Talbot Sayer Notepool

LAWS2112 - Law of Contract B

UNIVERSITY OF QUEENSLAND LAW SOCIETY INC

TALBOTSAYER

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1 Privity of Contract

1. Parties to a Contract

It is important to identify the parties so you know who can sue, who can enforce rights, and who is liable. Important to consider jurisdictional issues, time bars, and insolvency (so the person you're after has no money – so who is associated with the dosh).
Davies v Apted – negotiating with individual, but contract was with alter ego of a company – the other party think that it is only with the individual though, so is contract with individual personally or the company? Trial judge and appeal judges found it was in individual capacity.

> e.g. ***BBC v Harper Collins*** – identity of Stig was kept secret. Guy agreed as director for company which meant he personally was not party so not actually bound by confidentiality.

2. What is Privity?

Common Law doctrine – distinguish between particular rights of a 3rd party (stranger to the contract) and burdens to a 3rd party. Privity is the idea that only parties to contract could take advantage and be liable under contract.

3. Property Law Act

Start here for a question.

S55 Contracts for the benefit of third parties

(1) A promisor who, for a valuable consideration moving from the promise, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.

<u>Key Requirements:</u>

1. Must be consideration from promisee
    a. So consideration isn't necessary from 3rd party (unlike ***Coulls***)
2. Must be promise
    a. S55(6) defines promise: (a) which is or appears to be intended to be legally binding; and (b) which creates or appears to create a duty enforceable by a beneficiary, includes promise in deed, writing, orally, partly in writing and partly orally.
        i. ***Dinte v Hales*** – can be oral promise or implied term
        ii. 3rd party must prove that enforceable promise intended – ***Trident*** (not just intention to benefit 3rd party but intention that entitled to sue).
3. For benefit of 3rd party ("beneficiary")
    a. Not burden – ***Rural View Developments v Fastfort***
    b. Who is a beneficiary? S55(6): a person other than the promisor or promisee, and include a person who, at the time of acceptance is identified and in existence (but may not be so when promise given)

i. So time of acceptance only, need not be at time of contract
ii. Can be identified by name (easiest) – ***Bexelaw***; or by class ("sub-contractors"), but must be intention to benefit them.

4. Enforceable when "accepted" by 3rd party
    a. S55(6) acceptance means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorized on the promisor's behalf, in the manner (if any), and within the time, specified in the promise, or if no time specified, within a reasonable time of the promise coming to the notice of the beneficiary.
        i. Reasonable time is question of fact – ***Re Davies*** which said 3 years too long but ***Bexelaw*** was accepted by solicitor's letter 3 years later…?
        ii. ***Trident*** – must be some kind of proactive conduct

S55(2) Variation – prior to acceptance the promisor and promise may, without the consent of the beneficiary, vary or discharge the terms of the promise and any duty arising form it.
S55(3) Remedies – upon acceptance (a) can sue on own name (for specific performance or damages); (b) cannot transfer burdens to unwilling 3rd party but promise may not be unconditional, if accept promise also take burdens that go with it; (c) promisor entitled to remedies and relief as may be just and convenient for enforcement of duty of beneficiary.
S55(7) establishes that s55 gives new rights but does not take away any under existing CL…
S199 Assignment – solves most assignment issues. Assignor can assign legal rights to 3rd party assignee, (1) must be absolute assignment though (not partial). (2) Assignment is to be with express written notice to debtor. (3) Subject to any equities (so any kind of set offs that apply to that right) i.e. $10k for work, if work shit $5k also applies when assigned. Transfers all legal rights and remedies – consent not needed, assignee can sue in own name but not party to original contract.

4. Actions by 3rd Party (CL)

- ***Tweddle v Atkinson*** **(1861)** – Facts: marriage payment to son (contract between father & father in law to pay son (3rd party) money). Father in law did not pay. Held: son could not sue, stranger to consideration, consideration to move from promisee.
- ***Dunlop v Selfridge*** **[1915]** – Facts: Dew and Selfridge had a contract to observe restrictions on resale price (in place by Dunlop) and pay Dunlop £5 per tyre if undersells. Dunlop tried to enforce this. Held: Dunlop not party so cannot sue, even if intended 3rd party to benefit consideration must move from promisee and no 3rd Party rights recognized in English law.
- ***Coulls v Bagot's Executor & Trustee*** **(1967)**
    - Facts: contract allowing O'Neill to quarry on Arthur Coulls' land. Payments made to Arthur and Doris Coulls as joint tenants. In contract it was Arthur agreeing, but carved out that joint payment to wife as well. Wife also signed the contract. Arthur dies – payments to wife or to Arthur's will (so kids)?
    - Held (3:2) by majority: signature of wife was not enough, she had provided no consideration, pay to the will. Minority: O'Neill agreed to make payments to

them jointly, Doris participated in drafting, all signed for whole agreement – irrevocable identity of recipients. But said if it was a joint promise, jointly provided consideration is enough (this is in obiter).

- ***Trident General Insurance v McNiece*** **(1988)**
  - Facts: Trident provided insurance policy which covered liability to public to Blue Circle Cement. BCC hires McNiece (site engineer), a sub contractor (Gary) is injured on site and sues McNiece in negligence. McNiece tries to claim on Trident's policy. Policy labeled "assured" (so those covered) as BCC and associated/subsidiary companies, contractors, sub-contractors. McNiece was employed after contract with Trident*.
  - Held: McNiece not party to policy because * [4-3?]; McNiece able to enforce indemnity [4-3]. *Narrowest* (Toohey J [Mason CJ, Wilson, Gaudron JJ?]) 3rd P named under a public liability policy can claim benefit (special rule for insurance – avoids ruling on whole). *Cautious/Conservative* (Brennan, Dawson, Dean JJ) privity is fundamental and settled. Need precise and compelling reasons to change, existing remedies can alleviate problem. *Most radical* (Gaudron J) 3rd party can sue on basis of unjust enrichment. *Most enigmatic* (Mason CJ, Wilson J) recite arguments for and against and then say be incremental. Deane J said policy prima facie by its nature created a trust.

5. Ways used to avoid Privity

(a) Legislating for Problems

Legislation is probably the best way forward; however, currently it's a bit of a mess. There are lots of exceptions (so ways to avoid rule) e,g, *Insurance Contracts Act 1984* (Cth) s48; *Competition and Consumer Act 2010* Schedule 2 – ACL, ss59, 271(5) – manufacturer express warranties available to those acquiring from consumer, s266 – recipients of gifts from consumers can sue suppliers; *Carriage Documents Act 1996* (Qld) – bill of lading, holder of transferred bill (importer) in Aus can sue ship owner.
Also restrictive covenants in land law – e.g. covenant not to use building as a pub binds buyers (s53 *Law of Property Act 1974* (Qld)).

(b) Common Law Solutions

Estoppel possibly – ***Trident*** didn't deal with this, different if company had told you btw you are covered by policy. Novation – creation of new contract w/ parties to bring them into agreement, but need consideration effective for benefits and burdens.

(i) Assignment

Under CL assignment of *choses in action* generally not possible. However, equity said assignment of benefits possible; even orally without consent but still needs consideration to support a promise to assign. Exact basis of equitable assignment is unsettled. Only relevant when assignment not in writing (see s199 of *Property Law Act 1974* (Qld)).

(ii) Agency

Fear of subcontractors – what if something goes wrong with head contract? Don't want to be liable – never contracted w/ building owner. How do we remedy this for building owner? Can sue main contractor, subs not party – easier for insurance purposes, legal

costs. Etc. BUT what if want to sue sub contractors in torts? … enter the Himalaya Clause

Himalaya Clauses: Subcontractors

Adler v Dickson (The Himalaya) **[1955]** – Facts: lady falls into water when getting on to boat, sues captain in negligence but he wasn't party to contract between lady and cruise which had exclusion. What happened? Himalaya clauses (as a result of this case). At first instance, ***Wilson v Darling Island Stevedoring*** **(1956)** said no, not a thing. BUT, ***Scruttons v Midland Silicones*** **[1962]** said yes, but had requirements in Lord Reid's dicta:

1. Main contract clear that subcontractor intended to be protected by its clauses
2. Employer contracts as agent for the subcontractor to obtain benefits of clauses
3. Employer authority from subcontractor (or later ratification)
4. Subcontractor provides consideration

The New York Star **(1980)** – can stevedores rely on Himalaya clause in a bill of lading? Held: yes, clearly exempts sub-contractor (stevedore). They provide consideration by unloading cargo.

(iii) Trust

- ***Wilson v Darling Island*** – Fullagar J: why can't we just make them trustees?
- ***Trident*** – yeah sure legit, but there is uncertainty what courts will apply, must be clear intention to create a trust.
- ***Ashton v Pratt*** **[2015]** – reiterates need for clear intention.
- ***Korda v Australian Executor*** **[2015]** – said don't just make a trust because court thinks it's an appropriate means of protecting/creating an interest.

6. Remedies (CL)

1. Equitable remedies available to promisee
    a. ***Coulls*** – promisee may sue for specific performance or injunction
    b. ***Beswick v Beswick*** **[1967]** – different because she was able to sue as a party because she was executor as well as 3rd party.
2. Damages for promisee's own loss
    a. ***Coulls***, ***Trident*** – nominal damages only in many circumstances (because 3rd party is the one who actually suffers loss so promisee technically has no loss to compensate for)
3. Can get promisee to sue for 3rd party loss
    a. ***Trident*** – difficulties, hard because not suing for own loss. Lord Denning in ***Jackson v Horizon Holidays*** (father booked holiday, sues for damages for whole family not just himself) did recognize exceptional cases though – said father could claim for fam
4. 3rd party forcing promisee to sue?
    a. Possible if 'trust' of promise, otherwise no.

There are considerable difficulties in getting remedies for 3rd parties if don't have these devices.

2 Discharge of Contract

1. Discharge by Agreement

(a) Abandonment

Is it possible to legally abandon a contract? Mere inaction is difficult to prove, it is easier when there is an agreement to abandon (contractual) – but need consideration to make it legit or do it via deed. Mutual inaction is a question of fact. Mere inaction does give difficulties of proof though.
Kiefel in FCA: Aus may not have discussed theoretical basis, but abandonment may be seen as a point that parties have no intention to continue with the contract – can be inferred.

- ***Fitzgerald v Masters*** – after 'inordinate' time can infer abandonment BUT more difficult if partly performed or ambiguous comments on the abandonment.
- ***DTR Nominees v Mona Homes*** – mutual abandonment did happen. Both parties claimed to terminate on basis of what the other had done, by time case got to trial neither thought contract was still on foot. Both behaved as if ended, court said ok, it's over.

Often very fact intensive enquiries

- ***Mineralogy Pty Ltd v Sino Iron Pty Ltd***

(b) Compromise

Common law rule: release of a cause of action once accrued needed deed under seal, unless a binding "accord and satisfaction" exists. Basically, need consideration for agreement to discharge obligation.
McDermott v Black – Facts: P alleges D fraudulent misrepresentation. P offers to withdraw allegation if D gives extension of time for P to pay. D gives extension, P refuses to perform. Held: Clear intention to compromise, agreement to withdraw in consideration for grant of time can be regarded as an accord and satisfaction.
May need careful drafting, distinguish 'accord and satisfaction' (completed) vs. accord executory (settlement not yet performed – I will give up action once you pay me).

(C) Rescission & Variation

There is a difference between saying we brought it to an end by agreement or otherwise (rescission – so it's completely discharged) vs. varying the original agreement, because we are then saying the original agreement continues in force but is varied in some way.
Tallerman v Nathans – rescission or variation is Q of interpretation, variation does not automatically rescind original and replace it afresh – usually original still in force, but amended.

