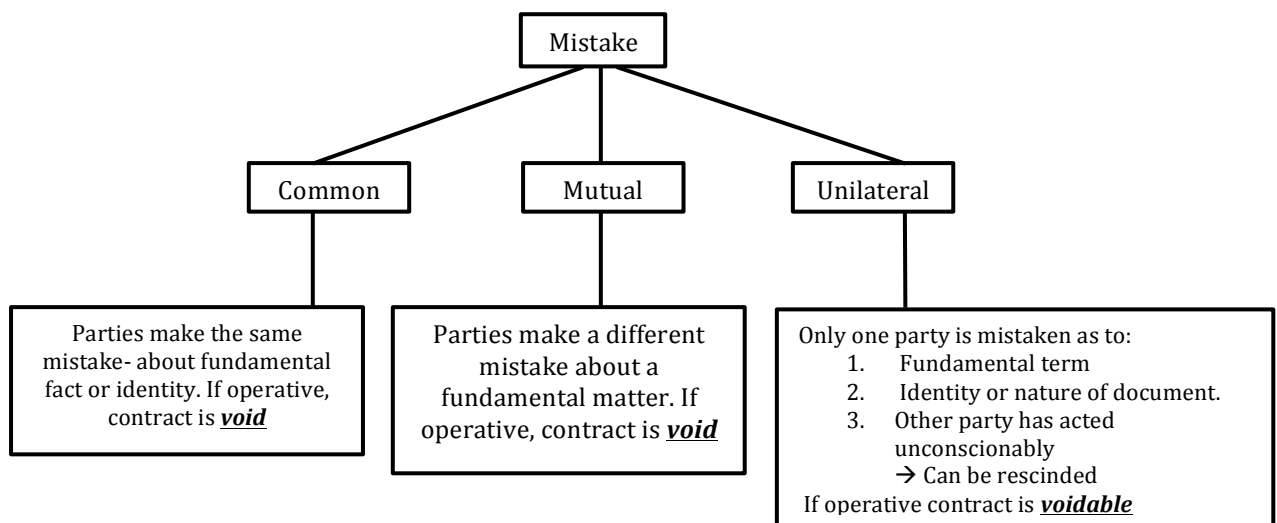


Genuine Consent

- Genuine consent must underpin the agreement → cornerstone of contract law
- Contract law is about allowing both parties to enter arrangements on terms they choose (“freedom of contract”) knowing all information, which the courts will then enforce (“sanctity of contract”)
- Generally speaking, courts are reluctant to allow a person to avoid a contract simply because one or both of the parties has entered into the contract on the basis of a mistake
- If one of the following vitiating elements is present, there is no genuine consent and the contract may be rescinded by the innocent party
 - i. Mistake of a fundamental kind
 - ii. Misrepresentation
 - iii. Duress
 - iv. Undue influence
 - v. Unconscionable conduct

(1) Mistake



a. Common mistake

- Parties have made the same mistake about one or more of the terms
- Only some types of common mistakes invalidate a contract → usually involve mistakes about a fundamental term or about property which neither party is aware no longer exists
- However, if the seller in fact warrants that the goods do exist → there is a valid contract
- Courts reluctant to say a fact is fundamental

Leaf v International Galleries (1950) – mistake as to qualities possessed [7.70]

- Purchased a painting from a gallery, both seller and buyer thought it was painted by a famous artist
- Buyer attempted to sell and discovered the famous artist did not paint it
- Argued the contract was affected by a common mistake → render it void (too much time had elapsed for a rescission)
- **Held:** no operative mistake → Leaf had wanted the painting that was hanging and this is what he got, everything else concerned the quality

McRae V Commonwealth Disposals (1951) – [7.80]

- CDC advertised a tanker, McRae was the successful tenderer
- The tanker was in fact never there, McRae sued
- CDC argued that the contract was void for a common mistake
- **Held:** CDC was liable because it had promised the tanker existed

b. Mutual mistake

- Where both parties are mistaken but their mistakes are not the same
- This type of mistake does not necessarily invalidate

Raffles v Wichelhouse (1864) – [7.95]

