CHAPTER 5

Law of Contract

[5.10] The law of contract pervades all aspects of construction projects. Not only does it define and determine the nature of the relationships amongst principals, superintendents, contractors, consultants, suppliers, sub-contractors, financiers and others as parties to their various contracts, it is also relevant to a wide range of activities and relationships incidental to the main focus of the project.

The law of contract applies to the main construction contract, subcontracts for specific work, employer/employee relationships, insurance, sale of goods and land, hire purchase, corporations, partnerships and myriad other arrangements all of which impinge on the project in legal terms. An understanding of the law of contract is, therefore, essential to the understanding of construction law.

This chapter considers how the general principles of contract law – primarily formation, interpretation, enforceability, discharge and remedies – apply in the context of construction projects. Specific issues arising under construction contracts, such as variations, payment and obligations as to progress and completion, are discussed in Chapter 9.

THE NATURE OF CONTRACT LAW

[5.20] In Australia, the law of contract is founded principally in the common law, so the focus is upon judgments of decided cases from the courts. Courts are generally reluctant to interfere with the terms of an agreement, although the uninhibited freedom to contract of a laissez-faire economy no longer exists. For example, at common law, terms may be implied in certain types of contracts, contracts may be rendered void for misrepresentation or other "vitiating factors", and certain categories of persons, for example, children and persons lacking the requisite mental capacity, may be restricted in their ability to contract. There are also, as will be seen from other chapters, important interventions upon the common law via statute, for example, unfair contract terms and security of payment legislation, see, respectively, [3.160] and [3.60].

Fundamentally, the law of contract concerns the *legal* enforceability of promises. A promise is legally binding only if it complies with the principles derived from the case law of contract, primarily the elements of formation discussed below. The contract involves an agreement which gives rise to rights and obligations which can both be enforced at law. For this reason,

in the eyes of the law, a "contract" refers to the bargain or agreement itself, though in everyday terms most people see the "contract" as being the documentation which records the agreement (or in any case purports to do so).

Basic to the nature of a contract, therefore, is the concept of agreement, or bargain, with each side contributing something to make it binding. In Australia, generally speaking, the law will enforce an agreement only if the parties intended to create legal relations reached real agreement about the terms on which they will be bound, offered reciprocal promises, acts or the relinquishment of something of value, known as "consideration", and were capable at law of entering such an agreement. Those requirements for enforcement are referred to as the "elements of formation".

Where contracts are in fact formed, the courts may be asked to consider the terms on which they are made, their relative importance and operation and any terms which may be implied. Rules exist on which contract documents are construed or interpreted.

Further, a contract may otherwise be valid according to the elements of formation, yet be unenforceable at law, for example, where it is to carry out an illegal act or under residential building contracts when the contractor is not licensed.

Contracts may be discharged, that is, the parties being released from their obligations. This is usually by performance, however, parties may seek remedies in the event of non-fulfilment by any other party of an undertaking. In addition, statutes place limitations on the time within which an action may be brought to enforce a contract or bring an action for breach of a contract.

FORMATION OF CONTRACTS

[5.30] In order to be legally enforceable, a "simple" contract (being a bargain between the parties with mutually supporting promises)[1] must satisfy certain technical legal requirements concerning its formation. For a contract to exist, there must be at least two parties who have achieved sufficiently certain agreement as to their respective rights and obligations, and who contemplate that such agreement will be protected, and, if need be, enforced, by the law.

To establish the existence of a contract, courts typically look to a number of essential elements of formation. These are categorised in this text, as discussed below, as:

- intention to create *legal* relations;
- offer and acceptance;
- consideration; and
- capacity to contract.

1. See [5.210] as to unilateral undertakings and other contracts entered into by way of deeds.

Having said that, commentators, lawyers and parties often frame the elements in different ways; for example, certainty is sometimes seen as a separate element. Whichever mode of categorisation is used, however, the fundamental exercise is to analyse whether the parties have in fact agreed to contract with one another.

Intention to create legal relations

[5.40] Not all agreements are intended by the parties to create legally binding obligations. In many informal situations, a party will exchange promises or benefits with an honest intention to be personally bound to perform the promise, yet lack any intention to impose a legal obligation on either party to perform. Despite the existence of all other elements required for a legally enforceable contract, in this case the parties will not be legally bound.

Therefore, the parties to a contract must, expressly or impliedly, show an intention to create a legally binding relationship. Whilst this is rarely an issue in construction projects, where most arrangements are commercial in nature, it can be important where, for example, friends or family members have an informal arrangement to carry out work. In such a case, the existence or absence of an actual or imputed intention to create legal relations could be crucial to whether the parties look to the law of contract to settle any disputes or have to fall back on extra-contractual legal principles.

Presumptions as to intent

[5.50] Traditionally, the law has applied "presumptions" to decide whether there is the required intention to create legal relations. In personal or family relationships, the presumption is that there is no such intention; conversely, in commercial relationships, the intention is presumed. However, such presumptions can be "rebutted" by evidence in particular circumstances. Furthermore, the High Court has indicated that a presumptions-based approach may be inappropriate in many cases, especially where the relationship sits somewhere between the "personal" and "commercial", see *Ermogenous v Greek Orthodox Community of SA Inc.*[2] Nevertheless, presumption remains a useful starting point for analysis in most cases.

The Full Court in the Federal Court case of *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs*[3] interpreted *Ermogenous* as rejecting "the use of presumptions as a basis for ascertaining whether parties intended to enter into contractual relations". The Court found "The fundamental question, whatever the circumstances of the parties, is whether in the situation in which they were, did their words and conduct objectively assessed, evince an intention that they intended to assume

2. *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.
3. *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237.

legally binding contractual obligations to each other? The family or other relationship is one circumstance that is relevant".

In *Ashton v Pratt*,[4] the NSW Court of Appeal favoured the view taken in *Evans*, moving away from the use of a rebuttable presumption: "... in my opinion the effect of the decision of the High Court in *Ermogenous* was that in considering the issue recourse should not be had to any presumption concerning the contractual or non-contractual effects of family arrangements. That does not mean that the relationship of the parties and the circumstances in which the arrangement was entered into are irrelevant to the question".

Family agreements traditionally have been presumed to be mere social arrangements.[5] However, the presumption can be overcome by evidence that the parties intended to affect their legal position, notwithstanding the domestic or social setting. Where the agreement anticipates substantial reliance by one party upon the other, this will often be an important factor in deciding to overcome the presumption that the contract is not binding. For example, in *Todd v Nicol*,[6] the plaintiffs moved from Scotland to Australia on the strength of a promise by the defendant to leave her house to them if they provided company for her. Also see *Bovaird v Frost*[7] at [52] where Brereton J confirmed that many examples of the rebuttal of the presumption against contracts in personal settings exist where the requisite intention to create legal rights has been found. Brereton J described such circumstances as being "where implementation [of the arrangement] involved the promisee leaving existing advantages or selling an existing residence".

The circumstances under which the agreement was made provides evidence of the intention of the parties, such as protracted discussions, seeking legal advice and formal recording of promises. Even if the presumption is not overcome and therefore there is no contract, reliance may form the basis for raising an estoppel binding the defendant to his or her promise (see [5.550]).

In business or commercial arrangements, the contrary presumption, that there *is* an intention to create legal relations, may apply.[8] This can often be crucial in construction projects where, for example, there might be dispute down the track about whether a "letter of intent" is binding upon the parties. A party seeking to assert that an agreement entered into in a commercial setting is not contractually binding upon it may face the difficulty of bearing the burden of proof; however, the answer will usually come down to the words

4. *Ashton v Pratt* (2015) 88 NSWLR 281.
5. See, eg, *Balfour v Balfour* [1919] 2 KB 571, where a wife could not enforce a promise of her husband to give her money while they were forced by his work to live apart.
6. *Todd v Nicol* [1957] SASR 72.
7. *Bovaird v Frost* [2009] NSWSC 337
8. See *Commonwealth Bank of Australia v Carotino* (2011) 111 SASR 573 for discussion; see *Banque Brussels Lambert SA v ANI Limited* (1989) 21 NSWLR 502 for an example of a party bearing the onus of setting aside a prima facie presumption.

used in the document, see *Gate Gourmet Australia Pty Limited (in Liq) v Gate Gourmet Holding AG*.[9]

This presumption may also be rebutted by a sufficiently strong inference drawn in all the circumstances of the case, from the conduct of the parties, or as is more common, by an express condition that the parties do not intend to be legally bound. This occurs in gambling activities, for example, where the coupon will state that there is no enforceable contract and that the parties are bound in honour only, for example, see *Jones v Vernon Pools Limited*.[10]

"Subject to contract"

[5.60] It is not uncommon for parties to indicate that their agreement is "subject to contract" or a like expression. The High Court considered the legal effect of such words in the case of *Masters v Cameron*[11] and pointed to the underlying need to ascertain whether the parties intended immediately to be bound by the contract. Thus, depending upon the circumstances, "subject to contract" (and similar expressions) could mean that:

1. the parties simply want to have their terms restated in a fuller or more precise form in a written contract;
2. the obligation to *perform* one or more terms depends (as a so-called "condition precedent") upon execution of the formal documents; or
3. the parties do not wish to be bound at all unless and until they execute such a document.

In the first two categories, there is a binding contract despite no formal document having been executed, but in the third there is not.

A possible fourth category was suggested in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*[12] and has been taken up in subsequent cases. See, for example, *Starwhist Pty Ltd v Tonge*.[13] Davies J found that a handwritten agreement executed at a mediation that stated "the parties intend this agreement to be binding" was immediately binding despite the agreement also stating the parties intended to enter into a formal deed within 7 days of the agreement. This contemplates that the parties intend to be bound "immediately and exclusively" to the terms they have agreed but expect to make a further contract, containing additional terms, in the future and that this will replace their current agreement.

The inevitable difficulty is determining which of these categories applies in the circumstances means that it is impossible, in the abstract, to give a

9. *Gate Gourmet Australia Pty Limited (in Liq) v Gate Gourmet Holding AG* [2004] NSWSC 149.
10. *Jones v Vernon Pools Limited* [1938] 2 All ER 626.
11. *Masters v Cameron* (1954) 91 CLR 353.
12. *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622.
13. *Starwhist Pty Ltd v Tonge* [2017] NSWSC 963.

"yes" or "no" answer to the question of whether a "letter of intent" or similar device forms a binding contract. For an example of such difficulties in practice, see *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd*.[14] Also see *Factory 5 Pty Ltd v Victoria (No 2)*[15] in which the Full Court of the Federal Court found that a signed letter of agreement which stated that "the parties have agreed...subject to reaching agreement on a legally binding Long Form Concessionaire Agreement" was not a binding contract. The Court quoted Gleeson CJ's comments in *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd*[16]: "... the fact that parties to negotiations have agreed upon the major matter under discussion, confidently believing that the remaining matters to be decided will be sorted out later between them or their lawyers, without any difficulty, can sometimes create a misleading appearance of consensus. Such parties may well believe that they have a "deal" or a "bargain", and speak and act accordingly, whilst at the same time knowing and intending that further of agreement, can be ambiguous. The resolution of the ambiguity may require more detailed factual and legal analysis". In other words, assuming that the other elements of formation are fulfilled, the answer depends upon the objective determination of the parties' intention at the relevant time.

Offer and acceptance

General principles

[5.70] To find out whether two parties have reached agreement in the formation of a contract, the courts will look for two complementary aspects: an "offer" by one party (the "offeror") and an "acceptance" by the other party (the "offeree").

The offer and acceptance do not have to be formally expressed in precisely identical terms. Inferences can be drawn from the conduct of the parties that they have a similar understanding of the nature of their promises such that a consensus "ad idem" (or "meeting of the minds") exists, and that they agree to be bound in those terms. There are many situations where conduct alone indicates an intention to be bound.

Agreement may also be explicit in a document signed by the parties, acknowledging the terms offered and accepted; hence, in the vast majority of written and signed contracts occurring in construction projects, it will not be an issue whether there has been offer and acceptance.

Whether the agreement arises from express or implied offer and acceptance, there are well-established legal rules which apply. The offer must be a definite promise to be bound on specific terms. It may be to a particular person,

14. *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* (2007) 20 VR 487.
15. *Factory 5 Pty Ltd v Victoria (No 2)* [2012] FCAFC 150.
16. *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd* (1995) 7 BPR 14,551.

to a particular class of persons or to the world at large. The general principle is that any person to whom the offer was made may accept it.[17]

The offer must be communicated, that is, brought to the attention of the person to whom it is made. There can be no acceptance and no contract unless the person purporting to accept was aware of the offer at the time when the alleged act of acceptance was made. For example, where a reward is offered for the return of a lost article, a person returning the article who does so without knowledge of the reward would not be able to claim the reward later upon becoming aware of it. The relevant principles are discussed by the High Court in *R v Clarke* (1927).[18]

Where an offeror has promised to keep an offer open for a specified period, such a promise will only be binding if the person to whom the promise is made has given some consideration for that promise; in the absence of such consideration, the offeror may withdraw their offer at any time prior to its acceptance. This rule is important with respect to tenders and the right of a tenderer to withdraw their tender prior to acceptance.[19]

There are situations which, whilst similar to offers, are not in fact offers. For example, an "option" is an arrangement whereby an owner of specific property, real or personal, agrees with a prospective purchaser, who pays a sum to the owner, that the purchaser has the sole legal right to purchase the property for a stipulated price within a nominated period of time. The effect of such a transaction is that the owner is not free to sell to anyone else within the specified period and will be liable to the option holder for damages for breach of the option contract if he or she does so.

Invitations to treat and tenders

[5.80] Another important distinction is between offers and invitations to make offers, often called "invitations to treat". The most common such invitation is the display of goods in a shop. In contractual terms, see *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd*,[20] no contract of sale exists until the customer has "offered" to purchase by taking or handing their selection to a cashier, who "accepts" by indicating the total price and taking the purchaser's money. In other words, as far as contract law is concerned, the price indicated on a price tag (and, for that matter, any representation that an item on a shelf is available for sale at all) is an unenforceable "invitation to treat". In practice, this contractual situation has now been substantially modified by consumer legislation, effectively meaning that merchants are bound to sell at the advertised price.

17. *Carlill v Carbolic Smoke Ball Company* (1893) 1 QB 256.
18. *R v Clarke* (1927) 40 CLR 227.
19. See [9.60].
20. *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* [1953] 1 QB 401.

Traditionally, the advertisement and calling of tenders, for example, for the construction of a building, have been regarded as no more than an invitation to treat.[21] In other words, tenders lodged will be offers capable of acceptance by the party calling tenders and the contract will be formed when the acceptance of a particular tender is made by the owner; conversely, no contractual obligations will arise in respect of conduct of the tender process.

