

## PART VII – CERTAINTY

### I THE CERTAINTY REQUIREMENT

#### A Elements

In order to be enforceable, an agreement must be sufficiently certain. The requirement that a contract be certain has three aspects:

- 1 *The contract must be sufficiently **complete***
- 2 *The contract must be sufficiently **certain and clear** that parties understand their obligations and rights*
- 3 *The promise must not be **illusory***

Determinations of certainty are highly factual, as noted by Lord Tomlin in *Hillas v Arcos*:

*it is in the application of [principles] to the facts of a particular case that difficulty arises; and the difficulty is of such a kind as often affords room for much legitimate difference of opinion and to present a problem the solution of which is not as a rule to be found by examining authorities*

#### B Overlap with Other Doctrines

There is some overlap between the requirement of certainty and other formation requirements:

- Offer and acceptance
  - The offer is only valid if it identifies the terms of the contract with sufficient certainty
- Intention
  - If essential terms are left uncertain it is arguable that, at that point in time, parties do not intend to confer contractual rights on each other

**Exam note:** where overlap is encountered, analysis can be performed either inline with offer/acceptance analysis or separately, under the heading 'certainty'.

### II CAUSES OF UNCERTAINTY

#### A Unclear language

A contract must be expressed in sufficiently clear and precise terms. However, unclear language is not fatal to the enforceability of the contract.

- If language is capable of a (ie, at least one) meaning, it is not fatal that several possible alternative meanings exist;
  - It is not necessary to have a very high degree of precision; courts seem to prefer to reach a certain meaning, wherever possible (*Upper Hunter*)
- If the unclear term can be severed (excluded from the agreement), then the contract will be otherwise enforceable;
  - Severance may only occur where the term is not fundamental/essential to the agreement; if it is essential, it cannot be severed
- If the unclear term is for the benefit of one party, that party is free to waive the right to have the other party comply with the other clauses;

Judicial language is sometimes used inconsistently and is a further source of ambiguity. Criteria such as 'reasonableness' and 'honesty' are often used as implicit requirements to the resolution of uncertainty. However, there is little consistency in the application of these pseudo-requirements to individual factual scenarios, which are applied without justification for or explanation of the objective, reasonable standards on which the requirements rely.

Courts have indicated a willingness to recognise certainty where the relevant clause is capable of at least one meaning (*Upper Hunter County*). Such a generous interpretative methodology means that it is arguably only necessary to show a meaning in order for certainty to be established.

### ***Upper Hunter County v Australian Chilling***

#### Facts

- UH purchased electricity in bulk and on-sold it to AC
- The agreement provided for automatic changes in rates according to changes in the basic wage and cost of coal
- The agreement contained a further clause that permitted the council to vary the amount it charged if the council's costs varied in any other way
- The agreement also contained an arbitration clause

#### Issue

- Was the concept of 'council's costs' certain?

#### Reasoning

- Uncertainty only arises where the language is so obscure it is not capable of **any** definite or precise meaning
- However, a clause does not have to be capable of only *one* meaning
- Here, the arbitration clause provided sufficient certainty in relation to the variation of the council's costs, to which a precise and definite meaning could be prescribed

#### Decision

- Yes, the concept is sufficiently certain and the contract is enforceable

*Whitlock* embodies a more restrictive approach to interpretation. Courts, or the parties themselves, may import a requirement of reasonableness to overcome uncertainty. However, if no objective criteria are available (as where the transaction is uncommon or has a unique characteristic) the uncertainty cannot be overcome (*Whitlock v Brew*).

