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LAWS2112 – Law of Contract B

UNIVERSITY OF QUEENSLAND LAW SOCIETY INC

TALBOTSAYER

VITIATING FACTORS:

RESCISSION

Definitions:

Rescission is the end of a contract at the election of a wronged party. If a contract is 'voidable', a party has a right to rescind, but the contract is valid and effective until they elect to do so. Void contracts, by contrast, never existed in the first place. Unenforceable contracts are valid and effective but might not be enforceable by one or both parties.

Termination is the ending of a contract due to complete performance or some other circumstance (election of party to terminate due to breach, frustration) which ends the contract after the performance or circumstance. Any rights accrued before the termination of the contract remain enforceable.

The distinction between these various states of contractual validity are important for subsequent transactions. One cannot give what one does not have: **nemo dat quod non habet.** For example, if contract for sale of car is void, then title doesn't pass to buyer, because contract never had any legal effect. But, if contract of sale of car is voidable or unenforceable then title may still pass. In the case of a voidable contract, the contract is effective until rescinded, so if title passes before rescission, the title transfer has the effect of barring rescission on the basis of intervening rights of a third party. In the case of an unenforceable contract, although the contract is unenforceable it still allows for the valid transfer of property. It simply cannot be enforced by one or both parties.

So, if a rogue purchaser sells the car onto a third party before the first party (wronged) rescinded it via a voidable contract, the legal title passes. On the other hand, if the contract is a void contract, title never passes.

Election to rescind:

Rescission requires positive election by wronged party in order for the remedy to have effect. The election must be made within a reasonable time and be communicated to the other party: (***Alati v Kruger***), and what will be sufficient to discharge the communication element will depend on the circumstances (***Car & Universal Finance v Caldwell***).

Car & Universal Finance v Caldwell

Facts:

- Caldwell sold a jaguar to rogue but cheque used for payment was dishonoured.
- Caldwell contacted both the police and automobile association immediately.
- Jag purchased by Car and Universal Finance from the rogue

Issue:

- Had Cadwell done enough to communicate rescission of the contract?

Ratio: Yes

- Contract was rescinded – Caldwell had taken all steps possible to rescind the contract and equity doesn't require the impossible.

Effects of Rescission:

1. Contract treated as if it was never effective and enforceable

2. Parties must be substantially restored to the pre-contract status quo, in a process called **restitutio in integrum** (the way things used to be).

- E.g. if A fraudulently induces B to enter into a contract to purchase A's house, restitutio in integrum requires that B return the house to A, and A return the purchase price to B.
- This must be possible in order for rescission to be available as a remedy

3. If not rescinded, the contract continues in force.

Bars to rescission:

Impossibility of **restitutio in integrum**

Alati v Kruger

Facts:

- Alati sold a fruit business in Toowong to Kruger
- Sale was induced by fraudulent misrepresentation
- By time of judgment the business was closed down, the premises vacated, and the landlord re-entered

Issue: Was rescission available as a remedy?

Held:

- Rescission was available in equity, provided that necessary adjustments were made to allow for depreciation of business
- E.g. fruits and vegetables, fact that landlord had re-entered land
- The test now is that you need to be able to restore both parties to substantially the same position as they were prior to the contract being formed – if this can't be done, you can't rescind

Rights of third parties

Once a third party has acquired title to the object, provided they didn't have knowledge of the rogue behaviour, the court will favour the third party purchaser over the party electing to rescind.

In ***Lewis v Averay***, , the rogue had already sold the car to a third party before contract was rescinded, so the rights of the third party acted as a bar to rescission. By contrast, in ***Car and Universal Finance v Caldwell***, the wronged party immediately made all reasonable steps to communicate rescission, which occurred before the third party purchased the car from the rogue. As such, rescission was available as a remedy.

Affirmation

The act of affirming the contract (i.e. the wronged party indicating that they wish to proceed with the contract) will displace their right to rescind the contract.

Sargent v ASL Development
Facts:

- Sargent and Turnbulls sold their houses to ASL Development via standard form REINSW contract for sale of land
- cl16 gave vendors right to rescind if the property was "affected by any town and country planning scheme"; i.e. if the property was being developed in accordance with a development proposal that engaged the relevant statutory approvals process
- Vendors knew at date of contract that the lands they were selling were affected by a planning scheme
- Nonetheless, vendors took receipt of 32 months of quarterly interest payments
- Vendors later attempted to rescind the contract. Purchasers initiated proceedings for specific performance.

Issue: Did the vendors affirm the contract, barring their right to rescind?

Ratio:

- Vendors had knowledge of the basis by which they were capable of rescinding the contract at the outset – they knew it was subject to a development process, and they knew this gave them a right to rescind
- Receipt of interest payments amounted to unequivocal acts affirming the contracts which barred vendor's right to rescind

The general test: affirmation requires

a. Sufficient knowledge of basis for rescinding contract
b. Unequivocal words or conduct that indicate an intention to proceed with the contract

Lapse of time (laches)

In exceptional circumstances, the lapse of time will prevent rescission, but such circumstances are usually accompanied by conduct leading to affirmation. Some commentators reject the notion that lapse of time is a bar to rescission, however.

Unconscionable Behaviour

Rescission may not be available to someone who has acted unconscionably after election to rescind

Alati v Kruger
Issue: Was Mr Kruger entitled to rescind even though he shut down the business?

Ratio: Kruger notified Alati that he intended to rescind, and Kruger had to shut down because he was losing too much money. He didn't act unconscionably

Execution of the contract

In some cases, the execution of a contract (i.e. the full performance of a contract, not simply 'signing' it) is a bar to rescission. ***Seddon's Case*** suggests that the sale of shares cannot be rescinded after they are concluded. The scope of the rule is somewhat uncertain. It at least applies to completed transfers of land: ***Svanasio v McNamara***; ***Krakowski v Eurolynx.*** The rule in Seddon's case has also been applied to leases (***Angel v Jay***), although ***Solle v Butcher*** seems inconsistent with this extension. Additionally, the rule has been been applied to a contract for the sale of business (***Vimig v Contract Tooling***).

There is a lot of pushback against the application of the rule in Seddon's case. ***Solle v Butcher*** is prima facie inconsistent with ***Angel***. Additionally, ***Baird v BCE Holdings*** directly contradicts ***Seddon's Case***, and ***Leason v Princes Farm*** seems at odds with ***Vimig***. As such, the application of the rule is uncertain. However, it may be circumvented by identifying obligations, even minimal, which have yet been performed.

Svanosio v McNamara (1956) 56 CLR 186

Facts:

- Sale of hotel that, unknown to the parties, was only partly built on the land that was transferred to the purchaser as part of the sale
- Sale had been completed prior to the purchaser learning of the problem

Issue:

- Was the misrepresentation innocent?

Ratio:

- Held; rescission not available to the purchaser. Innocent misrepresentation only.
    - Purchaser should have investigated title between signing contract of sale and completion of sale
- Contracts for sale of land have two steps – period between settlement and completion – this is when you should investigate whether the land you paid for was what you wanted
- So, once you've purchased, you are no longer able to rescind unless fraud or total failure of consideration

Exclusion clauses

Exclusion clauses will most likely act as a bar to rescission in cases involving misrepresentation. Properly worded exclusion clause can create an estoppel preventing the other party from relying on the vitiating factor. However, exclusion clauses cannot exclude fraud as a vitiating factor (***CBC v Brown***).

MISTAKE

Common Mistake

At Common Law:

- A contracts with B with respect to some subject matter S, which both parties mistakenly believe to be S*
- Both parties make the same mistake
- At common law, common mistake may render a contract void
- In equity, common mistake may render a contract voidable
    - But equitable jurisdiction not entirely settled – Denning's creation

- **The Great Peace** – where the parties agree that something shall be done which is impossible at the time of making the agreement, it is much more likely that one or other will have taken responsibility for the mistaken state of affairs.

McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 (common mistake at common law)

Facts:

- Tenders invited for purchase of "oil tanker" lying on "jourmaund reef" said to contain oil
- The tanker, and the reef it was said to lie on, didn't exist
- The CDC had simply acted upon 'mere gossip' in thinking that there was a tanker to sell

Issue: Was the contract void for mistake?

Ratio:

- ***Couturier v Hastie*** (case where at the date of the contract, cargo which was supposed to sail all the way to London had already been sold at Tunis because the corn became so fermented it couldn't continue) doesn't bind the court in the present case – that case didn't rule that the contract in that case was void.
    - Unlike Couturier, the parties didn't proceed on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations. The officers of the CDC made an assumption, but P didn't make an assumption in the same sense.
    - The contract had to be constructed such that there was a promise that there existed a tanker in the position as part of the contract
- Cites Denning LJ in ***Solle v Butcher*** – neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake
- Party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party

- CDC lacked reasonable grounds for their mistaken belief. They must have known that any tenderer would have relied implicitly on their assertion of the existence of a tanker, at the latitude and longitude given.

The test:

- Requires a fundamental mistake that destroys the consensus element of the contract. Great Peace test

Great Peace Shipping Co Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679 (Court of Appeal declined to follow Solle v Butcher) [E]

Facts:

- Tsavliris, a salvage company, contracted to provide services to the Cape Provider, a ship in difficulty in the South Indian Ocean. A third party advised Tsavliris that P's ship, the Great Peace, was 35 miles from the Cape Provider. T then contracted with GP to hire GP until its own tug could arrive (5-6 days) in case human rescue was necessary.
- As soon as GP diverted course it became apparent to T that the distance was 410 miles, not 35 miles. D waited two hours, until they could locate and strike an arrangement with a closer vessel, before communicating their cancellation of the contract with GP.

Issue:

- Was the purported contract void or voidable because it was concluded by reason of a fundamental mistake of fact in that both parties proceeded on the fundamental assumption that GP was "in close proximity" to the CP when she was not?
- Is there such a thing as mistake in equity?

Ratio:

- "if, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common mistake" – think back to McRae v CDC

THE TEST:

1. Common assumption as to existence of state of affairs
2. No warranty by either party that the state of affairs exists
3. Non-existence of state of affairs must not be attributable to either party
4. **Non-existence of state of affairs must render performance of contract impossible**

5. State of affairs may be the existence of or a vital attribute of consideration to be provided or circumstances which must subsist if performance of contract is to be possible – e.g. ford v holden probably doesn't matter

- Above test comes from the principle that you first need to determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake before you can turn to the rules as to mistake – Lord Steyn in ***Associated Japanese Bank***

- In this case, it was telling that Ds didn't want to cancel the contract until they could find a closer ship. Thus, the contract still had purpose at the point at which the mistake was realised, and element 4 of the test wasn't satisfied.

- ***Solle v Butcher*** was probably wrongly decided. There is no reason why the house of lords in ***Bell v Lever Bros*** were oblivious to the principles of equity. The result would have probably been the same if the case were considered on equitable grounds. Thus, ***Solle*** is incorrect.

Australian Estates Pty Ltd v Cairns City Council [2005] QCA 328 (Current approach to common mistake in Queensland)

Ratio:

- Atkinson J, Jerrard JA agreeing; McMurdo P considering it unnecessary to decide – majority of QCA adopted what was said in ***Great Peace***, and opined that ***Solle v Butcher*** shouldn't be followed in Australia (obiter, because no mistake occurred in the case)

In Equity:

Solle v Butcher [1950] 1 KB 671 (rescission in equity for common mistake) [E]

Facts:

- D agreed to let a flat to P for 250/year
- Flat had previously been let at rent of 140

- Substantial work was done on the flat, and both parties believed this altered the nature of the premises as to free them from the relevant rent control – were mistaken
- D actually couldn't charge rent higher than 140

Issue:

- Was there a separate action in mistake in equity with a more relaxed test than that at common law?

Ratio: (Denning LJ)

- Yes. "Cooper v Phibbs (a case about an uncle who accidentally told the nephew that he (the uncle) was entitled to a fishery when in fact the nephew was) affords ample authority for saying that, by reason of the common misapprehension, the lease can be set aside on such terms as the court thinks fit"

Contract voidable in equity if:

1. A common misapprehension either as to facts or as to their relative and respective rights
2. Fundamental nature of this mistake
3. Absence of fault on part of the claimant

In Australia, the position of ***Solle v Butcher*** is uncertain. The High Court stated in ***Svanasio v McNamara*** that:

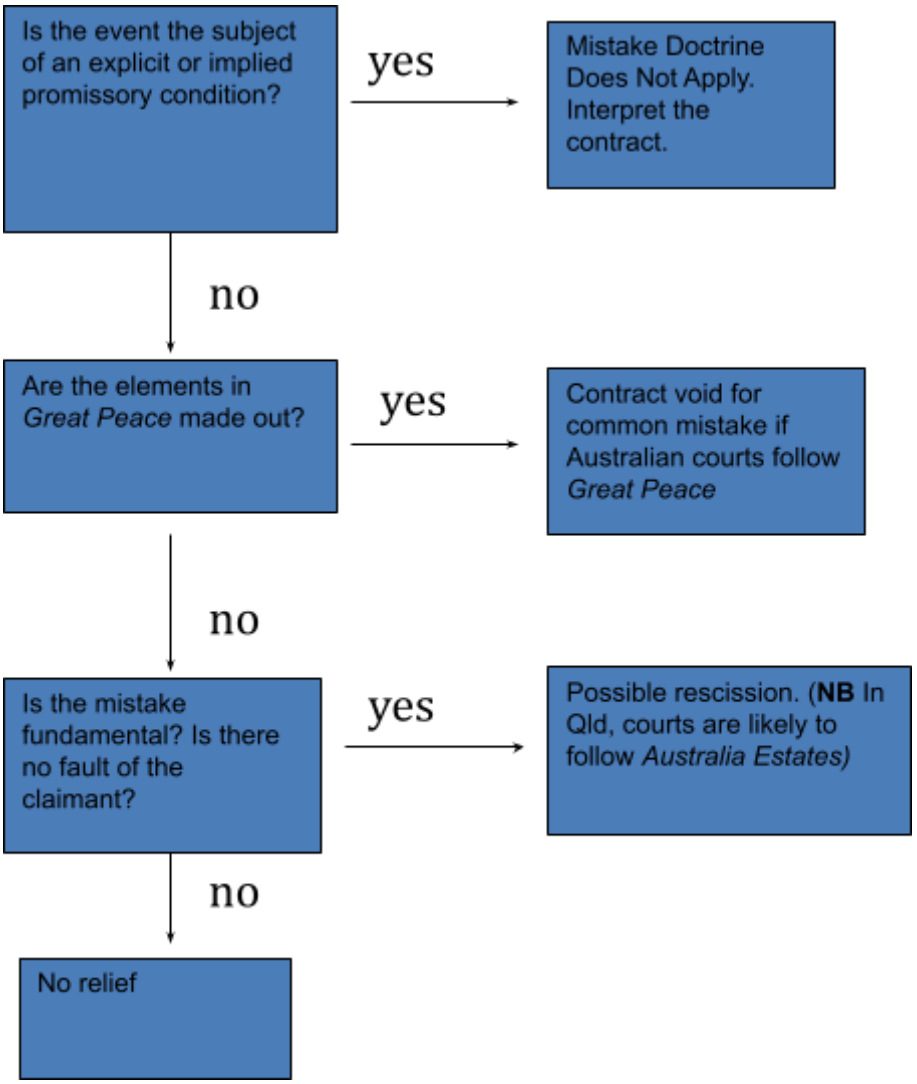
> *"there may be cases of 'mistake' in which it would be so inequitable that a party should be held to his contract that equity would set it aside. … But … it is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract."*

Commenting in ***Taylor v Johnson*** on their discussion of ***Solle*** in ***Svanasio***, the High Court said:

> *"Presumably, their Honours were referring to 'fraud' in the wide equitable sense which includes unconscionable dealing. If they were not, we do not share the difficulty to which they referred.'"*

The Queensland Court of Appeal held in ***Australian Estates v Cairns CC*** that there is no equitable jurisdiction to set aside a contract on the grounds of common mistake.

On the other hand, in ***HWG Holdings Pty Ltd v Fairlie Court Pty Ltd*** , the NSWCA continued to follow ***Solle***.



Mutual Mistake

A contracts with B with respect to subject matter S, which A mistakenly believes to be S*,

and B mistakenly believes to be S"

Raffles v Wichelhaus (1864) 159 ER 375 (mutual mistake)

Facts:

- Purchase of cotton from Bombay
- Supposed to be transported by the ship "Peerless"
- Two ships had this name, arrived at different times

Issue:

- Was the contract voided by the mutual mistake of the parties?

Ratio:

- Courts looked for extrinsic evidence to determine which was the agreed ship but each intended a different ship
- No consensus ad idem, and therefore no contract

Unilateral Mistake

A contracts with B with respect to subject matter S, which B mistakenly believes to be S*

Generally a unilateral mistake will not affect a contract unless there is involvement on behalf of the other party: ***Taylor v Johnson***

If there is involvement of the right sort, a mistake as to terms will render a contract voidable where there is unconscionability. A mistake as to identity will ordinarily render a contract voidable, but it may be void if no contract has been formed because the contract was not accepted by the right person

As to Terms

Smith v Hughes (1871) LR 6 QB 597 (unilateral mistake) [E]
Facts:

- Purchaser thought oats were new oats, seller knew they were old oats
- Purchaser bought them

Issue:

- Was the purchaser's unilateral mistake enough to make the contract void ab initio?

Ratio:

- No – There is not a legal obligation on the vendor to inform the purchaser that he or she is under a mistake, not induced by the act of the vendor.
- Fact that seller knew they were old oats was irrelevant – purchaser didn't make clear that they only wanted to buy new oats

Taylor v Johnson (1983) 151 CLR 422 (equitable rescission for unilateral mistake)

Facts:

- J granted an option to T to purchase two adjoining pieces of land for a total price of $15,000
- J refused to proceed with sale when T exercised the option because she thought the contract provided for a price of $15,000 per acre
- J was indeed mistaken as to what the option and contract stipulated as the price, and T knew that J was probably mistaken as to what the contract stipulated as the price

Issue:

- Was the contract void ab initio on the basis of the mistake? NO
- Alternatively, can J look to equity to rescind the contract? YES i.e. is it voidable?

Ratio:

- There is a clear trend to adopt the objective theory of contractual interpretation. Any notions of subjectivity are purely the realm of estoppel.
- The common law rule of McRae v CDC applies to the present case, and so J can't rely on their own unilateral mistake to say the contract was a nullity from the beginning

- On the other hand, equity grants the opportunity to rescind.
- "The particular proposition of law which we see as apt and adequate for disposing of the present appeal may be narrowly stated. It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party doesn't become aware of the existence of his mistake or misapprehension."

- Comment limited to cases where second party hasn't materially altered position and rights of strangers haven't intervened (i.e. presume rescission is available)

HCA: A party is entitled to rescission for a unilateral mistake if:

1. A party enters into a **written** contract under a serious mistake about its contents in relation to a fundamental term
2. Other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that
3. The other party deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension

- Per Mason ACJ, Murphy and Deane JJ

As to Identity

Prima facie, an offer can only be accepted by the person to whom it is objectively addressed. If it is not accepted by this person, the contract is void. Other cases of fraudulent misrepresentation of identity only render the contract voidable subject to there being no bars to rescission. Often, the timing of the election to rescind will be too late, and third party rights will intervene.

Consequently, many cases turn on whether the offer was made to the 'fraudster' personally or to the person whom the 'fraudster' was pretending to be, and there is a distinction drawn between face-to-face dealings and dealings over a distance.

Over a distance

Cundy v Lindsay (1878) 3 App Cas 459
Facts:

- Rogue called Blenkarn impersonated well-known firm called W Blenkiron & Son.
- Blenkarn placed written orders for goods with the Ps
- Signed the orders so the signature appeared to be Blenkiron & Co
- P, who knew of Blenkiron but not their address, accepted the orders and despatched goods.
- Blenkarn sold some of these goods to D, against whom P claimed in conversion

Issue:

- Was the contract void on account of the unilateral mistake of Lindsay?

Ratio:

- Yes. From beginning to end R believed they were dealing with Blenkiron and Co.

King's Norton Metal Co Ltd v Edridge
Facts:

- Rogue named Wallis had notepaper printed in name of Hallam & Co, and pretending to carry business in that name, ordered a ton of wire from P
- P delivered the wire on credit and Wallis sold it to D

Issue:

- Was the contract void on account of the unilateral mistake of Lindsay?

Ratio: No.

- P contracted to sell the goods to the writer of the letters. If it could be shown that there was another entry called Hallam and Co and another entity called Wallis, then the case might have come within the decision in ***Cundy v Lindsay***
- Only one entity, albeit trading under an alias, and there was a contract in which property passed to him.

In Person

Shogun Finance Ltd v Hudson [2004] 1 AC 919 (HL) [E]
Facts:

- H bought a Shogun car from a crook who had disappeared
- Crook had signed a hire-purchase agreement with Shogun, purporting to be a Mr Patel. He used Mr Patel's stolen driving licence as evidence. Shogun checked Patel's credit rating, and finding it to be satisfactory, gave the crook the car.
- H was a private purchaser who bought the vehicle in good faith.

Issue:

- Did a contract exist between Shogun and the crook?

Ratio:

- Hobhouse – no consensus ad idem between the finance company and the rogue. Firstly, Rogue never intended to contract with the finance company. Also, Either

the contract created by that acceptance was with Patel or there was no consensus ad idem.
- Phillips – correct approach is to construe the document to determine the identity of the hirer in written contract cases. As such, the hirer was Mr Patel, and the contract was void.

- Face to face – court preferred Lewis v Avery jurisprudence. There is a rebuttable presumption that you are dealing with the person in front of you, not the person they are pretending to be.
    - Can be rebutted by showing that only intended to deal with the person fraudster is impersonating
        - Was importance attached to the identity of the person that the fraudster pretended to be?
        - Did the seller check the name of the person the fraudster pretended to be?

Ingram v Little

Facts:

- Rogue turned up, wanted to purchase car from seller. Rogue said he was someone he was not.
- Seller checked at the post office whether the person existed – they did (at the post office)
- Cheque bounced, and the car was onsold

Issue:

- Was the contract void ab initio?

Ratio:

- Yes. Majority – judge was entitled to find that the identity of Mr Hutchinson was significant and that it was with him that the vendors intended to deal.
- Sellers LJ doubted whether Phillips v Brooks (very similar case) was correctly decided.

Lewis v Averay [1972] 1 QB 198
Facts:

- Person sold car to someone claiming to be a Hollywood actor when this person produced a pinewood identity

Issue:

- Was the contract void ab initio?

Ratio:

- Denning LJ - the contract was good – seller intended to deal with whoever was there.
- Impossible to distinguish between Phillips v Brooks and Ingram v Little on the facts, so Phillips to be preferred
- Contracts are only voidable when one party is mistaken as to the identity of the other
- Contract was rescindable but it wasn't rescinded until the contract was sold to a third party.

MISREPRESENTATION

At the outset, it is important to note that misrepresentation as a doctrine only applies when an alleged statement is not a 'term' of the contract. If this is the case, then common law and equity can provide relief on the basis of principles relating to misrepresentation.

In recent times, the common law doctrine of misrepresentation has largely been overtaken by statutory provisions, particularly those in the Australian Consumer Law pertaining to 'misleading and deceptive conduct'. Nonetheless, common law and equitable principles of misrepresentation are still important because remedies differ somewhat and the common law doctrines inform interpretation of the statute.

Generally, 'misrepresentation' requires

- Positive statement of fact which is made or adopted by a party to the contract
- The positive statement of fact is untrue

If a misrepresentation *induced* a party to enter into a contract, then it renders a contract **voidable** (usual bars to rescission apply)

In circumstances where the misrepresentation is tortious or a breach of contract, then there is a right to claim damages at common law.

There are three types of misrepresentation. Each have particular requirements and remedies.

- Innocent misrepresentation
- Negligent misrepresentation
- Fraudulent misrepresentation

Generally there are three issues to consider:

1. Was there a misrepresentation?
2. Did the misrepresentation induce the representee to enter the contract?
3. What type of misrepresentation was it (innocent, negligent, or fraudulent)?

Was there a misrepresentation?

The existence of a misrepresentation requires that a positive statement of fact is made which is not in fact true. Generally, the statement must be made about an existing or past fact, rather than future expectations. Additionally, 'sales puff' normally falls outside the meaning of a representation, although in some cases this may amount to an implied statement of fact (***Smith v Land & House Property Corp***). However, there are notable exceptions to these general rules about opinions and statements of future expectations, in addition to partially true information and failures to disclose new information. In any case, it is necessary to look at the circumstances to ascertain both the meaning of the representation and whether the relevant representation was false.

Bisset v Wilkinson [1927] AC 177 (E)
Facts:

- P vendor said that the land he was selling could carry 2000 sheep if properly worked
- Property had never been used to carry sheep
- Purchaser later sought to rescind the contract because it couldn't carry that many sheep

Issue: Was the statement a representation of fact?

Ratio: No.

- Ordinarily, statement as to carrying capacity should be considered a statement of fact. However, because buyer knew that the block had never carried sheep, it must be considered a statement of opinion
- In order to determine meaning of the statement, need to consider
    - Material facts of transaction
    - Knowledge of parties

    - Words used by the parties
    - Actual condition of the subject matter
- Also, the statement wasn't false. D failed to prove that the farm if properly managed was not capable of carrying 2000 sheep.

Statements of opinion not statement of fact

Smith v Land & House Property Corp (1884) 28 Ch D 7 (mere puffs) (E)
Facts:

- Representation that the tenant was described as a 'most desirable tenant' offering a 'first class investment', when in fact he was frequently late in making payments
- The tenant had paid "his last quarter's rent by driblets under pressure"

Issue: Was the statement a representation of fact or a mere opinion?

Ratio:

- This was a statement of opinion, but within that opinion was an implied statement of fact that the maker of the opinion had reasonable grounds for the statement of opinion
- Bowen LJ – 'if facts aren't equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion (Bowen LJ)'
- "In this case, the landlord knew the relations between himself and his tenant better than other persons, so when the landlord says that he considers that the relations are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable"

Brown v Raphael
Facts:

- Lot 11 was described in sale particulars for auction as the absolute reversion receivable on the decease of a lady aged 69 to the whole of a trust fund, with a sum set aside to pay an annuity to the old lady.
- Estate duty was payable on the death of the annuitant, **who is believed to have no aggregable estate**

Issue:

- Was the statement that the old lady had no aggregable estate a representation of fact, or just an opinion?
- Was it a material fact?
- Was it untrue?

