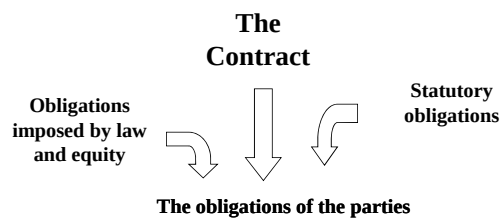


Law for Spatial Designers
Introduction to the Law of
Contract
Module 3 Topic 1

Sources of contractual obligations



New Zealand Law:

A contract is an agreement between two or more persons to which the courts will give legal effect.

The structure of the subject

The essential elements for a valid contract -

Factors that may vitiate an otherwise valid contract.

Failure of performance and remedies

The essential elements for making a valid contract

Intention to create legal relations

Offer and acceptance

Consideration

The intention to be legally bound

The parties must have intended their agreement to be legally binding

Because the courts cannot read people's minds at the time the agreement was made – the courts used to rely on presumptions based on the particular circumstances including the relationship between the parties

The agreement must settle or at least provide the mechanism or reference point for settling the material terms of the contract.

Scammel v. Ouston [1941] 1 All ER 14

But it is sufficient if the agreement provides for a means of settling the terms

Foley v. Classique Coaches Ltd [1934] 2 KB 1

Where the parties have expressly reserved a material term for future negotiation the contract must be seen a void for uncertainty until such time as agreement upon the material term reserved is in fact reached by the parties.

Willets v. Ryan [1968] NZLR 863

Offer & Acceptance

A simple contract is formed by an acceptance by one party of an offer made by the other party.

One party – the **offeror** makes an **offer** to the other party, the **offeree** or more unusually to the world at large.

The **offeree**, if he or she so chooses, **accepts** the offer.

At this point the contract is made

The Offer

An offer is a statement by one party of the terms on which they are prepared to do business, made with the **intention** that if it is **accepted** there will be a binding **contract**.

The invitation to treat

This is an invitation to other people to make offers.

There is **no obligation to accept any offer**.

No contract exists until an offer so obtained has been accepted.

Examples of invitations to treat

Goods displayed in a shop window

Potential customers are being invited to enter the shop and offer to buy the goods displayed at the prices marked, if any.

No contract until the customer's offer to buy has been accepted in some overt way – goods wiped across the bar code reader.

Fisher v. Bell [1960] 3 All ER 731

Advertisements in newspapers or elsewhere

These are generally invitations to treat, since, in the many instances of sale of goods, there is a limited supply and the advertiser must be able to refuse offers to buy once the supply is exhausted.

Partridge v. Crittenden [1968] 2 All ER 421

But a suitably or unsuitably worded advertisement may constitute an offer.

Carlill v. Carbolic Smokeball Co [1893] 1 QB 256

The Acceptance

The law requires some outward sign of the offeree's acceptance of the offer.

Acceptance may be:

- express,
either in writing or oral, or,
- by conduct

Communication of acceptance.

Where the offeror prescribes the method of acceptance

If the offeror prescribes the mode of acceptance then the offeree will assume the risk of the acceptance going astray if they use another method

Eliason v Henshaw (1819) 4 Wheaton 225

Acceptance must be communicated to the offeror

The general rule is that acceptance must be communicated to the offeror to form a valid contract.

Electronic and other instantaneous means of communication

The Electronic Transactions Act 2002

- 11. Time of receipt**—An electronic communication is taken to be received,—
- (a) in the case of an addressee who has designated an information system for the purpose of receiving electronic communications, at the time the electronic communication enters that information system; or
I.e. If the offeror designates that acceptance should be by fax or email as the case may be then acceptance is complete when it arrives in the offeror's system. E.g. if the message is delivered but cannot print because the fax is out of paper. It will have been received.
Although not clear if the offer is sent by, say, email this would show that the offeror was expecting the acceptance by email and would be taken to have designated email as the system.
 - (b) in any other case, at the time the electronic communication comes to the attention of the addressee.
E.g. if the offer is sent by letter and the offeree chooses to email the acceptance it would not be received until offeror has at least seen that it is in her/his mailbox.

Larsen v. Rick Dees Ltd [2006] 2 NZLR 765
Marsden Villas Ltd v. Wooding Construction Ltd [2007] NZSC 39

Consideration

At common law, unlike some other legal systems,

a promisor is not bound to perform a promise unless it was either made in the form of a deed or the promisor received some consideration in return.

A nudum pactum, i.e. "a bare promise" is not enforceable at law.
Wadsworth Norton v. Edmonds [1992] 1 NZLR 596

A simple definition Per Pollock

Consideration: the act or forbearance of one party, or the promise thereof is the price for which the promise is bought. The promise thus given for value is enforceable.

