

MACQUARIE
UNIVERSITY



FACULTY OF
BUSINESS AND ECONOMICS

DEPARTMENT OF BUSINESS LAW

STUDY GUIDE

BUSL832 BUSINESS TRANSACTION LAW

Semester 1, 2009

Credit points: 4 cps

Unit convenor: BENEDICT CONNORS

Students in this unit should read this study guide carefully at the start of semester. It contains important information about the unit. If anything in it is unclear, please consult one of the teaching staff in the unit.

1. ABOUT THIS UNIT

Unit description

The unit reviews contract law and the statutory additions to it – in particular, the *Trade Practices Act* (the consumer provisions which are largely replicated by the *Fair Trading Act* at the State level) and the *Sale of Goods Act*. As well, the related topic of principal and agency will be reviewed, and the principles of equity will be illustrated through a review of selected cases and doctrines.

Unit rationale

The unit will seek to put the basic principles of contract law and these related topics, into the broader commercial context and to consider such issues as the extent to which contract law realistically meets the needs of commerce (its complexity, and the cost of invoking it, will be sub-themes); the extent to which the traditional laissez-faire notion of freedom of contract has been entrenched upon by modern legislation seeking to inject standards of fair dealing into the law, and whether this approach has gone too far, or not far enough; and where the balance should be struck between regulation through black-letter law on the one hand and self-regulation on the other (such as by resort to ethical standards not necessarily embodied in the law).

TEACHING STAFF

Convener: Benedict Connors
Email: ben.connors@law.mq.edu.au

External class lecturer: Mona Hymel

CLASSES AND STUDY TIMES

Internal

Business Transactions Law is offered on a weekly basis in first semester on Tuesdays- in W5A 105- 6-9 pm

External

This unit is available to distance students. Classes will be offered as an intensive 2 day on campus session, held over 2 consecutive weekends from 10am-5pm.

Saturday 7 March C5C 240
Saturday 14 March C5C 240.

The class time will be spent reviewing and discussing the materials identified for reading, in light of unit objectives.

Students must check the Blackboard site for this unit on the Business Law site on the Faculty of Business and Economics website for changes to class times and rooms, after the commencement of Semester 1 on January 23, 2009.

REQUIRED AND RECOMMENDED TEXTS AND/OR MATERIALS

Prescribed texts

P Gillies, *Business Law*, 12th edition (Federation Press, 2004) (Ph. 9552 2200)

Additional text: it would be very helpful to have a copy of the *Trade Practices Act*, 1974 (Cth) (annotated versions are published by the Law Book Co. and Lexis Nexus, and CCH. The Act is also available at www.austlii.edu).

Prescribed course materials/readings

Access to certain documents is provided free to all students. These supplementary materials will be available on the Blackboard site for this unit.

Recommended texts

Business Law in general -

Chappenden & Carter, *Commercial Law & Personal Property* (Law Book Co)

Latimer, *Australian Business Law* (CCH)

Pentony et al, *Commercial Transactions Cases and Materials* (Lexis Nexus)

Turner, *Australian Commercial Law* (Law Book Co)

Vermeesch & Lindgren, *Business Law of Australia* (Lexis Nexus)

Contracts -

Allen & Hiscock, *Law of Contract in Australia* (CCH)

Carter & Harland, *Contract Law in Australia* (Lexis Nexus)

Carter, *Breach of Contract* (Law Book Co)

Graw, *An Introduction to the Law of Contract* (Law Book Co)

Greig & Davis, *The Law of Contract - with Supplement* (Law Book Co)

Hall, *Unconscionable Contracts and Economic Duress* (CCH)

Stark, Seddon & Ellinghaus, *Cheshire and Fifoot's Law of Contract – Australian Ed* (Lexis Nexus)

Sweeney & O'Reilly, *Law of Commerce* (Lexis Nexus)

Consumer and Trade Practices Law -

Beerworth, *Product Liability* (Federation Press)

Cavanagh & Barnes, *Consumer Credit Law in Australia* (Lexis Nexus)

Collinge & Clarke, *The Law of Marketing in Australia & NZ* (Lexis Nexus)

Corones & Clarke, *Consumer Protection and Product Liability Law – commentary and materials* (Law Book)

Corones, *Competition Law & Policy in Australia* (Law Book Co)

Duggan et al, *Regulated Credit* (Law Book Co)

Everett & Ranson, *The Fair Trading Acts* (Longman Professional)
Goldring et al, *Consumer Protection Law in Australia* (Lexis Nexus)
Healey, *Australian Trade Practices Law* (CCH)
Healey & Terry, *Misleading or Deceptive Conduct* (CCH)
Hurley, *Restrictive Trade Practices* (Law Book Co)
Miller, *Annotated Trade Practices Act* (Law Book Co)

There are further texts periodically published which students may wish to locate and use.

Statutes://www.austlii.edu.au

UNIT WEB PAGE

Study Guides and information on this unit can be found at the Blackboard site on the Business Law site on the Faculty of Business and Economics website

LEARNING OBJECTIVES

Unit Objectives

- To develop or enhance an appreciation by business managers and related professions of the legal context in which they operate;
- To create an enlightened awareness by individual professionals of the legal basis for, and scope of, their roles; and
- Generally, to contribute to the legal literacy of these professions.

The programs in which the unit is a component, do not aim to develop professional legal skills associated with legal practice.

Subject to this, the unit aims at developing and consolidating knowledge of the nature of law and the structure of the Australian legal system, the language of the law and the fundamental principles, doctrines and distinctive reasoning processes associated with the law.

For example, the nature of the common law as a precedent based system will be explored, as will the role of the common law and legislation, and the roles of the courts and legislatures. The unit will aim at developing the basic skills required for reading and understanding the texts of the law, primary (cases and statutes) and secondary (commentaries on the law, such as books and articles).

The unit will also aim at developing and consolidating knowledge of the foundation topics in the law governing business transactions, especially contract law and the statutory additions to it. This process will develop specific commercial law knowledge,

but it will also function as a medium for the development of the more fundamental skills of understanding, analysing and synthesising legal materials.

The unit will develop the skills required for analysing the key facts of a legal dispute, the identification of the law that needs to be applied to resolve this dispute, and for the application of this law to the established facts to secure this resolution.

The unit will develop an appreciation of the extent to which the application and development of the law is shaped by broader considerations of public policy (as illustrated by the progressive usurpation of the old doctrine of freedom of contract (also known as laissez-faire) by the consumer rights movement, which has attracted broad political support).

The unit will involve completion of a research project, embodied in an essay, which will further develop skills of legal interpretation, analysis and synthesis, and an understanding of the interrelationship between the development of the law and policy.

GENERIC SKILLS

As reflected immediately above, the unit aims at developing skills required for interpreting the materials of the law, and their analysis and synthesis. In essence, the unit develops verbal reasoning skills in the context of the law discipline.

TEACHING AND LEARNING STRATEGY

The unit consists of seminar-based classes (both in intensive and weekly modes). Students are encouraged to attend class and to prepare for class. The techniques of legal reasoning, legal knowledge, and a capacity to apply the principles of law to hypothetical fact situations (or “cases”) will be developed through explanation, discussion and essay writing. Students are encouraged to raise real life cases from their professional experience, relevant to the subject matter of the unit. Likewise, they are welcome to propose research project topics which are relevant to their work. (For example, a student employed in the insurance industry might choose to research an aspect of insurance contracts law.)

ASSESSMENT

Assessment consists of an essay between 5,000-7,000 words. A topic will be proposed by the unit convener, but students may subject to the convener’s approval, work on an alternative topic. This option would be especially relevant to those with prior legal training or professional exposure to the law.

Late submission: Essays that are submitted late, without an extension, will lose 2 marks per day.

Essays submitted more than 4 days late will lose 10 marks, plus 4 marks for each additional day they are late.

Essays submitted more than 10 days after the due date will not be marked.

Any essays on an independent topic, different to the topic proposed by the convenor, that are not first submitted to the convenor and approved by the convenor, will not be marked.

Unless prior arrangements are made with the convenor, a **hard copy** of assignments is required to be handed in to Ms. Sumi Pilkington Room 341 W3A, or posted to Ms. Pilkington at Room 341 W3A, to arrive by the due date.

External students to post directly to Ms. Pilkington.

Due Date: 2 June 2009, 5pm.

PLAGIARISM

The University defines plagiarism in its rules: **“Plagiarism involves using the work of another person and presenting it as one’s own.”** Plagiarism is a serious breach of the University’s rules and carries significant penalties. You must read the University’s policies and procedures on plagiarism. These can be found in the *Handbook of Postgraduate Studies* or on the web at: <http://www.student.mq.edu.au/plagiarism/>

Penalties may include a deduction of marks, failure in the unit, and/or referral to the University Discipline Committee.

If you take and use the work of another person without clearly stating or acknowledging your source, you are falsely claiming that material as your own work and committing an act of *PLAGIARISM*. This is a very serious violation of good practice and an offence for which you will be penalised. If you do any of the following in an assignment, or in any piece of work which is to be assessed, ***without clearly acknowledging your source(s) for each quotation or piece of borrowed material*** you are **guilty of PLAGIARISM**

YOU WILL BE GUILTY OF PLAGIARISM

- (a) Copy out part(s) of any document, including computer and web-based material;
- (b) Use or extract someone else’s concepts or experimental results or conclusions, even if you put them in your own words;
- (c) Copy out or take ideas or summarise from the work of another student, even if you put the borrowed material in your own words;
- (d) Submit substantially the same final version of any material as a fellow student. On occasions, you may be encouraged to prepare your work with someone else, but the final form of the assignment you hand in must be your own independent endeavour.

There is nothing wrong in using the work of others as a basis for your own work, nor is it evidence of inadequacy on your part, ***provided you do not attempt to pass off someone else’s work as your own.***

The Australian Guide to Legal Citation, available on the internet, must be used for referencing. No other school of referencing is permitted.

LIBRARY SUPPORT SERVICES

Macquarie University Library offers a wide range of services and resources to postgraduate students. Go to the Library website: <http://www.lib.mq.edu.au>.

Services

Include information on borrowing periods, services to distance students, links to IT Help (the Library's IT support service), and links to training information and training course notes.

Postgraduate students are eligible for a number of additional services. Information about these is available from the **Postgraduates** link, listed under **Additional Services** on the Library homepage.

Additional services for Macquarie postgraduate students include the Liaison Librarians (LL). The LLs are the first point of contact for Postgraduate students. There is an LL appointed to each Division of the University.