**Whitlock v Brew:**Facts

- W agreed to sell land to B for a specified price
- The land was sold on the condition that B would grant a lease of part of the land to a third party (Shell) 'on such reasonable terms as commonly govern such a lease' (condition 5)
- B declined to complete the purchase
- W terminated the contract and kept B's deposit

Issue

- Was there a contract between B and W? (If not, B is entitled to a return of his deposit)

Reasoning

- B sought to recover the deposit on the basis that the contract was void for uncertainty
- W was only entitled to keep the deposit if permitted by contract
- Condition 5 is uncertain:
  - Kitto J: there is no evidence of what was standard and reasonable for such a lease
  - Note, however, McTiernan J's dissent:
    - On the facts, there is sufficient evidence to construct the terms
  - The outcome would perhaps be different if this were a residential tenancy, since there is plenty of evidence which could be used to determine the objective meaning of condition 5 by reference to other, similar, leases
  - Taylor, Menzies, Owen JJ:
    - Expressly note that it would be a different situation if the arbitrator was given power to determine what constituted 'reasonable terms'
    - In such a case, they could determine a meaning for the clause
- The arbitration clause gives the arbitrator power to interpret the language:
  - This would place the arbitrator in the same position as the Court
  - However, because it is not possible to give condition 5 a definite meaning, the arbitration clause does not prevent a conclusion that clause 5 is uncertain
- Special Condition 5 is foundational to the agreement; if it is uncertain (and it is), it is not possible for the term to be severed
  - To do so would mean enforcing a contract materially different from that which was in the contemplation of the parties
  - The fundamental nature of the agreement reached between the parties would be altered
- W could not choose to waive condition 5 and enforce the rest of the agreement, because that term was for the benefit of B

Decision

- Condition 5 was uncertain because there were no standard conditions applied in leases of that type which could be used to identify reasonable terms to be imported
- The contract is unenforceable and B's deposit should be refunded

In determining whether severing a term alters the fundamental nature of the agreement, two factors are considered (*Life Insurance Co v Phillips*):

- 1      *The entire instrument (the contract as a whole)*
- 2      *Extrinsic evidence (though limited)*

## B Omission

If parties intend to make a contract but omit to include terms necessary for its operation, courts will imply the needed terms in accordance with rules of implication.

For example, in a contract for sale of land, many complex terms may be used to cover various contingencies. However, courts are willing to recognise the existence of an agreement of sufficient certainty where only the basic details (price, address, parties) are provided (*Cavallari v Premier Refrigeration Co Pty Ltd*). The other terms are imported by law where it is consistent with the governing rules of implication to do so.

## III AGREEMENTS TO AGREE

### A General Principles

- 1 *Leaving terms to be settled by future agreement between the parties will generally mean that terms are uncertain (and thus unenforceable)*
- 2 *Agreements to negotiate in good faith are likely to be held to be sufficiently certain*
- 3 *Leaving a term to be fixed in the future by an independent third party is usually regarded as sufficiently certain (Godecke)*
- 4 *Leaving terms to be fixed by one of the parties is unlikely to be uncertain if terms only relate to subsidiary matters*
- 5 *Leaving one of the parties' solicitors to add terms unilaterally will not make the contract void for uncertainty (Godecke)*

Leaving terms to be settled by future agreement between the parties is generally regarded as evidencing uncertainty because this is indicative of *future* bargaining that has yet to occur.

#### ***Godecke v Kirwan:***

##### Facts

- G (purchaser) and K (vendor) signed a document which set out the terms of an agreement for the sale and purchase of land
- K refused to proceed and G lodged a caveat (a notice with the land titles office that prevents sale of the property)
- K commenced an action to have the caveat removed
- K alleged the following terms were uncertain (and therefore there was no contract to support the caveat):
  - clause 3 – possession shall be given and taken on settlement upon signing and execution of a formal contract of sale within 28 days of acceptance of this offer;
  - (clause 4 – provided that all rates, taxes, rents and other outgoings shall be adjusted to the date of possession;)
  - clause 6 – gave K's solicitor the right to add *additional* terms (argued to be

uncertain);

#### Issue

- Was clause 6 an agreement to agree and therefore uncertain?

#### Reasoning

- Clause 6 was not an agreement to agree, because it was capable of being given a meaning by K's solicitor
  - Because it is able to be given a meaning by the third party, it is not uncertain
- Restrictions are placed on the solicitor's rights under clause 6:
  - Any term inserted must be consistent with the existing terms
  - There is an implied term of 'reasonable' in clause 6
  - It should read 'may reasonably require'
  - The meaning is thus not uncertain, since the court was capable of assessing the reasonableness of any inserted terms
  - This highlights the willingness of the court to rectify uncertainty by reference to reasonableness

#### Decision

- [???

