

BUSINESS LAW - PROPERTY STUDIES

AIM

In this subject you will be introduced to the general aspects of:

- The Australian legal system
 - Law
- of relevance to the property industry.

PRESCRIBED TEXT

Vermeesch R B & Lindgren K E *Business Law in Australia* Butterworths, Sydney.

Latest edition.

UNIT OBJECTIVES

On completion of this unit, you will be able to:

1. Explain the main features of the Australian legislative and judicial
2. List the elements needed to form an enforceable contract and agency agreement and be able to apply those principles to commercial activities within the property industry.
3. Explain the origins of law and its enforcement
4. Recognize legal problems that require professional advice.

INFORMATION

Sources of Law and Legal System

Supplement the following notes with selective reading from the first 3 chapters in Vermeesch & Lindgren. Read particularly the following parts:

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| Part 1: | The sources of law
Feudal Courts
The rule of law |
| Part 2: | The Colonies
The Commonwealth
The Commonwealth Constitution
The High Court and the expansion of Commonwealth Power |
| Part 3: | The Australian Court Structure
Precedent in English and Australian Law |

Legal systems respond to the various environments in which they operate. The different environments create a number of different perspectives or ways to view legal systems. These include:

- 1. A Systematic Collection of Principles and Rules of Law:** These should be distinguished from principles and rules of morality, politics or physics. Under this paradigm an analysis of law would be an inquiry into legal rules to determine what is permitted and what is forbidden.

2. An Independent System of the Government: The legal system should be separate from the government which possesses 'ultimate law-making and governmental authority'. Under this perspective legal systems are viewed externally, from the outside. For the system to survive it requires a level of coherence necessary for viability in the international community, irrespective of whether the mode of government is democratic, autocratic or oligarchic.

3. A Collection of Institutions within a Geographic Area: The collection typically includes a *legislature* which makes laws, an *executive department* which implements the legislature's policy, *courts* which resolve disputes between persons subject to the laws, and a *police force* to enforce the law and to prevent breaches. The collection is bound together into one system by its common recognition of an ultimate source of authority (eg the crown):

That common recognition of authority is made by reference to rules of law which are accepted as binding by all of them and which are usually described collectively as the 'Constitution' of that system and that country" (Maher and Waller 1991, 4).

THE AUSTRALIAN LEGAL SYSTEM

The Australian legal system has its base in the English legal system:

At the foundation of a simple description of the legal system is the fact that law and institutions of government in Australia were established or ultimately authorized by Britain. Hence an account of them must commence with an examination of the British connection. In essence, this connection is that from the perspective of the legal system, Australia commenced as a British colony. At the time Australia was colonised the major institutions of government in Britain were the *crown*, *parliament*, *executive* (ministers of the crown and government departments) and *courts*. (Enright 1991, 13)

The UK parliament had sovereign or unlimited power to make laws, and therefore, could legislate for colonies, and establish movements in colonies. The crown (the king or queen) had an inherent power to operate in colonies and therefore, could establish representatives (a governor or governor-general) and endow them with formidable executive powers called *prerogatives*. However, the power of the crown was inferior to, and subject to, that of parliament. So far as the Australian legal system is concerned, it would be fair to say that all constitutional power is derived from the UK Parliament and Australian institutions of government are 'modeled on those of Britain' (crown, parliaments, executive, courts). However, an important difference which is basic to Australian law is that, unlike Britain, which has a *unitary* form of government, Australia has a *federal* system of government (Commonwealth, State and Territory governments). Further, Australia has a written constitution, which Britain does not have. A major similarity is that Australian law, like British law, consists of statutes, delegated legislation, and the common law (also known case law or judge-made law).

SOURCES OF AUSTRALIAN LAW

There are *primary sources of law* which consist of rules of law themselves (they tend to correspond to the authoritative sources of Maher and Waller), and the less important *secondary sources of law* which comprise secondhand accounts of these rules, such as text books etc. Basically, the two main sources of Australian law are legislation and case law (law generated by courts):

The two great authoritative sources of law in our system declare the law by legislation and by precedent the parliaments, and bodies authorised by parliaments, by legislation; and the courts of law by deciding cases which become authoritative precedents (Maher and Waller 1991, 24).