Ratio:

- The fact was a material fact, because it is important to a purchaser to know whether the payment of estate duty by the trust fund would be limited to the rate for the reversion alone (because this would determine how much money was left in the trust fund at the end)
- The statement implied that the makers of the statement made it on "substantial and reasonable grounds".
    - No probable way for purchaser to find out what else might be in the lady's estate – didn't know her name. Even if purchaser inquired to the Public Trustee, that inquiry probably wouldn't tell them much.
    - Also, the person making the statement was a well-known firm of solicitors.
- There was no basis for the representation made. It was made by a clerk who knew nothing about the subject matter.
    - But, he wasn't dishonest, so it wasn't fraudulent misrep.

Statements of future intention not statements of fact

As a general rule, statements of future intention are not statements of fact. However, predictions, statements of opinion and statements of future intention may make an implied representation about something factual. Firstly, a statement of opinion may imply a representation that the opinion is genuinely held, which occasionally may be proven false. Second, a statement of opinion may imply the existence of a state of affairs supporting the opinion or prediction. The question becomes whether there exists a reasonable basis for the making of the statement (***Brown v Raphael)***.

Edgington v Fitzmaurice (1885) 29 Ch D 459 (opinions and statements of future intention) (E)
Facts:

- D company directors issued a prospectus for sale of shares in their company
- Prospectus stated purposes for which the money raised would be used – expansion
- In fact, real purpose was to pay down debt

Issue: Was the prospectus a misrepresentation of the purpose of the offering?

Ratio: Yes

- Company directors never had any intention for using the money for the purpose which they advertised
- Only ever had an intention to use it to pay down debt
- Misrepresentation as to state of mind
    - "the state of a man's mind is the same as the state of his digestion"
        - difficult to prove, but a fact
- the misrepresentation wasn't knowingly false, but it was reckless enough to be fraudulent

Ritter v Northside Enterprises
Facts:

- D made a representation that they believed the area was to be outfitted with sewage within four months
- In fact, the plaintiffs claimed that the defendants made the representation with either knowledge that it was fraudulent, or without caring whether it was true or false
- In fact, sewage wasn't to be installed until 18 months at the earliest

Issue:

- Was the prediction of the future a statement of fact?

Ratio:

- The representations alleged to have been made were as to the future, but they involved the assertion that Mr. Gray believed that the area would be sewered within the time mentioned. In other words, the fact allegedly misrepresented was the state of mind of Mr. Gray. (at p303)

Statements of Law:

After the case of ***David Securities Pty Ltd v Commonwealth Bank of Australia***, there is no longer a distinction between a statement of law and a statement of fact. If a statement about the law is given, it will be considered either a statement of fact, or a statement of opinion, depending on the circumstances.

Failure to disclose:

Generally, a positive statement is required to create a misrepresentation, as opposed to a failure to disclose. However, there are some exceptions:

- Fraudulent concealment of a defect (***Horsfall v Thomas***)
- Changes in circumstances (***With v O'Flanagan***)
- Contracts where duty to disclose, such as contracts uberrimae fidei (contracts in the utmost good faith) (e.g. insurance contracts), fiduciary relationships e.g. solicitor and client
- Partially true statements (***Krakowski v Eurolynx***)

Horsfall v Thomas

Facts:

- Sale of firearm
- Person selling the gun put a plug in it that made it unusable
- P could have discovered the defect if it had inspected the firearm before purchase

Issue:

- Did the seller of the gun have a positive duty to inform the purchaser of the defect?

Ratio:

- Because the gun had been changed in a way that had made it unusable, it required a positive statement by the seller, EVEN THOUGH the defect would have been discovered if P had inspected the firearm before purchase
- But no actual misrepresentation because it hadn't induced the contract

With v O'Flanagan

Facts:

- O'flanagan said truthfully at the beginning of negotiations that his practice was making 2000/year
- During the four month interval prior to signing, O'Flanagan fell ill, and the value of the practice dropped until it was practically worthless

Issue:

- Did O'Flanagan have a duty to positively disclose a change in circumstances such that the previous state of affairs which he represented no longer existed?

Ratio:

- O'F under duty to communicate change in circumstances, notwithstanding that the contract wasn't uberrimae fidel (a contract of the utmost good faith)

Partially True Statements

Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563 (partially true statements; type of misrepresentation)

Facts:

- K sought a leased property with a reliable return of 10% pa
- Purchase of leased property from Eurolynx as investment
- Eurolynx went into an tenancy agreement with Swaeder in order to encourage Swaeder to be a tenant
- Krakowskis bought the property for $1,560,000 on the basis of the rent at 156,000/annum
- But Eurolynx didn't tell Krakowski that they had given Swaeder a 3-month free rent period

Issue:

- Did Eurolynx fraudulently misrepresent that the tenancy agreement forwarded to Swaeder was the complete contract between the two parties?

Ratio:

- There are three different ways of understanding representations.
    - For the question of falsity: the sense in which a representation would be understood by a reasonable person in the position of the representee
    - For the question of inducement: the sense in which a representation is understood by the representee
    - For the question of fraud: the sense in which the representor intended the representation to be understood

- Eurolynx made a positive representation to the effect that the lease was the entirety of the agreement between the seller and tenant – entire agreement clause
- The representation was false, since Eurolynx knew of the separate agreement
    - A representation can be made fraudulently without evil motive, or a plan
    - "a division of function among officers of a corporation responsible for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge possessed by each of them"

Did the misrepresentation induce contract?

Actual Reliance

Actual reliance can be stablished where there is evidence that the representation was, in fact, relied on by the party when they decided to enter into the contract. The misrepresentation doesn't need to be sole reason for entering into the contract. It is sufficient if it is a 'real' factor in the decision.

Edgington v Fitzmaurice cont

Issue/Ratio 2

- In addition to issues relating to purpose for which funds could be used, P thought he would obtain a charge over company (i.e. right to assets)
- This was not correct, but not based on misrepresentation – he just didn't know how shares worked
- Not necessary to show that the misrepresentation was the sole thing inducing the contract though

Representee's knowledge of the truth can disprove inducement

Holmes v Jones
Facts:

- Owners of pastoral property misrepresented number of cattle in an offer to purchasers dated 20 November
- Purchasers Instructed friend Mr Easy to make inspection, and in meantime requested a fresh offer

Issue:

- Could the purchasers say they relied on the original representation, even though they discovered it was false?

Ratio:

- Held: P had relied on Easy's report
- Couldn't afterwards say they had relied on a previous representation

Opportunity to discover the truth doesn't disprove reliance

Redgrave v Hurd

Facts:

- Sale of solicitor's firm and accompanying house by redgrave
- Misrepresented income as 300 pd/annum, when it was 200pd/annum
- Offered to show papers that would have shown the truth
- Hurd failed to inspect the papers. If he had, he would have realised the truth

Issue:

- Does the fact that Redgrave could have discovered the truth prevent R from establishing a misrepresentation sufficient to rescind the contract?

Ratio:

- Hurd had still relied on representation. Carelessness by the party relying on the assumption is no bar to rescission

Inferred reliance

Inferred reliance can be established in cases where the misrepresentation by its nature is calculated to induce the contract; that is, the nature of the representation was so objectively important that it must be inferred that it was relied upon in any decision regarding the contract. This implies that the person would not have entered into the contract without the particular representation having been made.

In short, a material representation is one which, in an objective sense, is calculated to influence the mind of a reasonable person to enter the contract.

****Gould v Vaggelas (1984) 157 CLR 215 (fraudulent misrepresentation)***

Facts:

- Purchase of resort in Whitsundays
- Owned by V, purchased by G
- False statement made by V about profitability of the resort and occupancy rates of the resort
- G had expressed incredulity as to the figures, she got her accountant to check over the figures
    - But these were figures fraudulently provided by Vaggelas, so she couldn't have relied on her accountant's checking of them
- G still thought figures were unreliable after that process, but she bought the resort anyway

Issue:

- Did the false statement induce G to purchase the property, if they thought the figures were unreliable?

Ratio:

- Held: inference could be drawn from materiality of representation even where the representee expressed doubt
- Gould never had any knowledge of the true financial position of the resort.
- Four basic principles for inducement
    - Even if rep is false and fraudulent, you still need to show that it was relied upon to rescind the contract
    - If a material rep is made and calculated to induce a person to enter into a contract, and that person enters into the contract, there arises an inference that they were induced by that representation
    - This inference can be rebutted if you can show that before the contract was entered into, the representee had actual knowledge of the true facts (even stronger if they know the true facts to be the truth), or otherwise made it plain that they didn't rely on the misrepresentation
        - Evidence that G didn't believe V wasn't enough to make this rebuttal
        - Brennan J – 'a knave does not escape liability because he is dealing with a fool'
    - Rep doesn't need to be sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract

Commercial Banking Company of Sydney v Brown
Facts:

- wool-growers made inquiry to bank about their dealer's financial standing
- bank relied on rep from dealer's bank which were passed on to the woolgrower
- dealer defaulted

Issue:

- was the fact that the wool-growers weren't directly addressed by the dealer's misrepresentation enough to prevent them from claiming against it?

Ratio:

- No. Held: woolgrowers belonged to a class of intended recipients of the representation (customers of the bank)
- A person can rely on a representation if it is **intended for them** or a class of persons to which they belong

Shaddock v City Council of Parramatta
Facts, Issue (see below)

Ratio:

- A person can rely on a representation if they are a member of a class whom it was **reasonably foreseeable would rely** on the representation

Types of Misrepresentation

The strain of misrepresentation informs the remedies available to a party seeking to vitiate the contract. A successful case of innocent misrepresentation only makes the remedy of rescission available to an aggrieved party. On the other hand, negligent and fraudulent misrepresentation are vitiating factors which provide damages in addition to rescission.

Innocent Misrepresentations:

Innocent misrepresentation requires:

1. There is a misrepresentation
2. Which induced representee to enter the contract
3. There was **no negligence or fraud** on part of representor

Remedy: Rescission, but no damages. No specific performance.

Negligent Misrepresentation

Negligent misrepresentation requires:

1. There is a misrepresentation
2. Which induced representee to enter the contract
3. There was **negligence** on part of representor

As a limb of negligence, negligent misrepresentation requires:

1. Duty of care
2. Breach of duty in making the statement
3. Reliance on the misrepresentation causing loss

Damages: need to show reliance on the misrepresentation has caused loss or damage – similar to the 'inducement' requirement, except it must be proven for each head of damage. As the action is tortious, the damages are 'reliance damages', as opposed to the general expectation damages remedy for breach of contract.

Shaddock v Parramatta City Council (1981) 150 CLR 225 (negligent misstatement)

Facts:

- Solicitor made inquiry about road widening
- Council responded in way that indicated there weren't

Issue:

- Did the council owe Shaddock a duty of care to provide accurate information?

Ratio:

- Duty of care:

1. Carries on a business or profession and provides advice or information of a kind which calls for skill and competence when it is known or ought to be known that the recipient intends to rely on it
2. Speaker has a financial interest in the transaction w.r.t. which the statement is made
3. Broad sense
    a. Gives info or advice to another on a serious matter
    b. In the circumstances, the speaker realises, or ought to realise, that she or he is being trusted to give the best of his or her information or advice as a basis for action on the part of the other party
    c. It is reasonable in the circumstances for the other party to rely on the information or advice

Breach:

- Reasonable care in giving info or advice

Fraudulent Misrepresentation:

Fraudulent misrepresentation requires:

1. There is a misrepresentation
4. Which induced representee to enter the contract
5. There was **fraud** on part of representor. This requires that the statement is made knowing that it is false (***Edgington v Fitzmaurice***), or without belief in its truth or recklessly or carelessly as to its truth or falsity

Remedy: Rescission of the contract (subject to the various bars to rescission), **and** damages in the tort of deceit [Note that ***NOT*** contractual damages]

Krakowski v Eurolynx

- Representee must prove (onus on P) that the representor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood
- Intent to defraud (motive) is not necessary
- But court should not find readily that there has been fraud
- Evidence from Eurolynx – didn't think that the information was relevant to the other party, so didn't convey it – this was sufficient to dispel fraud for him?
- But the lease had this provision, and Euro knew that the purchase price was based on the rent. Aggregating this knowledge, Euro knew it was making a representation that the lease was the whole agreement and therefore had engaged in fraud.
- Negligence is not fraud. Needs to be more than carelessness or inattention.

MISLEADING AND DECEPTIVE CONDUCT

S18(1) ACL: *A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*

S18 of the Australian Consumer Law, which commenced 1 January 2011, replaced the identical s52 of the Trade Practices Act and equivalent provisions in the QLD Fair Trading Act. As such, cases considering s52 are still relevant. The primary change concerned the much broader range of remedies available under the ACL than the TPA.

Although not strictly speaking a common-law vitiating factor, s18 is often considered in light of vitiating factors because, in appropriate cases, a court may make 'rescission-like' orders if a contract was induced by conduct which breaches s18 ACL. The scope of remedies available under s236, 237, 243 are much wider than those available at common law, so a s18 claim is often used as a fall-back if other claims fail. S18 is particularly powerful because it imposes a strict duty. That is, it is unnecessary to establish the fault of the offending party to engage s18.

Remedies under s18 are broad, and include

- damages
- injunctions
- declarations
- termination
- variation
- refund money

There is a microeconomic rationale for the statute, in that fully informed markets function efficiently. S18 is not really based on the principle of consent as much as the common law doctrines of mistake or misrepresentation.

Three key elements:

1. in trade or commerce
2. engage in conduct
3. that is misleading or deceptive or is likely to mislead or deceive

In trade or commerce

Generally, *trade* is related to the purchase of goods, services or land. *Commerce* refers to activities undertaken for a business purpose. In order to fall within the scope of s18, activities on which a claim is made must themselves be trading or commercial activities. It is not enough that the activities on which the claim is made are 'in relation to' trade or commerce (***Concrete Constructions v Nelson***). However, the scope of s18 is not necessarily limited to conduct that lies within the usual course of business (***Bevanere v Lubineuse***). Additionally, the provision applies to those acting in business capacity, rather than an individual, private capacity (***O'Brien v Smoganov***)

Concrete Constructions v Nelson

Facts:

- Accident on construction site in Sydney – Grovenor Square
- Respondent was employed at site and injured by grates that the foreman had assured were secured by bolts
- Respondent sought damages for breach of s52 TPA in order to avoid restrictions on quantum in workers compensation

Issue:

- Did the statement fall within the ambit of 'trade and commerce'?

Ratio:

- Per Mason CJ, Deane, Dawson, and Gaudron JJ:
    - Refers 'only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character'
    - Conduct had to be 'towards or with other people with whom the company had a trading or commercial relationship'
    - The conduct of the company towards employees within that company didn't have that character
    - MASSIVE POLICY CONCERNS

Bevanere v Lubineuse

Facts:

- Vendor of a beauty clinic said that one of its employees (Mrs Kostic) would remain in the clinic after the sale knowing that she intended to leave and establish her own business
- Purchaser relied on this statement, and the former employee took most of the business' former clients with her, to a competing business set up across the road from the sold store.

Issue:

- Was the sale of the business within the ambit of 'trade or commerce'

Ratio: Yes

- Held: the sale of the clinic was part of the totality of the vendor's commercial activities
- The fact that it was the sale of a capital asset did not deprive it of its character as a transaction trade or commerce. Unlike O'Brien, the capital asset was used for the business activity.
- Additional considerations – sale of both the goodwill of the business and stock. Vendor obtained services of an agent to find a purchaser. Business sold as a going concern, and non-compete clause made as part of the sale.
- In other words, the proceeds of the sale could be used by the appellant for other commercial activities, and the sale entailed ongoing obligations to the purchaser not to engage in competitive commercial conduct. The hiring of a sale agent was a common procedure in trade and commerce.

O'Brien v Smolongov

Facts:

- Sale of land near Jindabine, NSW
- Sale originally advertised through an ad in the Sydney telegraph – included a statement that 'building permit ok'
- In reality, had to be converted to freehold from leasehold and pay appropriate fees, then amalgamate both portions into one property. It was likely that after this was done, the Shire Council would give the appropriate permit.
- Also dealings over a phone, which misrepresented five statements about the land
- letters between lawyers that mitigated the extent of the misleading or deceptive conduct in respect of the 'building permit' misrepresentation
- Judge at first instance still found that seller HAD engaged in misleading and deceptive conduct

Issue:

- was the sale in the ambit of 'trade or commerce'?

Ratio: No. Not done in the course of carrying on business and it lacked trading or commercial behaviour as a transaction

- ordinarily, sale of private land is not within the ambit of 'trade and commerce'. Whether a sale occurs in the business context depends on the circumstances of the case. Look at the nature of the transaction, the character of the parties, and the activities engaged in by the parties, whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons, and whether the participant played an active part in the transaction.
- Here the land was not acquired for trading stock, and did not amount to more than the mere realisation of capital asset
- Land not used for farming or grazing
- Seller argued that use of phone or advertisements made it fall within trade and commerce – thoroughly rejected
- "in our view, the mere use, by a person not acting in the course of carrying on a business, of the facilities commonly employed in commercial transactions, cannot transform a dealing which lacks any business character into something done in trade or commerce"

Engage in conduct

The scope of 'conduct' for the purposes of s18 ACL is broader than the scope of 'representations' in the common law doctrine of misrepresentation. A large number of actions or inactions will constitute conduct, but it is still necessary to establish that the conduct was misleading or deceptive. That is, a claimant must identify the specific conduct and explain how it was misleading and deceptive. Thus, the elements of 'conduct' and 'misleading or deceptive' are closely linked.

'Conduct' can include:

- silence and half-truths
- representations as to future
- promises
- puffery
- opinions

- S2(2)(a) ACL: 'a reference to engaging in conduct a reference to engaging in conduct is a reference to doing or refusing to do any act'
- S2(2)(c) ACL:'a reference to refusing to do an act includes a reference to: (i) – refraining (otherwise than inadvertently) from doing that act; or ii making it known that an act will not be done

Silence and half-truths

Silence and half-truths may constitute misleading or deceptive conduct if there is a 'reasonable expectation of disclosure' on behalf of the party alleging the conduct.

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd
Facts:

- sale of restaurant licenced to seat 84 people
- owner had increased seats to 128 and installed 8 bar stools without authority from the local council or the liquor licensing authority
- agent for the buyer was shown the restaurant and observed the seating – statement from seller that the restaurant could operate at this level
- buyer's agent wrote down a selling instruction card with "128 seats" and "licensed" written on it, as the seller watched on
- buyer's solicitor failed to check compliance with the bylaws, even though he was engaged to check this
- contract contained an entire agreement clause
- buyer sought rescission and damages

Issue:

- did Henjo engage in misleading and deceptive conduct?
- What is the effect of the fact that the buyer could have discovered the truth?
- Did the buyer have constructive knowledge of the truth?
- What is the effect of the entire agreement clause?

Ratio: (Lockhart J of Federal Court)

1. The representation was misleading and deceptive; it was not true.
- Henjo argued that the statement that the restaurant seated 128 people was true because that many chairs could in fact fit in the restaurant.

- This submission not accepted - The enquiry about the number of seats obviously wasn't in relation to the amount of chairs that could physically fit in the restaurant, but rather the scale of the business.

2. The representation was made even by silence; i.e. a failure to inform Collins of the true position w.r.t. limitations on seating capacity
- Duty to disclose relevant facts isn't confined to certain relationships (e.g. trustee/beneficiary, solicitor/client, principal/agent, guardian/ward); it can arise 'depending on the circumstances'
    - seller knew there were restrictions on the seating capacity, and they knew that they were making a misrepresentation that would affect perception of the profitability of the business.
    - seller was operating contrary to the law
    - buyer observed the business running for 4 weeks – was run at the basis of 128 seats; also representation made via Mr Le May (selling agent)
- The buyer didn't have constructive knowledge of the truth. Unlike the position at common law, the inquiry under s52 is whether the misleading or deceptive conduct continues to operate in fact

3. Irrelevant that the buyer had an opportunity to discover the true position (see Redgrave v Hurd)

4. The misleading conduct was an inducing factor – referred to decision of Wilson J in Gould v Vaggelas about inducing conduct – same rationale applied. The inference that the representee relied on a material representation calculated to induce them into a contract can be rebutted by showing "whether he knew the true facts or not he did not rely on the representation". Here, absent knowing the true facts, the purchaser relied on the information.

5. Purchaser did not have constructive notice of the true licensed seating capacity. Although Mr Saade (Henjo) did give Collins Marrickville an opportunity to look at files which contained the license specifics, these files were provided in the context of a discussion about the finances of the business rather than the validity of the licensing arrangements.
- Also, although there is authority that a client who employs a solicitor in a conveyancing transaction has imputed knowledge of anything known by the solicitor on proper enquiries, the real question in a s52 action is whether the misleading and deceptive conduct continues to be operative in fact, irrespective of what could have been discovered

6. The entire agreement clause couldn't be relied upon to exculpate Henjo. There was misleading and deceptive conduct which **in fact** induced the purchaser to

buy. That inducement was not negated because the parties said to the contrary in the agreement. Exclusion clauses cannot defeat s52 claims.
- Interesting bit of obiter – special condition 7 (general EAC) might exclude misrepresentations, but not representations by silence which have origin or effect outside the law of contract.

Miller v BMW
Facts:

- Miller acted as a broker assisting in arranging a loan between CTHL and BMW Australia Finance Ltd for a **non-cancellable** insurance policy
- Miller supplied BMW with documentation in support of the loan application, including memorandum and certificate of insurance
- BMW argued Miller should have disclosed that the policy was not cancellable

Issue:

- Was Miller's act of supplying the documentation a misrepresentation?
- What about misrepresentation by silence?

Ratio:

1. No misrepresentation by supplying the document.
- No evidence that the HIH certificate conveyed a representation that the underlying insurance was a cancellable property policy. By contrast, the HIH certificate had features that suggested the policy was unusual/different from a standard cancellable policy.
- Parties were sophisticated and experienced

2. There was no misrepresentation by silence.
- Miller's failure to draw BMW's attention to a circumstance that **the document itself disclosed** was not misleading or deceptive.
- There was no foundation for the conclusion that the fact that Miller knew the cancellability would be an important issue would create reasonable expectation of disclosure.
- Given that CT's application had been approved by the lender (and Miller knew this), it is to be inferred from Miller's perspective that cancellability was not critical to the determination of the loan application.
- Nothing in the conduct of the parties during negotiation indicated that cancellability was an important issue for BMW.
- BMW should have taken care of its own interests by reading the document

- Per French and Kiefel JJ:
    - 'the provision does not impose on a party an obligation in order to avoid volunteer information in order to avoid the consequences of careless

disregard, of its own interest, of another party of equal bargaining power and competence'

4 Misleading representations with respect to future matters

(1) If:

(a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and

(b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of this Schedule, to be misleading.

(2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

(a) a party to the proceeding; or

(b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or

(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

(4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:

(a) a misleading representation; or

(b) a representation that is misleading in a material particular; or

(c) conduct that is misleading or is likely or liable to mislead;

and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

Promises

- Conduct includes making and giving effect to contracts, arrangements, undertakings and covenants: S(2)(2)(s)
- A statement contained in a contractual document can be characterised as misleading and deceptive conduct

Accounting Systems 2000 v CCH

Facts:

- AS 2000 purchased the right to modify an accounting program for public sector accountants from source code originally created by Focus.
- AS 2000 assigned copyright in an accounting program to Castle Douglas, who sold to CCH
- There was a warranty in the contract between CCH and CD that said that AS had the initial assignment of copyright. This, of course, was untrue because Focus had the initial assignment of copyright.
- CCH sued AS for breaching s52 TPA (as it then was) on the basis that the warranty was false.

Issue:

- Was the making of a misleading contractual provision sufficient to amount to 'conduct' under the TPA?

Ratio:

- Yes. If a contractual provision is untrue, it can constitute misleading and deceptive conduct.

Puffery

In some circumstances, puffery might be considered M+D conduct

ACCC v TPG [2013] HCA 54

Facts:

- Advertisement of '$29.99 unlimited ADSL2', but some fine print below the bold text materially changed the deal

Issue:

- Was the advertisement in this case sufficient to constitute 'conduct' that was misleading and deceptive for the purposes of s18 ACL?

Ratio:

- 'The tendency of TPG's advertisements to lead consumers into error arose because the advertisements themselves selected **some words for emphasis and relegated the balance to relative obscurity**. To acknowledge, as the Full court did, that 'many persons will only absorb the general thrust' is to recognise the effectiveness of the selective presentation'.

Opinions

- Common law gloss has been placed on the meaning of s18 w.r.t. opinions
- Only opinions that amount to 'implied representations' may amount to misleading or deceptive conduct

Global Sportsman v Mirror
Facts:

- Articles about Kim Hughes alleged to have defamed Jeff Thomson

Issue:

- Were the opinions expressed in the articles sufficient to amount to misleading and deceptive conduct?

Ratio: Yes

- Held: where conduct amounts to a misrepresentation it will be misleading or deceptive
- There is no clear boundary between material that is defamatory and material which is misleading and deceptive
- A statement of opinion can possibly be a misrepresentation as to the state of mind of the maker of the statement
- Opinions which are representations as to the future covered by s4(1)

That is misleading or deceptive or is likely to mislead or deceive

Some have held that the terms 'misleading and deceptive' are inherently conflicting; Gibbs CJ in ***Parkdale*** said that "misleading or deceptive is on any view tautologous". It is certain however that culpability is not required in order to establish that conduct is misleading and deceptive – liability is strict. In order to determine if conduct is misleading or deceptive, the conduct needs to be considered as a whole (***Parkdale, Butcher v Lachlan Elder Real Estate)*** Furthermore, failure to make reasonable enquiries is relevant to assessing whether conduct is misleading or deceptive: ***Parkdale; Miller v BMW***

Parkdale v Puxu Pty Ltd
Facts:

- Parkdale sold furniture that resembled Puxu's 'Post and Rail' line
- Chairs were only identified by the manufacturer's label
- 'passing off' case – someone pretends their product is someone else's product

Issue:

- Was the mere fact that the chairs simply resembled another product misleading?

