

1. Where there is a breach of a contractual term, we bring an **action for breach of contract**
2. Where we are seeking to enforce a payment due under the contract, we bring an **action for debt**
 - a. Where the contract itself gives a right to recover in the event of breach or another act event
3. Where the formation of the contract is undermined by pre-contractual conduct, we look to **vitiating factors**:
 - a. Where one party exploits a relationship of trust and confidence, we look to **undue influence (equity)**
 - b. Where one party exploits another party's special disability, we look to **unconscionable conduct (equity)**
 - i. Noting the expanded remedies under **ACL s20** where conduct is in trade or commerce
 - c. Where one party applies illegitimate pressure to another, we look to **duress (common law)**
 - d. Where one or both parties enter into the contract under a mistake, we look to **mistake**
 - e. Where one party makes a misleading statement, we look to **misrepresentation (common law)**
4. Where the contract or accompanying conduct is unjust, we also look to **statutory actions**:
 - a. Where it is not a contract entered into for business or trade, we look to the **Contracts Review Act 1982**
 - b. Where the conduct/contract is in trade or commerce, we look to the **Australian Consumer Law**:
 - i. Misleading and deceptive conduct – **ACL s18**
 - ii. Unconscionable conduct – **ACL s21**
 - iii. Unfair contract terms – **ACL s23**

RESCISSION

1. **is the innocent party seeking to get out of the contract?**
2. **are there any vitiating factors giving rise to a right to rescind?**
3. **are there any bars to rescission?**
 - a. **factual bars**
 - i. inability to restore the parties to their pre-contractual positions
 1. e.g. subject matter is destroyed (business abandoned), perishable matter that cannot be returned, contract for services
 2. *Alati v Kruger* – even though precise restitutio in integrum is not possible, it can do what is practically just between the parties and by so doing restore them substantially to the status quo
 - b. **legal bars**
 - i. **affirmation of the contract**
 1. once an election to affirm the right to rescind is lost, unless the innocent party did not know of their **legal** right to rescind (*Coastal Estates*)
 2. election to rescind must be clear and unequivocal by words or conduct, continuation of contract is typically inconsistent with termination (*Tropical Traders*)
 3. don't have to rescind immediately, but if not done within reasonable time, may be taken as affirmation (*Leaf v International Galleries*)
 - ii. **rights of third parties** - provided the third party is a bona fide purchaser for value without notice and the property transfer occurs before rescission (*Car & Universal Finance Co v Caldwell*)
 1. rights of an innocent third party prevails over rights of contracting parties
 2. A passes property to B and B transfers it to C, if that transfer happens before contract is rescinded by A, title has passed to C (C prevails over A)
 - a. if transfer happens after rescission, B had no title to pass to begin with, so C has to return to A
 - iii. **rule in Seddon's Case**
 1. where a contract for the sale of **land** has been executed (discharged and complete in all respects, formal conveyance of title to that land), the right to rescind for **innocent** misrepresentation is lost
4. **if the innocent party elects to rescind the contract, what are the consequences?**
 - a. parties restored substantially to their pre-contractual positions (say what that will be in the facts)

DURESS (common law)

1. **Has there been a threat against a person, property or economic interest, amounting to illegitimate pressure that induces entry into a contract?**
 - a. common form of duress is economic duress – threat to economic wellbeing which would cause purely financial loss to the victim (*North Ocean Shipping Co v Hyundai Construction*)

- i. typical in cases where parties in contract, one threatening to breach contract unless other pays more money etc.
 - b. distinguish between legitimate commercial pressure and illegitimate pressure
 - i. no lawful act of duress in NSW – threat has to be unlawful (*ANZ v Karam*)
 - ii. questioned by dicta in the HC (*Crescendo*)
2. **Can the victim show that the illegitimate pressure was a reason for entering into the contract and can the other party show that it contributed nothing to the decision to contract (inducement)?**
- a. causative on person's entry, does not need to be the sole cause (*Crescendo Management*)
 - b. onus – person alleging duress must first establish that the appropriate kind of threat was made and directed to procuring contractual consent. then onus shifts to show that this contributed nothing to the decision to enter – *Crescendo Management*
3. **Consequence**
- a. contract is voidable and may be rescinded (*North Ocean Shipping v Hyundai Construction*)
 - b. see rescission scaffold

MISTAKE (common law)