This situation has changed substantially in recent years with the recognition that a separate "process" contract may arise where a conforming tender is submitted.[22] The ground-breaking case in Australia was *Hughes Aircraft Systems International v Airservices Australia*.[23] In other words, an invitor may be contractually bound, to each tenderer which submits a tender conforming with the request for tender, to conduct the tender process according to the advertised procedure. As an example of the way courts approach the issue of the obligations imposed under process contracts, see *Ipex ITG Pty Ltd (in liq) v State of Victoria*.[24]

Standing offers

[5.90] Standing offers are also common arrangements in construction contracting. These are agreements to supply goods or services at a particular rate and on pre-agreed terms as and when required, see generally *Synergy Protection Agency Pty Ltd v North Sydney Leagues' Club Ltd*.[25] Each order produces a separate contract. A standing offer can be revoked at any time, but only as to future orders.

Defects in acceptance

[5.100] Acceptance must be a complete and unqualified acceptance of the terms of the offer. A conditional acceptance or a counter offer may constitute a rejection of the original offer which may not later be able to be accepted. However, such a conditional or counter offer may itself be accepted by the original offeror.

Alternatively, it may be that the offeree's response is not in fact a counter-offer, and therefore rejection of the original offer but merely an enquiry about the offer. This is a distinction that has great importance as to the contractual effect of the statement but often may be difficult to work out in practice as

21. For discussion on tendering generally, see [9.110] ff.
22. *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151. See, generally, Bell M, "'From an Invitation to Treat to an Invitation to Tread ... Warily" (2003) 19 *BCL* 89 and, as to subsequent cases, Levin D, "The Unsuccessful Tenderer – Legal Rights and Remedies" (2010) 26 *BCL* 324 and Napier B, "Process Contracts in Government Commercial Tendering" (2011) 27 *JCL* 171.
23. *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.
24. *Ipex ITG Pty Ltd (in liq) v State of Victoria* [2012] VSCA 201.
25. *Synergy Protection Agency Pty Ltd v North Sydney Leagues' Club Ltd* [2009] NSWCA 140.

it will come down to the intention of the parties as manifest through their words and conduct. For example, if a sub-contractor offers to undertake work for $100,000 and the head contractor replies that they will accept their tender if it is for $90,000, this is likely to be a counter-offer; on the other hand, if the head contractor replies "could you do the work for $90,000?", this could be seen as simply an enquiry which leaves the original offer open for acceptance.

An acceptance "subject to contract" is generally not an acceptance at all. However, as is discussed in [5.60] above in relation to intention to be bound, the use of particular forms of wording may not be the end of the story. Thus, where the language used by the parties discloses an intention in the parties to be immediately bound by the terms they have agreed upon whilst also intending that those terms will be reduced into a formal document, a binding contract exists immediately between the parties. This is often the case in a building contract where the execution of the formal document does not take place until well after the work has commenced.

Problems may arise where parties intending to be bound are in fact not in agreement as to the precise terms of their apparent contract. The tendency for such issues is inherent in construction projects, which involve highly complex obligations and activities yet often the agreements are documented in a shorthand manner. Provided that the parties have agreed upon the terms essential for their contract to operate, this will generally be sufficient for the formation of an enforceable contract. Courts may be competent to "fill the gaps" (in the details of the bargain) by implication of obligations in limited circumstances. Courts are less likely to be competent to "fill the gaps" in major commercial undertakings, or novel or complex bargains, see *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd Trading As "Uncle Bens of Australia"*[26] and, further, [5.150] and [9.150].

Where a tender is conditional, but the acceptance and the formal executed contract do not include the proposed conditions, the contractor generally will not be able to rely on the conditional terms of the tender. It may be that the conditional acceptance constitutes a counter-offer in different terms which may be accepted. The resolution of the so-called "battle of the forms" is generally a question of construction but may be resolved by examination of the offer/counter-offer process, see *White Industries Limited v Piling Contractors Pty Limited*[27] and *Butler Machine Tool Company Limited v Ex-Cell-O Corporation (England) Ltd.*[28] See further *Tekdata Interconnections v Amphenol*[29]

26. *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd Trading As "Uncle Bens of Australia"* (1992) 27 NSWLR 326.
27. *White Industries Limited v Piling Contractors Pty Limited* (1986) 2 BCL 353.
28. *Butler Machine Tool Company Limited v Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965.
29. *Tekdata Interconnections v Amphenol* [2009] EWCA Civ 1209.

where the English Court of Appeal stated that "it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended".

In the extreme situation where no agreement is eventually reached, or where the Court is unable to find an agreement, there will be no contract. However a party who has carried out work in reliance on the non-existent, or unenforceable, contract may, if it is able to convince the court that justice in the circumstances requires that such a remedy be granted, be entitled to a *quantum meruit*, that is, a reasonable sum for the work done.[30]

Time when acceptance effective

[5.110] Acceptance is usually not effective – that is, it does not form a contract – until received by the offeror. A special method of acceptance may be imposed, although an equally expeditious method may be effective. Where no method of acceptance is prescribed, the court will look to the nature of the offer and the circumstances in which it was made in order to determine the appropriate method of acceptance. As a general rule, silence cannot be made a method of acceptance, that is, a statement in the offer along the lines "in the absence of advice to the contrary I will assume acceptance", but see *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*[31] where a party who had refused to sign a set of conditions – but had taken the benefit of the works and had paid for them in accordance with those conditions – was nevertheless found to be bound by them. The offeree must indicate acceptance positively by words or conduct.

Where the offeror contemplates and intends that acceptance is to be communicated by post, it will be effective (and a contract is formed) when the letter is posted, see *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd*.[32] Further see the discussion in *Wardle v Agricultural and Rural Finance Pty Ltd*[33] where Campbell JA doubted the existence of a general postal rule and opined that "the future existence of the postal acceptance rule itself might be in doubt". Where instantaneous communications, for example fax, are used, the position is different. The acceptance will generally be effective from when it is received, and, importantly, the contract will be made at the place where acceptance is received.[34]

Electronic communications, such as email, pose particular issues, especially as to when an email is "received". Whilst the law has been slow to catch

30. See the detailed discussion at [5.530].
31. *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523.
32. *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93.
33. *Wardle v Agricultural and Rural Finance Pty Ltd* [2012] NSWCA 107.
34. *Entores Limited v Miles Far East Corp* [1955] 3 WLR 48; *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 11,106.

up with the detailed implications for contracts of such communications, default positions are set by the *Electronic Transactions Acts* in force in each jurisdiction. Essentially, for example, unless otherwise agreed, communication is effective once it reaches the addressee's electronic address (in the case of a designated electronic address), and the addressee must become aware that the electronic communication has been sent to the addressee's electronic address (in the case only where an electronic address has not been designated).[35]

By contrast with acceptance, *revocation* of an offer will only be effective, meaning that the offer can no longer be accepted to form a contract, when it is *actually* received by the offeree. So long as the offeree learns of the revocation by some reliable means, it will be effective. A revocation by a tenderer communicated to a representative of the principal, for example, the superintendent, will normally be effective and a principal cannot purport to accept on the grounds that the advice was not received personally. See also [9.60] as to the withdrawal of tenders.

Consideration

[5.120] The third essential element in the formation of a simple contract in common law countries like Australia is the presence of "consideration". This is the value or benefit given or promised by one party in return for the other party's promise. Common forms of consideration in construction contracts include the payment of money, the supply of goods and the performance of work.

When asked to enforce an agreement, a court has to determine that something of value has been given which is sufficient in law to support a contract. This does not mean that the amount of consideration must be a particular amount or even a reasonable amount, it just has to have some "legal" value, hence the old saying that "a mansion can be bought for a peppercorn".

Consideration must not be too vague or indefinite, and not merely the performance of a moral obligation or a sense of obligation. Consideration also cannot be simply the performance of a pre-existing legal obligation or a public duty. Having said that, courts have been willing to allow the performance of an existing legal duty to be "good" consideration where there is a "practical benefit" to the offeree, see *Musumeci v Winadell*[36] and further, *Wolfe v Permanent Custodians Limited*[37] and *Cohen v iSoft Group Pty Limited*.[38]

35. See, for example, s 14 of the *Electronic Transactions Act 1999* (Cth). The Acts of each of the States and Territories operate in substantially the same way. See, generally, Mik E, "The Effectiveness of Acceptances Communicated by Electronic Means, or Does the Postal Acceptance Rule Apply to Email?" (2009) 26 *JCL* 68.
36. *Musumeci v Winadell* (1994) 34 NSWLR 723.
37. *Wolfe v Permanent Custodians Limited* [2012] VSC 275.
38. *Cohen v iSoft Group Pty Limited* [2012] FCA 1071.

Consideration also cannot be "past". In other words, if a party makes a promise to pay for something that has already been done, that promise generally is not contractually binding. Note, in this context, that payment under a construction contract (where, as is usually the case where progress payments are provided for, it follows the work being done by the contractor) does not constitute "past", and therefore invalid, consideration. Rather, the principal's consideration for the builder's work is by way of its promise to pay at the time the contract is entered into.

Where a debt is owed, an agreement to pay part of it may be insufficient in support of a promise to forego the balance (the "rule in *Pinnel's case*"[39]).

Capacity

[5.130] Whilst not precisely an element in the formation of a contract, the legal capacity of the parties is key to the validity of the contract. Not all persons are capable of being bound by a contract, and others are restricted in the scope of their contractual capacity. The more important classes with restricted contractual capacity are considered separately.

A "minor" or "infant" is a person under the age of 18 years. There are limitations upon their capacity to contract under the law in each State and Territory: these vary between jurisdictions and are based upon common law principles and various legislation. In New South Wales, the *Minors (Property and Contracts) Act 1970* (NSW) provides an overriding code regulating contracts with minors. It operates on a presumed binding intention by minors participating in "civil acts" and sets out the circumstances in which they may be set aside. In the other States and Territories, generally speaking, minors will be bound to pay a reasonable price for "necessaries", being those goods which are necessary and suitable to their condition. Contracts of service for the benefit of a young person will generally be valid; however, limitations are placed on contracts for purchase of property and shares.

A contract made by a person of unsound mind or a drunk person will generally be binding unless it can be conclusively shown that, when the contract was made, their mind was so affected that they were wholly incapable of understanding the nature of the contract and their own actions and that the other party knew or ought to have known about this condition. However, developments in the law relating to unconscionable dealing and, separately, consumer protection and credit arrangements, recently have opened up ways for people in such a position to gain relief, including, potentially, rescission of the contract.[40]

Under the *Bankruptcy Act 1966* (Cth), undischarged bankrupts may not obtain credit or enter into contract for goods and services of more than a prescribed

39. *Pinnel's case* (1602) 5 Co Rep 117a.

40. See, respectively, [5.330] and [5.350].

amount (currently $3,000) without disclosing the fact of their status.[41] The Act imposes penalties in such cases, or where the undischarged bankrupt trades under an assumed name. Any dealing with the bankrupt involving property acquired after bankruptcy will be valid against the trustee in bankruptcy if executed bona fide and for value, and if completed before intervention by the trustee.

A most important restriction on contractual capacity is that applying to corporations. Certain corporations, such as local councils or statutory corporations, may only contract within the powers provided under the statute creating them. Corporations generally may be restricted to entering contracts only within the powers and objects set out in their constitution. Further, a corporation must enter contracts with the required degree of formality, primarily associated with their execution (see [5.210]). Contracts made beyond the powers granted to the corporation are generally said to be ultra vires ("beyond power"); however, the *Corporations Act* 2001 (Cth) has to some degree modified this position.

CONTRACT TERMS

[5.140] Even where the existence of a contract is not disputed, the definition of the precise terms and their intended effect will often cause problems. A contract may be wholly oral, in which case, if there is a dispute, its terms are determined by evidence as a question of fact. Where the contract has been reduced to writing, it is usually a matter of construction of the terms, with the presumption, known as the "parol evidence rule", that the agreement is entirely reflected in the written instrument. Sometimes, however – and this often applies in respect of building contracts, especially those using standard forms – the contract document is not a complete record of the agreement, or it fails to record particular statements that were meant to have contractual effect.

If a court is willing to "look outside the four corners" of the written contract to ascertain the agreed intent, it will first be necessary to determine what statements have been made, either orally or in writing. The second step will be to determine which of those statements were intended to have legal effect, and which were merely representations not intended to be part of the contract. It will also be necessary to consider what terms may be implied into the contract, and lastly, what relative importance is to be given to the terms of the contract.

Terms and representations

[5.150] Statements made during the negotiation of the contract may be intended only to improve the bargaining position of the person making

41. Section 269.

them and not to form part of the contract. These are referred to as "mere" representations. The effect on the contract when such representations are incorrect or misleading is considered below. It may also be necessary to consider the provisions of the *Australian Consumer Law* (ACL), which provide remedies for misleading or deceptive representations made in the course of business (see [3.140]).

There is no precise test as to whether a pre-contractual representation becomes a term of the contract; however, the courts would consider the intention of the parties and the circumstances in which the statement was made. Considerations include the proximity of the statement to the agreement being reached, and its form. Where the agreement is oral, a statement is more likely to become a binding term.

Express and implied terms

[5.160] The terms of a contract are characterised as express or implied, the former being matters which the parties have actually turned their minds to. Express terms are easiest to identify in the context of a written contract; they are the clauses and other matters which are actually written into the contractual document. Having said that, express terms exist in oral contracts as well.

Implied terms are those which, whilst unstated, will nonetheless be held by a court to form part of the contract. There is a variety of classifications and terminology for implied terms, but a commonly used categorisation is into those implied by statute, by custom and usage, from the facts of the particular contract, and by law as an incident of the particular type of contract.

As examples of terms implied by statute, the *Sale of Goods Act* in each State imposes terms as to title, quality and fitness of goods sold. The ACL also imposes consumer guarantees as to quality and fitness for purpose and otherwise.[42] Contracts may also have terms or warranties implied by virtue of legislation regulating licensing and registration of builders. For instance, s 8 of the *Domestic Building Contracts Act 1995* (Vic) sets out terms as to quality of workmanship and various other matters which apply in every "domestic building contract" in Victoria (there are similar provisions in most other States and Territories).

The basis by which terms are implied from custom and usage in trade or business or as an instance of a type of contract often overlap, and in both instances may apply without the knowledge of the party thereby bound, *Con-stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd*.[43] As to commonly implied terms in building contracts, see [9.150].

42. See Pt 3-2 Div 1 and [3.180].

43. *Con-stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226.

The leading authority on the implication of terms as a matter of fact (or "ad hoc") in a particular case is the Privy Council decision in *BP Refinery Pty Ltd v Hastings Shire Council*.[44] It was observed that:

> "for a term to be implied the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term may be implied if the contract is effective without it; (3) it must be so obvious that it 'goes without saying'; (4) it must be capable of clear expression; and (5) it must not contradict any express term of the contract".

Whilst it is by no means the case that courts dogmatically require all five of these criteria to apply, for example, see, for example, *A-G (Belize) v Belize Telecom Ltd*[45] where the Privy Council considered that the list in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) should not be regarded as a series of independent tests which must each be surmounted and further see *Grocon Constructors (Victoria) Pty Ltd v APN DF2Project 2 Pty Ltd*[46], it remains the touchstone for implication of terms into a particular contract. *Codelfa Construction Pty Ltd v SRA of NSW*[47] provides a prominent example of the implication of implied terms in a construction context. There, the High Court found that, once a term has been implied into a contract, that decision may act as a precedent in similar contracts and parties may be bound in all such contracts by a like term.

