

MISREPRESENTATION	4
STATUTORY MISLEADING OR DECEPTIVE CONDUCT	6
MISTAKE	10
DURESS AND UNDUE INFLUENCE	13
UNCONSCIONABLE DEALINGS	17
ILLEGALITY AND PUBLIC POLICY	21
FRUSTRATION	23
CONTINGENT CONDITIONS	25
AFFIRMATION	27
TERMINATION FOR BREACH OF CONTRACT	28
DAMAGES	33
OTHER REMEDIES	37
CASE SUMMARIES	38
AGRICULTURAL AND RURAL FINANCE PTY LTD V GARDINER [2008] HCA 57	38
ANACONDA NICKEL LTD V EDENSOR NOMINEES PTY LTD [2004] VSCA 167	38
AUSTRALIA ESTATES PTY LTD V CAIRNS CITY COUNCIL [2005] QCA 328	38
AUST. COMPETITION AND CONSUMER COMMISSION V CG BERBATHS HOLDINGS [2003] HCA 18	39
AUST. COMPETITION AND CONSUMER COMMISSION V LUX PTY LTD [2004] FCA 926	39
AUST. SECURITIES & INVESTMENTS COMMISSION V NATIONAL EXCHANGE [2005] FCAFC 226	39
BARTON V ARMSTRONG & ORS [1973] 2 NSWLR 598.....	40
BOWEN INVESTMENTS PTY LTD V TABCORP HOLDINGS LTD [2008] FCAFC 38	40
BRADSHAW V GILBERTS (AUSTRALASIAN) AGENCY (VIC) PTY LTD (1952) 86 CLR 209	40
BRIDGEWATER V LEAHY [1998] HCA 66.....	41
BRISBANE CITY COUNCIL V GROUP PROJECTS PTY LTD (1979) 145 CLR 143	41
BURNS V MAN AUTOMOTIVE (AUST) PTY LTD (1986) 161 CLR 48	41
BUTCHER & ANOR V LACHLAN ELDER REALTY PTY LTD [2004] HCA 60	42
BYERS & ORS V DOROTEA PTY LTD (1986) 69 ALR 715	42
CARR V JA BERRIMAN PTY LTD (1953) 89 CLR 327	42
CIT CREDIT PTY LTD V KEABLE [2006] NSWCA 130	43
CODELFA CONSTRUCTIONS PTY LTD V STATE RAIL AUTHORITY OF NSW (1982) 149 CLR 337	43
COMMERCIAL BANK OF AUSTRALIA LTD V AMADIO (1983) 151 CLR 447.....	43
COMMONWEALTH V AMANN AVIATION PTY LTD (1991) 174 CLR 64.....	44
CRESCENDO MANAGEMENT PTY LTD V WESTPAC BANKING CORPORATION (1988) 19 NSWLR 40	44
DEMAGOGUE PTY LTD V RAMENSKY & ANOR (1992) 39 FCR 31	45
DOUGAN V LEY (1946) 71 CLR 142	45
DTR NOMINEES PTY LTD V MONA HOMES PTY LTD (1978) 138 CLR 423	45
ESANDA FINANCE CORPORATION LTD V PLESSNIG (1989) 166 CLR 131	46
FORAN V WIGHT (1989) 18 CLR 385.....	46
FITZGERALD V F J LEONHARDT PTY LTD (1997) 189 CLR 215	47
FUTURETRONICS INTERNATIONAL PTY LTD V GADZHIS [1992] 2 VR 217.....	47
GANGE V SULLIVAN (1966) 116 CLR 418	47
GARCIA V NATIONAL AUSTRALIA BANK (1998) 194 CLR 395.....	48
GOULD & ANOR V VAGGELAS & ORS (1984) 56 ALR 31	48
HAWKER PACIFIC PTY LTD V HELICOPTER CHARTER PTY LTD (1991) 22 NSWLR 298	48
HENJO INVESTMENTS PTY LTD V COLLINS MARRICKVILLE PTY LTD (No 1) (1988) 39 FCR 546.....	49
IMMER (NO 145) PTY LTD V UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (1993) 182 CLR 26.....	49
JC WILLIAMSON LTD V LUKEY AND MULHOLLAND (1931) 45 CR 282.....	49