(d) Promissory Estoppel

Technically not variation because no consideration. Equitable remedy is restricting exercise of rights, so more like suspension than variation i.e. ***High Trees***. But, like in ***Waltons v Maher*** – it may create new rights.

(e) Termination Provisions

A fixed term of a contract (i.e. 5 years) is biding. Can insert a break clause though i.e. upon giving notice, or paying money etc. the contract is cancelled.

For contracts without a fixed term, courts will lean against the contract lasting into perpetuity, rather, like in ***Staff Area Health***, they will see the contract as carrying on until a reasonable notice of termination is allowed. SA courts adopted ***Codelfa*** in resolving this in ***Lavers v Foothills Water*** – said implied term that contract is terminable on reasonable notice by either side (RN = question of fact). In commercial contracts, this implication is more likely.

- ***Jireh International t/as Gloria Jeans Coffee v Western Exports Services*** – it was LT contract, question of how long a term would operate for, CoA Held: that for that sort of contract you might need 10 years notice because of all the investments either side has made.
- ***Kocalidis v Andrews*** – two friends start on a vuilding contract. Falling out. Question was whether either side could withdraw. Held: imply a term that either could withdraw prior to construction starting.
- ***Netline v Qav*** – express termination clause – existence of such clause for one party may preclude implied term for the other party.

2. Performance

(a) Performance and Breach

To perform is to do what you've promised to do. In the *Sale of Goods Act 1896* (Qld), there are obligations (ss 16, 17). It is implied condition, the courts are clear if you don't meet it you're in breach.

Re Moore and Landauer – Facts: fruit in cases of 30 tins, not 24. Fruit and tins were perfect, but there was a claim for price. Held: breach of SOGA [s16] "description". Established that it's not about fault, it's just breach (nothing wrong with fruit, just doesn't meet description).

You can in the duties add some qualifications so the obligations are absolute, i.e. make a "reasonableness" criterion, or clauses defining extent of duties e.g. allow for margins of error (e.g. 40,000t of coal +– 10%) or specifications (we will ship this oil but it may have +3% sulfur). You can also exclude/restrict liability for breach – plain exclusion clause, or force majeure clause for circumstances outside your control – ***Pagnan v Tradex*** (seller to get export certificate but FM clause excused if State export prohibition).

(b) Good Faith in Performance

Orchard v Ross Neilson – for express terms about performance in good faith (core = honesty):

1. Not required to act "reasonably".
2. Give genuine consideration, by can act in own interest.
3. Giving wrong factual basis for decision not breach of good faith, if genuine.

But can you imply good faith into performance and what would it look like?

- ***Woodside*** – 'reasonable endeavors' - to be interpreted in commercial context, so allowed to preference own interests.
- ***Mackay v Dick*** – if both parties agree that something should be done and cannot effectively be done unless both concur, courts say construction of contract is that each agrees to do all necessary for the carrying out of that thing, even though no express words.

- ***Secured Income*** – either way is an acceptable way to ensure cooperation – if a party agrees by implication to do all such things as are necessary to enable the other party to have the benefit of the contract – but only for fundamental obligations (Mason J), like going back to old ***Butt v McDonald*** but more qualified.
- ***North Sea v PTT*** – may be cases were parties are in competition so implying things would be in contractual tension so can't.
- ***ACT Cross Country Club v Cundy*** – court applies both principles of construction & the implied terms approach to say that there is a duty to cooperate. Applies where the parties have to do something to make the contract work.
- ***Renard*** – exercise your powers reasonably, judges have different reasons why – Priestly J: there is a strong argument for good faith to be implied.
- ***Hughes*** – Finhem J: there's a duty to deal fairly in the performance of contracts, should be implied irrespective of parties intentions one of strongest examples of support of GF.
- ***Burger King v Hungry Jacks*** – Allsop J: the extent to which BK not approve the various applications for new sites which HJ had put forward ** need more info
- ***Bytan v BB Australia*** – no such general duty exists in Aus, you need to go through ***Codelfa*** rule – is it necessary to imply or not.
- ***Royal Botanic Gardens*** – HCA decided on interpretation – lease of land and whether or not the rent could be increased. The clause specifically said that Sydney may have regard to additional costs. Was there an implied term to act fairly and reasonably? Courts said no, this is exhaustive. <u>French:</u> our conclusion is that implied term shouldn't be a reflection on good faith; <u>Kiefel:</u> fairness in dealings is an aspect of good faith, but the Q of total good faith hasn't been resolved in Aus.

(c) Time and Order of Performance

Independent performance (so must perform even if other has not yet performed) is rare but is in *SGA* – price payable on specific day (irrespective of delivery).
Dependent performance is more common – D's onligtion to perform depends on P having first performed. Might be expressly consecutive, or performance then depends on <u>condition precedent</u> (to performance)

- ***Automatic Fire Sprinklers*** – employment contract, employees work is condition precedent to employer's obligation to pay wages. If employer wrongfully refuses to allow the employee to work, wages not due as a debt.

Concurrent Performance – also common, *SGA* – S must be ready and willing to give possession, B must be ready and willing to pay price in exchange.

(d) Entire and Divisible Obligations

How much performance of one side is needed before we get something?

- ***Cutter v Powerll*** – no payment until entire work completed. Seaman's wages not due if dies part way.
- ***Baltic Shipping Co v Dillon*** – was she entitled to the whole of her $$ when she'd travel for 10/14 days. Was there an entire obligation or not? An entire obligation is

one which consideration is entire and indivisible. She wasn't allowed her fare back unless there was complete failure of consideration from the other side, and because she'd had 10 of the 14 days she couldn't get fare.

Divisible obligations lets you claim return of payment for those things, but can't imply that divisible just to make life easier – it's a question of interpretation (***Steele v Tardiani*** – each tree)

(e) Substantial Performance

- ***Boone v Eyre*** – can sue for performance if P has "substantially" performed.
- ***Hoenig v Isaacs*** - £750 on completion of interior design/decoration. Disputes about details i.e. quality not quantity. D said entire obligation not performed so I won't pay. Held: Had been substantial compliance so P decorator could sue for full price, but D could counterclaim (set-off) for defects.
- But will depend on intention/construction if strict or entire performance is required
    - ***Bolton v Mahdeva*** – Facts: contract to install combined heating/hot water system. D alleged defects and refused to pay (or only after P making good) £560 price, £174 cost of making good. Held: was an entire lump sum contract. Types of defect and cost of remedying meant no substantial performance. Did not heat house, needed more than slight amendment. Contract had choice to remedy defects b4 suing for price.

(f) Conditional Performance

If performance is conditional on some act, if that act is not completed then performance is not required

3 Breach

(a) Discharge for Breach

TEST = WAS IT A FUNDAMENTAL BREACH?
It helps to classify the terms so as to know what kind of breach = fundamental breach.
Consequences of this breach – right to terminate + damages or equitable remedies (injunction/specific performance).

(i) Conditions vs. Warranties

If a condition, automatically will be discharged for the slightest breach. What is a condition though?
Sale of Goods Act

- s3(1) = warranty is breach of a small term – "collateral to the main purpose of the contract" and breach only = damages, not termination/rejection of goods (no discharge).
- S14(2) = condition gives you right to terminate, based on construction of contract.

Common Law

- ***Bettini v Gye*** – Facts: P to sing in season. P to be 'without fail' in London 6 days in advance for rehearsals. Arrived 2 days before. D refused to accept services. Held: not a breach as the rehearsal clause did not go to the root of the contract. Therefore, can't terminate.

- ***Poussard v Spiers*** – Facts: new opera opens on 28 Nov for 3mths. P singer unavailable for 24Nov-4 Dec. Held: more serious (quite a while), went to root. Therefore, D entitled to treat as 'repudiated' – can terminate.
- ***Wallis Son & Wells v Pratt & Haynes*** – Facts: Exclusion clause with "no warranty is given…" but did not extend to breach of 'condition'. Fletcher Moulton LJ said conditions are "terms going to substance of contract."

Test of Essentiality

***Tramways Advertising v Luna Park* (1938)**

- Facts: adverts placed on trams. By P advertising Co, for account of D – "£20/wk when 53 boards displayed… 3 seasons… guaranteed on track at least 8hrs/day." After 2 seasons D shows adverts are ot on each tram for full 8hrs & refuses to continue contract for last season. P says no, "average 8hrs" [over season].
- Held: parties intended strict obligation, 'guarantee' type language. Irrelevant that P could not control Tram Dept.
- Jordan CJ (position approved in HC, result reversed): "*The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor… If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight.*"
- So, depends on (1) intention of parties; (2) parties may provide term is "essential; (3) otherwise, matter is Q of construction for court.

***Associated Newspapers v Bancks* (1951)**

- Facts: D cartoonist with comic page for 29yrs. 10yr contract w/ paper for D to produce full page drawing and P to put on front page of comic section. BUT in 1951 newsprint shortages so for 3wks comic put in colour magazine on p3. D said no longer bound. P claimed injunction to stop going to rival.
- Held: was condition/essential term as reciprocal set up – D's obligation to provide cartoon clearly a condition therefore corresponding term for the cartoon to be on front page must be condition. Plus, important D has prominence and continuity of publication.

Who can classify?

Parties

- Parties entitled to specify consequences of a breach of a term (***Luna Park***, ***Bancks***, ***Shevill***).
- Courts will uphold choice to declare a term as a condition/essential term/fundamental term or a warranty, IF it is clear it is their intention.
    - "Without fail" is not enough though – ***Bettini***

- But, if seems disproportionate i.e. punctual payement is "of essence" ACL may help.
- "Condition" label may be misleading – ***Schuler v Wickman*** (condition label for requirement to visit firms, but also had a clause requiring notice and 60days to remedy – so read as a whole, merely being a condition is not enough + produces unreasonable result so probs didn't intend it that way).

Statute

Sale of Goods Act – ss16-17 declares that Title/Description/Quality = conditions.

Case Law

***The Mihalis Angelos* [1971]**

- Facts: Chartparty (like taxi hire) for voyage A-B. cl1: "Expected ready to load at Haiphong on 1 July" BUT ship distant from Haiphong when promise made. Shipowner said no expectation to load by 1 July – "expected" means only promised to be honest & reasonable
- Held: clause was a condition as established by case law over many years – courts are to give certain interpretation. Therefore, hirer could terminate charter.

Ankar v National Westminster Finance – treat surety obligations to guarantor as conditions.

(ii) Intermediate or Inominate Terms

Hong Kong Fir Case – substantially the whole benefit deprived

- Facts: 24 months hire; term that ship to be "seaworthy." ship unseaworthy for 15-20% of time. Charterer cancelled – was it justified?
- Held: no on the fact – still had 17 months of charter left.
- Diplock LJ: provided new approach – not all breached terms can be classified as conditions or warranties. Breaches of seaworthiness term could be minor (tinly leak) or major (permanent engine defects so cannot sail. Therefore, may need to ask a different question:
  - **Was P "deprived of substantially the whole benefit of which they contracted for?"**

***Koompahtoo Local Aboriginal Land Council v Sanpine* (2007)**

(iii) Non-essential terms (examples)

Shevill v Builders Licensing Board

- Facts: 3 year lease, tenant constantly paying late. Landlord alleged breach of essential term.
- Held: Promise to pay rent in advance at specified times would not, w/out more, be fundamental or essential term have the effect that *any failure, however slight*, to make payment at the specified times would entitled landlord to terminate lease.

Gough v South Sky Investments

- Facts: property development in Tower 1 of "The Oracle". Name change to "Peppers Broadbeach" before settlement.
- Held: name not an essential term. No evidence Oracle had any content or significant – identification only. Still a unit in a tower. GFC Case.