Conditions and warranties

[5.170] Having identified the terms of the contract, it may be necessary to determine the relative significance of those terms. This is because the law has traditionally treated terms of the contract as falling into two categories and treated breaches of each type of term differently. The distinction is particularly relevant when it comes to the consequences of a breach of the term: where the breach is of a term that is less significant, called a "warranty", the remedy will be damages only. Where the breach is of an "essential" term, also called a "condition", the innocent party may be entitled to terminate the contract, as well as being entitled to claim damages.[48]

Essentially, a warranty is a term subsidiary or collateral to the main purpose of the contract, whereas a condition is a term that "goes to the root of the contract", so that if a breach occurs, the performance of the rest of the contract will not be capable of execution as originally agreed.[49]

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44. *BP Refinery Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266.
45. *A-G (Belize) v Belize Telecom Ltd* [2009] 1 WLR 1988.
46. *Grocon Constructors (Victoria) Pty Ltd v APN DF2Project 2 Pty Ltd* (2016) 32 BCL 193.
47. *Codelfa Construction Pty Ltd v SRA of NSW* (1982) 149 CLR 337.
48. See, further, the discussion on termination at [5.420].
49. *Associated Newspapers v Bancks* (1951) 83 CLR 322.

The legal process for determining whether a term is essential or inessential depends primarily upon an objective assessment of how important the term is to the parties. This is a matter of construction of the contract rather than an enquiry of the parties as to what they actually intended. Parties often seek to influence this assessment by giving a particular title to a term, for example, they might say that "all terms relating to time in this contract are essential", but the courts can look behind such terminology to find out what status was intended for such terms. For example, construction contracts often refer to all of the express terms being "general conditions", and it is common for parties to "warrant" certain matters. The legal approach anticipates that the parties might be using this terminology in their technical legal sense rather than to indicate that the terms are intended to be essential or inessential.

In recent years, the dual distinction between essential and inessential terms has been regarded as of less significance and it is often criticised. Moreover, the High Court has confirmed that there is a third category of terms, known as "intermediate" or "innominate" terms because they sit between essential (conditions) and inessential (warranties) terms.[50]

The difficulties inherent in trying to adopt a distinction between conditions and warranties are well illustrated by modern building contracts: it would be impossible, for example, to say that in all cases a liquidated damages clause is essential, and thus a condition or, for that matter, that a notice provision is always inessential and thus a mere warranty. For this reason, it is usual for building contracts to have detailed regimes dealing with default and termination, a key part of which will be to define the types of default which allow the innocent party to move towards termination of the contract.[51]

Incorporation by reference

[5.180] Many contracts are made without formality but with the intention, at least on the part of one party, that the contract be based on, or incorporate, certain standard or written terms. This may be done orally or in writing. As a general rule, however, unless disclosed prior to formation of the agreement, the relevant term or form will not form part of the contract, *Rinaldi & Patroni Pty Ltd v Precision Mouldings Pty Ltd*,[52] but see *Surfstone Pty Ltd & Anor v Morgan Consulting Engineers Pty Ltd*[53] where terms not disclosed prior to formation were found to be incorporated by reference. Nonetheless, where a contract is entered as part of a course of dealing between the parties, terms which applied in earlier contracts may be found applicable in later agreements.

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50. *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115.
51. See, further, [9.760] to [9.790].
52. *Rinaldi & Patroni Pty Ltd v Precision Mouldings Pty Ltd* [1986] WAR 131.
53. *Surfstone Pty Ltd & Anor v Morgan Consulting Engineers Pty Ltd* [2017] 2 Qd R 66.

In building contracts, a common problem is the extent to which terms contained in documents referred to in the executed contract documents are effectively incorporated. As a general rule, a document may be incorporated by reference if there is no ambiguity, and the parties' intention to this effect was clear.[54] However, if there is an inconsistency, then the whole of the document and its terms may not be incorporated, see *Cable (1956) Ltd v Hutcherson Bros Ltd*[55] where it was held that a "basis of tender" clause in a specification was not part of the contractual obligation.

It is not uncommon for a contract to be concluded by correspondence which refers to standard terms. Only to the extent that there is certainty will such terms be incorporated, *Smith v South Wales Switchgear*.[56] Often attempts are made to rely upon arbitration clauses incorporated by this means, see *Behmer & Wright Pty Ltd v Tom Tsiros Construction*[57] and *Conagra International v Lief Investments*,[58] and see [8.240] in relation to the incorporation of head contract terms into sub-contract conditions.

Exclusion or limitation clauses

[5.190] Contracts, particularly commercial "standard forms" prepared by suppliers of goods or services, often contain terms which attempt to limit or exclude the liability of either or both of the parties. A person contracting with such an organisation has little choice but to accept all conditions which the organisation offers, whether the conditions are known or not. For this reason, such forms are sometimes called "contracts of adhesion". As a consequence of this, where an onerous clause, such as an indemnity or exclusion of liability, is ambiguous, the courts tend towards construing such clauses *contra proferentem*, that is, against the party which put the contract forward or otherwise seeks to rely upon it, see, for example, *Andar Transport Limited v Brambles Limited*.[59]

Courts have also demanded that in order for an organisation to rely upon an exclusion clause, the organisation bring that exclusion clause to the customer's notice, see *Oceanic Sun Line Special Shipping Company Inc v Fay*[60] in the context of "ticket" cases. Failure to do so may be a factor the court can take into account in determining whether such a contract term in a contract made with a consumer or a small business is unfair and void under Pt 2-3 of the ACL.[61]

54. *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 2 All ER 549.
55. *Cable (1956) Ltd v Hutcherson Bros Ltd* (1969) 123 CLR 143.
56. *Smith v South Wales Switchgear* [1978] 1 WLR 165.
57. *Behmer & Wright Pty Ltd v Tom Tsiros Construction* [1997] VSC 54.
58. *Conagra International v Lief Investments* (1997) 141 FLR 124.
59. *Andar Transport Limited v Brambles Limited* (2004) 217 CLR 424.
60. *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197.
61. See [3.160].

The standard form contracts in common use in the Australian construction industry generally do not incorporate such limitations upon, or exclusions of, liability. There are exceptions to this, however. For example, it is not unusual for consultants to seek to limit their contractual liability by reference to their professional indemnity insurance coverage. Moreover, limitations are the norm in the contracting practice of certain industry sectors, for instance, process plant engineering procurement. However, any proposal that liability be limited or excluded inevitably will be a matter requiring a detailed understanding of the legal ramifications.

To be relied upon, the term purporting to exclude liability must in fact be part of the agreement. Where a commercial agreement is signed, then, in the absence of fraud, misrepresentation, duress or other so-called "vitiating factors", it is binding whether read by the other party or not, see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*.[62] Where the agreement is not signed and the term is not reasonably brought to the attention of the other party, then it may not form part of the contract, *Baltic Shipping Co v Dillon*.[63] Even where the clause is in fact incorporated into the contract, its interpretation, and whether it excludes liability in the particular case, will be a question of construction; again, where the clause is not clear in its drafting, it may be interpreted *contra proferentem*, see *Darlington Futures Ltd v Delco Australia Pty Ltd*.[64]

Clauses may not only exclude liability or limit liability existing under the contract but also liability under other legal categories. For example, it is common for consultants in the construction industry to disclaim their potential liability in tort (see, generally, Chapter 6) when providing a report.

However, there are some statutory provisions, other than those mentioned above, which affect the operation of exclusion clauses. Liability for consumer guarantees under Pt 3-2 Div 1 of the ACL cannot be excluded,[65] whereas the conditions and warranties imposed under the *Sale of Goods Act* may be in some cases. Likewise, a contractual provision cannot, by itself, exclude liability for misleading and deceptive conduct under s 18 of the ACL, see, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*.[66] However, some New South Wales courts have permitted temporal and monetary limits on damages. See further, *Lane Cove Council v Michael Davies and Associates and Others*;[67] *Firstmac Fiduciary Services Pty Limited & Anor v HSBC Bank of*

62. *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.
63. *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.
64. *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500. See, generally, [5.220].
65. See s 64.
66. *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546.
67. *Lane Cove Council v Michael Davies and Associates and Others* [2012] NSWSC 727.

Australia Limited.[68] Contrast the Victorian decision in *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* in which it was held that a contractual time limitation of 7 days upon the making of a claim did not preclude a claim for misleading and deceptive conduct.[69] Therefore, contractual regimes seeking to limit the consequences of such contraventions typically do so by showing that the parties have agreed that one or more of the elements of such statutory liability do not apply in the circumstances (for example, that the relevant conduct is not in fact misleading or deceptive) or that the relevant loss has not been caused by reliance upon such conduct.

Whilst these basic principles are relatively easy to state, the effectiveness of disclaimers in relation to misleading and deceptive conduct is an area of law sitting directly upon the fault line between two substantial forces in Australia law: consumer protection and commercial freedom of contract. This remains, therefore, a dynamic area in the case law and statutory reform, making it all the more important to seek specialist advice in relation to the drafting of disclaimers and disputes arising from them.

Collateral contracts

[5.200] Where mere representations made in the course of and prior to entering into a contract are not incorporated into the agreement, the party relying upon those representations may nonetheless be able to claim the existence of a "collateral contract". Such a contract is based on the promise or warranty relied upon. For a collateral contract to exist, the representation or warranty has to have been intended to have contractual effect.

Take, for example, a situation where a contractor is reluctant to enter into a building works contract with an owner because the latter was late in paying invoices on a previous project. However, during negotiations, the owner reassures the contractor by saying that they will pay progress claims within three days of certification, a relatively short time compared to that provided for in most commonly used standard forms, see *JJ Savage & Sons Pty Ltd v Blakney*.[70] Notwithstanding this representation, however, the written contract later signed by the parties gives no indication as to the applicable payment period.[71]

The basic *contractual* position would be that, subject to any overriding statutory provision, such as under the security of payment legislation,[72] the contractor could only expect payment within a reasonable time, by reliance

68. *Firstmac Fiduciary Services Pty Limited & Anor v HSBC Bank of Australia Limited* [2012] NSWSC 1122.
69. *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* [2018] VSC 246.
70. *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435.
71. See [9.450] as to these timeframes.
72. See [9.520]-[9.540].

upon an implied term. This is because the written contract would, via the parol evidence rule,[73] be deemed to be the entirety of the bargain between the parties; in turn, the contractor would be precluded from claiming that the shorter period forms part of their contract.

However, in this situation, the contractor might successfully be able to argue that the provision forms a "collateral contract", as it seems likely that the relevant elements apply:

- First, the statement is independent of, but related to, the building works contract.
- Secondly, the contractor entered into the main contract in reliance upon that provision; in a contractual sense, such entry forms the consideration by the contractor underpinning the binding nature of the provision.
- Thirdly, and related to the second point, the owner likely intended the provision to induce the contractor to enter the main contract.
- Fourthly, the provision is consistent with the terms of the main contract, that is, the main contract does not expressly deal with payment provisions.

Hence, the owner might be *contractually* bound to the representation of a three-day payment period even though it does not appear in the signed contract.

A different type of "collateral warranty" is sometimes said to arise where a principal, on the basis of warranties as to quality of goods or services by a sub-contractor, nominates the sub-contractor and subsequently relies upon the collateral warranty in a claim against the sub-contractor. Such a claim succeeded in *Shanklin Pier Ltd v Detel Products Ltd*[74] where representations were made as to the suitability for the particular purpose of certain paint. The wisdom of formalising such collateral warranties between principals and nominated sub-contractors is recognised by the Australian Institute of Architects (AIA) who have proffered a standard form warranty for such circumstances.[75]

CONTRACT DOCUMENTS

Form – deeds and agreements

[5.210] The discussion in the preceding section related to the formation requirements for "simple" contracts, that is, bargains between the parties with mutually supporting promises or other valid forms of consideration. It is, however, also possible for a contract to be enforceable, even though

73. See [5.230].
74. *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854.
75. Architects may refer to the Acumen notes on warranties and to the Form of Warranty (AN14.02.100 - July 1993). See Chapter 3 n 18.

only one party is promising to do something, if it is framed and executed as a "deed".

Commonly encountered unilateral undertakings of this type in construction projects include some forms of parent company guarantees and suppliers' warranties. Moreover, even where there is consideration on both sides, parties might agree to document their contract as a deed in order to have extended limitation of actions periods apply.[76] Apart from gratuitous undertakings, certain other contracts are required by law to be under seal. Moreover, statutory corporations such as municipal councils and government authorities must observe the formalities and limitations imposed by the specific Act which created them and any provisions applying generally to such entities, see, for example, the *State Owned Corporations Act 1989* (NSW).

The principles underlying the enforceability of deeds are ancient and complex but revolve around the document being "signed, sealed and delivered". In the modern sense, this generally requires that the promise must be made in writing, signed (in the case of a company, by an authorised officer or attorney and attested to by at least one witness) and expressed to be executed as a deed. Under s 127 of the *Corporations Act 2001* (Cth) most companies are no longer required actually to use a seal.

The deed must also be delivered to the other party, although this formality can be completed merely by actions indicating that the deed is intended to be binding and binds the party which has executed it upon such delivery, even if the other party has not yet executed it. For this reason, escrow arrangements often apply to the execution of deeds and care must be taken with, for example, the dating of such instruments, see, generally, *400 George Street (Qld) Pty Limited v BG International Limited*.[77]

Ambiguities and inconsistencies

[5.220] Contracts for major construction projects rarely suffer from an insufficiency of documentation and more often are sought to be expressed in an abundance of material. Apart from the "instrument of agreement" itself, the page where the parties sign the contract, sometimes produced as a part of the conditions, there will often be appendices including special conditions and schedules of items requiring completion, correspondence attached or incorporated by reference and separate bundles of documents including the contract plans, the specifications and, where applicable, the bills of quantities or schedules of rates.

The abundance of material does not, however, ensure that there will be no dispute or doubt as to the party's intention or the meaning of the terms. There may, for example, be inconsistencies between similar provisions in different documents or there may be ambiguities in the terms themselves.

76. See [5.560].
77. *400 George Street (Qld) Pty Limited v BG International Limited* [2010] QCA 245.

To minimise arguments about which documents, and, where applicable, which *versions* of such documents, form part of the parties' contract, all parties should execute or endorse complete sets of all contractual documents, and these should be preserved intact.

Even then, however, the written terms may be incomplete, requiring the implication of terms or the introduction of oral terms (as discussed above)[78] in order to save the agreement. They might also suffer from ambiguity, requiring that the principles of contractual interpretation be applied. The following section considers these principles: it is, necessarily, concerned only with the issues arising where the agreement is wholly in writing.

