Agreement –

Two things are necessary: promise and consideration

**Promise**

Offer – an expression of willingness to contract on the terms stated

Invitation to treat – an invitation to make an offer

Provision of information

A declaration of intention

**Offer**

**A willingness to be bound on particular terms without futher negotiation (carter et al)**

Self-Serve basis – sale is complete when the person takes the goods (offer to buy) to the counter and the pharmacist accepts the sale (acceptance) – *Pharmaceutical Society of Great Britain v Boots Cash chemists (Southern) Ltd*

A mere statement as to the price at which land, goods or services may be sold or provided is not an offer

Consideration must be given (*Australian woollen mills v Cth)*

Onus of proof on intention to create legal relations is on the party trying to disprove (*Australian woollen mills v Cth)*

An offer is available for acceptance until the time (if any) specified for their currency, unless previously withdrawn by the offeror and provided that the offeree has not already rejected the offer

Death (offeror or offeree) may terminate an offer

An offer is terminated by rejection or a counter-offer. (there are exceptions) (Hyde v Wench)

An offeree does not reject an offer or make a counter offer, merely by requesting further information about the offer. *Stephenson Jaques v McLean*

The word offer, does not necessarily mean an offer in contractural terms. Depends also on intent *Seppelt v Commissioner*

The offerer must be unequivocal – the offer and the acceptance must correspond.

**Option**

Once an option is agreed, the offerer cannot withdraw the offer except in accordance with the option itself.

Isaacs J has stated that the only feature that distinguishes an option for a mere offer is the consideration. In his view, it's still an offer. The consideration merely ensures its continuance, by creating a relation in which the law forbids the offeror retracting it.

Death (offeror or offeree) does not necessarily mean the option has ended. The person responsible is the executor of the

**Revocation**

Revocation – an offer may be revoked at any time by the offeror prior to acceptance – even if a time frame has been given, and that time frame has not expired. *Goldsborough v Quinn, Dickinson v Dodd*

Revocation only takes affect on receipt *Byrne v Van Tienhoven*

**Acceptance**

**Acceptance must be unequivocal, unconditional and in terms identical to the offer.**

For an acceptance:

1. The offerer may stipulate what is necessary for an offer to be accepted'
2. Offer and acceptance must exactly correspond
3. Acceptance need not be express: it may be inferred from a party’s conduct
4. Only the entity to 'whom the offer is made may accept it

An offeror can not deem an offer to be accepted by mere silence. *Felthouse v Bindley*

Acceptance was done by doing of the act - *Carlill v Carbolic Smoke Ball Co.*

Is a contract formed by the exchange of a promise for an act or an offer is an expression of willingness to contract on the terms stated in the offer – *Carlill v Carbolic Smoke Ball Co.*

When reviewing offers, counter offers and acceptance, they can be viewed in entirety. *Butler Machine Tool v Ex-Cell O Corp*

Postal Acceptance – Acceptance is concluded when the acceptance is sent. The address of the offerer has to be correct and acceptance can be received by post. *Bressan v Squires.* Places the risk on the offerer.

Postal Rejection – are effective when they are received.

Knowledge of Offer is required for acceptance – *R v Clarke*

Acceptance is not effective unless and until communicated to the offeror.

An offeror is entitled to specify the manner of acceptance – *Carlil v Carbolic Smoke Bomb*

Telephone and instantaneous communication acceptance – acceptance is complete only when heard by the offeror.

Acceptance must be in reliance to the offer.

Agreements to Negotiate are not, generally, considered binding - *Coal Cliff Collieries v Sijehama*

Subject to finance clauses are for the protection of the purchaser – and are valid - *Meehan v Jones*

Subject to approval by solicitors are not binding clauses - *Masters v Cameron*

Subject to contract may have one of three *effects Masters v Camersons*

1. Concluded contract and the purpose of the document is simply formal – the contract is not conditional
2. Although here is a concluded contract, it is conditional because there is an obligation to perform once the document is signed.
3. The clause may postpone the formation of the contract. Neither party is bound to proceed with the transaction since formation of the contract is conditional on execution of the document

**Consideration**

Consideration is an act of forbearance or promise therefore, which is the price for the promise *Dunlop Pneumatic v Selfridge & Co*

Consideration needs to be given for a contract to be completed – *Australian Woollen Mills Pty Ltd v Cth*

"that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement of announcement"

Contracts in the form of deeds do not require consideration

Consideration must be related to the promise – *Australian Woollen Mills v Cth*

Promises for which consideration has been given are contracts – but they have to be related – see above.

