

THE MOTIVES OF THE PARTIES ARE IMMATERIAL

The law is only concerned with the intention of the parties to enter into legally binding relations. It is not concerned with whether or not the motives of the parties are "good" motives or not. However, the purpose that is the subject of the contract cannot be an illegal purpose. For example, if an informant following a reward notice informs only to "ease her conscience and not for the sake of the reward" is still entitled to the reward despite her motive - *Williams v Carwardine* (1833) 172 ER 1101.

HONOUR CLAUSES: Certain clauses written into an agreement have the effect of not making the agreement a contract because of the intentions of the parties:

CONTRACTS IN WRITING

Certain contracts such as over land must be in writing. This is because of the "parol evidence rule":

By the general rules of the common law, if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any matter to vary or qualify the written contract.

See *State Railway v Heath Outdoor* (1986) 7 NSWLR 170.

FORMAL CONTRACTS

Formal contracts include recognizances, contracts under seal, judgments of courts of record, and possibly, bills of exchange. They are the most powerful contracts and derive their force from the formal character of the action which created the obligation

In contracts under seal the elements of bargain and consideration are missing. **EXAMPLE:** If A wishes to make a gift to B, he cannot do so under a simple contract as it lacks consideration. Therefore, it must be effected by way of deed. The deed becomes a binding agreement because the donor has complied with the requirements of the prescribed form. However the law has been greatly modified by statute and there is a growing tendency to disregard form. If a document is signed and expressed to be sealed it will be deemed to be sealed under the relevant state Acts.

RECOGNIZANCES: The acknowledgment before a court of record of an obligation or bond, which is afterwards enrolled in some court of record. For example, to appear in court, or keep the peace.

CONTRACTS UNDER SEAL: A solemn mode of expressing consent to a contract in a written document such as a deed. Today any act done with the intention of sealing is sufficient.

COURTS OF RECORD: A court where the acts and judicial proceedings are recorded, and has the authority to fine and imprison for contempt of its authority.

BILLS OF EXCHANGE: A form of negotiable instrument such as a cheque.

INFORMAL CONTRACT

Informal contracts are all contracts other than formal contracts. They are also termed simple or parol contracts.

EXPRESS CONTRACT

An express contract is one which is fully written or fully expressed at the time of making. All terms and conditions are known at that time.

IMPLIED CONTRACT

An implied contract is one in which not all the terms and conditions were expressed at the time of making. Therefore if there is a dispute the court has to determine the missing terms, or even that there is no contract because of non-agreement or vagueness. Where a contract is subject to implied terms it is said to be implied in fact. Terms can be implied in a contract if they are:

1. Reasonable and equitable
2. Necessary to provide business efficacy to the contract
3. So obvious that they "go without saying"
4. Capable of clear expression
5. Do not contradict any express term

- see *BP Refinery v Hastings Shire* (1978) 52 ALJR 20.

They apply shareholders in an incorporated company in that a subscription by one member to the Memorandum of Articles of Association is not only a contract between that member and the company but also between that member and other subscribers - *Rayfield v Hands* [1958] 2 All ER 194.

IMPLIED TERMS: It is often necessary to imply terms in a contract. They can be classified as terms implied in law and in fact. However, it is not always easy to distinguish between the two - *Codelfa v State Railway; Liverpool City Council v Irwin*. Implication can be made by way of trade or custom - *Con-Stan v Norwich*.

Implied terms can fall under statute law and the power to exclude statutory implied terms is often severely restricted or eliminated - ss69-72,74 Trade Practices Act (Cth), ss8,9 Consumer Transactions Act 1972 (SA), ss12-15 Sales of Goods Act 1895 (SA).

INFORMATION B1

Contract 2 - Elements of a Contract including Offer and Acceptance and Consideration

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

Consideration

Read Vermeesch & Lindgren, in Part 5 The Terms of a Contract:

Introduction
Implied Terms
When may Oral Terms be Added to a Written Document?
Interpretation of a Contract
What is meant by the Language Used?
Exclusion Clauses

THE ELEMENTS OF A CONTRACT

In considering contractual law it is convenient to divide a contract into the following elemental parts:

1. The offer
2. The acceptance
(1 and 2 together constitute the agreement)
3. The consideration
4. Intention of the parties
5. The capacity of the parties
6. Legality of the contract

OFFER OR INVITATION TO TREAT?

An invitation to treat is not an offer. Instead, it shows a willingness to trade, negotiate, or the inviting of an offer. Typical invitations to treat are:

1. Advertisements by business houses
2. Displays in shop windows
3. Catalogues - *Granger v Gough* [1896] AC 325.

Because it is not an offer, the merchant cannot be forced to sell the advertised or displayed products upon a request to do so by the customer. Instead, the customer is making an offer which the merchant does not have to accept. In a supermarket the customer makes his offer at the checkout so that the antecedent behaviour of putting the goods into a shopping trolley is part of the supermarket's invitation to treat - *Pharmaceutical Society v Boots* [1953] 1 QB 401).

The importance between an offer and an invitation to treat is shown in *Harvey v Facey* [1893] AC 552 where B telegraphed A; "Will you sell us Bumper Hall Pen? Telegraph lowest cash price". A replied; "Lowest price for Bumper Hall Pen, 900 pounds". B: "We agree to buy Bumper Hall Pen for 900 pounds asked by you".

HELD: That there was no contract as A's telegraph reply was only an indication of A's minimum price. Therefore B's reply was an offer. Therefore, the intention of making an offer should be clear.

REVOCATION OF AN OFFER

The offeror may revoke his offer any time before it is accepted. However, the revocation must be brought to the knowledge of the offeree. Therefore, if the offeror sends the revocation by mail it is not effective until received by the offeree. If the offeree has sent his acceptance in the mode required by the offeror before he receives the revocation, it is a contract even though the offeror has not received the acceptance - *Byrne & Co v Van Tienhoven* (1880) LR 5 CPD 344. For the offeror to rely upon revocation as a defence he/she must show:

1. He/she sent the notice of revocation
2. The offeree has received knowledge of the revocation.

However, the offeror need not personally give the notice of revocation for it to be effective - *Dickinson v Dodds* (1876) 2 Ch D 463. For example, a reliable source may be sufficient. Whether or not there has been effective communication is a question of fact in each case.

REVOCATION BY CONDUCT

If B offers to sell land to A but instead, sells to C, the sale to C would constitute a revocation of the offer to A if A receives notice of the sale before he has accepted.