- Raffles sold Wichelhouse cotton that arrived by boat
- There were two boats by the same name leaving the same city- one departed in October and the other in December
- Wichelhouse thought the contract was for the October ship while Raffles thought it was for the December ship
- Raffles delivered the December shipment, Wichelhouse refused it
- Raffles sued for breach- arguing the date of the ship was not relevant
- **Held:** defendant only bought that cotton which was to arrive by a particular ship → therefore no agreement on a fundamental term → contract was void

c. Unilateral mistake

- Where one party is mistaken as to the terms of the contract or the identity of the other party and that mistake is known to the other party
- The mistake must be about:
 - a. A **fundamental term** and an element of unconscionable conduct
 - In the past, where the unilateral mistake involved a fundamental term of the contract → was declared void, however since *Taylor v Johnson*, the position is that a unilateral contract mistake as to a fundamental term will not render a contract void at common law → instead make it voidable in equity if the unmistaken party has acted unconscionablyOR
 - b. The **nature of the document** itself (*non est factum defence*)
 - Defendant must establish that the document they signed was of a fundamentally different or type character from that which they thought it to beOR
 - c. About the **identity** of one of the parties

Lewis v Averay (1972) – [7.165]

- Lewis sold his car to a rogue buyer who gave a different name
- The rogue buyer then resold the car before Lewis found out he was a rogue buyer → cheque bounced
- Lewis tracked down the second buyer and sued him

Issue: whether Lewis entered the contract with the rogue as a result of a mistake (as to the identify of the other party) or as a result of misinterpretation

- If it was a mistake = contract would be void → title cannot pass
- If it was misinterpretation = voidable → valid until rescinded by Lewis, Avery bought the car before the contract was rescinded and therefore would get a valid title

Held: misinterpretation, not an operative mistake (Lewis could sue rogue)

Taylor v Johnson (1983) – [7.180]

- Vendor granted purchaser an option of purchasing two adjoining blocks of land → option was exercised and they entered into a written contract of sale
- In both option and sale agreement price was stipulated at \$15,000, yet the vendor later refused to complete the purchase on the grounds that she mistakenly believed it was agreed at a price of \$15,000 per acre
- The vendor was acting under a serious mistake about either the terms (price) or the subject matter (value) of the transaction and deliberately set out to ensure she was not disabused of the mistake
- Induced by purchaser

- **Held:** contract of sale should be set aside → “will be entitled in equity to an order rescinding the contract if the other party is aware the first party is entering under serious mistake

Petelin v Cullen (1975) – [7.330]

- Petelin owned land Cullen wished to buy and develop
- Through his agent Clements, Cullen obtained a 6 month option to purchase land with \$50 consideration
- After the expiry of the option, a letter was sent to Petelin with another \$50
- Cullen then saw Petelin and asked whether he had received the cheque, Clements then asked if he had a form (holding up an extension), Petelin said yes and signed it thinking it was a receipt
- Petelin did not read English and had signed the document in the belief it was a receipt
- Cullen brought Petelin to court when she refused to sell the land → Petelin used **non est factum**
- **Held:** Petelin was not careless, his belief that it was a receipt was from Clements and Cullen was responsible

Remedy for unilateral mistake

- Contract is voidable i.e. may be rescinded
- Equitable remedy (in the case of both fraudulent and innocent misrepresentation)
- It amounts to setting the contract aside and restoring the parties to the position they occupied before the contract was made
- But if the parties cannot be restored to their pre-contractual positions, then rescission cannot be possible

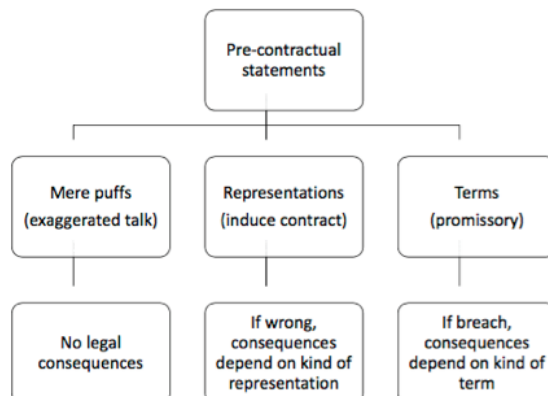
Rescission is not possible where:

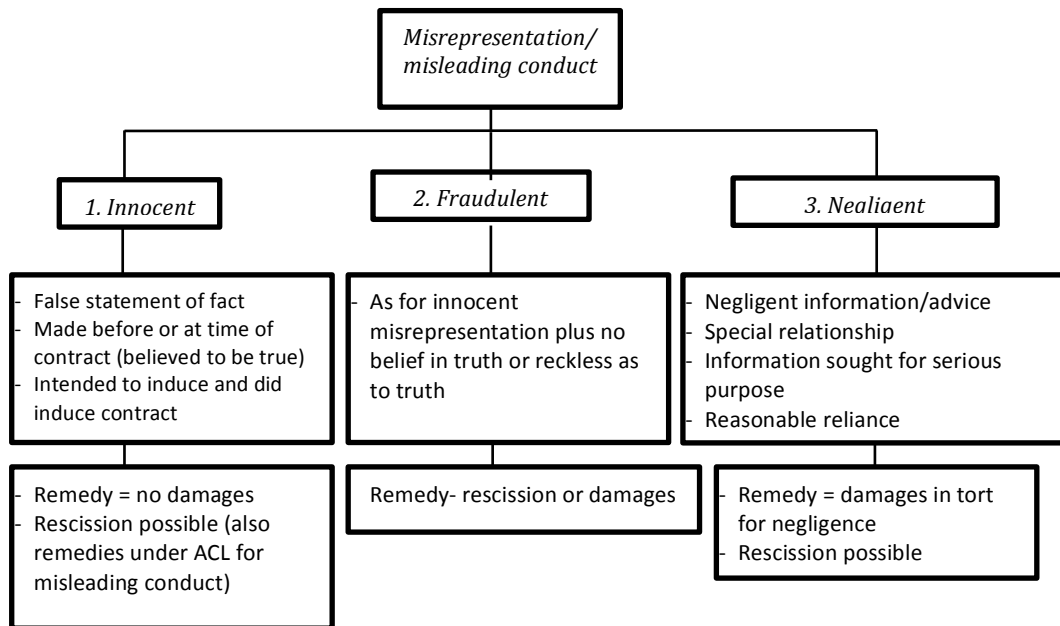
- The representee chooses to affirm the contract after becoming aware of the falsity of the representation
- Return to the pre-contractual positions is not possible (next result: payments)
- An innocent 3rd party has acquired interest in the subject-matter of the contract in good faith before the contract was rescinded
- Rule is Seddon’s case might prevent rescission for innocent misrepresentation of a contract that has been fully performed

(2) Misrepresentation

Statements

- **Terms = promissory:** If the party making a statement promises truth of that statement in the sense of making it part of the contractual bargain, then it is a term of the contract → non-fulfilment entitles the other party to take action for breach (promissory) = legally binding
- **Representations:** statements that are not promissory → while not contractual, they induce the person to whom they are made to enter into the contract
- **Mere puff** would not persuade someone to enter a contract (e.g. absolute gem)





Types of Misrepresentation

1. Common law:
 - Innocent
 - Fraudulent
 - Negligent
2. Statutory misrepresentation (S 18 ACL)

In the contract

- **Vitiating factor:** may allow the contract to be avoided and must have the 4 elements to be actionable
 - a. A false statement
 - b. A statement of fact
 - c. Addressed to the other party
 - d. Intended to induce the contract
- **Remedy:** damages or rescission of contract
 - Rescission is the equitable remedy which effectively ‘undoes’ the contract
 - Rescission is available in limited situations and this remedy may also be lost, depending upon the facts

a. Innocent misrepresentation

A false representation made by a person who, at the time of making it, believed it to be true

Remedies

- Common law provides no remedy for innocent misrepresentation (where it was not made a term)
- No damages (unless made a term)
- Very limited right to rescind (equitable remedy)
- A person induced into a contract has the right to:
 - a. Rescind the contract whereby they can obtain an “indemnity” against expenses incurred because of the obligations of the contract
 - b. To resist successfully an action for specific performance of the contract

Remedies for Rescission – Atali v Kruger – Pg.156

Redgrave v Hurd (1881) – [7.540]

- The defendant was induced to enter into a contract to purchase a house from the defendant along with the defendant's practice (solicitor) on the faith of a misstatement as to the value of returns
- **Held:** no statement made which was false to the knowledge of the defendant- but the plaintiff was refused specific performance → contract was rescinded

b. Negligent misrepresentation

An innocent misrepresentation made negligently

Step 1: did representor owe a duty of care to the representee (Donoghue and Stevenson)

Step 2: has the representor failed to exercise the required standard of care?