Consideration must move from the promisee (but not necessarily to the promisor) – *Coulls v Bagots*

Consideration must be sufficient – but need not be adequate – *Chappell v Nestle*

Past consideration is no consideration

Executed consideration is enforceable – *Re Casey Patents: Stewart v Casey*

Illusory – whether the law can countenance as consideration a promise which is illusory in the sense of being impossible to enforce – *Dunton v Dunton*

Condition is illusory if what B is going to do what B promises is entirely at B's discretion (*Placer Developments v Commonwealth*)

Illusory – 2nd concept, the promise sought to be enforced is entirely discretionary – *Placer developments v The commonwealth*

Consideration only exists if duty is exceeded (contract voided if illegal) *Glasbrook Bros v Glamorgan, Popiw v Popiw*

Right to interest cannot be given up if it is not supported by consideration *Foakes v Beer*

Part payment does not mean that person does not have to pay full amount (*Foakes v Beer*)

Nominal Consideration can be:

 Bringing forward the date for the payment

 Changing the place of payment to suit the creditor

 The addition of something in kind to the money

Extra consideration can be given if both parties benefit and it's not done under economic duress or fraud – *Williams v Roffey*

Existing duty can also be exceeded (*Ward v Byham*)

It is the agreement to compromise the dispute which is the source of the fresh consideration, rather than what the parties have agreed to do under the compromise. For that reason, even if one party has, in performing the compromise agreement, in fact done exactly what it was contractually bound to do there is still consideration – contract of compromise. *Wigan v Edwards*

Practical Benefit – if Williams provided a practical benefit it could be good consideration for the extra money (*Williams v Roffey*)

Part payment of a debt can not be discharge of the debt (*Foakes v Beer)*

Public duty has two cases that are quite different *Ward v Byham* (taking care of child) and *Glasbrook Bros v Glamorgan County Council*

**Concluded Agreements**

It can be a binding agreement, if it's a settlement or compromise

Depends on establishment of agreement, intention to create legal relations and consideration.

A concluded agreement will not be effective if what the parties agreed upon cannot be determined objectively with a reasonable degree of certainty.

Last one who fired the shot for T & Cs is the one in the contract – *Butler v Ex-cell*

Auction – acceptance occurs when the hammer is knocked down

A contract may be found in the conduct of the parties

A contract can be severed if clauses are unenforceable. Importance of clause has to be determined first - *Whitlock v Brew*

**Estoppel**

Two areas: 1) where there's a contract and something not working and 2) where there's no contract (*Hightree Case*)

Estoppel relies on (*Walton Stores v Maher* & *Legione v Hateley*)

1. a promise – which must generally be both clear and unequivocal (*Legione v Hateley*)
2. Reasonable and detrimental reliance by the person claiming the estoppel
3. Unconscionable conduct – circumstances which make it unequitable, unconscionable or unconscientious for the person who made the promise to retract it

Estoppel can occur with and without contract

Estoppel was used as a sword in *Waltons v Maher*

**Intention to Create Legal Relations**

If there's consideration, there's intention

Usually, family agreements are not considered to be contracts. There are exceptions - *Jones v Padavatton*

Party that wants to enforce the contract has to prove the intention

Usually, in commercial situations – the contracts are intended to be binding

An express term of the agreement to the contrary must usually be present before the conclusion can be reached that there is no intention to create legal relations (*Rose & Frank v JR Crompton*)

An intention that the agreement is not to create legal relations may sometimes be inferred (*Esso v Commissioner*)

The HC is sceptical of the ability to formulate acceptable rules to prescribe the kinds of cases un which absence of intention to create legal relations should be found (*Ermogenous v Greek Orthodox Community*)



Letters of Comforts are letters given by a third party to the promisee to help in the decision of contracting

Bulk of cases say that letters of comforts are not binding. However, in *Banque Brussels v Australian National Industries* it was found to be binding

**Collateral Contracts**

Can use the same consideration as long as the consideration moves from the promisor



**Contracts requiring written evidence**

Contracts require written evidence if legislature requires it.