Interpretation of contracts

[5.230] Where the contract is recorded in written documents, the task of construction of that contract is, fundamentally, to determine the intention of the parties by reference to the words used in those documents, reading them as a whole. The judgment of Allsop P in *Franklins Pty Ltd v Metcash Trading Ltd*[79] provides a comprehensive and detailed discussion of the principles of contract interpretation as they generally apply.

The contract itself may assist with the process of interpretation by any of all of the following types of provisions:

- definitions of critical words or expressions within the documents themselves (see, for example, section S of the standard form ABIC MW-2018 and cl 1 of AS 4000-1997);[80]
- an order of precedence of the various contractual documents to apply in the event of inconsistencies or ambiguities (see, eg, cl B2 of ABIC MW-2018); and
- provisions for the resolution of discrepancies by the superintendent (see, for example, cl B1 of ABIC MW-2018 and cl 8.1 of AS 4000-1997).

The key general principle applicable to construction of contracts is that it seeks to ascertain the objective intention of the parties, that is, the meaning which would be conveyed to a hypothetical "reasonable person" who possesses the background knowledge reasonably available to the parties at the time of entry into the contract, see *Maggbury v Hafele*.[81] This objectively ascertained intention may not necessarily be the same as the parties' actual intention.

Where parties have reduced their agreement to a written document, the other key principle is that, subject to limited exceptions, they are bound by

78. See, respectively, [5.160] and [5.200].
79. *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15.
80. See Chapter 10 as to these and other standard forms generally.
81. *Maggbury v Hafele* (2001) 210 CLR 181.

the document as the sole declaration of their intention. Thus, the "parol evidence rule" provides that parol or oral testimony is inadmissible to vary, contradict, add to or subtract from the written terms. In turn, evidence of negotiations prior to contract is inadmissible to contradict the language or terms of the contract or as a guide to the parties' intention, see *Codelfa Construction Pty Ltd v State Rail Authority NSW*[82] and subsequent cases which have considered the issue.

Complications arise when evidence of such negotiations are relied upon to support an asserted implied term or as part of a claim based on misleading and deceptive conduct. Thus, there are a number of exceptions to the rule. The first relates to evidence of surrounding circumstances to assist in the interpretation of the contract where there is an ambiguity or uncertainty, see, for example, Codelfa, see n 82, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[83] and *B & B Constructions Pty Ltd v Brian A Cheeseman & Associates*[84] dealing with the meaning of "variations". Further, evidence may be admissible of the rejection of a term which is sought to be implied.

An example of the use and limitations of evidence of surrounding circumstances and negotiation is *Walker Civil Engineering (Qld) Pty Ltd v FA Pidgeon & Sons Pty Ltd*,[85] in which the correspondence prior to a lump sum agreement as to a rate for the execution of particular work which, it was claimed, was not included in the lump sum works, was admitted.

Evidence of pre-contractual negotiations and representations may be admissible in support of extra-contractual remedies including proceedings under the ACL, and evidence of existing facts known to both parties may be admitted as evidence of the surrounding circumstances which may be considered in order to resolve ambiguities or uncertainty as to the parties' intentions.

Another category of extrinsic evidence which is, as a general rule, inadmissible as an aid to construction is evidence of subsequent conduct; that is, evidence of how the parties dealt with or treated the terms concerned during the performance, see *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd*,[86] *FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd*[87] and *Spunwill Pty Ltd v BAB Pty Ltd*.[88]

82. *Codelfa Construction Pty Ltd v State Rail Authority NSW* (1982) 149 CLR 337.
83. *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104.
84. *B & B Constructions Pty Ltd v Brian A Cheeseman & Associates* (1994) 35 NSWLR 227.
85. *Walker Civil Engineering (Qld) Pty Ltd v FA Pidgeon & Sons Pty Ltd* (1986) 3 BCL 345.
86. *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310.
87. *FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343.
88. *Spunwill Pty Ltd v BAB Pty Ltd* (1994) 36 NSWLR 290.

"Maxims" of legal construction

[5.240] Apart from the general principles referred to above, there are a number of so-called "maxims" of construction which may assist the parties, or a judge or arbitrator called upon to resolve the issue where the precise meaning of a term or a document cannot be discerned even with the assistance of admissible evidence or from an overall view of the document.[89] These include the following:

- *A reasonable meaning is preferable to an unreasonable one:* As the High Court explained in *Australian Broadcasting Commission v Australasian Performing Right Association*,[90] given a choice between two possible interpretations, "that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, even though the construction adopted is not the most obvious, or the most grammatically accurate". This does not apply where alternative interpretations are not possible and cannot be used to mitigate clearly unreasonable terms.[91]
- *The ordinary meaning will be given in the context intended:* In construing a term of a contract, a court will give to the words used any ordinary, special or technical or trade use that the parties intended unless to do so would be illogical.
- *A valid meaning is preferable to one that will make the term void:* This rule may sometimes lead to the correction of obvious errors in the document by the court and giving definition to loose or general language.
- *The surrounding words may assist in ascertaining the meaning of a doubtful word*: The contract must be construed as a whole, effect being given, so far as practicable, to each of its provisions, that is, the whole may assist the understanding of the part.
- *Where a class of things is mentioned expressly, other things of the same class not mentioned may be excluded:* This rule, sometimes referred to by the Latin phrase *inclusio unius est exclusio alterius*, will operate where it is not clear what is meant to be included (for example, where an insurance clause requires cover to be effected for certain stated risks, other risks would be excluded).
- *Where words of a particular class are followed by general words the general words only cover matters or things of the same class (the "ejusdem generis" rule):* The rule operates where phrases such as "and any other materials" or "any other cause" are used and restricts the matters which can be interpreted within such phrases to the class of things which immediately precede the general phrase. The rule can be excluded, so that the word "whatsoever"

89. See, generally, eg, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15.
90. *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99.
91. *SA Railways Commissioner v Egan* (1973) 130 CLR 506.

after the general phrase has excluded the operation of the rule. The use of "(without limitation)" after "including" is a common way of dealing with this.

- *The contra proferentem rule: The author of, or the party relying on, a clause which is ambiguous will have it construed against them:* Described as a rule of last resort, other than in respect of particularly onerous clauses[92] and applying only in the event of ambiguities, this rule generally applies against the person who prepared the contract document and wishes to rely upon a term inserted for his or her benefit which is capable of alternative interpretation.

Unfortunately, many construction contracts include words and phraseology which are inconsistent and unclear at best and dangerous at worst. This often results from the proliferation of documents making up the contract and the enthusiasm of those preparing the specifications and other technical documents to cover the field. It is also very important to note the distinction between meanings of words used by architects and engineers, and the meaning given to them by lawyers. For example, an intended subjective "reasonable" may be construed objectively, and the duties expected of a person providing "supervision" may be much greater than the intended managerial superintendence.

Rectification of contracts

[5.250] Where there is a mistake in a contractual document, the parties are free to agree to amend that matter so that it reflects the true agreement. The court may also order such correction, by way of "rectification", if the party seeking such an order is able to provide "convincing proof" that the parties have mistakenly failed to record the true agreement reached between them, see, generally, *J M Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd (No 5)*[93] and see further *Simic v New South Wales Land & Housing Corp.*[94]

Rectification for such a "common mistake" provides an exception to the parol evidence rule discussed in [5.230]; in other words, in determining whether rectification will be granted, the court is attempting to ascertain what the parties had *actually* agreed rather than what was recorded in the document.[95] The remedy is equitable and consequently is discretionary and may not apply where there are alternative remedies. Rectification is rarely granted in practice, but an example of it being ordered is *M R Hornibrook Pty Ltd v Eric Newman (Wallerawang) Pty Ltd.*[96] There, a sub-contract which did

92. See [5.190].
93. *J M Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd (No 5)* [2010] QSC 389.
94. *Simic v New South Wales Land & Housing Corp* (2016) 260 CLR 85.
95. See [5.280] as to mistake generally.
96. *M R Hornibrook Pty Ltd v Eric Newman (Wallerawang) Pty Ltd* (1971) 45 ALJR 523.

not include a rise and fall clause was rectified to pass on the applicable rise and fall provision under the head contract.

It is also possible for rectification to be granted in cases of "unilateral mistake", the situation where only one party is under a misapprehension as to the contents of the contractual documentation. Again, the remedy is rarely applied and requires "convincing proof" of the mistake. The basic elements which need to be satisfied are that:

- the mistaken party ("A") erroneously believes that the document contains (or does not contain) a particular provision;
- the other party ("B") was aware of the omission or inclusion and that it was due to A's mistake;
- B fails to draw the mistake to A's attention in circumstances where equity would require such disclosure (essentially, it would be unconscionable not to do so); and
- the mistake is to B's benefit.[97]

GROUNDS ON WHICH CONTRACTS MAY BE UNENFORCEABLE

[5.260] There are a number of situations where, although all the elements required of a valid contract are present, the contract will not be legally effective. These defects result variously in contracts being void, voidable, unenforceable or illegal.

A *void* contract is one which, from its inception, has no legal effect and creates no rights or obligations. A *voidable* contract is one which one of the parties is entitled to affirm or reject, the contract remaining valid until rescinded. An unenforceable contract is a valid contract in substance, being an agreement creating rights and obligations, but because of a technical defect in the form of the contract, either one or both parties cannot enforce it in a court of law. An apparently valid contract may also be struck down as illegal by its nature or by the manner in which it is performed. No action can be brought on an illegal contract.

The effectiveness and operation of a contract may be influenced by a flaw in technical requirements, such as a requirement for writing, the failure to reach genuine consensus because of a mistake as to the subject or the nature of the contract, false statements by a person which induced the conclusion of an agreement, unjustified pressure on a party to enter into a contract or a prohibition by statute or the common law of the subject matter or the manner of performing the contract.

97. See *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 and *Leibler v Air New Zealand (No 2)* (1999) 1 VR 1.

Requirement of writing

[5.270] Whilst, generally speaking, contracts do not require "writing" in order to be enforceable, some contracts are required to be in writing and will be void or unenforceable if they are not. These include cheques, promissory notes, bills of sale and hire purchase agreements. The origin of these requirements is in the *Statute of Frauds*, a piece of legislation enacted in England in 1677 in the wake of the Revolution which brought such political and social upheaval to that country. A most common form of arrangement subject to such requirements is contracts for the sale or other disposition of land or any interest in land.[98]

The evidence in writing may be made before or after the making of the agreement but must exist before the action to enforce the contract commences. Where there is insufficient evidence to show the existence of the contract alleged, but there has been part performance of the contract by the person seeking to enforce it, equity may provide a remedy.

In the building industry, there is a requirement in most Australian jurisdictions that contracts for the performance of "residential" (or "domestic") building work be in writing, signed by the parties and sufficiently describing the work.[99] Section 45 of the *Builders' Licensing Act* 1971 (NSW – subsequently replaced by the *Home Building Act 1989* (NSW)) was held by the High Court not to preclude a right to a *quantum meruit* based on a claim for unjust enrichment, see *Pavey and Matthews Pty Ltd v Paul*.[100] The statutory requirements and the consequences of the absence of writing are, however, different in each jurisdiction. In most States and Territories, a builder may be entitled to recover a quantum meruit for the benefit of the work done notwithstanding the absence of a written agreement. It would seem that the legislative attempts to preclude such a claim have not been effective, see, for example, *Gino D'Alessandro Constructions Pty Ltd v Powis*,[101] *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd*[102] and *Dover Beach Pty Ltd v Geftine Pty Ltd*.[103]

Apart from a statutory requirement for writing, residential building legislation also precludes recovery of payment by unlicensed contractors in different ways, some of which seek to preclude recovery on any basis. Section 94 of the New South Wales *Home Building Act* (1989), when first introduced, sought to preclude recovery on any basis when at the time a contract was entered there was no home owners warranty insurance policy in place. The

98. See s 54A of the *Conveyancing Act 1919* (NSW) and similar legislation in other States and Territories.
99. See, for example, s 7 of the *Home Building Act* 1989 (NSW).
100. *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221.
101. *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40.
102. *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd* (1991) 23 NSWLR 571.
103. *Dover Beach Pty Ltd v Geftine Pty Ltd* [2008] VSCA 248.

provision has been amended numerous times and seems to permit recovery on a "just and equitable" basis notwithstanding the absence of a policy, see *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd*[104] and the sequence of amendments made to s 92 of the *Home Building Act 1989* (NSW) in an attempt to develop a policy.

Mistake

[5.280] This section is concerned with mistake by the parties affecting the formation of an agreement. Various aspects of this have already been discussed at [5.250] in relation to the availability of the remedy of rectification.

The nature of the mistake will usually concern a question or issue of fact rather than law. The rule which formerly precluded any recovery of money paid under a mistake of law has been overturned by the High Court in relation to a claim in restitution in *David Securities Pty Ltd v Commonwealth Bank of Australia*[105] so that the identification of that aspect of the nature of the mistake no longer has the relevance it formerly held.

There are a number of categories of legally operative mistake which, once established, make the contract void. The first is "common mistake", where both parties have made the same fundamental error concerning the subject matter of the agreement. Where the common mistake is about the existence of the subject matter, the contract will be void. However, where the subject matter of the contract has perished, or in fact never existed, the operation of common or even mutual mistake may be limited where the mistake results from negligence or implicit warranty on the part of the defendant, see *McRae v Commonwealth Disposals Commission*.[106] Where the common mistake is only about the quality or nature of the subject matter, the contract will not be void; for example, *Leaf v International Galleries*,[107] where the sale of a painting thought to be by Constable was held not to be void when it was discovered that it was not by that artist.

The second category of mistake, "mutual mistake", occurs where both parties are mistaken but are at "cross purposes": each has a different understanding about the subject matter of the contract. The mistake in question must be fundamental and incapable of being remedied for the contract to be void. An example of mutual mistake would be where an owner of two cars – a Ford and a Holden – offered to sell "my car" meaning the Ford, but the purchaser agreed, believing the car concerned to be the Holden.

The third category, "unilateral mistake", occurs when one party is mistaken and the other party knows or ought reasonably to know that they

104. *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 273.
105. *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.
106. *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.
107. *Leaf v International Galleries* [1950] 2 KB 86.

are mistaken. The mistake will only make the contract void if it is of such a fundamental character that the person making the error does not appreciate what the contract is really about, see *Taylor v Johnson*.[108] Further elements required in order for such mistake to be established are discussed above.

Where the identity of the person is a material factor in the mind of the person making an agreement, and they are mistaken about the identity, then the contract will be void. If the agreement concerns the sale of goods, a subsequent purchaser will have no rights to the property. In *Ingram v Little*,[109] the plaintiffs sold their car to a rogue who was impersonating a reputable businessman. They accepted a cheque because they believed he was that businessman and were able to recover the car from a subsequent purchaser.

Uncertainty as to the entity which conducts business under a business name is not uncommon, see, eg, *Pethybridge v Stedikas Holdings Pty Ltd*.[110] Where the fact of the actual identity of the other party is not relevant to the party or cannot be established, then the contract may not be avoided, see *Phillips v Brooks*.[111]

Where the mistake is about the very nature of the contract or the document that is being signed then the contract may be avoided. This plea in avoidance of the contract is called "*non est factum*".