JOHNSON V BUTTRESS (1936) 56 CLR 113.....	50
KOOMPAHTOO LOCAL ABORIGINAL LAND COUNCIL V SANPINE PTY LTD (2007) HCA 61	50
KRAKOWSKI & ANOR V EUROLYNX PROPERTIES LTD & ANOR (1995) 183 CLR 563	50
LAURINDA PTY LTD V CAPALABA PARK SHOPPING CENTRE PTY LTD (1989) 166 CLR 623	51
MK & J A ROCHE PTY LTD & ORS V METRO EDGLEY PTY LTD & ANOR [2005] NSWCA 39	51
NORTH V MARRA DEVELOPMENTS LTD (1981) 148 CLR 42	51
OOH! MEDIA ROADSIDE PTY LTD V DIAMOND WHEELS PTY LTD & ANOR [2011] VSCA 116	52
PACIOCCO V AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED [2016] HCA 28	52
PAPAS V BIANCA INVESTMENTS PTY LTD (2002) SASC 190	52
PERRI V COOLANGATTA INVESTMENTS PTY LTD (1982) 149 CLR 537.....	53
PETELIN V CULLEN (1975) 132 CLR 355.....	53
RINGROW PTY LTD V BP AUSTRALIA PTY LTD [2005] HCA 60.....	53
SANDRA INVESTMENTS PTY LTD V BOOTH (1983) 153 CLR 153.....	54
SILVERBROOK RESEARCH PTY LTD V LINDLEY [2010] NSWCA 357.....	54
STUART PTY LTD V CONDOR COMMERCIAL INSULATION PTY LTD [2006] NSWCA 334	54
TANWAR ENTERPRISES V CAUCHI [2003] HCA 57	55
TA SUNDELL & SONS PTY LTD V EMM YANNOULATOS (OVERSEAS) LTD (1956) 56 SR (NSW) 323	55
TAYLOR V JOHNSON (1983) 151 CLR 422.....	55
VADASZ V PIONEER CONCRETE (SA) PTY LTD (1995) 184 CLR 102	56
WILKINSON V OSBOURNE (1915) 21 CLR 1915	56

Misrepresentation

- A representation is a “statement made by one party... to the other, before or at the time of contracting about some existing state of affairs or to some past event, which is one of the factors that induced the representee to enter into the contract” – *Krawkowski & anor v Eurolynx & anor* (1995) 183 CLR 563 at [586]
- There is no general obligation to disclose facts (but active concealment might be fraud), unless:
 - Silence distorts a positive representation – half truth
 - Contract is ‘uberrimae fidei’, or in utmost good faith – eg. contract of insurance
 - There is a fiduciary relationship

Elements

1. A statement was made by one party to the other, before or at the time of contracting, with regard to some existing or past material fact (a representation) – *Krawkowski* at [586]
 - Different to statements about future facts, these form part of the contract if promissory
 2. The representation is untrue
 - The way a reasonable person in the position of the representee would have understood a representation is evidence of whether the representation is false – *Krawkowski* at [576]
 - Statement must contain “a clear and wrong impression”, rather than being “puff” – *Byers & ors v Dorotea Pty Ltd* (1986) 86 ALR 715 at [720]
 3. The representation induced the contract
 - “The sense in which a representation is understood by the representee is relevant to whether the representation induced the representee to act on it” – *Krawkowski* at [577]
 - *Gould & anor v Vaggelas & ors* (1984) 56 ALR 31:
 - “a material representation is made which is calculated to induce the representee to enter a contract and that person in fact enters the contract there arises a fair inference that he was induced” at [236] per Wilson J
 - “The inference may be rebutted, for example by showing that the representee [had] actual knowledge of the facts or made it plain that he did not rely on the representation” at [236] per Wilson J
 - “The ultimate onus of proving inducement rests of on the party seeking relief” [237]
 - “The representation need not be the sole inducement. It is sufficient so long as it plays some part even if it is only minor in contributing to the formation of the contract”
 - “If the representation is known by the representor to be untrue, the representor does not escape liability because the representee did not believe the representation in full” at [252] per Brennan J
 - Sufficient that it leads, or is likely to lead into error – *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [368]
 - Must induce or be capable of inducing error – *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at [198]
 4. The representor intended that the representation would induce the contract, or was reckless
 - “the sense in which the representor intended the representation to be understood is relevant as to whether the representation was made fraudulently” – *Krawkowski* at [577]
- Where the representation forms part of the contract, the remedy is for breach of contract
 - Where it doesn’t the remedy in contract is rescission and damages lie in tort
 - Promise or representation? See Deane J [120] and Gibbs CJ [60]-[63] in *Hospital Products*

Innocent Misrepresentation

- Exclusion clause may remove liability – *Byers* at [729]
- Affirmation to an innocent misrepresentation may preclude rescission – *Byers* at [729]
- No damages available

Negligent Misrepresentation

- Review tort of negligence (remedy is damages under this tort)
 - Duty of care (ie. representor owed representee duty to take reasonable care to ensure accuracy of representations)
 - Breach and foreseeability

Deceit or Fraudulent Misrepresentation

- Statement made knowingly, without belief in its truth or reckless/careless as to whether it is true or false – Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337
- Must prove the representor had “no honest belief in the truth of the representation in the sense in which the representor intended it to be understood” – *Krakowski & anor v Eurolynx Properties Ltd & anor* (1995) 183 CLR 563
- “Once fraud is found... the Court must determine whether... rescission of the contract [would be] effective [in that] at the time the writ was issued, equity can restore the parties substantially to the status quo. As the equitable remedy is discretionary, [it] will be denied if a purchaser acts unconscientiously during the pendency of the action” – *Krakowski* at [586]
- Remedy is damages in tort of deceit (amount required to restore party to previous position)

Rescission – Contract is ‘voidable’