Ratio:

- Held: not misleading or deceptive conduct, even though the furniture looks pretty much the same; goods were properly labelled.
    - S18 is not confined to conduct that is intended to mislead or deceive
    - There is nothing in s18 that would confine it to conduct which was engaged in as a result of a failure to take reasonable care
    - The court must decide objectively whether the conduct is misleading or deceptive or likely to mislead or deceive – the focus must be on the likely audience of the alleged misleading or deceptive conduct
    - The sale by one manufacturer of goods that closely resemble another is not misleading or deceptive if the goods are properly labelled

Good Gibbs Quote:

- "Section 52 does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion by regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests. What is reasonable will or course depend on all the circumstances. The persons likely to be affected in the present case, the potential purchasers of a suite of furniture costing about $1,500, would, if acting reasonably, look for a label, brand or mark if they were concerned to buy a suite of particular manufacture."

Failure to take care

Parkdale (Gibbs CJ):

- *"Evidence that members of the public have been misled is not conclusive; the section must be regarded as contemplating the effect of the conduct on the reasonable members of the class. The heavy burden of the section cannot have been intended to be imposed for the benefit of those who fail to take reasonable care of their own interests."*

Miller v BMW (French CJ, Kiefel J)

- *"[The provision] does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power and competence."*

Audience of the conduct

If conduct is directed towards a class of people it must be assessed from the point of view of an 'ordinary' or 'reasonable' member of the class addressed: ***Campomar v Nike International***. This integer does not amount to 'an extraordinarily stupid person', but they 'may be gullible or inexperienced'.

Then, the question becomes whether a 'not insignificant number of them have been misled'. Arguments can be made either via evidence (testimony of many people), or by logical and plausible characterisations.

If conduct is made to individuals only, then regard must be had to the nature of the transaction, the individuals involved, and what each party knew about the other (***Butcher v Lachlan Real Estate***).

Campomar Sociedad Limitada v Nike International

Facts:

- The trademark 'NIKE' belonged to both Campomar w.r.t. cosmetics and toiletries and Nike (w.r.t. sportswear) in Australia
- Campomar released a product labelled 'nike sport fragrance'
- Nike International argued that the use of this trademark misled customers into thinking that it was the manufacturer of the fragrances

Issue:

- Was the labelling misleading or deceptive, notwithstanding that Campomar had the trademark registered in Australia?

Ratio: Yes

- the audience for assessment is the 'ordinary' or 'reasonable' member of the class of prospective purchasers of a mass-marketed product for general use
- "[107] In the present case, evidence was given of the marketing of the "NIKE SPORT FRAGRANCE" products in pharmacies. Sheppard J said121 : "Some of the evidence establishes that this product was found displayed in pharmacies beside or underneath other sports fragrances, including a sports fragrance marketed under the name 'Adidas'. Evidence establishes that the well known sporting organisation Adidas does either itself, or through other companies which it authorises, market a sports fragrance bearing its name." Further, an examination of the affidavit and oral evidence of the witnesses shows that in the assumption they made as to the extension of "NIKE" sportswear business into a sports fragrance, they were aware of and influenced by the activities of the Adidas company in introducing a range of Adidas fragrance products.
- In those circumstances, looking at the matter objectively, there was nothing capricious or unreasonable or unpredictable in Sheppard J's conclusion that the placing of the "NIKE SPORT FRAGRANCE" product in the same area of pharmacies with other sports fragrances was likely to mislead or deceive members of the public into thinking that the "NIKE SPORT FRAGRANCE" product was in some way promoted or distributed by Nike International itself or with its consent and approval."

Butcher v Lachlan Elder Realty

Facts:

- Butcher claimed real estate agent had engaged in misleading or deceptive conduct by including an inaccurate survey diagram in the marketing brochure
- The diagram suggested, erroneously, that Mr Butcher's plan to move the swimming pool would be feasible and wouldn't encroach on the high water mark
- The brochure included a disclaimer to the effect that 'All information contained herein is gathered from sources we deem to be reliable. However, we cannot guarantee its accuracy and interested parties should rely on their own enquiries'
- The brochure was made public

Issues:

- Was the conduct misleading or deceptive?

The relevant class of people: either

a) "members of the class to which the conduct in question is directed in a general sense" (in this case, potential home buyers for Pittwater properties worth >$1 mil), or
b) "identified individuals to whom a particular misrepresentation has been made" (the plaintiffs). This is the inevitable class considered in cases such as the present.

Ratio: Held (by majority 3:2): no

- The agent did no more than communicate what the vendor was representing, without adopting it or endorsing it
- In order to determine whether conduct was misleading or deceptive, it is necessary to consider
    - The nature of the parties
    - The character of the transaction contemplated
    - Contents of the brochure itself
    - What each party knew about the other as a result of the dealings
- As to parties:
    - Purchasers were intelligent, shrewd and self-reliant business people who could be assumed to respond to the representation in question in a reasonable manner
    - Suburban real estate agent was a business with a small staff that didn't hold itself out as possessing the means of independently verifying title details of property
        - The real experts on these issues are solicitors or conveyancers, relying on specialists like surveyors
    - Real estate agent was only agent of the vendor in a limited sense.
- Character of the transaction: purchase of 'a very expensive property, to be used as an investment' and the purchasers engaged professional advisers throughout the transaction
- Knowledge of the other party: it was plain to Mr Butcher that the diagram hadn't been made by the agent and the circumstances negated any suggestion that the agent had adopted the diagram as its own or that it had verified its accuracy
- Reasonable reader would have read the whole brochure, including disclaimers of accuracy of the diagram.
    - Might be different analysis that the court has to conduct if the document was only briefly examined before a decision was made

Effect of exclusion clauses

Unlike common law misrepresentation, exclusion clauses cannot exclude responsibility for failure to conform with s18 of the ACL, as the ACL cannot be excluded by parties to a contract. However, courts may still take exclusion clauses into consideration in assessing whether a party has suffered damage or not.

Remedies under the ACL

The ACL allows for a variety of forms of relief unavailable under common law, including:

- Injunctions (s232) – discretionary remedy, will only grant if appropriate
- Damages (s236)
- Other orders to compensate the injured person, prevent or reduce the loss or damage suffered (s237, s243)

Damages – s236

If:

a) A person (the claimant) suffers loss or damage because of the conduct of another person; and
b) The conduct contravened a provision of chapter 2 or 3, the claimant may recover the amount of the loss or damage by an action against that other person, or against any person involved in the contravention

In order to recover damages under s236, a plaintiff must suffer loss or damage, and show the conduct caused the loss or damage. Where there is no fraud or intent to mislead, damages may be reduced to reflect the plaintiff's possible share of responsibility (s137B of the competition and consumer act).

Additionally, there is a limitation period of 6 years (s236(2)).

Generally, the tort measure of reliance, rather than expectation damages are applied. However, courts have warned against over-reliance on this language; the question is how much 'worse off' a plaintiff is as a result of conduct (***Marks v GIO***).

Marks v GIO Australia Holdings:

Facts:

- Marks borrowed from GIO group; thought he had signed up for a fixed rate loan on the basis of representation from a brochure that margin was fixed
- Contract terms conferred right to vary the loan margin (from 1.25% to 2.25%)
- GIO permitted Marks to refinance
    - Evidence established that the loan was still more beneficial than any other available (at any point)

Issues:

- What quantum of damages is Marks entitled to?

Ratio:

- Gaudron
  - M didn't establish that they had suffered any loss or damage.
  - They could have argued that they were "likely to suffer" loss or damage, where there was a real possibility of such (e.g. if the margin was increased so that interest was payable at a rate above most commercial rates such that M would have gone into another loan).
  - However, because they were given the option to refinance without penalty, they were never held to the contracts.
- McHugh, Hayne, Callinan
  - Need to assess loss comparatively – but for the misrepresentation, would the misrepresentee have acted differently?
  - No evidence they would have.
- Held: no damages remedy available
  - Marks had not established any loss or damage

1. Need to establish causal connection between conduct and loss
2. Don't look to whether entitled to expectation loss – the question is whether the person would have acted differently if the breach of s18 had not occurred
- Probably would have been different if Marks could show that he wouldn't have entered into any loan if he was aware of the true state of affairs

Other Orders

- S.237(1): Court may *'make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct'*
- S.237(2): Basis is to compensate the injured person or to prevent or reduce loss or damage suffered
- s237(3): Claim must be commenced within 6 years

S243 sets out variety of examples of 'other orders'.

- Voiding the contract – s243a
- Varying the contract – s243b
- An order to refund money or return property – s243d

It should be noted that a court will still consider common law/equitable bars to rescission in determining whether to grant orders to the effect of allowing rescission. In ***Henjo Investments***, the court decided not to grant an order making the contract voidable because of these barriers. Ultimately, the ACL remedies are discretionary, so a court will naturally consider many circumstances as part of the decision of whether to award them.

	Misrepresentation	s.18 ACL
Silence	Need to show duty to disclose	Section 2(2) covers silence
Innocent Misrep	No damages	Damages available - culpability is irrelevant
Puffery	Puffery not generally misrepresentation	Can cover puffery
Entire Agreement and Exclusion Clauses	May be relied on as defence to claim of innocent misrep (estoppel by convention)	Exclusion clauses cannot exempt from liability, but may be relevant to damages
Time Limits	Equitable affirmation or *laches* (otherwise usually 6 years)	Limitation period of 6 years (s 236(2), s237(3))
Trade or Commerce	Applies to conduct outside of trade or commerce	Does not apply to conduct outside of trade or commerce.

Misrepresentation	S 18 ACL
Reliance Damages	Damages for loss incurred; variety of other orders (s237, 243)
Rescission - Rule in Seddon's case might apply	Rescission-like orders under s 237 - Rule in Seddon's case doesn't apply
Rights of 3rd parties bar rescission	No strict bar to rescission, but guided by equitable principles

Rule *Seddon's case* may apply to innocent misrepresentation.	No rule regarding executed contracts

UNCONSCIONABLE CONDUCT:

Unconscionable conduct is an equitable doctrine that focuses on the vulnerability of one party and the unconscionable conduct of the stronger party in their dealings with them. That is, it is a response to the immorality of using a position of strength in an unconscionable manner. It is not as concerned with deficiencies in the quality of consent of the aggrieved party as duress or undue influence.

As an equitable doctrine, unconscionable conduct makes equitable remedies such as rescission available to a successful claimant; it may also act as a defence to enforcement.

Relief from unconscionable conduct is also granted by the Australian Consumer Law (s20, 21). The same remedies that are available to misleading and deceptive conduct are also available to unconscionable conduct (s236, 237).

It should be noted that unconscionable conduct is a broad doctrine that is heavily fact-dependent:

> Mason J in ***CBA v Amadio***: "it goes almost without saying that it is impossible to describe definitively all the situations in which will be granted on the ground of unconscionable conduct"

> Kirby J in ***ACCC v Berbatis***: "the factors relevant to determining whether the conduct of a party was unconscionable in the circumstances of a given case cannot be comprehensively catalogued"

In order to establish unconscionable conduct, it must be shown that the party alleging the conduct was under a special disability of some sort, which the stronger party took advantage of to procure the transaction. If this is proven, the stronger party must then

prove that the transaction was otherwise 'fair, just or reasonable' in order to prevent a court from finding the existence of unconscionable conduct.

General Principles

Special disability

A special disability may be referred to with other terminology, such as a 'disabling condition' (e.g. Gummow and Hayne JJ in ***ACCC v Berbatis***) or a 'special disadvantage' (e.g. Mason J in ***Amadio***; Kirby J in ***Berbatis***, ***Kakavas v Crown***).

The overarching principled definition of a special disability is adverse circumstances or characteristics that place one party at a serious disadvantage vis a vis the other.Ultimately, the question is whether a party could judge their own best interests, or whether they were vulnerable because of a characteristic that meant that the other party could take advantage of the fact that they could not judge their own best interests?

Regardless, there is consensus that a special disability requires more than a mere inequality of bargaining power; some inability of a party to properly judge their own interests is necessary (***ACCC v Berbatis***).

Although a special disability may take a variety of forms, which have not yet been comprehensively catalogued, Fullagar J in ***Blomley v Ryan*** gave several examples of what prima facie may constitute a special disability:

- Poverty or need of any kind
- Sickness
- Age
- Sex
- Infirmity of body or mind
- Drunkenness
- Illiteracy or lack of education
- Lack of assistance or explanation (Amadio was like this)

Special disabilities can be grouped into two broad categories (although some have criticised such a distinction – Gleeson CJ in ***Berbatis***). First, 'constitutional' disabilities are special disabilities which arise from an inherent characteristic of one of the parties. Second, 'situational' disabilities arise from the nature of the relationship between the parties.

CBA v Amadio

Facts:

- Son got his parents to guarantee the debts of the business
- Loan from bank to Vincenzo (Son), but guarantee given by parents (Amadios)

Two key statements of principle:

- Deane J: If
  - A party is under a special disability in dealing with the other party with the consequence that there is an absence of any reasonable degree of equality between them
  - The special disability is sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' to procure or accept the weaker party's consent to the impugned transaction in the circumstances in which it was procured or accepted

  ⇨ Then, onus cast on stronger party to show the transaction was fair, just and reasonable

- Mason J:
  - A party makes unconscientious use of superior position or bargaining power
  - To detriment of party who suffers from special disability or is placed in some special situation of disadvantage

Elements:

1. Was weaker party under 'special disability'?
2. Did stronger party take advantage of that special disability in procuring transaction?
3. Can stronger party show the transaction was 'fair'?

'Special disability'

- CBA
  - Major financial institution
  - Privy to affairs and financial instability of V's company
  - Aware company was unable to meet debts as they fell due
  - Aware of 2 overdrawn accounts and failures to observe borrowing limits
  - Suggested that Mr and Mrs A enter into the transaction
  - It was aware of the content of its own document

- Amadios
  - Advanced age, limited grasp of written English
  - Relied on V for management of business affairs

  - Believed V and his company were prosperous
  - Approached in the kitchen whilst reading the paper and washing up
  - Presented with a complex document
  - Received no independent advice
  - Had been misled by V about extent and duration
  - No attempt made by bank rep to explain the transaction apart from correcting the time misconception

- As a whole, special disability of Amadios was that they were people that didn't understand what was going on, and they needed advice in order to understand what was going on.

'Taking Advantage'

- Focus on bank's **knowledge of the circumstances** of the Amadios
  - Representative knew relied on Vincenzo
  - Knew of problems with V's business
  - Knew of consequences for A if business failed
- V told bank he explained transaction to A
  - Actually, he misrepresented position to A
  - Also, bank should have known not accurate given V had never seen guarantee
- Apparent when signing that A mistaken as to duration of guarantee
  - Representative corrected that misunderstanding but didn't enquire as to whether they actually understood guarantee
- Trial judge found A wouldn't have given guarantee and mortgage if knew of V's financial difficulties

Subissue: Knowledge of the special disadvantage - an element of taking advantage

  - E.g. in Amadio, Deane and Mason J both focussed on bank rep's knowledge of characteristics of Amadios and their relationship with their son
- What is the extent of knowledge required?
  - Amadio per Mason J: actual knowledge or aware of facts that would raise the possibility in mind of reasonable person
  - Amadio per Deane J: 'wilful ignorance is not to be distinguished… from knowledge' (a bit narrower)
    - If transaction improvident for the debtor, financial institution ought to be put on enquiry and ensure independent advice obtained.

Subissue: Relevance of consideration

  - Lack of adequate consideration may be relevant but it is not necessary – e.g. Louth v Diprose – no consideration, c.f. Amadio – consideration but still causal element cf Kakavas – parties bargaining at arms length commercial basis, when there is consideration, doesn't help establish unconscionable conduct
- Intention to exploit?
  - Not necessary to prove subjective intention to exploit: Louth v Diprose
    - Louth aware of D's infatuation and his consequent inability to judge what was in his best interests
    - Inference that this caused ggift of property that followed taking advantage of that situation
  - But Kakavas: need to prove a 'predatory state of mind'
    - This is inconsistent with Amadio, where the bank acted with no moral obliquity (Deane)?
    - Best explanation – Kakavas doctrine limited to arms-length commercial transaction. In Amadio and Louth, by contrast, no personal benefit to the contracting party
    - Alternatively, this requirement is satisfied by knowledge in the earlier cases?

For Mason, this was enough, but for Deane, still possible for bank to show that the transaction was **'fair, just and reasonable'**

- Mr and Mrs A were not wholly misinformed as to the terms and effect of the transaction – they got what they wanted – the bank loaned money to their son
  - They had previously provided guarantees and mortgages
  - They had been corrected about the 6 month time limit
  - They executed the document to assist their son's company in obtaining credit from the bank which did advance the money
- BUT
  - They believed their liability had been limited to $50,000
  - They were under a complete misapprehension as to the financial state of the company

Per Mason J – '… without disclosing facts as may have enabled Amadios to form a judgment for themselves and without ensuring that they obtained independent advice'

Some interesting Mason J obiter (sic).

- 'Although unconscionable conduct… bears some resemblance to undue influence, there is a difference between the two. In undue influence, the will of

the innocent party is not independent and voluntary because it is overborne. In unconscionable conduct, the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which they are placed and of the other party unconscientiously taking advantage of that position'

Louth v Diprose
Facts:

- Male solicitor Diprose bought a house for his female friend
- Mr Diprose – infatuation. Extraordinary vulnerability in the false 'atmosphere of crisis' in which he believed that the woman with whom he was 'completely in live' and upon whom he was emotionally dependent faced eviction and suicide
- Ms Louth – she tolerated his visits and company because of the material benefits which 'fed the flames' of his passion.
    - She manufactured an atmosphere of crisis
    - She played upon his love and concern by threats of suicide
    - Informed Mr Diprose that she would shortly be evicted

Issue:

- Was Diprose under a special disability?

Ratio: Majority (Toohey dissent)

- Diprose was under a relevant special disability
- It was irrelevant that he was also a solicitor – special disability was emotional dependence on Ms Louth

ACCC v Berbatis
Facts:

- B owned a shopping centre in WA, Roberts operated a fish and chip shop in centre
- Rob's daughter was seriously ill with encephalitis and they wanted to sell their business. Sale agreed for approx. $65K subject to securing renewal of lease
- Robs also involved in legal proceedings against Berbatis due to charges levied under lease
    - Believed claim worth approx. $50K
    - Based on settlement claims by other tenants, probably worth $3K
- Berbatis made renewal of lease subject to discharge of claims (including dismissal of proceedings)
    - Condition reintroduced in renewal negotiations at 11th hour
    - Roberts obtained legal advice to effect that should not sign
- Trial Judge (French J) held Roberts were operating under a 'special disadvantage'

Issue:

- Was Robs under a special disadvantage in concluding the modified agreement at short notice?

Ratio:

- Gleeson CJ
  - 'unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position
- Gummow, Hayne JJ
  - Mr and Mrs Roberts were under no disabling condition which affected their ability to make a judgment as to their own best interests
- Issue for Roberts – both parties were experienced businesspeople. Disadvantage that Roberts really faced was that they had no legal right to renewal of the lease – this caused them to have the weaker bargaining position.

Another issue for Roberts: needed to show causation, i.e. that the use of special disability lead to transaction that Roberts sought to avoid.

- Gleeson CJ: Roberts had to choose between two competing interests: claims and sale of business
  - Made a rational decision to choose latter following receipt of legal advice
  - Requirement for release in renewal of lease commercially relevant to owners and apt to require as part of request by R
- Gummow and Hayne JJ: 3 options
  1. No renewal – not acceptable to Rob but a legitimate course of action for owners
  2. Renewal with no release – not acceptable to owners
  3. Renewal with release – acceptable to owners and **accepted** by Roberts

Dissent:

- Kirby J
- Release clause 'had all the hallmarks of a well-tuned demand imposed by those with proportionately greater economic power to take advantage of the vulnerable position that the Robs found themselves in, given the course of dealings and their commercial, financial and personal circumstances at the time
- Robs were 'taken by surprise and without sufficient opportunity or time to act with caution'. This was the way in which the information upon which the Robs were proceeding was contrived, as was their ultimate assent to the transaction. This is why it can be said there was no real bargaining over the term, and in the circumstances, Robs were unable to assess properly their options and interests.

Taking advantage

Kakavas v Crown Melbourne
Facts:

- Kakavas ran a seemingly profitable property development company
- Pathological gambler addicted to high stakes gambling
    - i.e. he could make a rational decision to go/not go to the casino, the problem hit once he hit the tables
- Gambled at casinos on the gold coast, Sydney Melbourne
- Underwent therapy and self-excluded from Crown, but later applied to have the self-exclusion revoked
- Attended the casino on 30 separate occasions
- Lost over $20 mil playing baccarat
- Crown Melbourne withdrew K's licence to remain on the premises due to charges of armed robbery
- Revoked withdrawal after learning Mr Kakavas had lost several million dollars in Las Vegas Casinos
- Offered preferential treatment, increased stakes limit, use of private jet and cash rebate of 20% on losses

Ratio:

- No special disability as he was capable of making decisions in his own best interests.
    - He had previously made rational decisions to abstain from gambling, he was a competent businessman
- No taking advantage because
    - Exploitation/unconscionability requires actual knowledge or 'wilful ignorance'
    - Constructive notice (i.e. notice of matters would have known if made reasonable or usual inquiries) not enough
    - No actual knowledge of special disability (if there was one)
    - No wilful ignorance because facts known to Crown would not have suggested, on their own, that Mr K had a special disability (if there was one). K always represented himself as if he was in control.

Obiter:

- Equitable intervention for unconscionability requires proof of a predatory state of mind. This principle is not engaged by mere inadvertence, or even indifference to the circumstances of the other party to an arm's length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.

Criticisms of Kakavas:

- Lack of special disability would have been sufficient to dispose of the case so it wasn't a good case to test the principle
- There is no principled reason to restrict exploitation to circumstances involving actual knowledge or wilful ignorance
- Constructive notice criterion was causing no practical problems
- Rule pushes balance in D's favour, and makes it exceedingly hard to justify court intervention
- On principle, exploitation can include 'transactional neglect'

Remedies:

Equitable:

- Primary – rescission
- Refusal to grant specific performance
- Injunction to prevent enforcement of contract
- Equitable damages???? (sketchy)

Statutory:

- S20 ACL: "a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law"
    - Includes at least principles applied in Amadio: ACCC v Berbatis
    - In trade or commerce, as for misleading and deceptive conduct
    - Does not cover conduct prohibited by s21
- S21 ACL: "a person must not, in trade or commerce, engage in conduct that is, in all the circumstances, unconscionable' in connection with the supply or acquisition of goods or services
    - Not related to Amadio: ACCC v Simply No-Knead (Franchising)
    - Now express – s21(4)c
    - In trade or commerce as for misleading or dec. conduct
    - Not apply if only instituting legal proceedings s21(2)
    - If conduct relates to a contract then can consider: terms, manner and extent to which carried out, formation

S22 ACL: in determining whether conduct is unconscionable for s21, court may consider (note doesn't limit scope of matters that may be considered)

- Relative strengths of bargaining positions
- Whether conditions reasonably necessary for protection of legitimate interests of stronger party
- Whether able to understand documents relating to transaction
- Whether undue influence or pressure was exerted or unfair tactics were used
- Amount and circumstances to buy or sell (as applicable) equivalent goods or services
- Extent to which conduct was consistent with conduct in similar transactions

- Applicable industry codes
- Extent to which failed to disclose conduct that might affect the interests of the other party
- Extent to which failed to disclose risks arising from intended conduct that wouldn't be apparent to the other party
- Willingness to negotiate terms of contract
- T's and Cs of contract
- Conduct in complying with contract
- Conduct after entered contract
- Whether contractual right to vary contract unilaterally
- Whether acted in good faith

ACCC v Lux Distributors:
Facts:

- Phone call to householder offer free maintenance check of vacuum
- Maintenance check was a ruse for salesperson to offer new vacuum
    - Failure to disclose this was a breach of another provision of ACL
- Once at home, salesperson would do demo of efficiency of old vs new vacuum and evidence that purchasers felt compelled to buy new vacuum following demonstration
- Salesperson offered for purchaser to call family to discuss
- Contract included a cooling off period but this was requirement of law

Ratio:

- Conduct was unconscionable because used deceptive ruse on old woman living alone to obtain a sale
    - Cooling off period didn't prevent conduct being unconscionable
    - Task is to evaluate facts by reference to a normative standard of conscience that is informed by community values such as honesty and fairness and freedom from deception
    - Unconscionability means something not done in good conscience
    - Key problem – entering into a home under a false pretence

UNDUE INFLUENCE:

There is a substantial overlap between unconscionable conduct and undue influence. However, the latter focuses on the weaker party's actual or presumed state of mind as evidence of somewhat deficient consent, whereas the former focuses on the unconscionability of the stronger party taking advantage of a weakness.

In a nutshell, undue influence examines relationship between the parties and its effect on consent. It applies where there has been influence that goes beyond ordinary persuasion or commercial pressures so that one party's will is 'overborne'.

Johnson v Buttress
Facts:

- B owned cottage in Maroubra, NSW
- J was related to B's deceased wife (seemingly niece) and had visited wife during her illness
- Evidence that B was illiterate and dependent on others but also somewhat odd that not many people liked him
- Eventually B became close to J after his wife's death and spent much time with her and her husband
    - B remade his will leaving all property to J
    - Subsequently he transferred cottage to J for no consideration
    - After B died, son was executor under a subsequent will and challenged the transfer to J

Dixon J: 2 types of Undue Influence

1. **Presumed undue influence**
    a. Presumed due to class of relationship

- Parent and child
- Guardian and ward
- Solicitor and client
- Trustee and beneficiary
- Physician and patient
- Religious advisor and advisee

But not

- husband and wife
- dentist and patient
- master and servant
- financial advisor and client

    b. Presumed due to factual matrix

- key is showing pre-existing relationship of either or both:
    - ascendancy or influence of stronger party
    - dependence or trust of weaker party
- take into account
    - trust and confidence reposed

  - age, health, literacy, education, intelligence, personality, character, business experience
  - period and closeness of friendship
  - opportunity to influence

- if 1A or 1B presumption established, onus shifts to stronger party to show no undue influence- must show weaker party's actions were an independent and well-understood exercise of free will. Need evidence of advice from a qualified legal practitioner independent of the stronger party will generally rebut the presumption.
- Transaction need not be disadvantageous, but absence of consideration may have evidentiary relevance

2. **Actual undue influence**

- Nature and character of influence on particular transaction must be proven. Fact-based inquiry.
- Actual undue influence – need to demonstrate through evidence at time of transaction that there is lack of free will (evidence of state of mind of the affected party). Often overlaps with presumed undue influence. However, presumed requires establishing the factual matrix over a period of time, whereas actual can work for a one-time transaction.