Step 3: where the representee's losses caused by the negligence and were the losses reasonably foreseeable

Remedies

- Rescission if a contract was entered into with the representor- if possible
- Damages for tort of negligence

Hedley Byrne v Heller; Shaddock's case

c. Fraudulent misrepresentation

The representor made the statement either

- a. Knowing it to be untrue
- b. Recklessly, not caring whether it was true or false

For an action of fraud to succeed/constitute grounds for action, or for the other party to have the remedies given to a person induced, the following elements must be established:

1. The representation must be one of fact

- A statement of opinion/intention or a prediction cannot be true or false at the time it is made
- However, they can be misrepresented if the representor does not hold that opinion or have the intention or does not have reasonable grounds for making the prediction
- Silence may also constitute misrepresentation
- Although there is no general duty to disclose information there are two situations where there is a positive duty to disclose:
 - d. Where the statement may be literally true, but left alone, creates a false impression
 - e. When the statement is true at the time it is made but circumstances change so that it becomes untrue

2. The representation must be false

- If the representation is true when made but becomes false to the knowledge of the representor before the contract is concluded and does not disclose → liable (*Jones v Dumbrell 1981*)

3. The party who makes such representation must know that what they are stating is false, or they have no belief in its truth, or be reckless about whether it is true or false

- Need to actually know that what they are representing is in fact untrue
- Are liable if they make the false statement when they have no knowledge of whether it is true or false or seek to verify it as true
- However, if they genuinely believe it was true there is no fraud even though their belief was formed negligently

4. The party who makes the representation must intend the other party to the contract to act upon such representation

5. The representation must, in fact, have been acted upon by the other party (*Redgrave v Hurd*)

Redgrave v Hurd

- Vendor argued that as the purchaser could have discovered correct earnings figures he should not be able to say he relied on the misrepresentation
- **Held:** The fact that Hurd had an opportunity to investigate whether a representation was true or false was insufficient to prevent reliance upon that misrepresentation

6. The person claiming must have suffered damages

Remedies

- Rescission
- May take advantage of the contract and retain any benefits while suing for fraud and claiming any damages (affirm contract) → contract is voidable
- May successfully defend any attempts to enforce the contract against them
- Damages for tort of deceit (fraud)
- **Derry v Peek**

Misrepresentation under the Australian Consumer Law (ACL)

When it is difficult to prove intention in fraudulent misrepresentation → use ACL

ACL Provides civil remedies where misrepresentation by a person constitutes misleading or deceptive conduct. S18(1) provides that:

Section 18(1): “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”

To demonstrate breach, must be/have:

- A person = applies to people and persons → applies to any sellers (not consumers)
- Made the misrepresentation during the negotiations
- Common law had problems establishing fraudulent as they must prove intention
- ACL only need prove conduct
- General (section 29 more specific)

Section 29(1): “A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation about the:

- a. Standard, quality, value, grade, composition, style or model or have had a particular previous use
- b. Services are of a particular standard quality value or grade
- c. To n.

Remedies: damages: fines \$1.1mil for corporation and \$220,000 for person

- Applies specifically to supply of goods and services

Section 30(1): “A person must not in trade or commerce in connection with the sale or grant of an interest in land or in connection with the promotion by any means of the sale of grant of an interest in land make a false or misleading representation

- See (a)-(g)
- Remedies: damages, fines

(3) Undue Influence

Improper use of the ascendancy acquired by one person over another for the benefit of the ascendant person themselves or someone else, so the acts of the person influenced are not their 'free voluntary acts'

- Usually arises in transfers of property for no or inadequate consideration
- The doctrine of undue influence is primarily concerned with gifts but may also apply to contract
- The gift or contract may be set aside where the parties were in a relationship where one had the power to influence the other in an unacceptable way