- Only available for fraudulent misrepresentations and duress!
- Rescission is only allowed where the parties can be substantially restored to their pre-contract positions (‘restitutio in integrum’) – *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102
- “Where appropriate, an order will be made which only partly nullifies a transaction... [T]he order will, in an appropriate case, be made conditional” – *Vadasz* at [114]
 - This depends on the intentions of the representee had there been no misrepresentation, would they have signed a contract with slightly different terms or not at all?
- The right to rescind can be lost by:
 - Affirmation or delay – *Byers*
 - However, an aggrieved party is entitled to a reasonable time to consider his or her position, provided he or she does not otherwise affirm the contract or cause prejudice to the other party – *Sargent v ASL Developments Ltd* (1974) 131 CLR 634
 - Unconscionable conduct – *Vadasz*
 - Third parties having already acquired rights under the contract
 - *Restitutio in integrum* not being possible
 - Executed contracts
 - “absent fraud, equity would not order rescission of the contract of sale [of land] after conveyance” – *Krakowski* at [585]

Damages

- Consider the difference between the price paid by the representee and what the subject-matter was worth on the market at the time of purchase. The aim is to place the person in the position they would be in if the contract hadn’t been made – *Gould*
- Damages will vary between deceit and negligence as damages for negligence are only for loss that was reasonably foreseeable – *Gould*

Damages

Right to Damages for Breach of Contract

- Unless otherwise agreed, a party is entitled to damages (compensation) for a breach of contract where the loss to be compensated is:
 - Caused by the breach
 - Not too remote
 - “If the event would have appeared to the respondent as not unlikely to occur, that would be sufficient to establish liability” – *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd* [2006] NSWCA 334, 99
 - Damage must be “in the reasonable contemplation of the parties as arising from the breach” – *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 669 quoting *Hadley v Baxendale* (1854) 156 ER 145, 151
 - “What was in contemplation of the parties depends on the terms of the contract in the matrix of circumstances” – *Amann*, 92
 - Could not have been avoided by mitigation
 - Damages are not recoverable for any loss that could have been prevented by the injured party taking reasonable steps to mitigate the loss
 - May blur with issues of remoteness and causation – see *Burns*
 - No failure to mitigate unless injured party knew or should have known of breach
 - Party in breach must establish a failure to take reasonable steps to mitigate
- A party in breach is potentially liable to pay at least nominal damages, even if no loss was caused by the breach – *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286
 - To recover more than nominal damages, the plaintiff must prove readiness and willingness to perform all concurrent obligations – *Hensley v Reschke* (1981) 18 CLR 452
- A right to damages for loss caused by breach of contract arises regardless of whether the contract has been terminated (exception is damages for anticipatory breach)
- Rules relating to the calculation of damages are not strictly applied and can be displaced where necessary to achieve a result which provides reasonable compensation
- Various types of damages:
 - Nominal damages
 - Substantial damages (‘real’ damages)
 - Expectation damages (loss of profit damages)
 - Reliance damages (wasted expenditure damages or consequential loss)
 - “Reliance damages do not cover lost profits but both cover expenditure reasonably incurred in preparing to perform and in performing” – *Amann*, 107
 - Disgorgement damages (restitutionary damages)
 - Exemplary damages (punitive or retributive damages)
 - Liquidated damages (stipulated by the contract itself)
- Contract damages may include compensation for combinations of losses based on elements of:
 - Expectation
 - Reliance
 - Restitution (eg. refundable deposit)

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1) (1988) 39 FCR 546

Facts

Henjo owned and operated a restaurant, which sat 120 and 8 at the bar. However, they were only legally allowed to seat 84 and the bar area could not be used for drinking. Collins sought to purchase the restaurant and did not find out about the illegal activity until after the contract had been signed. They sought rescission under s 87 (ss 237-239 ACL) and were successful, Henjo appealed, seeking that the contract not be rescinded and only damages be awarded.

Judgement

Majority of 2 judges in favour of Henjo (appellant), Foster J dissented in part

Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (1993) 182 CLR 26

Facts

Immer contracted to purchase unused floorspace rights from Uniting. Council stated that the transfer of rights would only occur after Uniting had completed renovation works on its property. The works were not completed, and the transfer of rights could not go ahead before the date of completion stipulated in the contract. An option to rescind was provided in the contract for this circumstance. After the date, Immer continued attempts to finalise the sale for another 4 months, before filing a notice of rescission. The Court of Appeal concluded this continuation was an election to proceed and made orders for specific performance. Immer appealed.

Judgement

Unanimous judgement in favour of Immer (appellant)

- “The letter cannot be construed as an unqualified election to affirm the contract whether or not the Trust was in a position to complete the transfer” at [30] per Brennan J

JC Williamson Ltd v Lukey and Mulholland (1931) 45 CR 282

Facts

JC Williamson made an oral contract with Lukey for a lease of 5 years and the exclusive right to sell confectionary in the theatre they owned. When Lukey sued for an injunction after exclusive rights were given to another tenant, JC argued that the contract was unenforceable. The Supreme Court awarded damages in lieu of an injunction for Lukey, and JC appealed.

Judgement

Unanimous judgement in favour of JC Williamson (appellant)

- “that duty is not enforceable at law because the contract is not evidenced by writing” [300]