In NSW, only contract for the sale of transfer if interests in land have to be in writing. A note or memorandum is sufficient notice to be considered 'writing', document must be signed, but this is a loose interpretation. A number of documents can together constitute a note/memo, but there must be some internal reference between them. The note must contain all the material terms of the contract and the failure to include a material term in the oral contract will mean the note is insufficient.

If one document has a reference to another document with the transaction information on it, both documents can be used. *Harvey v Edwards.*

What actually has to be in the document is spelled out in *Pirie v Saunders*

A contract not complying with the conveyancing act is not void, but unenforceable

Has to 1) describe with precision the subject of the contract and 2) clearly identify the parties.

**Restitution or Unjust Enrichment**

Elements *Pavey v Mathews*:

1. Benefit received by the defendant (has to be a legal benefit, courts will often see what the benefit would be if there was a contract)
2. At expense of the plaintiff
3. Unjust factor""

What does it matter if contract is unenforceable v void:

* + If the contract is unenforceable – the money goes back
	+ If the contract is void no contract

**Capacity**

Parties must have legal capacity

Minors have limited capacity, only to buy necessities

Mentally ill people may have limited capacity

Corporations have legal capacity

**Representations**

Pre-contractual statements can be puffs, representations or terms. Representations are statements of fact which indue the representee to enter into a contract, but which are not guaranteed by the maker of the statement

1. If a statement is a puff, it has no legal effect
2. If a statement is a representation, the receiving party has certain rights, depending on if it was fraudulent, innocent or negligent misrepresentation
3. If a statement becomes a contractual term, the remedy depends on what kind of term it is

**Express Terms**

Express terms are the terms that are written

Express terms are objective – a reasonable person in the position hearing the statement will understand it

Representations are like terms, but are not guaranteed. They are statement of facts made to induce a contract

Courts will consider the statement an express term if:

1. Timing of the statement – just before signing – more likely to be true and have influenced the signing (*Dick Bentley v Harold Smith*)
2. Content
3. Oral Statement
4. Expertise – if the person making the statement is an expert, then it's more likely to be an express term (*Oscar Chess v Williams and Dick Bentley v Harold Smith)*

"If an intelligent bystander would reasonably infer that a term was intended, that will suffice" Denning LJ in *Oscar Chess v Williams and Dick*

Term v Representation – what is required is a statement of fact to be present and the intention to guarantee its truth.

Lord Denning's thoughts are that there has to be intention and it has to be acted upon for it to be a warranty

Defendant said that in **my opinion**, the cabin cruiser could do 15 MPH, though it could not. Court found it was not a term as he stated i**n my opinion** This case also states that there can be collateral contracts. *JJ Savage*

**Collateral Contracts**

Collateral contract is a contract where the same consideration is used as the consideration for the main contract

It must be proved that the statement was held out as a promise to guarantee or assurance the consideration for which is entry in the main contract

Even in cases about land, the collateral part does not have to be in writing (*Sheppard v Ryde Corp)*

The collateral term has to be consistent with the main contract (*Hoyts v Spencer)*

**Contract**

Sign a document and you're bound – regardless of you haven't read them (*Léstrange v Garucob*)

Reasons why one may not be bound

1. Contract is unfair
2. If there's fraud
3. Misrepresentation
4. Non est factum

A & B have an alleged contract. B disputes that a term is not part of the contract. Would a reasonable person in B's position understand that A was only contracting on the bases that the term was part of the contract?

**Ticket Cases:**

The person proffering the ticket was making an offer based on the T&Cs on the ticket. The person accepting it was accepting it and the T&Cs when they took the ticket (*Thornton v ShoeLane*)

1. Did the party taking the ticket know that there was writing on it?
	1. If no – they are not bound
	2. If yes – go to 2 & 3
2. Did the party know that the writing referred to terms?
	1. If yes – they are bound
	2. If no – go to 3
3. Did the person issuing the ticket do what was reasonable to bring to the attention of the taker that there were T & Cs?
	1. If yes – person taking the ticket is bound
	2. If no – not bound

The words of a contract will not e incorporated as terms of the contract if there is misrepresentation (*Curtis v Chemical Cleaning*)

Sometimes receipts handed over – are actually notice boards (*Causer v Browne*)

In order for ticket cases to apply, the document relied on must be one which a reasonable person would regard as contractual in nature.