Liaison Librarians

Judit Baranyai Phone (02) 9850 7262

Phillipa Hair Phone (02) 9850 7555

Services offered by your LL include:

- Providing further information on the library services
- Providing individual and group library resource sessions for postgraduate students
- Advising on new database trials being held in the Library
- Advising on appropriate contacts for specific services, such as requesting items not held at the Library from the Document Supply Service.
- Preparation of resource guides in print and on the web
- Reference advice (face-to-face, phone and email)

UNIVERSITY POLICY ON GRADING

The University requires all Divisions to adhere to a policy relating to the distribution of grades across high distinction, distinction, credit and pass grades. This means that on occasion a student's raw mark for a unit (ie, the total of their marks for each assessment item) may not be the same as that which they receive on their transcript. This is because the total raw mark may be scaled up or down so that the grades of all students in each unit sit within the distribution bands set down by the University. The policy does not require that any number of students are to be failed in any unit.

SCHEDULE OF TOPICS

TOPIC 1

- An overview of the legal system G Chaps 1-4
- Revising the nature of the law, the legal system, and the federal compact.

TOPIC 2

- Contracts - an overview G Chap 7
- Consideration of the grounds of legal redress, which may be available in a particular contractual situation, including torts, equity, and statutory remedies.

TOPIC 3

- Contracts - formation: offer and acceptance; intent to enter into legal relations
- G Chaps 8,10

TOPIC 4

- Contracts - formation: consideration G Chap 9

TOPIC 5

- Contracts - terms G Chaps 11, 12

TOPIC 6

- Contracts - terms (continued) G Chap 13

TOPIC 7

- Contracts - vitiating elements G Chaps 14, 15

TOPIC 8

- Contracts - vitiating elements (continued) G Chap 16, 17

TOPIC 9

- Breach of contract G Chaps 18-20
- Also, miscellaneous aspects of contract

TOPIC 10

- Statutory developments affecting contracts
- Sale of Goods Act and corresponding provisions in Trade Practices Act G Chap 24

TOPIC 11

- Statutory developments (continued) - Consumer provisions in Trade Practices Act and Fair Trading Act G Chap 33

TOPIC 12

- Principal and agent G Chap

DETAILED AREAS: ITEMS FOR DISCUSSION, READINGS

TOPIC 1

An overview of the legal system G Chaps 1-4
Materials Volume II

It is assumed that students will have a working familiarity with the fundamentals of the legal system. This will in most cases have been acquired by previous study of the law at some level, or by pre-course reading. This outline includes summary notes of the matters dealt with in Chaps 1-4, and discussion points.

In this class, attention will be directed to such topics as the:

- nature of the law
- sources of the law
- differences between common law and equity
- role of the courts
- structure of the courts
- Federal Constitution and its division of powers between the federal and State parliaments

- As well, note should be taken of the difference between the fundamental branches of law - contracts and torts and the criminal law (and the difference bases of liability created by each); and the broader distinction between the civil and criminal law which they reflect. (The law of torts, by the way, will be dealt with in the concurrent first semester unit, BUSL833 - BUSINESS PROPERTY LAW.)

TOPIC 2

Contracts - an overview G Chap 7

Consideration of the grounds of legal redress, which may be available in a particular contractual dispute, including torts, equity and statutory remedies.

Issues for discussion include

- concept of a binding contract (need for offer and acceptance; consideration; intent to enter into legal relations. Requirement of privity; and occasional statutory requirement that a contract be in writing and signed by the party to be bound.
 - role of contract law.
 - philosophies of contract law - freedom of contract versus general law and statutory encroachments upon this concept.
 - commercial limitations upon reliance on litigation to enforce formal legal rights - consideration of alternative strategies for redress.
-

TOPIC 3

Contracts - formation: offer and acceptance; intent to enter into legal relations
G Chaps 8,10

For Discussion

Issues concerning legal fundamentals:

- How does the manager ascertain at what point an agreement has been reached?
[Ch. 8, Text]
- What might constitute “evidence” of an agreement which is legally binding?
[Chs. 9,10, Text]
- Must contracts be written to be legally binding?
[Chs.11,23, Text]

Problems relating to offer and acceptance, intention to create legal relations.

1. At an auction sale, M, an auctioneer, invites bids for an antique chair. N bids \$25 but M says, “I am not going to let this go for less than \$1,000. There was no other bid, and the sale was advertised as being ‘without reserve’.

Advise N.

2. David and Jack are good friends. David comes to know that Jack wishes to sell his car and writes the following letter to him:

“Dear Jack,

I hear you want to sell your Corolla. I’ll give you \$1,250 for it. If I do not hear from you within five days of receipt of this letter I shall take it that you accept.

Signed:

As you can see, David forgot to sign his letter, but in addition to placing Jack’s name on the front of the envelope, he placed his own name and address on the back. The letter reached Jack on May 10. On May 16 Jack asks David to collect the car and to pay the price. David refuses on the grounds (a) that silence cannot constitute acceptance, and (b) that on May 14 he had posted a letter to Jack revoking his offer. This letter arrives on May 17.

Advise Jack about the validity of David’s arguments and as to the likelihood of success of any other points he may raise.

3. Graeme visits a self-service hardware store to purchase a length of pine shelving. He finds a 2.6 metre length 240 mm wide and asks the assistant to cut it into

300mm pieces. When he reaches the cash register he realises he actually needs 200mm timber. Is he required to pay for the pieces of 300mm pine?

READINGS: *Carlill v Carbolic Smokeball Company* [1893]

Summary Notes

Contracts

A contract is for our purposes, defined as a legally binding agreement (ie one which can in the ultimate issue, be enforced in a court).

Formation of Contracts G Chs 8-10

As well, for a person to be able to sue on a contract, or to be sued on it, he/she must be a party to the contract, ie privy to it -a requirement referred to as PRIVACY.

Uncommonly, a contract must be in WRITING - but only where statutes require this. For example, a contract to sell land or an interest in it, must in NSW and elsewhere in Australia, be written and signed, or be evidenced by a writing which is signed.

To become party to a contract, a person must have contractual capacity, ie capacity must exist in at least two parties for a binding contract to come into existence.

To be binding, three elements are needed:

- (a) Offer and Acceptance;
- (b) Consideration; and
- (c) Intent to enter into Legal Relations

(a) Offer and Acceptance G Ch 8

The so-called offer and acceptance element is really a reference to the requirements of a central element of agreement. The offer and acceptance model is an analytical tool, pursuant to which it may be determined whether an agreement came into being (ie was there an offer which was accepted). The issue of whether an agreement was formed is determined objectively not subjectively, ie from a reasonable person standpoint. If X behaved in such a way as to lead to the reasonable conclusion that X formed an agreement, the law will deem him or her to have done so even as X's thinking may have been contrary. This approach is necessary otherwise great uncertainty (commercial and legal) could result.

Offer:

- nature
- distinguish it from puffs and invitations to treat (ie pre-offer conduct)
- note specific prima facie rules, concerning when an offer is made, in these contexts:
 - a. retail
 - b. auction
 - c. purchase of tickets

- d. applications for shares, debentures
- termination of offer
- e. rejection
- f. revocation
- g. lapse of offer through time
- h. death of offeror, offeree
- i. failure of condition precedent

Acceptance:

- nature
- need for communication (including post office rule)
- acceptance must be in reliance on offer

Miscellaneous Aspects of Formation of Agreement

- conditions precedent and subsequent
- j. defined
- k. subject to finance clauses
- l. subject to written agreement clauses
- option agreements

READINGS: *SWV Pty Ltd v Spiroc Pty Ltd* [2006] NSWSC 668 (Volume II, 33)

(b) Consideration G Ch 9

It is an old rule that a contract must be “supported by consideration”. This means essentially, that each party must promise something which is of value to the other party, ie promise to pay a price in return for the other’s promise. The requirement is much criticised, given that consideration can be a token, but is still a part of the law.

Consideration which is yet to be performed but which has been promised, as part of an agreement, is executory; when performed it has been executed.

Consideration is not needed where a promise is embodied in a DEED; ie a unilateral promise in a deed, signed by the promisor and witnessed by a non-beneficiary under the deed, is legally binding. If in doubt, embody promises in a deed.

(Ignore G Ch 9.4 - in essence this complex material just restates the requirement of privity.)

- the law is unconcerned with the financial value of consideration. A party’s consideration does not have to be commercially valuable - the requirement is simply, that it be accepted by the other party, as the price of the latter’s promise. Furthermore, the consideration from each side need not be financially balanced - you can make a valid contract to sell a \$10,000 (market value) painting for \$200.
- but the law does require the consideration to be legally sufficient, ie “insufficient” consideration is void and cannot ground a valid contract. This concept has nothing to do with financial value. Insufficient consideration includes:
 - past consideration

- promise to perform pre-existing duty
- compromise of existing action (where not done property)
- illusory, or uncertain promises

READINGS: *Mango Media v Bassal* [2004] NSWSC 1253 (Volume II, 43)

Promissory Estoppel

This doctrine exists in the general law. It is not per se part of the consideration doctrine, but it is relevant to the doctrine, in so far as a lack of consideration can be overcome (and rectified) by resort to the doctrine of promissory estoppel, as cases like the High Trees case (G Ch 9.7.6) illustrate. Promissory estoppel is a type of estoppel - the latter principal denotes situations where a person has legal rights, but the law prevents him/her from relying on these legal rights in court so as to win the case. This might appear to be extreme, and obviously, the law will not step in and estop a person from asserting his/her legal rights, where to allow this would be to stultify the law and lead to an unfair result. In general, estoppel is grounded by the person's prior conduct - this is such as to make it unfair and unreasonable to allow him/her to rely on his/her technical legal rights. The High Trees case illustrates this very well.

More radically, promissory estoppel has been used to overcome not just the lack of consideration - but also the lack of a contract in the first place (i.e. there was never an agreement). The *Waltons' Stores* case illustrates this.

READINGS: *Apple Communications v Optus Mobile* [2001] NSWSC 635 (Volume II, 50 esp para 21)

(c) Intention to enter into Legal Relation G Ch 10

There must, on an objective view, be an intent on the part of each party to enter into contractual relations.

Distinguish two cases:

- agreements arising in a business context: there is a presumption of intent. That means the onus is on the person who claims that there is no such intent, to prove this, the civil standard of proof applies.
- agreements arising in a social, or domestic context: there is an equal and opposite presumption against intent.

TOPIC 4

Contracts - formation: consideration G Chap 9

Review of the historical, but still very much alive requirement of consideration (ie, that each party give value for the other's promise). This requirement, it will be noted,

has been undermined by the broad general law doctrine of promissory estoppel. The doctrine can even displace the requirement of an agreement and treat persons as having contracted when in fact and in law, they have not.