Where the following special relationships exist, undue influence is presumed in dealings and the onus of proving that it was not exercised is on the party denying it:

- Parent and child; until the child has withdrawn from the influence of the parent (*Lancashire Loans v Black*)
- Guardian and ward
- Trustee and beneficiary
- Solicitor and client (*Lloyd v Coote*)
- Religious advisor and devotee (*Allcard v Skinner*)
- Doctor and patient

Where a special relationship exists, the onus is on the person in whom the confidence is reposed to establish the transaction in question was the "pure voluntary and well-understood" act of the person reposing the confidence

→ not subject to undue influence

- Relationships that may give rise to presumptions are not closed
- Husband and wife does not give rise to presumption (are special cases though)

In the absence of a special relationship (giving rise to the presumption) → onus is on the person seeking to avoid the transaction to prove that it was the result of undue influence exerted on her or him by another

Johnson v Buttress (1936) – [7.810]

- Johnson three years before he died gave his land and cottage to Buttress, a woman who he had known for 20 years
- After his death, the administrator of his estate challenged the gift on the basis their relationship was one of trust and confidence
- Administrator held Johnson was illiterate, ignorant of commercial matter and did not understand the nature of what he had done
- **Held:** agreed with administrator → onus shifted to Buttress to prove that she had not exercised undue influence

Spong v Spong (1914) – [7.830]

- Son brought action against father for rescission of a voluntary transfer of land back to son on the ground that when the transfer was executed son, as father knew, was incapable of knowing or understanding the effect of the transfer and of undue influence
- **Held:** son was to father knowledge feeble-minded, weak and incapable of transacting business and gave ruled in favour of son

Lloyds Bank v Bundy (1975)- fiduciary – [7.840]

- There was a relationship between defendant and the bank and the court could intervene to prevent the relationship being abused
- Since the effect of the guarantee and charge could have resulted in the defendant being left penniless and had no other independent advice as to what he was doing
- **Held:** breach by bank of fiduciary duty of care

(4) Duress

- Duress is actual or threatened violence to, or the deprivation of liberty of, a person or their immediate family to pressure or coerce such person into entering into a contract
- A person entering into a contract under duress, was deprived their free will to act and thus no true consent has been given for the agreement
- **Voidable** = at the option of the coerced party, they can elect to be bound or not bound by the contract

Barton v Armstrong [7.750]

- P claimed he had executed deed for purchase of D's shares because of threats against his life
- Held: P had also been motivated to execute the deed for business reasons
- Privy Council Held: Though it may be that P would have executed the documents even if D had made no threats/unlawful pressure to induce him to do so, the threats and pressure in fact contributed to his decision to sign the document

Scolio Pty Ltd v Cote (1992)

- Contracted entered into by employee for repayment of money misappropriated from employer was not voidable under ground of duress where the employer had threatened police intervention
- The amount was in fact owing and the employee received consideration by given time to pay

Economic Duress

Where one party is induced to enter into a contract because of threats to that party's economic interests

- (a) Whether any applied pressure induced the party to enter into the contract; and
- (b) Whether the pressure went beyond what the law is prepared to countenance as legitimate, for example unlawful threats or unconscionable conduct

Where economic duress is established, contract is voidable at option of the person threatened

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd [7.780]

Held: Shipbuilder's threat to break legal contract without any legal justification unless the owners agreed to pay increased payments amounted to economic duress

- Contract for increased payments therefore voidable and the money prima facie recoverable
- Held: Because of their delay in seeking recovery of excess payments, owners had affirmed the contract and could not recover payments

Remedies for duress and undue influence

- Rescission (if possible)
- Contract is voidable by the party coerced
- Damages may be available for the tort of intimidation

Consumer contracts s50(1)- prohibits harassment and coercion → rescission and penalties

(5) Unconscionable conduct

a. At common law

The general rule is that the court will not grant relief to a party merely because the contract they have entered into operates harshly or oppressively against them

Commercial Bank of Australia v Amadio HCA (1983) – [7.890]