(iv) Stipulations as to time – treated specially

Equity is chill, they don't treat time as essential. Merging of two means special treatment…

Express clause about time to perform

- Can include that "time is of the essence" – acts to basically exclude the equitable treatment (which is way more lacks) according to Mahoney J in ***Citicorp v Hendry***
    - Alternatively, can say any failure to perform at time stipulated is repudiation of the contract – ***Lombard North Central v Butterworth***.
- Cancellation clauses
    - E.g. can cancel if don't get Gov't approval by September 1 (so may not necessarily require breach by either party)
- Relief against forfeiture (unclear if extends to all of property)
    - ***Tanwar Enterprises v Cauchi*** – forfeiture clauses in leases. Equity intervened if non-payment of rent on due day E.g. if short delay, or inadvertence they let it slide.

Once date for performance has passed what does P do?

- If P waived date but still no performance P can give reasonable notice to return to essence – ***Rickards v Oppenheim*** (preparing a car, extended time allowed, missed that, essence notice)

No Express clause about time to perform

- Sale of goods contracts
    - S13 *SGA* – time of <u>payment</u> is <u>not</u> of the essence
    - Other time stipulations – depends on terms.
    - Time of delivery generally held to be of essence
        - ***Bunge v Tradax*** – <u>Facts:</u> 'June' shipment of soya beans from a US port. Port to be nominated by Seller. Buyer to provide ship and give 15 days notice of its readiness. S's nomination depended on B's notice. <u>Held:</u> notice clause was condition.
- Other contracts
    - Is there a general rule? Conflicting opinion. Generally if it can be inferred from construction taking into account surrounding circumstances & subject matter = fine, as in ***United Scientific Holdings v Burnley***.
        - E.g. if perishable goods or of going concern – ***Lock v Bell*** -selling licensed premises
        - Deposits often interpreted as essential – ***Brien v Dwyer*** (show intention etc.)
    - *Property Law Act 1974* – s13

- Time not automatically of the essence following fusion of law and equity
- Matter for courts and parties
- BUT property law 'settlement' date (payment) is often essential.

Once date for performance has passed what does P do?

- If cancel immediately have to establish term was really essential or it was a fundamental breach of an intermediate term – runs risk of repudiation if wrong
- Could wait until delay (if breach) is really substantial & treat as fundamental breach
- Safer and easier to give D notice to complete
  - Set a reasonable time, making time of essence – failure to perform is then a repudiation
  - Notice must:
    1. Advise of obligation to be performed
    2. Fix a reasonable time for performance
    3. State that time is essential or that failure to comply will give rise to a right to terminate

    As per ***Laurinda v Capalaba Park Shopping Centre*** (where they did not provide reasonable time – 14 days to get a lease was not enough, plus wasn't clear by them they would terminate if failed to meet requirement).

(b) Repudiation & Anticipatory Breach

Repudiation looks to the future – where a D says it *will* not perform. Victim does not repudiate.

Anticipatory breach is concerned with how far a P can act *now* to terminate a contract where D has indicated it will not perform in the future i.e. how far can P anticipate a breach, which has not yet actually happened? When can P safely say, "I've had enough"?

(I) REPUDIATION

Definition summarised in ***Koompahtoo*** □ "conduct which evinces an unwillingness or an imability to render substantial performance of the contract." Sometimes described as conduct of a party which evinces an intention to (a) no longer be bound by the contract; or (b) to fulfill it only in a manner substantially inconsistent with the party's obligations.

TEST: whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.

□ Key: (1) intent not to be bound in future + (2) indicated by words or conduct + (3) reasonable person conclude no intention to complete

Examples

- ***Luna Park*** – Facts: all the trams on the tracks for 8 hrs. Held: T intended to continue to perform in *future* in same (average) manner as past, despite L complaints – repudiation.

- ***Bancks*** – Facts: cartoonist on front cover case. 26 Feb 3 breaches of condition (not front page etc.), but was enough *also* to be repudiation (so *both*) bc P made original changes w/out consultation, maintained that it was entitled to do so, more breaches intended and manager promised "to see what he could do…" so future wasn't looking bright, Held: repudiation.

WHAT DOES IT LOOK LIKE? *EVIDENCE OF REPUDIATION*

a. Express renunciation = easiest to prove
b. Inference from statements or actions?
   i. D disabling or incapacitating itself
      - ***Omnium v Sutherland*** – sells ship that is supposed to be hired, repudiation was inferred by this conduct.
   ii. ***Carr v Berriman***
      - Facts: Building contract. Owner announces another contractor engaged for large part of work inference that performance only if suits owner.
      - Held: evinces intention not to be bound, repudiation.
c. Inconsistent or incomplete performance by D (difficulty)
   - Partial repudiation? E.g. 90%
   - Or will perform but in different/slower ways?
   - Repudiation also arises if there is intent to perform only in a manner 'substantially inconsistent' with obligations
      - But what is enough to be substantial?
         - More than mere delay
         - Same degree of gravity as fundamental breach
      - ***Laurinda v Capalaba Park Shopping Centre***
        Facts: P leasing property off D (Capalaba). D obliged to register lease, P made their payments and arrangements. However, D did not register lease for over 9mths. P gave notice of 14 days to complete. D did not comply.
        Held: D's conduct on the whole amounted to repudiation – unreasonable & deliberate delays, absence of explanations, misleading statements, non-responsive letters…
d. Existing breach may be evidence of future non-performance
   - If fundamental breach, doesn't matter because can terminate anyway. BUT what if it is not yet substantial? Evidence may show inference of future breaches.
      - ***Shevill v Builders Licensing Board*** – Facts: inferences that tenant would not pay rent in future. Held: Slight future breaches not threatening to deprive of substantially the whole benefit. Besides, tenant payment problems may have improved.
      - ***Profressive Mailing v Tabali*** – Facts: persistent refusal to pay rent. Held: repudiation.
e. Wrongful termination is itself a repudiation

- Motive is irrelevant, even if you terminate because you believe that the other side has repudiated – ***The Nanfri*** – said would do it differently but didn't go to core so when terminated by other party, the latter party was in repudiation.

f. If D is acting on legal advice…?

- Issue was left open in ***Koompahtoo*** but is important to determine
  - Is D saying "I will not perform"
  - Or, "I fully intend to perform, and am terminating on the understanding of the legal position"
- Regular position
  - ***Progressive Mailing v Tabali*** – Facts: refused to pay rent on basis work certificate not given by an architect. Distinguished from ***DTR*** because there was a genuine dispute about what contract meant, it was unclear. Held: it is too difficult to prove that they intended to renounce it because they were merely struggling to understand.
  - ***Hill End Gold v First Tiffany*** – Facts: letter sent by new solicitors was part of debate in litigation in context of 20yrs of commercial history (which was uncertain, as were the recollections, and not everything had been reduced to writing). So lawyers formulated various contentions this from unclear material. Obiter: the letter was seeking to assert property entitlements from an unclear body of history which was subject matter of dispute between parties – not repudiation.
  - Dangerous to jump the gun – do not claim repudiation before the evidence supports it (***Lennon v Scarlett***)
- Difficult cases
  - ***DTR Nominess v Mona Homes*** – A acted on own interpretation of contract, not aware that B had different view. Held: no repudiation. Note – unusual facts.
  - ***Woodar v Wimpey*** – D not evincing intent not to be bound; always saying it wanted to perform

WHEN CAN P ACT?

Hochster v De La Tour

- Facts: P to be employed by D for 3mths. D dismisses P before start.
- Held: no need for P to wait for performance if D repudiates (anticipatory breach).
  - A/N claiming anticipatory breach could be dangerous and P will need clear evidence
  - If P is wrong, they may be held in repudiation
  - Easier to wait for the breach and rely on express repudiation

P MUST HAVE ABILITY TO PERFORM

P when accepting repudiation and claiming damages, has to show that they were able to perform.

- P has to prove at date that ready and willing to perform if D had not repudiated

- Except in so far as D dispensed with P's performance
    - ***Foran v Wight*** - Facts: contract for sale of land. Date specified for completion. Vendor notified P that wouldn't be able to complete on time. Completion date passed and then P brought action for breach of time clause, wanted deposit back. Vendor claimed that weren't financially ready & able to perform either. Held: didn't matter because V notice meant they didn't make the moves to be (estoppel).
    - ***Peter Turnbull v Mundus*** – Held: could validly terminate after date of settlement even though weren't able to perform then because at the time the Vendor announced inability to perform they were ready & able at that point.
    - ***Legione v Hately*** – Facts: wasn't clear and unambiguous???
        - Estoppel can be employed if clear and unambiguous statement that performance is unnecessary
- Court is reluctant to find unreadiness where P relied on D's indication of non-performance
    - ***Highmist v Tricare*** – Keane: probably obligation to be ready and willing to perform only goes to damages point, rather than ability to terminate. So only use this in assessment for damages, rather than whether you can terminate. Besides, if neither will perform (properly) what's the point of the contract?
- P can still terminate for D's repudiation, even if P is itself in breach of a non-essential term
    - ***Almond Investors v Kualitree Nursery*** – provided P is willing to perform contract on its proper intention, being in a minor breach doesn't stop you from terminating.

(II) ANTICIPATORY BREACH

Species of repudiation. E.g. you have declared that you will not perform, so I am treating that as a breach and terminating now. Focus is what can P do now they've said, "won't perform" – treat it now to give right to terminate now instead of waiting for the future - ***Hochster v De La Tour***.

If wait, then would be an actual breach rather than repudiatory or anticipatory breach.

(c) Consequences of right to terminate

Firstly, election to terminate or affirm the contract must be made. Election is a one off choice (but if party repudiates again, party has choice again – ***Millstream v Schultz***).

1. Election to Terminate

1. Parties do not have to perform remaining contractual obligations
2. damages for loss of bargain
3. BUT – rights which have been unconditionally acquired are not divested or discharged (***McDonald v Denny***). These include:
    a. Deposits (***Bot v Ristevski***)
    b. Advance payment, IF

i. Total failure of consideration; and
ii. Right to retain payment was conditional on full performance (Mason CJ in ***Baltic Shipping v Dillon***).

However, installments are **conditional** on basis that something is received in return for them later; therefore, they are claimable once the contract has been terminated on grounds of repudiation (***McDonald v Denny*** per Dixon J). Obviously different if it's a divisible contract e.g. sale of goods – 10,000 tonnes in 10 installments for payment each time because the right to payment accrues on delivery of each installment.

2. Election to Affirm

Affirmation needs to be *clear, unequivocal, permanent* and needs to be *communicated* to D.

1. Contract remains 'on foot' as if the other party never repudiated (***Peter Turnbull v Mundus Trading***) – both parties are entitled to full rights under contract (***The Simona***)
2. P can still claim damages.

3. If D repudiates, does P have duty to mitigate damage of repudiation?

White & Carter v MacGregor say no.

Facts: P to place adverts on litter bins for Ds business – 3yr contract. D repudiated on day 1. P continued to place adverts for 3 yrs and sued D for full price (i.e. debt), not damages (i.e. lost profit). Held 3:2: P was not obliged to mitigate and claim damages but could require full performance.

So in cases where a repudiation precedes the time for performance, it is not part of the mitigation rules to consider whether the P behaved reasonably in deciding to terminate (***The Stolholt***) or to continue with performance (***White v McGregor***).

BUT, this position has been criticized in:

- ***Clea Shipping v Bulk Oil International*** by Lord Reid dicta
  - P would have to accept damages as opposed to full price of contract if:
    a. The Ds cooperation was required to fulfill the contract; OR
    b. If the D can show that the P has no "legitimate interest" in performing the contract
- ***Meriton Apartments v Owners Strata Plan***
  - Mitigation was required on the basis of Lord Reid's dicta in ***Clea*** that cooperation with the D was needed.

Not yet considered by HCA.

