- Breach of fitness of purpose was reasonably foreseeable. Robbery would not have happened without the breach, therefore can receive damages.
- 'But for' test to determine if causation is established

Remoteness of damage

Damage must not be too remote from the breach

- Must show that loss suffered was not too remote from breach

Rule in Hadley v Baxendale

- Test to be applied in determining whether loss is too remote from breach is to ask whether
 1. Damages arises naturally according to usual course of things from breach
 2. the damage is such as may reasonably have been contemplated by both parties at the time they made the contract as a probably result of breach.
- Rule shown in *Hadley v Baxendale* (1854) Court of Exchequer
 - Operate city stem mills. Mew machine made, carriers did not deliver new one on time.
 - Delay prevented company from working, lost profits. Damages awarded.
 - Defendants found not liable, merely a carrier who did not know mill would be stopped.
- *Koufos v C Czarnikow* [1969] HL applied first rule
 - Deviation of course. Sugar prices fell, therefore lost profits because they could not sell when sugar prices were up.
 - Loss occurred in usual course of things. Knew there was a market of sugar, should have contemplated that failure to deliver on time could mean loss of profit. Must have known market price could fluctuate.

Types of loss recognised

- Most forms of loss arising from breach are recognised as compensable at common law.

Mental distress

- Alone will not ordinarily be regarded as a compensable form of loss.
- However, if object of contract is to provide enjoyment then mental distress resulting from breach may be recoverable.
- Authority: *Baltic Shipping v Dillon* (1993) HCA
 - Passenger on cruise ship, cruise sank. Plaintiff suffered injury and lost possessions.
 - Could cover damages for stress, but not for the fare of ship.
 - Claim for damages for loss of entertainment and joy, pleasure cruise which did not deliver

Loss of chance

- Loss of chance difficult to quantify with precision.
- Courts have recognised that loss of chance of gaining some benefit under a contract due to defendant's breach can give rise to substantial damages.
- In determining loss, courts take into consideration the prospect of success of the lost opportunity.
- Damages for this were first recognised as recoverable in *Chaplin v Hicks* [1911] English CA
 - Acting case, application for acting spot.
 - Plaintiffs letter for interview did not arrive in time to make interview, no opportunity to make another. Found she can claim damages.
- Australian authority: *Howe v Teefy* (1927) Supreme Court NSW
 - Leased a horse, took it back. Loss of money for betting on horse.
 - Loss too remote, however on appeal found not true. Plaintiff deprived of something of value.
 - Won't get full amount back, only had a chance of winning, but can still claim damages.

Wasted expenditure – reliance damages

- Where plaintiff has spent money in the expectation of defendant's performance which is wasted as a result of the defendant's breach, this loss may be recovered.
- Authority: *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) HCA
- Aerial surveillance of the Cwlth. Put a lot of money into it.
- Cwlth terminated contract by notice. Breach of contract. Able to claim damages.

The cost of repairs

- Will most commonly arise when defendant is a tradesman who has defectively performed the work contracted for.
- General rule is that defendant can recover amount necessary to put it in the position it would have been had the work been performed properly.
- Authority: *Bellgrove v Eldridge* (1954) HCA
- Build house in accordance with plans, building found to be unstable.
- Damages for full demolition and rebuild of house found necessary and reasonable
- Court in the above case indicated that the general rule in building contracts that a defendant can recover the costs necessary to put them in the position they would have been if the contract was performed properly was subject to qualification that that course of action must be reasonable in the circumstances.
- Authority to reasonableness: *Ruxley Electronics and Construction Ltd v Forsyth* [1995] HL
- Swimming pool not built to same depth, still deep enough to dive.
- Just because not to specifications, does not mean always get damages.

Loss of the use of money

- Damages for loss of use of money recoverable in Aus.
- Deprivation of use of money may cause loss in the form of costs associated with borrowing money from another source or through the loss of interest.