The effect of establishing mistake is that the contract is void from the very beginning ("ab initio"), and any property transferred or money paid under the contract may be recovered. There may also be remedies in equity.

On the other hand (discussed at [5.250]), where both the parties, or possibly even one of them, see *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd*,[112] intended something different from what has been set down in the formal documents, they may seek rectification of the contract, see, eg, *Ryledar Pty Ltd v Euphoric Pty Ltd*.[113]

Misrepresentation

[5.290] A representation in this context is a statement of fact relating to the contract by one of the parties but which does not form part of the contract. If this statement is untrue, it is a misrepresentation, and its effect may be to render the contract voidable. Misrepresentations may be either "fraudulent" or "innocent", with a major distinction in the remedies that are available. As will be seen, remedies are available only in limited circumstances, and

108. *Taylor v Johnson* (1983) 151 CLR 422.
109. *Ingram v Little* [1961] 1 QB 31.
110. *Pethybridge v Stedikas Holdings Pty Ltd* [2007] NSWCA 154.
111. *Phillips v Brooks* [1919] 2 KB 243.
112. *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505.
113. *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603.

the party seeking not to be bound by a contract entered into as a result of misrepresentation needs to prove a number of elements.

This difficulty, and the resulting lower deterrence against parties making false or misleading statements prior to entry into contracts, was a significant factor in Parliament stepping in, via the TPA and *Fair Trading Acts* (now the ACL) to prohibit misleading and deceptive conduct (see [3.140]). Whilst misrepresentation has to a large extent been overshadowed by this statutory route to a remedy, it remains available to parties as a means of recovery where the relevant elements are satisfied.

Elements

[5.300] To gain a remedy in respect of misrepresentation, a party must prove the existence a false statement concerning an existing or past fact made to them by the other party before or when the contract was made, which was intended to, and in fact did, induce the making of the contract. Hence, it is a key requirement that the party alleging misrepresentation shows that they relied upon the misrepresentation in entering into the contract.

Generally a mere statement of law, intention or opinion is not enough. Moreover, an exaggerated description or opinion of value by a person selling property may not be a statement of fact if a reasonable person would realize that they are not meant to be taken literally: for example, "Nothing to spend, perfect presentation" in a real estate brochure was held, in its context, to be "puffery" rather than an actual representation that the property was free of serious faults *Mitchell v Valherie*.[114] The distinction between a misrepresentation of fact and mere puffery may, however, be subtle so parties should always take care not to make unjustified statements: for example, in *Pryor v Given*,[115] a statement that land was a "wonderful place to live" was regarded as a statement of fact conveying the impression that the land was appropriately zoned.

Generally speaking, silence – in this context, a party not disclosing something that they know might affect the other party's interests in the contract – does not amount to misrepresentation. This is an important point of distinction with the statutory prohibition on misleading and deceptive conduct, where, for example, silence may be misleading if the other party has a reasonable expectation of disclosure in the circumstances, see, for example, *Demagogue Pty Ltd v Ramensky*[116] and *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*.[117] Nevertheless, the general law does recognise

114. *Mitchell v Valherie* (2005) 93 SASR 76.
115. *Pryor v Given* (1980) 30 ALR 189.
116. *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.
117. *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.

certain categories of behaviour where staying silent may amount to a misrepresentation. These include:

- "half truths", that is, making a statement that is true on its own yet conveys a false impression as to the entirety of the situation (for example, stating that the site contains "only good fill" might indicate that it is suitable to support the works, yet the owner knows that there is a pocket of methane under the fill which will require remediation); and
- changes of circumstances, where, before the contract is entered into, the error of a statement is discovered subsequent to it being made or where circumstances have changed and this has not been disclosed.

Fraudulent v innocent

[5.310] For a misrepresentation to be "fraudulent", specific characteristics must be established, see generally, *Krakowksi v Eurolynx Properties Ltd*.[118] The misrepresentation must be false, that is, an active intention to deceive must be shown, and it must be one of fact. The representation must be made with knowledge of its falsehood, without belief in its truth or made recklessly. The representation must be made with the intention that it be acted upon by the other party, and it must actually have deceived that party.

Sometimes a representation may be ambiguous as to its truthfulness; for example, a statement that a site is "good" might be stated with the intention of indicating that it has ready access to services yet understood by the other party to mean that it will allow for easy pouring of footings. What is important in determining whether the statement is fraudulent is the sense in which the representor intended it to be understood.

A misrepresentation is "innocent" if it is an incorrect statement of fact made without intention to mislead and made in the honest, albeit careless, belief that it was true.

Remedies

[5.320] The remedies for misrepresentation depend on whether it was fraudulent or innocent. In either case, the contract will be voidable by either party. Fraud entitles the party to avoid the contract at law and in equity by means of rescission and also to seek damages at common law for the tort of deceit. Innocent misrepresentation has no remedy at common law, but equity will allow the victim to insist on performance or to resist specific performance of the contract, or elect to rescind the contract.

The remedy of an action for rescission (which applies to both fraudulent and innocent misrepresentations) involves the cancellation of the contract and restoration of the parties to their position prior to the contract.

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118. *Krakowksi v Eurolynx Properties Ltd* (1995) 183 CLR 563.

The right to rescind may be lost in certain circumstances. For example, the innocent party must act promptly and must not take any benefit, or affirm the contract, after discovering the misrepresentation. Generally speaking, the court will not grant rescission if it is impossible to return the parties to their original positions, *restitutio in integrum*.

The common law limitation on a right to damages for innocent misrepresentation will not preclude an action in tort for negligent misstatement where it can be established that the misrepresentation was made in circumstances of a sufficiently proximate relationship.[119] The victim may alternatively be able to show a collateral contract, or even that the innocent representation became a term of the contract, and then sue for damages for breach.

Statutory modification of the common law position has been made in South Australia (*Misrepresentation Act 1971* (SA)) and the Australian Capital Territory (*Civil Law (Wrongs) Act 2002* (ACT)). These provide for damages for innocent and negligent misrepresentations inducing an entry into a contract, but a defence of reasonable belief in the truth of the representation applies.

As foreshadowed above, by far the greatest impact upon innocent or negligent misrepresentation has been the TPA and equivalent fair trading legislation at state level, dealing with misleading or deceptive conduct in the course of trade or commerce (see [3.140]), which is now addressed under the national ACL.

Duress, undue influence and unconscionable dealing

[5.330] There may be circumstances where the courts will find that a contract was induced either by threats of physical or economic injury (duress), because of the unconscionable exploitation of a relationship of confidence (undue influence) or in circumstances where the contract was entered unconscionably. Such abuses of power may be grounds for having the contract rescinded or, depending upon the circumstances, obtaining other remedies (such as under the ACL – see [5.350]) which provides for a wide range of remedies. Each has its own elements which need to be satisfied.

The basis of actionable *duress* is that one party exerts illegitimate pressure upon the other which impairs their consent in entering into the contract. The threat may be to the party's person (or that of their close relatives), their goods or economic interests. This is an unsettled area of the law, especially as to duress to economic interests, see, for example, *Crescendo Management Pty Ltd v Westpac Banking Corp*[120] and *Australia and New Zealand Banking Group Ltd v Karam*.[121] The law is seeking to strike an appropriate balance between

119. See, generally, Chapter 6.

120. *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40.

121. *Australia and New Zealand Banking Group Ltd v Karam* (2005) 64 NSWLR 149.

allowing robust commercial negotiations, which often involve pressure being applied, whilst not condoning behaviour which crosses the line, hence, the focus on whether the behaviour is "illegitimate".

Undue influence concerns exploitation of a relationship of influence, resulting in a contract made without free consent. Whilst undue influence is unlikely to apply in respect of construction contracts in the commercial sphere, it is not inconceivable that the elements could be satisfied in relation to residential work or peripheral arrangements, such as financial guarantees.

In some relationships, such as those between solicitor and their clients, doctors and patient and parents and children, the special relationship of confidence existing between the parties gives rise to a (rebuttable) "presumption of influence". It may also be that, outside of such established categories, the vulnerable party can establish that they place such trust and confidence in the other party that a presumption of influence should be made, *Johnson v Buttress*.[122] Where such deemed relationships of influence exist, the dominant party must prove that there was no influence. Where there is no such special relationship, the party alleging undue influence must prove they were the victim of "actual" undue influence in that they lost their free will to contract.

Whilst undue influence looks primarily to the nature of the relationship between the parties, the vitiating factor of *unconscionable dealing* focuses upon their behaviour. In order to gain relief, the party needs to show that they were under a "special disability" in dealing with the other party such that there was no reasonable degree of equality between them and that the disability was sufficiently evident to the other party so as to make it prima facie unfair or unconscientious for them to procure the vulnerable party's consent in those circumstances. The significance of the "prima facie" label is that, once the allegedly vulnerable party establishes this threshold, the other party needs to show that the transaction was fair, just and reasonable, *Commercial Bank of Australia Limited v Amadio*.[123] There are a number of recognized categories of special disability (including mental disorder, drunkenness and emotional dependence), but these continue to evolve within the case law.

The vitiating factors noted above apply primarily in situations where there are two parties to the contract. There is also the possibility that a third party's behaviour may render the contract unenforceable. For example, party A might enter a contract with party C whereby party A guarantees that party B will meet its payment obligations under a construction contract between B and C. Even though party B is not a party to the guarantee, if party B acts improperly in relation to A's entry into the guarantee, for example, by coercing A, that might result in the guarantee being set aside. The elements

of such an action are highly detailed but revolve around party A establishing that party B has acted in a manner recognised by the law as improper for these purposes, such as unconscionable dealing, undue influence or the so-called "special wives' equity", and that party C was somehow tainted by or implicated in B's conduct, *Garcia v National Australia Bank Ltd*.[124]

Where the vitiating factors noted above apply, the contract will be voidable at the option of the party induced to enter into the contract and the unlawful inducement or unconscionable conduct may act as a defence to actions to enforce the contract or the term.

Illegality

[5.340] Where a contract has the aim or intention of committing an illegal act, or involves performance by way of an illegal act, then the contract is illegal and generally unenforceable. The illegality may arise as a result of statutory prohibition, either of the formation of a contract of that type, or the manner in which the contract is performed.

Statutes may expressly or impliedly prohibit the formation of a contract; such a contract will be "illegal as formed". It is void and no action lies by either party, regardless of knowledge or intention. The contract may be legal as formed but when performed, it becomes a contract prohibited by statute. It is thus a contract "illegal as performed", and unenforceable by an offending party. An innocent party may recover damages for breach of contract and probably recover any property transferred under the contract.

Where a contract is let for the construction of a building in contravention of a statute, the contract is illegal and unenforceable. If, for example, a contract requires the construction of a building that will be in breach of regulations (for example, rooms undersized or insufficient boundary setbacks) then the contract will be illegal.

However, where the contract is properly entered into but is executed in breach of regulations, the question of illegality will depend on how serious the breach is. Where it is failure to obtain a required approval or permit, the contract is more likely to be a contract prohibited by statute and recovery for payment for work done under such a contract will be prevented. The effect of failure to obtain approval will, to some extent, depend upon construction of the statute or regulation, see *Hayes v Cable*,[125] *Doug Rea Enterprises Pty Ltd v Hymix Australia Pty Ltd*[126] and, generally on the role of statutory construction, *ACCC v Baxter Healthcare Pty Ltd*.[127]

124. *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.
125. *Hayes v Cable* (1961) 62 SR (NSW) 1.
126. *Doug Rea Enterprises Pty Ltd v Hymix Australia Pty Ltd* [1987] Qd R 495.
127. *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1.

Where regulations prohibit alterations to be made to work as approved without further approval, it is possible that the whole contract will be illegal and unenforceable *Varley v Spatt*.[128] This situation will be relatively rare and, in general, where a contractor carries out certain work in breach of a regulation on the request of the principal, recovery would be possible. Even a contractor failing to comply with regulations may recover for other work which does comply.

Statutory provisions

[5.350] As was discussed in detail in Chapter 3, the common law with respect to the enforcement of contracts has been the subject of some significant legislative amendment in recent years. Section 18 of the ACL (formerly s 52 of the TPA and equivalent State and Territory provisions) prohibits misleading and deceptive conduct in the course of trade and commerce (see, generally, [3.140]). Thus, for example, pre-contractual misrepresentations which have been relied upon to enter the contract may be actionable.

The legislation (former Pt IVA of the TPA, now Part 2-2 of the ACL) also prohibits unconscionable conduct in certain transactions[129] and provides, in addition to a right to damages (s 82 of the TPA/s 236 of the ACL), a wide range of discretionary remedies including orders to vary or set aside a contract (s 87 of the TPA/Pt 5-2 Divs 2-5 of the ACL).[130]

The potential scope of the application of statutory prohibition of unconscionable conduct to the construction industry, particularly in relation to sub-contractors, has not been developed. The terms of s 22 of the ACL, formerly s 51AC of the TPA, are very wide and having regard to the discretionary remedies under s 243 of the ACL, formerly under s 87 of the TPA, there would seem to be many situations to which they could apply in the construction industry. Unconscionable conduct has been the basis for a claim for injunctive relief to restrain a call upon a performance or bank guarantee under construction contracts in a number of cases. The particular unusual circumstances which prevailed in *Boral Formwork v Action Makers*[131] will be rare, but the case is an example of the application of statutory unconscionability intervening in reasonably settled commercial affairs, see also *Clough Engineering Ltd v Oil & Natural Gas Corporation*.[132]

Further, the introduction in Part 2-3 of the ACL of restrictions upon and remedies to set aside unfair contract terms may provide relief for consumers and parties to contracts for the supply of goods or services in the construction

128. *Varley v Spatt* [1955] VLR 403.
129. See [3.150].
130. See [3.200].
131. *Boral Formwork v Action Makers* [2003] NSWSC 713.
132. *Clough Engineering Ltd v Oil & Natural Gas Corporation* [2007] FCA 927.

industry which include or involve a significant imbalance in the rights and obligations of the parties: see [3.160].

In New South Wales, there is also the *Contracts Review Act 1980*, which provides relief in respect of harsh, oppressive, unconscionable and unjust contracts and provides a means by which individuals may seek relief in respect of unconscionable contracts or unjust terms in contracts which they have entered where under the common law, relief would not be available. The circumstances in which it will apply to building contracts will be limited, see *Toscano v Holland Securities Pty Ltd*,[133] as a result of its limitation of remedies to individuals and the exception of "business contracts".

PRIVITY OF CONTRACT

[5.360] It is a basic common law principle that only the parties to a simple contract obtain legal rights or incur legal liabilities under the contract. This is the doctrine of privity of contract.

Where A promises B to pay money to C in consideration for B doing work for A, the third party C will not, therefore, be able to sue A in contract for payment or B to enforce the performance. An example of application of the doctrine in a construction contract is where a provision allows, under certain circumstances, a principal to pay a nominated sub-contractor directly. The nominated sub-contractor may not be able to rely on the provision in the head contract to enforce payment, even where the pre-conditions are satisfied.