Ratio: - transfer of cottage should be set aside

- No actual undue influence, but cat 1B satisfied -evidence established that the relationship between J and B such that it was presumed that the transfer was the result of undue influence
  - Illiteracy, his ignorance of affairs, and his strangeness in disposition and manner that provide the foundation
  - Little doubt can be felt that ultimately he came so to depend upon Mrs Johnson that a full relation of influence over him subsisted
- J did not rebut that presumption by showing that the transfer was exercise of B's independent will
  - Needed to send dependent party to independent legal advice

DURESS:

Duress is the process of procuring contractual assent by an illegitimate threat. If proven, it is a vitiating factor that renders a contract voidable. The doctrine has a long history, and was originally conceptualised via the 'overborne will' theory, which suggested that the will of the relevant party needed to be completely overcome in order to establish duress. However, this strict requirement has been softened in Australia in recent cases:

Crescendo Management v Westpac Banking Corp

Facts:

- Westpac withheld money unless certain documents were signed.
- However, based on the facts, duress was not shown as there was a lack of causation and it was held that the mortgage was executed before the pressure was applied.

Issue: What is the correct test for duress? Is the 'overborne will' theory (Pao On) correct?

Ratio: Per McHugh J

- reject overborne will theory
- The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate?
- Pressure similar to inducement from misrepresentation
- Illegitimate pressure need not be the sole cause of the decision to contract, but person applying the pressure may show that it made no contribution

Must show

1. Illegitimate pressure by one party
2. That pressure was a cause of the other party's decision to enter into the contract

There are three broad categories of illegitimate pressure:

1. Duress to the person
2. Duress of goods
3. Commercial pressure

Obiter: Kirby J

- Defining economic duress in terms of 'illegitimate' commercial pressure is problematic. Difficult for courts to trace the boundary between impermissible economic duress and necessary operation of the market economy. Perhaps a better solution is to view economic duress as an aspect of the doctrines of undue

influence and unconscionability. This way, the courts would be able to provide relief in a consistent, principled fashion rather than by pretending to possess economic expertise and judgment which they generally lack.

Duress to the Person

Duress to the person consists of actual or threatened violence to the party's person or a third party. It is sufficient that it is just one reason for entering the contract. It does not need to be the primary reason for entering into the contract.

Barton v Armstrong
Facts:

- Barton and Armstrong were respectively MD and Chair of a public company
- B and two other directors wanted to exclude A from management of company
- Following A's exclusion from management, his interests remained substantial shareholders and creditors of the company
    - A used this position to threaten action that would lead to insolvency of company
    - A also found to have made threats to have B murdered if he did not
- Eventually, B signed deed buying A out of company which avoided insolvency and also threats of being killed

Issue:

Ratio:

- Held by PC: unlawful threat was one of the reasons for entering into the agreement, so duress was established. The fact that he still achieved his aim of getting A out of the company doesn't matter.

Duress of goods

In most cases, threats to unlawfully take, damage, detain or destroy goods or property will be considered an illegitimate pressure. This may include the taking or keeping of goods which is not permitted by common law.

Hawker Pacific Pty Ltd v Helicopter Charter
Facts:

- 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 releasing from liability for defective workmanship

Held: Hawker had no proprietary right to helicopter, so the demand was unlawful and the payment contract was voidable.

- H's conduct was such that the victim would form a reasonable belief that a threat to the goods was being made.

Commercial pressure

Where a stronger bargaining position is used to coerce a party to enter into a contract, it may constitute duress. However, acceptable commercial pressure is not sufficient to establish duress. Withholding or threatening to withhold contractual performance can constitute economic duress in some circumstances. However, courts are generally reluctant to hold that commercial pressure amounts to duress.

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd
Facts:

- Shipbuilding contract for the 'Atlantic Baron', with fixed price payable in five instalments
    - Price in USD which devalued
- Hyundai threatened cancellation of the contract unless additional price increased by 10%
    - Increase in price in return for increased letter of credit being provided to North Ocean (i.e. security for return of instalments if Hyundai ultimately failed to deliver the ship)

Issue: Was the contract void for duress?

Ratio:

- new contract was void for duress because Hyundai had no contractual basis for demanding the extra payment but North Ocean had delayed in deciding to rescind the contract and were held to have affirmed
    - Delay of approx. 2 years after agreeing to increase and approx. 8 months after delivery of ship was evidence of affirmation
    - It was unlawful for Hyundai to carry out their threat because that would have been a breach of contract

Universe Tankships Inc of Monrovia v ITWF

Facts:

- International Transport Workers Federation had extracted payments into ITWF's welfare fund by threatening to blacklist a ship (i.e. not unload the ship)
- Admitted duress, but claimed it was legal under industrial relations legislation

Ratio:

- Payments made under duress as blacklisting was not in pursuance of trade dispute
    - This meant that threats were unlawful
    - Diplock LJ: consequences of blacklisting were 'so catastrophic as to amount to a coercion

Lawful Act Duress

Prima facie, conduct which is lawful will be considered legitimate (e.g. Tankships). But in certain circumstances, lawful such as blackmail or extortion acts might be illegitimate. For example, threatening to tell the police that someone has committed a crime unless they pay you money will likely be considered illegitimate lawful pressure. The HCA has not yet clarified the of 'lawful act' duress. Intermediate appellate courts are inconsistent. McHugh JA in ***Crescendo*** suggested that pressure is illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. However, Keane JA in ***Mitchell v Pacific Dawn Pty Ltd*** disagreed on the basis that duress and unconscionable conduct are different doctrines which are not subsets of one another.

Verve Energy v Woodside

Facts:

- Explosion at Apache gas production facility
- Woodside offered Verve short-term gas sale at higher price than under existing Gas Sale Agreement
- There was a clause requiring Woodside to make 'best efforts' to provide gas supply in the case of a shortage

Issue: Was the commercial pressure used by Woodside to conclude the transaction legitimate?

Ratio:

- Court of Appeal
    - Pressure exercised by Woodside was an application of illegitimate pressure

    - Lawful pressure may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports (per McLure P)
    - Here, the higher price was not justified by the circumstances.
- High Court
    - Woodside had not breached any contractual duties to Verve. It was conceded by the parties that this rendered consideration of the duress case unnecessary

ANZ v Karam
Facts:

- Karams owned and operated a shoe business that was in financial distress and required further funds
    - Karams previously gave unlimited personal guarantees in support of loans to business but the loans were given some time ago (late 70s)
    - ANZ made provision of further loans conditional on acknowledgement of personal liability including mortgages of personal homes
- Business failed and ANZ sought to call on agreements that imposed personal liability on Karams

Issue: Can the contract be set aside on grounds of duress/unconscionable conduct?

Ratio 1:

- Kirby's comments in Crescendo should be accepted. A test for 'economic duress' that relies on 'illegitimate pressure' should be abandoned. Economic duress can be dealt with by unconscionable conduct and undue influence instead.
- Karams knew of the financial position of the company; they had the same level of knowledge as ANZ. As a result, they were under no 'special disadvantage' like the Amadios were. There could be no unconscionable dealing without this special disability.
- ANZ didn't act unconscionably by failing to provide Karams' solicitor with relevant security documents. Without sighting the documents, the solicitor told the Karams exactly what the effect of the acknowledgment was, which they understood.
- ANZ didn't act unconscionably/exercise 'economic duress' on the basis of Karams' desparate financial circumstances which were known to ANZ. Merely being impeded by financial difficulties or pressured from pursuing one's best interests isn't sufficient to amount to a special disadvantage, let alone establish unconscionable conduct.

Obiter:

- Per Beazley, Ipp and Basten JJA – *'The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of* ***"duress" as limited to threatened or actual unlawful conduct****….if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in Amadio.'*

Merits and demerits of Karam:

- Merits
  - Unconscionability doctrine can likely accommodate duress
  - Encourages parsimony
  - Draws attention to the coherence of the two requirements
  - One vague doctrine is better than two
- Demerits
  - Confused what are currently two discrete but overlapping doctrines
  - May create new remedies for duress (e.g. damages under ACL)
  - Distinction allows the law to better 'police' lawful pressure claims
  - Test for 'illegitimate pressure' not unmanageably vague and unconscionability is no less vague

Reception:

- Mitchell v Pacific Dawn Pty Ltd – Chesterman J – agreed that the term 'illegitimate pressure' should be abandoned, but reminded that "duress and unconscionable conduct are distinct doctrines with different bases and incedents: they are not different ways of describing the same doctrine. The expression 'illegitimate pressure' is not a synonym for 'unconscionable conduct'".

Remedy

- Unless there is a total failure of consideration, the usual remedy is rescission. Regular bars to rescission apply, including laches (***North Ocean v Hyundai***).

THIRD PARTY LIABILITY:

In some cases, conduct sufficient to establish a vitiating factor is done not by counterparty but a third party. The question then arises as to whether the counterparty be held responsible (in the order of having the contract voidable) for conduct/actions of third party.

The most common illustration of this issue are cases where A, related to B, secures a loan to bank C. Common issues concern whether the creditor makes the debtor (B) an agent, whether the creditor is put on notice of the guarantor (A's) vulnerability or lack of autonomy (***Royal Bank of Scotland***), and whether the creditor knows that the guarantor

(A) is in a relationship such as being a spouse of B and the transaction is not for the debtor's benefit (***Yerkey v Jones***)

Agency

Agency involves one person being appointed to act for and behalf of another, and generally requires an appointment to be made out in fact or a 'holding out'. ***O'Brien*** suggests that generally, the debtor won't be considered an agent of the creditor. Furthermore, leaving a creditor to procure a signature from the guarantor is unlikely to be enough to show agency by 'holding out' (***Ribchenkov v Suncorp-Metway).***

Notice

Where there exists presumed undue influence due to class of relationship, notice of the relationship automatically puts the creditor on enquiry as to the guarantor's equity. That is, once a creditor becomes aware of presumed undue influence between the guarantor and debtor, they must verify that there is no actual undue influence. Alternatively, a creditor can also be put on notice when they are aware of circumstances which constitute the presumed or actual undue influence or vitiating factor. In ***Bank of NSW v Rogers*** , the bank knew that R and her uncle lived at the same address and that R was likely to do whatever her uncle told her to. Consequently, the bank had notice of presumed undue influence.

A creditor can avoid being fixed with notice by

- Insisting on attendance at private meeting
- Explaining the extent of liability
- Explaining the nature of the risk
- Urging the taking of independent advice, although there is some confusion about whether this requires a solicitor not associated with the debtor with whom the alleged undue influence exists.

Yerkey v Jones

- Wife who acts as a guarantor and signs a written guarantee which creditor accepts without direct dealings has a prima facie right to have the contract set aside
- Wife needs to be a 'volunteer'
- No notice (actual or constructive) is required for the right to arise
- Two limbs:
  - First: where there is actual undue influence by husband
  - Second: where the guarantor does not understand the effect of the document

- First limb

    - Independent advice to the wife or relief from the ascendancy of her husband over her judgment is required to validate the transaction
    - Enforcement of a voluntary transaction against her when she did not bring her free will is unconscionable
        - These principles caught by s20 ACL?
- Second limb
    - It is unconscionable for a creditor to enforce a guarantee against a wife when
        1. The surety (wife) didn't understand the purport and effect of the transaction
        2. The transaction was voluntary in the sense that the wife obtained no gain from the contract the performance of which was guaranteed
        3. The creditor is taken to have understood that the wife may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife
        4. The creditor nonetheless failed to take any steps to explain the transaction to the wife or to find out that a stranger had explained it to her

Garcia v NAB
Facts:

- Mrs G was a physiotherapist who had been engaged as such either full or part time at all relevant times
- Mr G was a foreign exchange broker
- In August 1979, Mr and Mrs G gave a mortgage over the land on which the family home was built to secure a loan for her husband's business
    - Mrs G understood what she was doing as she had some business experience with banks and had utilised service trusts and companies in the operation of her own business
- Mortgage was an "all moneys" mortgage and subsequently she executed a number of guarantees to cover loans to companies controlled by her husband
- Mrs G was a director and shareholder in Mr G's companies but they were controlled by Mr G
- When she signed the guarantees, Mrs G didn't understand the extent of guarantees nor appreciate that the guarantees were supported by the mortgages
    - She had apparently been told by her husband that there was no risk as there would be money or gold in the account

Key facts:

1. Mrs G had signed guarantees without explanation from the Bank
2. She was aware, however, that she was signing a guarantee to guarantee one of her husband's company's overdrafts
3. It was not explained to her, in particular, that the guarantee operated so that it was secured by the mortgages she had given some years earlier
4. There was some pressure applied by her husband – he called her a 'fool' in matters of business and asserted that he was an expert

5. She was attempting to save her marriage

Ratio:

- Mrs G entitled to relief on bases of second limb of Yerkey
- She was a 'volunteer' even though she was a shareholder and director, because she was passive in management of the company
- Doctrine in Yerkey v Jones was not based on principles of notice or constructive notice of actual wrong dealing – it is just about unconscionability
- Rationale is not protection of women as a 'subservient class' but relationship of trust and confidence between husband and wife

- Kirby agreed with the outcome but rejected the principle in Yerkey
    - He thought basis lay in unconscionable conduct
    - He thought the Yerkey doctrine was sexist and shouldn't be followed

- It is unresolved whether the doctrine might be applicable to same-sex couples, de facto relationships, or husbands acting as sureties to their wives
- No reason why the rule in Yerkey should be limited by contemporary courts e.g. Agripay v Byrne

Agripay v Byrne
Facts

- Dr Byrne's husband borrowed funds to enter into a tax minimisation agricultural managed investment scheme
- Dr Byrne guaranteed the loan
    - She conceded that in general terms she understood the guarantee but didn't read or browse the application
    - She had 'blind faith' in her husband

Ratio: Guarantee was set aside

- Garcia extends the principle to the indifferent wife as well as the mistaken wife
- Critical element is that the person didn't understand the effect of the guarantee. The cause of the misunderstanding is irrelevant.

ILLEGALITY

Contracts may be illegal

1. According to statute; or
2. Contrary to common law (to commit crimes, sexual immorality, corruption, against national interest etc)

Contracts may be void

- According to statute; or
- Contrary to common law (ousters of jurisdiction, in restraint of trade etc)

Void vs unenforceable

- A contract that is illegal for public policy reasons may be void ab initio, voidable or unenforceable
- Matter of construction of the relevant law – terms of the statute, purpose/objects of the statute, the nature of the party responsible for the wrongdoing
- Might only intend that the wrongdoer is unable to rely on the contract
- If there is a way to interpret the contract that is consistent with the law, that will be preferred

Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215
Facts:

- F landowner, wanted water bores but didn't get licences
- Driller competed the work, broke the law and F refused to pay
- Was a valid contract – F could have gotten the permits

Issue: was the contract enforceable against F?

Ratio: Yes

- For it to be unenforceable would allow F to get the benefit of the contract without paying

RECTIFICATION:

- Refers to mistakes in instruments (written contracts)
- Rectification can be available where there has been some sort of contractual mistake
  - 'convincing proof' of mistake required (e.g. antecedent agreement reached)
- for unilateral mistake, possible alternative to rescission
- test is similar to rescission (***Taylor v Johnson***): ***Leibler v Air NZ (No 2)***

1. misapprehension that contract contains provision that it doesn't contain
2. other party knows of misapprehension
3. concludes contract in knowledge of mistake in circumstances where equity would require disclosure

- needs to be clear that the rectified result is what both parties originally intended, which is difficult to prove

- for common mistake, justification is ensuring contract reflects common intention of parties
- usual bars in equity apply
    - laches
    - 3rd party rights
    - performance no longer possible

DISCHARGE:

DISCHARGE BY AGREEMENT

Abandonment

The legal basis on which the analysis of discharge of a contract by abandonment is uncertain. Abandonment often involves very fact-intensive enquiries. Arguably, abandonment can occur either through an agreement to abandon, or by mutual inaction (sometimes referred to as 'abandonment in fact').

Agreement to abandon

It is possible to abandon an executory contract, but doing so requires objective agreement, and consideration (or a deed).

Abandonment in fact

It is possible to infer abandonment in fact due to the passing of time with neither party performing or evincing an intention to hold the contract as binding upon them. However, it is a high bar to meet, which can be made even higher where the contract has been partly performed, concerns a proprietary interest or has been formally registered or recorded (***Masters***).

Fitzgerald v Masters
Facts:

- 1927: F and M enter into a contract of sale for a 50% interest in F's farm
    - price set at 850
    - 350 paid before signing
    - balance to be paid by monthly instalments of 10
    - further payments of 130 are made
    - masters is entitled to possession from the date of the contract
- 1929 – M begins work on the farm
- 1931 – M moves to farm with wife and child. Offers further payments, but F requests him not to
- 1932 – M leaves the property
    - M consults his solicitor and has the contract stamped and registered
    - M tells F he intends to retain his equity in the property

    - F says "you put your money into the property, Rupe. You own half of it, and I won't let you down. You will get your money back some day"
    - M: "It will be a long time, Jack, but I will probably have to take you through the equity court to do it"
- 1937 – M writes letter to F prompted by account sent to him (no reply)
- 1948 – M's solicitor writes to F asking for 'suggestions' (no reply)
- 1951 – F dies, further correspondence ensues
- 1953 – M commences action
- In total, M had paid more than half the sale price, but F's estate wanted to cancel the half-interest from his bank and the authorities
- Effective silence between M and F for 16 years

Issue:

- Did the parties make an agreement to terminate when the seller said "you'll get your money back one day"?
- Was the contract abandoned?

Ratio:

- Agreement to terminate?
    - No – conversation had to be interpreted in context.

- Abandonment?
    - No – delay is not a basis on which to infer abandonment
    - It is true however that a long period of silence or inactivity can amount to termination by abandonment
    - more difficult if partly performed, or ambiguous comments on abandonment
        - here then needed express release or agreement, because buyer had already paid half the money
        - also, Masters had stamped and registered the contract
        - here, transfer of proprietary interest, so needs to be strong evidence on which to infer abandonment, especially where money has been tendered

DTR Nominees v Mona Homes (1978) 138 CLR 423
Facts:

- some dispute about the interpretation of a contract relating to subdivision of properties to be sold
- contract was still on foot on and after 25th July 1974 – no rescission by either party
- claim in breach brought on 5th December

Issue:

- was the contract abandoned in fact?

Ratio:

- by 5th December 1974 neither party regarded the contract as being on foot
    - neither party intended the contract should be further performed
    - time passed during which neither party took any steps to perform the contract

Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 4) [2015] FCA 570
Facts:

- "Facilities Deeds" created between Mineralogy, Korean Steel and Sino Iron while the latter two were still subsidiaries of the former.
- CITIC then acquired all of the shares in Sino Iron and Korean Steel.
- Mineralogy argued that the Facilities Deeds had been either
    - Mutually abandoned by the parties,
    - Terminated because of a fundamental breach

Issue:

- Was the contract mutually abandoned?

Ratio:

- The principal issue at the trial before the primary judge was whether Mineralogy had terminated certain agreements, called "Facilities Deeds", which it had with each of Sino Iron and Korean Steel. Sino Iron and Korean Steel entered into Facilities Deeds with Mineralogy while they were subsidiaries of Mineralogy. Subsequently, CITIC Ltd (then CITIC Pacific Ltd), through various intermediate holding companies, acquired all of the shares in Sino Iron and Korean Steel (the CITIC parties). If the Facilities Deeds had been terminated as alleged by Mineralogy, then the multibillion dollar project established by the CITIC parties would come to an end.

- "As to (3), and the proposed abandonment plea, the difficulties include the need for the CITIC parties to explore what is meant in the 5 August 2010 letter about "discussions today": who were the parties to those discussions? Were they continuing? If they were continuing then what had previously been discussed? Are those persons still employed by the CITIC parties? The difficulties also include the need to determine what occurred between the time of the 23 March 2010 letter and the alleged abandonment on 5 August 2010? Why does the 5 August 2010 letter which is said to abandon any agreement on 23 March 2010 fail to refer to the 23 March 2010 letter? Was the 5 August 2010 alleged

agreement conditional? If so, were the conditions satisfied? Could any estoppel by convention of the nature already pleaded arise to prevent the Facilities Deeds, if varied by the 23 March 2010 letter, from having the variation removed when the 5 August 2010 alleged agreement took effect?"

Compromise and Variation:

It is good practice to settle legal disputes via compromise and variation of the legal document/contractual obligation in dispute rather than immediately moving to litigation: this is encouraged in the Uniform Civil Procedure Rules.

At common law, a cause of action can be released once it has accrued by a 'deed under seal', which did not require consideration. Alternatively, there may exist a binding "accord and satisfaction"; that is, an agreement to discharge an obligation, and consideration provided in place of the obligation.

In equity, it is possible to obtain a 'release', where a party is able to produce cogent evidence that the other party has abandoned a claim or right or released it from an obligation.

McDermott v Black (1940) 63 CLR 161

Facts:

- Contract to buy shares in business
- P alleges D fraudulent misrepresentations
- P offers to withdraw allegations if D gives extension of time for P to pay
- D gives extension
- P refuses to perform (i.e. pay without dispute)

Issue: Did P reach a binding accord and satisfaction with D such that they could no longer pursue the initial claim in misrepresentation?

Ratio: Yes

- Clear intent to compromise
- Agreement to withdraw in consideration for grant of time can be regarded as an accord and satisfaction

Jingalong v Todd [2015] NSWCA 7

Facts:

- Todd owned a property he wanted to subdivide
- In 2002 or 2003 he agreed orally to sell Lot 1 to Mr Pernic
- In 2005 he got worried he wouldn't be able to subdivide, entered into written contract of sale with Poultons – special condition that once subdivision completed, Poultons would transfer Lot 1 back to Todd for $1
- 2010 – Todd discovered Poultons wanted to sell, so lodged a caveat claiming equitable interest in Lot 1
- Todd introduced Poultons to Jingalong, who could provide additional funds to complete subdivision
- Jingalong entered into joint venture with Poultons – terms acknowledged Todd's equitable interest
- To effect the sale of a certain portion of land to Jingalong, Mr Todd agreed to withdraw his caveat.
- 2011 - Poultons sold part of the property, including Lot 1, to Jingalong, without recognising Mr Todd's equitable interest.
- 2012, Mr Todd lodged another caveat regarding his equitable interest, then commenced proceedings against Jingalong and Mr Pernice.
- During pleadings, parties had mediation. The parties executed a handwritten 'Heads of Agreement' (the Agreement) which purported to settle the proceedings.
    - It provided (among other things) for the various parties to pay certain amounts to each other and that the Agreement 'ha[d] effect unless any later deed is entered into by the parties'.
- Mr Todd subsequently decided not to comply with the Agreement. Jingalong sought to enforce it.

Issue: Was the claim barred by a binding accord and satisfaction?

Ratio:

- There is a difference between a completed accord and satisfaction and an 'accord executory', which is a settlement that is not yet performed (e.g. a. "I agree to give up my action on receipt of payment by you" = no new rights and obligations pending performance).
- Here, it would be odd if one party could prevent the compromise from having any legal effect by simply refusing to perform the acts they agreed to perform
- The fact that the Agreement did not contain a specific clause in which Mr Todd and Mr Pernice agreed to abandon their claims against Jingalong, or acknowledge that those claims had been satisfied, was not fatal – if an agreement contradicts a cause of action, it is easy to infer that the cause of action has been discharged by that agreement.

- Here, the transfer of relevant monies between the parties in return for a reallocation of Lot 1 was inconsistent with the proprietary right of Todd to obtain the land for the sum of $1, so it is clear that the cause of action was discharged.

Tallerman v Nathans (1957) 98 CLR 93
Facts:

- P contracts to sell to D two million rounds of .22, delivery 'at earliest'
- 9 months later, finally delivers 1.8 million rounds
- D refuses to take delivery of the rounds, sends them back to P
- Letters exchanged between solicitors – HCA disposed of appeal on the basis that these two letters modified the legal position of the parties from the original written contract
- One of the parties argued that one of these letters accepted an offer to rescind the contract/make a new one, and because it was posted in NSW, this means that the new contract was within NSW jurisdiction

Issue:

- Did the letters have the effect of rescinding the contract and creating a new one in NSW? Or, did the correspondence simply amount to a variation of the original Victorian contract?

Ratio:

- Test applied: is the 'new' contract "entirely inconsistent" with the old one, or inconsistent with the "root" of the original one? If so, may be a replacement as opposed to variation.
- The letters were unintelligible without reference to the original written contract, so they cannot have created a new contract.
- Instead, the letters simply varied the contract that already existed in force in VIC jurisdiction
- Whether subsequent negotiations amount to rescission and replacement of a contract or mere variation of an existing contract is a question of interpretation
- Later variation does not automatically rescind original and replace it afresh

Estoppel

Even in the absence of express agreement supported by consideration to vary an existing contract, conduct of one party may cause them to be estopped from denying that certain contractual rights would not be exercised. Two variations of estoppel may operate. Promissory estoppel is an equitable remedy that restricts the exercise of rights. On the other hand, estoppel by convention is a common law doctrine which recognises

conduct of both parties that is premised on the mutual acceptance of the fact that there was a contractual variation.

Equitable Estoppel

Central London Property Trust v High Trees House
Facts:

- P let a block of flats to D for a term of 99 years
- Landlords halved rent during the war years
- Tenants – reduction to apply through the entire term of 99 years, or payable up to Sep 24, 1945 when the war ended

Issue:

- Was the contract legally binding/was there an intention to be legally bound?
- Is there a case in promissory estoppel?

Ratio:

- When a promise is made with an intention to create legal relations, and in knowledge of person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on, courts have said such promises must be honoured.
- If it had been a case of estoppel, the estoppel would end with the ending of the conditions to which the representation applied, or alternatively on notice

Walton Stores (Interstate) Ltd v Maher
Facts:

- W wanted M to demolish its existing premises, and build a new building for W as part of a lease of the premises
- Some draft agreements were exchanged, until W started to worry about the project and told its solicitors to 'go slow'
- M commenced building, and later W informed M it didn't wish to proceed, even though building work was 40% complete.
- W knew that M didn't want to demolish a part of the existing building until the agreement was concluded
- W had M's executed agreement sitting in its office for nearly two months before it replied to M, informing them that they didn't want to go ahead

Issue:

- Can estoppel be used as a 'sword' to create new rights?
- If so, what is the test and is it established here?