In *Abbott v Lance* (1860) Legge 1283 L offered to sell his properties to A subject to the condition that A could have 2 months to inspect the properties so as to make an offer. L retained the right to sell to anyone during those 2 months but promised to pay A 100 pounds if A made his offer within 2 months. A was about half way on his inspection trip of the properties when he received communication that L had sold the properties to another person. A sued for the 100 pounds.

HELD: (Wise J):

The defendant would have been bound to accept the offer when made although the 2 months had not expired, if the property was still unsold, and he had by his own act rendered the performance of the contract impossible, and had, in effect, dispensed with the performance of the condition precedent. We, therefore, are of opinion that the defendant is liable to pay the 100 pounds. The present case does not affect the general proposition that an offer may be retracted before acceptance, because we consider that the part-performance of the journey constituted a sufficient consideration to give the plaintiff a right in the events that have happened.

From the above case where the offeree contemplates an act that will take time, and a bona fide commencement of the performance is made by the offeree, it is deemed equivalent to an acceptance to a conditional unilateral contract.

LAPSE OF THE OFFER

An offer may lapse according to the time allowed for acceptance in the offer or if there is no time limit, within a reasonable time. The determination of reasonable time will depend upon the nature of the offer, and individual circumstances. Where the subject matter of the offer is land, and the price of land in that locality does not fluctuate greatly, then a considerable time could expire before it is considered to be unreasonable time.

COUNTER OFFER: If a counter offer is made the original offer lapses. However, a mere request for clarification of the terms or for more information does not nullify the offer.

OPTIONS

If the offeror promises to keep an offer open for a definite period of time he can still withdraw the offer before that time as there is no contract to keep this promise - *Offord v Davies* (1826) 142 ER 1336. In *Routledge v Grant* (1823) 142 ER 1336, G promised R that his offer to buy R's house would remain open for 6 weeks. **HELD:** That G could withdraw the offer even though R had incurred expenses in reliance in G's offer to buy.

If the offeree provides consideration (something of value) to the offeror to keep his offer open for a certain period then the agreement becomes a contract and is known as an option. If the offeror breaches the option agreement by selling to a third party or withdrawing the offer then it is a breach of contract.

EXERCISING THE OPTION: When the offeree decides to accept the option and buy the subject property it is called "exercising the option".

COUNTER OFFER

The acceptance of the offer must be strictly in the terms of that offer otherwise it is a counter offer - *Mobil Oil v Kosta* (1969) 14 FLR 343. However, the courts will not entertain "unreasonableness" particularly when the offeree has made a bona fide effort to comply with the terms. For example, in *Ian Hunter v Durham Holdings* (1973) 47 ALJR 606 the option agreement required that acceptance was to be delivered by the expiry date "in the ordinary course of the post." The expiry date was a Saturday and as the Post Office was closed on that day the acceptance was delivered on the following Monday. **HELD:** That the acceptance was validly given as "in the ordinary course of the post" can refer to the normal delivery procedures of the Post Office.

The contract in *Laybutt v Amoco* (1974) 48 ALJR 492 included a "return mail" stipulation. If the offeror stipulates that the acceptance should be made by "return mail" then this indicates urgency. However acceptance posted anytime on the day the offer was received would be sufficient to meet the stipulation - *Dunlop v Higgins* (1848) 1 HLC 381.

AGREEMENT - TERMS

Although the agreement must be on the terms of the offer, commonly, not all terms are stated. In such a case there must be agreement on at least, the material terms. The agreement must apply to the subject matter - *Raffles v Wichelhaus* (1864) 2 H & C 906.

FRAUD & DECEIT: The innocent party has agreed to an entirely different contract than he intends and therefore, there can be no binding contract - *Foster v MacKinnon* (1869) LR 4 CP704. However if the aggrieved party has signed a document without proper investigation and perusal then that would be negligence and if as a result, a third party suffers he would be liable.

MISTAKEN IDENTITY: If one party makes a contract with a different person other than with whom he is dealing, then the following general rule applies:

GENERAL RULE: The contract is valid if the parties are dealing face-to-face even if one party misrepresents his identity. It is assumed that the party intends to deal with the person who stands in front of him - *Phillips v Brooks* [1919] 2 KB 243. Where the agreement is not face-to-face (eg by post) the court will generally allow the defrauded party to recover against an innocent third party as there was never any intention to deal with that person - *Cundy v Lindsay* (1878) 3 App Cas 459.

REASONABLE MAN TEST: The reasonable man test should be applied to the agreement. Would a reasonable man believe that the defrauded party only intended to deal with a particular person?

PRESUMPTION OF KNOWLEDGE OF THE TERMS: If the offeree accepts an offer and the terms have been reasonably brought to his attention then it is presumed that offeree knows the terms.

EXAMPLE: If a public transport ticket has special terms printed on its face it is presumed that the ticket buyer knows of them even though he may be able to prove that he did not read them.

If the contract contains the offeree's signature, he is bound by it including the exclusion clauses even though he may not have read it. If the document is unsigned then the reasonable man test is applied.

EXAMPLE: If the ticket or docket containing the exemption clause could have been easily been mistaken for a receipt. The offeror should bring the exclusion clause to the attention of the offeree - *Causer v Browne* [1952] VLR 1.

Where the offeree is in disagreement with all the terms and yet the offeror had made the offer in definite terms, and had taken reasonable steps to communicate those terms, then it is presumed that the offeree had accepted those terms - *Thompson v L M & S* [1930] 1 KB 41.

PERFORMANCE AS ACCEPTANCE

If the offeree accepts an offer by responding to the terms of the offer then there is a contract.

EXAMPLE: A writes to B; "I will give you \$40 000 if you agree to build a house on my land". B accepts in writing.

However, suppose B does not reply but instead goes ahead and builds the house. Strictly speaking the actual performance by B is not within the terms of A's offer. However, for convenience such action is held to be valid acceptance as the actual performance is more valuable than a mere promise to perform. However, the reverse is not acceptable where the offeror pays \$40 000 to the offeree who only promises to build the house. The offer contemplates the act of building a house and not a promise to do so.

COMMUNICATION OF ACCEPTANCE

A mere intention to accept an offer is not enough. The acceptance of the offer must be communicated to the offeror - *Felthouse v Bindley* (1821) 11 CBNS 869. The offeror cannot impose a negative condition upon the offeree for acceptance. For example, the offeror cannot state that if the offeree does not reply to the offer, the silence will be deemed to be acceptance - *Felthouse*. However, there may be exceptions in some business arrangements because of prior dealings.