Rule in Bain v Forthergill (1874) HL

- In this case, HL held that where a vendor of lands fails to complete as a result of defect in title, purchaser is restricted to recovering losses associated with investigating title as well as any deposit paid unless the vendor is guilty of fraud or bad faith.

Assessment of damages

Date for assessing damages

- Date plaintiff's cause of action arose which will normally be the date on which defendant's breach occurred.
- However, where that date would not fairly compensate plaintiff for loss, another date may be used.
- Authority: *Hoffman v Cali* [1985] Supreme Court QLD
- Anticipatory breach of contract by a developer of block of units.
- At completion date, market value had dropped.
- Plaintiff who accepts repudiation allowed damages, as the date of the repudiation.

Mitigation of loss

- Plaintiff must do what is reasonable to reduce (mitigate) loss suffered.
- Where plaintiff does not mitigate their loss any damages awarded will be reduced by amount defendant could have reasonably reduced their loss.
- Any costs associated with mitigating loss e.g. advertising goods for sale, can be recovered as damages.
- Defendant has onus of demonstrating that plaintiff could have mitigated their loss.

- Authority: *Burns v MAN Automotive (Aust) Pty Ltd* (1986) HCA
- Plaintiff did not have enough funds to fix an engine.
- Gibbs CJ: "...a plaintiff's duty to mitigate his damage does not require him to do what is unreasonable and it would seem unjust to prevent a plaintiff from recovering in full damages caused by a breach of contract simply because he lacked the means to avert the consequences of the breach".

Contributory negligence

- Legislation provides in cases where a contract imposes a duty of care on a party and it is breached, but other party is partly responsible for loss suffered, damages may be reduced by amount proportional to extent that other party was responsible for their own loss.
- *Wrongs Act 1958 (Vic)* s26 liability for contributory negligence

Liquidated (agreed) damages

- Parties may include in contract amount that will be payable in event of breach.
- Provided it is a genuine estimate, will be enforced by courts.
- If sum specified is a penalty it will not be enforced.
- Authority: *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1915] HL
- D supply goods to R. R agreed not to sell below A's list price.
- Agreed that if they did R would pay D 5 pounds per tyre sold in breach 'by way of liquidated damages and not as a penalty.
- Issue: was the clause for liquidated damages or penalty. Liquidated damages.

Restitutory damages for breach of contract

- *Attorney-General v Blake* [2001], House of Lords held that restitutory-type damages could be recovered for breach of contract in a limited number of cases where compensatory damages alone would not achieve justice.

Other common law remedies for breach of contract

Debt

- Where debt is a breach, remedy is an action to recover the money owed.
- Plaintiff does not have to prove loss.
- Damages may be recoverable in addition to debt owed where failure to pay on time results in additional loss.

Termination clauses

- Where a contract is terminated with reliance to termination clause, damages not recoverable.
- Authority: *Shevill v The Builders Licensing Board* (1982) HCA
- Over rent on lease. Clear words to allow landlord to claim damages.
- Landlord entitled to rent that was not paid for two years, however not other years.

Retention of deposits paid

- A deposit paid pursuant to a contract may be retained in the event of a breach.
- Plaintiff may also recover from defendant a deposit due at time of breach but not yet paid, even when no demonstrable loss.
- Deposit must be reasonable (10%).
- *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] Privy Council
- Deposit was 25%, contract said it can be forfeited on breach. Can seek relief against forfeiture as it is more than 10%.

REMEDIES: EQUITABLE REMEDIES

Nature of equitable remedies

- Seek to compel performance of contractual obligations.
- In each case, court required to decide whether it is appropriate for it to exercise its discretion to grant the remedy sought.
- Usually only when it can be demonstrated that common law remedies would be inadequate.
- *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] HL explains the nature of equitable remedies.

Specific performance

Nature of specific performance

- Order of specific performance directs party against whom it is made to perform obligations under contract.
- Used as a method to enforce positive obligations.