There are three sources of law:

1. COMMON LAW: That part of the law of England formulated, developed and administered by the old Common Law Courts. It was originally based on the common customs of the country but unwritten. It is "the commonsense of the community, crystallized and formulated by forefathers". It is not local law or law produced by statute. It is basically tribal custom. For example, for real estate, the tribe in question was the Norman conquerors of England, who imposed on England Norman ideas of land holding, the "feudal system". These early medieval concepts still form the basis of Real Property Law in Australia.

The Common Law is Case Law or Judge made Law:

Cases are a source of law because in the process of deciding some cases judges make common law. For this reason common law is also called case law or judge made law. It is also what lawyers mean when they refer to 'precedents' or 'authorities' for a proposition of law. Common law then consists of the principles made in the area where no statutes apply. which is the older and purer form of common law, but also includes the interpretation counts give to statutes and delegated legislation (Enright 1991,125).

In today's modern and complex society there is a greater need for government intervention. Statutes have become the dominant source of law, particularly inasmuch as statute law can amend or repeal common law, and therefore, has priority over it. The main problem with common law is that it has been too slow to meet the needs of today's society. On the other hand, sometimes the common law leads society for example, Mabo. When this happens it is called "positive law". Today common law survives in such areas as contract, torts, criminal etc, though in these areas there are significant modifications. 'In summary, common law is still with us, but its luxuriant growth has been severely trimmed' (Enright 1991, 126).

2. EQUITY: Primarily, "fairness" or "natural justice". A new body of rules by the side of the original law founded on distinct principles but claiming to superiority to the Common Law because of superior sanctity inherent in those principles. It was originally the body of rules formulated and administered by the Court of Chancery to supplement and provide relief to the strict and often harsh rules and procedures of the Common Law.

It was attractive to the Monarch as it allowed the remedy of defects in the administration of justice through the established courts. Originally, it had a general mandate to provide justice in all cases, but over the centuries, the rules of Equity became fixed. It is sometimes important to distinguish between Equity and Common Law, but both are very similar in that they are both judge made law.

3. STATUTE LAW: Statute Law includes both direct legislation passed by Parliament (Acts) and delegated legislation, for example, bylaws and regulations. If there is a conflict, statute law is the superior law.

The relationship between the 3 sources of Law is quite complex:

1. Common Law and Equity are often lumped together under the name; Common Law to distinguish Common Law and Equity from Statute Law. Most of the time, the distinction between the two is unimportant, but in theory the two are separate, and there is one very important practical distinction. Where Common Law and Equity are in conflict, Equity prevails.

2. In theory, and for the most part in practice, Statute Law prevails over the Common Law. However, the interpretation of a statute is generally by way of Common Law principles. Therefore, there is one thing more important than what a Statute says - what the courts believe it means. Common Law includes both Common Law proper and Equity, and both may be modified by Statute.

3. In a sense, there is only the law as the 3 branches are often hard to distinguish today. Statutes that have been in force for more than a few years tend to develop their own caselaw, that becomes far more important than the wording of the Statute itself and therefore, after a century or two, the actual wording of the Statute can become quite unimportant. For example, the Statute of Frauds 1677 that generally, required that the passing of interests in land can only be done by way of writing, has become part of the Common Law.

Lawyers are often unhappy with new legislation that is difficult to interpret. It may take a number of "test cases" before the correct interpretation of the statute is known. They prefer legislation that has substantial caselaw to allow informative and confident interpretation. For example, the statutory definition of rating values is certain legislation as the interpretation of the various provisions are well known and certain through case law. Case law on interpretation for example, converts a couple of lines (or even words) of a Statute into a detailed explanation.

4. There are areas of law that are inherently unclear, and other areas that have been made unclear either by poorly drafted legislation or poor decisions by the courts or both:

EXAMPLE: In the first category of inherently unclear law, consider the question of what goods or chattels belong to a piece of land. Clearly, a car driven onto the land doesn't. A pile of bricks on the land may, but if those bricks are cemented together to form a house, then clearly they do belong to the land. It is impossible to make a clear statement or series of statements which cover all situations, and there are many borderline cases. In these situations, it is said that the law depends on the "circumstances of the case".

LEGISLATION

Legislation is a generic term used to cover both parliamentary statutes or acts and can be classified into *delegated* or *subordinate* legislation. A statute will frequently authorize delegated legislation or executive instruments.