ACCEPTANCE THROUGH AN AGENT: The agent to accept an offer on behalf of the principal must be so authorised to do so - *Director of Post & Telegraphs v Abbott* (1974) 2 ALR 625.

WHEN IS THE CONTRACT FORMED ?

This question has been important in cases where one party claims indemnity from damages through an exemption clause in the contract. The offeree must be aware of the exemption before the contract is formed - *Thornton v Shoe Lane* [1971] 2 QB 163.

WHERE IS THE CONTRACT FORMED ?

This question arises where one of the parties lives in a different state or country to the other party. The law of the state or country within which the contract arises will apply to the contract. The answer for different situations are as follows:

1. **FACE TO FACE CONTRACTS:** The contract arises in the place where they negotiate the agreement. Therefore the law of that place will apply to the contract.
2. **TELEPHONE AND FAX CONTRACTS:** These are treated the same as for face-to-face contracts. Acceptance must be received by the offeror before the contract is formed - *Entores L v Miles Far East* [1955/2] Q8 327.
3. **SLOW COMMUNICATIONS:** Such as the post is subject to the postal rule.

THE POSTAL RULE

The postal rule states that the contract arises when the offeree puts his acceptance into the mail box. It is immaterial when the offeror accepts it. This rule has been established on the grounds of business efficacy. If the offer is sent through the post and there are not terms within it which specifies a required mode of acceptance, it is implied that the acceptance can be transmitted to the offeror through the post. If the letter is never received the fault lies with the offeror who could have stipulated different modes of communication and when the contract would arise - *Tallerman v Nathan's Merchandise* (1957) 98 CLR 93. However, the offeror cannot be so dogmatic about the mode of acceptance required that an equally expeditious mode would not suffice - *Manchester Diocesan v Commercial & General* [1970/1] WLR 242).

RECEIPT OF ACCEPTANCE

It is always possible for the offeror to state as a condition of the offer that he must receive the acceptance and this would overcome any disadvantage which may arise from the postal rule. EXAMPLE: "Upon receipt of your order we will ship the goods within two days" or if the offeror states a date on which if he "does not hear" from the offeree the offer is refused.

If a special action is required and stated in the offer, the offeror cannot readily exempt that requirement. For example in *Latec Finance v Knight* [1969] 2 NSW 79 the company had intended a hire purchase agreement with K. The printed form of the offer stated "this offer shall...not be binding upon you the offeree until the memorandum of acceptance endorsed hereon shall have been signed by you..."?

The offeree signed the memorandum but before he had notified the acceptance to the offeror, the offeror withdrew his acceptance. **HELD:** That in the case of such an executory contract there can be no binding contract until the completion of the stated essential step in the procedure of acceptance.

PRECONTRACTUAL AGREEMENT

Often the parties will enter into a preliminary agreement with the intention of drawing up a complete contract later. **GENERAL RULE:** As the intention of the parties is not to enter into a legal relationship at the date of agreement, either party may withdraw without liability.

In *Masters v Cameron* (1954) 91 CLR 353 the parties signed a memorandum whereby C agreed to sell and M agreed to buy a certain property owned by C. A deposit was paid by M for the property. The memorandum contained the following clause; "This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my (C's) solicitors on the above terms and conditions..." **HELD:** By the High Court:

The formal contract it is true, is to be "on the above terms and conditions", but it is to be acceptable to the vendor's solicitors, and the meaning is sufficiently evident that the contract shall contain, not only the stated terms and conditions expressed in a form satisfactory to the solicitors, but also whatever else the solicitors may fairly consider appropriate to the case.

Accordingly....(there) was no binding contract for the sale and purchase of the property...

However, intention and conduct are important. The parties may treat the preliminary agreement as binding and perform under it. In such a case there is a contract even though the preliminary agreement may be incomplete. This applies particularly to business agreements.

EXCLUSION (EXEMPTION) CLAUSES

Exclusion clauses are prevalent in contracts used in today's mercantile world. For example, carpark tickets, tickets for public and private transport, and repair shops. The clause is usually on a standard form clause in the contract and attempts to limit or exclude completely any liability of the owner or organization. However, it is often mandatory and not pointed out to the customer despite its importance as a term of the contract. Therefore, the courts will tend to construe the clause against the party depending upon it.

The defendant may be liable under more than one head of liability eg the breach of contract also involves negligence. In such a case the general words of exemption will be construed *contra proferentem* to cover only the strict contractual liability only. Therefore, negligence must be excluded by a specific reference - see *Davis v Pearce Parking Station, Sydney City Council v West*. For an effectively drafted exemption clause see *Darlington Futures v Delco*.

There are statutory controls on exemption clauses - see ss68, 68A Trade Practices Act 1974

PUFFING

Puffs are not actionable at common law. It is an obviously wrong or outlandish statement made by the for example, vendor. For example, "this is the best house in the world!". Puffs are outside s52 of the Trade Practices Act 1974 (Cth) or s56 of the Fair Trading Act 1987 (SA) which focus on "misleading and deceptive conduct".

MERE REPRESENTATIONS

An objective test will show that the parties did not intend that the truth of such a statement be guaranteed or that it was to have contractual (promissory) force. They can be classified into innocent, fraudulent or negligent mere representations.

TERMS

On the other hand terms are statements which the parties objectively intended to be contractual promises. Guaranteed by the maker that the statement is true or that the state of affairs promised will be brought about. Any failure to comply with a promissory term (subject to any qualification expressed in the contract) will render the person strictly liable for breach of contract. Terms can be classified into warranties, conditions and innominate.

SIGNED CONTRACTS

GENERAL RULE: A party is bound to a contract he has signed irregardless of whether or not he has read the contract. However, the signature cannot be obtained by fraud, duress, undue influence, or misrepresentation - *L'Estrange v Graucob* [1934] 2 KB 394.

MISREPRESENTATION

INNOCENT MISREPRESENTATION: As opposed to fraudulent misrepresentation is not deceitful. It will only attract common law remedies if it has become a term in the contract or it has caused complete failure of consideration for the contract.

A fraudulent or innocent misrepresentation may be relied upon by the representee as a defence to a suit for specific performance of the contract induced by it. The law in Australia is that rescission of a contract through innocent misrepresentation will only be possible if the misrepresentation goes to the "root of the contract" - *Hynes v Byrne* (1899) 9 QLJR 154.

See *Oceanic Sun Line v Fay* (1988) 165 CLR 197.