A separate agreement, possibly including a collateral warranty by the sub-contractor, might be effective in such instances.[134] The provisions of security of payment in most States may also permit recovery of payment directly from the principal if the pre-conditions are satisfied.

There are a limited number of exceptions to the general rule of privity of contract. One such exception is the right of third parties who have been named as the insured to enforce the benefit of an insurance policy, notwithstanding that they were not a party, *Trident General Insurance Co. Ltd v McNiece Brothers Pty Ltd*[135] and *Co-operative Bulk Handling Ltd v Jennings Industries Ltd*.[136] The law of agency is to some extent an exception, particularly where the third party accepts and ratifies the actions of one party to a contract as being the acts of his or her agent. Another possible exception, common in construction contracting, is where a third party becomes entitled by way of an effective

133. *Toscano v Holland Securities Pty Ltd* (1985) 1 NSWLR 145.

134. See [5.200].

135. *Trident General Insurance Co. Ltd v McNiece Brothers Pty Ltd* (1988) 165 CLR 107.

136. *Co-operative Bulk Handling Ltd v Jennings Industries Ltd* (1996) 17 WAR 257.

assignment to enforce the rights of a party to the contract, or claims to be entitled, see *Kramer v Prima Homes*.[137]

Certain other contracts made under seal and executed as deeds may also be enforced by a third party entitled to rights or benefits. Finally, legislation in the Northern Territory (*Law of Property Act*), Queensland (*Property Law Act 1974*) and Western Australia (*Property Law Act 1969*) provides certain rights to third parties, though the terms of the statutes are by no means uniform.

DISCHARGE OF CONTRACT

[5.370] A contract may be brought to an end in a number of ways. Generally speaking, but subject to the discussion below, the effect of such termination is to discharge the contract and to release the parties from their obligations under it. To know when a contract is discharged is important because, after discharge, neither party can enforce the original terms of the contract; they can only enforce their respective rights arising as a consequence of the discharge. For example, the provisions in construction contracts for the determination of the contractor's employment do not effect a discharge of the contract whereas a termination of the contract for repudiatory breach discharges the contract, and the party's remedies are those consequent upon the termination and not the contract.

Discharge may be effected in a number of ways:

- Where the parties perform all their obligations, the contract is said to be discharged by *performance*.
- Express *agreement* between the parties can also discharge a contract; this refers, here, to a new agreement between the parties, but it may also be that the contract is brought to an end via a default regime in the existing agreement.[138]
- Where the performance of the contract becomes impossible during the course of the contract, it may be discharged by *frustration*.
- In certain circumstances, discharge can result from a *breach* or *repudiation* of the contract by one of the parties.

Each of these grounds for discharge will be considered in turn. In addition, for completeness (but not discussed in any detail below), the contract may be discharged independently of the parties, that is, by *operation of law*, for example, upon the bankruptcy of one of the parties.

Even where one or more of these grounds applies, there may be restrictions upon a party's right to treat the contract as terminated; for example, there

137. *Kramer v Prima Homes* (1998) 20 SR (WA) 149.

138. See [9.760]-[9.790] as to the operation of regimes dealing with default and termination within contracts, including the standard forms.

is a general requirement that a party seeking to terminate the contract for breach or repudiation show that they were ready and willing to perform their side of the contract at the relevant time, *Foran v Wight*.[139] The detail of these restrictions is beyond the scope of this text but is discussed in the general contracts texts referred to in the "further reading" for this chapter.

Discharge by performance

[5.380] Where the contractual obligations consist of the doing of an act, the general rule is that only exact and complete performance will discharge the contract and entitle the party to recover payment or consideration for the act, see *Phillips v Ellinson Brothers Pty Ltd*.[140] Part performance will generally not confer a right to part payment.

The courts have, however, adopted the view that, in certain circumstances, substantial performance may entitle the performer to payment, see, for example, *James Birrell Mack and Partners v Evans*.[141] This mitigation of the general rule has been applied in construction contracts on the basis that the other party to the contract has taken a benefit from the substantial performance, and the materials and services supplied cannot be returned. However, just as the contractor is entitled to payment, the person for whom the work is done is entitled to make a deduction in respect of any defects, *Hoenig v Isaacs*.[142]

Part performance may entitle recovery where the contract is "divisible" or severable, rather than an "entire" contract. A divisible contract is one that either expressly or impliedly entitles a party to recover payment without complete discharge. As to whether construction contracts generally are "entire" contracts see *Tan Hung Nguyen & Anor v Luxury Design Homes Pty Limited*.[143]

Typically, a construction contract is discharged by performance when the contractor has completed all of its obligations (including those during the defects liability period), all certificates required by the superintendent have been issued and all payments that are due have been made. Where work has not been completed in accordance with the contract, there will not have been a discharge by performance. However, the right of the principal to sue the contractor for unknown defective work will depend, in part, upon the terms of the certificates issued under the contract, particularly the final certificate and also the applicable limitation of actions legislation.[144]

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139. *Foran v Wight* (1989) 168 CLR 385.
140. *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221.
141. *James Birrell Mack and Partners v Evans* (1984) 1 BCL 345.
142. *Hoenig v Isaacs* [1952] 2 All ER 176.
143. *Tan Hung Nguyen & Anor v Luxury Design Homes Pty Limited* (2005) 21 BCL 46.
144. See, respectively, the discussion on latent defects and the final certificate at [9.500] and upon limitation periods at [5.560].

Discharge by agreement

[5.390] As with the formation of contracts, the parties may terminate the contract by a new agreement. The agreement to discharge may take a number of forms. Where the original contract has not been performed, the discharge of it should not cause difficulty. The agreement nevertheless will need to be supported by consideration.

Where, however, one party has fully performed their obligations and the other has not, there may be a difficulty. For a binding discharge to apply, some further consideration will need to be given, see *D & C Builders v Rees*.[145] To avoid disputes as to whether there is sufficient consideration, parties often frame their agreement to discharge the contract as a deed.[146] The new agreement between the parties may in fact substitute a complete new agreement for the original. Alternatively, the agreement may be merely to modify the terms of the original agreement without introducing a completely new agreement.

The contract itself may make provision for the full or partial discharge of the contract: for example, the provisions in building contracts dealing with the termination of the employment of the contractor in certain circumstances (see [9.760]-[9.790]).

Novation and assignment

[5.400] Novation and assignment are discussed more fully at [8.320]-[8.360]. It is, however, worth noting in the present context that it is not uncommon for contracts discharged by a novation of the original agreement. *Novation* is a procedure by which one party transfers all its obligations under a contract and all its benefits arising from that contract to a third party. The third party effectively replaces the original party as a party to the contract. When a contract is novated the other contracting party must be left in the same position as they were in prior to the novation being made. A novation requires the agreement of all three parties involved.

An *assignment* of rights, on the other hand, may be made unilaterally by one party, subject of course to the terms of the contract. Contracts often include terms restricting or prohibiting assignments. Such terms have the effect of making any purported assignment invalid as against the other party to the contract: see, for example, *Linden Gardens v Lenesta Sludge*,[147] where a poorly drafted clause was held to prevent the assignment of certain rights under the contract. However, the right to prevent assignment may be lost by waiver, see *Bonacci Rickard (NSW) Pty Limited v Jeffery & Katauskas Pty Limited*.[148]

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145. *D & C Builders v Rees* [1966] 2 QB 617.

146. See, generally, [5.210] and also *Flowers v Vesci* [2006] NSWCA 342.

147. *Linden Gardens v Lenesta Sludge* [1994] 1 AC 85.

148. *Bonacci Rickard (NSW) Pty Limited v Jeffery & Katauskas Pty Limited* [2005] NSWSC 726.

Assignment of obligations under contracts is, therefore, more often effected by a novation.

Discharge by frustration

[5.410] The mere fact that the performance of a contractual obligation becomes more expensive or more difficult than anticipated does not discharge the contract or obligations under it. However, Australian law recognises that, in limited circumstances, disruption of the parties' ability to perform by events beyond their control may result in the discharge of the contract. This is the doctrine of "frustration".

The basic concept of frustration, as outlined by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*,[149] is that if, "without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract", the contract may be frustrated and thereby discharged. In *Codelfa*, for example, the High Court held that a contract for construction of an underground railway was frustrated as a result of the imposition of injunctions upon the hours originally contemplated to be worked during performance of the contract.

Whilst the complaint will often be made that the work is radically different from that contemplated and contracted for, the operation of the doctrine is quite narrow. Even if the causes of the contract becoming more difficult or more expensive are beyond the control of the contractor, see *Davis Contractors Ltd v Fareham UDC*,[150] this will not necessarily frustrate the contract, and the doctrine will not apply to individual terms, see *Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd*[151] where a claim by a contractor that strikes had frustrated certain provisions of the contract was rejected.

On the other hand, the courts have found frustration to apply in circumstances where performance is not impossible. These include where the subject matter of the contract is destroyed, for example, the burning down of a hall in which the parties had contracted to put on concerts: *Taylor v Caldwell*[152] or the basis or purpose of the contract disappears, for example, where a re-zoning of a development site made the project commercially unviable from the developer's point of view, *Brisbane City Council v Group Projects Pty Ltd.*[153]

In the context of construction contracts, it needs particularly to be borne in mind that the theoretical basis for the operation of frustration (as reflected

149. *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.
150. *Davis Contractors Ltd v Fareham UDC* [1956] 3 WLR 37.
151. *Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd* [1975] VR 202.
152. *Taylor v Caldwell* (1863) 3 B & S 826.
153. *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143.

in the statement from *Codelfa* noted above) is the allocation of risk under the contract. Therefore, if the risk of the event which is alleged to comprise the frustration is allocated to one of the parties under the contract, it will generally not be possible to claim that the event makes performance radically different from that contemplated under the contract. In other words, if there is a "force majeure" regime under the contract which deals with what happens if there is an "act of God", then it may be expected that the contractual provisions will apply if, for example, there is an earthquake and that there will be no room for frustration to be argued.

Two other key limits on the operation of frustration are that the event must not have been foreseeable by the parties at the time of entry into the contract and that the frustrating event must have occurred without fault on the part of the party seeking to have the contract discharged.

The effect of frustration is that the contract is discharged automatically (that is, there is no formal requirement for a party to elect to terminate) but only as to the future. Obligations which have arisen under the terms of the contract prior to frustration will remain and may be enforced, but obligations outstanding under the contract cannot be enforced. The contract may make provision for frustration and the consequent rights of the parties.[154]

The position at common law as stated above has been modified in some States by the various *Frustrated Contracts Acts:* 1959 (Vic), 1978 (NSW) and 1988 (SA). These contain provisions which empower the court to apportion between the parties the loss suffered under a contract and to order re-payment of money.

Discharge by breach or repudiation

[5.420] A breach of contract is a failure by one of the parties to perform obligations in accordance with the contract. Any breach will entitle the innocent party to damages; in order for the damages to be more than "nominal", though, the breach must cause loss. The breach may also be of such significance that the party not in breach may be entitled to regard the breach as being wholly inconsistent with the contract and therefore giving them a right to terminate it.

The general law recognises three grounds on which a breach of contract may give rise to a right to terminate:

- where the term breached is a "condition" of the contract, also known as an "essential" term;
- where the term is "intermediate" in nature but the breach and its consequences are particularly serious; and
- where the breach amounts to "repudiation" or "renunciation" of the contract.

154. See, eg, cl 45 of AS 2124-1992 and cl 40 of AS 4000-1997.

Whilst the boundaries between each of these concepts are, in practice, often difficult to discern, there are conceptual differences between them. The first, the condition-warranty divide, looks at how important the breached term was to the parties at the time of entry into the contract, whereas under the second, consideration is given to the gravity of the breach and its consequences at the time it occurs. Repudiation is distinct from the other two categories because the focus is upon the intention and behaviour of the party at fault. Conduct disclosing an intention to no longer be bound by the contract will usually constitute repudiation.

Breach of essential terms (conditions)

[5.430] Where a term is classified as "essential" (or a "condition"), any breach of that term will generally give the party adversely affected by the breach a right to terminate. The manner of determining whether a term is a condition or warranty is discussed at [5.160]: fundamentally, conditions are terms which go to the root of the contract, and warranties are terms which do not.

Breach of intermediate terms

[5.440] Australian law has for some time recognised that the seriousness of the breach may be a factor to be taken into account in determining whether the breach justifies termination. For example, in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*[155] and *Associated Newspapers Ltd v Bancks*,[156] the courts looked to whether the breach was "substantial". Conceptually, there appears to be overlap here with the doctrine of "fundamental breach" which provided, primarily, that a party which has committed a breach going to the root of the contract cannot rely upon an exclusion clause. However, this doctrine no longer applies in England[157] or Canada,[158] and Australian law has instead recognised the concept of "intermediate terms" to cover situations where breach of a term which is not classified as a condition may give rise to a right to terminate.

The first detailed treatment of intermediate terms in Australia was in the 2007 High Court case of *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*.[159] There, the Court was asked to decide whether a series of breaches of a joint venture agreement by Sanpine justified its termination by Koompahtoo. The Court could conceivably have regarded the relevant terms as conditions, but the majority preferred to regard them as intermediate terms; in turn, because the Court was satisfied that that the breaches went to the root of the

155. *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 61 CLR 286.

156. *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322.

157. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

158. *Tercon Contractors Ltd v British Columbia* [2010] SCC 4.

159. *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115.

contract, Koompahtoo was entitled to regard the contract as at an end. The Court noted that the analysis is based upon construction of the contract and "takes account of the nature of the contract and the relationship it creates; the nature of the term; the kind and degree of breach; and the consequences of the breach for the other party".

Repudiation (renunciation)

[5.450] Repudiation (or, as more recently characterised by the High Court in *Koompahtoo*, "renunciation"), is where one party shows an unwillingness or inability to perform their side of the contract, either in its entirety or in an essential respect. Where repudiation has occurred, this gives the other party the right of election whether to terminate the contract.

The repudiation may be express or may be inferred from conduct. For example, in *Carr v J A Berriman Pty Ltd*[160] the principal was held to have repudiated the contract through ordering, via the superintendent, that a significant portion of the contractual work be removed from the contractor's scope of work and given to another contractor. Repudiatory conduct is that such as to evince an intention not to be bound by the contract, or to be bound by the contract only on terms other than those provided for in the contract, *Shevill v Builders Licensing Board*.[161] The consistent maintenance of an incorrect construction of the contract upon a significant matter could be regarded as repudiation, see *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*,[162] *Kennedy v Collings Construction Co Pty Ltd*[163] and *Wilson v Kirk Contractors Pty Ltd*.[164]

For the contract to be effectively discharged, there has to be an "acceptance" of the repudiation by the innocent party. The innocent party may elect to accept the repudiation, in which case the contract will be discharged, or they may treat the contract as subsisting and still binding on the parties. Where a repudiation is accepted this must be communicated expressly or impliedly to the party in breach. If the innocent party ignores the repudiation as a basis for discharging the contract then both parties remain liable for obligations under the contract, but the innocent party can sue for damages.