For Discussion:

- is it possible to become contractually bound without realising it?
- should the requirement of consideration be scrapped?
- how can it be evaded?

Summary Notes:

See A(3) in Topic 1, above.

TOPIC 5

Contracts – terms

- (a) principles of construction G Chaps 11, 12
- (b) determining the scope of the contract
 - (representations v terms)
 - (incorporation of terms)
 - (implied terms)
 - (collateral contracts)
 - (uncertain terms)

For Discussion

1. Is it possible to become bound by certain contractual terms, without having any such intent, or even realising it?
2. C visits D's paint factory for information about the qualities of various paints. D tells him that "Superbo" will last ten years. However when C applies "Superbo" it peels off after 3 years. Discuss where:
 - C buys the paint from D;
 - C buys the paint from the local shop. Would it make a difference if C also bought in reliance upon D's television advertising that "Superbo", freely available at all of the better shops, will last ten years?

SUMMARY NOTES

TERMS OF THE CONTRACT

See G Chs 11-13. This material deals with the principles governing identification of the content of the contract.

(a) TERMS OF THE CONTRACT - PRINCIPLES OF CONSTRUCTION

A contract may be written, or oral, or a mix of written and oral terms. (As noted below, it may also have implied terms.)

G Ch 11 deals with the principles governing the interpretation of (in the main, written) contracts. Skim this material. Note in particular the parol evidence rule (G 11.7). This rule says that where the parties (on an objective view) intended that the contract be wholly in writing, the court should not look beyond this writing (in one document or a series of linked documents) in determining its meaning. Needless to say, there are some important exceptions to this rule:

- issue of whether a contract is in existence
- abandonment, abrogation, suspension or variation
- commercial object or genesis (“factual matrix”)
- whether contract is mixed oral and written
- ambiguity - identification of subject matter
- technical meaning of words
- sham agreement to establish real or true consideration

Where these issues arise, the court will normally look beyond the four corners of the document.

(b) TERMS OF THE CONTRACT - DETERMINING ITS SCOPE

See G Ch 12. This material deals with the courts’ development of the principles which are resorted to in determining the true scope of the contract. Exceptionally, these functions make the contract broader or more detailed than was intended by the parties (even on an objective view).

Distinguishing representations and terms.

A party, prior to formation, may make a representation. It may or may not become embodied in the concluded agreement as a term. Note the tests for determining this issue (ultimately, the issue is one of their objective, joint intention).

Incorporation of terms by signing, display, etc.

The case law recognises that even as a party may not really have intended it, terms (which are usually adverse to him or her) can be deemed to have been incorporated into the contract, because the term/s were displayed to him/her prior to formation, and he or she engaged in conduct which objectively, amounted to an assent to their being incorporated. Classic instances include - where a party signs a contractual document with or without reading it; or enters into a contract after having the proposed terms displayed to him/her by fine print on the back of a ticket or other contractual document, or on a sign, etc. Terms can also be incorporated by reference to past dealings between the same parties.

A classic instance is where a parking station has a sign at the gate, containing proposed terms which exclude the proprietor's liability for damage to or loss of the vehicle to be parked within. If the motorist nonetheless enters he/she will normally be deemed to have contracted on the basis that the terms are incorporated in it are part of the contract.

TWO KEY IDEAS ARE:

- The material must have been brought to the attention of the party concerned, PRIOR to formation of the- contract. (It is too late to bring it to their attention post-formation - the other party cannot unilaterally insert a term in a contract after it is made.)
- The party seeking the benefit of the clause must have brought it to be actual or constructive notice of the party to be burdened with it. By "constructive" is meant that the latter did not read it, but had a reasonable opportunity to.

ONCE A TERM IS DEEMED THEREBY TO BE INCORPORATED, it is a separate issue as to its effect. Usually, these contentious incorporated terms are exclusion clauses, seeking to minimise the liability of the beneficiary party. The courts dislike these clauses, and endeavour to read them down. (This issue will be returned to below).

- Implied terms See G 12.4

The courts recognise that parties cannot always think of every possible contingency, when they are making their contract. Accordingly, the courts will imply into the contract, additional terms, where it is sensible to do so. They do not do this willy nilly, however, settled legal principles govern this process.

- giving effect to the presumed intention of the parties
 - business efficacy, etc
- Note that where a term is sought to be implied under the business efficacy doctrine, it must be both reasonable and necessary.
- implying terms from customs and usage
 - implication from prior course of dealing
 - legal duty as a basis for implication
- NOTE ALSO that statute law may imply terms into contracts (see the Sale of Goods Act, and the Trade Practices Act, below).

- Collateral contracts (G12.5 - non-examinable)
- Uncertain terms (G12.6)

READINGS: *Macdonald v C E Heath Underwriting & Insurance (Australia) Limited* (1997) NSWSCCA (Volume II, 46)

TOPIC 6

Contract - terms - issues of meaning and effect G Chap 13
(exclusion clauses)
(conditions and warranties)

For Discussion:

Can exclusion clauses be justified, in some commercial contexts, as being reasonable from the standpoint of both parties?

X left his dinner suit with Y Pty. Ltd. for cleaning. Y's employee gave X a docket with the following clauses on the back: "All care taken but no liability for any loss or damage howsoever caused". The suit is returned in shreds. Advise X where (ignore the Trade Practices Act, 1974, s.74):

- (i) X was requested to sign the docket. He asked Y's employee why and was told that it was to protect Y in case the dye ran from the lapel. He signed. The document has a further clause to the effect that none of the printed terms can be varied by any of T's employees;
- (ii) X read the docket and threw it away;
- (iii) X did not read the docket, but he had frequently left clothes with Y;

What if (a) X had frequently dealt with Y but this time forgot to give X any docket; (b) Y had installed a new 24 hour system, X dropped his clothes through a chute and a machine issued X with a docket containing the exclusion clause?

READING: *Apple Communications v Optus Mobile* [2001] NSWSC 635 (Volume II, 50)

Goodman v Cospak [2004] NSWSC 704 (Volume II, 58 esp paras 34-66)

SUMMARY NOTES

TERMS OF THE CONTRACT - ISSUES OF MEANING AND EFFECT

G Ch 13. The meaning and effect of certain types of terms are considered.

- Exclusion clauses
 - is the alleged exclusion clause (one which seeks to minimise a party's liability for breach of contract) really part of the contract? Typically, this involves a consideration of the incorporation principles noted above.
 - if so, consider its effect. The courts dislike these clauses, and try to read them down, adopting the strict constructionist (contra preferens rule) approach.
 - there is no doctrine of fundamental breach (G13.1.3)
 - however, the Council of City of Sydney v West (13.1.3) analysis may help. This says in essence that an exclusion clause is only as wide as the contract itself - it cannot protect a party against a conduct which is outside the scope of the contract or its purported (if sometimes incompetent) performance. If this conduct is in the latter category, then it cannot ground an action for breach of

contract, but it may ground an action based on another legal doctrine, such as bailment, or tort.

READING: *Goodman v Cospak* [2004] NSWSC 704 (Volume II, 58 esp paras 79-90)

- Conditions and warranties G 13.2)

The common law classifies all terms into conditions and warranties.

Condition - a term going to the core of the contract.

Warranty - a collateral term, not going to core

Where a party breaches a condition, the other party can both (a) rescind the contract (ie walk away from it, if this makes commercial sense) and/or seek damages.

Warranty - cannot rescind for breach - but can seek damages

There is also the theoretical class known as innominate terms. These are by their nature of a broad ambit - their breach may encompass central and collateral breaches. If breach of such a term goes to the core of the contract, its effects are as for a breach of condition; otherwise, the breach has the same effect, as does a breach of warranty.

TOPIC 7

Contracts - vitiating elements G Chaps 14,15

- review of the role of mistake and misrepresentation in relation to formation of contracts.

For Discussion

Vitiating elements in the contract

Consider the following cases:

- (i) X purchases from Y, a picture dealer, at the price of \$2,000 a portrait which X believes to be a genuine "Old Master". Y is unaware of X's belief. On further examination X discovers that the portrait is a modern copy by an unknown artist and he claims a refund of the price from Y.
- (ii) The facts are the same as in (i) with this difference, that Y knows that X believes he is buying a genuine "Old Master" and Y takes no steps to correct X's mistake.

Q1: Are there any circumstances in which a mistake or misrepresentation as to a matter of significance, should not permit the plaintiff to rescind the contract?

Q2: Should a party normally be able to rely on the caveat emptor maxim in a case where he/she knows things adverse to the other party, but declines to disclose them?

SUMMARY NOTES

CONTRACTS - VITIATING ELEMENTS

OVERVIEW

See G Chs 14-17. There is a lot of material here, and you will be expected to have a mastery of the basic principles only. What follows is a guide to the level of knowledge required.

The vitiating factors fall under several groups - mistake; misrepresentation; illegality, inequality between the parties.

A relevant vitiating factor operates to render a contract voidable or void. Most contracts are rendered voidable. Exceptionally, in the case of illegality, a contract may be so tainted with illegality that it is void.

If a contract is VOIDABLE, this means that the aggrieved party has the option of rescinding (ie cancelling) it. If he or she is in a position to rescind it, then it is said to be void ab initio, ie it is void back to the moment of formation. It is as if (in the legal sense) it never existed. (Contrast this case with the rescinding of a contract for breach of condition - here there is no retrospective voiding - the contract is void only from that moment on, ie prospectively.)

But when will the aggrieved party be permitted to void the contract (assuming legal ground is made out)? This will be permitted only where restitution (so-called restitutio in integrum) is possible. By this is meant that the facts must be such that the parties can be restored to their pre-contractual positions, more or less. (The common law tends to require precise restitution, while equity is content with substantial restitution.) To illustrate, if A procures B to buy a painting by fraud, restitution is possible - the painting can be handed back, and the money returned. This would not be possible if the contract involved building a boat, and the contract was sought to be voided when the boat was half built.

There are other bars on rescission too - in particular, if the contract involved property, and an innocent third party has bought the property from a party, in good faith without notice of the problem, and for value, then rescission normally would not be allowed, because if the contract is retrospectively undone, the third party will lose title. See G 15.3.2 (other bars include that the claimant may have acted unconscientiously in relation to the subject matter of the contract, such as letting it deteriorate to some extent, or the claimant may have been guilty of unfair delay in seeking rescission; or the claimant may after learning of the vitiating factor, have affirmed the contract prior to rescinding it).

The gist of the rescission-for-vitiating factor doctrine is, that where it is fair and practicable to do so, the law will undo the contract and restore the parties to their pre-contractual positions.