#### Notes

- What happens if a party charged with fixing terms in a contract fails to do so?
- What is the relevance of the 26<sup>th</sup> Schedule of the *Transfer of Land Act*?
- What uncertainty arose about outgoings under clause 4?
- What was the alleged problem with clause 3?
- Why was the result here not the same as in *Masters v Cameron*?

## B *Agreements to Negotiate in Good Faith*

A different approach is followed in the United Kingdom to that adopted in Australia. In the United Kingdom, promises to negotiate in good faith are void for uncertainty. In Australia, promises to negotiate in good faith are sufficiently certain (*Aiton Australia*).

### ***Aiton Australia v Transfield:***

#### Facts

- AA claimed to have suffered loss as a result of T's misleading and deceptive conduct
- The agreement between them contained a clause (clause 28) which required parties to attempt negotiation and mediation before filing suit
- Clause 28 also included obligations to negotiate and mediate in good faith
- AA attempted to negotiate and mediate but attempts were frustrated by T
- As a result, AA initiated proceedings
- T sought a stay of proceedings on the basis that the dispute resolution procedures stipulated in clause 28 had not been complied with
  - If granted, this would prevent AA bringing an action for breach of contract

#### Issue

- Is AA able to show clause 28 to be uncertain?
  - Should the requirement of good faith be severed from the agreement?

#### Reasoning

- Einstein J:
  - Refuses to stay proceedings
  - Good faith requirement was certain, but contract was still uncertain in other ways (structural factors)
- A promise to negotiate in good faith imports with it several requirements in order to be sufficiently certain:
  - Parties must undertake to subject oneself to the process of negotiation or mediation; and
  - Parties must keep an open mind in the sense of:
    - willingness to consider options for resolution of the dispute (proposed by mediator or other party); and
    - willingness to give consideration to putting forward options for the resolution of the dispute
  - Parties are not under a duty to accept all proposals – they are still able to act in their own self-interest
  - Parties are not under a duty to act reasonably in accepting or rejecting the offer; just a duty to consider it with an open mind
  - Note that behaviour which appears to be in 'bad faith' may be just a negotiation stance, and is permitted

#### Decision

- An agreement to negotiate, mediate, or do anything in good faith is not an agreement to agree
- The notion of good faith is not so vague and uncertain as to render a contract void
- To satisfy a requirement to act in good faith, parties need only
  - Subject themselves to the process of negotiation/mediation
  - Have an open mind to consider suggestions of the other party and propose solutions themselves
- Failure to reach agreement is not evidence of a failure to negotiate/mediate in good faith; thus, it may be difficult to establish breach of the obligation

#### Notes

- Is an agreement to negotiate in good faith enforceable under Australian law?
  - AA lost the argument that the contract exists but wasn't on their complying with that clause
  - Yes, but there must be 'identifiable criteria' by which the court can infer how the parties would have acted in the negotiations – this can be difficult to prove (*Coal Cliff Collieries v Sijehama*; *Aiton Australia v Transfield*)
- Is there a difference between an agreement to agree and an agreement to negotiate (in good faith)?
  - Yes; the latter implies that the parties must act *reasonably*, which is not uncertain, whereas the former is indicative that the bargain is not concluded or constrained, and thus uncertain
- Given the difficulty of breaching an obligation to negotiate in good faith, it is arguable that the nature and extent of the obligation are insufficiently defined to be certain

Noteworthy is Badgery-Parker J's formulation of principle in *NSW v Freeman*, which was subsequently applied by Einstein J in *Aiton Australia*:

*An undertaking to mediate in good faith no doubt cannot [deny] a willingness on the part of a party to consider options for resolution propounded by the mediator or the opposing party, but an inference should not be drawn from the adoption of a strong position that the parties are not negotiating in good faith. (My emphasis)*

## IV ILLUSORY PROMISES

### A General Principles

Prima facie, where one party has 'a discretion or option' as to whether to carry out a promise, the promise is said to be illusory and the contract void for uncertainty (per Kitto J in *Placer Developments*).