4. Cancellation Clauses

May:

1. give right to terminate mutual obligations and give rise to damages (but not technically a breach because right to terminate); OR
2. intended to be a condition/essential term which if breached gives rise to both termination and damages; OR
3. may give right to terminate upon the happening of an event (***Woodar***) or if the goods in question are not ready by the set date (***The Mihallas Angelos*** – vessel not ready by set date then no damages & both parties discharged).

(d) Frustration

1. What amounts to Frustration?

The Hannah Blumenthal (reformulates test into one package)

- Lord Brandon: Two essential factors –
  1. Must be some outside event not foreseen or provided for by the parties which makes it impossible to perform contract at all or at least renders its performance something radically different from what parties contemplated when entered into; and
  2. The outside event or extraneous change of situation must have occurred without either the fault or the default of either party.

A/N: this is a strict and difficult test.

The Process of Comparison – fact based

Codelfa

1. What was contemplated?
   - Use contract terms and negotiations to discover.
   - Common assumption of 3shifts/6day week. No injunctions expect. Methods used as agreed, within fixed 130day limit from March 1972.
2. What was the new situation or obligation?
   - 2 shifts not 3; 5 day week; work still not finished in May 1976.
3. Compare 1-2 – was the new situation/obligations radically/fundamentally different?

- Held: manner/method of work was essential to performance. Impossible lawfully to have performed contract in compliance. New performance was radically different.

Examples

- Impossibility
  - ***Taylor v Caldwell*** – hall burnt down which contract was re so contract couldn't exist
- Commercial purpose defeated
  - ***Krell v Henry*** – room hired for the day, payment way in excess for what you would expect for rent, very clearly that it was for platform to view coronation (advertised) so Held: coronation cancelling could amount to frustration.
  - Vs. ***Herne Bay v Hutton*** – fleet, bit different. Not enough if it has become more difficult or expensive for one side
- Delay – different for each contract
  - ***o*** Normally compare delay length with remainder of contract – radically different performance?
  - ***o*** ***The Eugenia***
    - Facts: hire contract (daily rate), aware of Suez Canal closure risks (1956 nationalisation). No term agreed, but normal war clause "charterer not to order to war zone." Arrived at Port Said, shots firing, but charterer ordered into Canal. 31 Oct War: Egypt blocks canal trapping ship until January. South

not unblocked until April. Charterer wanted frustration by war in January – paying per day, so presumably stopped in Jan – if wrong, then C in repudiation.
    - Held: (1) war clause – charterer breach by allowing into Canal – voyage via canal was not required, couldn't have gone via Cape; (2) Frustration – being trapped was self-induced so no frustration if own fault. Blocking causing frustration? Canal would have been caused anyway and if had been waiting outside could have gone via Cape. Alternate journey radically diff? No, whole contract was Italy-Black Sea-India which was 138 days (Cape), or 108 days (Canal). Not that diff.
- Not enough
    - ***Tsakiroglou v Noblee Thorl*** – Facts: sale of Sudanese (non-perishable) goods to Hamburg. No date fixed for delivery. S refuses to ship as obliged to carry via Cape (S. Africa) instead of shortcut. Held: S's extra expense is not enough to frustrate.

Limits to Frustration

- Self-induced
    - i.e. P negligently causes event (e.g. fire)
    - Operates as a bar to relief (***The Eugenia***). So cannot claim frustration if event brought about by own (1) choices, (2) breach or faults.
        - In effect P may be in repudiation or fundamental breach
- Forseeability relevant?
    - ***The Eugenia*** – not is event foreseeable, but has contract allocated risks?
- Express clause covering Events
    - ***Fibrosa*** – "If dispatch hindered/delayed by war… extension of time allowed". War happened. Held: clause can allocate risks (and thus prevent frustration), but clause may not be intended to apply to 'massive' frustrating events. Covered minor, not prolonged or indefinite interruptions.
    - ***AGL Sales (Qld) v Dawson Sales -*** 'Force Majeure' clause. "Interruption" of gas supply not apt to describe any diminution in supply, even slight – so wasn't covered by clause.

2. What are the consequences if there is frustration?

Most often there is a clause dealing with this (i.e. FM). Frustration is only needed when this kind of clause does not exist.

- Advance Payments
    - Court discretion, if just, could (equity-style):
        - For sums paid = allow to retain
        - For sums payable = allow to recover
- Benefits

  - Problem where payment due after discharge, so if benefit received but not paid for before discharge and if A obtains "valuable benefit" (e.g. tenant use of room before cancellation in ***Krell***) then B can recover sum up to value of benefit – at court discretion. Subject to expenses incurred by A e.g. sums paid by A for room cleaning in ***Krell***.
- ***Krell v Henry*** – payments: £25 in advance (paid by tenant); £50 after coronation (unpaid). Held: £25 could be kept by landlord (assume accrued right like deposit – ***Baltic Shipping v Dillon***); £50 not payable by tenant – right not yet accrued.
- ***Fibrosa*** – sale price for machinery £4,800 w/ £1,600 payable in advance by buyer. B in fact only paid £1000 b4 war. So, consequence? Is it B pay £600 or S repay £1000? Held: as 'total failure of consideration' (goods not delivered) B entitled to repayment of £1,000 advance. (But is this unfair to S who may have incurred expense?).

3 Vitiating Factors

1. Mistake & Rectification

1. Common Mistake

Very rare to give rise to remedies at CL, may sometimes be able to get equitable remedies of rescission or rectification though (it's tough).

Step 1 (CL approach = VOID)

(a) Mistake as to existence of subject matter

Courts take constructional approach, in a narrow line of cases, mistaken belief as the existence of subject matter is a condition precedent.

- ***Couturier v Hastie***
  - Facts: contract for the sale of corn. The corn had already been on-sold so wasn't actually available for sale at time of contracting.
  - Held: Because it was a condition precedent of the contract, the contract was void. A representation had been made that the subject matter was in existence.
- ***McRae v Cth Disposals Commission***
  - Facts: there was no tanker at the location and there had never been one.
  - Dixon and Fullaghar JJ: there was no condition precedent, only a promise that the tanker was at that location. You need more than a contractual term about the existence of subject, you need a condition precedent that the subject matter exists.

(b) Mistake as to quality

Usually no condition precedent on the constructional approach. At common law, the circumstances in which a contract has been found void are extremely restricted – needs to change the whole nature of the contract.

- ***Bell v Lever Bros*** – Couldn't void it because did not involve the actual subject matter of the contract but a mere quality of, so not of fundamental character. Judges warned against retrospectively constructing contracts to find condition precedents where there are none – endorsed in ***Taylor v Johnson***.
- ***Svanosio v McNamara*** – Facts: Sale of land with a hotel but the hotel was only partly on the land. Held: Not a condition precedent, only can be so if whole subject matter is mistaken.
- ***Associated Japanese Bank v Credit du Nord SA*** – Facts: fraudulent sale of non existent machines to a bank. There was an express condition precedent of a contract of guarantee, Held: court treated that guarantee as a condition precedent. Did try and apply the CL to find a condition precedent but the reasoning is questionable. Not rel. jurisdiction though. Be wary.

ANOTHER COMMON LAW APPROACH

In ***Great Peace Shipping v Tsavliris Salvage*** the English CoA declined to follow ***Solle*** (equity), and instead came up with 5 steps – good alternative for Qld because rejected equity:

1. Common assumption as to the xistence of a state of affairs

2. No warranty by either party that such a state of affairs exists
3. The non-existence of state of affairs must not be attributable to the fault of either party
4. Performance <u>impossible</u>
5. Vital attribute

(likely to be less common than frustration)

Step 2 (Equity approach – not in QLD)

(c) When is it possible to rescind in equity? Basically never

Solle v Butcher

- <u>Facts:</u> tenant discovered that rent control legislation affected their property, when they thought it didn't.
- <u>Held:</u> could be rescinded in equity.
- <u>Per Lord Denning:</u>
    a. A common misapprehension as to facts or as to their relative and perspective rights
    b. Fundamental nature of this mistake
    c. Absence of fault on the part of the claimant
    d. Note that there are discretionary limiting factors on your ability to rescind:
        a. Affirmation
        b. Substantial restitution in *integrum* impossible (not possible to approximate the position the parties were formerly in)
        c. Intervention of bona fide third party purchaser
        d. Lapse of time
        e. Promise has acted inequitably
- Some other Australian jurisdiction have continued to follow ***Solle*** though
- Rejected by ***GPS*** – so just rule it out.

<u>NOTE:</u> ***Australia Estates v Cairns City Council*** – the state of the law in Queensland at least is that there is no equitable jurisdiction to set aside, on the ground of common mistake, an agreement which is valid and enforceable at common law.

2. Mutual Mistake

The two parties are both mistaken as the nature of the term, but they think it is a different thing to each other (so both parties make different mistakes).
The courts task is to apply the <u>objective theory of contract</u>. If no meaning can be given to each party's representation, then no contract has been formed.

a. ***Raffles v Wichelhaus*** – <u>Facts:</u> contract for goods delivered on *Peerless* the ship. There were two ships of this name, each thought it was different one didn't know the other existed. <u>Held:</u> contract was void because it could have reasonably been given either meaning. Note this is very rare.
b. ***Goldsborough Mort v Quinn*** – meaning of the clause was plain and unambiguous and parties couldn't just use the excuse that they didn't understand.

3. Unilateral Mistake

Generally will not void a contract unless there is involvement on behalf of the other party.

1. D aware of mistake
2. Deliberately set out to ensure other party is not aware
3. What kind of mistake is it?

(a) Mistake as to terms

(contract = voidable)

- Knowledge of mistake is not independently sufficient (***Smith v Hughes***)
- Snapping up – someone put something up on ebay (e.g.) for a ridiculous price by accident and before can change it on internet someone snaps it up (***Hartog v Colin & Shields***) it must have been obvious that the seller did not intend to make the offer
- ***Taylor v Johnson*** HC set out circumstances in which the courts would intervene in equity to provide relief, per Mason, Murphy and Deane JJ (USE THIS):
  1. Serious mistake
  2. D knows of mistake
  3. Deliberately sets out to ensure that the other party is not aware

(b) Mistake as to identity

(contract = voidable; void if no contract has been formed)

- Classic scenarios involve fraud (***Ingram v Little*** – D held himself out to be someone else, and P had checked, she must have intended to contract w/ someone else, was void *ab initio*).
- Can allow for recovery by innocent third parties
- Offer can only be accepted by a person to whom it is (objectively) addressed
  - ***Cundy v Lindsay*** – Facts: Rogue was man named Blenkarn but made out to Lindsay (handkerchief manufacturer) that were reputable business Blenkiron & Co. As a result, Lindsay agreed to deliver large order. Rogue sold it on to Cundy and disappeared before paying Lindsay. Held: Where identity is of crucial importance can void it, it was a one sided contract. Offer was made to Blenkiron & Co. not rogue. Criticised tho because based on subjective intention of Lindsay (should have been objective) and also should have been voidable.
  - ***Shogun v Hudson*** – rogue went to dealer to buy car on hire purchase. Said his name was Mr Patel & showed licence. Dealer communicated with Shogun Finance who did credit check & said good to go. Rogue sold car to Mr Hudson. If hire purchase had been legit Hudson would be legit owner. Shogun Finance claimed it wasn't and sued Hudson for conversion. Held: hire purchase contract not legit. Followed ***Cundy*** and said void where identity is important. Face-to-face exemption did not apply because seller was not the dealer, rather finance company was.
- Mistaken identity from a distance
  - ***Kings Norton Metal v Edridge*** – Facts: similar to ***Cundy*** but the rogue just used fancy letterhead type thing. So Held: Not void for mistake because

couldn't identify company like that (had no knowledge of company – so clearly not that important).
    - ***Cundy v Lindsay*** – see above.
- Mistaken identity in person

  Strong presumption in favour of a contract coming into being (will still be voidable tho)
    - ***Ingram v Little*** – person in room was not who the offer was made to – sisters wanted the rogue to pay in cash but he represented himself as someone else and gave an address. They checked with the bank and it was all G. But then cheque was dishonoured. Held: contract void for mistake – only intended to deal with Mr Hutchinson not rogue – heavily criticized.
    - ***Lewis v Avery*** – Facts: P (Lewis) sold car to rogue impersonating Richard Green (famous actor). P convinced because rogue had studio pass w/ his picture. Rogue gave cheque but it bounced. Rogue sold car to D (Averay) and disappeared. Held: contract was only voidable, not void, because a contract had still been made with person in the room (so can't say contracting with someone else) + was barred from rescission because 3rd party.
    - ***Shogun v Hudson*** – can provide an out if there is a written contract (parol evidence rule type stuff)

(c) Remedies?