Throughout a review of these factors, it will be noted that on some occasions, the common law and equity will each analyse things differently, and potentially decree a different outcome. The claimant can pursue the remedy which is most advantageous, be it legal or equitable.

Voiding the contract ab initio is one option at law. If this is not commercially practicable or legally possible, then other remedies may be available.

For example, the facts may disclose that the aggrieved party can sue for breach of contract (seeking damages, or perhaps, rescission for breach of condition, or both); or another legal remedy may be sought, such as an action in tort, on account of a negligent or fraudulent precontractual misrepresentation.

MISTAKE G Ch 14

The contract may have been entered into in circumstances where one or both parties were labouring under a mistake. This mistake must have been operative at the time of formation, and not post-formation only.

One common textbook analysis refers to common, mutual and unilateral mistakes. It is suggested that the legally significant division of mistakes is by reference to their effects: (a) at common law; (b) in equity.

Law: The law is reluctant to intervene in the case of a mistake. If on an objective view the contract is fully formed, and the parties are in agreement on its terms, then a subjective mistake on the part of one party will not suffice to attract the common law's intervention. On the other hand, if on an objective view there is confusion as to some essential element of the contract, owing to a mistake on the part of a party or parties, then the law may decide that there is no agreement in the first place. At common law, that is, the contract will be void, and not simply voidable. The outcome may be drastic. Cases have dealt with such areas as:

- Fundamental mistakes as to subject matter. The law has tended to disregard these, unless the mistake prevents formation.
- Mistake as to identity of party.
- If the contract is complete on an objective view, a mistake by a party as the identity of the other party does not make the contract void or voidable.

In conclusion - the trend of modern authority is that if a mistake does not prevent formation, and the contract is clear and complete in its terms on an objective view, the common law will not render it voidable.

Equity: the approach is different, and more helpful to an aggrieved party. Equity will treat a contract as being voidable, and set contracts aside on the basis of a common or

unilateral mistake, where the mistake is fundamental; it would be unconscionable to allow the contract to stand; restitution is possible; and (in particular) the rights of an innocent third party who has acted on the faith of the contract, would not be compromised. In practice cases of mutual mistake do not arise - in such a case it would be difficult to discern an agreement in the first place.

Note also the doctrine of RECTIFICATION (G 14.6). This doctrine allows the court to step in and order the correction of a written document embodying a contract, where through error it does not truly reflect an agreement in clear terms genuinely arrived at through negotiation (most obviously, oral negotiation).

MISREPRESENTATION G Ch 15

A person may enter into a contract after a pre-contractual false representation by the other party. The misrepresentation may be innocent or fraudulent; and it may or may not become embodied in the contract as a term. If it becomes a term, the aggrieved party can sue for breach of contract.

If it does not become a term, then what are called the “misrepresentation remedies” may be resorted to.

As a general rule, each of these remedies depends upon the misrepresentation being a legally relevant one, with the following hallmarks:

Legally relevant misrepresentation:

- is a false statement of existing fact (this concept includes a statement as to one’s state of mind - it can therefore include a representation as to intention, or belief).
- mere silence is not a misrepresentation. However, there may be a duty to speak up and tell the truth, as where the maker has been responsible for half-truth or, has made a statement which was true but is no longer because of changed circumstances.
- misrepresentation must induce, in whole or in part, the contract.
- objective test - on an objective view the misrepresentation must be capable of affecting the mind of an ordinary person.
- knowledge of the truth, prior to formation, on the part of the plaintiff, will defeat the claim based upon misrepresentation.
- the misrepresenter, on some authority, must act with the purpose that his/her misrepresentation be acted upon.
- affirmation of the contract by a party after learning of the truth will defeat a claim.

Effect of misrepresentation

Law: If the misrepresentation is innocent, the law does not grant a specific contractual remedy.

If it is fraudulent, the common law permits rescission, provided precise restitution is possible.

The common law will also give relief in tort. If the misrepresentation is innocent but careless, the common law will give damages pursuant to the tort of negligence where economic loss results.

If the misrepresentation is fraudulent, and economic loss results, the common law tort of deceit can be used to ground an action, with damages being obtained.

Equity: an innocent or fraudulent misrepresentation will render a contract voidable in equity at the option of the aggrieved party. The contract can as noted only be rescinded where restitution is possible - but unlike the law, equity is content with substantial (as opposed to precise) restitution.

Statute Law: as it will be seen in the coverage of consumer law later in the course (see G Ch 33) statute law may well give a remedy for misrepresentation in (inter alia) the precontractual context. The Trade Practices Act, s.52 for example, allows a person to sue where they can establish economic loss, as a result of conduct by a company in trade or commerce, which is misleading or deceptive or which tends to mislead or deceive. A comparable provision under the State Fair Trading Acts makes the trader (corporate or non-corporate) liable in the same circumstances. These provisions are not confined to the contractual context.

TOPIC 8

Contracts - vitiating elements (continued) G Chaps 16,17

- • illegality
- • inequality between the parties

This area of contract law represents the heaviest encroachment upon the laissez-faire/freedom of contract philosophy.

For Discussion

Is the restraint of trade doctrine really fair as between the competing commercial interests? Should the public interest be considered, or should it suffice that the agreement containing a restrictive covenant is fair as between the parties?

Jack, an elderly farmer, gives to Andrew, a much younger man, lease of the farm for a period of five years. Jack goes to live with his daughter in town.

After a few months, Andrew becomes very friendly with Jack, whose grasp of business affairs is declining with age, and Andrew becomes a de facto business adviser. Andrew tells Jack that money needs to be spent on a number of things associated with the farm, and Jack, who has considerable accumulated savings, agrees and signs the cheques. Some \$50,000 is thereby expended, and the increase in the value of the farm is commensurate. Two years later, the farm is worth \$800,000. At this point Andrew tells Jack he would like to buy the farm, and Andrew presents Jack, with an option agreement, giving to Jack the option of buying the farm at any time in the next three years for \$800,000. Although rural property prices have just commenced to rise vigorously, after a flat period of six years, Jack readily signs. He does not take any advice, not even telling his daughter of the matter. Jack deteriorates rapidly over the next year. Two years later Andrew purports to exercise the option. Jack's daughter is alarmed - she has received independent advice that the farm is by now worth \$1.6 million. Advise Jack and his daughter.

SUMMARY NOTES

ILLEGALITY G Ch 16

An element of illegality may impact upon the validity or enforceability of a contract. There are many categories of illegality. In an extreme case, a contract will be made void. Less drastically, a term in it may be rendered void and thus unenforceable. In more marginal cases, it will be necessary to ask - was the element of illegality central or collateral to the contract. The more marginal it is, the less likely it is to void the contract.

Illegality at Common Law

Some contracts are wholly void at common law, or at least prima facie void.

- contracts for unlawful act - prima facie these are void
- contracts for acts prejudicial to the administration of justice
- contracts in corruption of public life
- contracts for sexual immorality (this category is for practical purposes, defunct)
- contracts to defraud the public revenue

Some contracts are not wholly void, but have a term which is void for illegality. If this term can be "severed", ie disregarded without impairing the overall operation of the contract, then the contract can otherwise be enforced.

Restraint of trade doctrine and contractual terms in restraint of trade.

The restraint of trade doctrine exists at common law. It strikes down as unlawful conduct which is in restraint of trade, including contractual terms having this complexion.

Prima facie conduct and contractual terms in restraint of trade are void. "Trade" is a broad term, and includes working as an employee.

The onus of proof is on the person who asserts the legality of a restraint, to establish that it is unlawful. Two tests are applied (tests laid down in the leading case of Nordenfelt; G 16.2.4).

Ask: Is the restraint

- reasonable as between the parties; and
- reasonable by reference to the public interest, or (in more modern form) not adverse to the public interest.

Subsidiary factors to be considered in applying these tests include:

- restraint must afford no more than adequate protection
- duration of restraint
- unequal bargaining power between the parties
- master-servant relations (the courts take a dim view of restraints placed on employees by their contract of employment, for example, restrictive covenants governing the taking of a job with a rival employee)
- the public interest test is subordinate to the main test, ie was the restraint reasonable as between the parties?

Restraint of trade clauses in contracts - which are usually terms restrictive covenants - are commonly a clause in a contract of employment, limiting the employee's rights to take another job; and a restrictive covenant in contracts for the sale of a business which restrains the vendor from starting up a rival business or from working in one (the latter clause is more readily proven to be lawful). Much will hinge on how reasonable the restraints are by reference to their parameters of time and geography.

Note that the clause can be severed where unlawful or watered down to preserve its legality, by reference to the Restraint of Trade Act 1976 (NSW) (G 16.4.2).

- contracts to oust the jurisdiction of the courts
- contracts in prejudice of marriage

Illegality under Statute Law

Statutory provision may expressly or by implication render a contract void in whole or in part. The main issue is - would it stultify the law, for the law is to be used to enforce an agreement which breaches the law? The more collateral the illegality, the lesser the problem. See G 16.3.A wholly void contract will not be recognised or enforced by the courts. If partially void, the courts may give it some effect, for example, recognise all the contract except for one offending term, which is to be severed, if this can be done without destroying the integrity of the contract. It may be that the law operates to make the contract void for certain purposes only, such as enforceable by one party but not the other. An instance of less radical illegality, would be a contract which is required to be in writing, and signed by a party or parties, but which is not. Depending on the legislation, it may be able to be enforced by one party (where the writing was for the benefit of this party). Even the disadvantaged party in such a case, while not being permitted to enforce the contract, may be able to pursue some other remedy.

Recovery of money or other property handed over pursuant to an illegal contract. (G 16.5).

Recovery by an aggrieved party may be possible:

- where parties are not in *pari delicto* (ie not equally involved in the illegality).
- repentance by a party where the contract is wholly or largely unexecuted.
- independent actions. An action independently of contract may be able to be brought (the contractual action cannot be, if the court won't recognise the contract because of illegality). These include an action in debt or an action in quasi-contract (such as an action on the quantum meruit, which permits recovery of a reasonable price for goods supplied or services rendered, in a case where there was a reasonable expectation on both sides that payment would be made - see G Ch.23)

INEQUALITY BETWEEN THE PARTIES G Ch 17

This is the final category of vitiating factors to be considered. Under this head there are several distinct doctrines.

Duress G 17.2

Duress is a common law doctrine. It is not confined to contract cases; but where contract is concerned, it can be invoked to void a contract where a party has been induced to enter into a contract by duress, ie threats to the person (of a physical nature - a threat to property will not suffice). The facts must be such that the victim's free will, ie his or her free choice was destroyed.