Upon the termination of the contract for repudiation, the innocent party will be relieved from any further liability; however, the rights and obligations of the parties prior to termination remain, *McDonald v Dennys Lascelles Ltd*.[165] The innocent party may claim damages against the party in default for breach and the termination. Where the innocent party is the contractor,

160. *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327.
161. *Shevill v Builders Licensing Board* (1982) 149 CLR 620.
162. *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.
163. *Kennedy v Collings Construction Co Pty Ltd* (1989) 7 BCL 25.
164. *Wilson v Kirk Contractors Pty Ltd* (1990) 7 BCL 284.
165. *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.

it may have an election as to whether a claim for damages is pursued or, alternatively, to bring a claim for a *quantum meruit* (in this context, a "reasonable" sum) for the work and materials provided. See [5.530] on *quantum meruit* generally and, for an application in construction contracting as to the amount recoverable upon repudiation, the Victorian Court of Appeal's judgments in *Sopov v Kane Constructions Pty Constructions Pty Ltd*[166] and *Sopov v Kane Constructions Pty Ltd (No 2)*[167] applied in Western Australia in *Austman v Mount Gibson*.[168] Such a right of election is regarded as an anomaly, which ought to be addressed in the contract by a term which limits the recovery of a contractor when the contract has been terminated, for breach by the principal, under either a contractual regime or at common law, to a remedy confined only to damages at common law. Clause 44.9 of AS 2124-1992 is a possible, although, uncertain example; cl 14.7 in PC-1 1998 would likely be more effective.

Impact of contractual regimes

[5.460] The general law grounds are usually modified under construction contracts through an express regime dealing with default and termination.[169] Such a contractual regime usually is designed to avoid the need to work out, during the execution of the contract, whether a particular breach, for example, failure by the principal to pay a progress claim or defective work by the contractor, gives rise to a right to terminate.

A contractual regime may, therefore, modify the rights available at general law. Such modification may also amount to a restriction on general law rights. Parties to commercial contracts may, by clear words, expressly exclude such general rights or provide that the contractual regime amounts to an exclusive "code" of the parties' rights. There is also the possibility that a comprehensive treatment of rights to terminate in the contract may amount to a code, even though the parties have not expressly noted that to be their intention, see, for example, *Amann Aviation Pty Ltd v Commonwealth*,[170] *Turner Corporation Limited (Receiver & Manager Appointed) v Austotel Pty Limited*[171] and *GT Corporation Pty Ltd v Amare Safety Pty Ltd (No 2)*.[172] On the other hand, the High Court has emphasised that clear words are usually required in order to exclude general law rights to terminate, see *Concut v Worrell*.[173]

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166. *Sopov v Kane Constructions Pty Constructions Pty Ltd* (2007) 20 VR 127.
167. *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510.
168. *Austman v Mount Gibson* [2012] WASC 202.
169. See [5.370] and the detailed discussion at [9.760]-[9.790].
170. *Amann Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527.
171. *Turner Corporation Limited (Receiver & Manager Appointed) v Austotel Pty Limited* (1994) 13 BCL 378.
172. *GT Corporation Pty Ltd v Amare Safety Pty Ltd (No 2)* [2008] VSC 223.
173. *Concut v Worrell* (2000) 75 ALJR 312.

The difficulties that the interplay between general and contractual rights can cause in practice mean that it is usual for construction contracts to deal with the matter expressly. For example, cl 44.1 of AS 2124-1992 and cl 39.1 of AS 4000-1997 make it clear that the contractual rights supplement, rather than override, general law rights, whereas cl A11 of ABIC MW-2008 indicates that remedies conferred by the contract are exclusive of general law rights.

In many respects, the contractual termination regimes theoretically provide a more certain and effective procedure than might be thought to apply at common law. The alternative or consequential remedies which are included are wider than the mere right to damages at common law, the most significant being suspension of payment obligations and the right for the principal to use materials and plant owned by the contractor.

Contractual procedures usually involve either "show cause" or "default" notices. Under the former the recipient (usually the contractor) is required, within the prescribed period of time, to explain in writing why the powers available under the contract should not be exercised. This will frequently involve an explanation for the alleged misconduct of breaches. The critical next step is the assessment by the principal of whether cause has been shown, meaning that there is an explanation and possibly an acknowledgement of the matters allege. The principal must act reasonably in considering the response and be able to prove that due consideration was given before acting under the provision, *Renard Constructions (ME) Pty Ltd v Minister for Public Works*.[174] If, for example, it can be shown that the procedure was premised on a foregone conclusion then reliance upon the exercise of the power by the principal may amount to a repudiation.

There are often other challenges to the use of the contractual regime based on procedural error, or that the allegations of breach which predicated the notice to show cause, were incorrect, and that the notice was invalid. Thus, where the contract involves the use of a default notice, then important considerations arise. Most clauses contemplate a notice which sets out the existing breaches and requires that the defaults be remedied within a specified period of time. Rarely will there be any benefit in reliance upon past breaches or default that is incapable of remedy.

Further, the allegations of default will need to be shown to be correctly made. For example, general allegations of a failure to proceed with "diligence" are susceptible to an explanation for the default based on factors which do not amount to a breach, see, for example, *Hometeam Constructions v McCauley*[175] and see *DCT Projects Pty Limited v Champion Homes Sales Pty Limited*,[176] and see further *Torbey Investments Corporated Pty Ltd v Ferrara*.[177] A contractor may

174. *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
175. *Hometeam Constructions v McCauley* [2005] NSWCA 303.
176. *DCT Projects Pty Limited v Champion Homes Sales Pty Limited* [2016] NSWCA 117.
177. *Torbey Investments Corporated Pty Ltd v Ferrara* [2017] NSWCA 9.

be delayed by matters over which they have no realistic control and, whilst there may be no defence to a claim for late completion, the delay may not amount to a breach of the obligation to proceed with diligence.

Finally, it should be noted that applications by contractors for injunctions to restrain principals from an alleged wrongful exercise of a right to terminate are unlikely to succeed when any such order would in effect be an order for specific performance, see *Crouch Developments Pty Ltd v D and M (Australia) Pty Ltd*[178] and *Sugar Australia Ltd v Conneq*[179] and, generally as to specific performance, [5.540].

REMEDIES FOR BREACH OF CONTRACT OTHER THAN TERMINATION

[5.470] Apart from the right to regard the contract as discharged, an innocent party to a breached contract may have a number of other remedies available to them. Whilst the remedy most often sought is damages (compensation), other remedies may exist depending upon the circumstances.

As noted above, where the contract has been terminated by acceptance of a repudiation, the innocent party may have an election as to the remedy which may be sought. For example, a contractor may sue for damages consequent upon the breach or alternatively may bring a claim in quantum meruit for the work and materials provided prior to termination. Such a right to an election is correctly recognised as an anomaly and ought to be addressed in the contract.[180] Further, the contract itself may provide some remedy for the breach so that no action is required other than to enforce the prescribed contractual remedy.

Another remedy potentially available but, as noted below, rarely granted is to seek an order for specific performance of the contract, in effect a mandatory order for performance. In rare circumstances it may be possible to obtain an injunction to restrain a breach of contract.

Contractual remedies

[5.480] There is an important distinction between a claim for damages for a breach of contract and a claim made under a provision in the contract which nominates a prescribed remedy in the event of certain specified events. In the latter, the remedy operates by reason of the contract itself, and any prescribed adjustment may be made without recourse to legal action. Moreover, in some instances, the contractual remedy may preclude or limit any claim at law for the breach concerned.[181]

178. *Crouch Developments Pty Ltd v D and M (Australia) Pty Ltd* [2008] WASC 151.

179. *Sugar Australia Ltd v Conneq* [2011] NSWSC 805.

180. See [5.450].

181. See [5.460].

In building contracts, quite apart from the provision for determination of the contractor's employment, there are numerous other examples of contractual remedies. Perhaps the best known example is liquidated damages for late completion; as a general rule, these preclude a claim for damages at law in excess of the amount prescribed.[182]

Where work has been carried out in breach of the contract, the principal may be entitled, after prescribed notice is given, to employ others to remedy the defect and to deduct the cost thereof from payment to the contractor. The principal may not be able to set off the cost incurred if the specified procedure is not followed, see *Turner Corp Ltd v Austotel Pty Ltd* concerning cl 5.06 of the JCC form.[183]

Damages

[5.490] Under Australian law, the primary purpose of an award of damages for breach of contract is to compensate a party for loss occasioned by the default of the other party, not to punish the party in default or make an example of them. The award of a sum of money is the traditional way that common law courts have treated compensation for breach of contract. The losses which may be recoverable are limited to those which are caused by the breach, and only losses which are at law not too "remote" can be recovered. The plaintiff is also obliged to take reasonable steps to mitigate or minimise the loss caused by the breach of contract.

The question of the appropriate measure (or "quantum") of damages in contract is, therefore, a complex issue which often creates difficulties in practice. The following sections consider a number of particular issues in relation to quantum in construction contracting.

Remoteness of damage

[5.500] The damage that flows from a breach of a construction contract may occur in chronological or physical relationship to the breach and may be far-reaching. For example, a failure by the contractor to complete an engineering process plant on time might not only cause the owner of the plant "direct" loss in terms of production but also "indirect" loss in that it loses the opportunity to attract new customers. In an attempt to draw a line in the sand between losses which are available as damages and those which are too "remote", the law has recognised that, in order to be recoverable, loss needs to fit within one of the two "limbs" first identified in *Hadley v Baxendale*[184] and further developed in subsequent cases.

182. See [9.650]-[9.690].

183. *Turner Corp Ltd v Austotel Pty Ltd* (1997) 13 BCL 378.

184. *Hadley v Baxendale* (1854) 9 Exch 341.

The so-called "first limb" concerns damages arising in the usual course of things as a result of a breach of contract itself and the "second limb" involves damages "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of it". Where notice of such special circumstances, either actual or imputed, was given prior to the contract, "special" damages resulting from a breach in these circumstances may be recovered. The defendant is assumed to have accepted the risk of liability for such special damages when entering the contract.

An example of the application of the principles of remoteness of damage is *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*.[185] There, a defendant engineering company which was to supply a new boiler was aware of the type of business of the plaintiff, but not that the boiler was required to extend the plaintiffs' business to new, lucrative work. The boiler was delivered late and the new work was lost. The plaintiff could only recover the profit to be expected from the normal business operations and not the damages flowing from the loss of the new contracts.

On the basis of actual or imputed knowledge, loss of rent for a block of flats or an office building would not seem too remote and ought to be in contemplation when the contract was formed, as might interest and holding charges on money tied up for an extended period, *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd*.[186]

Given the difficulties in application of the remoteness test, parties to construction contracts will often seek to anticipate or clarify the applicable quantum through the contractual provisions, for example, by setting out limitations of liability or liquidated damages. These are discussed in detail at, respectively, [5.190] and [9.640]-[9.680].

Australian courts have recently reconceived the relationship between categories of loss within limitation clauses and the limbs of the remoteness test, see *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd*[187] and *Allianz Australia Insurance Ltd v Waterbrook at Yowie Bay Pty Ltd*[188] and discussed in *Patersons Securities Ltd v Financial Ombudsman Service Ltd*[189] and *Alstom Ltd v Yokogawa Australia Pty Ltd*.[190] In particular, it is no longer the case that "consequential" loss is confined within the second limb. This emphasises the need for parties to construction contracts to draft limitation clauses with precision, identifying to the extent possible the actual types (or amounts) of loss which

185. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.
186. *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504.
187. *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* (2008) 19 VR 358.
188. *Allianz Australia Insurance Ltd v Waterbrook at Yowie Bay Pty Ltd* [2009] NSWCA 224.
189. *Patersons Securities Ltd v Financial Ombudsman Service Ltd* [2015] WASC 321.
190. *Alstom Ltd v Yokogawa Australia Pty Ltd* [2012] SASC 49.

are agreed not to be recoverable rather than having recourse to legally contentious descriptions such as "consequential" or "indirect".

Measure of damages for defective work

[5.510] The general rule relating to the assessment of damages is that the plaintiff is entitled to recover such an amount as will put them in the same position, so far as money can do so, as if the contract had been fulfilled (*Robinson v Harman*).[191]

In relation to defective building work which comprises a breach of contract, the default measure is "rectification" or "reinstatement", that is, the cost to make the work conform to the contract (*Bellgrove v Eldridge* (1954)[192] and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*).[193] This general rule is qualified: such damages will only be recoverable so long as rectification of the defect is necessary to achieve contractual conformity and is a reasonable course to adopt (recently re-characterised by the High Court as the work not being unreasonable (*Tabcorp*)).

Where either or both of these limbs do not apply, the appropriate measure is likely to be the "diminution in value" measure (generally, the difference between the value of the building as constructed and the value which it would have had if erected in accordance with the contract). Another method of assessment where rectification of the defective work is unnecessary or unreasonable is to ascribe to the value of that work, some lesser value than would apply if executed correctly: see *Galambos & Son Pty Ltd v McIntyre*.[194]

A number of factors have been noted as indicating that rectification is not reasonable in the circumstances. These have included:

- the cost of rectification being out of proportion to the benefit to be obtained (in *Ruxley Electronics and Constructions Ltd v Forsyth*,[195] for example, the English House of Lords held it unreasonable to insist upon rectification of a pool which was about eighteen inches shallower than specified yet remained suitable for diving, bearing in mind that rectification would require the rebuilding of the pool); whilst the High Court in *Tabcorp* cast doubt upon whether proportionality remains a factor to be taken into account, courts continue to look to it;[196]

191. *Robinson v Harman* (1848) 1 Exch 850.
192. *Bellgrove v Eldridge* (1954) 90 CLR 613.
193. *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.
194. *Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10.
195. *Ruxley Electronics and Constructions Ltd v Forsyth* [1996] 1 AC 344.
196. See, eg, *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61; *Building Insurers' Guarantee Corporation v The Owners – Strata Plan No 57504* [2010] NSWCA 23 and *Stone v Chappel* [2017] SASCFC 72. The point is discussed, albeit pre-*Tabcorp*, in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2006] NSWCA 361.