The Categories of Consideration

1. Executory consideration
2. Executed consideration
3. Past Consideration

Factors which may vitiate an otherwise valid contract

1. Formal requirements
2. Capacity
4. Legality of object
3. Genuine consent

Genuine consent

Apparent consent may be invalidated by:

- Duress
- Undue influence
- Unconscionable bargain
- Mistake
- Misrepresentation

Never sign a document you have not read

Mechenex Pacific Services Ltd v TCA (Air Conditioning) NZ Ltd [1991] 2 NZLR 393 CA

Or do not understand

Engineering Plastics Ltd v J. Mercer & Sons Ltd [1985] 2 NZLR 72

Performance & non performance of contractual obligations

The rights or obligations of the parties may be discharged or terminated in one of the following ways:

- by performance of the obligations;
- by agreement of the parties;
- by frustration;
- by operation of the law;
- by cancellation or rescission for breach by the other party.

Interpretation

The interpretation of written contracts: where the contract is in writing, the interpretation of the written word is a question of law. It is a rule, subject to many exceptions, that where a contract is in writing extrinsic evidence may not be brought to contradict or vary the written terms.

This principle is known as the Parol Evidence Rule:

However it is sound practice to document every alteration or variation to the terms of the contract which in the case contracts for design services includes the design brief.

Performance of contractual obligations other than payment

Tender or offer of performance

If one party is ready, willing and able to perform their obligations but is prevented by the wrongful act of the other party, their obligation to perform is discharged.

What suffices for performance?

The doctrine of incomplete performance

Until a party has completely performed their obligations under the contract they are not entitled to payment.

Bolton v. Mahadeva [1972] 2 All ER 322

The doctrine of substantial performance

If a party has **substantially** performed their obligations they are entitled to payment subject to an allowance for the **minor** defects or failures in performance.

Hoenig v. Isaacs [1952] 2 All ER 176.

Remedies for non performance of contractual obligations

Introduction

- What do parties want when a contract goes wrong?
- To get out of the contract altogether
- To get out of the contract and claim damages
- To go on with the contract but claim damages for the failure of the other party to perform
- To compel the other party to perform their contractual obligations.

The are a number of different regimes or sets of rules for different types of contract or different types of parties

Contracts subject to s7 *Contractual Remedies Act 1979*

Contracts that are not for the sale of goods or are not contracts that are subject to the *Consumer Guarantees Act 1993*. eg. Contracts for the sale of land.

Contracts for the sale of goods that are not consumer contracts

Consumer contracts

Contracts for the supply of goods or services which are of a kind ordinarily acquired for personal, domestic, or household use or consumption; which not acquired for the purpose of: re-supplying them in trade; or consuming them in the course of a process of production or manufacture; or in the case of goods, repairing or treating in trade other goods or fixtures on land.

Contracts to which the *Fair Trading Act 1986* applies

ie: where the party whose failure of performance relates to representations or conduct and is 'in trade'.

The right to cancel under s7 *Contractual Remedies Act 1979*

Section 7(1) provides that the provisions of the section replace those that existed at common law or in equity relating the avoidance of a contract in the case of breach or misrepresentation.

(This does not apply to contracts for the sale of goods or to contracts to which the *Consumer Guarantees Act 1993* applies)

Therefore in the case of contracts for the sale or other disposition of land and for the provision of services that are not supplied to a consumer by a person in trade the party not at fault may cancel:

1. If the other party repudiates the contract

Section 7(2): Where the other party makes it clear by words or conduct that they will not perform their obligations under the contract, then the other party is entitled to cancel the contract.

The innocent party may either cancel the contract immediately the notice of repudiation is received and bring an action for damages or relief as the case may be, or may wait until the time for performance and then bring an action for breach of contract.

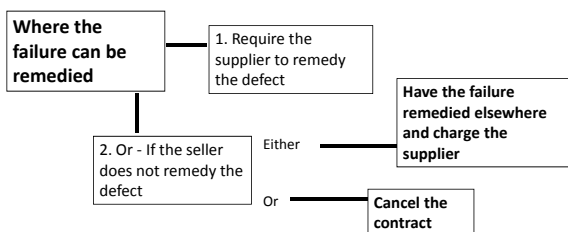
In order that the innocent party may cancel the contract, they must show : —

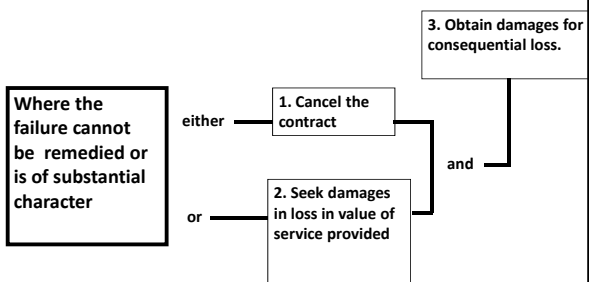
- a) The parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the [term] is essential to him; or
- b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—
 - i. Substantially to reduce the benefit of the contract to the cancelling party; or
 - ii. Substantially to increase the burden of the cancelling party under the contract; or
 - iii. In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