ADVERTISING: A householder's "for sale" advertisement which misdescribes the zoning of the land for sale - *Argy v Blunts* (1990) 94 ALR 719. Consumer legislation limited to "consumers"? - see *Concrete Constructions v Nelson* (1990) 169 CLR 594.

The problem of causation and reliance - see *Kaze Constructions v Housing Indemnity* (1990) ATPR 41-017.

If the representation is not intended to be a term then no action for damages for breach of contract will lie on its account. However, certain kinds of mere representations may give rise to other liability. If it is a misstatement of fact which induces the contract there may be an action for damages under s7(1) of the Misrepresentation Act 1971 (SA). It may qualify as "misleading or deceptive conduct" under s52 Trade Practices Act 1974 (TPA) (Cth) or s56 of the Fair Trading Act 1987 (FTA) (SA) giving rise to an action for damages for consequent loss under s82 of the TPA or s84 of the FTA.

CONSIDERATION

All simple contracts (ie a non formal contract) must be supported by a consideration. Consideration is something of value which changes hands between the parties at the date of the contract.

OPTIONS: EXAMPLE: A offers to sell his house to B for \$100,000. B asks for 2 weeks to consider and A agrees. A can sell at any time during the 2 weeks as the promise was not supported by consideration and therefore, was not binding. However, if B had given \$1 to A as part of the option agreement it would be a contract by which A must abide.

RULE: The consideration must be a "detriment" to the promisee. If the promisee has given up something of value including a forbearing to do something which he/she has a legal right to do, it is consideration - *Thomas v Thomas* (1842) 114 ER 330.

ADEQUACY OF CONSIDERATION

The adequacy of the consideration immaterial. However, a lopsided bargain may support other evidence of fraud or misrepresentation etc. In *Chappell v Nestles* [1960] AC 87, N promoted a chocolate by offering a record called "rocking shoes" for 1s 6d plus 3 wrappers from their chocolate bars. Royalties were determined on the 1s 6d + the nominal value of the 3 wrappers.

If any part of the consideration is valid, the promise will be enforceable.

GRATUITOUS PROMISES (SUBSCRIPTION CONTRACTS)

It is doubtful that the acceptance of a gift or a promise to accept one can be sufficient consideration to support a promise to make the gift. For example, a list of signatures and amounts promising to pay for the building of a new church. It cannot be said that the application of the fund to build the church is consideration since the fund cannot be utilized until it is paid into the hands of the trustees.

COMPOSITION WITH CREDITORS AND OTHER MATTERS

Although a creditor cannot accept a smaller amount in lieu of a debt as it is not sufficient consideration, the law will try to find an extra element (such as premature payment) to enforce the new agreement. It is not good consideration to do something that the party is already obliged to do at law - *Foakes v Beer* (1884) 9 App Cas 605.

PROMISSORY ESTOPPEL

The tendency for courts to find good consideration has led to the development of the doctrine *promissory estoppel*. It has been applied to lease situations, for example in *Hughes v Metropolitan Railway* (1877) 2 App Cas 439, H held a long term lease from MR. He was served with a notice to make certain repairs within 6 months or he would be evicted. After receiving this notice he entered into negotiations with the MR concerning the possible purchase of the long term lease however, these negotiations fell through.

Within a week after the failure of the negotiations H was served with a notice to quit as the 6 months had expired and the repairs not completed. **HELD:** That H should be granted relief because the effect of MR's entering into negotiations with him implied suspension of the notice to repair at least for the period of the negotiations.

EXAMPLE: In *Central London Property Trust v High Trees House L* [1955] 1 All ER 256, H leased from C in 1937 a block of flats for an annual rental of £2500. During the war C had trouble in renting the flats and consequently in January 1940, to keep H they agreed to let H stay at £1250 pa. By 1945 C had the building fully let and therefore claimed rent from H at the original rent for the last 2 quarters of 1945. **HELD:** By Denning L that the claim was successful but C could not claim for the arrears ie the difference between the original rent and the reduced rent for the period 1940 to 1945 under the doctrine of promissory estoppel.

The doctrine is not a cause of action itself but rather a defence only. The doctrine operates as a shield and not sword - *Combe v Combe* [1951] 1 All ER 767.

More modern examples are *Waltons v Maher* (1988) 164 CLR 387, *Comm v Verwayen* (1990) 170 CLR 394 and *David Securities v Cth Bank* (1992) 66 ALJR 768.

ESTOPPEL BY CONDUCT

In *Ismail v Polish Ocean* [1976] 1 All ER 902, I had insisted that P store the cargo in a particular manner despite the fact that P was responsible for storage under the contract and the misgivings expressed by the master. The cargo was subsequently destroyed and the court held that in the circumstances I should be estopped from insisting on his strict contractual rights.

BUILDERS AND CONTRACTORS

EXAMPLE: Under a typical building contract the builder agrees to carry out certain work for a fixed price. He/she refuses to finish as it would be unprofitable, so the owner promises to pay an extra amount. Strictly, under the law of contract the second promise must be invalid as the contractor has not incurred any legal detriment and there is no mutual desire to rescind the original contract.

PROMISES TO A THIRD PARTY

EXAMPLE: A enters into a contract to build a house for B. B is dissatisfied with the contract and intends to stop construction. C being an interested party (the new tenant) promises to pay \$10 000 to A to complete the building. Upon completion A tries to recover the \$10 000 from C. The law would hold that A could recover as an agreement between A and C is a new agreement.

CASE STUDY - TERMS OF THE CONTRACT

DEFECTS IN A BUILDING

In *Wigan v Edwards* (1973) 47 ALJR 586, the purchaser of a new house after signing the contract submitted a list of defects to the builder. The builder gave the purchaser a written agreement to rectify the faults and the sale was completed on that basis. In an action to force the builder to make the repairs, the builder alleged that since the purchase contract had been finalized prior to the agreement to repair there was no consideration to support that agreement. **HELD:** By the High Court that since the purchasers bona fide believed that they had valid grounds for not completing the contract, and since they refrained from bringing any action on this belief because of the builder's written agreement there was a valid forbearance (= consideration) and therefore, binding on the builder.