1. Contract is voidable
2. Contract is void Rescission (usual bars) (rare – because say a contract still formed)
3. Rectification (alternative) (rarest)
    a. refers to mistakes in *instruments* – usual bars of 3rd party rights, performance no longer possible and laches (time delay) apply.
    b. Only available where parties can prove a continuing common intention as to the content of an instrument e.g. to correct the schedule of a deed – ***United States v Motor Trucks Ltd***
    c. Concerned with contracts and documents, not with intentions – ***Frederick E Rose (London) v William H Pim Junior***
    d. May be awarded in cases where non-mistaken party is guilty of unconscionable conduct – ***Riverlate v Paul***
    e. Given that rescission is not generally available for unilateral mistake, it can be assumed that rectification will be equally hard to achieve.

4. Non *est factum* "this is not my deed"

Must show:

1. The signer is under a relevant disability (must not be temporary)
2. That the document was believed to be radically different
3. If the rights of innocent parties are affected, that there was no carelessness of the claimant (burden on P to prove they weren't negligent) - ***Saunders***
    - ***Saunders v Anglia Building Society*** – Facts: Mrs G (broken spectacles), signed doc w/out informing herself of contents. Lied to by her nephew's business

partner that docs were merely gift of home to her son. Actually, granting a mortgage over property in favour of Anglia. Defaulted on mortgage so came after Mrs G. Held: Mrs G was bound because temporary blindness doesn't fly. Provided 3 step test though (above).

- ***Petelin v Cullen*** – Facts: Petelin could not read English, signed doc believing it to be a receipt for $50. Actually gave Cullen option to purchase Petelin's land which Cullen then exercised. Petelin refused to sign a contract for sale and Cullen sought specific performance. Held: applied ***Saunders*** and found in Petelin's favour.

2. Misrepresentation

A misrepresentation is a positive statement of fact which is made or adopted by a party to a contract, and which is untrue. Common law route.

Remedies

A contract will be voidable if misrepresentation is established – never will be void *ab initio*. In circumstances where the misrep is tortious or breach of contract then there is a right to claim damages at common law as well. Other forms of misleading conduct fall under statute (e.g. 7.1).

1. Is there a misrepresentation?

(a) Is there a false statement of fact?

A statement of fact is distinguished from a mere puff, a statement of law, or the expression of an opinion.

- Existing or past, not future – a mere prediction does not give rise to a statement of fact.
    - ***Ritter v Northside Enterprises*** – Facts: made a prediction of the future, seller asserted that I think the land will be sewered in 4 mths time. Held: prediction could not be statement of fact; however, they had misrep their current state of mind…
- Statements of opinion – can't amount to misrep BUT mix of opinion & fact?
    - ***Gould v Vaggelas*** – Facts: made statements of opinion like the hotel is good and very profitable but also made very clear factual misreps i.e. of revenue streams so Held: had to read them together – sufficiently factual.
- Mere sales puff – generally doesn't
    - BUT ***Smith v Land & House Property Corp*** – Facts: represented that tenant was 'most desirable tenant'. Held: while evaluative, it is a positive statement of fact about likelihood of ability to make regular payments.
- Statement of future intention
    - ***Edgington v Fitzmaurice*** – "a misrepresentation as to the state of a man's mind is … a misstatement of fact."
    - ***Ritter v Northside Enterprises*** – person didn't genuinely believe land would be sewered in the 4mths represented. Held: misrepresentation.
- Change in circumstances

- ***With v O'Flannagan*** – sale of medical practice. Dr O'F said truthfully in Jan that had takings of £2000pa but in May he became ill and so were actually £5/wk. Failure to disclose this change was held to be misrep.

- Can't be misrep if too vague
  - ***Dimmock v Hallet*** – can improve with "moderate cost" – not misrep bc vague
- Fact or law?
  - Prediction of future of the litigation of a court case would not be held to be a positive statement of fact. Reps of law are usually simply a rep of opinion until the court rules on the matter, and then the ordinary principles governing opinion apply.
  - ***David Securities v CBA*** – will only be a misrep if you are in a certain position (i.e. legal adviser) which would mean you are expected to know the law. Distinction between mistake of fact and mistake of law didn't matter to payments made under mistake of law cases. So likely that a simple misrep of law will be covered by the exception if they're shit.
  - What's the deal

(b) Is it Positive?

The general rule is that positive statement or conduct is required. However, in certain circumstances failure to speak the truth amounts to misrepresentation.

I. Partially true statements
   - ***Dimmock v Hallet*** – hello; ***Krakowski v Eurolynx*** -

II. Fraudulent concealment of a defect
   - ***Horsfall v Thomas*** – Facts: faulty gun, concealed by metal. Conduct of concealing could amount to a positive statement of fact. Held: P hadn't relied on misrep because failed to check the gun so hadn't been interested in quality, but if had then it would have amounted to misrep.

2. Has the representor induced the representee to enter?

(a) Addressed to the party in reliance

A person can rely on a representation only if it is intended for them or a class of persons to which they belong.

- ***Peek v Gurney***
  - Facts: P had relied on prospectus from the company which misrepresented. P alleged misrepresentation. Prospectus was addressed to the initial allotees.
  - Held: P was buying 'down the line' and therefore was not an intended addressee.
- ***Commercial Banking of Sydney v Brown***
  - Facts: P asked for a report about a deal at the bank. Bank went to the dealers bank and sought a report of the dealer. The dealer made several misrepresentation, made with the intention that a customer of the bank might act on it.
  - Held: It did not matter that the specific plaintiff was not in mind, customers were in mind and P fell within this class.

- ***Essanda Finance Corp v Peat Marwick Hungerfords*** – third parties to a proposition cannot sue on reliance.
  - Facts: finance company were auditors of the company to whom Essanda had loaned $$.
  - Held: audits had been intended for the company, so Essanda could not rely

(b) Party in actual reliance

Actual reliance on behalf the representee –

- May simply be a 'real factor' (i.e. one of the things which made them rely)
  - ***Leighton Properties v Hurley***

    Possible that the party would have entered into the contract anyway but held that the representation or concealment was a material reason for them having entered into the contract Facts: purchase of building unit but plan of property varied so significantly from what was represented pre purchase. Held: Entitled to rescind.
- Representee's knowledge of the truth may disprove that the party is in actual reliance
  - ***Holmes v Jones***
- An opportunity to discover the truth does not disprove reliance
  - ***Redgrave v Hurd***

    Facts: sold a solicitors firm. Misrepresented the income of the firm. Purchaser had the opportunity to inspect the financials of the company, but he didn't. Held: misrep.

(c) Inferred reliance

If the inducement is sufficiently material, then an inference of inducement may be drawn. A material representation is one which in an objective sense is calculated ot influence the mind of a reasonable person.

- ***Gould v Vaggelas*** – a representee may still rely on the fact that a representation was intended to induce and did in fact induce.
  - Facts: Gould purchased a tourist resort. False statements by Vaggelas that 'profitable' and false figures as to returns and occupancy rates. Mrs G had expressed incredulity as to figures.
  - Held: inference could be drawn from material representation even when the representee expressed doubt.
- ***Nicholas v Thompson*** – not material, even though rep of fact
  - Facts: P1 & P2 enter into contract to purchase D's interest in speculative venture. During negotiations, D said he had been offered a large sum of money for his interest but had turned it down. D knew this to be false. Ps sought to rescind & recover dosh.
  - Held: could be a statement of fact, but was not material. Material – "must be likely to induce a reasonable person to enter into the contract." Not relevant if can prove reliance (can be used to establish inducement) but otherwise, take into account of surrounding factors.

Why would you ever need to infer reliance? If it's fraudulent – why would I lie? I would only lie if I'm trying to draw you in – so that's why don't need materiality.
But what if it's innocent, but it's about something that's not important
Buy my car – say "tyres are new, great nick, bridgestone tyres" – actually not great. In that case, you might argue where there is difficult evidence to prove induced – can just say who really cares about it, doesn't matter.
So look at it where there is difficult evidence p382
Facts aren't clear on inducement but because of materiality would infer inducement. On the other hand, is inconsequential – barely material etc. then probs won't infer inducement.

3. Is the representor culpable?

(a) Innocent

Equitable fraud – defence to a claim for specific performance
Rescission of the contract is available but no damages

(b) Negligent

Negligent misrepresentations are a specific type of negligent misstatement and have three elements:

1. A duty of care
    a. Arising in the context of certain 'special relationships'
        i. ***Hedley Byrne v Heller*** – Facts: HB were a firm of advertising agents. Got a large order from a customer. HB wanted to check creditworthiness with bank. Bank (Heller) provided the report saying good to go (but had a disclaimer). Held: relationship was sufficiently proximate, knew info would be relied upon for a contract of sorts = special relationship.
    b. But can be found outside of special relationships as well
        i. ***Shaddock v Parramatta City Council*** – Facts: Shaddock wanted to buy a property located in jurisdiction of council. Checked with council to see if plans to widen roads. Council negligently said there were no such proposals. The proposals were a thing and the property was reduced in value. Held: DoC *because of the profession*, when providing advice or info which calls on that profession and he know or out to know recipient intends to act or rely on it.
        ii. ***Essanda Finance Corporation v Peat Marwick Hungerford*** – do not owe duty of care to *third parties*. Used multifactorial approach for duty – Esanda not vulnerable, could have made own enquiries, plus indeterminate liability for the auditor.
        iii. ***Esso Petroleum v Mardon*** – Esso had *special knowledge and skill* – knew the traffic, knew the throughput, had much experience and expertise – way better position than Mardon to make a forecast. Intended that Mardon act on it and he did.
2. A breach of duty in making the statement
    a. A person must take reasonable care in making their statements
    b. Reliance: essentially the same as for inducement
    c. Reliance damages will be available, as in torts.
3. Reliance on the misrepresentation causing loss

(c) Fraudulent

A fraudulent representation is made:

1. Knowingly; and
2. Either without belief in its truth; or
3. Recklessly, careless as to its truth or falsity

- ***Derry v Peek*** – provides definition of fraud as: it must be shown that a defendant (1) knows a statement is untrue, or (2) has no belief in its truth, or (3) is reckless as to whether it is true or false. (see test above – so use this as citation)
- ***Krakowski v Eurolynx Properties*** – may be misrep if statement of fact is made but representor fails to include info which would significantly alter interpretration.
    - Facts: Mr & Mrs K agreed to enter into contract to buy shop premises from Eurolynx as long as 'strong tenant' was organized. Contract proceeded on grounds such tenant had been arranged. Unbeknown to Ks, Eurolyns had entered an additional agreement with tenant to provide $$ for first 3 mths rents to ensure contract went ahead. When tenant defaulted on rent Ks cried rescission.
    - Held: Eurolynx failure to disclose all material facts about the 'strong tenant' was enough to constitute a misrep & contract could be rescinded on these grounds. So

4. Consequences of establish misrepresentation

Voidable – never will be void ab initio because doesn't prevent a contract from coming into being.