1. DELEGATED LEGISLATION: There are four types of statutes which apply in Australia: Commonwealth, State, Territory, and UK statutes. The first three categories are straight forward and the most important.

Since Australia is a federal system, disputes will arise from time to time about whether or not particular acts are actually within the legal jurisdiction of the parliament that enacted them. Such jurisdictional disputes between the States and the Commonwealth are, in the last resort, resolved by the High Court. The process is called 'judicial review'.

2. SUBORDINATE LEGISLATION: Subordinate legislation is made under the authority of acts of parliament that delegate powers to a person or body of people to make laws in the form of regulations. Today, the volume of written laws made under such delegated legislative authority greatly exceeds those laws in acts of parliament. Parliaments being somewhat unwieldy bodies, tend to limit their own activities to that of determining broad matters of policy. Therefore, there is an ever burgeoning mass of legal rules embedded in regulations, by-laws, orders in council and so forth. At the same time:

In Australian States/Territories, there are 4 types of statute that may be applicable (plus of course rules, regulations and by-laws which may be made under any of the 4 types).

1. STATUTES: State and territory statutes are made by State and Territory Parliament, while Federal statutes are made by the Commonwealth Parliament. In addition, two types of statute made by the English or British Parliament may be relevant (these are known as Imperial Statute and English Municipal Acts).

When the British settled NSW in 1788 they brought not only measles and syphilis, but also their law. Much of that law remains law today; "the common law of England, and such statutes as might be appropriate to the circumstances and condition of the province", in the words of the House of Lords in an 18th Century case relating to one of the American colonies.

2. ENGLISH MUNICIPAL ACTS: It is generally assumed that all statutes in force in England in 1788 became part of NSW's law on settlement, with the exception only of those statutes that clearly do not apply here (for example, The Wolf Control Act of 1716 because the colony had no wolves). This includes English statutes made between 1066 and 1703 and United Kingdom statutes made between 1103 and 1788. Some very old English statutes still apply (eg the Statute of Frauds), particularly in property law, since real property was even more important in the 12th Century than today.

3. IMPERIAL ACTS: Imperial Acts are also statutes passed by the British Parliament but in its capacity as the Parliament of the Empire rather than Parliament of Britain.

One of these, the Colonial Laws Validity Act of 1865, is closely connected with the Real Property Act. When the Act was first passed, it was bitterly opposed by the local profession, who persuaded the colonial judge, Mr Justice Boothby, to declare it invalid as being inconsistent with English Law. He was promptly dismissed by the Governor on the address of the Legislative Council, and a new judge appointed. Boothby refused to go, and for several months, the two judges worked not quite side by side, since each held that the other had no authority. Eventually, the decision of the Colonial Office in London arrived - Boothby was no longer judge and Boothby left for England to appeal. Mysteriously he disappeared overboard shortly before the ship reached India, and his appeal was never heard.

The Colonial Laws Validity Act was passed in 1865 to settle any doubts which may have existed that colonial parliaments throughout the Empire could indeed make laws, as everyone but Boothby knew anyway. Several Imperial Acts still apply. The most important is the Commonwealth of Australia Constitution Act, from which our own two Parliaments derive their authority. Imperial legislation about insurance, shipping and a few other topics also remains in force.

In 1932, the Imperial Parliament passed a statute known as the Statute of Westminster, in which it declared that no Imperial Acts would apply to the Dominions without the consent of these dominions. In theory, the British Parliament could perhaps repeal that statute at any time, and make new laws for Australia, but in practice it is unlikely. The status of pre-1932 Imperial legislation is debatable and unclear, but fortunately of little relevance to those concerned with business law.

4. FEDERAL AND STATE AND TERRITORY STATUTES: The distinction between Federal and State/Territory statutes is important but complex.

Typically under their Constitution Act a State Parliament has power to make laws for the "peace order and good government of the province" (South Australia). It has been held to mean any law that the State or Territory Parliament thinks fit to pass. The Federal Parliament however, has only those powers listed in the Federal Constitution under s51, and cannot make any laws except by reference to those powers. The High Court has authority to declare void any statute passed by the Federal Parliament, if that statute is not a valid exercise of the powers granted to under s51. (Vermeesch & Lindgren list those powers in Part 2 under the heading "The legislative powers of the Commonwealth").