More modern authority also suggests the existence of a concept, or doctrine of economic duress, pursuant to which a threat to prejudice another's economic interests, made to procure a contract (or another transaction) with the latter, will render this contract unenforceable, provided that the victim's free will was impaired. The threat must relate to unlawful or illegitimate conduct - normal self-interested commercial pressure will not suffice. (The cases are vague on where the line is to be drawn.)

Duress, if established, makes the contract voidable at the option of the victim.

Undue Influence

This doctrine was evolved in equity. Where relevant relationship between two persons is established, with one person being in a position of ascendancy or domination over another, equity will void a contract or other legal arrangement between them pursuant to which the dominant person obtains an advantage, UNLESS it is established by the latter that the weaker party was not in fact subject to undue influence at the time of entering into the arrangement. In a case where the latter cannot prove this, the contract, etc is voidable at the option of the weaker party.

In practice not only must undue influence be shown; but also the arrangement must be shown to be manifestly unfair as well, before equity will intervene to make the contract, etc. voidable.

The key to these cases is to establish at the beginning that a relationship of undue influence exists. There are two ways to do this:

- Show that the relationship is one that equity classifies as a (presumed) relationship of influence, eg solicitor/client; trustee and beneficiary; fiancé and fiancée; religious adviser and advisee; principal and agent. The following are not presumed relationships of undue influence banker/client; financial adviser or accountant and client; husband and wife. These relationships are established by precedent and it can always be argued in court that a new precedent should be established. Because these are presumed relationships, once it is established that one exists, equity assumes undue influence, with the onus then being on the presumed stronger party to prove that there was no undue influence in fact.

NB: The fact that A and B are in a fiduciary relationship, does not per se establish a presumed relationship of influence. A fiduciary relationship, broadly speaking, is one of confidence or trust - in such a case the fiduciary (the person owing the duty) is put under a special duty of disclosure and fair and open dealing with the person to whom the duty is owed, because of the special vulnerability of the latter. Instances of fiduciary duty include trustee/beneficiary; relationships between partners; director and company, principal and agent, employer and employee, solicitor and client. Sometimes a fiduciary relationship may arise between vendor and purchaser (exceptionally) S see Hill v Rose (G 17.3.2).

- Prove that although the relationship is not one of presumed influence, nonetheless it is one of influence - see G 17.3.3. In such a case, a presumption of undue influence then arises.

NB: Even in the absence of a presumed or proven relationship of influence, it may be established by evidence that undue influence in fact exists.

Where influence is established by one means or another, the onus is on the stronger party to prove that the influence was not undue, ie that he or she took no unfair advantage of the situation; and that the weaker party acted in an independent and well-informed way. In a marginal case, it may be wise to arrange for the weaker party to have independent advice, such as from a lawyer.

As mentioned, where undue influence is established, the transaction is normally voidable at the option of the weaker party (G 17.3.6).

Unconscionable dealing - contracting with a person under a disability

Equity will in an appropriate case, render a contract voidable at the option of the plaintiff, where the other party has taken advantage of him or her in an unconscionable way, by reference to the disability under which the plaintiff labours. “Unconscionable” means broadly, unfair or offensive to conscience.

Instances of relevant disabilities include poverty or need of any kind, sickness, age infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where this is necessary.

The doctrine is grounded by a special disability - it does not render contracts voidable on a general ground of unfairness. There is no general principle of unfairness, by reference to which contracts may be voided.

Legislation

Statute law makes relevant provision for contracts involving some element of unfairness or unconscionability. (See G 17.6):

- Trade Practices Act 1974 (Cth) - use of physical force or undue harassment or coercion by a company in trade (s.60 and see s.53A; and note the unconscionability provisions in ss.51ABA, 51AB).
- Contracts Review Act 1970 (NSW) (making provision for unjust contracts)

TOPIC 9

Breach of contract termination of the contract (in general; breach and anticipatory breach); remedies for breach of contract G Chaps 18-20

Contracts miscellaneous aspects - privity; capacity, requirement of writing; quasi-contract - C Chaps 21-23, 24. (NB this material will be reviewed briefly. The main areas of interest are the Minors (Property and Contracts) Act; and the requirement that contracts for the sale of land, etc be in writing. Where quasi-contract is concerned, the main item of interest is the action on the quantum meruit.)

For Discussion

1. What are the kinds of remedies available for contractual breaches and is there any pre-contractual action which a manager should be aware of in order to maximise the amount of any future contractual damages? [Chs. 20,25, Text]
2. Stewart goes to D, a motor vehicle dealer, in mid May. He likes a particular van offered for sale, which costs \$25,000. He explains to D that he cannot take delivery before 8 June, because that is the date when his loan from the credit union, needed to buy the van, will “come through”. The dealer says that is alright - he (Stewart) can take delivery and pay for the van in the week commencing 8 June. Stewart signs an agreement to purchase the van. The agreement says nothing of the date for delivery. He pays a deposit of \$500, which is described in the agreement as a “holding deposit”.

They part company. A few days later D phones Stewart. He explains that he cannot deliver the van on or after 8 June, rather, delivery and payment must take place before 2 June. This is because the wholesale price of the van will

jump on 2 June when the manufacturer's current promotional scheme ends. Would Stewart therefore please come and pay for the van before 2 June? Stewart explains that this is impossible. He will not have the money by then. Stewart further says, "I will have to look elsewhere". The dealer responds irately, "that's your business then".

Stewart goes and puts a deposit on another brand of van at another dealer. He then tells D that he will not be proceeding with the purchase, and would D please return the \$500 deposit. D says to Stewart, "You're bound by our contract. You can take delivery in the week commencing 8 June. I will register the vehicle in your name and have it waiting here on 8 June for you to pick up. If you don't pick it up then, I will lose my profit - and that will be on your head".

SUMMARY NOTES

TERMINATION OF CONTRACT

See G Chs 18, 19, 20

TERMINATION IN GENERAL G Ch18

Termination is a broad term used to describe the case where a contract is no longer "on foot" ie, for practical reasons it has come to an end, even if one or both parties still had obligations to perform. (It is to be distinguished from the case where a contract is voided, by reference to a vitiating factor, as noted in the preceding pages. In these cases, the law or equity treats the contract as never having existed.)

Termination takes place in a variety of situations. Before reviewing them, note some basic terms in this context.

Termination - also called ending the contract, discharging it, cancelling it, etc. The word rescission is also used to denote a type of termination pursuant to which a contract, which has not been performed, or at least fully performed, is cancelled by the act of a party.

Contracts can, as noted in the account of voiding contracts for a vitiating element, be terminated "ab initio", ie retrospectively, with the law or equity deeming the contract never to have existed. This "rescission" is dependent upon restitution in integrum being possible.

There is another type of rescission, ie where a person terminates a contract on the basis of a breach of condition (breach of a condition entitles the aggrieved party to cancel, as well as seek damages). Here the termination is of prospective effect only - it does not undo the contract all the way back to the moment before it was formed. Rights and liabilities in existence up to the point of termination are prima facie still in existence.

Repudiation - refers to the case where a party who has obligations under it, signals that he or she will not complete his or her obligations. "Repudiation" has connotations of wrongful conduct, ie conduct in breach.

Affirmation - refers to conduct whereby an innocent party who is confronted with another's breach of condition, and who has the right to terminate, nonetheless affirms the contract as being still on foot. The innocent party has the choice to rescind or affirm and must (in due course) make a binding election between these two choices. Once they have affirmed, they cannot change their mind (unless presented with a new, ie fresh, breach of condition),

AS NOTED, TERMINATION CAN TAKE PLACE IN VARIOUS CIRCUMSTANCES

Termination by performance

Where a contract is duly performed by both sides, each gets a discharge of liability on it, and the contract ends. Note that there may be terms governing time for performance (in the absence of such a term, performance must be in a reasonable time). Rules govern payment (including the terms). A contract can be performed by another, unless this is against the intent of the agreement.

Partial performance creates problems: see G 18.3.2. The prima facie rule is that a party must perform his or her entire obligations, to be entitled to payment (in cash or kind), but this outcome can be drastic. Case law has evolved a "substantial performance" doctrine which is really just a legal presumption that the contract does not contain an implied term that partial performance should entail that the performer gets no payment at all. Rather, in such a case, the performer should get his or her contractual payment, less damages for incomplete performance. However, it is always open to the parties to make it a condition that payment should be on an all-or-nothing basis. Another analysis which can mitigate the all-or-nothing analysis, is that of severable contracts. This applies to contracts which expressly or by implication, are for the supply of goods or services in instalments, with payment being on a progressive, or pro rata basis. In a case of breach, the supplier can claim payment for each stage (but will be liable in damages for non-completion overall).

Termination by agreement G 18.4

Note that an agreement terminating an agreement, must itself be supported by consideration from both sides (there will be no problem unless one has fully completed his or her obligation. In this case the other will have to promise some fresh element of consideration or embody the agreement to terminate in a deed).

Termination by abandonment

Contracts by way of variation of a contract: see G 18.4.2. This topic is related to termination by agreement. Parties can agree to vary an existing contract - again note the requirement of consideration.

Accord and satisfaction; waiver. These are minor topics - see G 18.4.3.

Termination by a term in the contract G 18.5

A term in a contract, such as a condition precedent or a condition subsequent, may operate to terminate a contract after it is entered into and before it is fully executed. These focus on the occurrence or non-occurrence of an event after formation.

Termination by the doctrine of frustration G 18.6

Once a contract is formed, and before it is fully completed, it may be terminated by the happening of an event which grounds the doctrine of frustration. The contract is said to have been frustrated. A frustrating event is one which:

- (a) happens independently of the will of either party; and
- (b) so changes the circumstances as to make the performance of the contract either impossible or radically different to the expectations of the parties at the time of contracting.

Note examples in the cases. The contract is terminated with prospective effect. The Frustrated Contracts Act 1978 (NSW) regulates the adjustment of the rights and liabilities of the parties at this point. Where one has done more than the other, the Act aims to effect a fair adjustment between them.

Termination of indefinitely continuing agreement G 18.7

Normally, there will be an implied term that such an agreement can be terminated by either party upon the giving of reasonable notice.

Sometimes, the intent (express or implied) will be incompatible with this approach.

Termination by breach G Ch.19

As noted, where a party breaches a condition, the other party has the right to elect to (a) affirm, or (b) rescind the contract. The situation may be analogised to reaching a fork in the road - a decision must be made. See G 19.4. The innocent party does not have to act immediately, but undue delay will destroy this right of election. The acts of termination/affirmation can take a variety of forms - but they must be unequivocal in the meaning they communicate. If the party opts to affirm, they must perform (but can seek damages). If confronted with a fresh breach of condition, they have a new right of election. The business realities of a case must be considered in making the choice. If the

contract is rescinded, it ceases to exist. Both parties are discharged of obligations to perform outstanding duties under the contract, but the innocent party can seek damages as noted (and it may be that the party at fault, can nonetheless cross-claim for damages, where a breach by the innocent party, such as of a warranty, can be established).