- Old Italian couple, with limited knowledge of English language and education signed a mortgage to the bank over a block of shops as security for payment of its debts by one of their sons companies → they would become liable for the total present and future indebtedness of the company
- Little discussion, couple did not try to read the document and manager did not explain its meaning or fix their misunderstanding and left with the contract signed
 - Son's company went into liquidation and couple called to pay \$240,000

Court held: couple was in a position of special disadvantage in that they were mistaken as to the extent of their son's company → ill-informed about the seriousness of their position

- Their age and background and reliance on their son's misleading advice contributed to the special disadvantage
- **Although bank may not have known the full extent of the disability, it knew enough to be put on inquiry as to whether the Amadio's appreciated the nature of the contract**
- Failure to make further inquiry amounted to wilful ignorance = the unconscionable conduct
- Bank should have told them to get a second opinion

Louth v Diprose (1992) – [7.910]

- Diprose made friends with Louth in Tasmania and became infatuated with her however she was indifferent toward him- she was never
- She moved to Adelaide and he followed her and regularly gave her gifts and from time to time paid for household bills and her children school fees
- Louth was living with her sister and told Diprose she was asked to leave and would commit suicide, however she was under no such pressure → Diprose bought a house and put her name on it
- Diprose moved in and their relationship deteriorated and Diprose wanted the house back under his name

Court held: Louth had engaged in unconscionable conduct → Diprose would have a special disability and Louth manipulated it

→ intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness, but to prevent his victimisation

Garcia v National Australia Bank (NAB) (1998) – pg. 166

b. Unconscionable conduct under equity

Requirements:

1. The weaker party must be under a special disability in relation to the stronger party
2. The stronger party must be aware of the special disability
3. It must be unfair for the stronger party to procure an agreement in those circumstances

c. Unconscionable conduct under statute (ACL)

There is a statutory prohibition in ACL against unconscionable conduct in consumer contracts (ss 20-22)

Difference between fraudulent and innocent → **intention** and action (to get the person into the contract) in fraudulent

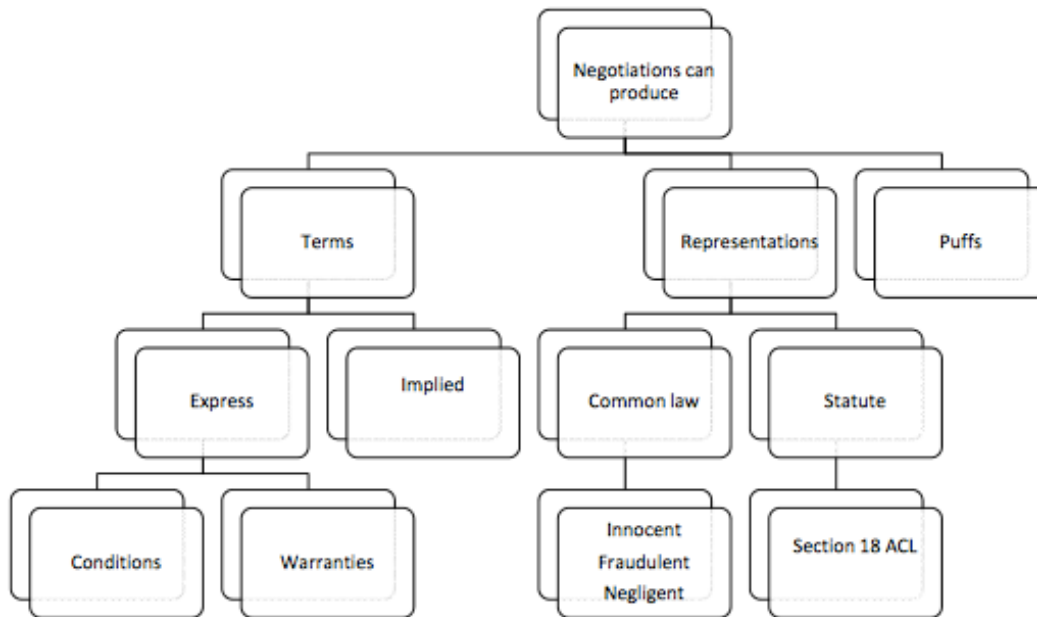
Difficult to prove → we go to the statute S18 ACCL