(a) Damages

Only available where the representor is culpable (so for negligent and fraudulent only). Turn to s18 of ACL if want damages for innocent misrepresentation because it is a strict prohibition.

(b) Rescission

Available for all kinds of misrepresentation (innocent as well).
Right to rescind the contract *ab initio*. Because the contract is on foot until rescission, it may have created rights and duties which cannot be altered. In equity, rescission requires substantial restitution rather than strict restoration of the precontractual position (Common Law requires exact restitution and is not available in Qld).

1. Restitutio in Integrum – not always needed

Alati v Kruger – couldn't be strict restitution in the circumstances (because perishable fruit) so court intervened and was willing make proper adjustments between both the parties. Now both getting subject to orders despite one party being wrong. Made alterations in terms of the payment to allow for the fact that the lease could be reassigned and trade could not be returned. So as long as can "restore them substantially to the *status quo*" that will fly.

2. Election to Rescind

- Must take place within reasonable time and be communicated
- What will be sufficient will depend on the circumstances

3. Bars to rescission

- Legit third party interests
- Affirmation
- Impossibility of restitution
- Time lapse

Sargent v ASL Developments – Facts: contract to sell S's land stated that either party was entitled to rescind if the land was affected by a town planning scheme otherwise than disclosed in Schedule. Schedule referred to an annexed certificate, but certificate was not annesed. In fact, S knew land was so affected. 2.5yrs later was advised she was entitled to rescind. But did she waive her right by receiving payments of interests and rates? Held: S was precluded by subsequent acts from exercising right of rescission because she knew it was wrong and then carried on (conduct = affirmed).

3. Misleading and Deceptive Conduct

Start here for misrep type question. Statute route.
Section 18 of ACL: A person must not in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. *Strict liability – innocent therefore covered.*

1. Who is a Person?

Federal – must be a corporation, if not a corporation then probably at the state level. But at state level can't be a corporation.

2. In trade or Commerce

- Ordinary order of business, but must be **in** trade or commerce, not 'in relation to' – as it was in ***Concrete Constructions v Nelson*** (conduct between company and employee=no)
- One off sale of assets i.e. business selling itself – ***Bevanere v Lubidineuse***
- BUT selling a family home would not be in trade or commerce – ***O'Brien v Smolonogov***

3. Engage in Conduct that is misleading or deceptive

Look at conduct overall as a whole – was the D's conduct misleading or likely to mislead – ***Butcher v Lachlan Elder Realty***

- (Facts: brochures from realtor said pool was above high water mark, but also contained disclaimer. Held: nature of parties – (1) realtor (D) was small suburban operation while P was shrewd and experienced, (2) character of transaction – large investments, (3) content of brochure – disclaimer clearly visible. Conduct was not m&d because would not expect accurate info in that context).

Take into account all factors, including (1) the character of the transaction (more complex = less likely any one bit of info is misleading); (2) the nature of the parties (more experienced = less likely to be misleading; and (3) the actual conduct (false = likely to be misleading, but possibly not where there are disclaimers).

- Includes:
  - Silence (s2(2)) and half-truths

- In ***Miller v BMW*** the parties were of equal bargaining power and it was reasonable to expect BMW to enquire about the cancellation of insurance. So even though Miller knew it was something BMW wanted to know, they didn't know BMW didn't know but they had no obligation to tell them. Also comes in to the idea that you consider whether the injured party fails to make reasonable inquiries.
- Whereas in ***Henjo*** – if look at conduct as a whole their silence/half-truth was m & d – had all the signs up saying fully licensed, seats 128 even though not licensed for all 128. Didn't matter that solicitors were instructed to find out, on the whole they were shit.

  - Representations as to future (s4)
  - Promises, only if there is an implication/representation as to some past or present fact (***Global Sportsman***) – so merely breaking a promise isn't enough
  - Opinions – only if represent something not actually their opinion (***Campbell v Blackoffice Investments***) or is not reasonably grounded (***Batemen v Slayter***)
  - Statements of law
  - Puffery (only in certain cases where it's super specific ***Dewhirst & Kay-Rent-A-Car v Budget Rent-A-Car*** – best in luxury car rental service)

- Intention does not matter, it's about what the conduct objectively would do – ***Parkdale Custom Built Furniture v Puxu*** (Facts: Parkdale manufacturing similar furniture to Puxu, BUT they were putting on labels to show different whereas it was vendors removing such logo, held: overall the conduct of Parkdale was not M&D and Puxu failed).
- For representations made to the public, must regard what the 'ordinary' or 'reasonable' members of the class of prospective purchasers addressed would do – ***Campomar v Nike International***

4. Outcome – can you recover & what can you recover?

Note – 6year time limit on the statute for bringing a remedy. Full rememdies available even for innocently misleading.

Entire Agreement/Exclusion clause?

Doesn't stop the individual from recovering – it's one among many factors e.g. in ***Henjo v Collins*** they had an entire agreement clause & exclusion clause, but that was not enough. ***Blackoffice*** – only way entire agreement clause can get you off is if you can show it breaks the chain of causation.

What can you be awarded? ACL s243

- Void (a(i))
- Void ab initio (a(ii) or void at some other date – more flexible
- Variation
- Refusing to enforce provisions
- Refund, return property

- Damages – **s236 & (e)** □ done on a tortious basis, gives status quo back (compensation) as detailed in ***Gates Case***
    - This means if can't show loss as in ***Marks v GIO*** where given option to refinance but even the actual deal was still better than any other loan, won't be able to get damages because nothing to compensate.
- Repair at own expense or provide parts
- Apply specified service at own expense

Would you prefer rescission under general law or statute? Well, courts aren't bound by equity – it's only guiding principles plus there are bars to rescission like third parties under the general law. Whereas under statute, they are bound so rescission is a legit option – plus 3rd party considerations are only considerations, so doesn't bar. Therefore, if you really wanted rescission and there was a third party involved, you would prefer to go after it under statute.

4. Duress

Very old legal doctrine, rarely litigated now due to undue influence doctrine (easier to prove). Basis: procuring contractual assent by an illegitimate threat □ improper pressure. Renders a contract voidable rather than void.
Must show: (1) illegitimate pressure, (2) which was a cause of the decision to enter into the contract.
Consideration? Presence of consideration does not necessarily bar the victim's claim (***Pao On***). Consideration that was there is not obliterated by the presence of duress, which is why the contract will be voidable and not void.

1. Illegitimate Pressure?

"There must be pressure, the practical effect of which is compulsion or the absence of choice… the classic case of duress is… the victim's intentional submission arising from the realization that there is no other practical choice open to them." – Scarman L, ***The Universe Sentinel***.
Illegitimate pressure must take form of some wrongful conduct or unlawful demand.

(a) Duress to the person

Barton v Armstrong – Facts: P and D were 2/4 company directors. P & 2 other directors wanted to exclude D from management. P signed deed, buying D out of company for a lot of money. D had made threats to have P murdered. Held: the unlawful threat was one of the reasons for entering into the agreement, so duress was established.

(b) Duress of Goods

Hawker Pacific v Helicopter Charter – Facts: An unsatisfactory paint job on helicopter was returned twice. No express threat, but it was made clear that release would occur only after contract executed stipulating an amount due and released from liability for defective workmanship. Held: (1) Hawker had no right to the helicopter, so demand was unlawful. The payment contract was voidable. (2) Defendant's conduct was such that the victim would form a reasonable belief that threat was being made.

(C) Economic Duress

- Needs to be distinguished from acceptable commercial pressure.
    - ***The Sibeon v The Sibotre*** – Facts:
    - ***Smith v William Charlick***

- ***White Rose Flour Milling v Australian Wheat Board***
- Withholding or threatening to withhold contractual performance can constitute economic duress
  - ***Nothern Ocean Shipping v Hyundai Construction*** – Facts: Shipbuilding contract for the Atlantic Baron. Fixed Price payable in 5 installments, fixed in USD which devalued. Hyundai threatened cancellation of the contract. Payment was made in return for increased letter of credit. Held: This new contract was voidable for duress. However, North Ocean had delayed in relation to rescission and so affirmed.
  - ***The Universe Sentinel*** – Facts: Int. Transport Worker Federation had extracted payments into ITWF's welfare fund by blacklisting a ship. Admitted duress, but claimed it was legal under industrial relations legislation. Held: blacklisting not in pursuance of trade dispute so not expressly lawful. Consequence of blacklisting were 'so catastrophic' (Diplock).

(d) Threats to commit a lawful act?

In certain circumstances lawful acts might be illegitimate – such as blackmail or extortion. Prima facie though conduct which is lawful will be legitimate – ***Monrovia***.

2. Cause of entrance into contract?

Need not be sole cause, but person applying pressure may show it made no contribution – ***Crescendo Management Pty Ltd v Westpac Banking Corp***. Sufficient that it is one reason for entering the contract – ***Barton v Armstrong***. Can be a threat to a third party (spouse, loved one).

3. Remedies Available

Primary remedy is rescission. Regular bars to rescission (e.g. affirmation – ***The Atlantic Baron***: delay in seeking repayment/rescission constituted affirmation). Once rescission has been ordered, payments made will be recoverable on the basis of a restitutionary right to recover for the unjust enrichment of the defendant.

4. When will it be void *ab initio*?

(a) When the will is overborne

Overborne will theory is criticized for being too simplistic - ay not in all cases be so much duress as to completely overbear one's will duress merely needs to be one of the causes, not an overbearing one. NSW case ***Crescendo Management*** rejected the theory. Theory is: "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent." – ***Pao On v Lau Yiu Long***. Kerr J in ***Occidental Worldwide Investment Corp v Skibs A/S Avanti*** – court must "at least be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of any [intention to contract]."
BUT If the whole will was actually overborne, then the contract should be void *ab initio* and not simply voidable as there was no actual intent to contract. CASE?

(b) When consideration = relief from duress

A victim will find it relatively easy to recover under duress where the 'contract' made had no consideration. Telling someone the item of duress will no longer be under duress is not valid consideration.

TA Sundell & Sons v Emm Yannoulatos – Facts: contract for purchase of iron, in return for letter of credit. D made threat to cease supplying iron at that amount because they deemed that amount to no longer be commercially viable. Held: the variation of credit was induced by the threat to stop supplying, therefore there would be no consideration. Parties were already obliged to supply under that contract and therefore the variation had no consideration. So the extra money was recoverable in unjust enrichment.

5. Undue Influence

Can be difficult to distinguish from unconscionable conduct, but need to remember that the court is concerned with relieving parties from contracts where there has been influence that goes beyond ordinary persuasion or commercial pressure.
Two types (equity based) per Cotton LJ in ***Allcard v Skinner***:

1. Actual undue influence – nature and character of influence must be proven
2. Presumed undue influence – where there is a pre-existing relationship of the requisite type that either:
    a. Belongs to an established class; or
    b. Is factually such that the court will presume undue influence to be present.

1. Actual Undue Influence

Relies on evidence of influence at the time of transaction. Requires evidence of the state of mind of the party. May inevitably involve appealing to character of their prior relationship.
Involves proof of actual pressure being exerted during the transaction.

2. Presumed Undue Influence - Established Class

Requires: (1) rel. of trust and confidence; (2) improper dominion of that relationship.