There are two exceptions to the rule that illusory promises are uncertain. Discretion will not render a promise illusory where

- The option is a condition subsequent/precedent to the performance of the contract; or
  - Eg, subject to finance clauses
  - Here, no obligation comes into effect until a certain precondition is met (*Meehan v Jones*)
- Discretion is expressly or impliedly to be exercised according to objective criteria
  - Eg, the exercise of discretion needs to be reasonable
  - Consider judicial willingness to imply obligations as to reasonableness as a means of overcoming uncertainty

The general rule that discretionary promises are illusory and unenforceable is expressed in *Placer Developments v Commonwealth* (per Kitto J). Implying an obligation to exercise the discretion reasonably may, however, overcome problems of uncertainty (per Windeyer J in *Placer Developments*).

#### ***Placer Developments v Commonwealth:***

##### Facts

- P and the Cth formed a timber company to operate in Papua New Guinea
- Clause 14 of the agreement provided that, if customs duty was paid on the importation of the company's products into Australia the Cth would pay to the timber company a subsidy *at a rate to be determined by the Cth*, but not exceeding the amount of customs duty paid

##### Issue

- Is the government's promise illusory because of discretion the Cth had as to performance; or
  - This would render the promise unenforceable, because the amount could be \$0

- Does clause 14 imply an obligation that the government act reasonably in determining the subsidy, thereby overcoming any uncertainty?
  - An exercise in linguistic manipulation; attempt to show that certainty is not completely absent (eg, draw a relevant comparison)

#### Reasoning

- General principle (per Kitto J):

*The general principle is that wherever words which themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise the result is that there is no contract at all*

- Windeyer (dissent)
  - Cth is under an obligation to determine the amount of the subsidy and pay it
  - The discretion as to the amount only was not sufficient to make promise uncertain or illusory
  - Generally, where no amount specified, courts will require payment of a reasonable amount
  - Here there were no objective criteria against which reasonableness could be measured
    - (Doesn't this seem to indicate uncertainty?)
  - This does *not* mean that the Cth was excused of its certain obligation to determine *an* amount and pay that amount

#### Decision

- Held, by a 3 to 2 majority – promise unenforceable
- Cth had plainly retained the right to review and vary the amount of the subsidy
- Therefore, the promise was illusory

#### Notes

- The analysis is highly factual
  - Recognise the basic principle; then
  - Identify salient factors; then
  - Apply and acknowledge uncertainty, where relevant
- Contrast the reasoning of the majority and minority
  - Windeyer J: tries to find a contract, recognising a broad agreement; however, the nature of that broad agreement is so discretionary as to allow the practical result to be that there is no agreement
  - Kitto J: the courts need objective criteria by which to determine whether a discretion is void for uncertainty
- There is the possibility that clause 14 could be redrafted so as to impose binding obligations on the Cth whilst still leaving it some discretion
  - Provide a minimum threshold; or
  - Explicitly provide for a set of objective criteria by which to assess the amount set by the Cth; require that it be reasonable
- Recall *MacRobertson Miller*: the promise in this case was illusory
  - The very broad exemptions made by the airline effectively gave it the discretion whether to perform (carry the passenger) or not (due to overbooking, cancellation, etc)
  - Barwick CJ: found that it was illusory (no contract until passenger on the plane,



- but at that point there was certainty)
- [???] Stephen J: also found that the promise was illusory, because when the passenger accepts the contract (either within a reasonable timeframe or when boarding, whichever is the earlier) the airline maintains a discretion as to whether they carry the passenger

### ***Meehan v Jones:***

#### Facts

- J agreed to sell land to M
- The contract was executed, subject to the following conditions:
  - M entering into a satisfactory agreement with Ampol for the supply of a satisfactory quantity of oil; and
  - M receiving approval for finance on satisfactory terms and conditions
- If these conditions were not satisfied by 31 July 1979 then the agreement was null and void
- J claimed the contract was void for uncertainty and, on 23 July 1979 sold the property to another person
- About a week later (before 31 July 1979) M gave notice that it had made satisfactory arrangements with Ampol and obtained finance
- M sought specific performance of the contract
- Trial judge and Full Court of Supreme Court refuse specific performance on the basis that the contract was void for uncertainty

#### Issue

- Did the parties intend to make a binding contract?
- Was the promise illusory?