INFORMATION B2

Contract 3

Read Vermeesch & Lindgren, in Part 6 *Matters Affecting the Validity and Enforceability of Contracts* 1:

Introduction
Requirements as to Form of a Contract
Necessity for Contractual Capacity

CAPACITY

Capacity of parties can be considered under the following headings:

1. Mentally disordered persons and drunkards
2. Infants
3. Married women
4. Corporations
5. Convicts and aliens.

MENTALLY DISORDERED PERSONS

Parties to an agreement must have genuine consent and the intention to be bound. Therefore, the state of mind at the time of the agreement is the test as a mentally unstable person may still have lucid moments. The contracts of a mentally disordered person are binding unless it can be shown that at the time of the making of the contract he was unable to understand what he was doing. Further, the other party knew or should have known that he was incapable of understanding.

If the above is shown then the contract is voidable at the plaintiff's option. However he must repudiate within a reasonable time.

DRUNKARDS

The same general rule applies to drunkards. In *Barrett v Buxton* 2 Aik (Vt) 167 the parties agreed to enter into a contract for the exchange of land. The defendant gave his promissory note to the plaintiff for the difference in value between the properties exchanged. The plaintiff alleged that he was drunk at the time he signed. It was held that his intoxication was a valid defence as it deprived him of his understanding. Excitement of alcohol was not sufficient if he was able to understand the purport of the agreement.

The same rule applies to persons of feeble intellect.

INFANTS AND MINORS

A creditor cannot bring an action against a minor to enforce a minor's promise to pay a debt unless the promise or ratification is in writing and is signed by him. If the agreement is void under legislation it remains void even if the minor had represented himself to be of full age.

Each state has its own legislation covering contracts with minors.

MARRIED WOMEN

A married woman has full contractual capacity in respect of property that she holds in her own right.

AS AGENT FOR HER HUSBAND: Where a married woman enters into a contract for the supply of necessities for herself, children, or husband she is deemed to act as agent for her husband while she is living with him. This principle will still apply if she is living away from him through no fault of her own.

CORPORATIONS

Corporations being "artificial persons" have the inherent power to enter into contracts for the furtherance of its purposes. The concept of ultra vires (beyond legal powers) has been effectively abolished by the Companies Act.

CONVICTS AND ALIENS

A convict cannot pursue any legal rights through the courts. This rule would appear to apply to non capital felonies - *Dugan v Mirror Newspapers* (1979) 53 ALJR 166.

ALIENS: An alien is one who is not an Australian citizen. However, during peacetime there are no limits placed on the contractual capacity of an alien. During war and if he/she becomes an enemy alien there are many contractual restrictions placed on him/her.

UNDUE INFLUENCE

A contract can be avoided if it was induced by duress. That is, by the use of threat or physical pressure against the plaintiff. However, prosecution or the threat of prosecution, or the unlawful detention of goods are not duress. However, in equity the plaintiff can rescind a contract if he can prove that actual pressure was used to bring about the contract including a threat of prosecution - *Bridgeman v Green* (1757) 97 ER 22.

Once undue influence has been established it can only be rebutted by showing that the transaction was the result of the plaintiff's independent will, freely exercised. The law in Australia is not clear. Compare *Baburin v Baburin* [1990] 2 Qd R 101 with *Farmers' Coop v Perks* (1989) 52 SASR 399.

UNCONSCIONABLE TRANSACTIONS

Unconscionable transactions arise where one party confides in another. The other party is expected to act in the interests of the first party and not in his own interests. Whether or not this is the case will require close investigation of the disputed facts. However, a consensus may not always be present as in the case of a constructive trust.

EXAMPLE: A tenant for life may only renew a lease for the benefit of those entitled to the old lease in succession. This is despite the absence of any confidential relationship between the life tenant and the remainderman. A parent/child, and a husband/wife are NOT fiduciary relationships.

FIDUCIARY DUTY

The fiduciary has the following duties:

1. He/she must not place his/her interest in conflict with his/her duty
2. He/she must not do for his/her own benefit that which he/she ought to have done for his principal - *Lister v Stubb* (1890) 45 Ch D 1.
3. A breach of fiduciary duty can arise even though the principal may not have sought the benefit which the fiduciary has obtained - *Phipps v Boardman* [1967] 2 AC 46. If the fiduciary is ordered to account to the principal the principal receives the benefit.
4. The duties required of the fiduciary are preventive and deterrent. Therefore the bona fides of the fiduciary are irrelevant - *Nocton v Lord Ashburton* [1914-15] All ER Rep 45.
5. A fiduciary cannot purchase from his principal other than at arms length and after full disclosure of all he knows with respect to the property.

Parties may be concurrently controlled by the Common Law rights and a fiduciary relationship.

EXAMPLE: Principals and agents as shown in *BLB Corporation v Jacobsen* (1974) 48 ALJR 372. In that case it was alleged that J was in breach of a clause in his employment contract which imposed duties no less comprehensive than those of a fiduciary dealing with his principal:

The obligation of a fiduciary to take full disclosure extends to all material information of which he is aware or which he has deliberately refrained from acquiring. In our view it does not extend to other facts of which he is unaware notwithstanding that prudent inquiry would reveal their existence.

No attempt has been made to suggest that the respondent's breach of duty consisted in a negligent failure to obtain and convey more accurate information as to Bel-Knit's financial position and capacity to pay its debts.

In *Nocton v L Ashburton* [1914-15] All ER Rep 45 the House of Lords considered the relationship between solicitor and client:

..a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital,...

The solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort for negligence in breach of a duty imposed on him.

The conclusion at which I have arrived is that this action ought properly to have been treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty, or for breach of contract to exercise due care and skill.

INFORMATION B3

Contract 4

Read Vermeesch & Lindgren, in Part 7 *Matters Affecting the Validity and Enforceability of Contracts 2*:

Introduction
Illegal and Void Contracts

MISTAKE

Mistake by one or both parties cannot replace the doctrine of *caveat emptor* but can provide relief from contractual obligations in certain circumstances. Examples where mistake will not affect the contract are given by Lord Atkin in *Bell v Lever Bros* [1932] AC 161:

A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty. A agrees to take on lease or to buy from B an unfurnished dwelling-house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy, and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty. A buys a roadside garage business from B abutting on a public thoroughfare; unknown to A, but known to B, it has already been decided to construct a by-pass road which will divert substantially the whole of the traffic from passing A's garage. Again A has no remedy. All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts ie agree in the same terms on the same subject-matter-they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

The legal meaning of mistake is wider than the common meaning. It can signify a misunderstanding as to the existence or non-existence of a fact, an ignorance of some matter relevant to the transaction, and where the parties agree to act upon some assumed fact relevant to the transaction. Under Australian law the power to relieve parties following mistake is founded on limited grounds only. A contract can be void ab initio when:

1. There is mistake as to identity, as distinct from mistake as to attributes
2. There is mistake as to the substance of the subject matter as opposed to its qualities
3. There is a mistake as to the nature of the transaction, as opposed to its terms.