- where supervening events, such as increased regulatory requirements, make the work required to achieve conformance with the specifications more difficult than originally anticipated by the contract;[197]
- the property being sold to a new owner who does not require the rectification to be carried out,[198] or the sale otherwise making it difficult to carry out the work;[199] note, in this context, that some residential building legislation (for example, s 18D of the *Home Building Act 1989* (NSW)) allows successors in title to sue the original builder for breach of the statutory warranties;[200] and
- in the context of the reasonableness of a head contractor claiming damages from a sub-contractor, the principal not insisting that the work be rectified.[201]

In *Tabcorp*, the High Court noted that the test of unreasonableness is "only to be satisfied by fairly exceptional circumstances" and pointed, as an example of such circumstances, to the reference in *Bellgrove* to insistence upon a building being constructed of second-hand bricks, as specified, where it had actually been built of new bricks. The Court emphasised that the basis of contract damages is that the plaintiff is entitled to get what it paid for, and it was no answer to the plaintiff's claim that the interest they were seeking to protect was primarily aesthetic rather than commercial.[202]

If the plaintiff does not intend to use the damages received to actually rectify the work, will this be taken into account in deciding whether to award compensation on the rectification measure? The traditional position, reflected in *Bellgrove*, is that it will not be: essentially, the view is that the court is seeking to assess damages "once and for all" and has no interest in what the plaintiff does with the money received. However, more recent cases have suggested that it may be a factor to be taken into account under the "reasonableness" limb: the ambivalent stance of the plaintiff as to whether he intended to rebuild the pool was noted as a relevant factor in the English case of *Ruxley*, and the New South Wales Court of Appeal (in *Westpoint*) has

197. See, eg, *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 which was distinguished in *Gagner Pty Ltd trading as Indochine Café v Canturi Corporation Pty Ltd* [2009] NSWCA 413 where the claim was in tort for negligence and damage to property.

198. See, eg, *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 and *Cordon Investments Pty Ltd v Lesdor Properties* [2012] NSWCA 184.

199. *Director of War Services Homes v Harris* [1968] Qd R 275; *UI International Pty Ltd v Interworks Architects Pty Ltd* (2007) distinguished in case of a tort claim in *Gagner Pty Ltd trading as Indochine Café v Canturi Corporation Pty Ltd* [2009] NSWCA 413.

200. See, eg, *Building Insurers' Guarantee Corporation v the Owners Strata Plan No 57504* [2008] NSWSC 1022.

201. *Alucraft Pty Ltd (In Liq) v Grocon Ltd* [1996] 2 VR 386.

202. For an application of these principles, see, eg, *Willshee v Westcourt Ltd* [2009] WASCA 87 and *Stone v Chappel* [2017] SASCFC 72.

noted that it "may be evidentiary of unreasonableness". The Full Court of the Supreme Court of South Australia has also pointed to its potential relevance, see *Unique Building Pty Ltd ACN 008 107 837 v Brown and Anor*.[203]

Where the breach is the failure to complete the contract, the default measure of damages is the difference between the contract price and the actual cost to complete the work. Additional damages such as loss of profits or earnings may also be recovered, depending on their remoteness.

As a general rule, the cost of rectifying defective work will be assessed at the date when rectification ought reasonably to have taken place. Where the defective work is hidden and not discovered for some time and, further, is not rectified until some time after discovery, the difficulty is to determine at what time the damages should be assessed. The principal will generally be able to recover the cost of reinstatement (subject to satisfaction of the *Bellgrove* test noted above) so long as they have not unreasonably delayed taking action to rectify, see *Jones v Barton*[204] and *Director of War Service Homes v Harris*.[205]

Liquidated and unliquidated damages

[5.520] A claim for damages may either be a claim for unliquidated damages or for liquidated damages. Where the plaintiff is not in a position to claim a certain or precise sum of money in the action, and it is left to the court to decide and assess damages, these are said to be "unliquidated". The previous sections of this discussion on damages deal with the principles for assessment of such damages.

Another approach is to agree in the contract the amount of damages which are to apply in respect of a particular breach. These are referred to as "liquidated" (or "liquidated and ascertained") damages. In construction contracts these are often provided in respect of delay in completion.[206] The issues relating to liquidated damages are considered in detail in [9.640]-[9.680]. The key principle is, however, that the amount purporting to be liquidated damages must be a "genuine pre-estimate" of the loss which will result if a breach of contract occurs; if it is not, it may be ruled a "penalty" and therefore unenforceable as a matter of contract.

Quantum meruit

[5.530] *Quantum meruit* is a Latin phrase meaning "the amount which is deserved". There are two primary ways in which a claim for a quantum meruit for work performed arises in construction contracting.

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203. *Unique Building Pty Ltd ACN 008 107 837 v Brown and Anor* [2010] SASC 106.
204. *Jones v Barton* (1978) 1 AFCC LR 179.
205. *Director of War Service Homes v Harris* [1968] Qd R 275.
206. See [9.550] and following.

The first is where a contract has been discharged as a result of the acceptance by the contractor of the principal's repudiation and the builder has exercised the option to seek to recover for the work done on a *quantum meruit*, rather than suing for damages for breach of contract. Where the claim by the contractor for a *quantum meruit* arises in this way, the claim is not limited by reference to the contract, see *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[207] and *Sopov v Kane Constructions Pty Ltd (No 2)*.[208] In *Sopov*, the Victorian Court of Appeal regarded the question of whether the contractual limitation applies as an "important" one but the High Court subsequently refused to allow special leave to appeal. Therefore, as happened in *Sopov*, it is not unusual for the contractor, on a *quantum meruit*, to be entitled to the reasonable cost of the work actually performed (even if it exceeds the original contract price) plus a reasonable profit margin.

The second primary category is where a claim for restitution based on unjust enrichment arises. The relevant principles are derived from the law of equity rather than the common law and therefore look primarily to whether it is unjust for a party to retain money or a benefit rather than compensating the other party for a breach of contract, see, generally, *Roxborough v Rothmans of Pall Mall Australia Limited*.[209] The circumstances in which such a claim might arise in construction contracting include where construction work has been undertaken and provided to the principal under an unenforceable contract, see *Pavey & Matthews Pty Ltd v Paul*[210] or without any contract in fact being entered into, see, for example, *Monarch Building Systems P/L v Quinn Villages P/L*.[211]

The key issue, however, is what types of factors make it unjust in those circumstances for a person who has received the benefit of the work to retain that benefit without paying a reasonable amount for them. This is at present an unsettled area of the law in Australia. Until the High Court's decision in *Lumbers v W Cook Builders Pty Ltd (in Liq)*,[212] it was generally recognised that the decisive factor was whether the work had been "freely accepted", that is, it ought reasonably to have been realised by the recipient that there was an expectation of payment and the recipient accepted the work having had a reasonable opportunity to reject them, see *Brenner v First Artists Management Pty Ltd*;[213] *Quarante Pty Ltd v The Owners Strata Plan No 67212* [2008] NSWCA 258. However, in *Lumbers*, the High Court indicated that a request and the doing of the work may be sufficient to establish a restitutionary claim.

207. *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
208. *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510.
209. *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516.
210. *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.
211. *Monarch Building Systems P/L v Quinn Villages P/L* [2005] QSC 321.
212. *Lumbers v W Cook Builders Pty Ltd (in Liq)* (2008) 232 CLR 635.
213. *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 221.

The Court in *Lumbers* also emphasised that restitution, as a branch of the law of obligations, is subsidiary to the law of contract. Crucially, this means that a restitutionary obligation to pay for work does not arise where an enforceable contract remains on foot, see, *Update Constructions v Rozelle Child Care Centre*[214] and where a defaulting builder under the contract had no right to quantum meruit in *Cordon Investments Pty Ltd v Lesdor Properties*.[215]

There may be other circumstances where a claim in *quantum meruit* arises; for example, where an existing and enforceable contract exists but which does not set a price for the work to be performed or where it is agreed expressly or impliedly that a reasonable price shall be paid. Moreover, the law of restitution for unjust enrichment potentially has impact in other areas of construction contracting, such as money paid under a mistake.[216]

Specific performance and positive injunctions

[5.540] Specific performance is an equitable remedy and hence is discretionary. It is an order of the court addressed to the person in default, requiring that person to do that which was contracted.

This remedy will generally not be granted if, in the opinion of the court, damages would be an adequate remedy, the court cannot properly supervise the performance of the order or the contract is for personal services. Accordingly, it is unlikely that specific performance will be ordered for a construction contract *Hewett v Court*.[217] However, in *Downer Construction (NZ) Ltd v Silverfield Developments Ltd* [218]Harrison J in the New Zealand High Court upheld the validity of an order for specific performance granted by an arbitrator. It remains to be seen whether this case will open up possibilities for remedies on this side of the Tasman Sea.

In much the same way, a contractor will have some difficulty obtaining an injunction to restrain their exclusion from the site.[219] The remedy of specific performance is more applicable where the contract is for the sale or lease of land to be built upon, or a contract to repair or maintain as part of a major contract. For the order to be granted, the contract must concern something for which an award of money upon proof of a breach is not adequate compensation.

214. *Update Constructions v Rozelle Child Care Centre* (1990) 20 NSWLR 251.
215. *Cordon Investments Pty Ltd v Lesdor* Properties (2013) 29 BCL 329.
216. See [5.280].
217. *Hewett v Court* (1983) 149 CLR 639.
218. See Court of Appeal decision on application for leave to appeal, *Downer Construction (NZ) Ltd v Silverfield Developments Ltd* [2008] 2 NZLR 591.
219. See *Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93; *Robert Salzer Constructions Pty Ltd v Elmbee Pty Ltd* (Smith J, 15 ACLN 60, 29 June 1990); *Crouch Developments Pty Ltd v D and M (Australia) Pty Ltd* [2008] WASC 151; and *Sugar Australia Ltd v Conneq* [2011] NSWSC 805.

ESTOPPEL AND WAIVER

[5.550] The doctrine of promissory estoppel raises the potential for parties to become bound to promises they have made even though they have not been set out in a contract. The fundamental elements of estoppel are that party A relies upon an assumption induced by the conduct of party B and A acts upon the assumption in a way such that they will suffer detriment if B resiles from the assumption, see, for example, *Waltons Stores v Maher*.[220] It is generally the case that A's reliance must be reasonable and B's departure unconscionable.

Where the relevant elements are established, the court may use its equitable jurisdiction to grant a remedy. Whilst, initially, the remedies available were limited to the minimum necessary to prevent detriment being suffered (*Waltons*), more recent cases (see, especially, *Giumelli v Giumelli*)[221] have taken a more expansive approach which, in practical terms, means that party A has the right to have B make good upon the assumption they raised.

The doctrine of promissory estoppel has many possible applications in the context of construction contracting. For example, it may be that a superintendent who indicates to the contractor that strict compliance with the contractual notice provisions is not required will then (as the principal's agent) bind the principal not to insist upon strict compliance. This type of estoppel is related to the concept of waiver of strict adherence to contractual terms. The High Court has recently taken a narrow view of waiver in this context, indicating that it falls within existing doctrines including estoppel, see *Agricultural and Rural Finance Pty Ltd v Bruce Walter Gardiner & Anor*.[222] Some building contracts include provisions which seek to preclude waiver of any conditions without written consent.[223]

LIMITATION OF ACTIONS IN CONTRACT

[5.560] The right to bring a legal action to court does not exist for an unlimited period. The general principle is that the plaintiff must bring their action to court within a period set down in the applicable limitation statute, failing which the claim is statute-barred. There is, however, a vast array of categories into which the relevant action might fall, depending upon the relevant cause (or causes) of action, and the applicable provisions vary between jurisdictions. Therefore, it is essential that up to date commentary be consulted.[224]

220. *Waltons Stores v Maher* (1988) 164 CLR 387.

221. *Giumelli v Giumelli* (1999) 196 CLR 101.

222. *Agricultural and Rural Finance Pty Ltd v Bruce Walter Gardiner & Anor* (2008) 238 CLR 570.

223. See, eg, cl 48 of AS 2124-1992 and AS 4300-1995; and cl 43 of AS 4000-1997 and AS 4902-2000.

224. See, eg, the table provided in the Civil Procedure title of *Laws of Australia* (Thomson LegalOnline).

Where the action is for breach of contract, the limitation period depends upon the type of contract concerned. An action on a simple contract, written or oral, must be brought within six years (in the Northern Territory, three years) from the time on which the cause of action accrues. Generally speaking, the cause of action accrues when the breach of contract occurs. For deeds and "specialties" (essentially, documents under seal), the period is greater:

- the Australian Capital Territory, New South Wales, Northern Territory and Western Australia (in respect of deeds entered into after 15 November 2005) provide a 12-year limitation period in respect of deeds; and
- in respect of specialties, Queensland and Tasmania have a 12-year limitation period, South Australia and Victoria 15 years and, for specialties entered into before 15 November 2005, Western Australia has a 20-year period.

The limitation period generally commences with the occurrence of the breach of contract, not from the time that actual loss is suffered (however, where the action is via an indemnity, it generally accrues upon the loss being suffered). This is contrasted with the position in tort (in respect of which all States and Territories provide for a six-year period), where the cause of action only arises with the occurrence or the discovery of damage, so that the cause in tort or via an indemnity may arise long after the alternative claim in contract has been statute-barred.

If the injured party fails to bring an action within the limitation period, they will be statute-barred from seeking a remedy. There are, however, exceptions to this bar; whilst they depend upon the terms of the relevant statute, they generally relate to where there has been fraud on the part of the defendant or their agent, there has been concealment of the right of action, or in a case where the action is based is on a claim of mistake. In these cases, the period generally runs from the time the plaintiff discovers or reasonably ought to have discovered, the right of action, fraud, concealment or mistake. If, for example, a contractor with knowledge of the breach constructed a house with totally inadequate footings, the limitation period would probably only run from the time the principal discovered the inadequate footings.

Quite apart from the general limitation periods noted above, certain States and Territories impose a 10-year limitation upon claims relating to building work.[225] Again, these provisions vary considerably between the jurisdictions, especially as to the types of actions to which it applies, the event which starts time running and whether or not they provide a "long stop" period (meaning that, even if, for example, a contract is entered into as a deed, an action

225 *Building Act 2004* (ACT) s 142; *Environmental Planning and Assessment Act 1979* (NSW) s 109ZK; *Building Act 1993* (NT) s 160; *Development Act 1993* (SA) s 73 which is in the process of being repealed by *Planning, Development and Infrastructure Act 2016* (SA) s 159; *Building Act 2016* (Tas) s 327; *Building Act 1993* (Vic) s 134 and see *Brirek Industries Pty Ltd v McKenzie Group Consultants (Vic) Pty Ltd* [2014] VSCA 165.

cannot be brought more than 10 years after the work is completed) or simply supplement (or replace) existing limitations periods.

In the case of the Victorian provision, for example, it applies to "building actions" (damages for loss or damage arising out of or concerning defective building work) and is triggered by the issue of the occupancy permit (or, in default of such issue, the issue of a final inspection certificate). Resolving many years of uncertainty, the Victorian Court of Appeal in the case of *Brirek Industries Pty Ltd v McKenzie Group Consultants (Vic) Pty Ltd*[226] held that the 10-year period is a replacement limitation period, and not a "long stop" period, meaning that building actions in that State have a 10-year limitation period. As a contrast the cause of action by an insurer under a home warranty insurance policy to recover from the builder the amounts paid under the policy in reliance upon indemnities under the policy could not be characterised as a "building action" and was not subject to the "long-stop" limitation. The cause of action was not based upon the performance of defective work but upon the failure to indemnify when required, see *Dinov v Allianz Australia Insurance Ltd*.[227]

See also [3.190] as to limitations under the ACL and [6.330] as to limitations relating to torts.