Anticipatory breach (also known as repudiation) G 19.3

A party may signal that he or she is unable or unwilling or both, to perform the contract. Even if the time for performance has not yet arisen, the innocent party can treat this as being the equivalent of a present breach - and if (as will often be the case) a breach of condition is entailed, the innocent party can rescind. The law does not require the latter to wait until the time for non-performance.

REMEDIES FOR BREACH OF CONTRACT G Ch.20

Remedies at Common Law

Breach of a warranty, as mentioned, gives a right of rescission to the aggrieved party (see above). Breach of condition or warranty may also ground a right to damages, ie money compensation. Other general law remedies include an order for specific performance of the contract, or an injunction.

Rescission for breach of condition See above

Damages for breach of contract (and for anticipated breach) G 20.1

Damages refers to an order by a court directed to the defendant for the payment of money compensation.

To get damages, a plaintiff must prove all of:

- (1) BREACH OF CONTRACT
- (2) CAUSATION (IN LAW), of a
- (3) RECOGNISED TYPE OF DAMAGE

Then

- (4) THE PRINCIPLES GOVERNING ASSESSMENT OF DAMAGES are to be applied

- Basic principle of damages G 20.1.1

Damages are assessed on the basis that the aggrieved party is to be placed in the same position he or she would have been in had the contract been duly performed, and not breached: see Robinson v. Harman. Thus, lost (net) profits can be claimed.

Causation G 20.1.2

Causation is a legal concept, in contracts (and torts and criminal law). The law does not want a defendant's liability for (in his case) a breach of contract to be totally open-ended, so it seeks to limit this as the level of causation. The alternative might be a simple but-for test, ie the defendant is liable for every loss, no matter how remote in time or circumstance, which would not have happened but for the breach. The law treats this approach as being too dynamic, fearing that commerce would be unworkable. Thus, the law takes the approach that X is liable for only the direct and not the remote consequences of X's breach of contract.

How is the line to be drawn between the direct and remote consequences? The principles are laid down in the famous case of Hadley v Baxendale, which must be studied. In essence the case says that a loss is direct, and thus in law "caused by the breach", where

- (a) it arises naturally from the breach in the usual predictable course, or
- (b) a reasonable person in the defendant's shoes, at the time of contracting, would have foreseen the loss as the probable outcome of the breach. (The greater the knowledge available to the defendant, the more likely he or she could have this foresight, in an individual case.)

The case law since then has stressed that the test of eventuality to be applied to both "branches" of Hadley is "probable", which means "likely" or such as to create a "substantial risk" of occurrence. To boil the law down to its fundamentals then, a loss is a direct result of the breach, where a reasonable person at the time of the formation of the contract, possessing the knowledge available to the defendant, would have been able to predict that this loss was a probable outcome of the breach.

The principles of causation are applied on an objective basis - the parties' subjective thinking about matters is irrelevant.

The defendant's breach need not be the sole cause of the loss nor even the substantial cause - it is enough if it is a significant concurrent cause, and not a merely peripheral one.

The objective reasonable contemplation must identify the kind, or category of loss - it need not comprehend the extent of loss.

Types of loss compensable G 20.1.3

- Financial loss is compensable, such as for loss of profits
- Physical injury, loss of property is compensable
- Physical inconvenience and discomfort has been held to be compensable
- Injured feelings, disappointment, etc are prima facie not recoverable, except where the contract was about the delivery of glad feelings (see Swan v Jarvis Tours, dealing with a packaged holiday).

Assessment of damages G 20.1.4

As mentioned, the basic principle here is that laid down in Robinson v Harman - the damages are to be assessed on the basis that the plaintiff is to be put in the position he or she would have enjoyed, had the contract been duly performed.

Difficulty of assessment is not a bar to damages - the courts will make educated guesses, if need be.

Note the illustrative cases. Note also the approach of the civil law, is that the defendant is to be made to compensate, but if not liable for punishment. The plaintiff accordingly is to get proper compensation, but not enrichment beyond the status he or she would have enjoyed had the contract been performed. So, to illustrate, in a loss of profits situation, prima facie the plaintiff gets compensation for lost net profits.

Other factors impinging on assessment include:

- inflation (broadly, it is factored in)
- mitigation - this is a very important principle. When confronted with a breach of contract, the plaintiff must take reasonable steps to mitigate, ie minimise his or her loss. If he or she does not, damages will be assessed on the basis that he or she did. But only reasonable mitigation is required.
 - agreed damages; penalties (ie, liquidated damages). For convenience the parties can agree in the contract what damages should be payable in the event of a defined breach. These are known as liquidated damages (ie damages are a sum certain) as opposed to unliquidated damages (which are not a sum certain, and have to be calculated by the court). So long as the agreed figures is a reasonable and not extortionate pre-estimate, this clause is valid and enforceable. If it is excessive, it will be struck down as an unlawful “penalty” clause.
- interest - may be payable on damages.
- taxation is factored into assessment
- contributory negligence. This is a statutory doctrine applying in the context of the tort of negligence doctrine. Sometimes, however, a breach of contract is at the same time, an act sufficient to ground this tort. Some cases indicate that the contributory negligence principles, as apt, may be able to be applied to reduce damages in a contracts case.

READINGS: *Garstang v Cedenco* [2002] NSWSC 144 (Volume II, 79)
Goodman v Cospak [2004] NSWSC 704 (Volume II, 58 esp paras 102-110)

EQUITABLE REMEDIES FOR BREACH OF CONTRACT G.20.3

Two equitable remedies in particular, are relevant to breach of contract:

Order for specific performance

A court exercising jurisdiction in equity can make an order for specific performance of a contract, i.e., order the party in breach to perform their outstanding obligations under it. Most such cases concern contracts for the sale of land. Limitations on the order include:

- not available where damages would be an adequate remedy. (This does not preclude the remedy in land sales, because each parcel of realty is unique).
- prima facie not available, when the order would in effect compel an association between persons where this would be obnoxious or unpleasant for one of them.
- not available where its implementation would require detailed, long-term supervision by the court.

Injunctions

These are court orders compelling a person to act in a given way in conformity with the law. Most injunctions are negative; but they can be positive. Note Lumley v Wagner. Injunctive relief can promote performance of a contract.

LIMITATION PROVISIONS G 20.4

Normally, an action for breach of a simple contract must be brought within six years.

MISCELLANEOUS ITEMS

PRIVITY

As noted, to sue or be sued on a contract, a person must be a party to it, ie privy to it. The doctrine of privity is discussed in G Ch 21. Skim this material - just know the basic principles. Note that a person can become privy to a contract through an agent (this topic will be examined later.) Ignore 21.2

REQUIREMENT OF WRITING

The common law does not require that a contract be in writing. Exceptionally statute law does. The main such case in practice concerns contracts for the sale of land: see G Ch.23.5, 23.6.23.7 and 23.8.

Note also the related topic of quasi-contractual remedies, G Ch 25. The main such remedy of note is the action on quantum meruit - G 25.2.1. Otherwise, just skim this material on quasi-contracts.

CAPACITY

On this topic, see G Ch 22.2.3, and note that companies can enter into a contract (22.4, although do not worry about the detail on companies).

QUASI-CONTRACT - See comment at (G2) above.

TOPIC 10

Statutory developments affecting contracts - Sale of Goods Act and corresponding provisions in Trade Practices Act G Chap 24

For Discussion

What variations to ordinary common law contractual principles occur with respect to sale of goods, and what is the legal difference between “goods” and “services”?

James, who was visiting Sydney from Forbes, where he lived, visited the premises of Compact Car Sales Ltd. In conversation, he told the salesman that he wanted to buy an inexpensive, small car. After a test drive, he ordered a new Midget model at a cost of \$15,000. The vehicle was delivered to him a month later. It had several dents in the bodywork and the upholstery was torn. He protested at its condition but accepted delivery as he had to return to Forbes the following day. The performance of the vehicle was at first satisfactory, but after 12 months many problems developed. A friend, who is an experienced mechanic, has told him that although the Midget is suitable for city driving, its construction makes it quite unsuitable for country driving. Moreover, the braking system, which was at first satisfactory, has suddenly started to deteriorate. The cause of this deterioration is unknown but the friend considers that it is not related to the condition of the roads on which it has been driven. James's friend considers it is unlikely that the defects can be satisfactorily repaired. Compact Car Sales Ltd. states that the 12-month warranty given by Midget Ltd., the manufacturer of the vehicle, has expired and states that it does not consider that it is under any liability to James. Advise James.

READING: *Goodman v Cospak* [2004] NSWSC 704 (Volume II, esp parras 100-101)

SALE OF GOODS G Ch.24

The common law evolved a number of specialised principles dealing with the contract to sell goods (ie chattels). These principles were codified in the Sale of Goods Acts, which are very similar from State to State. The present situation is - the common law governs sale of goods, except to the extent that the specialised statutory principles in the Sale of Goods Act (NSW) (etc) override these. Also, note that other legislation may impinge in this area, such as the Trade Practices Act and other consumer law.

A number of topics are relevant:

- Goods - defining them G24.2

Goods are essentially chattels. The details do not matter for present purposes. Note that where a contract is for a mix of goods and services (eg dental work; a portrait painting) the contract is one for goods where the dominant element in the contract, by value, is goods and not services.

- Formalities of contracting

By dint of recent changes, there are no formalities required for a contract for the sale of goods.

- Classifying goods G 24.4

Certain categories of goods are defined for the purposes of the SGA. Note existing and future goods; specific unascertained and ascertained goods.

- Terms of contract - implied terms G 24.5

The SGA and the Trade Practices Act imply terms into contracts for the sale of goods, in specified circumstances.

Sale of Goods Act - Implied terms G 24.5.1

The implied terms are of the status either of condition or warranty. If they are a condition, breach entitles the buyer to rescind the contract. Note an important limitation, however rescission is not permitted where the buyer has accepted the goods [SGA s.16(3)] (unless there is an express or implied term to the contrary). This rule applies where the contract is not severable (ie, in substance, is not an instalment contract). Goods are accepted when the buyer intimates acceptance to the seller; or where the goods have been delivered, and the buyer does any act in relation to them which is inconsistent with the ownership of the seller; or when after the lapse of a considerable period of time the buyer retains the goods without intimating to the seller that he/she has rejected them (s.38). See also G 24.8.7. The buyer is not deemed to have accepted the goods until he/she has had a reasonable opportunity to examine them to see if they conform with the contract (SGA s.37). However, if an act of acceptance is performed under s.38, without examining the goods, then s.37 has no further effect. Thus an examination after acceptance, will not undo the fact or legal effect of acceptance. Hence, the buyer cannot rescind for breach of condition.