- *Psaltis v Schultz* (1946) 76 CLR 547.

Where the contract is void because of mistake the results on an innocent third party may be unfortunate. However equity may grant relief against the consequences of such mistake without necessarily declaring the contract null and void.

Although modern courts administer both common law and equity there is a conceptual division between equitable and common law remedies. This division inherited from the time when there were 2 distinct court systems accounts for most of the problems and uncertainty surrounding mistake. The common law rules were applied in *Raffles v Wichelhaus* and *Couturier v Hastie* however, both cases are better explained on other grounds today. Equitable remedies are more readily applied by the courts.

CLASSIFICATION OF MISTAKE

Mistake can be classified as follows:

1. **COMMON MISTAKE:** Both parties have made the same mistake. The mistake is underlying and fundamental to the contract. For example, the subject matter may have perished. See *Lukacs v Woods* (1978) 19 SASR 520.
2. **MUTUAL MISTAKE:** The parties misunderstand each other and therefore are at cross purposes. For example, A is offering Lot 1 for sale but B mistakenly believes he/she is offering Lot 2.
3. **UNILATERAL MISTAKE:** Only one of the parties is mistaken. A buys from B a block of land which A believes to be unaffected by a road widening. The land is in fact affected and B knew this. If B did not know of A's mistake then the transaction is one of mutual mistake but if he/she did know of A's mistake then it is unilateral mistake.

The above examples should be determined upon whether or not an agreement has been reached between the parties. In common mistake an agreement has been reached about the same erroneous fact however, for the other 2 cases there is no consensus between the parties.

If the subject matter of the agreement is non-existent then no contract exists - *McRae v Comm Disposals Comm* (1951) 84 CLR 377. Similarly, if A tries to sell something to B which he/she doesn't own then contract must be a nullity. In *McRae Dixon and Fullagar JJ* stated that the above principle should not apply if one party by his own culpable conduct causes the erroneous belief common to both.

Equity can grant relief in certain circumstances. For example, in *Solle v Butcher* [1949] 2 All ER 1107 the Court of Appeal denied that the contract was void but that the lease must be set aside. This would have been inequitable to the tenant who would have been immediately dispossessed so he remained in possession on terms.

Also in *Grist v Bailey* [1966] 2 All ER B75 where a house was sold at a price governed by the erroneous belief of both parties that the tenant was a "protected tenant". Held by Goff J that the common mistake of the parties did not render the contract void but was sufficient to require the intervention of equity. Therefore, the defendant should enter into a fresh contract to sell the house at the appropriate vacant possession value.

At common law only fundamental mistake is material - *Kennedy v Panama Royal* (1867) LR 2 QB 580. Mutual mistake cannot by itself nullify a contract. The reasonable man would conclude that they intended to enter into a contract - *Goldsbrough Mort v Quinn* (1910) 10 CLR 674.

MISTAKEN IDENTITY

The majority of cases relating to unilateral mistake involve mistaken identity. For example, if A buys from C who he mistakenly considers to be D. In such a situation there is a rebuttable presumption that a contract has been concluded between the parties. The onus of rebuttal lies on the party pleading the mistaken identity. He must show:

1. He regarded the identity of the other party as of vital importance at the time of the agreement.
2. His intention was to deal with C and he took reasonable steps so to do
3. That the wrong acceptor knew of the other party's intention.

The plaintiff's case can also be prejudiced by the doctrine of estoppel - *Cundy v Lindsay* [1874-80] All ER Rep 1149. Generally, equity follows the law for both mutual and unilateral mistake.

DISCHARGE OF CONTRACT

DISCHARGE BY PERFORMANCE:

It is a principle of English law that parties having contracted to do an entire work for a specific sum can recover nothing unless the work be done or it can be shown that it was the other party's fault that the work was incomplete or that there is something to justify the conclusion that the parties have entered into a fresh contract (*Phillips v Ellinson* (1941) 65 CLR 221, 233-4).

There is a distinction between "entire" and "divisible" contracts and a qualifying doctrine of *substantial performance*. Sometimes circumstances will warrant a new contract or give rise to a restitutionary claim in respect of part performance. The Law Reform Committee of South Australia has recommended reforming the rule in *Cutter v Powell* (19th report).

DISCHARGE FOR BREACH: Normally, any non performance of a contractual obligation amounts to a breach of contract. This will give the innocent party the right to claim damages for any loss suffered as a result. However, in some circumstances the breach will also have the effect of giving the innocent party the option of "terminating" or "discharging" the contract as well.

Where obligations are mutually dependent and concurrent the party purporting to terminate the contract must show that he/she was ready and willing to perform his/her obligations - *Foran v Wight*.

TERMINATION FOR BREACH

A contract can be terminated on the breach of an essential term or condition as opposed to a mere warranty - *Associated Newspapers v Bancks* (1951) 83 CLR 322. In *Tramways v Luna Park* (1938) 38 SR(NSW) 632:

The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor (641-2).

See also *Shevill v Builders Licensing Board* (1982) 149 CLR 620 (636).

The parties can expressly stipulate the essentiality of a term that might otherwise not appear to be essential - *Tropical Traders v Goonan* (1964) 111 CLR 41 but such a term will not prevent termination unless it follows from the proper construction of the term - *Progressive Mailing House v Tabali* (1985) 157 CLR 17.

REPUDIATION

Repudiation of a contract can be based on words or conduct; "amount to an intimation of an intention to abandon and altogether to refuse performance of the contract" - *Freeth v Burr* (1874) LR 9 CP 208 (213). See *Laurinda v Capalaba Park Shopping Centre* (1988) 166 CLR 623. Repudiation can arise from an inability to perform the contract (not frustration) - *Rawson v Hobbs* (1961) 107 CLR 466.

Repudiation is usually willful for example, where the defendant's statements or conduct evince an intention no longer to be bound by his/her contractual obligations - *Progressive Mailing House v Tabali*. It can also come about where the defendant has made it impossible for him or herself to perform ie an actual breach has become inevitable - *Foran v Wight* (1989) 168 CLR 385.

FUNDAMENTAL BREACH OF AN INNOMINATE TERM

It is not clear that such a breach is allowable to terminate a contract in Australia. However, some Australian cases seem to support the idea, see *Stern v McArthur* (1988) 165 CLR 489. The better view is that there need be only two categories; conditions and intermediate/innominate terms.