(1) relationship of trust and confidence

Examples of established include, but are not limited to:

- Solicitor and client – ***Dowsett v Reid***
- Religious adviser and disciple – ***Morely v Loughnan***
- Physicians and patients – ***Breen v Williams***
- Parent and child – ***Phillips v Hutchinson***
- Guardian and ward
- Trustee and beneficiary

(2) Improper dominion of that relationship

Burden on the dominant party to prove transaction was free from 'undue influence' and "was the free outcome of the donor's uninfluenced will" – ***Watkins v Combes***

3. Presumed Undue Influence – Factually so

Requires: (1) rel. of trust and confidence; (2) improper dominion of that relationship.
This is where a relationship of trust and confidence is proven on the facts, rather than simply one of the presumptive categories.

(1) relationship of trust and confidence

Take into account:

a. Trust and confidence reposed

b. Age, health, literacy, education, intelligence, personality, character, business experience
c. Relative strength and character
d. Period and closeness of friendship
e. Opportunity to influence

- Best way to displace this presumption of undue influence is so prove that P had advice from a legal practitioner independent of the contracting party.
- Transaction need not be disadvantageous to P but an absence of consideration may have evidentiary relevance – ***Johnson v Buttress***, ***Royal Bank of Scotland v Etridge (No. 2)***
- ***Johnson v Buttress*** – if can establish this then the onus will switch (like in presumed undue influence for established class) so D now has to prove that it was a transaction made with you under your own free will.
    - Facts of JvB: Johnson (appellant) had for many years looked after the deceased, Buttress. B was unsophisticated in business affairs & reliant upon J. B transferred ownership of a piece of land to J w/out receiving independent legal advice. After B's death, transfer was challenged by B's son.
    - Held: transfer to be set aside. Although no evidence J had *actually* pressured B, there was an antecedent relationship between them (B placed trust & confidence in J and relied upon her for advice) which cast upon J burden to prove she had not taken advantage of position. Unable to do son. Importantly, evidence that B did not realize parting w/ property permanenty.

Lloyds Bank v Bundy – Facts: Elderly farmer whose farm was his only assets. Son's company in financial trouble. Guaranteed his overdraft with farmhouse as security. Held: a special rel. arises where someone relied on the guidance or advice of another, where the other is aware of the reliance, and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.
O'Sullivan v Management Agency and Music – Facts: Gilbert O'Sullivan was being manipulated by his agent. Held: they had a close and confidential relationship which gave rise to the presumption of undue influence.

(2) improper dominion of relationship

Just look at the facts and make a judgment

4. Third Parties and *Yerkey v Jones*

(a) Yerkey v Jones

It will be unsconscionable to enforce a guarantee, when:

1. Bank understood the guarantor to be in a relationship of trust and confidence
2. The transaction was voluntary – no gain from the transaction on behalf of guarantor
3. Guarantor under mistake/misunderstanding as to the purport and effect of the transaction

Bank will not have been unconscionable though if they take steps to deal directly – i.e. provide independent advice etc.

(b) Garcia v NAB

Facts: P (Mrs Garcia) a physiotherapist. Mr Garcia a foreign exchange broker. Mrs Garcia took mortgage from NAB. To secure a loan for her husband (had some business experience) "all moneys" mortgage – executed guarantees to cover other loans to companies controlled by Garcia.
Note: Could not be said the family was beneficially interested that the loans had been paid off and did not appreciate the guarantees were supported by the mortgage.
Deciding factors: Mrs G signed without explanation from the bank but aware she was signing to guarantee of one of her husbands overdrafts – thought it was limited to only a specific scenario, but wasn't˚. Not explained to her that the guarantee operated so that it was secured by the mortgages she had given some years earlier. Some pressure applied by husband who had called her a 'fool in matters of business' and asserted he was an expert. She was attempting to save her marriage.
Held: Majority decided on basis of ***Yerkey v Jones*** but denied the rationale was because women were a subservient class (special wives equity). Kirby J rejected ***Yerkey v Jones*** yet arrived at the same outcome on the basis that equity protects vulnerable parties in a relationship.
Note that ***Yerkey v Jones*** and ***Garcia v NAB*** were both husband/wife scenarios – but there is no reason why the doctrine couldn't extend to other relationships of trust and confidence.

6. Unconscionable Conduct

(1) EQUITY ROUTE

Undue influence looks to the relationship between the parties and their affect on consent. Whereas unconscionable conduct looks towards vulnerability of one party and the conduct of the stronger party in their dealings with them.
CBA v Amadio –Deane J provides the two-pronged test detailed below.
Onus of proof to enliven jurisdiction, it is on P to show that circumstances fall under (so the two-pronged test). But then, onus is on D to show that the transaction was fair, just and reasonable.

1. Is there a special disability between A & B?

a. Overriding characteristic is that the adverse circumstances has the effect of placing one party at a serious disadvantage *vis a vis* the other.
b. Examples per Fullagar J in ***Blomley v Ryan***:
    i. Poverty or need of any kind
    ii. Sickness
    iii. Age
    iv. Sex (probs not anymore hey)
    v. Infirmity of body or mind
    vi. Drunkenness
    vii. Illiteracy or lack of education
    viii. Lack of assistance or explanation
c. Advanced age, limited grap of written English, relied on son for management of business affairs, no independent advice - ***CBA v Amadio***
d. Infatuation is special disability – ***Louth***
e. Gambling addiction is not – ***Kakavas***

CORE: must be able to show that the special disadvantage serious affects his or her ability to make a rational judgment as to his or her own best interests – ***Kakavas***.

What about consideration?

While lack of consideration may be relevant, it is not necessary. Even where consideration is adequate, the transaction might have been unfair, unjust or unreasonable (***Amadio***).

2. The other part knew or was wilfully ignorant as to that disadvantage and takes unfair advantage

(a) Knowledge Element

1. ***Kakavas*** – HC says need actual knowledge, recklessness or willful blindness
2. Constructive notice is where the D would have received notice of the special disability if it had made investigations that a reasonable person would have made in the circumstances – HC refused to extend this to commercial transactions in ***Kakavas***.
3. Do they know of facts that would lead to the constructive knowledge of that special disadvantage – like in ***Amadio***. Plus, because the bank acted through the son, his actions are its actions and his knowledge is its knowledge – so consider this.

(b) Taking the unfair advantage

1. In ***Louth*** there was actual knowledge & actual taking advantage (suicidal/creation of environment). Not necessary to prove a subjective intention to exploit.
2. Need evidence of exploitation or victimization, or you need proof of a *predatory state of mind* – indifference to the best interests of the other party is not sufficient in commercial transaction – ***Kakavas***.

3. Was the transaction fair, just and reasonable?

Onus is on the D to prove this. Factors to consider a really quite factual.

(2) STATUTE ROUTE

s20 ACL

Conduct that is unconscionable, within the meaning of the unwritten law. includes principles from ***Amadio***, ***Accc v CG Berbatis Holdings***, ***Kakavas***. May include other equitable doctrines such as unilateral mistake and sharp practice. Needs to be in trade or commerce.

s21,22

Unconscionable conduct in relation to goods and services – considers things like relative bargaining power, whether there are any unnecessary terms that protect the rights of the D, whether the P had any capacity to understand the nature of the transaction, did conduct comply with industry code and was consistent with how they dealt with other similar parties for such transaction etc.

Remedies

- Damages under s236 of ACL
- Other orders may be sought pursuant to ss237 & 243
    - Rescission-like orders

        - To vary the contractual terms
        - To refuse to enforce certain provisions
    - Discretionary orders regarding loss or damages must prevent or reduce loss or damage
        - ***Marks v GIO***
    - There are no strict bars to restitution but courts will be guided by equitable principles
    - Avoidance *ab initio* is not the only remedy, and may not be suitable
        - ***Akron Securitives v Iliffe***
- The principles are the same as for breach of s18 of the ACL
- Damages are calculated in terms of the consequential loss directly flowing from the unconscionable conduct in question

2.

4 Remedies: Damages

1. Did you cause a loss?

(a) 'But for test'?

Causation can be established using the 'but for' test, or failing that, on a common sense basis – ***March v Stramare***. But in ***Chapel v Hart*** – McHugh J rejected 'but for' as determinant because a person should not be liable for every wrongful act or omission. So often not enough to establish this.

(b) Concurrent causes – which was dominant?

- If two causes have been proved, which is dominant/effective cause needs to be established. Contract loss may be caused by (I) breach of obligations and (II) exemption clause. E.g. ***The Monarch*** – held unseaworthiness was the dominant cause as it led to delay which meant couldn't get through before government orders (exemption clause) re world war (knew WW was a thing).
- ***Shipping Corporation of India v Gamlen*** – Facts: cargo loaded into hold, get bad weather, ship moves and cargo damaged. Exception if peril of sea (bad weather). However, held: bad stowage for expected weather was effective (dominant) cause – should have packed better.

(C) Prevention Principle

How far can D (in breach) allege that part of loss caused by P? Breach by P (e.g. of implied term to cooperate), or P loss not completely caused by D breach.

- ***CMA Assets v John Holland*** **[2015]** – as a matter of construction it prevent CMA relying on the "prevention principle" as any additional costs from John Holland were dealt with by the contract. Dredging and removing debris by subcontractor – left concrete in seabed case.

2. Was it all too remote? (contemplation of contract?)

Hadley v Baxendale – (1) damages arising naturally; (2) damages in reasonable contemplation of parties. This is the limits kinda?

- Facts: crank shaft broken at mill, D agreed to carry it to London so it could be replicated. Delayed in delivery by D = breach. Mill out of action for several days.
- Held: (facts avail. Issue) loss was not in reasonable contemplation of parties at time of contract – didn't know purpose of carriage. Didn't know what they knew but probs not.

The Heron II **[1969]** – reformulated ***Hadley*** – Lord Reid: "*whether, on the information available to the D when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.*"

- Facts: D shipowner chartered to carry bulk sugar, expected to take 20 days, took 29. Delay was caused because D brought sheep on board and detoured to sell them. P claims fall in price (another ship arrived w/ sugar so price fell by £4000 -4%). Shipowener didn't know intended use for sugar, offered interest of £160 for 9 days.

- Held: D knew of existence of *a* market. "Not unlikely" sugar would be sold in market at market price on arrival. Loss of market price recoverable.

Victoria Laundry v Newman – Facts: D sold new boiler to P laundry. D knew of P business. Delay = breach. P claimed (1) lost laundry business (£16/wk); (2) loss of 'specially lucrative' dyeing contract (£262) for Gov't defence. Held: recover (1) only as it was imputed knowledge (general damages); loss (2) required special knowledge (and got special damages) – didn't have that loss in contemplation.
McRae v Cth Disposals Commission **(1951)** – Facts: Cth agency (D) agrees to sell tanker to P salvor. P mounts expensive salvage operation but no tanker existed. Express promise tanker existed = breach. Held: ***HB***(1) natural loss would be lost profit (as it did not exist, P could not prove lost profits. ***HB***(2) Cth had actual knowledge of the loss that P would suffer (in contemplation of the parties P would mount full salvage operation, so £3000 wasted expenditure and £285 sale price could be claimed.

(a) Likelihood of loss – how likely is likely?

How likely have damages to be to satisfy ***HB***? Givvs J in ***Wenham v Ella*** said did not need to "*go so far as to establish that the los s was a near certainty or odds-on probability.*" So sufficiently likely in contemplation of parties – probably less than 50/50.

(b) Extent of Loss?