c.f. misrepresentation (induced by party), mistake is self-induced

1. **common mistake – parties under same misapprehension about same thing (2 approaches)**
- a. **common law (void)** - As a matter of construction is the contract subject to an implied condition such if the condition fails, the contract fails and is **void** at common law? (*Bell v Lever Brothers*)
 - i. alternatively, had one of the parties assumed the responsibility for the assumed facts existing? (*CTH v McRae*)
 - 1. Seller assumes responsibility if the contract impliedly promised the existence of those facts (*Commonwealth v McRae*)
 - ii. common mistake at common law renders the contract void ab initio (*CTH v McRae*)
 - b. **equity (voidable)** – first 3 elements from *Solle v Butcher*
 - i. were parties under a common misapprehension either as to the facts or as to their relative and respective rights?
 - ii. was misapprehension fundamental?
 - iii. was party seeking to set it aside at fault?
 - iv. did circumstances render it **unconscionable** for the party seeking to uphold the contract to have it enforced?
 - 1. added in *Svanosio* (no suggestion of fraud by M, S had no rights against M for this mistake and there was no unconscionability here so common mistake not established)
 - c. *Sale of Goods Act 1923* (NSW) s 11 - where there is a contract for the sale of specific goods, and the goods without the knowledge of seller have perished at the time when the contract is made, the contract is void
2. **mutual mistake – parties at cross purposes, mistaken about same thing in different ways**
- a. can consensus ad idem (objective agreement) be identified?
 - b. On an objective view of the parties' dealings and the surrounding circumstances, is it possible to say that one party has the '**right**' understanding of the bargain?
 - i. if yes – parties have a contract on those terms, and it is only one party who is mistaken – it is then a question of whether relief is available with respect to that **unilateral mistake** (*Goldsborough Mort v Quin*)
 - ii. if no, there is no contract (mutual mistake renders contract void ab initio) (*Raffles v Wichelhaus*)
3. **unilateral mistake – one party is mistaken about something**
- a. one person enters into contract under a **serious mistake** about its content in relation to a **fundamental** matter (*Taylor v Johnson*)
 - b. the other party is **aware** that the first person is entering into the contract under a serious mistake about the content or subject matter of the contract AND (*Taylor v Johnson*)
 - c. the second party **deliberately sets out** to ensure that the first party does not become aware of the existence of the mistake (*Taylor v Johnson*)
 - i. can also be **omitting** to bring the mistake to person's attention (*Smith v Smith*)
 - d. consequence – contract is voidable and can be rescind (see rescission scaffold)
4. **rectification – equitable doctrine**
- a. pleaded in response to mistake, operates where an error has occurred in reducing an agreement to writing (change the contract to eliminate error, about fixing not escaping the contract)
 - b. requires - '**convincing proof**' of a **common intention** which existed up to the time of creation of the written instrument but is not reflected in the written agreement (high evidentiary bar)

- i. e.g. earlier drafts, communication, emails etc.
- c. usually granted for common mistake, but can be granted for a unilateral mistake if the non-mistaken party knows of the other party's mistake and concludes the agreement in circumstances where it would be **unconscionable**

5. non est factum

- a. misapprehension as to the **nature or effect** of the document that was signed
- b. 3 elements (*Petelin v Cullen*)
 - i. signer under relevant disability (illiteracy, blindness etc.)
 - ii. other party must have known of and exploited the disability
 - iii. must be fundamental difference between the effect of the document as signed and what signer believed it to be
- c. failure to read and understand has to NOT be due to carelessness
 - i. this condition important if third party has acquired rights in subject matter of document or defence asserted against innocent party
- d. onus – on party who seeks to disown signature

UNDUE INFLUENCE (*common law and equity*)

1. Is there actual undue influence?

- a. can weaker party prove undue influence established through the circumstances/direct evidence of the particular transaction?
 - i. focus on transaction rather than relationship between parties

2. Is there presumed undue influence?

- a. 2A. Relationships which by virtue of their type or class give rise to the presumption that influence has been exercised: See *Allcard v Skinner*
 - i. parent and child
 - ii. doctor and patient
 - iii. solicitor and client
 - iv. trustee and beneficiary
 - v. guardian and ward
 - vi. religious advisor and adherent
- b. 2B. Relationships of influence in fact, whereby the applicant establishes sufficient trust and confidence to give rise to a presumption of influence: See *Johnson v Buttress*
 - i. factors (age, mental/physical disability, education, business knowledge, history of reliance)
 - ii. Dixon J in *Johnson* –
 - 1. did influence exist?
 - 2. was influence exercised?
 - 3. was exercise undue? does P receive a benefit?
 - 4. did exercise actually induce the transaction that a causal link could be established?
 - iii. the relationship must go 'beyond mere confidence and influence. It must be a relationship involving dominion and ascendancy by one person over the will of the other, and correlative dependence by the other.' (*Anderson v McPherson* (No 2) [2012] [247]-[248].

3. onus - once undue influence is established by applicant, whether via 2A or 2B, onus then on the stronger party to rebut that presumption

- a. by showing weaker party was acting independently of influence, free consent, independent advice needs to be quite thorough to rebut the presumption (but note, legal advice given in the presence of stronger party may not be independent advice)
- b. in case of gifts, presumption will be rebutted if it is proved that gift was spontaneous act of the donor acting under circumstances which enabled her to act independently (*Allcards*)

4. third parties

- a. did lender know or ought to know of the circumstances giving rise to undue influence between the parties (actual or constructive knowledge)? (*Bank of NSW v Rogers*)
 - i. bank had constructive notice that some special relationship existed, this knowledge of facts was enough to raise possibility of undue relationship, bank couldn't rebut

5. Yerkey Principle

- a. applies where wife acts as guarantor of her husband's debts and he has used his influence over her to obtain her agreement but note HC left possible extension open to other relationships including 'long term and publicly declared relationships short of marriage between members of the same or opposite sex' (*Garcia*)
 - i. McMurdo P in *Agripay Pty Ltd v Byrne* - These legal principles should apply equally to all vulnerable parties in personal relationships