ESSENTIAL VERSUS NON ESSENTIAL TERMS (WARRANTIES)

The breach of condition occurs through the non performance of an "essential" term. The test is as follows:

The question whether a term in a contract is a condition or warranty, ie, an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor...If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance of a substantial performance of the promise, any substantial breach will ordinarily justify a discharge. In some cases it is expressly provided that a particular promise is essential to the contract, eg. by a stipulation that it is the basis or of the essence of the contract...but in the absence of express provision the question is one of construction for the court, when once the terms have been ascertained ..." (Jordan CJ in *Tramways v Luna Park* (1938) 38 SR (NSW) 632, 641-2).

The intention is construed at the date of contract not at the date of breach. Where there is an absence of any express provision the question is one of construction for the court - *Associate Newspapers v Banks*.

The fundamental breach of an innominate term is where there is a breach causing very serious consequences of a term undesignated as either condition or warranty. The parties are not so much concerned with the significance of the term but the gravity of its breach - *Hongkong Fir v Kawasaki*. In *Ankar v National Westminster*:

Since the judgment of Diplock LJ in *Hongkong Fir* it has been recognised in England that a term in a contract may stand somewhere between a condition and a warranty. Such an intermediate or innominate term, it has been held, is capable of operating, according to the gravity of the breach, as either a condition or a warranty. In *Hongkong Fir* the obligation of seaworthiness was readily classified as innominate because a breach of the obligation might be trivial, making damages an adequate remedy, or grave, in which event it should have effect as a breach of condition. The innominate term brings a greater flexibility to the law of contract... (Mason ACJ, Wilson, Brennan and Dawson JJ, 690-691).

A breach justifying termination does not itself discharge the contract but gives the innocent party the option to elect whether to terminate or continue. Once the innocent party has elected to affirm, then he/she loses for all time the right to terminate for that breach.

DISCHARGE BY FRUSTRATION

Some cases of non-performance do not amount to a breach of contract. If it can be said that non-performance results from a supervening event or change of circumstances, which is neither party's fault and for which the parties have not attempted to make any provision in their contract, but which effectively deprives one or both parties substantially of the benefit they expected to derive from the contract, then the contract is automatically frustrated.

Discharge by frustration discharges all obligations that remain unperformed at the date of frustration whether or not performance has fallen due (obligations that have been performed are not rescinded). Losses suffered and benefits acquired at the date of discharge are redistributed between the parties with formula in the Frustrated Contracts Act that is applicable in most of the states. Frustration can arise when the following occurs:

1. Supervening impossibility of performance
2. Supervening illegality of performance
3. Radical change in performance
4. Frustration of purpose
5. Cases involving land - *National Carriers v Panalpina*.

However, the mere occurrence of the above will not necessarily by itself be sufficient for frustration. Frustration will depend upon a proper analysis of the circumstances in accordance with the principles in *Codeffa* and a proper construction of the contract. It may be seen that on a proper construction of the contract one party will have accepted the risk of such an event occurring. If this is the case, it is breach of contract and not frustration. Where the frustrating event is "self induced" the party who induced it cannot rely on it - *Maritime National Fish v Ocean Trawlers*.

DISCHARGE BY AGREEMENT

The courts have allowed discharge by agreement in the following cases:

1. For a nominal consideration - *Pinnel's case*
2. For a change of time or place of payment
3. For partial payment to a third party
4. Composition with creditors
5. Promissory estoppel - *D & C Builders v Rees*.

REMEDIES

ENFORCEMENT: This is done by way of specific performance which is an equitable and discretionary remedy. Damages may be awarded in lieu of specific performance under the Supreme Court rules applicable in many states.

COMPENSATION: This is the most common contractual remedy in an action for damages for breach of contract. The object is to compensate the plaintiff for the loss resulting from the defendant's breach. The plaintiff is entitled to be put in the same position as if the defendant had performed the contract. The plaintiff is entitled to compensation for "expectation loss":

Where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same position with respect to damages, as if the contract had been performed" - *Robinson v Harman* [1848] 1 Exch 850 (855) Parke B.

Compare with tort where the plaintiff recovers damages only so as to put him/her in the position in which he/she would have been had the tort not been committed ie "expectation loss is excluded - *Gates v City Mutual Life Assurance*. However, as in tort the following will restrict recovery:

1. Causation
2. Termination pursuant to a contractual right
3. Remoteness
4. Duty to mitigate loss
5. Liquidated damages and penalty clauses
6. Nominal damages.

RESTITUTION: Restitution claims are founded on the need to prevent unjust enrichment. It is an action for money had and received to recover money paid under an ineffective contract for which nothing has been received in return. That is, there is a total failure of consideration. Also restitution as *quantum meruit* for reasonable recompense for services rendered under an ineffective contract.

STATUTORY REMEDIES: See Consumer legislation later in this subject.

ACTIVITY 3

Read the court case mentioned above; *Wigan v Edwards* (1973) 47 ALJR 586. Draw a time line against which itemise those factors that the court took into account when determining whether or not a contract had been entered into. Based on this information do you think the decision is a fair one? What would have been a better way for the purchasers to protect themselves with regard the correction of defects contract? What was the consideration used by the Court to find a contract? Discuss how this could possibly be construed as consideration.

USE THIS SPACE FOR YOUR RESPONSES TO ACTIVITY 3

INFORMATION C

Law of Agency

Read Vermeesch & Lindgren, in Part 14; *Principal and Agent*:

- Definition
- Creation of Agency
- Capacity of Parties
- Classification of Agents
- Agent's Duties and Principal's Rights
- Agent's Rights and Principal's Duties
- Common Classes of General Agent
- Secret Commission

The role of the property professional acting as an agent in his/her business environment is most important and a legal area that can leave the agent liable and open to a claim for damages.

DEFINITION: An agent is authorised to act on behalf of his/her principal to create legal relations between the principal and a third party. Therefore, because the agent is generally, representing the principal in the transaction, so long as the agent has acted within instructions, the principal is bound by the new legal relationship entered into. The principal's instructions to the agent can be express or implied.

Note however, that this general Common Law proposition has been heavily modified by statute. For example, real estate agents in the ACT operate under the Agents Act, 1968. Using the convention in Vermeesch and Lindgren, these notes will use P for principal and A for agent.