The implied terms (under the SGA):

(s.17) implied undertakings as to title

- implied condition on part of seller that seller has right to sell goods, etc.
- implied warranty that buyer shall have an enjoy quite possession
- implied warranty that goods shall be free from any charge etc. in favour of third party not declared, etc.

(s.18) implied condition in a contract for sale by description that the goods shall correspond with the description; and if the sale is by sample and description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description

(s.19) implied terms as to fitness for purpose and merchantable quality.

i.e., subject to any provision of the SGA or other statute, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

- (i) where buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relied on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's description to supply there is an implied condition that the goods shall be reasonably fit for any such purpose. (But where a specified article is bought under its patent or other trade name, there is no implied condition as to fitness for purpose.)
- (ii) where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality - PROVIDED that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.
- (iii) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade (ie industry norms).
- (iv) an express warranty or condition does not negative a warranty or condition implied by the SGA unless inconsistent with this.

NB: merchantable quality is defined non-exhaustively in S.64(3) - in essence the goods must meet the description under which they are sold and if they do and are fit for any normal use to which the described goods are put, they are merchantable.

Section 64(3) says: "Without limiting the expression "merchantable quality", goods of any kind which are the subject of a consumer sale are not of merchantable quality if they are not fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them by the seller and to all other circumstances".

See also SGA s.62 (below).

(s.20) Sale by sample

- implied condition that bulk shall correspond to sample
- implied condition that buyer shall have a reasonable opportunity of comparing bulk with sample.
- implied condition that goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the samples.

Exclusion of implied terms

The SGA (NSW) provides that the terms implied by ss.18-20 (s.19(4) excepted) cannot be excluded by agreement between the parties to a consumer sale [s.64(1)]. Note the description of "merchantable quality" for the purpose of a consumer sale - s.62. In essence goods are not of merchantable quality where they are not fit for the purpose for which goods of the kind are commonly bought as it is reasonable to

expect having regard to their price, to any description applied by them to the seller and all other circumstances (the definition is not an exhaustive one).

Terms implied into consumer contracts for the sale of goods by the Trade Practices Act 1974 (Cth) G24.5.3

The TPA also implies terms into contracts for the sale of goods by a corporation where the buyer is a “consumer” (on “consumer” in this context, see G Ch 33.2.2). These terms cannot be excluded by a provision in the contract (TPA s.68).

Terms implied tend to parallel those in the SGA, but not precisely. See TPA ss.69-72, in particular, which include provision for an implied condition, and warranties, concerning title; implied condition that goods will (where sale is by description) comply with the description; implied condition as to merchantable quality (where defect not drawn to buyer’s attention; or where consumer examines goods before contracting and such examination ought to have revealed defect); and implied conditions regarding sale by sample.

The right to rescind for breach of condition is subject to certain limitations, as where the consumer fails to take reasonable steps to prevent the goods from becoming unmerchantable, or if the goods are not returned in a reasonable time. The mere fact that property vests in the consumer is not a bar to rescission.

Remedies under the TPA are examined in G Ch 33, and include damages, rescission, remoulding of the contract, or such other order as the court thinks fit (see 33.2.8)

Other remedies under the TPA (or State Fair Trading Act) may be available under the consumer provisions G Ch 33.

Transfer of property in goods G 24.6

The SGA lays down prima facie rules governing when property passes to the seller. ss.21ff.

Title in ascertained goods cannot pass unless and until the goods are ascertained. Otherwise, title passes when the parties intend to it. The SGA lays down rules of prima facie effect. For example, where the contract is for the sale of specific goods in a deliverable state, title passes when the contract is made even as the time for payment or delivery may be postponed.

Given that these rules are prima facie only, the opposite may be provable by reference to particular circumstances, ie in a particular case a party may be able to prove that the objective intent of the parties was otherwise.

Where the contract is for unascertained goods, or future goods by description, property passes when goods of that description and in a deliverable state are appropriated to the contract by one party with the assent of the other. This assent can be express or implied, and be given before or after appropriation.

When the seller does not have title G 24.7

- nemo date rule: a person transferring title (ie ownership) of property cannot give better title than he/she possesses [s.26(1)]
- exceptions to nemo date
- estoppel: where through his or her conduct the true owner is estoppel from denying the seller's authority to sell (ie estopped)
- agency: ie seller appoints an agent, giving him or her an express/implied authority to pass title; (ostensible authority can likewise operate to create agency.) (On agency, see below)
- mercantile agents (factors)

Performance of contract G 24.8

Note this material, but main principles only. Do not go into detail.

Remedies for breach of contract for sale of goods G 24.9

Do not go into detail. Note that the general contracts remedies are available, including rescission for breach of condition, and damages for breach of condition/warranty.

Also, the SGA creates some specific remedies, such as rights of unpaid seller against the goods

- unpaid seller's lien
- stoppage in transit
- resale by seller

Note the general principles only.

TOPIC 11

Statutory developments affecting contracts (continued) - consumer provisions in Trade Practices Act and Fair Trading Act G Chap 33

For Discussion

- Is s.52 in the TPA too sweeping in its terms and too dynamic and unpredictable in its operation?
 - Are the unconscionability provisions in the TPA likewise too sweeping and uncertain?
 - Do any of these claims involve a possible infringement of s.52 and/or s.53 of the Trade Practices Act 1974 (Cth)? Consider each claim separately.
- (a) "Antarctic Ice available here" - (in fact the origin of the ice is unlikely to be Antarctica).
 - (b) A billboard prominently positioned in front of a service station reads "45c". Less prominently displayed is a second billboard reading, "Super 65c".
 - (c) "X Insurance Company looks after your claim".

- (d) “Two out of three dentists who replied to a survey indicated they recommended Brand X as a leading fighter against tooth decay”.
- (e) Claims - later found to be inaccurate - that in relation to the leasing of shops in a shopping mall :-
 - (i) Shops A and B are the only shops in the Macquarie Centre specially designed for use as a bakery and cake shop in a manner which complied with all health and building requirements, and
 - (ii) Shops X and Y have already been leased to McDonald’s
- (f) Claims - later found to be inaccurate - regarding the purchase off-plan of a home unit that
 - (i) the unit would have a view clearing the adjacent building, and
 - (ii) no shelf would join the balconies of the units in the building.
- (g) In relation to the plan in (f) above, the architect omitted to provide for a linen press in one of the units - are there any legal consequences under s.52 or s.53?

READINGS: *Hosmer Holdings Pty Ltd v CAJ Investments Pty Ltd (1995) 57 FCR 45 (Volume II, 86)*

SUMMARY NOTES

CONSUMER PROTECTION G Ch 33

Consumer law supplements the judge-made law and the older statutory law (such as the Sale of Goods Act) and gives additional remedies to consumers, ie people buying goods or services for personal or domestic consumption. (In the Trade Practices Act - the “TPA” - the definition of consumer is wider than this). The general law is not always adequate - for example, contracts require privity, for the plaintiff to be able to sue. Tort law requires proof of a fault element like negligence. Minor disputed between traders and consumers can be heard by tribunals with simplified and inexpensive procedure, such as the Small Claims Tribunal.

The Sale of Goods Act (above) is a traditional source of remedies. Of course, it applies only to contracts to sell goods (it does not touch contracts for services).

A major new source of consumer type remedies is Part V of the Trade Practices Act 1974 (Cth), the consumer provisions in which are largely replicated in the Fair Trading Act (NSW) (the “FTA”). The other States have a Fair Trading Act also, in similar terms, as do the territories).

TRADE PRACTICES ACT

For constitutional reasons, the TPA only applies to corporations (ie companies) engaged in trade or commerce. If an unincorporated business (such as a sole trader or partnership) supplies a person, the TPA does not apply. However, resort in the latter case can be made to the parallel remedies under the State Fair Trading Act which applies to corporate and non-corporate businesses.

Key concepts in the TPA

- corporation G 33.2
- consumer G 33.2.2. A person is a :
- consumer of goods for purposes of TPA if (i) goods are not more than \$40,000; or if they are (ii) they are of a kind ordinarily acquired for personal, domestic or household use or consumption, etc AND IN EITHER CASE [(i) or (ii)], they were not acquired for purposes of resupply etc. in trade or commerce, etc.
- consumer of services where (i) price of services does not exceed \$40,000; or if they do (ii) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

NB not all of the TPA Part V provisions are contingent upon the plaintiff having acquired goods/services as a consumer.

- prima facie liability is strict, ie under the TPA, as a general proposition, a fault element such as intent to harm, recklessness or negligence does not have to be proven by the plaintiff. G 33.2.6

The key provisions will now be noted:

SECTION 52 - MISLEADING OR DECEPTIVE CONDUCT IN TRADE OR COMMERCE (33.2.3)

This is the primary remedy in the TPA, and has attracted the most litigation. It is very versatile. It is used not only by people who acquire goods and services under a contract, but in many other cases, such as where one competing business sues another. Section 52(1) provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. This is the primary provision in s.52 - and when reference is made to “s.52”, in most cases it is this provision in subs(1) which is being referred to.

The provision is in essence a statutory tort. (The torts, ie civil wrongs, are of common law creation, and include trespass against the person, goods or land; negligence, defamation; and public and private nuisance).

Some aspects of s.52 are:

- liability is strict, ie intent, recklessness and negligence need not be proved by the plaintiff.
- “corporations - in trade or commerce”. In most cases the defendant is a company engaged in a trading enterprise. It is covered by this definition. Some trading corporations in the public sector are also caught.
- The concept of “trade” or “commerce” is vital - the conduct must have been by a corporation in trade or commerce. Thus, a one-off sale by an owner of property other than in a business context (such as a private house) will not qualify, even as the owner may be a company. But sale of its factory by a company will be in trade or commerce.

- “engage in conduct that is misleading or deceptive or is likely to mislead or deceive” - the target group. The conduct must either mislead or deceive, or be likely to, ie create a real risk of this (ie, proof that someone has actually been misled is not required). However, unless loss can be proven, the plaintiff cannot get damages under the TPA. Proof of conduct which is likely to mislead, etc. may ground another remedy, such as an injunction.

As mentioned, liability is strict.