Approach to claims for specific performance

- Not available automatically following a breach or anticipated breach.
- A court will generally adopt following process when determining whether appropriate to exercise their discretion.
 - Plaintiff must be entitled to some remedy in respect of breach.
 - Damages must not provide an adequate remedy for the breach.
 - Specific performance must provide a more adequate remedy.
 - If all other elements are met, court must then be satisfied that it is fair to order specific performance.

Plaintiff entitled to some remedy – normally easily satisfied

Damages do not provide adequate compensation if:

- Item contracted for is unique, such as contracts for the sale of land.
- Contractual remedies are not available at law as a result of a failure to comply with statutory formalities.
- Contract was made for the benefit of a third party who is not able to sue directly to enforce that benefit.
- Authority: *Beswick v Beswick* [1968] HL – specific performance

Specific performance must provide a more adequate remedy

Is it fair to order specific performance?

Courts will consider factors:

- Lack of mutuality: *Price v Strange* [1978] CA UK pg 706
- Delay: if a party delays in seeking an order for specific performance, a court will be less inclined to exercise jurisdiction in their favour.
- Hardship to the defendant: courts unlikely to exercise their discretion to order specific performance if hardship to defendant. *Dowsett v Reid* (1912) HCA
- Mistake or misrepresentation: where defendant has been victim of mistake, court may choose not to order specific performance.
- Inadequacy of consideration:
- Plaintiff also in breach: will not order specific performance in their favour. *Green v Sommerville* (1979) HCA

Contracts for which courts routinely award specific performance

Contracts for rare or unique goods – *Dougan v Ley* (1946) HCA

- D owned taxi. Contracted to sell taxi to L, but D reneged. Legislation at time limited number of taxi licenses in relevant area.
- L sought specific performance.
- Held: because of limited number, remedy of specific performance should be ordered.

Contracts involving land – *Pianta v National Finance & Trustees Ltd* (1964) HCA

- Trial judge determined no binding contract of sale of land from P to N, but did not order specific performance.
- Issue: H was a land developer, so were damages an adequate remedy.
- Held: no binding contract, no order for specific performance.

Contracts which will not be specifically enforced

Contracts for personal service – such as employment contracts

Contracts requiring contact supervision – constantly supervised by courts, *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] HL

Injunctions

- Ordinarily sought when one party wishes to restrain the other from committing a breach (a prohibitory injunction) or to reverse a breach that has already occurred (a mandatory injunction).
- Frequently sought to prevent disclosure of confidential information or to enforce a legal restraint of trade clause.
- *Lumley v Wagner* [1852] Lord Chancellor's Court
 - W agreed to sing at L's theatre for a certain number of nights for 3 months.
 - W received better offer elsewhere and planned to abandon contract.
 - L sought injunction preventing W from signing elsewhere for 3 months.
- *Warner Bros v Nelson* [1937] Court of KB
 - WB sought injunction to restrain N from making a film with a third party.
 - Under contract N agreed to work exclusively for WB for one year.
 - Injunction granted where contract is of personal service.
- Same considerations that apply in determining specific performance apply here.
- Discretion to order injunction: *Hill v CA Parsons & Co Ltd* [1971] English CA
 - H asked to join union, when didn't received notice that he lost his job.
 - H sought injunction restraining termination of employment contract.
 - Injunction granted, company could not change conditions of employment.

Damages in lieu (instead) of equitable remedy

- Damages may be awarded in addition to the equitable remedies of specific performance or an injunction.
- May be because a party fails to comply with an order for specific performance, either refused on discretionary grounds, additional loss has been suffered, or where damages are not available at law.
- *Supreme Court Act 1986 (Vic)* s38 damages in addition to or in place of other remedies
- *Johnson v Agnew* [1980] HL
- A entered into contract to sell property to J.
- J refused to perform and A obtained specific performance. J still did not perform.