**Notice Board Cases**

Someone writes some T&Cs on a sign or poster. Different principles developed

1. Did the person who wants to rely on those terms do what was reasonable to bring them to the attention of the other party? (*Thornton v Shoe Lane*)

Where the terms are unusual the ticket giver has to highlight them in some way (red hand pointing) *Thornton v Shoe Lane*

**Incorporation by course of dealing**

Two requirements (Henry Kendall v William Lillico):

1. A consistent and sufficiently long course of dealing
2. Evidence of assent to the terms, usually in the failure to object to the term at issue

Whether there is a consistent and sufficiently long course of dealing is a question of fact

A sold note can be part of the contract if they contain T&Cs and have been exchanged over the course of the contract (*Hardwick v Suffolk*)

Would a reasonable person in Sappa's position understand that G was contracting on those terms? Would a reasonable person in G's position understand that SAPPA by not protesting had accepted those terms over the course of dealing?

If the parties don't understand that a contract is being done, then it's not being done by Incorporation by course of dealing (*DJ Hill*)

**Implied Terms**

Implied terms fill in the gaps – but courts don't like to fill in gaps

At common law, in order to express a generally accepted incident of the contract

A term may be implied by statute if the requirements for implication set out in the statute are satisfied

Formal Contract – written contract that appears to be complete at its face

Informal – oral or a contract that's written, but not complete

Characteristics for formal contract:

1. Term is reasonable & equitable
2. Term is necessary for business efficacy (*Moorcock*)
3. Term must be obvious (*Codelfa v State Rail)*
4. Term must be able to be precisely expressed (*Codelfa v State Rail)*
5. It can't contradict express terms

Characteristics for informal contract – much lower

A term can be implied if you can prove that it's reasonable or necessary for the contract (*Byrne v Australian airlines*)

In terms implied by law – for a class, you only have to prove to something that already exists (sale of goods, employment contracts), then it's up to the other party to disprove If you can't prove to a class, then you have to show that it's necessary for contracts of that kind

Gummow JJ brings up in necessity in that if a term is so unusual and different from their current contract, and that they had to behave in a certain manner to obtain the benefit, and the employee would not know about the term unless they were made aware of it - the employer has an obligation to bring it to the attention of the employee (Scally)

Plaintiff has to prove that there's a breach of the implied terms (*Liverpool City Council v Iriwin*)

Good Faith – in the last 15-20 years courts have been willing to imply terms that the parties must act in good faith in relationships to exercise rights of performing obligations under the contract. This has been applied in commercial cases, mostly where one party goes to terminate.

**Construction of Contract**

It will be about interpreting the contract. We don't care what the parties meant to say – we care what the parties said.

1. When the parties have dealt with the matter, the court tries to give meaning
2. When the parties have not dealt with issue, but its arisen – the courts will try to infer what the parties would have intended
3. When the court does 1 or 2 it tries to take a business or commercial point of view
4. What material can the court look at?

Courts treat the interpretation of spoken words as raising an issue of fact, but treat the interpretation of written words as raising an issue of law

The words are construed according to their ordinary or natural meanings

Commercial construction

1. Universal approach – the general rule is that the same construction rules apply no matter what the form of nature of the contract
2. Construe contract as a whole – in order to determine the meaning or legal effect of a particular term, the whole contract must be construed

**Parole Evidence Rule**

This is about what the contract is and what it means

If A + B put their agreement in writing, then we assume that's the whole agreement. However, the court also figures out if the contract is capturing the whole agreement.

Proper approach is to determine what the contract is and then, when all the agreed terms are known, to ignore evidence relating to other terms.

Whatever boundary is drawn, the court accepts no other evidence

Negative rule – the parol evidence rule determines what evidence is extrinsic evidence and prohibits the admission of such evidence for the purpose of construing a contract

Extrinsic (excluded) evidence maybe include:

1. Direct evidence of the parties actual intention
2. Evidence of the parties negotiations (*Prenn v Simmonds*)
3. Evidence of the parties conduct after the contract was concluded (*L Schuler v Wickman Machine Tool Sales*). This was also re-affirmed in Codelfa

Application of Parol Evidence Rule is a rejection of *LG Thorne v Thomas Borthwick*

Integration can be wholly integrated, or partially integrated

**Factual Matrix**

A contract should be construed with regard to the context in which the agreement was reached. This includes:

1. Internal context – the case in which the words in issue appear, as well as the contract as a whole
2. External context – the factual context of the contract
3. Legal context – the prior cases relevant to the issue

There are two views as to when the factual matrix can be applied:

1. In all cases it is permissible for a court to take the factual matrix into account prior to construing the contract
2. Mason J in *Codelfa* said that the word or expression must be susceptible of more than one meaning – ie there has to be ambiguity. HC approved this in *Royal Botanic Gardens and Domain Trust v Sourth Sydney City Council*
3. Mason J – you're allowed to think about the object, where did the parties meet, why are they talking to each other, what's the prevailing market condition – there's difference of opinion – according to Mason J's judgement – when it's ambigious

**Promises and Contingencies**

Contingency is there if something is dependent on something else happening (that is not an option). A has lost dog and offers $100 to B if they find the dog. This is a contingency.

Option is the example of the developer and options to buy the apts in the apartment block.

**Exclusion Clauses**

Generally means that the party admits it's liable – but there is this clause as a defence. Historically, there have been really big exclusion clauses. Statutes have been introduced to limit the exclusion clause

Nowadays, the courts tend to assume there is statute to protect the consumer, therefore except in major commercial contracts, the main permitted use of exclusion clauses today is in relation to the breach of express contractual terms

Main principles (*Darlington Futures v Delco Australia*):

1. Exclusion clauses are to be interpreted in sensible, ordinary meaning, in light of the surroundings
2. When there is ambiguity – read it contra-proferentum – read it against the person who is trying to protect themselves – courts lean towards making people liable
3. Guidelines & rules of thumb
	1. The four corners rule: When a clause is very broad, you tend to interpret it in a way that is inside the contract – the exclusion clause doesn't apply outside the contract (*City of Sydney v West*)
	2. Deviation rule – old principle – comes from shipping cases and carrying goods for someone else. Exclusion clause works when you're following the agreed route, but not if you deviate from it. (*Thomas National Transport v May & Baker*)



Canada SS Rules (from above):

1. if a clause expressly excludes liability for negligence (or an appropriate synonym ) then effect is given to that. If not,
2. ask whether the words are wide enough to exclude negligence and if there is doubt that is resolved against the one relying on the clause. If that is satisfied then
3. ask whether the clause could cover some alternative liability other than for negligence, and if it can it covers that.

HC has said that if a contract states "The following terms will cause termination, that's fine – but HC still determines substantial damages (*Shevill v Building Board* )

Herron J stated, dissenting, in *Thorne* – Before applying the parol evidence rule it must be determined whether the parties have agreed that the document embodies the bargain

Main Principles for Parol Evidence Rule:

1. First – meaning of the words is the meaning a reasonable person in the position of the party to whom the words are addressed would place on them
2. Second – In a commercial situation, a court will stive to achieve a commercially sensible concultion
3. Third – extrinsic evidence is not generally admissalbe in the interpretation
4. Evidence of the factual matrix is not regulated by the parol evidence rule

**Privity**

Only a party that is part of the contract can sue.

Exception – was made to apply to liability insurance (*Trident Insurance v McNiece*)



Each of the ways to do this doesn't break the privity rule:

1. Argue that C is a party, C sues
2. B sues A for breach
3. Specific performance
4. trust – trustee B sues on C's behalf

Contracts that attempt to burden a third party –

Himalaya Clause – the carried excludes liability, this also extends to stevedores –



The Eurymedon – an exclusion clause that worked. Need to show four things:

1. Text of the clause covers the stevedores
2. Carrier enters the clause as the stevedores agent
3. Carrier has authority to act as the stevedores agent
4. Stevedores provide consideration to the consignor

**Performance**

The order of performance depends on the intention of the parties and is therefore a question of construction

If not stated in contract, assumption is that it's concurrent

Concurrent obligations – when the performance of the obligations is at the same time – presumption is that the parties are ready, willing and able to perform

Where a party cannot perform without the co-operation of the other, a tender is sufficient to make the other party liable. The offer to perform is treated as equivalent to performance to the extent that the party refusing to co-operate will be liable in damages (*McKay v Dick*)

**Severable Contract**

Payment obligations are apportioned in accordance with performance.

Often a seller is entitled to receive payment in respect of goods delivered, even though the contract has not been completed.