EXAMPLE: In 1955 for example, Menzies' passed the Communist Party Dissolution Act, that would have enabled the government to declare any opponent a communist, and thereby disqualify him from holding any office and liable to summary imprisonment. It was held by the High Court, that this was not a valid exercise of the Commonwealth's defence power and therefore was void. A similar problem arose more recently with the Commonwealth's attempt to try "war criminals" (*Polyukhovich v Comm* (1991) 54 CLR 521).

However, if a Commonwealth Act is valid, it overrides any State Act which is inconsistent with it. Precisely what is meant by "inconsistent" is a question of enormous financial significance to the legal profession. The rule applies equally to Commonwealth Acts of Parliament and to Commonwealth delegated legislation. Regulations made under the Commonwealth Air Navigation Act would override inconsistent State legislation.

There are therefore a few problems with statute law in a federated collection of former colonies. Generally, these will not bother those involved in business law, but any person who works with laws should be aware that there are circumstances in which the apparent law is not the law. The decision of whether or not a law is valid is usually one for a legal expert.

TERRA NULLIUS AND THE SETTLED COLONIES THEORY

Today, the perspective and context has changed as the legal validity and significance of English settlement of Australia is under close scrutiny. This shown particularly by the *Mabo* decision of the High Court. The historical problem which has largely been remedied by *Mabo* was the legal fiction that when Australia was first colonised it was *terra nullius* (land without owners), and therefore, was treated as a *settled colony*, as distinct from a *conquered* or *ceded territory*. Compare with New Zealand where the UK Parliament was obliged to sign a treaty with the Maoris. Hookey (1984, 2) believes that this was 'an entirely convenient doctrine to support white settlement in Australia', for on this basis the British can claim both sovereignty and ownership of the land. This, of course, inexorably led to the dispossession of the original Aboriginal inhabitants of their land. Under *Mabo* although Britain had "radical" title to Australia it did not inherently have "beneficial" title over native lands and therefore native title remained intact where land was not alienated or used for a purpose contrary to that of native title.

The general principles for the introduction of British law into a 'settled', as distinct from a 'conquered', colony were articulated by Blackstone in 1765. This distinction had originally been confirmed by the British Privy Council in *Cooper v Stuart* (1889) 14 App 286 at 291 where it was pointed out that NSW had been regarded as a 'tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions'. What this meant, of course, was that Aboriginal tribal law and land rights could be conveniently disregarded.

The context of law was mentioned above and the history of Aboriginal land rights claims in the courts well illustrates the gradually changing community attitudes towards these basic claims. Law is deeply embedded in its socio-cultural milieu, and as such reflects the *zeitgeist* or spirit of its age. Even after *Mabo*, Aborigines are in a *de facto* (according to how things are) if not in a *de jure* (by "rightful" title) sense, marginalised in the Australian social and legal systems.

In its landmark 6-1 judgment in *Mabo v Queensland* (1992) 66 ALJR 408, the High Court finally put an end to the elaborate fiction, which had persisted for two hundred years, namely, that when the British settled Australia, the continent was *terra nullius*. It is now the law in Australia that Aborigines did, indeed, possess property rights prior to British settlement, and still have property rights (native title) where their claims have not been overridden by subsequent government actions and land uses:

Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (eg authorities to prospect for minerals) (*Mabo v Queensland* (1992) 66 ALJR 408 at 422).

THE AUSTRALIAN CONSTITUTION

When the Commonwealth of Australia came into existence in 1901 as a result of the *Commonwealth of Australia Constitution Act* (an act of the United Kingdom parliament passed in 1900), the six self-governing colonies became States within the Australian federation.

As part of the agreement or compact between the colonies prior to the establishment of the federal system under the Constitution, the States agreed to surrender some of their law-making powers to the Commonwealth. Some powers surrendered by the States were to be exercised exclusively by the Commonwealth, while other powers, though given to the Commonwealth were not withdrawn from the states, but could be exercised by the States as well as the Commonwealth (joint powers). However, under the Constitution:

S109: When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The Commonwealth can only make laws under the powers listed in the Constitution. S51 of the Constitution deals with most (though not all) of the legislative powers of the Commonwealth parliament - see Vermeesch & Lindgren, Part 2. "The legislative powers of the Commonwealth". Another important section to refer to when considering Commonwealth powers is s52:

s52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to--

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Therefore, the Commonwealth is empowered to make laws with respect to specified and limited subject matters and are only valid if *intra vires* the Constitution, that is, it must fall under one the above heads in s51. This apparent limitation on the power of the Commonwealth is not as restrictive as it may at first appear. For example, the use of the *external affairs* power which is the power that validates the Racial Discrimination Act 1975 (an act central to the Mabo debate. Indeed). However, there is some concern in the High Court as to the extent which matters even tenuously related to external affairs, can be used to validate Commonwealth legislation. However, there are some express prohibitions in the Constitution which preclude certain sorts of legislation by the Commonwealth. For example:

s116: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and not religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This section was crucial in the DOGS (Defence of Government Schools) case: *AG (Vic); ex re Black v Commonwealth* (1980) 33 ALR 321 which is the major case in the history of the State aid to private schools debate.

The Constitution is Australia's fundamental law, but the various Constitutions of the states are also imperial legislation, which at least in theory, can still be amended by the UK parliament prior to the *Australia Acts* 1986. A state's constitution can be amended by state parliament (if in the correct form) but the Commonwealth's Constitution can only be amended by way of referendum as laid down in the Constitution. It has proved very difficult to amend the Constitution as it requires reasonable consensus throughout Australia.

See Vermeesch & Lindgren, Part 2, *The Doctrine of Parliamentary Sovereignty*
See Vermeesch & Lindgren, Part 3, *The Australian Court Structure*

ACTIVITY 1

The development of law in the ACT followed a pattern quite different from that of the states. From the above information discuss the development of municipal laws (local laws) for the day to day running of the ACT. What is the Constitutional basis for such laws?

USE THIS SPACE FOR YOUR RESPONSES TO ACTIVITY 1

INFORMATION A

Doctrine of Precedent

Read Vermeesch & Lindgren, Part 3, *Precedent in English and Australian Law*

Australian courts are in a hierarchy, and as successive appeals are made, a litigant moves up the hierarchy, and in the end the case may reach the *High Court of Australia* which is the final court of appeal, and which exercises both original and appellate jurisdiction.

Adjudication in Australia is divided between the Commonwealth and the States/Territories, and demarcation disputes resulted in cross-vesting legislation being enacted (*Jurisdiction of Courts (Cross-Vesting) Act 1987*) whereby the major courts of each jurisdiction (Commonwealth, States and Territories) were vested with the jurisdiction of major courts of all other jurisdictions.

TRIBUNALS: Tribunals or boards are limited to a special jurisdiction and only hear matters involving a limited and usually specialist area of state/territory law. The courts in ACT's legal system (and in other states and territories) are structured in order of seniority or importance. There is only one superior court in each state/territory, the *Supreme Court*, where decisions and judgments made are noted and used as precedents (examples) for future cases. All other courts are known as *inferior courts*.

BINDING AND PERSUASIVE PRECEDENTS: A court is bound to follow an earlier decision of a higher court. For example, the Local Court must follow a precedent set by the Supreme Court if it has a similar situation before it.

ACT COURTS: The Courts in the ACT dealing with general law are:

- Coroners Court
- Juvenile Court
- Magistrates Court
- Small Claims Court
- Supreme Court
- High Court

Generally, the Supreme Courts in the various states/territories are only bound by decisions of the High Court. However, the Supreme Court of the ACT is not bound by a High Court decision made on appeal from the Supreme Court of Queensland. This is because the law in the two jurisdictions may be different. However, it would be most unusual for a Supreme Court not to follow a High court precedent, and it would do so only if there was a clear difference between the laws of the state and the ACT.

Single judges of the Supreme Court are bound by decisions of the Full Court and the High Court. The Full Court may overturn its own previous decision, but is bound by previous High Court decisions. The High Court is not bound by any precedents. This is shown by the *Mabo case* where the Court overturned a long line of legal authority on the concept of *Terra Nullius*. In the *Millirpum case*, heard before *Mabo*, Blackburn J of the Federal Court felt obliged to follow the concept of *Terra Nullius* (amongst other reasons) and not allow a claim for native title because of the binding authority of the High Court in this area.