Ratio:

- Mason CJ and Wilson J – common law estoppel can be established.
    - W was under obligation to tell M within a reasonable time after receiving the deed and knowing that demolition had begun that it didn't intend to complete
    - Inaction in the circumstances was clear encouragement or inducement to M to continue to act on the basis of the assumption for which they had made.
- Brennan J – agrees with the result, but expands on the test
    - Estoppel doesn't have to be supported by consideration
    - Different measure of obligation – parties dictate in contract, whereas equity uses the minimum remedy needed to do justice
    - Elements
        1. Must relate to contractual relationship which exists or would exist and the D isn't free to withdraw from that
        2. The defendant induced P to adopt the belief that the relationship existed
        3. P acts or abstains from acting in reliance on this belief
        4. D knew or intended p to do so
        5. P's action/inaction will cause P detriment if assumption not fulfilled
- 2 issues very important
    - urgency of negotiations
    - M already executed lease and had sent it to W and began acting. WS knew this and stood by while M did something that would have hurt them if the contract didn't actually exist
- Gaudron thought common law estoppel existed (i.e. estoppel relating to the existence of a representation of existing fact)
    - On the other hand, equitable estoppel operates on representations as to future conduct

Estoppel by Convention

- Estoppel by convention
    - [common law estoppel – existing fact]
    - e.g. conduct of both assuming there had been a variation

Duration Provisions

Contracts must be valid for some duration. This may either be provided expressly in the terms of the contract (e.g. a 24 month tenancy), or interpreted by the court. A court may, for example, interpret the contract such that it amounts to indefinite performance, or it may imply a term allowing termination on notice.

Lavers v Foothills Water (1981) 21 SASR 584

Facts:

- Domestic water supply contract without a termination provision

Issue:

- Does the agreement, including the price, last indefinitely for both sides?

Ratio:

- There is an implied term that the contract is terminable on reasonable notice by either side
- 'reasonable' notice is a question of fact in each case
- in commercial contracts, such an implication may be more likely because it is more likely that such an implication will be necessary for the business efficacy of the contract.

Jireh International t/as Gloria Jean's Coffee v Western Exports Services Inc

Facts:

- WES agreed in 1996 to assist Jireh in obtaining the right to operate Gloria Jean's Coffee
- Cl3: "For sales by Jireh to GJGC Stores in Australia and to other countries, WES shall receive a commission of 5% of the ex-factory price of the coffees, teas and other products."
- March 2004 – Jireh entered into agreement with third parties to supply to Gloria Jean's. Third parties then supplied to GJ's instead of Jireh.
- WES argued that the cl3 commission was payable on sales by the third parties to GJ's
- No express duration or termination clause
- Cl5 entitled WES to another special commission if Jireh transferred any of its interest to another party

Issue:

- Was there an implied term that the contract was terminable by Jireh?
- If so, when could Jireh terminate?

Obiter (issue not determinative):

- Period of notice must be sufficiently long to enable the other person to deploy his labour and equipment in alternative employment to carry out his commitments and to bring current negotiations to fruition and wind up the association in a business-like matter

- Existence of cl5 is not enough to create a perpetual obligation, but it does weigh on what a reasonable period of notice would be
- "at least 10 years" would be reasonable – couldn't terminate before 2006

Kocalidis v Andrews [2012] VSCA 127
Facts:

- small building joint venture between an accountant and a builder
- relationship went sour

Issue:

- was there an implied term that either party could terminate prior to construction starting?

Ratio:

- yes (trial judge, uncontentious on appeal)

Netline Pty Ltd v Qav Pty Ltd [No 2] [2015] WASC 113
Facts:

- contract between owner of luxury apartment and property management service to rent out a property
- two agreements – management services agreement and split returns agreement. Former had express termination clause – 30 days notice ahead of renewal period – and a limited duration of 20 years
- latter said nothing about termination or duration

Issue:

- was there a implied term in the split returns agreement allowing the management service to terminate the contract?

Ratio:

- no. The existence of the express termination clause precludes implied term of termination on reasonable notice
- the contract was not of indefinite duration – it had a clear duration of 20 years
- have to read both documents in light of one another – they referred to each other and formed one whole contract

DISCHARGE BY PERFORMANCE:

Where parties are contractually bound to perform a given obligation, the common law treats the contract as a guarantee where a failure to perform is a breach, and defective performance is also a breach. Unlike civil law systems which lack a unitary concept of breach and consider impossibility, supervening events, etc, common law is not concerned with whether a party is at fault for a given breach.

Clearly, this creates problems for drafters that want to avoid liability from strict obligations or giving the other party a right to terminate due to circumstances out of their control. There are several tricks which drafters can utilise to dull the harsh edge of the unitary concept of breach.

First, the terms themselves can overwrite the common law by importing a standard of 'reasonableness'. Terms like 'due care and skill', or 'services reasonably fit', can import a standard of reasonableness that was in the common contemplation of the parties at the time of formation into performance.

Second, clauses can define the extent of duties. Clear, objective specifications of goods and services can go a long way to prevent frustration caused by misunderstanding (and possibly avoid situations of common mistake!). Additionally, margins of error can grant leeway in performance. To some extent, exclusion clauses can exclude or limit liability for breach, whether contractual or negligent. Finally, force majeure clauses can prevent liability for breach caused by events out of the control of a party such as natural disaster or war. In ***Pagnan v Tradax [1987],*** a force majeure clause released a vendor from an otherwise strict obligation to obtain an export certificate because the state had imposed export restrictions.

It should be noted that a force majeure clause will not be needed in every situation as the doctrine of frustration may provide parties similar relief from strict liability to perform obligations which are far removed from the circumstances contemplated by the parties at the time of contractual formation.

Good Faith in Performance

"Good faith" is a concept that heralds from civil law jurisdictions. Enshrined in many commercial codes and international instruments such as the CISG, common law has long shunned notions of good faith as imparting too much of a subjective element upon the objectively agreed terms of a contract.

An obligation of good faith in negotiations leading to a contract can be distinguished from good faith obligations of performance in contract. Generally, there is much scepticism about an obligation to negotiate in good faith (***Walford v Miles***).

On the other hand, it is possible to incorporate good faith obligations via express terms of a contract.

Express Terms

Orchard v Ross Neilson [2010] QSC 340
Facts:

- contract between a property developer and an investment firm. Developer was required to make a recommendation of what to do with the property if the development approval was not obtained (it wasn't)
- express term requiring performance in good faith

Issue: what scope of good faith conduct did the obligation require? Was the good faith obligation breached?

Ratio:

- Not required to act 'reasonably'
- Give genuine consideration, but can act in own interest
- Giving wrong factual basis for decision not breach of good faith, if genuine
- "In any event, it was accepted on behalf of RNP that those responsible for the rejection of its recommendation honestly believed the factual basis of the stated ground for rejection to be true. In those circumstances, it seems to me, even if RNP were to establish the factual basis was incorrect, it would not establish an absence of good faith."

Interpretation

Electricity Generation Corporation v Woodside Energy
Facts:

- Woodside had to supply MDQ (max daily quantity) to verve
- Verve also could nominate SMDQ (sup max daily quantity) which Woodside must use reasonable endeavours to make available
    - Another clause that said that Woodside could take all relevant commercial, economic and operational matters into account when determining whether they were able to supply gas
- Explosion in gas manufacturing plant, lack of energy

    - Woodside had physical capacity to provide at this point, but refused to provide SMDQ, only MDQ.
- P entered into agreement with D for extra supply at higher price under protest

Issue:

- Was the price hike a reasonable endeavour to ensure that supply was maintained?

Ratio: D Didn't breach

1. Obligation not absolute or unconditional
2. Nature and extent of obligation necessarily conditioned by what is reasonable in circumstances, which can include circumstances that may affect an obligor's business
    - E.g. not if certain ruin of defendant
    - Obligor's freedom to act in its own business interests, in matters to which the agreement relates, is not necessarily foreclosed by obligation to use reasonable endeavours – no expectations that parties will be nice to one another
3. Some contracts contain their own internal standard of what is reasonable because of an express standard mentioned

Mackay v Dick (1881) 6 App Cas 251
Facts:

- Contract to test and sell machine; agreed that payment would be made after the machine was tested
- One party refused to test the machine

Issue: Did this amount to a breach of contract?

Ratio: Yes

- If parties agree that something should be done and cannot effectively be done unless both concur, ***construction of contract*** is that each agrees to do everything necessary to achieve performance of the contract, even though no express promise given

Implied Term?

Another approach, which may sometimes be an easier method of imparting good faith-esque obligations into a contract than the interpretation approach, is to do so via an implied term to co-operate in the performance of a contract where such co-operation is necessary.

Of co-operation

Secured Income v St Martins (1979) 144 CLR 596, 607

Facts:

- Sale of office building
- Term of contract that purchaser had to approve tenants of the office building, with approval not being held arbitrarily or capriciously
- Purchaser didn't approve the tenants, which caused an effective reduction in the price as there was no fixed rental income

Issue: Did the purchaser's refusal to approve the tenants breach an implied obligation of good faith, or co-operation?

Ratio: No

- Party agrees by ***implication*** to do all such things as are necessary on his part to enable the other party to have the benefit of the contract
- When the obligations in question only entitle the other party to a benefit under the contract but are not essential for performance, the correct interpretation of the contract depends not so much on the general rule of contractual intention but rather on the intention of the parties manifested by the contract itself

North Sea v PTT [1997] 2 Lloyd's Rep 418

Facts:

- Contract for supply of oil that was purchased from Saudi Aramco
- Because Aramco had restrictions on ultimate end-users (including sanctions, and region-based pricing), it required confirmation of end destinations and light/heavy crude split before it would release the oil
- North Sea promised in a letter ancillary to the contract to provide the documentation clearing the sale (but this required Saudi approval, which required destinations)
- PTT didn't supply end destinations

Issue:

- Was it an implied term of the contract that PTT supply the end destinations?

Ratio: No

- PTT didn't know that the end destinations were needed – it didn't have much in the way of dealings with Aramco. Both parties were aware of PTT's lack of knowledge of Aramco's policies.

- PTT didn't know what the destinations would be – it anticipated possible refining difficulties. Both parties were aware that PTT wanted flexibility when the contract was signed.
- The contract was unusual in that it was a supply for 5 years, rather than a fixed year contract w/review – this increases the extent to which an implied term would contradict the business efficacy requirement

- i.e. this is a case of contractual tension where contract has allocated risk – no implication

ACT Cross Country Club Inc v Cundy
Facts:

- ACT Cross Country Club and Cundy Sports had a disagreement about their rights to conduct the Canberra Marathon
- 1 March 2010 – both parties reached a contractually enforceable agreement to settle their dispute – mutual promises by moth parties to stop litigation; ALSO included that Cundy Sports would have the right to organise and administer the 2010 Canberra Marathon.
- Marathon couldn't be run without authorities permission to close roads – authorities didn't want to give permission unless both parties provided written confirmation that the dispute had been settled.
- No confirmation provided by 15 March. Cundy couldn't hold the marathon before April 2010, brought the agreement to an end.

Issue:

- Did the Club breach the settlement agreement by failing to co-operate with Cundy to communicate that the dispute had been settled to the road authority?
- If club had breached, Cundy could terminate the agreement. If Club didn't breach, Cundy breached by failing to hold the marathon.

Ratio:

- Club breached settlement agreement by failing to co-operate
- Club was bound not to act in a way which would deprive Cundy sports of the substantial benefit of the settlement agreement and its right to manage the 2010 Marathon
- Co-operation in this case was essential and urgent
- General rule applicable in every contract "that each party agrees, by implication to do all such things as are necessary to enable the other party to have the benefit of the contract"

Of good faith
Renard Constructions v Minister for Public Works (1992) NSWCA
Facts:

- Termination and other clauses involving discretion
- Duty of good faith and fair dealing, or interpret powers to be exercised reasonably

Hughes Aircraft Systems v Airservices Australia (1997) FCA

Facts:

- Really dodgy tender process, multiple abuses of due process and fairness
- Tender process for proliferation of civilian radar for use by civil aviation authority

Issue:

- Could a term of fair dealing/good faith in terms of the process contract be implied?

Ratio:

- An implied term of fair dealing should be presumed in all government/public body tender processes

Burger King v Hungry Jack's

Facts:

- Burger King failed to approve new franchises of Hungry Jacks on an unreasonable basis
- Effectively, BK tried to shut down the franchises by using a discretionary contractual right in a particularly unfair way

Issue:

- Did BK have an implied obligation to exercise the contractual right in good faith? Was it breached?

Ratio:

- Yes.
- If there wasn't an implied condition of reasonableness and good faith, Cl4.1 enabled BKC to change the operating requirements of HJ without notice and then terminate the franchise/refuse performance of the contract on that basis. This would serve to bring an end to the very valuable rights which HJ had under the development agreement.
- BKC can still have regard to only its own legitimate interests in exercising discretion, but it must not do so for a purpose extraneous to the contract – e.g. withholding financial or operational approval where there is no basis to do so, or to thwart HJ's rights under the contract.
- BKC had to exercise powers in good faith and reasonably

Bytan Pty Ltd v BB Australia (Blockbuster) [2012] VSCA

Facts:

- Bytan was a franchisee under franchise agreement with Blockbuster (franchisor)
- Agreement made in 2002 for term of 10 years. In 2012, Bytan elected not to renew the agreement, so it expired
- Cl 18.13 gives BB option upon termination or expiry of agreement to purchase all the assets used in the store.
- Bytan argues that the right to purchase assets and right to require Bytan to close the store can only be exercised if BB intended and/or was able to continue to operate the franchise business at the existing site

Issue:

- Is a limitation of the sort argued by Bytan implied in the contract?

Ratio:

- Three bases for good faith duty
    - Pure construction
        - No – limitation didn't arise from interpretation of the clause
    - Good faith obligation implied in all contracts
        - No legal duty of good faith is implied into all contracts in Australia
    - Good faith implied in fact
        - No – not necessary to give business efficacy
- Here, no benefit promised to franchisee would be defeated if franchisor could exercise the power to purchase assets/shut down the store where it doesn't intend to keep operating the franchise on site
- Not indiscriminately implied into all commercial contracts: must still be necessary to give business efficacy to imply
- If implied includes obligation not to exercise contractual power for extraneous purposes

Yam Seng v International Trade Corp [2013] 1 Lloyd's Rep 526 (England)

- No duty in law to imply in all commercial contracts
- May imply in ordinary commercial contracts based on presumed intent - implication of terms in fact
- In the facts of the case, giving the other party false information contradicted an implied obligation of good faith dealing

Royal Botanic Gardens and Domain Trust v South Syndey City Council (2002) HC

Facts:

- Royal Botanic Gardens Trustees entered into a 50 year lease with Sydney CC in relation to the Domain
- Yearly rent for first 3 years was $2000, clause 4(b) provided that subsequent rent was to be determined by the Trustees having regard to "additional costs and expenses" arising from construction, operation and maintenance of the parking station
- Council claimed the trustees considered costs and expenses not contained within clause 4(b)
- Trustees claimed implied in the lease that rent must be fair and reasonable

Issue:

- Was there an implied term of good faith and reasonableness in the lease

Obiter (not determinative)

- Kirby J – such an obligation might be inconsistent with caveat emptor

CBA v Barker [2014] HCA 32 [42,107]
Facts:

- Barker was employed by Commbank his whole life
- He was told that if he was not redeployed within the bank to a different position, his position would be made redundant and his employment would be terminated
- Mr Barker was not informed about an alternative position, and was thus made redundant

Issue:

- Did CBA have a term of mutual trust and confidence implied into its employment contract with Barker?

Ratio:

- All - No general term of mutual trust and confidence should be implied into employment contracts – too many policy concerns – this would effectively amount to judicial imposition of industrial relations legislation
- French CJ, Bell and Keane JJ – no conclusion reached on whether there is a general obligation to act in good faith in the performance of contracts. The decision doesn't stop limits on contractual powers and discretions analogous to those in public law.
- Kiefel J – unnecessary to reach a conclusion on general good faith obligations

Mineralogy v Sino Iron (No 6) [2015] FCA 825, [2017] FCAFC 55
Facts (as above), and

- Cl33(c) gave right to terminate on a 'serious or persistent breach'
- CITIC relied on implied term in facilities deeds that Mineralogy would act reasonably and in 'good faith' when it issued a notice specifying breach and requiring it to be remedied within a reasonable time.

Issue: did such an implied term as CITIC pleads exist?

Ratio:

- No – apart from a duty of honesty, which is a universally imposed duty, there is difficulty implying further restrictions from a principle of good faith to limit a contractual termination 'for convenience power'
- Outside fiduciary context, rare for an implication to be made which would require one party's interests to be subordinated to those of another
- Three matters mean that an implication is unnecessary for the business efficacy of the contract
    - Cl33(c) discretion concerns termination notices, not termination itself.
    - Discretion can only be exercised where the breach is objectively serious or persistent
    - Reasonable time must be given to remedy the breach

The 2017 position:

At present, there is no reason to refuse to give effect to an express good faith term. An implied term to co-operate, which have readily been incorporated in case law, will often be good enough to ensure performance.

At present, the High Court seems unwilling to take the step of implying a universal obligation of good faith in all contracts. However, it will make an implication in individual cases where business efficacy demands it. This is particularly true in contracts where certainty is important (e.g. international trade) or long-term 'relational' contracts (e.g. franchises), or where the good faith obligation acts as a limit on the exercise of contractual rights and powers.

In the case of discretionary contractual powers or consent clauses, it is often easy to establish that the power must be exercised within the bounds of the mutual contemplation of the parties. In ***Bytan***, an obligation was implied not to exercise a contractual power for extraneous purposes. It must be remembered however that a party will never be forced to forgo or sacrifice their own business interests via an implication of good faith (***Woodside***).

On the other hand, absolute rights are less likely to attract an implication of good faith. This is particularly true of ordinary commercial cancellation clauses. In ***BPN v Trident***,

an ordinary clause giving either party a right to termination at three months' notice left no room for the incorporation of an implied obligation of good faith as neither party was so vulnerable that their mutually agreed contractual interest needed protecting by such a good faith provision. It was shrewdly observed, rather, that the purpose of the termination clause was to allow Trident an escape in case of unfavourable market conditions, and BPN an escape if it secured alternate employment. Similarly, in ***Mineralogy***, an implication of good faith could not be reconciled with an ordinary right to terminate, and the fact that a clause gave a party the discretion to request a remedy for a material breach which, if unresolved, would give a right to terminate was not enough to make such an implication.

Time and Order of Performance

Generally, the time of performance of contractual obligations will be made clear by express stipulation (e.g. express deadlines in the contract). However, if there is no time stipulation, a time for performance that is reasonable may be implied. What is reasonable will be a question of fact in each case.

The order of performance, similarly, will often be dealt with by express provision. In the absence of an express term, the order of performance is a question of objective construction of the contract. Obligations may be independent (i.e. to be performed irrespective of the time of performance of obligations of the other party), dependent, or concurrent (as mandated by the SOGA Qld).

Perri v Coolangatta (1982) 149 CLR 537
Facts:

Issue:

Ratio:

Entire and Divisible Obligations

Some obligations are 'entire' in that they must be performed in their entirety in order to be discharged. Other obligations are 'divisible' in that they can be split into separate obligations, to each of which a separate piece of consideration attaches.

Cutter v Powell (1795)

- No payment until entire work completed
- Seaman's wages not due if dies part way

Baltic Shipping Co v Dillon (1993) 176 CLR 344

- "an entire obligation is one in which the consideration for the payment of money or for the rendering of some other counter-performance is entire and indivisible" Mason CJ, 350
- whether an obligation is entire or divisible is a question of interpretation

Steele v Tardiani (1946) 72 CLR 386

- Italian POW's agreed to cut 1000's of tons of firewood into [2m] lengths by [12cm] diameter
- Held: not entire contract. Severable obligations for each tree – entire for each tree
- But for each divisible part still needed correct specifications

Statute may intervene in the division of obligations. For example, s232 of the Property Law Act 1974 (Qld) provides for divisibility by deeming all rents, annuities, dividends and other periodical payments in the nature of income (e.g. interest on money lent) as accruing on a daily basis, subject to express stipulation otherwise.

Partial Performance

If an obligation is divisible, a performance of any number of the divided sub-obligations will constitute a part-performance.

If extra work is done at request, the law of restitution, a limb of unjust enrichment, operates to compensate the party which performed the work (***Westdeutsche v Islington [1996] AC 669***). The basis of restitution here is not an implied contract, but rather the injustice of allowing the party to obtain the benefit of the work done for free. That is, the right to compensation is not equivalent to enforcing the contract.

In ***Pavey & Matthews v Paul (1987) 162 CLR 221***, work was done at the request of a property owner even though the building contract was unenforceable on grounds of

formality. It was held that the builder was entitled to restitution of the value of building work done, which was not the same as the contract price.

Sunwater Ltd v Drake Coal [2016] QCA 225 (recent QLD illustration of restitutionary principles)

- "Where it is pleaded that work was done by the claimant at the request of the other party, it is not open as a matter of law to the recipient to contend by way of defence that no "benefit" was conferred. The respondents' contention that no "benefit" was conferred may be a reflection on the nature or wisdom of the work requested but it is not, as a matter of law, a factor of relevance in defeating the restitutionary claim pleaded by the appellant."

It should be noted that statutory intervention has made significant changes to payment schemes, particularly in the construction industry. The *Building and Construction Industry Payments Act 2004* (Qld), and a 2017 amendment bill, require project bank accounts be created, and entitle subcontractors to progress payments even if the contractual obligations are entire in order to prevent substantial economic harm to subcontractors when a project fails and the parent company declares bankruptcy.

Substantial Performance

If there is a substantial but defective performance of the contract by P, P may sue D for performance (e.g. price) in its entirety (***Boone v Eyre (1775)***). D then may counterclaim an action in set-off for any defect in the performance. However, whether a contract has been substantially performed will always depend on a construction of the meaning of 'substantial'. In some cases, strict or entire performance may be the common intention of the parties.

Hoenig v Isaacs [1952] 2 All E.R. 176
Facts:

- price of $750 to be paid on completion of interior design and decoration of a building
- disputes arose about the quality of the work done
- D argued that the 'entire obligation' was not performed and so there was no obligation to pay the price

Issue:

- Did P substantially perform the contract? If so, were they entitled to payment?

Ratio:

- Had been substantial compliance

- P decorator could sue for full price
- D could counterclaim (set-off) for defects

Bolton v Mahdeva [1972] 1 WLR 1009
Facts:

- Contract to install combined heating/hot water system
- D alleged defects and refused to pay (or only after P builder making good)
- 560 contract price, cost of making good 174

Issue:

- was the contract substantially performed?

Ratio:

- contract was entire, lump sum
- types of defect and the cost to remedy were so significant that no substantial performance had occurred. The system did not heat the house, and gave out fumes. More than 'slight amendment' to the system was needed.
- Contractor had choice to remedy the defects before suing for price

Conditional Performance

Often, a contract will stipulate that performance is contingent on certain events external to the control of the parties. Conditions may influence the contract as either conditions subsequent or precedent to obligations.

A condition subsequent, might, for example, end the contract if Donald Trump is elected president. In Head v Tattersal (1871), a condition subsequent allowed for the return of a horse by a specified time period of it was unsatisfactory (the dissatisfaction acted as a condition subsequent which, if it existed, brought an end to the obligation to purchase the horse).

On the other hand, conditions may precede the formation of a contract, or some aspect of contractual performance. ***Pym v Campbell (1856)*** where the contract didn't come into existence until a third party approved a patent, is an example of the former. ***Perri v Coolangatta (1982) 149 CLR 537*** is an example of the latter.

Perri v Coolangatta (1982) 149 CLR 537
Facts:

- Sale of house 'subject to' purchaser selling their own property
- Purchaser asks too much, takes 15 months to sell
- Seller waits for 4 months then terminates

Issue:

Ratio:

- Term was condition precedent to performance, not existence of the contract. The court should favour this view because if it was the other case, both parties could immediately withdraw from the contract.
- Here, interim obligations existed
- A time limit must be implied by which the condition must be satisfied. This should be a reasonable time. After this time limit is reached, either party can elect to treat the contract at an end without notice.

BREACH:

Often, the practical issue is not just whether damages are given, but whether the contract continues at all. Non-performance of a term is always a breach, but different types of breaches attract different remedies.

Non-performance may give rise to:

- damages for breach
    - [or equitable remedies, e.g. injunction and specific performance]
- termination of contract
    - ['rescission' for breach is misleading – avoid] We don't rescind for breach. We terminate.

A fundamental contractual issue for all legal systems concerns when termination for breach is appropriate, especially in the case of executory contracts which still have contractual obligations yet to be performed by one of the parties as part of the consideration. The question arises: At what stage can P treat its own obligations as discharged as a result of D's breach?

Historical classification of terms

Historically, there has been much confusion between 'conditions', 'warranties', and 'intermediate (innominate)' terms, and the remedies of 'termination' and 'rescission'. Indeed, as discussed in the previous section, 'conditions' have a meaning in the context of acting as conditions precedent and subsequent to formation and obligations, in addition to denoting obligations themselves.

Over time, courts have made a distinction between 'conditions' which are fundamental terms and 'warranties' which are terms that do not go to the root of the contract. This distinction is illustrated in the case law:

Bettini v Gye (2876) 1 QBD 183
Facts:

- P to sing in opera season 1875
- P 'without fail' to be in London 6 days in advance for rehearsals
- Arrived 2 days before
- D refused to accept services

Issue:

- What sort of term was the rehearsal clause?

Ratio:

- Warranty – a breach didn't go to the root of the contract

Poussard v Spiers (1876) 1 QBD 410
Facts:

- New Opera opens on 28 November (for 3 months)
- P singer unavailable from 24 Nov-4 dec

Ratio:

- D entitled to treat as 'repudiated'
- Distinction between minor breaches and major breaches; language not fully articulated

Wallis Son & Wells v Pratt & Haynes [1910] 2 KB 1003
Facts:

- Exclusion clause "no warranty is given"

Ratio: scope of this exclusion clause doesn't extend to breach of "condition"

- Terms going to the substance of the contract are conditions
- i.e. courts deciding how substantial breach was and putting label on it?
- Assuming always was a 'condition'

At the conclusion of the early cases, several issues remained.