#### Reasoning

- Jones argued no binding contract because:
  - There was merely an agreement to agree
  - The conditions used imprecise or indefinite language
  - The condition rendered the promise of sale illusory
- Agreement to agree argument
  - Rejected
  - Only the purchaser need be 'satisfied', not the seller
    - Thus, any discretion lies solely with one party (the purchaser) and not both
  - Clauses not indicative of future rights
- Imprecise or indefinite language argument
  - Subject to finance clauses are generally not void for uncertainty (cf UK and NSW approach)
  - The purchaser is obliged to act honestly (but not necessarily reasonably)
    - They have to make some attempt to find and obtain finance
    - 'Satisfactory terms' for finance is *not* too uncertain; this is a subjective term, so the purchaser needs to be subjective pleased/satisfied
- Illusory promise argument
  - Rejected: the promise is not illusory

- Gibbs CJ – the promise will not be illusory where the discretion relates to a condition on which the contract depends
- Mason J – the implied obligation of honesty means that there is sufficient certainty as it removes the purchaser’s discretion as to whether finance is actually sought
  - Thus, the discretion is not unfettered because the Court is capable of determining whether acts of the purchaser are honest

#### Decision

- The promise is not illusory and the contract of sale is enforceable; M is entitled to the property

#### Notes

- Reconciling with *Placer Developments*
  - Mason J: here, the promise is not unbounded (unlike *Placer*); need the objective criterion of honesty
  - Gibbs CJ: in *Placer*, there was no condition to performance (Cth had sole discretion over what figure to set; could be \$0); here, the promise is alleged to be illusory because of a condition to its performance

### ***Biotechnology Australia v Pace:***

#### Facts

- P entered into a contract of employment with BA
- The contract of employment contained the following term:

*I confirm a salary package of \$36,000 per annum, a fully maintained company car and the option to participate in the Company’s senior staff equity sharing scheme*

- At the time of the offer, no such scheme existed
- No such scheme was subsequently brought into effect
- when his contract of employment was terminated, P claimed damages for failure to provide him with the option to participate in the (non-existent) company senior staff equity sharing scheme

#### Issue

- What types of uncertainty affected the employment agreement?
  - Vague, uncertain and ambiguous clause (cannot be determined from the words in the contract exactly what BA was obliged to do to fulfil its promise to P)
    - Eg, ‘a staff equity sharing scheme’ –what rights would be conferred under such a scheme, and what would be its nature?
  - Illusory promise by BA (because it retains discretion as to whether to implement the scheme)

#### Reasoning

- Kirby P identifies several general principles which should be referred to when determining whether a promise is void for uncertainty
- Extrinsic evidence:
  - It is permissible to consider extrinsic evidence to give the agreement meaning

- Methodology:
  - **The determination of every case rests on its facts**
  - The court should, where possible, uphold contracts; in the search for the intention of the parties, no narrow or pedantic approach is warranted (*Upper Hunter County*)
  - However, courts will not spell out, to an unacceptable extent, matters the parties have themselves failed to agree
  - Judicial opinion will often vary (citing judgments in *Placer Developments*)
- Certainty:
  - Leaving a term to be settled by an identified third party is likely to be sufficiently certain
  - Whether the courts will permit parties to leave terms to one of the parties depends on the importance of the term so left
- Objective standards:
  - Where there is a readily ascertainable external standard, the court will have regard to it in order to flesh out the allegedly uncertain provision (*Meehan v Jones*)
  - Where the term specifies a range of possibilities the party making the promise will be held to (at least) the minimum provision in that range