It can be seen from the above definition that there must be some sort of contract between P and A for an agency relationship to exist. Note in V & L the distinction between an agency, "independent contractor" and "master and servant". Note that the main difference is "degree of control" in carrying out the tasks.

P can be held accountable for his/her agent's actions through the principle of "vicarious liability". Vicarious liability is the principle according to which one person (in this context, P) is held liable for the acts or omissions of another (in this context, A).

Most substantial agencies are created by an express agreement. For example, a real estate agent will not list a property for sale until P has signed the standard form Agency Agreement. Therefore, the contract between A and P is the agency agreement but plus any implied terms that are not covered in the contract (for example, the authority "to sell" has been held to impliedly mean "to sell in the usual manner"). At Common Law the appointment of an agent "under seal" (by deed) for example, to act as P's attorney must be in writing (see Real Property Ordinance 1925, s130(2)). An agency agreement to sell land on behalf of P must be in writing because of the relevant statutes operating in the state/territories

Apparent or ostensible authority usually arise from the conduct of the parties. For example, if an unauthorized person holds himself/herself out to the world as P's agent and P knowing this, takes no action to repudiate A's claim, then P is liable to an affected third party by way of ostensible authority. This brings in the Common Law notion of "estoppel". See *Tooth v Lays* (1888) 9 LR (NSW) 154; *Hook v Day* (1971) SASR 440 summarized in V & L.

Note also that agency can be presumed through cohabitation. Therefore, the de facto partner may be held liable for the spending actions of the other. This rule applies particularly, if the expenditure is on household necessities.

When dealing with a third party, that third party must know that A is indeed the agent of P. Read V & L's comments on the problems of an undisclosed principal and particularly the case *Construction Engineering v Hexed* (1985) 155 CLR 541.

Much of the logic for a valid agency contract comes from the Law of Agency. For example, P must exist and have capacity. Similarly, A must have capacity to enter into the agency agreement. The following are a summary of A's duties to P:

1. A must act according to the terms and conditions of the agency agreement. Therefore, A cannot exceed his/her authority (except in some exceptional circumstances for example, emergency).
2. A must follow all the instructions of P so long as they are lawful and reasonable
3. A must complete the contract within a reasonable time. He/she can obtain an extension of time from P.
4. A should always seek to clarify P's instructions when they are in doubt. Otherwise, A may be liable for breach of contract or negligence.
5. A must exercise the skill and ability expected of an agent in that particular matter
6. A must act in person. However, he/she can delegate minor or administrative matters
7. A has a fiduciary obligation to P. That is, he/she is in a position of trust
8. A cannot obtain a secret profit or commission in the transaction. Similarly, P can by the property for example, by but there must have been "full disclosure".
9. A must keep all monies obtained as trustee separate from his/her own. This is usually done by banking into a "trust account". Similarly, there must be full and proper accounting of all monies involved in the transaction.
10. A must treat all matters affecting the transaction that P does not want revealed, confidential.

Most of these duties and responsibilities have been codified. For example, Part VII - Rules of Conduct for Agents, s72 in the Agents Act, 1968 (ACT). P's duties to A include the following:

1. To pay commission as under the terms of the agreement or if work has been successfully performed by the agent, a reasonable amount. See *AL Wilkinson v Brown* [1966] 1 WALTER 194; *Montana v Coffey* (1968) 88 WAN (PTA) NSW 240; *Hooker v W J Adams* (1977) 138 CLR 52, as summarized in V & L. This part of the Law of Agency is most important to real estate agents as they may not have to complete a sale but merely introduce the potential purchaser for the commission to be payable.
2. A is entitled to be indemnified by P against all losses and expenses incurred by A in carrying out P's instructions.

The relationship between the P and A and a third party (TAP) can be summarized as follows:

1. A retires from the transaction once the TAP has entered into legal relations with P
2. When A discloses the name of P, then P, not A may sue and be sued on the contract
3. When discloses that there is a P but not his/her name, then A is not personally liable unless the contract shows that A as well as P are liable.
4. If Anon the face of the contract does not show that he/she is acting as an agent, A will incur personal liability and the TAP can sue either A or P.
5. When neither the name nor the existence of P is disclosed, the TP can sue either A or P. Similarly, both A and P can sue the TP.

The agency agreement can be terminated by:

1. An agreement between A and P
2. P can revoking A's authority. This can be done at any time
3. A renouncing his/her authority but if the agency has been undertaken for valuable consideration, damages may be payable by A.
4. P dismissing A following A's acceptance of a secret commission.
5. A completing the contract
6. The expiration of the time for which A was engaged
7. The death of A or P
8. The bankruptcy of A or B, in certain cases
9. The insanity of A or B

GENERAL AGENT: A general agent is one who has an agency business generally, specializing in a particular class of agency.

AUCTIONEER: An auctioneer is a general agent employed to sell property at auction. There are special rules of contract that apply to the sale of property by way of auction. The most important is that there is a binding contract between P and the successful bidder (TP) on the "fall of the hammer".

MERCANTILE AGENT: There are 2 types of Mercantile Agent:

1. **FACTOR:** A Factor is a mercantile agent who is entrusted with the passing of title of goods entrusted to him/her. Controlled in the ACT by the Mercantile Law Ordinance, 1962.

2. **BROKER:** A broker is a mercantile agent who is employed to buy and sell on behalf of another, rather than in his/her own name. For example, Insurance Brokers.

DEL CREDERE AGENT: A Del Credere Agent is one who receives an additional commission from P on the basis that he/she will undertake not only to sell the goods entrusted to him/her for sale but if they are not sold, then the agent will buy them. For example, a Stock Agent.

SECRET COMMISSION: If A accepts a commission from a TP without the knowledge of P, then that is a secret commission and a civil wrong. Secret Commissions are governed by the Secret Commissions Act 1905 (Cth) and generally, state legislation. It is part of the Rules of Conduct in the ACT Agents Act, 1968 (s72(l)).

REAL ESTATE AGENT: Unlike an Auctioneer a Real Estate Agent contracts to sell the property by way of "private treaty". He/she is usually paid a commission only if the sale is successful.

SPECIAL AGENT: A special agent is only authorized to make one particular transaction only. For example, a contract to buy a car on behalf of P.

ACTIVITY 4

From the financial, business and specialist papers (eg The Land) collect 4/5 advertisements for each of the following classes of agent:

1. Real Estate Agent
2. Auctioneer - Real Estate and/or Plant and Machinery
3. Factor
4. Del Credere Agent.

USE THIS SPACE FOR YOUR RESPONSES TO ACTIVITY 3