- What is the best test for deciding when termination is allowed?
- Is a prior classification into the "conditions and warranties"
    - Best concept or expressions?
    - Practical and useful?
    - A straightjacket????
- How far do we allow classification by
    - Parties?
    - Statute?
    - Case law?
- Can we approach termination from after the breach? (fundamental breach)

Modern Case Law

Leading Cases

Luna Park v Tramways Advertising (1938)
Facts:

- Adverts placed on trams
- By P advertising co, for account of D
    - "20 per week when 53 boards displayed… 3 seasons… guaranteed on track at least 8 hours a day"
- After 2 seasons D shows adverts are not on each tram for full 8 hours and refuses to continue contract for last season

Arguments:

- P says 'average 8 hours' [over season], not on each particular day

Issue:

- Was the requirement of advertisement time a condition or warranty?

Ratio:

- Parties intended strict obligation
    - Irrelevant that P could not control the Tram Department

    - ‘guarantee’ type language
- term was in effect to be treated as a condition, not a warranty
- Jordan CJ (NSWSC)’s words endorsed 4-1 in HCA
    - The test of “essentiality” is whether it appears from the nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such performance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor…
- Depends on:

1. intention of parties
2. parties may provide term is “essential”
3. otherwise matter is a question of construction for the court

- Note factors
    - ‘we guarantee’
    - other ‘strict terms’
    - emphasis on continuity of display

Associated Newspapers v Bancks (1951) 83 CLR 323

Facts:

- cartoonist was a big draw for a newspaper
- D cartoonist with comic page for 29 years
- 1949 – 10-year contract for Sunday paper
- D to produce full page drawing
- P to put on front page of comic section

- 1951 newsprint shortages
    - for 3 weeks
        - comic put in colour magazine
        - cartoons on p3
    - d said no longer bound
    - P claimed injunction [to stop going to rival]

Ratio:

- Was condition or essential term, as
    - Reciprocal
        - D’s obligation to supply cartoon was undoubtedly a condition
        - If D had not produced full page P could have terminated
    - Vital for D to have prominence and continuity of publication so

- Work kept continuously before public
- Work should be published as a whole and not mutilated, and
- Published on most conspicuous page of comic section

Shevill v Builders Licensing Board (1982) 149 CLR 620
Facts:

- Obligation to pay rent not condition/essential
- 3 year lease, tenant constantly paying late
    - landlord alleged breach of essential term

Ratio:

- promises to pay rent in advance at specified times would not, without more, be a fundamental or essential term having the effect that <u>any failure, however slight</u>, to make payment at the specified times would entitle the landlord to terminate the lease

- landlord remedy if want to terminate lease?
    - Prove tenant repudiated [later]
    - Express cancellation clause [later]
        - E.g. landlord could re-enter if unpaid for 14 days
    - Declare term a 'condition' expressly?

Gough v South Sky Investments Pty Ltd [2012] QCA 161, [28-43]
Facts:

- Property development in Tower 1 of 'The Oracle' at Broadbeach
- Name change to 'Peppers Broadbeach' before settlement

Issue:

- Was the name change an essential term?

Ratio:

- Not essential term
    - No evidence Oracle had any content or significance – identification only
    - Still a unit in a Tower [GFC case?]
- So courts reluctant to allow termination for technical breach

Classification by parties

It is well-established that parties are entitled to specify the consequences of breach of a particular term (***Luna Park, Bancks, Shevill***). A court will follow the directions of the parties as expressed in the contract if the intention is clear. However, it should be noted that even strong wording may not be sufficient – 'without fail' was not enough in ***Bettini*** to make time of the essence. Furthermore, labelling a particular term as a 'condition' is not in of itself enough to automatically make the term a condition – the use of the word 'condition' is often unintended (***Schuler v Wickman*** [1974] AC 235).

If interpretation of the elements produces an odd result (e.g. making time of the essence in relation to a tiny payment), Australian Consumer Law on unfair terms may intervene.

Classification by statute/precedent

Statute often classifies terms in particular classes of contract. For example, SOGA ss16-17 classifies the title, description and quality of goods as 'conditions'.

It is possible for some terms to be classified as conditions by precedent, however this is unusual, and can always be rebutted by examining the specific intention of the parties.

Intermediate aka innominate terms

Hong Kong Fir Case [1962] 2 QB 26
Facts:

- Charter ship, hired for 2 years
- Term that the ship was to be 'seaworthy'
- Ship unseaworthy for 15-20% of the time
- Ship was eventually prepared such that it was fully working again

Issue:

- Could the hirer terminate the contract?

Ratio:

- Diplock LJ discussion
    - Not all terms can be classified as conditions/warranties
    - Breaches of seaworthiness term could be
        - Minor – tiny leak
        - Major – permanent engine defects so cannot sail

- So we should ask a different question:
  - Was P "deprived of substantially the whole benefit which it was the intention of parties as expressed in the contract that it should obtain"?

Held: No on facts: - 24 month time charter, 17 months of charter left

Although courts are generally reluctant to construe terms as conditions because they like to encourage contractual performance, it is always necessary to examine the nature and gravity of a breach as opposed to simply accepting rigid categories which do or don't grant a right to terminate.

- The Diana Prosperity (Reardon-Smith v Hansen Tangen) [1976] 1 WLR 989 (HL)
  - Look to nature and gravity of the breach, rather than accepting rigid categories which do or do not give an automatic right to terminate

- Ankar Pty Ltd v National Westminster Finance (Australia) (1987) 162 CLR 549
  - Encourages performance rather than automatic right to terminate
  - But coondition/warranty analysis may be relevant
  - treated surety's obligations to guarantor as conditions

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115
Facts:

- 1997 – K and S joint venture agreement
  - Dev and sale of land as residential property
  - K provides land, S project manager
  - S obligations
    - Seek funds
    - Keep proper books, maintain records/documents, prepare tax returns
    - Updated dev programme and timetable
  - Mutual obligations
    - Joint management committee
    - Be just and faithful to each other and consult regularly, promptly inform each other of material info
  - Land mortgaged, but no planning approval ever obtained
  - April 2003 mortgagee takes possession
  - Dec 2003 K's administrator claims S repudiated
    - Showing no intention to be bound e.g.

        - No proper books, updates, reports, funding or properly managed development
    - S claims contract still on foot
        - No breaches entitling termination
        - [alternatively waiver and estoppel prevent reliance on breach]

Ratio:

- affirms Luna Park condition/essential term approach
- HC (4-1) adopts tripartite classification from Hong Kong Fir
    - Kirby J two part classification – but same result
- Intermediate terms gives greater flexibility
    - Limits termination to serious breaches
- Breach going to the root
    - Deprive P of a substantial part of the benefit to which P is entitled under the contract
    - Consider
        - Construction of the contract
        - Benefit P entitled to under contract
        - Seriousness and consequences of breach
        - Adequacy of damages as a remedy

Essentiality of Time

Generally, parties will expressly stipulate that time is of the essence if it is important to them. The REIQ cl 6 states that time is of the essence by default in conveyancing. Cancellation clauses may also allow a party to terminate on an express date even without breach by the other party.

It should be noted however that equity may provide relief against forfeiture in some cases, particularly where rent has not been paid when due as the result of a short delay or inadvertence (***Tanwar Enterprises Pty Ltd v Cauchi***)

Where there are no express clauses, the essentiality of time is left to interpretation. Time of payment is generally not of the essence in sale of goods contracts (SOGA s13), but the time of delivery will generally be of the essence (***Bunge v Tradax*** [1981] 1 WLR 711). In other contracts, there is no default rule. Characterising contracts as 'commercial' or 'mercantile' is of little use. Perhaps a more useful question is whether D's performance is vital in order for P to conduct its affairs.

In property, time is not automatically of the essence following the fusion of law and equity (Property Law Act 1974 s13), although the 'settlement' date in conveyancing transactions is often essential.

Repudiation and Anticipatory Breach

Repudiation (aka renunciation) is established in circumstances where the breaching party has declared that they will not perform the contract, or part of the contract. Unlike fundamental breach, repudiation looks forward, and recognises that a party is not going to perform the remainder (or entirety) of the contract. The test is whether the conduct of one party is such as to convey to a reasonable person (objectively) in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it

Definition: *Words or conduct which evinces an unwillingness or an inability to render substantial performance of the contract, or no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with contractual obligations.*

Repudiation is a conclusion with severe consequences, and clear evidence of repudiation is needed. Express renunciation is the best evidence of repudiation. However, repudiation is an inference that may also be drawn from statements or actions, including the following:

<u>D disabling or incapacitating itself</u>

Omnium v Sutherland [1919] 1 KB 618 - Sells ship that is supposed to be hired – repudiation inferred from conduct

Carr v Berriman (1953) 89 CLR 327 – building contract – owner announces another contractor engaged for a large part of work – inference that performance only if it suits owner – evinces intention not to be bound

<u>D indicates inconsistent or incomplete performance</u>

Laurinda v Capalaba Park Shopping Centre (1989) 166 CLR 623
Facts:

- P leased property from D, D obliged to register lease
- P made arrangements to register lease and paid D for the fees. However, D didn't register the lease for 9 months
- P wanted to sell business – needed that damn lease registered!
- P gave D notice of 14 days to complete, D didn't comply
- P announced termination, D alleged P wrongfully terminated

Issue:

- Did P wrongfully terminate? Was time of the essence?

Ratio:

- Notices to complete can make time of the essence when it is unspecified in the contract. If a reasonable time limit is set by the notice, failure to perform is then a repudiation.
- The notice must advise of obligation to be performed, fix a reasonable time for performance and state that failure to comply will give rise to right to terminate

Rickards v Oppenheim [1980] 1 All ER 420 (EWCA)

- Where time was originally expressed as essential, but P waived the date and yet there has been still no performance by D, P can give reasonable notice requesting performance which effectively makes time of the essence again

Luna Park

- T intended to continue to perform in future in same [average] manner as past despite L complaints – this amounted to repudiation

<u>Threat of future breaches</u>

Shevill v Builders Licensing Board

Facts:

- Lessee constantly making late payments for rent
- Lessor terminated contract

Issue: repudiation?

Ratio:

- Slight future breaches not threatening to be fundamental breaches are not repudiation

- Tenant payment problems could have improved – previous max only 2 months in arrears

Progressive Mailing v Tabali (1985) 157 CLR 18
Facts:

- Tabali leased property to Progressive
- Prog to pay rent on basis work certificate not given by an architect
- Clause allowed Tabali to re-enter property if rent unpaid
- Prog took possession of the property prematurely, then argued that Tabali failed to deliver the work certificate
- But delivery of work certificate was a precondition to rent!
- Prog also failed to make payments and a number of other small breaches. Tabali demanded remedy, Prog gave none

Issue:

- Did Progressive repudiate the contract?
- Did the existence of the termination clause mean that progressive didn't have a right to repudiation?

Ratio:

- Tabali could still claim repudiation even though it also had a contractual right to terminate
- Combination of unwillingness to pay rent and other minor breaches amounted to repudiation by conduct, even though each breach wasn't enough in isolation
- DTR was 'bona fide dispute about the true construction of a contract expressed in unclear terms'
- Here no basis to support claim for no rent when in possession

Associated Newspapers v Bancks (1951) 83 CLR 323
Facts (as above)

Issue: repudiation?

Ratio: Yes - also found that Paper had repudiated –

- by evincing no indication of change of publishing policy upon notification of breach, OR also sufficiently:
- Papers made original changes without consultation, maintained that it was entitled to do so, on 26 Feb 3 more breaches intended, and manager only promised "to see what he could do"

Wrongful termination

Wrongful termination is itself a repudiation, irrespective of motive (***Luna Park, The Nanfri [1979] AC 757***). In ***Koompahtoo***, the High Court left open the question of whether repudiation could follow from acting on incorrect legal advice. The question is whether D, by relying on the legal advice, is evincing an intention not to perform, or whether D is evincing an intention to perform on their understanding of the legal position. Difficult cases arise in resolving this issue.

DTR Nominees v Mona Homes (1978) 138 CLR 423
Facts:

- A acted on its own interpretation of contract
- Not aware B had a different view, no attempt made by B to inform A they had misinterpreted the contract
- Purchaser claimed Vendor repudiated, and vice versa
- Other facts above

Ratio:

- No repudiation where erroneous party would be willing to perform the contract according to the actual interpretation once they are notified that they have misinterpreted
- Vendor didn't repudiate, so termination by purchaser was wrongful
- Purchaser's wrongful termination didn't repudiate contract because only terminated on the basis that Vendor repudiated
- Neither side effectively repudiated, but contract was mutually abandoned
- Unusual facts? Murphy J view more realistic?

Woodar v Wimpey [1980] 1 WLR 277 (HL)
Facts:

- Contract had a cancellation clause if "government purchased the land"

Ratio:

- D not 'evincing intent not to be bound'
- Always saying it wanted to perform

Hill End Gold v First Tiffany [2011] NSWCA 276
Facts:

- Letter [repudiatory?] sent by new solicitors was part of debate in litigation in context of 20 years of commercial history, which was uncertain, as were recollections, and not everything had been reduced to writing.
- Lawyers formulated various contentions from this unclear material

Obiter:

- Letter in litigation might amount to a repudiation of a contract.
- "The letter here should not, however, be so characterised. Rather, it was seeking to assert proprietary entitlements from an unclear body of history which was the subject matter of dispute between the parties"

It should also be noted that claiming repudiation before evidence supports it can itself amount to a repudiation, even if that repudiation is eventually made out (***Lennon v Scarlett***). It is much better to ask D if they intend to perform, or call out D's legal error and request a response/issue a notice requesting performance.

Hochster v De la Tour (1853) 118 E.R. 922
Facts:

- P to be employed by D for 3 months
- D dismisses P before start

Issue: Does P have to wait until D ought to have started paying them to terminate?

Ratio:

- No need for P to wait for performance if D repudiates – anticipatory breach
- Still, anticipatory breach is harder to establish than express repudiation

Termination and Consequences

If P has a right to terminate, they face a choice between electing to terminate the contract or affirming it. If terminate, what is the effect on contract and damages?

McDonald v Denny Lascelles (1933) 48 CLR 457, 476-477 Dixon J
Ratio (general principles):

- When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning.

- Both parties are discharged from the further performance of the contract, but rights which have already been unconditionally acquired are not divested or discharged
- Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected
    - Unlike rescission, where parties have to be restored to the position before the contract was made
- When a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined [terminated] so far as it is executory only and the party in default is liable for damages in its breach

Essentially,

- P chooses to treat unperformed obligations as discharged
- Needs to communicate unequivocal intention to bring the contract to an immediate end in order to terminate
- Consequence:
    - P doesn't have to perform remaining obligations (nor does D), and
    - P can sue for damages for P's loss of bargain

Damages

The general rule of contract damages is that P is entitled to be put in position s/he would have been in if contract performed. On termination, P can claim damages for both past breaches and the loss of benefit of the remainder of contract no longer to be performed.

For example, in ***Frost v Knight (1873) VII L.R. Exch. 111***, D repudiated an obligation to 'marry [P] when D's father died' before the father's death. P did not have to wait before accepting the repudiation (terminating) and claiming damages for the loss of the future wealthy lifestyle which they would have enjoyed if the contract had been performed.

However, in order to claim expectation damages for repudiation, P has to show that it was ready and willing to perform if D had not repudiated (***Foran v Wight (1989) 168 CLR 385***). This rule, although criticised by some including Keane J, is well-established. Note that this is only a requirement to claim expectation damages – even if P cannot prove they are ready and willing to perform the contract, they can still terminate for D's repudiation – they just can't get expectation damages (***Highmist v Tricare [2005] QCA 357***, Keane J [60])

P's right to terminate on account of D's repudiation exists even if P is itself in breach of a non-essential term, provided P is willing to perform the contract on its proper interpretation (***Almond investors v Kualitree Nursery*** [2011] NSWCA 198).

As McDonald v Dennys establishes, rights that are already unconditionally acquired before a P elects to terminate are not divested or discharged. For example, in a contract for a sale of goods where a deposit is payable in advance, once the deposit is paid, it is an accrued right that is non-recoverable if the contract is terminated. On the other hand, if the full price is payable on delivery, the right is not accrued until performance.

Payments actually made in advance???

Baltic Shipping Co v Dillon [1992] 176 CLR 344
Facts:

- Ship sank 8 days into 14 day cruise
- Passenger had already paid fare in advance
- Remedies?
    - Clearly damages (luggage and 'disappointment')

Issue:

- Could she also have refund of full fare? Was there a total failure of consideration? If not, was the right to retain payment conditional on full performance?

Ratio:

- Mason CJ: two grounds to recover advance payments
    1. Total failure of the consideration?
        - Not here as had 8 days of holiday
    2. Was right to retain payment conditional on full performance?
        - Question of construction
        - Relevant if payee required to work and incur expense before completion
            1. D working from start
            2. Advance payment was consideration for each substantial benefit expected
        - Test proposition that full refund intended:
            1. Q1 what if engine breakdown and P airlifted back to Sydney?
            2. Q2 what if cyclone meant missed one port of call?
        - Result? In effect accrued right?

Affirmation

Affirmation amounts to a one-off choice by a plaintiff with a right to terminate to continue with the contract. SOGA s37 provides that 'acceptance' of goods amounts to affirmation of a sale of goods contract that extinguishes a right to reject goods (but not a right to claim damages for defective goods).

In the general case, affirmation requires clear, unequivocal, permanent affirmation communicated to D by words or action, or convincing evidence of such (***Tropical Traders v Goonan*** (1964) 111 CLR 41).

In order to affirm a contract, P must know of facts giving rise to the right to elect to terminate and the right to choose between affirming and terminating the contract.

Once a party has affirmed a contract, it remains 'on foot' for both parties as if no fundamental breach or repudiation had occurred. However, P can still claim damages for losses suffered by previous breaches.

Let's say that D repudiated the contract and P chooses to affirm. On of two things may happen. First, D might perform the contract. If this happens, P is bound to perform their end of the bargain. On the other hand, if D keeps refusing to perform after P affirmed, P may terminate later (***Millstream v Schultz*** (1980 1 NSWLR 547)). This is true even if P asked for 'specific performance' during the affirmation (***Galalassi v Kelly*** [2014] NSWCA 190).

A contentious issue remains as to whether a P's right to affirm a contract is limited by the principle of mitigation of loss. This principle has traditionally been applied to claims for damages only as opposed to actions in debt (***White***), however recent decisions at the intermediate appellate level in Australia have suggested there may be some limit on the right to affirm a contract (***Clea Shipping, Meriton***). Presumably there is an economic rationale to limit the doctrine in that allowing an unfettered right to affirm will create economic wastage (Oiao Liu, Anticipatory Breach (2011)). There is no authoritative High Court authority on the topic yet.

White and Carter v MacGregor [1962] AC 413
Facts:

- P agrees to put adverts on litter bins for D's business – 3 year contract
- D repudiates on day 1
- P continued to place adverts for 3 years AND P sued D for full price, i.e. debt, not as damages

Issue:

- Was P's right to affirm the contract limited by a duty to mitigate loss?

Ratio 3-2: No

- P's action was in debt, which is not a discretionary remedy. A duty to mitigate loss only applies to those claiming damages, not debt.
- Not obliged to mitigate and claim damages

Clea Shipping v Bulk Oil International (The Alaskan Trader) [1984] 1 All ER 129

- Using dicta of Lord Reid in White
- P would have to accept damages if:
    - D's co-operation required for execution of contract or
    - D can show P has no 'legitimate interest' in performing the contract

Meriton Apartment v Owners Strata Plan No 72381 [2015] NSWSC 202 [322+]

Facts:

- Caretaking/security/concierge contract for large apartment block
- D wrongfully terminated, P sought to affirm and claim debt for full price, even though no cost had been incurred, rather than an action in damages for lost profits

Issue: Damages or debt?

Ratio: Damages only

- No HCA decision, but can only elect to affirm subject to Lord Reid's dicta
- **Legitimate interest**? – clear financial interest to pressure market regulation (building management), but
- **Co-operation** needed here for access and because relations are wrecked, would need an order for specific performance which is not available because it would require too much supervision

Cancellation Clauses

Parties will often specify situations which entitle them to terminate in express terms of the contract. These clauses will have different names: cancellation, withdrawal,

rescission, termination, re-entry, force majeure (clauses) are just some. Such clauses may have different effects:

- Absolute right ("P may terminate if no delivery by 1 August"), or
- Graduated response; e.g. warning, opportunity to remedy
- Some discretion ("if P considers there is a material breach, give 30 days to remedy")

Furthermore, a distinction can be drawn between cancellation clauses that merely give a right or option to terminate ('neutral right') and those that are intended to be a condition/essential term. If the latter are activated, they grant the aggrieved party a right to termination and damages. The former do not require a breach by D to activate the right, whereas the latter usually will.

Generally, cancellation clauses act cumulatively upon existing common law rights. In ***Tabali***, the existence of a re-entry clause didn't restrict common law rights to terminate in response to repudiation. However, the position could be different in the case of modern, graduated termination clauses that encourage remedies where possible to prolong the contract in case of breach.

Restrictions on the right to terminate

- Exercise termination clause reasonably?
    - Construction approach?
    - Implied term
        - Good faith in performance?
        - Difficult if express termination clause?
- Estoppel?
    - E.g. if P led D to believe P would not terminate
        - Legione v Hateley
        - Clear statement that extra time allowed?
- Consumer and small business cases?
    - Australian Consumer Law part 2-3 – termination clause unfair?
- Relief against 'forfeiture'?
    - Time of essence, but equitable remedy 'relief against forfeiture'
    - Mostly land (property) forfeiture cases e.g. mortgages, leases
        - Tanwar Enterprises Ltd v Cauchi (2003) 217 CLR 315, e.g. Callinan J at 363
            1. 'fraud, mistake, accident and surprise' are key issues for equitable intervention
    - could equitable relief be applied in non land cases, e.g. to commercial service contracts?
        - Mineralogy Pty Ltd v Sino Iron
- Termination equivalent to a penalty clause?

- Paciocco v ANZ
- Mineralogy Pty Ltd v Sino Iron

FRUSTRATION

Introduction

Frustration is a doctrine that limits obligations to perform on the basis of supervening events in light of which the parties could not have expected performance. Frustration is a broad doctrine that includes:

- Impossibility (***Taylor v Caldwell*** (1863))
- Illegality
- Delay (***Jackson v Union Marine Insurance*** (1874))
- Commercial purpose defeated (***Krell v Henry (1874)***)

Unlike common mistake which concerns a circumstance that didn't exist (but was believed to) at the time of making the contract, frustration concerns a valid contract that has been interrupted by a supervening event.

Theoretical Basis

Codelfa establishes that frustration has a theoretical basis as its own legal principle, not an implied term. Nonetheless, historically there have emerged multiple formulations of the test

1. "Changed situation" test: Lord Reid in ***Davis***
    - determine on construction of terms
    - in light of nature of the contract and the surrounding circumstances, is the contract wide enough to apply to the new circumstances?
    - If not, it is at an end
2. "Change in significance of obligations" test: Lord Radcliffe in ***Davis*** – "frustration occurs when the law recognises that without default of either party a contractual obligation has become incapable of performance because circumstances in which performance is called for render it a thing radically different from that which is undertaken by the contract"

3. The test reformulated: ***The Hannah Blumenthal*** [1983] 1 Lloyds Rep 103 – lord Brandon p112: 2 factors needed
- some outside event not foreseen or contemplated by the parties which makes it impossible to before or something radically different
- that circumstance or event must have occurred without the fault of either party

Really, we are required to compare two situations: 1. what performance was contemplated? 2. What was the new situation or required performance? Is 2 radically different to 1?

Codelfa Constructions v State Rail Authority of NSW
Expected Situation:

- Common assumption of 3 shift 6 day week
- No injunctions expected
- Methods used as agreed, within fixed 130 day limit from march 1972

New Situation:

- 2 shifts not 3
- 5 day week
- work still not finished in may 1976

Issue: Was new situation radically different to expected?

Ratio:

- manner/method of work was essential to performance
- impossible lawfully to have performed contract in compliance with contractual requirements
- new performance was radically different
- c.f. Brennan J (dissenting) – no change in the relevant legal position

The doctrine in practice

The doctrine in practice is a strict and difficult test. Mere expenses or extra difficulty are not enough; parties must perform obligations and accept risks. However, frustration is a rule that operates if there is no express term which covers the events, so force majeure clauses can often soften the harsh edge of the doctrine of frustration. However, the existence of a force majeure clause will not exhaust the common law application of frustration.

It should also be noted that although the implied term basis of the doctrine of frustration has been rejected, cases which rested on this basis are often still good precedent because they applied the same fundamental test.

Examples of Frustration

Supervening [in effect permanent] impossibility

Taylor v Caldwell

- frustration of a lease because the music hall burned to the ground a week before performances were meant to start due to no fault of either party

Sale of Goods Act 1896 (Qld), s10

Supervening illegality

Fibrosa SA v Fairbairn, Lawson Ltd [1943] AC 32

- contract for sale of machinery frustrated by the outbreak of WWII

Also ***Codelfa***

Commercial foundation defeated

Krell v Henry [1903] 2 KB 740

Facts:

- Edward VII coronation procession due to pass
- Cancellation due to King's illness
- Fancy flat in Pall Mall was hired out at a crazy rate for two days for the hirer to watch the coronation ceremony

Issue: Was the commercial purpose of the contract defeated?

Ratio: Yes

- foundation of contract (underlying commercial purpose) had ceased to exist. Contract was frustrated. Wasn't really a contract for a room, but rather a contract for a viewing platform.

Herne Bay v Hutton

Facts:

- After coronation King was going to go down and review the royal navy. Someone had hired a pleasure cruiser to take people out on the river to watch the king.

- Coronation cancelled

Issue: Frustration?

Ratio: No.
- Unlike Krell, the boat was still there, and parties could still have the major part of the utility of the contract (taking people and looking at the fleet) notwithstanding the event of cancellation.
- Krell difference because much larger price than ordinary rent, and couldn't stay overnight => the only purpose of renting was viewing

Extra expense not sufficient

Tsakiroglou v Noblee Thorf [1962] AC 93
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)
- Suez canal was shut because of war between Arab states

Ratio: S extra expense not enough to frustrate

Limits of Frustration

Self-induced frustration

The fact that frustration is self-induced operates as a bar to relief (The Eugenia), with the likely consequence that the party relying on the doctrine for release from obligations will have repudiated or fundamentally breached the contract. In determining fault of a frustrating event, the question is not whether the event is foreseeable, but rather whether the contract has allocated risks between the parties.