**Discharge by Performance**

Where there is a lump sum payment, there has to be complete performance by the other side to be paid (*Cutter v Powell*) and (*Sumpter v Hedges*)

Substantial Performance can sometimes be used to recover full or part of the price of the part (*Hoenig v Isaacs*) and (Bolton v Mahadeca)

**Breach**

Any failure to discharge a contractual obligation is potentially a breach

For a breach to occur, two preconditions must be met:

1. The breach must be serious, go to the root of the contract
2. The innocent party must elect to discharge the breach

Negligence and intention are irrelevant (unless accounted for in contract)

Types of terms: conditions, intermediate, warranties

Terms are classified by the construction of the agreement.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Nominal | Sustantial | Terminate |
| Conditions – express or implied term | Yes | Depends on Loss | Yes |
| Intermediate | Yes | Depends on Loss | Depends |
| Warranties | Yes | Depends on Loss | No |
| Repudiation | Yes | Depends on Loss | Yes |

Condition – A term will be construed as a condition where it can reasonably be inferred from the contract that the promisee would not have entered into the contract but for an implied assurance of strict compliance with the term.

Intermediate – terms that can be breached in a number of ways and sometimes it can be serious and sometimes not. Comes from *Hong Kong Fir Shipping*

Intermediate Term – the right to terminate the contract will depend upon the nature and extent of the breach of the intermediate term. If the breach is serious or continuing, the innocent party has the right to end the contract. If the breach is minor, or is capable of simple rectification, then the innocent party retains the right to claim damages but must continue with the performance of the contract.

Tripariate system of conditions comes from *Ankar v National Westminster Finance*

A court will not construe a term as a condition if that would produce an unreasonable result unless that result was clearly intended by the party (*Ankar v National Westminster*)

A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. Lord Roskill (*Bunge v Tradax*)

Always get damages if there's a breach other damages depends.

Onus is on plaintiff to prove the loss. (*Luna Park v Tramway Advertising*)

Can't sue for warranties.

Usually termination is separated from breach.

Only way to terminate a time clause is to be late (*Bunge v Tradax*)

The question to consider is whether a court will allow a party to rely on an exclusion clause that excludes or limits liability for a fundamental breach. The answer to this question is found in a rule of construction and not in a rule of law

**Breach for Defective Performance**

Usually it's a question of construction as to wether strict performance is required or reasonable care.

Has to be fit for purpose (*Greaves & Co v Baynham Meikle*)

**Breach for Late Performance**

If the contract doesn't specify when something has to be done, then it can be done in a reasonable time

Look at industry standard

Courts err on the generous side because if you get it wrong, then the consequences can be very great

If time clause is put in contract, then time is considered to be of the essence. (Canning v Temby) – Need to find out about this case

**Breach for Failure to Perform**

Consequences of the breach must be very serious for the promisee to be entitled to terminate for breach of an intermediate term (*HK Fir Shipping*)

**Termination**

Stops the contract where it is and any other obligations are discharged (This includes future payments)

**Repudiation/Renunciation**

"An attitude problem"

Occurs when the promissor has an absence of willingness, or readiness, or capacity to perform.

Two kinds:

1. Inability – harder to prove
2. Words or Conduct

It's anticipatory if one of the parties calls it off before the other one has a chance to perform. If it happens after the other person has performed, then it's still repudiation, but not anticipatory.

Just repudiation does nothing, the other party has to accept it. Once B accepts the repudiation, it's called anticipatory breach by A.

One party is not going to perform obligation x, and obligation x is a condition of the contract – then it's repudiation.

Level of seriousness is the same as breach, the consequences and impact needs to be serious. Ie, not going to perform contract at all (*Federal Commerce v Molena Alpha*)

Intention is not important but some courts do not talk about it.

Persistent misrepresentation of the contract can amount to repudiation

Only get damages when you accept and terminate the contract.

Wholly and Finally disabled – Devlin J (*Universal Cargo Carrier v Citati*) It's about the facts, not what a reasonable person would thing.