#### Decision

- Kirby P:
  - The promise is illusory because it depends for fulfilment on BA deciding to implement such a scheme
  - No external standard can be identified, which could dictate an ‘appropriate’ or reasonable scheme that could be implemented
  - The promise would also be void for uncertainty because there are too many elements left uncertain – the court cannot substitute a fair scheme in place of what the parties contemplated
  - It is possible to resolve uncertainty by reference to reasonableness, but here there is no objective standard to do so (ie, no similar sharing schemes or possible assessment criteria)
- McHugh JA:
  - The promise is illusory because it is too vague and uncertain
- Hope JA (dissent):
  - Noted how far courts have been prepared to go in order to find that there is an enforceable contractual promise
  - Promise was not too illusory or uncertain because of an implied obligation to act reasonably
  - Courts have the requisite commercial experience to determine a reasonable, minimum amount payable

#### Notes

- The preferable approach seems to be one highly entwined with factual analysis
  - The approach taken will often dictate the outcome; should judges attempt to find a contract, or should they be less forgiving of uncertainty?
  - It seems preferable to use some form of objective benchmark to resolve any uncertainty, but facts which mitigate against the application (or identification) of such a standard should always be considered (eg, per Kirby J)

## V CERTAIN PRICING

### A Goods

There is no universal approach as to the extent to which price must be certain in order for there to be a contract.

Sale of goods is covered by legislation in the form of the *Goods Act 1958* (Vic).

#### 13 Ascertainment of price

- (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.
- (2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependant on the circumstances of each particular case.

#### 14 Agreement to sell at valuation

- (1) Where there is an agreement to sell goods on the terms that a price is to be fixed by the valuation of a third party, and such third party cannot or does not make such a valuation, the agreement is avoided, provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefore
- (2) Where such third party is prevented from making a valuation by the fault of the seller or buyer the party not in fault may maintain an action for damages against the party in default

#### Summary:

- *Goods Act* s 13(1) – price for sale of goods may be
  - Fixed by the contract
  - Left to be fixed by a manner agreed under the contract
  - Determined by the course of dealing between the parties
- *Goods Act* s 13(2) – where the price is not determined as indicated above, the buyer must pay a reasonable price (a question of fact to be determined on the circumstances of each case)
- *Goods Act* s 14 – where there is agreement to sell at a price determined by a third party, and that third party cannot or does not make the valuation, the agreement is avoided (although if goods have been provided or part provided the buyer must pay a reasonable price for them)

## B Land

Sales of land may involve a more restrictive approach to the question of whether the price is sufficiently certain (*Hall v Busst* (1960)).

It is often argued that the approach in *Hall v Busst* reflects a more restrictive approach to certainty than that which is now applied by the courts (*Booker Industries v Wilson Parking*).

### ***Hall v Busst:***

#### Facts

- H sought to enforce an option for the purchase of land
- Clause 5 of the agreement specified the price as follows:

*a dollar amount + value of additions and improvements -  
reasonable amount to cover depreciation*

- B argued that reference to a reasonable amount to cover depreciation made the agreement uncertain

#### Issue

- Did the formula specified in clause 5 meet the degree of certainty required?

#### Reasoning

- The concept of a 'reasonable amount for depreciation' is uncertain because there are different ways to calculate depreciation
  - If the parties had specified a way to calculate depreciation of a fixed amount, the clause may not have been uncertain

#### Decision

- Because the measure of depreciation is uncertain, the promise is void and H cannot enforce the option for purchase

#### Notes

- This does *not*, however, mean that the price of land must always be stated in dollars
- As in *Biotechnology Australia*, there is no way to choose between multiple schemes/multiple ways of measuring depreciation (but contra *Upper Hunter* – a restrictive approach seems to have been taken)
- If it is possible for the Court to fix a price where the parties did not, it should only be done so objectively; however, such a possibility seems unlikely
- There should not be different rules for different types of transactions; coherency needs to be maintained

## **VI UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS**

### *A Provisions Relating to Certainty and Intention*

- Article 1.7 – good faith and fair dealing
- Article 2.13 – subject to contract clauses
- Article 2.14 – agreements to agree, leaving terms to third parties
- Article 4.1(2) – intention (reasonable person)
- Article 4.8 – supplying an omitted term
- Article 5.7 – price determination