The Eugenia [1964] 2 QB 226
Facts:

- Hire contract [daily rate] – Italy – black sea (load iron) – India
- Parties knew there was a possible risk that the Suez Canal might be shut (1956 nationalisation)
- No term agreed, but normal War Clause - 'charterer not to order war zone'

- arrived Port Said, artillery fire, but charterer ordered into canal
- 31 Oct War: Egypt blocks canal trapping ship until Jan
- South not unblocked until April [ship undamaged]

Issue: Did the war clause release the charterer from obligation? Alternatively, was contract frustrated?

Ratio:

- War clause didn't release from obligation to deliver
    - Voyage via canal was not required by contract
    - Construction - no term saying must go via canal
    - Could have gone via Cape (more expensive)
- No Frustration
    - Being trapped was self-induced – no frustration if own fault/choice
    - Blocking causing frustration?
        - Canal would have been blocked anyway, even if charterer not in breach. Time to judge? By November, all considered blocked indefinitely
        - Was extra voyage via Cape 'radically different'? Depends on comparison of contract and new obligations. Mere fact that more expensive or onerous not enough. Not a perishable cargo
        - Which comparison of delays?
            1. Black Sea-India 56 days (Cape); 26 days (Canal) but correct comparison was with the hole contract
            2. Italy – black sea – india 138 days (Cape); 108 days (Canal) not radically different
- Strict test (36% extra time not enough)

Express clauses covering events

Fibrosa SA v Fairbairn

Facts:

- "if despatch hindered/delayed by war.. extension of time allowed"
- war (Germany invades Poland)

Ratio:

- 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
- here, clause didn't prevent doctrine of frustration applying

AGL Sales (Qld) v Dawson Sales [2009] QCA 262

- 'force majeure' clause
- 'interruption' of gas supply not apt to describe any diminution in supply, even slight, from expected levels
- minor disruption didn't engage the clause

Consequences of Frustration

Frustration has similar consequences to termination in that accrued rights are enforceable, but rights not yet accrued are not enforceable.

- Payments due beforehand – must pay, unless total failure of consideration. Payments due after – no obligation to pay.
- Payments made beforehand – not returnable, unless total failure of consideration. Payments made after were not due.

Krell v Henry (1903)
Facts:

- $25 payable in advance
- $50 due after hire (unpaid)

Ratio: deposit could be kept by landlord, remainder didn't need to be paid

Fibrosa (1943)
Facts:

- Sale price for machinery - $4800. $1600 payable in advance by buyer. Only $1000 paid in advance before frustrating event though...

Issue: What was the consequence of frustration? Did B have to pay $600, or S pay back $1000?

Ratio: Because there was a total failure of consideration, B entitled to payment of $1000 advance payment.

Frustration statutes in some jurisdictions (UK, NSW, SA, Vic) give courts the discretion to apportion advance payments and other benefits accrued under a frustrated contract. If it is just, a court may allow a seller to retain sums paid, or recover sums payable.

Another issue relates to benefits obtained before frustration. The statutes allow, if A receives a "valuable benefit" from B and payment is due after discharge, if the contract is frustrated before discharge, B can recover a sum up to the value of the benefit at the court's discretion, subject to expenses incurred by A in obtaining that benefit.

DAMAGES FOR BREACH

Damages are the default remedy available for breach of contract at common law. Although damages are automatically available as of right for breach of contract, remoteness can limit the type of loss that is recoverable and its quantum. Furthermore, unlike debt (for the most part), damages are subject to a duty to mitigate loss. There is also a difference between a loss of bargain/expectation loss, reliance loss and restitution of the defendant's gain.

The general principle of contractual damages is that a party who has sustained a loss by breach of contract is entitled to be placed in the same position, so far as money can, as if the contract had been performed (***Robinson v Harman***, ***Wenham v Ella***).

In order to obtain damages, P must prove that D's breach caused the loss. Causation can generally be established by the 'but for' test, but perhaps also on a common sense basis (***March v Stramere***) as a question of fact. It is generally irrelevant if D's breach is just one of many concurrent causes of P's loss, but there may be problems in cases where a later event occurs, but for which P wouldn't have suffered loss (novus actus interveniens).

Remoteness is principally governed by the two rules [limbs] in ***Hadley v Baxendale***. Damages which are recoverable are those:

1. Damages arising naturally
2. Damages in reasonable contemplation of BOTH parties as the probable result of the breach

Importantly, the standard of remoteness (in terms of probabilities) isn't too hard to meet. In ***Wenham v Ella***, the standard was described as a 'serious possibility', 'real danger', 'liable', or 'not unlikely'. It is clear that it is unnecessary to prove that the damage was 'a near certainty or odds on probability'.

Remoteness: Likelihood of Loss

Hadley v Baxendale
Facts:

- Crank shaft of steam engine broken at P's mill
- D agreed to carry shaft to London manufacturer
    - Shaft was to be used as 'pattern' to make new one
- Delayed in delivery by some neglect of D – breach
- Mill out of action for several days
- D didn't know precisely why carriage was needed

Issue:

- Was the consequential damage by the loss of productivity within the scope of damages?

Ratio:

- On limited facts available, loss did not arise naturally
- D not liable for lost profits while mill stopped. The loss wasn't in the reasonable contemplation of D at the time at which the contract was made

Additional facts relevant to know?

- Did P have a spare shaft?
- Was mill otherwise out of action?

Had special circumstances been known

- P and D might have concluded special terms, e.g.
    - Higher price for rush job, or
    - Clauses limiting D liability

There is an overlap between causation, remoteness and mitigation.

McRae v Commonwealth Disposals Commission (1951) 84 CLR 377

Facts:

- Ww2 lots of wrecked vessels
- Cth agency agrees to sell tanker to P salvor

    - "lying on Joramund reef," 100m north of Samurai (PNG), oil and metal
- no guarantee as to condition of the tanker, but there is a tanker
- no such place as joramund reef, and no tanker
- salvor mounts expensive salvage operation, but no tanker existed
    - express promise that tanker existed = breach
    - Trial J said P should have only spent 500pd in checking to see if the tanker existed

Issue:

- What measure of damages is appropriate?

Ratio:

- HB1 Natural loss would presumably be lost profit
    - As it did not exist, P could not prove lost profits
        - Big tanker? Small tanker? Who knows
    - Claimed for wasted expenditure – HB2 (Hadley Baxendale No 2)
- HB2 Cth had actual knowledge of the loss that P would suffer
    - In contemplation of parties that P would mount full salvage operation
    - 3000 wasted expenditure and 285 sale price
- technically two rules, but one overriding principle
    - HB1 – what is in normal contemplation/ordinary contemplation
    - HB2 – what is in special contemplation of these particular parties

Koufos v Czarnikow (The Heron II) 1967
Facts:

- D shipowner chartered to carry 3000 tons bulk sugar
    - Romania to Basrah, Iraq
- Expected to take 20 days, took 29
    - D breach by deviation from agreed route
    - Master took sheep on deck/did extra unauthorised trading on the way there
- P charterer claimed fall in price in that period
    - Another ship had arrived, price fell by 4000 (4%)
- Shipowner didn't know what P intended to do with sugar; offered interest 180 euros for 9 days.
- That said, D knew of existence of a market
- "not unlikely" sugar would be sold in market at market price on arrival

Issue:

- was the loss of market price in contemplation of the parties?

Ratio:

- Crucial question is whether, looking at the time that the contract is made, would the reasonable person have realised that such loss was sufficiently likely to result from breach to make it proper to hold that the loss flowed naturally from the breach or that loss should have been within D's contemplation
- loss of market price recoverable
- HB one rule. Two branches?
- Cited with approval in HCA

Victoria Laundry v. Newman [1949]
Facts:

- D sold new boiler to P laundry; D knew of P business
- Delay in supply = breach
- P claimed lost laundry business and loss of 'specially lucrative' dyeing contract

Issue: which loss was too remote?

Ratio:

- Recover ordinary laundry business only
- No special knowledge of the special lucrative contract

Parsons v Uttley Ingham [1978]
Facts:

- P pig farmer, D hopper maker
- D sold and delivered hopper
- Installed hopper with closed ventilator
    - Nuts in hopper became mouldy
    - Animals fed nuts to pigs
    - Pigs died (surprisingly?)
- D in breach of SOGA [s16], but damages?
    - To replace mouldy nuts?
    - Damages for all pig deaths?

Issue:

- What damage was in contemplation of the parties?
- What is the right question?
    - "What if mouldy nuts fed to pigs?" or?
    - "what is likely if D supplied hopper…
        - unfit for storing nuts
        - which are suitable for pigs?"

Ratio:

- unnecessary to see the extent of the loss
- D and P to contemplate
    - Type of consequence
    - As 'serious possibility
- D liable for pig losses

Transfield v Mercator (The Achilleas) [2009] HL

Facts:

- Ship hired to charterer, charterer redelivers it 9 days late in breach
- Shipowner had already arranged next charter to third P at a much higher rate
    - Third P had right to cancel as late
    - Agreed only if reduction of $8000 a day on account of being late
- Shipowner argued that the $8000/day loss was the relevant loss
- Charterer argued
    - HB1 – volatile market
    - HB2 – no actual knowledge of terms of next charter

Issue:

- What damages are appropriate?
    - Charterer obliged to continue to pay hire for use at original charter rate?
    - What about the market rate? It might have increased/decreased since the original charter was made

Ratio (arbitrators)

- HB1 – charterer fully aware of market – damages not too remote
- Normally enough to foresee type of loss (not exact amount), so volatility irrelevant

Ratio (HL)

- Not in **reasonable** contemplation of parties
    - Extra special level of market volatility in this case that meant that this type of volatility wasn't reasonably contemplated by the hirer
- Too remote as market difference was 'unquantifiable, unpredictable, uncontrollable or disproportionate liability'
- No assumption of responsibility by charterer

Gaskell:

- This is probably an exceptional case

Non-pecuniary loss: disappointment and distress

There is some question of the extent to which courts can award non-pecuniary damages for breach of contract. Physical injury caused through a breach of contract is clearly recoverable, of course. To some extent, the physical consequences of breach are also recoverable:

Watts v Morrow [1991]
Facts:

- Surveyor fails to find defects in a house purchased by a husband and wife
- Husband and wife are very disappointed

Issue: Can they recover damages for the discomfort they experienced?

Ratio:

- Awarded 750pd each, not for tension and frustration of being in a legal dispute, but for vexation and discomfort inconvenience of having to live in a defective house
- It is possible to allow non-pecuniary loss for disappointment if the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation.
- Here, it was just an ordinary house survey, so no damage for disappointment loss, but still damage for resulting physical discomfort.

Courts are generally reluctant to award damages for disappointment, anxiety and mental distress. Historically, damages for disappointment by breached were not allowed for train delays, missing appointments with clients (***Hamlin v GNR***), or injured feelings coming from a humiliating dismissal (***Addis v Gramophone Co***).

Over time, courts have incrementally broadened the scope of non-pecuniary loss.

Jarvis v Swan Tours [1973] 2 QB 233 Lord Denning

- "So there was Mr. Jarvis, in the second week, in this hotel with no house party at all, and no one could speak English, except himself. He was very disappointed, too, with the ski-ing. It was some distance away at Giswil. There were no ordinary length skis. There were only mini-skis, about 3 ft. long. So he did not get his ski-ing as he wanted to. In the second week he did get some longer skis for a couple of days, but then, because of the boots, his feet got rubbed and he could not continue even with the long skis. So his ski-ing holiday, from his point of view, was pretty well ruined." There were also no Swiss cakes, just crisps and little dry nut cakes. The "yodeler" was a local man who came in work clothes and sang four or five songs quickly. The "Alphütte Bar" was empty and only open one evening."

Jackson v Horizon Holdings [1975] All ER 82

- Ruined 1200 holiday, 1100 damages awarded for discomfort, vexation and disappointment
- As non-pecuniary loss of this sort was in contemplation of parties

Heywood v Walters [1976] QB

- Solicitor negligent in obtaining non-molestation order
- Distress was direct and inevitable consequence of failure to perform sole purpose of contract

Farley v Skinner [2001] 4 All ER 801

- Surveyor specific undertaking to investigate important matter for F's peace of mind (flight paths of aircraft)
- Not necessary for 'pleasure, relaxation, peace of mind' to be THE only object of contract
- Damages were awarded because peace of mind was one of the objects of the contract

Ruxley v Forsyth [1998] 3 ALL ER 268

- 70,000 pd swimming pool built too shallow
- P awarded 2500 for loss of pleasurable amenity

Baltic Shipping v Dillon [1992] 176 CLR 344

Facts (as above)

Issue:

- What remedy is appropriate?
- Damages [luggage] and disappointment?
  - Trial J awarded 5000
- Could she also have refund of full fare in advance?

Ratio:

- HC – cannot have full damages and complete restitution for the same breach
- Damages for disappointment and distress - HC recognised difficulty if apply simple 'contemplation' approach because foreseeability is an easy bar to meet.
- Mason CJ [365] such damages not recoverable unless "they proceed from physical inconvenience caused by breach, or "contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation"
- here pleasure cruise, so entitled to damages for disappointment, distress and physical inconvenience

Interest

Generally, the English common law position is that there is no right to interest as damages, unless there is some special (HB2) circumstance that brings interest as potential in the common contemplation of the parties at the time at which the contract was concluded (***La Pintada*** [1985]).

In Australia, the position is somewhat different. In ***Hungerfords v Walker*** (1989), it was held that where negligent breach of contract by accountants resulted in taxpayers paying too much tax, damage resulting from the loss of the use of that money was a foreseeable loss directly related to D's negligent breach of contract in the mutual contemplation of the parties at the time of formation (HB1), so compound interest was awarded.

However, interest does accrue on judgment debts (i.e. the monetary sum owed once damages are awarded) from the date of proceedings: *Federal Court of Australia Act 1976* (Cth) s51A, State Supreme Court Acts, e.g. *SCA* (Qld) 1995.

Mitigation of Loss

Although debate continues as to the principle underpinning a duty to mitigate loss (whether a question of causation, remoteness, or a separate duty), it is clear that the duty exists.

Burns v MAN Automotive (1986)
Facts:

- 1977 D supplies used truck, "engine fully reconditioned" for $31K
    - was not reconditioned – heavy fuel use, engine knocking, lack of power

    - clear breach of warranty (description, fitness for purpose)
    - many problems for P, e.g. breakdowns
- 1979 P learns fully of breach
    - 1978-9 P restricted to using in QLD as could not be trusted interstate
    - 1979 final breakdown, P behind in payments and finance co repossesses, sells for $6K

Ratio: HCA 3 judges (Wilson, Deane and Dawson agree with FC

- P not entitled to loss of earnings after 1978
- Not a case of mitigation, but remoteness
    - i.e. identify time after which loss could not be within the reasonable contemplation of the parties
    - P should have given up and returned truck to the finance company
- FC generous to find that P didn't have knowledge until 1978, but may have reflected P's financial difficulties in deciding what to do

- Brennan J (673) – same result achieved through remoteness or causation. Tort case of Leisbosch Dredger (1933) distinguishable. In that case, dredger was hired to replace one negligently destroyed by D. However, the hire of the dredger cost more than it would have to purchase a new one, which P couldn't do because it couldn't obtain finance. In that case, P's impecuniosity not traceable to D's actions. However, here, P's impecuniosity was caused by D's breaches, i.e. pre-1978 decision to trade in QLD only.

Dougan v Ley (1946)
Facts:

- D contracts to sell P a Sydney taxi plus (valuable) licence ($1850)
- Just before trial P buys another taxi in market for $1900

Issue: Did P forfeit their right to damages by purchasing another cab?

Ratio:

- Not a question of a replacement in mitigation
- P wanted to build a taxi fleet and still wanted D's taxi as well
- Probably would have bought that licence in any event

Clark v Macourt (2013) 253 CLR 1
Facts:

- Sale of sperm [technically defective]
- B goes to only alternative supplier and claims cost from S

- Extra costs recovered by charges to patients, no loss of profit claim

Issue: Did the fact that extra costs were recovered by increasing prices extinguish P's right to damages?

Ratio: "breach date rule" – damages assessed at date of breach, not date of trial

- P entitled to amount would have had to pay at date of performance
- Subsequent acquisition cost used as a proxy for that

Measure of Damages

Expectation Loss – examples

Sale of Goods Contracts

- SOGA Qld ss61-62
    - S61 – damages for non-acceptance by buyer
        - Difference between contract and market price
        - At date when should have been accepted
    - S62 damages for non-delivery by seller
        - Difference between contract price and market price
        - At date goods should have been delivered

It should be noted that in some cases, a breach simply causes a loss of opportunity. However, a court will still attempt to quantify the value of such a loss of opportunity (***Chaplin v Hicks (beauty contest)***), (***Markholm Constructions (ballot)***).

Speculative contracts: competitions

Dupois v Galley Commodities [2016] QSC 167
Facts:

- D agreed to lend money to P, then reneged on the agreement
- P claimed that if D had lent money to them their song would have been downloaded 18 million times, producing massive revenue

Issue: What was the value of D's lost business opportunity?

Ratio:

- There was a breach, but ultimately the burden lies on P to prove the loss
- $100 nominal damages

CALCULATING DAMAGES

Expectation Loss

Measuring Loss of Amenity

Radford v De Froberville
Facts

- Contract to sell land
- As part of deal, buyer agreed to build wall
- B failed to build the wall, even though they paid the price
    - 1965 cost 1200
    - 1977 cost 3400
- Damages?
    - Award the cost, or
    - Diminution in value of P property (minimal)?

Ratio: Loss of the amenity was equally important to P

- P entitled to be in 'as good a position' as if performed
- Not necessarily 'as good a **financial** position'
- So awarded cost
    - C.f. if P intended to knock down whole property and redevelop

Measuring Reinstatement

Ruxley Electronics v Forsyth [1995]
Facts:

- Wants swimming pool built - 70,000 pounds
- Builder fails to build to correct depth
    - "skimped performance"?

Damages issue:

- no reduction in value if sold house
- P wanted pool rebuilding – 21,000 pounds

- Is P entitled to cost of restatement?

Held:

- Unreasonable to reinstate
- Doubted if P intended to rebuild
    - These two above factors were probably terminal in this case – it is quite exceptional
- Not two choices: profit or reinstate
- Reasonable valuation of what P ought to have received, but did not
- Awarded 2500 for loss of amenity
    - This is one of those cases where disappointment was recoverable as that was the purpose of the contract
- Hard case as no protection for P?

Tabcorp Holdings v Bowen Investments (2009) 236 CLR 272
Facts:

- Tenant alters foyer of building in breach of special covenant not to do so
- Owner had put particular care into making the foyer
    - Special materials, e.g. San Francisco granite, sequence matched US cherry

Remedy?

- Damages for diminution in value of building [$34320]? Or
- Restoration [$580000] + lost rent [$800000]?

Ratio:

- Ruxley is exceptional
    - Cost of rectification in that case was wholly disproportionate and unreasonable
- Need to put P owner in 'same situation' – not necessarily financial
- Reinstatement costs had to be reasonable
    - E.g. if building had become unstable (Bellgrove v Eldridge), or
    - Room painted in wrong colour
- Here it was for P owner to stipulate specifications
- Betterment discount?
    - If owner delayed work until after lease would avoid fair wear and tear damage + better off
    - But tenant failed to argue point

Reliance Loss

Typically reliance loss will be claimed if there is difficulty showing what the loss of profit would have been if the contract hadn't been performed.

McRae v CDC
Facts (as above)

- No loss of profit because the tanker never existed, so impossible to determine the value of the tanker

Issue 2: What damages were P entitled to?

Ratio:

- Entitled to recover sale price and wasted expenditure (285 + 3000)
- Trial Judge said P should have only spent 500 in checking to see if there was a tanker, but
- HCA: in contemplation of parties that P would mount a full salvage operation i.e. HB2 case – CDC must have known that this would be a speculative exercise so McRae would be unlikely to check position first
- Measure
    - Breach makes it impossible to measure value
    - But can measure wasted expenditure
- Mere difficulty of estimating chance/loss does not relieve court of duty to assess

Commonwealth v Amann Aviation Pty Ltd (1991)
Facts:

- Amann agrees to provide coastal surveillance flights for initial period of 3 years, replacing a previous contractor
- On day flights meant to commence, Amann doesn't have all 11 aircraft ready to perform obligations as required by the contract – only 7 ready which don't comply with all requirements
- Cth aware of this shortcoming for some time and is prepared to deal with the problem, however it wrongfully terminates the contract for this failure (admitted at HCA). Cth tries to argue legal right at common law even though no serious breach (remaining aircraft only a few days late) instead of arguing right to terminate in contract cl7.24 which allowed it to terminate for unsatisfactory performance if good cause not shown to 'satisfaction' of minister
- Amann treats wrongful termination as repudiation, elects to terminate contract.
- Amann incurred heavy expenditure in acquiring and fitting out aircraft for performance. Amann couldn't have made its money back in the first 3 years though, so they essentially gambled on the contract being renewed, which was not guaranteed

Issue: Can Amann recover damages for pre-performance reliance on contract even though its contract would have resulted in a net loss?

Ratio:

- Where total income is greater than expenditure required to perform, P cannot recover reliance because this would allow double recovery
- Where the contract is a 'losing contract' (they won't make money from it) they are able to recover expenses wasted as a result of D's breach – the onus rests on D to prove that the expenses would not have been recouped anyway

Breach Date Rule

Generally, the quantum of damages is assessed at the date of breach (***Johnson v Perez*** (1988) 166 CLR 351). However, questions arise as to how far facts arising at the time after the date of breach should be considered in determining the quantum of damages.

Commonwealth v Amann Aviation Pty Ltd (1991)
Argument:

- Damages should be reduced on account of the possibility that the Commonwealth might have legitimately terminated the contract before renewal

Ratio:

- Trial Judge determined a 50% chance of cancellation
- Full Court of the Federal Court determined 20% chance of cancellation
- High Court – P entitled to full reliance damages
    - Deane Toohey, McHugh – damages should reflect 20% or 50% possibility that Cth would have validly cancelled contract
    - Mason, Dawson, Gaudron – agree with FC that because only 20% chance, isn't proven on balance of probabilities and should be ignored
    - Brennan J – Cth failed to prove that would have cancelled validly, but 20% would have applied if P claimed expectation loss after renewal

The Golden Victory [2007] HL
Facts:

- 7 years 1998-2005 ship hire contract
- Clause in contract – if war breaks out, hirer can cancel the contract
- 2001 charterers repudiated (accepted by owners)
- 2003 2nd Gulf War
    - Charterers argued they would have cancelled anyway so damages should be reduced

Issue: does court reduce damages for repudiation where later factors indicate the repudiating party would have cancelled anyway?

Ratio:

- Yes (controversial 3-2 HL decision): damages 2001-2003 only
- But not pre-destined at date of breach: here war not inevitable
- This seems at odds with Amann, where there was also uncertainty at the date of breach

Clark v Macourt (2013) 252 CLR 1
Ratio:

- Breach date was the appropriate date to value loss (on business sale)
- Certainty important (Keane J, 110)
- Ignore market movements or events affecting P after breach

Restitutionary Damages?

The term 'restitution' is used in two senses. First, it refers to the law of restitution, also known as unjust enrichment, which creates a proprietary interest. This restitution can order the return of P's property, for example where P has paid money by mistake to D, or require an account of profits in the case of a breach of equitable rights of trust or fiduciary duty or common law agency (bribes taken).

Second, it may refer to compensate P by restitution of D's gain from breaching the contract, particularly where D makes a calculated decision to breach a contract because it will gain more from the breach than it will lose in damages. Of course, P could attempt to obtain an injunction, but this requires anticipation/foresight which is difficult. So far, common law has been reluctant to award these damages.

Surrey CC v Bredero [1993] 3 All E.R. 705
Facts

- P council sells land
- D buyer agreed to build only 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
    - D claims no loss by P: nominal damages

Ratio:

- Held by EWCA: nominal damages only
- Generally not possible to compensate for breacher's profit, rather than victim's loss
- Case now doubted as a universal general principle

A-G v Blake
Facts:

- D was British secret agent
- 1944 signed official secrets act
    - agree in employment contract, indefinitely
    - not to divulge secrets, e.g. in book
- spied for Russia from 1961
- put in jail, then broke out of jail, escaped to Moscow
- 1990 autobiography
    - broke secrecy promise
    - 90,000 profits, still with publish
    - contents no longer secret
- crown never applied for an injunction… political reluctance, freedom of expression issue, or no longer secret content

Issue: could the state obtain the profits of the book?

Ratio:

- Law can recognise restitution claim for profits made in "appropriate cases"
- Exceptional, discretionary remedy (equitable)
    - is it just and equitable that D should retain benefit?
    - Exceptional here
    - Did P have legitimate interest in preventing D's profit making activity?
- Not 'restitutionary damages'
- No need for 'constructive trust'

Dissent: Lord Hobhouse

- Not commercial claim - effectively a punitive reaction
- Restitution is analogous to property - Crown had no right to own the book

Remedy: effectively D made a compulsory purchase of the crown's right of refusal. Yet the crown received the complete value of D's profit, rather than the price that would be reasonable for permission to publish.

Ordinary Compensation Order?

It should be noted that A-G v Blake is an exceptional case, and it has been criticised by some for failing to fit the result into the existing law of contract. Arguably, the same result could have been reached by claiming P's loss equivalent to the notional fee which P might have charged D to allow the breach, rather than claiming for D's benefit.

Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798
Facts:

- P sells neighbouring land to D
    - Restrictive covenant not to build on land sold
    - Houses built by D in breach of restrictive covenant
    - P's land not diminished in value

Issue: can P obtain profit of D's breach (i.e. increase in land value)?