Go from innocent → negligent → fraudulent

1. A false statement
2. Made in order to induce other party to enter into the contract
3. Other party entered
4. Other party made a loss

Contents and Interpretation of the Contract

5. Content and Interpretation of the Contract



Content

- Contractual disputes are very often about the **rights and obligations** that the contract creates
- Such rights and obligations are found in the **terms** (or **contractual promises**) of the contract
- Such terms may be **express** (in writing or oral) or **implied** (by the courts or parliament)

Interpretation

- Basic rules of interpretation of contract – what do the words mean (9.435)

(1) Express and Implied Contract

Express Contracts

- May be in writing (or partly in writing, partly oral)
- May be entirely oral

Implied Contracts

- No express contract but contract implied by conduct of the parties
- Also terms are implied into express contracts

(2) Distinguishing Representations and Terms (9.100)

Why distinguish? – Remedies differ depending on whether the statement is a:

A puff? A misrepresentation/ misleading conduct? A term?

- A term is a promise – a part of the contractual bargain
- A representation is intended to persuade but is not 'promissory'

How to distinguish?

- The importance of the term to the plaintiff...
 - Have they reasonably relied on the statement and placed importance on it?
- The time lapse between the time the statement was made and time when contract was made...
 - Less time – more likely to be term
 - Longer time harder to argue significance
- Special skill or knowledge of defendant...
 - The more knowledgeable about the matter – more likely to be a term
- Statement made during negotiations and agreement is subsequently reduced to writing, any statement not included in writing will be regarded as a representation (consistent with parol evidence)

Oscar Chess Ltd v Williams [9.110]

- Defendant traded in second-hand car to the plaintiff in part payment for new car
- Defendant described his old car as a 1948 – on this basis the plaintiff allowed him \$290 trade in
- Later plaintiff discovered vehicle was 1939 model – a previous owner must have fraudulently altered date
- Plaintiff sought to recover \$115 damages, on grounds that the representation constituted a term of contract – held: claim failed
- Defendant **did not promise** it was a 1948 – it was an innocent misrepresentation for which damages could not be awarded
- **Rule:** If seller says ‘I believe...’ it is not a promise. But if seller says ‘I guarantee...’ this is clearly a **warranty (promise)**

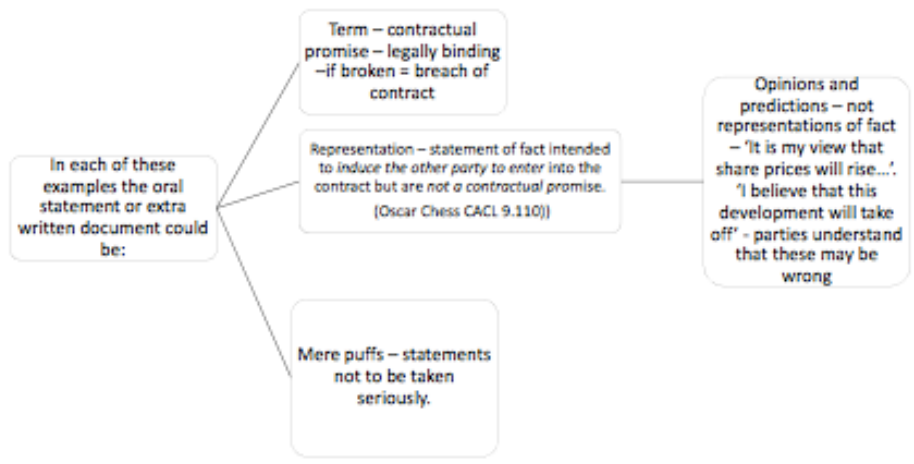
Dick Bentley Productions v Harold Smith Motors [9.112]

- Court held it was a term of contract because it was influenced by the fact that the vendor was a car dealer who was possessed of superior knowledge and expertise

Ross v Allis Chalmers Australia [9.115]

- Court held statement was not a term of contract but merely a statement of opinion, based on experience, and was not intended to be promissory

Terms, Representations and Mere Puffs



(3) Parole Evidence Rule

- Where parties have expressed their agreement in writing, the ‘parol evidence rule’ applies
- If the written document is intended by parties to contain a complete record of their transaction, extrinsic evidence is not admissible