Brennan J is too demanding a test (*Foran v Wight*)

Factual Inability -Back to *Universal Cargo Carrier v Citati*

What was the seriousness - - couldn't have loaded by 21/7 but there was debate on how much longer

Was loading term a condition or warranty? Devlin said warranty – if it was condition it would have been serious

It's up to the innocent party to accept the repudiation, though they don't have to – but kinda silly if they don't

If repudiated party continues to perform, it has to be exactly to the terms of the contract (*Bowes v Chalayer)*

Discharge regarding Time

1. Express contractural term – if A is late then B can terminate, this does not make the above a condition
2. Time is of the essence term" is a condition, based upon commercial certainty (*Bunge v Tradax*)"

Commercial Certainty – parties need to know at any time where they stand (*Bunge v Tradax*)

**Discharge regarding time - breach**

Can discharge for the following:

1. Express contractual term – if A is a late, then B can terminate
2. Time is a conditions – "Time is of the essence"
3. Time is an intermediate term – has the breach been so severe to deprive the party with the substantial benefit
4. Notices to Perform – way to get around time is of the essence
5. Frustrating Delay

Notice to Perform - Once in breach by being late, innocent party sends a letter saying – you're late,, but I'm going to give you an extension, if you don't perform, I'm going to terminate the contract. By the party not complying with that time, it's a repudiation by the other person, so then the innocent party can terminate (*Louinder v Leis*)

If a party does not terminate/repudiate/discharge, they lose the right to.

**Frustration**

**Election**

After repudiation, once a person terminates, or affirms, they can't go back.

Giving extra time after an election, is not an affirmation. HC said no, it's an extension of time to election again (*Tropical Traders v Goonan)*

If payments have been done, with time is of the essence term, person is not estopped from using time is of the essence again. (*Tropical Traders v Goonan)*

**Termination**

Termination:

1. The parties are discharged from performance in the future
2. Rights that have accrued unconditionally remain

Legitimate interest – If the defaulting party can prove the innocent party had no legitimate interest in performing, then damages can be limited (*White & Carter Council v McGegor*)

Legitimate interest – can only be applied in extreme cases, it's a hard argument to make

Can do termination in a way that has not been communicated – A agrees to sell to B, B repudiates, A sells house to C. A's contract with B has been terminated

If you pick the wrong reason for terminating, it's ok if you can find another correct reason for terminating (*Rawson v Hobbs*)

Termination has occurred, parties are discharged from performance in the future, and also from obligations. There are some exceptions, like arbitration clauses. (*Heyman v Darwins*)

Courts often require deposit as being unconditional, but the buyer would most probably not get I1 and I2 back.

**Discharge by Frustration**

The event brings the contract to an end.

The frustrating event must be an unforseen event that is not caused by any of the parties, often called acts of god", the event wasn't planned for.

From Davis: Frustration occurs whenever the law recognises that 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 ratified in *Codelfa v State Rail*

The technique is two fold:

1. The contract must be constructed to determine the scope of the parties contractual duties
2. The factual circumstances which are alledged to amount to frustration must e considered. When looking at the factual circumstances the issue is the degree to which the event or events affected the contract

Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being prepared because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by contract (Lord Radcliffe in *Davis Contractors v Fernham Urban District Council*)

Frustration occurs when there is destruction of subject matter of the contract (*Taylor v Caldwell*)

Frustration of Purpose – controversial category) – non-occurrence of event which is the basis of the contract (*Krell v Henry*)

If contract is not rendered entirely or substantially pointless, then it's not frustrated (*Herne Bay Steam Boat co v Hutton* and *Scanlon New Neon v Tooheys)*

In *Codelfa*, the HOL distinguished this from *Davis v Farenham* because one was foreseeable and the other wasn't.

Sometimes, terms provide for termination on the occurrence of events which might frustrate the contract. Usually this is to avoid the uncertainty involved in predicting if a court would conclude the contract has been frustrated. However, this is not frustrating, rather, it's termination by the terms of the contract.

Forseable can be reasonable as long it's not far fetched or fancifull.

If, when reading the contract, one party took the risk, by adding something in the terms, then frustration does not apply.

If you bring about the cause of frustration – then you can't rely on it. (*Maritime National Fish v Ocean Trawlers*)

Consequences: Frustration discharges the whole contract automatically. – Not like repudiation, where the other party has to accept it.

Frustration is stopping the contract;, the rights that have accrued automatically still remain

Common Law – people paid money in advance – want money back – people used restitution – total failure of consideration – Restitution – did you actually get what you bargained for – it the answer is no – you can get money back