In deciding whether conduct misleads, etc or is likely to, the target group it is directed at must be identified. It may be, for example, that the conduct is aimed at deceiving consumers at large, or it may be directed only at a smaller and more sophisticated group, such as buyers for a department store chain. In deciding whether it has this potential, ask (1) what is the target group, on an objective view, and (2) could the conduct have had reasonable potential (at least) to mislead or deceive the average member of this group (some formulations are less favourable to the defendant, and refer to it as being sufficient if the conduct has the potential to mislead or deceive any of the members of the group other than the exceptionally stupid ones).

An opinion can infringe s.52, if it purports to be based on objective data, and is not reasonably so based. An obviously subjective opinion, or a mere “puff” (an extravagant statement) may not be reasonably capable of misleading, for the purpose of s.52.

- silence - can infringe s.52 - ask whether in the total context of the facts, a failure to disclose did mislead or have this potential. In an arms’ length transaction, the courts would be unlikely to so hold, on the basis that reasonable people would have known that they had to be vigilant, and make their own enquiries.
- causation - if substantive relief, most obviously damages, is sought for a s.52 breach, it must be shown that the conduct caused the loss complained of. As in the case of contracts and torts, a loss which is not an objective view reasonably foreseeable, will be treated as being too remote in law for there to be causation. (The principles are a little more complex - see 33.2.3.6).
- consumer - the conduct need not be targeted as a person in his or her capacity as a consumer, ie non-consumers can sue under s.52, etc.
- liability for s.52 (and other breaches of the TPA) can be imposed on individuals where they are knowingly involved in breaches by a company of s.52 (etc), ie where they instigate, encourage or assist such breaches.
- remedies - these are provided for in Part VI of the TPA, and include damages, injunctions, rescission of contract or reconstruction of a contract, pecuniary penalties (a quasi-fine, ie money has to be paid to the government, but the action is a civil not a criminal one), etc. The court also has a broad power to make such other orders as it thinks to be appropriate, to compensate loss or damage. Prosecutions can be instigated for breaches of most of the consumer provision in

Part V of the TPA (but not for s.52, which is regarded as being too sweeping in scope to properly be made the basis of a crime, as well as a statutory tort).

- Where damages are concerned, the basic principle is that a plaintiff is to be put in the position he or she would have enjoyed had the s.52 breach not occurred.

OTHER UNFAIR PRACTICES UNDER THE TPA PART V (G33.2.4)

- unconscionable conduct (G33.2.4.1)
These provisions include s.51AA(1) which provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories. This is a broad provision. “Unconscionable” in this context means broadly, conduct which is so contrary to conscience as to demand the intervention of the courts.
- false representations - s.53 (G33.2.4.1)

Other provisions of note include:

- cash price to be stated in certain circumstances - s.53C
- misleading conduct in relation to services - s.55A
- bait advertising - s.56
- unsolicited credit cards - s.63A
- assertion of right to payment for unsolicited goods or services or for making entry in directory - s.64
- liability of recipient of unsolicited goods - s.65
- Product Safety Information - see G 33.2.5
- Conditions and warranties in consumer transactions G 33.2.6

Goods: As seen in the account of the Sale of Goods Act above, the TPA contains provisions which imply conditions and warranties into contracts for the sale of goods. These are similar to the SGA implied terms.

Services: Note s.74. Section 74(1) provides that in every contract for the supply by a corporation of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any services supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. Note also s.74(2) - (a fitness for purpose warranty is implied into contracts for the supply of services by a corporation, whereby the consumer makes known expressly or impliedly the purpose for which they are required, etc. The warranty is not implied into contracts for the supply of professional services by an architect or engineer). By subs (3) the provision does not apply to contracts for the transport or storage of goods for a business, insurance contracts, etc.

These terms cannot be excluded in a contract - see s.68 (but note the qualifying provisions in s.68A).

- Actions against manufacturers and importers of goods G33.2.7

Under these provisions consumers have certain statutory rights to sue the manufacturers and importers of goods (TPA s.74A ff). Usually the consumer will sue the retailer, for a breach of contract. But the manufacturer or importer may be equally to blame or more so; and the retailer may be of little substance or may have closed down. Accordingly, it may make more sense to sue the manufacturer/importer and the TPA permits under these provisions, in stated circumstances. The grounds for action parallel (more or less) those created by the implied term provisions, including

- actions regarding unsuitable goods (s.74B)
- actions regarding false descriptions (s.74C)
- actions regarding goods of unmerchantable quality (s.74D)
- actions regarding non-correspondence with samples, etc. (s.74E)

- actions regarding failure to provide facilities for repairs or parts (s.74F)

action in respect of non-compliance with express warranty (s.74G) - is available where consumer suffers loss as a result of a failure of the goods to comply with an express warranty (s.74A says that an express warranty means an undertaking, assertion or representation regarding quality of goods, etc.).

The vital matter here is that the consumer can sue the supplier although he/she is not in a contract with the supplier, ie these actions are in substance statutory torts.

Where a seller is sued, the seller can recover what the action costs it, from the manufacturer or importer. The latter parties' liability here is limited in certain cases (s.74L).

These provisions cannot be excluded by a term in any contract (s.74K).

REMEDIES

The remedies available for breach of the consumer provisions in Part V of the TPA have been noted above in the discussion of s.52 - they include damages, injunctions, pecuniary penalties, orders for rescission or remoulding of contracts, etc. and the court has a catch-all power to make any other such order as it thinks to be appropriate if it thinks that this order will compensate the plaintiff for the loss or damage.

Criminal liability attaches to breaches of many Part V provisions

EXCLUSIONS; SAVINGS G33.2.9

Section 51 provides, inter alia, that conduct specifically authorised under State law does not contravene the TPA Part V.

JURISDICTION OF COURTS

The TPA can be invoked in the federal and State courts.

TPA Part VA - Liability of manufacturers and importers of defective goods for injury to individuals, and related types of damage G33.3

The provisions in ss.75AA ff provide for remedies where goods supplied by an importer or manufacturer (and certain cases the intermediate supplier) are defective and kill a person, or cause damage to collateral goods or to buildings, etc. The regime creates a range of statutory torts. It is not confined to the supply of goods to consumers, although a consumer will be a typical plaintiff. The regime does not apply a remedy for the defect in the goods per se - this will be sought at general law or under other provisions in the TPA or other legislation. The details of the regime should be noted (broad principles only). The main provision is s.75AD, headed, "Liability for defective goods causing injuries" It is strict liability provision- the manufacturer of goods which through a defect cause injury or kill, is liable without proof of a fault element (such as negligence) - but limited statutory defences are available in s.75AK, including that the defect was not present in the goods at the time of supply.

A person does not have to have bought the goods - the plaintiff may for instance, have received them as a gift. There is no requirement of privity with the manufacturer (or for that matter, the retailer).

TOPIC 12

Principal and agent - G Chap 26

This topic is very important to contract law, in that agency law is largely about the making of a contract by P through the agency of A with a third party TP.

The focus will be on the laws governing principal and agent, with special reference to the relationships between principal and agent, and between each of them and third parties.

For Discussion

1. A principal, A, instructed his agent, B, to purchase a certain brand of ball point pens at a cost of no more than \$1 per dozen. The agent was unable to acquire the pens at the price but entered into a contract in his own name for the pens at \$1.10 per dozen. The agent did not disclose to the seller the existence of his principal. On being informed of the contract, the principal purported to ratify the agreement and the pens were duly delivered by the seller to the principal on the direction of the agent. The agent soon after the completion of the transaction went bankrupt and the seller is endeavouring to recover the price of the pens from the principal.

Discuss the power and effect of the principal ratifying a contract made by his agent concluding with advice to the principal as to whether he is liable under the contract to the seller for the price of the pens. Could P be liable on any other basis? What is A's liability?

2. X owns a department store in an outer suburb. He advertises in the local paper for a manager who in addition to his duties as manager will do the store's window dressing. Y, an experienced window dresser, answers the advertisement and is hired as manager/window dresser at a salary higher than would be paid to a person who was only a manager. X then departs for overseas leaving Y in charge.

Y soon tires of doing the window dressing and phones Confident, an established window dresser, telling him to call at the store and ask for the manager. Confident comes and is interviewed by Y in the manager's office. He is engaged as window dresser for \$400 per week. Confident does the window dressing for 3 weeks but is not paid. X then returns and refuses to pay Confident.

Confident inform you that he had never heard of X's store before Y's phone call, that he had no knowledge that Y's duties included window dressing and that it is usual practice for window dressers to be hired by store managers. Advise Confident.

What if, after Confident had been hired, X had faxed to Y, "I received reports about your activities and you're doing fine", although he did not know that Confident had been hired?

SUMMARY NOTES

(I) PRINCIPAL AND AGENT

Agents (A) bring principals (P) into contractual relations with third parties (3rd party)



Provided a valid agency exists (and it is not a situation of undisclosed principal) the A is not a party to the contract created between the P and the 3rd party. However, the A and P are nonetheless contractually bound via the agency agreement which will contain the rights and obligations of each party. Further, there are various general law duties owed by A's to P's such as personal performance of duties, which will be relevant unless modified by the agency agreement.

An agency will be created (thereby creating the contractual relationships abovementioned) in the following manner.

Actual Authority

- express (agreement spelt out either in writing or orally)
- implied (not spelt out but makes sense of express authority by including certain administrative or peripheral tasks into agreement).

Ostensible Authority

For this type of agency actual authority is irrelevant. Ostensible means "outwardly appearing as such". The elements needed to establish an agency created by way of ostensible authority are:

1. P represents that A has authority
2. 3rd party aware of 1 above
3. A act as A

The essence of ostensible authority is that it benefits a 3rd party where the A exceeds, or does not have, actual authority but to the 3rd party it looks like the A has authority having regard to the elements above.

If ostensible authority is established the 3rd party will have contractual rights in relation to the P.

Ratification

If an A has acted beyond the terms of the agency agreement, it is still possible for contractual relations between the P and 3rd party to be established if ratification (confirmation or approval after the event) is available.

Ratification will create an agency where:

1. A acts as A
2. P exists at time of transaction
3. P has legal capacity
4. P knows of transaction at time of ratification
5. Ratification relates to whole transaction

Undisclosed Principal

Where an A has actual authority but does not disclose (to 3rd party) that a P exists then not only will P be bound by the contract created, but also A.

This works for the benefit of the 3rd party.

ESSAY COVER SHEET

Family Name:		Unit Code:	BUSL852
Given Names:		Date Due:	4pm Tuesday, 2 June 09
Student ID:		Tutor's Name:	
Essay Title:			

"I certify that I am aware of the University's policy on plagiarism (as stated in www.student.mq.edu.au/plagiarism/) and that this assignment meets those requirements and has not been previously submitted for assessment in any other course of study"

Signed

MARKER'S COMMENTS