- ***Parsons v Uttley Ingham*** **[1978]** – Facts: P pigfarmers; D hopper makers (pig feeder). D sold and delivered hopper with closed ventilator (failed to open it) so no ventilation and feed got mouldy. Pigs ate it and died. Did D really know about this damage? D said we will buy you new pig nuts. Q: what happens if mouldy nuts fed? OR what is likely if D supplied hopper unfit for storing nuts suitable for pigs to eat? Held: (1) not necessary to see extent of loss; (2) D and P to contemplate type of consequence as serious possibility – D held liable for pigs deaths.
- ***The Achillieas*** **[2008]** – Facts: ship hired; redelivery date 2 May 2004, actually delivered 11 May. Clear breach, but had no termination by shipowner. Shipowner's claim - already arranged next charter (after redelivery) to 3rd P for 4 months. 3rd P had right to cancel next charter. Shipowner renegotiated 3rd P contract [reduction $8000/day]. What of "lost charter [4mths x $8000/day]? Charter argued ***HB***(1) - volatile market; ***HB***(2) - no actual knowledge of terms of next charter.
  - Held (by Arb, TJ, CA): damages not limited to daily hire rate, ***HB***(1) charterer fully aware of market - damages not too remote, it was expected type of loss so volatility irrelevant - Gaskell thinks this is fine.
  - BUT Held by HL: not in reasonable contemplation of parties, too remote, Hoffman said depends on 'assumption of risk' by D. Could say charterer had not assumed this very high risk - so introduces this idea of assumption of risk, even if contemplated the loss.

3. What if it was a non-pecuniary loss?

Damages for physical consequences of breach are fine - e.g. injury or as in ***Watts v Morrow*** where it was physical inconvenience of living with defective house (due to breach) for x months.

While damages for disappointment by breach were historically not allowed e.g. train delays = missed appt with clients (***Hamlin v GNR***), humiliating dismissal = injured feelings (***Addis v Gramophone***), courts have started to let a few slide:

- ***Jarvis v Swan Tours*** - ruined skiing holiday (£62), awarded £125.
- ***Jackson v Horizon Holidays*** - a loss was in contemplation of parties for ruined holidays - legit.
- ***Heywood v Weller*** - solicitor negligent in obtaining non-molestation order. Distress was direct and inevitable consequence of failure to perform sole purpose of contract.
- ***Farley v Skinner*** - if it is the type of contract to provide pleasure, relaxation, peace of mind - i.e. an object of the contract is this, then can award such damages. Facts: survey of a house. Found that one of the purposes of the survey fit into above possible object because they wanted them to look into airplane flight paths (didn't want interrupted sleep).
- ***Ruxley v Forsyth*** - $70,000 swimming pool built too shallow. P awarded $2,500 for loss of pleasurable amenity.

4. Did the P mitigate loss appropriately?

Burns v MAN Automotive - Facts: 1977 D supplies used truck, "engine fully reconditioned" for $31K. Was not - had heavy fuel use, engine knocking & lack of power. Clear breach of warranty. 1978 P learns fully of breach, continued to use it from there.

- Held (3 judges): not entitled to loss of earnings for use after 1978, said not a case of mitigation but rather it's too remote - not in contemplation of parties.
- Held (Gibbs J): clearly in contemplation that P might lose profits of an interstate hauler, but subject to mitigation - they took it too far.
- Held (Brennan J*): made link btn contemplation & mitigation, same result. Said could return truck etc. pay for repairs, carried on best he could. Couldn't afford much, so how could it be said he hasn't mitigated his loss? So the lack of money was brought about by D's actions.

Dodd Properties v Canterbury City Council (cited by Gibbs J [659]) - "*A P who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do: particularly where, as here, the P's 'financial stringency,' so far as it was relevant at all, arose, as a matter of common sense, if not as a matter of law, solely as a consequence of the D's wrongdoing.*"

Dougan v Ley – Facts: D contracts to sell P a Sydney tax plus (valuable) licence = $1850. Just before trial P buys another taxi in market for $1900. Held: Not a question of a *replacement* in mitigation – Dixon J: "could obtain an additional car for their business without prejudicing their righ to obtain *in specie* the taxi-cab rego & licence already contracted for". P wanted to build a taxi fleet and still wanted D's taxi as well. So make sure don't confuse P's normal commercial dealings with mitigation.

5. Proof and nominal damages

P bears the burden of proving not only that it has incurred costs or suffered loss, but also the amount of those costs or the loss it has sustained. Standard = balance of probabilities, as much precision as subject matter reasonably permits – ***CMA Assets v John Holland (No 6)***. Uncertainties exist, sure BUT mere difficulty does not prevent estimation (***Burns***, ***MacRae***, ***Amann***) especially where caused by D.

Two steps:

1. Loss suffered resulted from the breach

2. Loss was not too remote

If P unable to prove damage or loss is a result of breach, entitled to 'nominal' damges e.g. $5. Consider injunction to stop future breaches.

6. How do we actually calculate the damages then?

(a) Expectation Loss

This occurs where you expected to be put in a beneficial position after performance (i.e. make a profit/some kind of benefit) and position post breach is one where you do not receive such benefit.

1. ***Sale of Goods Contracts – SGA 1896***

Section 51: Damages for non-acceptance by buyer
□ Difference btn contract price and market price; at date when should have been accepted.
Section 52: Damages for non-delivery by seller
□ Difference btn contract price and market price; at date goods should have been delivered.

2. ***Carriage Contracts***
   - *Goods damaged: difference between sound value at place of destination & actual damaged value at destination.*
   - *Goods completely lost: sound value at place of destination.*
   - *Goods delayed: lost profit (**Hadley v Baxendale**), drop in market value (**The Heron II**)?*
3. ***Contract for Services***
   - Failure to provide any service = extra costs for another to repair + truck not able to earn profit for x days while repaired.
   - Defective repairs of truck = if truck crashes □ repairs; if truck not able to earn profit □ profit for x days while repaired.
   - Rockstar fails to show up = loss on ticket sale + wasted expenditure...?
   - Bad holiday = unclear how to value pleasure or disappointment – in ***Jackson v Horizon Holidays*** was given £1,100 for a £1,200 holiday; ***Jarvis v Swan Tours*** was given double $
4. ***Speculative Contracts: Competitions***
   - ***Chaplin v Hicks*** – actress P prevented from attending final of beauty contest when D cancelled. P entitled to value of lost chance of prize? Yes even tho speculative – got £100

(b) Loss of Amenity

Not all breaches are measurable by profit.
***Radford v De Froberville* [1977]** - Facts: 1965 contract to sell land, B to build wall. B fails to build □ cost in 1965 = £1,200; cost in 1977 = £3,400. Damages – award the cost or diminution in value of P property (minimal)? Held: loss of amenity was important to P, so P entitled to be in 'as good a position' as if performed – not necessarily 'as good a financial position'. SO awarded cost of repairing breach (£3,400).

(i) Reinstatement

***Ruxley Electronics v Forsyth* [1995]** – Facts: swimming pool construction - £70,000; builder fails to build to correct depth – "skimped performance." Damages? No reduction

in value is sold house; P wanted pool rebuilding = £21,000; is P entitled to cost of reinstatement? Held: unreasonable to reinstate, it's not the choice between profit or reinstate. Instead, reasonable valuation of what P ought to have received but did not = £2,500 for loss of amenity.

(c) Reliance Loss

Where P cannot demonstrate whether contract would have resulted in profit P can recover expenses reasonably incurred as "reliance damages" ⍰ no rule that P must "elect" between reliance or lost profits as alternatives – it depends on ***Robinson*** principle.

Amann: cannot claim these losses if would have occurred despite breach (i.e. cant be in superior position than no breach). D is required to prove losses were inevitable (because their breach prevents P proving otherwise. If inevitable, can't get damages.

Commonwealth v Amann Aviation

- Facts: tender for 3yr contract w/ Cth for aerial coastal surveillance; 12 March 1987 P awarded contract. Expected 6mths preparation, P acquires and fits out 14 aircrafts in US but delays involved. 12 Sept P starts flights, but only with 7 ready aircrafts (not 11 fully equipped ones), most of which lacked necessary endurance. Cth meanwhile had practical difficulty – await P's non-performance (obv problems after March), prev. supplier (Skywest) about to dispose of aircraft but agreed to continue until 11 Sep. 12 Sept Cth cancels contract.
    - Unfortunately Cth couldn't justify cancellation on CL grounds or under their contract rights (needed to provide notice). Therefore, in breach.
    - Problems with what to award as P's damages:
        - Not much profit expected in yrs 1-3 as heavy upfront expenditure
        - Profit would be after renewal (year 4+)
        - Could P claim for wasted expenditure (reliance) + lost future contract renewal?
- Held: Awarded $6.6m in reliance loss, i.e. expenditure rendered futile by Cth repudiation. Cannot claim these losses if would have occurred despite breach BUT burden on D (Cth) to show P would not have recouped losses (e.g. from renewal) – failed at this so could get $$.
    - $6.6m = $4.4m loss on resale of airplanes + $856k pre-operational expenditure.

McRae v Cth Disposals Commission **(1951)**

Not a bar to awarding reliance loss that impossible to value a non-existent thing. Non-existent wreck so unsure how much oil, P claimed profit of £250,000. Breach made it impossible to measure value of profit as never existed, but can measure wasted expenditure.

(d) Interest on Damages?

Hungerfords v Walker **(1989) HC**

(e) Breach Date Rule

General rule (not universal) is assess the damages at the date of breach – ***Johnson v Perez***.

How far to take account of facts arising after the date of breach? E.g. repudiation by D of contract but would D have terminated anyway for valid reasons.

7. Restitutionary Damages

Restitution used in two senses:

1. Law of "restitution" or "unjust enrichment"

   Analogous to property law e.g. return of P's property from D top P or account for profits
2. Is it possible to compensate P by "restitution" of D's gain from breach? (EXCEPTIONAL)

   What if D deliberately breaches contract? I.e. a breach for "efficiency", calculates D gain more than damages to P? P remedy could = injunction (if in time)

Surrey CC v Bredero **[1993]** – Facts: P council sells land. D agrees to build 72 houses; in fact D builds 77 houses (extra profit). Council claims extra as if contract for 77. But D never promised to pay extra so D claims no loss by P: nominal damages? Held: generally not possible to compensate for breacher's profit rather than victim's loss.

BUT, ***A-G v Blake*** (secret agent case) contradicts (better authority) ⍰ Law can recognize restitutionary claim for profits made in 'appropriate cases' – i.e. D to repay D's profits. It is an exception remedy though.

No Australian HC authority but take into account that this is very exceptional – difficult to apply commercially. Does P have any interest or entitlement to complete value of D's profits? Dissent by Hobouse L in ***Blake*** suggests the case should have been remedied in public law. Said principle of compensation would have given answer.

Wrotham Park Estate v Parkside Homes **[1974]** suggests may be able to make normal compensation order. Facts: P sells neighboring land to D; restrictive covenant not to build on land sold; houses built in breach of restrictive covenant; P's land not diminished in value. Held: wouldn't give injunction for demolition (for social and economic reasons). SO awarded compensation to P, not restitutionary damages i.e. value of what D would reasonably have had to pay for P to relax their rights under the agreement (basically a licence fee).

WWF for Nature v World Wresetling Federation **[2008]** confirms this compensation based claim.

5 Equitable Remedies

1. Underlying Equitable Principles

1. He who comes to equity must come with clean hands
    a. ***Thomson v Golden Destiney Investments***
2. Equitable remedies are discretionary
    a. E.g. specific performance or injunction – court will exercise discretion on basis of overall fairness. Emphasis on "conscience"
3. Equitable remedies may be additional, or alternative, to common law remedies
    a. So while CL provided damages for loss of bargain, equity provides flexibility e.g. account, money/assets held in trust for particular purpose.
4. 'New' principles such as promissory estoppel, unconscionability?

2. Range of Equitable Remedies

1. Declarations
2. Specific performance
3. Injunctions
4. Equitable damages
5. Equitable compensation
6. [Taking] "Account"
7. Constructive trusts
8. Appointment of Receivers
9. Rescission
10. Rectification
11. Specific delivery
12. Delivery-up & cancellation

(a) Declarations

Dougan v Ley – damages inadequate
– look what bargaining for. E.g. for sentimental reasons (case), special rare asset
Burns v MAN Automative

Reputation