Ratio:

- Court refuses mandatory order [injunction] for demolition (social and economic reasons)
- Awarded compensation to P, not restitutionary damages, ie
    - Value of what D would reasonably have had to pay for P to relax their rights under the agreement (in effect, a licence fee)
- Later cases confirm it is a compensation based claim, ***WWF for Nature v World Wrestling Federation*** [2008] - "negotiating damages" or "price payable for the compulsory acquisition of a right"

Debt vs Damages

Difference between suing for

- Debt (e.g. s50 SOGA 1896)
    - When property [title] passes to buyer, seller can sue for price
- Damages for breach (e.g. s51-52 SOGA)
    - Defective goods or non-payment

Eg

- Bob books hotel room for $100 for 1 Apr
    - Room is retained vacant but he fails to turn up
    - Hotel claims debt for empty room made available – hotel fully performed
    - [subject to possible mitigation rule, unless 'legitimate interest]

- Rosa employs bill to extend her house

- Price to be 3 monthly payments of 5000
- She cancels [repudiates] after 2 months
    - Bill does not do last month's work
- Bill claims damages for loss of that last month's work
    - Subject to mitigation
    - Bill finds less profitable work elsewhere for that last month

Liquidated/pre-agreed damages and penalties

Generally ,there are a variety of clauses that deal with "consequences" of loss:

- "hold harmless clauses" – ensure that both side is responsible for their own loss
    - Exemption/exception/exclusion clauses
        - E.g. D/P not liable for consequences of breach
    - Indemnity clauses
        - E.g. D/P to pay sums (e.g. repairs to hire car)
- Limitation of liability clauses
    - E.g. maximum liability $1000
- Time limit clauses
    - E.g. D accepts liability only if P brings claim in 7 days
- Liquidated damages clauses
    - Genuine pre-estimates of loss, e.g. $100 per day payable if breach
- Penalty clauses
    - Attempt to force performance by penalising, not compensating
    - E.g. X to pay $1 million if 5mins late in performance
    - Dunlop v New Garage [1915] AC 79 HL

A penalty clause, unlike a liquidated damges clause, is "punishment for non-observance of a contractual stipulation and consists, upon breach, of the imposition of an additional or different liability" (***Legione v Hateley***). Penalty clauses are unenforceable, whereas liquidated damages clauses are enforceable.

Andrews v Australia and New Zealand Banking Group (2012) 247 CLR 205, 216 [9]-[10]
Facts: Alleged penalties in banking contracts with consumers, e.g.

Issue: Could late payment (e.g. credit card) fees be considered as penalties

Ratio: (test case – 38,000 claims: how bank charges generally are to be characterised)

- Rejected argument that a contractual breach was required before there could be a penalty, i.e. a 'fee' **could** be a penalty, and
- Reaffirmed that both common law and equity had to be considered

- Gave greater scope for challenges to contractual provisions on the ground that they were unconscionable

Cavendish Square Holding v Makdessi [2015] 3 WLR 1373 (UKSC)

- Disagreed with Andrews: "radical departure"
- Penalties confined to cases arising out of contractual breach

Paciocco v Australia and New Zealand Banking Group [2016] HCA 28

Issue: are credit card payment fees ($35 later reduced to $20) penalties or liquidated damages clauses?

Ratio: Not penalties (also not unconscionable/unfair terms in ASIC Act)

- Cavendish: English and Australian law may differ, but in any case this concerned a fee imposed after a breach of contract
- Court moved away from the notion that a clause must be either a penalty or a genuine pre-estimate of loss
- Penalty if the sum stipulated for is extravagant and unconscionable, or out of all proportion to the amount which would be recoverable as unliquidated damages – not in relation simply to loss (damages) but to legitimate interests of [D]
- All judges
    - Emphasise exceptional nature of penalty doctrine; i.e. exception to freedom of contract
    - Agree no part of the law of contract allows one party to punish the other for non-performance
- What were legitimate interests of ANZ?
    - Maintaining return to shareholders
    - Which ANZ costs to compare with the $20 or $30 fee?
        - Operational costs: admin recovery costs [$3????] and interest charges
        - Provisioning costs; ways of mitigating risks – need to hold regulatory capital buffer
    - Not a simple comparison – need to reflect both sets of costs
- Burden on P
    - Judge at time of contract and not with hindsight [looking back at what actual costs may be relevant]
    - No proof that fee was punative, threatening or grossly disproportionate
- Economic issues (Keane J)
    - Agreed sum reduces uncertainty and legal costs
    - P may make rational choice – why disturb?
    - Courts have never set fee levels
    - If reduce late payment fees must increase interest rates?

EQUITABLE REMEDIES

Introduction to equitable principles

Equity is a system of law which allows the chancellor to ameliorate the harshness of common law rules at their discretion to do justice. Many equitable doctrines are underwritten by certain 'maxims' or principles, including:

- "[s]he who comes to equity must come with clean hands"
- equitable remedies are discretionary
    - e.g. specific performance, injunction
    - court will exercise discretion on basis of overall fairness
    - emphasis on 'conscience' still – 'unconscionability' or unconscientious conduct
- Civil Proceedings Act 2011 (Qld) s7(3) – equity prevails over common law if conflict
- Equitable remedies may be additional, or alternative to common law remedies
    - Common law damages for loss of bargain, e.g. loss of profit if contract performed
    - Equitable flexibility, e.g. account, money/assets may be held in trust for particular purpose depending on facts
    - May prevent D from relying on certain common law rights
    - Equitable compensation for reliance (e.g. ***A-G v Blake***, or estoppel)?
- Equity is flexible, and its doctrines are in a constant state of flux

Range of equitable remedies: include:

- **declarations**
- **specific performance**
- **injunctions**
- **equitable damages**
- **equitable compensation**

- constructive trusts
- [taking] "account"
- delivery-up (order the retrieval of a specific good that might be otherwise spent or exchanged) and cancellation (?)
- specific delivery
- appointment of receivers (approaching insolvency)
- rescission
- rectification
- subrogation (allows Gaskell's insurance company to stand in his shoes and bring a claim against the third party that negligently hurt Gaskell)

Declarations

Declarations, aka 'declaratory orders', involve clarification of an individual's rights by a court at their request. In modern times, s10 of the Civil Proceedings Act 2011 (Qld) confers the power to issue a declaratory order upon courts. Such orders can help parties save costs by resolving a legal dispute without resorting to damages, which may be expensive to calculate.

Examples:

- status: e.g. "P is a member of a club, or validly appointed as expert assessor"
- property, e.g. P is the true owner of X land/Y shares
- contract agreement or terms: e.g. contract has been concluded, breach has occurred, and contract has been terminated
- declarations of non liability e.g. trying to have a decision here before a foreign court decides issue: i.e. jurisdictional and conflict of laws purposes

Declarations are useful as pre-emptive actions:

Apache Oil Australia v Santos Offshore [2015] WASC 318

- JV between Apache and Santos over Spar-2 gas well
- Apache to be 'operator', but could be dismissed if 'material breach' not remedied in 90 days
- Santos alleges breaches
- Apache triggers DR provisions, seeks declaration that Santos can't remove as operator (pre-empt termination of contract)
- Santos then claims declarations that there WERE material breaches and unauthorised developments took place
- Material breach not equal to fundamental breach
- Santos gets the declaration but must be more than repeating the terms of the joint venture.

However, they must address a question that is not too abstract. For example, the declaration sought in the Sino Iron case, that "Mineralogy must do all things necessary to implement the Sino Iron project", amounted to just a "restatement of obligations contained within the contract without what was required by those obligations in the factual circumstances".

In principle, privity requires that only parties to contract can seek declarations (Sons of Gwalia Ltd v Margaretic [2009] FCAFC 17). Furthermore, a declaration can't be made unless all persons interested in the declaration are made parties to the application. In the Sino Iron case, the declaration was not granted because it would not have afforded parties sufficient procedural fairness for them to be bound by the declaration, and the

State of WA, a party to one of the agreements, wasn't joined to the application. The effect on third parties is similar to that of injunctions.

Specific Performance

The default remedy for breach of contract in common law systems is damages. However, the Court of Equity developed the remedy of "specific performance", which amounts to a court order that D must perform its executory obligations under the contract terms. Although the remedy is discretionary, it has long been reserved for contracts for the sale of land or some other unique good, where the uniqueness of the good renders damages inadequate. Additionally, an order for specific performance will not be granted where court supervision is required, for contracts of personal services, or where a third party has acquired an interest in in the contract being performed. In some circumstances, damages can be awarded "in lieu" of specific performance or an injunction ["Lord Cairns Act damages"].

- Mutuality: can both perform?

Are damages an adequate remedy?

Dougan v Ley (1946)
Facts:

- Sale of taxi cab + benefits of rego/licence for 1850pd
- Oral agreement, 10pd paid
- P intended to earn a living as a cab proprietor
- There was a market in selling licenses – total number of licences restricted in number
- Average market price – 1318
- Similar issues with water licences
- Declining numbers available, prices increased
- P claims couldn't buy another cab; claims specific performance.
- Just before the hearing P buys another licence for 1900pd. Not a replacement – P still wanted the contracted one
- Licence transfer required government approval – had to be satisfied that P reputable

Issue: is P entitled to specific performance?

- Are damages an adequate remedy?

- Is mutuality a bar to SP in this case? i.e. could SP only be awarded if it could also have been awarded if the situation was reversed?
- Is the fact that the discretion ultimately lay with the minister a bar to SP in this case?

General Comments:

- can have a suit of specific performance not just for land, but also for chattel (Dixon)
- no SP if there is an adequate remedy for damages at common law; i.e. if damages could place P in position in which P would have been if contract performed
- SP instead of damages only when the Court "can by that means do no more perfect and complete justice"
- Damages available for goods/securities where there is a market

Ratio:

- Mutuality – D could have obtained SP. SP required seller to make an application for the transfer of the licence only; this order could have been made in favour of the seller
- Supervision – no need for court to supervise once application for transfer made
- Damages not an adequate remedy because taxi licence a 'good of special or peculiar value'

Defences/bars to orders of specific performance

There are a number of bars to an order of specific performance, including:

- Discretionary factors
    - P conduct – unclean hands
    - P unwilling to perform its side of the bargain
    - mutuality
    - Can only have SP of whole of contract (unless severable?)
    - 3rd parties affected – (e.g. land already transferred to innocent 3rd party)
    - laches or acquiescence by P/ delay in seeking remedy
- Contracts for personal services, employment contract
    - continual cooperation required
    - also court supervision difficult - may be uncertainty over some terms. Arguably could make individual orders as disputes arise, but in long term the contract could be impractical. Additionally, the sanction for a breach of order – contempt of court – is pretty harsh (on top of expensive defence litigation).
    - Also what happens if D wants to sell business?

Williamson v Lukey (1931)
Facts:

- P right to sell sweets in D theatre
- Contract unenforceable because it wasn't in writing but it was part of a lease
- P ensure staff subject to control of D's theatre manager for attire and behaviour was part of the contract

Issue:

- Was SP available?

Ratio:

- No specific performance, because the court can't supervise the proper dress of staff

Injunction

Injunctions are court orders that usually forbid D from doing something, such as breaching a contract (prohibitory injunctions). However, some injunctions consist of positive orders to do something (mandatory injunctions). Unlike specific performance which orders performance of the entire contract, a mandatory injunction may only order the performance of a part of the contract to avoid breach.

There are several types of injunctions:

- "final" injunctions (part of final judgment)
- "interlocutory" (after action started) and "interim" (until further order) injunctions
    - preserve position until hearing or another order
- "quia timet" ("because he or she fears") injunctions
    - for future threatened breaches, not present/continuing breaches
- Mareva [freezing] injunctions/orders
    - Example of "ex parte" injunctions/orders (without notice to other side)
    - PT Bayan Resources v BCBC Singapore [2015] HCA 36 – use of Australian freezing order to support pending Australian case in Singapore
    - Now incorporated in statute – asset preservation orders
- Anti-suit injunctions
    - E.g. against D starting proceedings abroad in breach of an exclusive Australian jurisdiction clause

Injunctions are enforced at the penalty of contempt of court. If there is a deliberate breach of an injunction, an offending party may be imprisoned, fined or required to supply sequester sheets. Technically, injunctions are not limited to prohibiting D from

breaching contract, but can also prohibit D from committing legal wrongs. If it is used in such a manner, the injunction must satisfy the basic requirements of supporting a legal right of P where there is some actual or threatened infringement of the right and damages are an inadequate remedy.

Statutory Basis

- Civil proceedings act 2011 s9(1 – final) (3 – interlocutory)
- Mareva injunctions – FC Rules 2011 Div 7.4
- CCA 2010: ACL s232 – mirror injunction remedies for breaches of ACL

Examples

- Negative contractual stipulations
    - Express negative stipulations, eg D promises not to sell goods or disclose information to 3rd party
    - Implied negative stipulations, e.g. D not to prevent or hinder P's performance
- Contracts in 'restraint of trade'
    - D will not play for another footy club for 10 years
    - Unreasonable restraint of trade will be unenforceable
    - Unenforceable unless reasonable for parties and public
        - Depends on extent and duration
        - E.g. sports associations can't prevent transfer of P if its rule is in restraint of trade
        - Buckley v Tutty (1971) 125 CLR 353
            1. Injunction to prevent Rugby League from interfering in transfer to another club

Defences

Defences to injunctions are similar to that of specific performance (unclean hands, laches, court supervision, personal service contracts etc). One notable addition is that a court will not enforce an injunction after denying a request for an order of specific performance where it is equivalent to enforcing specific performance indirectly. It was on this basis that an injunction to prevent a competitor having access to the theatre, or not to revoke P's permission to enter the theatre in ***Williamson v Lukey*** was denied.

Equitable damages

Damages in lieu of specific performance or injunction:

- Lord Cairns Act: Chancery Amendment Act 1858
    - Equity Act 1867 (Qld) s62

- Civil proceedings Act 2011 s8

Wentworth v Woollahra (1982) 149 CLR 672

- HC accepts power or jurisdiction to award LCA damages in lieu of injunction/SP even where defences might bar those orders

Johnson v Agnew [1980] AC 367

- Measure of damages are compensatory, just like common law, but the date of assessment is flexible as appropriate to do justice – could be breach, or later, e.g. when SP claim failed/aborted

Discretionary Factors

Shelfer v City of London Electric Lighting (1895) AL Smight LJ

- Good working rule: can award LCA damages if
    - Injury to P's rights was small
    - Value was capable of being estimated in money (Wrotham Park)
    - Adequate compensation provided by small money payment
    - Oppressive to D to grant injunction

Leeds Industrial Coop v Slack [1924] AC 851

- If in addition to injunction
    - Compensates for injury done and injunction prevents future continuation/repetition
- If in substitution for injunction
    - Covers past injury and future injury (if no injunction)
- If no injury yet sustained
    - Damages only for future injury injunction would have prevented

Jaggard v Sawyer [1995] 1 WLR 265

- P should have gone for an injunction when they saw D clearing the ground of the park they promised not to build on (except for gardens)
- Because P waited until D had already built units on this land in breach, damages should suffice instead of an injunction

Equitable compensation

Whereas LCA 'damages' act as payment instead of a discretionary order, equitable compensation focuses on restoring a party to the position it was in before a breach of equitable obligations (e.g. trusts (loss of funds), fiduciary duties (solicitor profits from client)).

Thomson v Golden Destiny Investments [2015] NSWSC 1176 [600, 683]

- solicitor breach of fiduciary duty (acting for two parties, in one of which he had an interest)
- should have advised of right to terminate on basis of his breach. Possible 6mil loss, loss of interest on a deposit held for an additional 3 months
- Cites Nicholls v Michael Wilson Partners Ltd

Nicholls v Michael Wilson & Partners Ltd [2012] NSWCA 383

- Questions of causation flowing form loss as a consequence of breach of fiduciary obligations should be determined differently from common law negligence causation
- This is because objective of equitable the loss of the consequence of the breach of equitable obligations is to be assessed with the full benefit of hindsight.
- However, where equitable compensation is sought for breaches of fiduciary duty, necessary to identify criteria that are adequate/sufficient connection between the equitable compensation and the breach of duty

In addition to equitable compensation/in order to award equitable compensation, a court may order an account of profits, which involves a court order that P can examine D's books using a third party accountant to produce an account of what is owed.

Tort and contract: Remedy Overlaps

- Tort negligence claims for damage to property may have contractual implications
    - Car park ticket incorporation cases
- Contract claim may give rise to cumulative tort actions
    - Cf Civil law – these claims can't coexist
- Remedies may overlap
    - E.g. Star sports player Z under contract with X club
    - Poached by Y club
        - No possibility of specific performance of contract, but
            1. Injunction to stop Z acting in breach?
            2. Claim against Y for tort of inducing breach of contract
- Contract remedy may not be enough e.g.
    - Contract claim against insolvent company
    - Bring claims against indiv directors?
        - Fraud (tortious)
        - Misleading/deceptive conduct ACL s18
        - Unconscionability
        - Tort of inducing breach of contract

Tort of inducing breach of contract

Transerve v Blue Ridge WA [2015] FCA 953: test of tort of inducing breach of conduct

1. Must be contract between applicant and third party
2. Respondent must know that this contract exists
3. R must know that if 3rd party does or fails to do particular acts, conduct of 3rd party would be in breach of contract
4. R must intend to induce or procure the 3rd party to breach the contract by doing or failing to do the particular act
5. The breach must cause loss or damage to applicant

Contributory Negligence

Contributory negligence will often be relevant in assessing the chain of causation in contract cases. Alternatively, there may be concurrent negligence claims in contract and tort. As a result of ss4A, 5, 10(1), a court may reduce damages for contributory negligence in the case of concurrent causes of action if the court considers it just and equitable to do so.

Limitation of Actions

- Contractual time limits
    - Notification clauses barring remedies
    - Time limits as type of exclusion clause
- Statutory time limits
    - Most legal systems have em
    - Limitations of Actions Acts (State)
        - E.g. Limitation of Actions Act 1974 (Qld); Limitation Act 1969 (NSW)
        - 6 years from date cause of action arose (breach)
    - ACL misleading and deceptive conduct – ss236,7 – 6 years from accrual of cause of action

PRIVITY

Parties, agents, assignment

At the outset, it is important to identify the parties to a contract. Only the parties to a contract can sue and be sued in respect of rights and obligations. It is important to identify parties in order to determine applicable jurisdictions, time bars, the scope of

insurance and insolvent parties. Often, there will be mix-ups between the principals of companies and the company themselves, or subsidiaries of the company.

The doctrine of privity establishes that only a party to a contract can take advantage (benefits) or be liable for burdens under the contract. However, in some circumstances, rights and liabilities may be imposed upon third parties, which creates issues.

Technically, whether a person is party to the contract is a separate issue from whether a party has given consideration for the contract.

Tweddle v Atkinson (1861)
Facts:

- Marriage payment to son after married in contract between father and father in law alone
- Father in law then refused to pay

Issue: Was the son privy to the contract?

Ratio:

- Son could not sue – 'stranger to consideration'
- Arguably, the decision was only about consideration, but has been interpreted as requiring a claimant to be a 'party'

Dunlop v Selfridge
Facts:

- Dunlop sold tyres to Dew, who onsold to selfridge (department store)
- Price floor clause in contract 1, clause in contract 2 that if selfridge's sold at below price floor would pay 5pd per tyre sold to Dunlop

Issue: could Dunlop sue Selfridge for breaching the clause about paying it money located in the second contract?

Ratio:

- Dunlop not a party so it can't sue
- No third party rights recognised in English law; even if <u>intended</u> that third party would benefit, consideration must move from promisee

Coulls v Bagot's Executor (1967) HCA

Facts:

- Contract allowing O'Neill to quarry on Arthur's land – regular payments to be made to Arthur and Doris as joint tenants, but contract only between Arthur and Doris
- Arthur dies.

Issue: Should executors pay income to Doris under the contract, or under the will (Arthur's children to benefit)?

- Had Doris provided any consideration for promise to pay her? No consideration moving from her though.
- Was Doris party to the contract between O'Neill and Arthur?

Ratio:

- Non-party cannot sue
- There is a difference between privity to the promise and privity to the consideration
- Doris was not a party (dispute on the facts) – even if joint consideration, she wasn't a party. Her mere signature was not enough

Trident General Insurance v McNiece (1988) HCA

Facts:

- Gary (employed by Faro) is injured, sues McNiece (site engineer, employment of Blue Circle) in negligence.
- Contract between Blue Circle and Trident Insurance for public liability – "assured" associated/subsidiary companies, contractors, sub-contractors public liability/injury insurance

Issue:

- Did privity apply to insurance?
- Was McNiece party to the policy, or an "assured" able to claim an indemnity?
- Was McNiece able to claim indemnity without consideration?

Ratio:

- McNiece not a party to the policy [4-3]?
- McNiece was able to enforce the indemnity [4-3]

Reasoning

- Narrowest – Toohey J, [Mason CJ, Wilson J, Gaudron J?] – 3rd party named under a public liability insurance policy can claim benefit; devise special rule (exception) for insurance, whilst avoid ruling on whole doctrine of privity
- Most cautious – Brennan J, Dawson J, Deane J – privity is fundamental and settled rule that needs precise and compelling reasons to change. Existing remedies such as damages, estoppel, trusts (esp Deane J) can alleviate problems
- Most radical suggestion – Gaudron J – 3rd party can sue on basis of unjust enrichment – limited support from Deane J in some circumstances
    - This is probs not followed anymore
- Mason CJ, Wilson J – incremental approach – enigmatic/uncertain

Ways to avoid privity

Legislating for particular problems

- Many exceptions, devices or ways to avoid rule – Insurance Contracts Act 1984 (Cth) s48
- Competition and Consumer Act 2010 Sch 2 – ACL ss59, 271(5), s266 – recipients of gifts from consumers can sue supplier, and warranties for goods available to subsequent users of goods
- Sea Carriage Documents Act 1996 (Qld)
    - Bill of lading (eg contract between shipowner and steel exporter in japan)
    - Holder of transferred bill (importer) in Australia can sue shipowner
- Restrictive covenants in land law
    - E.g. covenant not to use building as a pub – binds buyers – PLA Qld s53
    - Note: no positive covenants
- Specific privity legislation – PLA s55 (Qld)

Property Law Act s55

- 3rd party can enforce a promise once it accepts the benefit of the promise
- once that happens, promisor and promisee can vary only subject to 3rd Party acceptance
- key concepts defined in s55(6)

1) must be consideration from promisee
    a. consideration not necessarily from 3rd party
2) must be promise
    a. must be legally binding/intention to create legal duty
    b. could be oral promise or implied term (Dinte v Hales)
    c. if creates interest in land, subject to writing requirements in s59
    d. NT PLA – identical to QLD except promise must be expressly in writing
    e. 3rd party must prove that enforceable promise intended – not just intention to benefit 3rd party but intention that 3rd party be entitled to sue (Trident). Cf Sorbello – conversation between dying wife and husband whether to include children in life insurance – not conclusive enough to be legally binding
3) for benefit of 3rd P (beneficiary)

   a. not burden – Rural View Developments v Fastfort
   b. s55(6) – beneficiary includes members of an identifiable class who is identified and in existence at the time of acceptance although they may not have been at the time at which the promise was given
   c. doesn't need to be identified at time of promise, but at acceptance. Identification by name is easiest (Portland Downs Pastoral v Bexalaw)
4) enforceable when accepted by 3rd P
   a. communicate assent to promisor or agent
   b. promise may specify manner of acceptance
   c. time limit may be specified in promise
   d. if time limit not specified, reasonable time – question of fact – Re Davies – 3 years too long. Time calculated not from promise, but when 3rd party actually knew of the promise (not when they ought to have known)

Variation – prior to acceptance the promisor and promisee may vary or discharge the terms of the promise and any duty arising from it without consent of the beneficiary. Once accepted by beneficiary, need their assent to modify the terms

Remedies

- key remedy is suing on own name – no need to rely on promisee
- can't transfer burdens to unwilling third party
- but promise may be conditional – 3rd party also takes on burdens that go with it

Relationship with existing privity:

- s55 doesn't take away any existing common law rights – existing privity exceptions preserved?

Judicial Solutions

Collateral contract; estoppel; novation

Collateral contracts: manufacturer (3rd party) guarantees

- Shanklin v Dettol [1951]
- Misrepresentation remedies probs more appropriate today or ACL s59

Estoppel

- Might operate to estop someone from denying that a third party was entitled to a benefit – might happen when the insurer leads a third party to believe it is covered
- Deane J in Trident – if insurer induces 3rd party to act to detriment on common assumption that he is indemnified the insurer will be estopped from denying the indemnity

Novation

- Creation of new contract with new parties – e.g. tripartite contract A-B-C to replace A-B contract. New rights created, not old rights 'transferred'
- Needs consideration
- Effective for benefits AND burdens
    - E.g. joint venture startup
    - Special Purpose Vehicle – way of transferring all obligations to another party

Assignment

- You can agree to transfer rights as well as things (e.g. intellectual property)
- Very common commercial transaction – sometimes used for financial security
- E.g. A contracts to buy goods from B, B assigns rights to income from A to C. C can then sue debtor A. A's permission not needed, but notice to A usually necessary.
- Common law
    - Assignment of choses in action [intangible legal rights or claims] was generally not possible
    - Roman law notion of a right being entirely personal
- Equity – only relevant if assignment not in writing
    - Assignment of benefits possible, even orally without consent but still need consideration to support a promise to assign
- Property Law Act 1974 (Qld) s199 solves most assignment issues. Assignor can assign legal rights to 3rd party assignee – must be absolute, not partial assignment in writing signed by assignor
- Assignment with express written notice to debtor
- Transfers all legal rights and remedies
    - Consent of debtor not needed
    - Assignee takes subject to equities
    - Assignee can sue in its own name but doesn't become a party to the original contract (assignor-debtor)

Agency

- Contract between two principals, discussed/negotiated by agent on behalf of a principal

Trusts

- X and Y create a trust (e.g. transferring property such as land or money).
- Trust holds trust property, controlled by trustee(s)
- C beneficiary of trust
- Wilson v Darling Island (1956) Fullagar J – equity can make promisee the trustee of the promise for 3rd party. Trustee may consent to act for the benefieciary. Beneficiary may join trustee as defendant if no consent.
- Strongest support from Deane J in Trident. Mason CJ, Wilson J pointed out that parties may not want arrangement to be irrevocable

- Korda v Australian Executor – trust not simply to be inferred simply because a court thinks it's an apt means of protecting/creating an interest (not a privity case)
- Ashton v Pratt – clear intention needed to establish a trust

Remedies

- Equitable remedies available to Promisee
  - ***Coulls***
    - Promisee [Arthur] may sue for specific performance or injunction
- Damages for Promisee's [Arthur] <u>own</u> Loss
  - ***Coulls, Trident***
    - Nominal damages only in many circumstances?
- Promisee [Arthur] suing for 3rd Party loss
  - ***Trident***
    - Difficulties of principle
    - UK courts have recognised exceptional cases
      - *Jackson v. Horizon Holidays* [1975] EWCA
- 3rd Party [Doris] forcing Promisee [Arthur] to sue
  - Possible if 'trust' of promise
    - *Les Affreighteurs Reunis v. Walford* [1919] A.C. 801 [HL]