Herrick v. Bourgeois-Baker [2005] NZHC 454

The guarantees with respect to the supply of services:

- Reasonable care and skill
- Fitness for a particular purpose
- Time of completion
- Price

The options for consumers where services do not comply with the guarantees

The options for consumers where services do not comply with the guarantees

What is a failure of substantial characters in the case of services?**A failure is of a substantial character if:**

- the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- the product of the service is substantially unfit for a purpose for which these services are commonly supplied and cannot easily and within a reasonable time be made fit for the purpose;
- the product of the service is unfit for a particular purpose, or cannot be expected to achieve any particular result, made known to the supplier and cannot easily and within a reasonable time be made fit for the particular purpose or capable of achieving the particular result;
- or the product of the service is unsafe.

Monetary compensation for the Breach of Contract

The innocent party's ability to achieve the desired solution depends on the particular legal regime which governs the contract.

➤ **Legislation (for breaches of contract)**

- *Contractual Remedies Act 1970*
 - The power of the Court to grant relief under s9
 - The right of the party not at fault to damages: s10
 - The right to damages for misrepresentation under s6
- *Fair Trading Act 1986* s43
- *Minors Contracts Act 1969* s7
- *Illegal Contracts Act 1970* s7
- *Contractual Mistakes Act 1977* s7
- *Sale of Goods Act 1908* ss51, 52, 54
- *Consumer Guarantees Act 1993* ss18(3)(b), 18(4), 19, 27, 32

The power of the Court to grant relief under s9 *Contractual Remedies Act 1979*

s9 Where a contract has been cancelled, on the application of any party, the Court may if it is just and practicable to do so, make orders to:-

- a) Settle property under the contract either by vesting it in a party or by ordering its transfer to him
- b) The Court may order the payment of such sum as the Court thinks fit. (Subject to s6, i.e. in the case of misrepresentation the Court must give effect to s6.)
- c) Direct any party to do or refrain from doing any act in relation to any other party as the Court thinks fit.

Courts view s9 as providing a complete regime for awarding compensation in the event of breach of contract giving rise to cancellation

The court's powers under the *Fair Trading Act 1986*

Section 43 gives the Courts wide powers to adjust the position between the parties where the provisions of the *Fair Trading Act* have been infringed

These powers **confer no right of action** on the party who has been injured as result of the breaches of the Act

The Court may take into account contributory conduct by the plaintiff.

Before compensation can be awarded there must be shown a clear connection between the conduct of which complaint is made and the loss suffered

Compensation under s43 cannot include loss of profits

Harvey Corporation Ltd v Barker [2002] 2 NZLR 213

Monetary compensation for the Breach of Contract (2) – assessing the amount of damages

The calculation of damages

Two questions have to be asked:

1. For what losses is the defendant liable to compensate the plaintiff? (Remoteness)
2. Having established the losses for which the defendant is liable – how are the damages for those losses to be measured? (*Quantum*)

**1. For what losses is the defendant liable to compensate the plaintiff?
(Remoteness)**

The “Rule in *Hadley v Baxendale*.”

The rule in *Hadley v Baxendale* (1854) 9 Exch 341 comprises two limbs or elements

The first limb

The defendant is liable for the normal losses that anybody would see as being a natural and likely consequence of the breach.

The second limb

Where the defendant has been made aware, when the contract was made, of circumstances that would give rise to additional losses in the event of breach then D will be liable for any such additional losses.

**How are the damages for those losses to be measured?
(*Quantum*)**

The successful plaintiff is entitled to be put in the position that they would have been in had the defendant not failed to perform the obligations.

The date of the breach is the generally date at which damages are to be calculated.

The plaintiff is under a duty to mitigate his/her loss

Where a breach of contract has occurred the innocent party must take all reasonable steps to reduce the loss suffered.

Pacific Overseas Corp Ltd v. Watkins Browne & Co [1954] NZLR 459

Contract and the business Plan

The obvious things to look for in any contract include

- The project brief - what is required
- The exact nature of the services to be provided –
 - Is the designer required to oversee or otherwise be involved in installation/implementation ,process? Or
 - Is the designer merely providing the designs and specifications
 - If overseeing the project – who is responsible for obtaining the necessary permits or consents?
- The price/fee
- How much?
- When?
- Are there any contingencies?
- Owner ship of the design (usually with the client but there may be room for negotiation)
- Is the designer required to give any specific guarantees relating to the product or its performance?