Although the High Court is not bound by the Supreme Court, it will usually follow Supreme Court precedents, unless it thinks they are wrong. Similarly, judges in the ACT will usually follow decisions of judges in Victoria or England or even Massachusetts if they are considered to be good and relevant law. The closer the legal systems and laws in the two jurisdictions, the more likely it is that a nonbinding (or persuasive) authority will be followed.

Courts are reluctant to overturn long established precedents, on the basis that people have been regulating their affairs on the basis of such decisions for a long time, and it would be unfair to change the rules in the middle of the game. However, no precedent is too venerable to be overturned if necessary. Again, this is shown by *Mabo's* overturning of the concept of *Terra Nullius* as it applied to Australia.

The individual reputation of the judge making a decision is important, as is the reputation of the court, the source of the report of the decision, the age of the precedent, and many other factors. For example, specialist judges of the NSW Land and Valuation Court (such as Else-Mitchell J) earned a reputation for vanguard thinking in a number of areas where the law had not been established by higher courts (for example, the rating and taxing of commercial strata). Generally then, all precedents are useful, but none are sacrosanct.

ACTIVITY 2

Look up the court case *Shaddock v Parramatta City Council* (1981) 55 ALJR 713 in your nearest law library. ALJR stands for the Australian Law Journal Reports. At the beginning of the case there is a summary. From that summary, what court cases were used by the High Court as precedence for their decision?

USE THIS SPACE FOR YOUR RESPONSES TO ACTIVITY 2

INFORMATION B

Contract 1 - Nature of Agreement and Intention to Create Legal Relations

Read Vermeesch & Lindgren, in Part 4 Elements of a Contract:

Introduction
The Sources of Contract Law
Freedom of Contract
Agreement

The law of contract in Australia is essentially, the Common Law but Statute Law is becoming more and more important in this important part of Business Law. There are a number of statutes that affect contracts but these are peripheral to the Common Law base. The development of contractual law has the following features:

1. A trend from a policy of *laissez-faire* tolerance (*buyer beware* or *caveat emptor*) of almost all contracts to an era of legislative protection for the consumer (*vendor beware*) but particularly against certain harsh, misleading, or unconscionable contracts.
2. A rationalization of contract law with the disappearance of a number of legal inconsistencies, and fictions.

DEFINITION OF A CONTRACT

A contract is an agreement between two or more parties under which all parties make promises, and which they intend to be legally binding. Therefore, there can be agreement on a fact such as "the sky is blue" however, this is not a contract as there are no promises in the agreed statement. However, if the statement continues, "the sky is blue therefore I will take you fishing if you pay for the boat" and the other party accepts, then this is an agreement with promises.

INTENTION TO ENTER INTO A LEGALLY BINDING RELATIONSHIP: The agreement is not a contract unless the parties intend to enter into a legally binding relationship. In the above case this will depend upon the intention of the parties supported by facts and circumstances of the agreement. For example, if the agreement is between a father and son on holiday, then most likely, there is no intention to enter into a legal relationship and therefore it is not a contract. However, if the agreement is between two professional fishermen who are dependent upon each other and often enter into such an arrangement for business purposes then most likely, there is an intention to enter into a legal relationship, and therefore, the agreement becomes a contract.

UNCERTAINTY: If the parties have failed to agree on their terms with sufficient certainty there is no contract. Uncertainty can be caused by the language used that is, insufficiently clear. Alternatively, although the language is clear, it is incomplete. However, the courts will try to save unclear contracts - *Hillas v Arcos* (1932) 147 LT 503 otherwise the agreement is void - *Hall v Busst*.

SOCIAL AGREEMENTS

REBUTTABLE PRESUMPTION: In determining the law judges often start with a *rebuttable presumption*. This is an inference that the law requires to be drawn from the facts of the case and that is conclusive until disproved or rebutted by evidence to the contrary. Therefore, the onus of proof is on the person trying to disprove the presumption. A *rebuttable presumption* for contracts is that commercial or trade agreements are binding and social or family agreements are not. For example, there is a presumption that an agreement between husband and wife concerning housekeeping money is a social agreement and therefore not legally binding.

All cases are considered on the facts and the agreement should be an amicable one between the parties. Contracts have been held to exist between husband and wife where there is animosity between the two (*McGregor v McGregor* (1888) 21 QBD 424) and where the husband had left the wife to live with another woman - *Merritt v Merritt* [1970] 1 WLR 1121.