Under the general law, rights to rescind arise from pre-contractual conduct that influenced the decision to contract. The conduct must qualify as a vitiating factor in order to qualify as capable of being grounds for rescission.

**Void vs. Voidable**

1. **Void** - A contract that is void is null from the beginning, i.e. it never existed. A contract that is void, cannot be enforced by either party. A contract will be considered void, for example, when it requires one party to perform an act that is impossible or illegal.
   a. E.g. Contracts that require performing something impossible, or depend on an impossible event occurring.
2. **Voidable** – A voidable contract is a valid contract and can be enforced. Usually only one party is bound to the contract terms in a voidable contract. The aggrieved party is allowed to rescind the contract.
   a. E.g. Contracts where one of the parties was forced or tricked into making it by one of the vitiating factors below.
   b. Contracts entered into where one party was incapacitated.

**RESTRICTIONS ON RESCISSION**

Rescission is the process of ‘unwinding’ a contract (i.e. each party returns the benefits obtained under the agreement). Rescission seeks to restore the parties to the position they were in prior to the contract, however is restricted in some circumstances.

1. **Affirmation**
   a. Innocent party expressly/impliedly affirms the contract
   b. Innocent party must have knowledge of the facts of the false representation, mistake, unconscionable conduct etc. AND knowledge of the legal right to rescind (meaning that legal advice must generally have been sought) at the time of affirmation – Coastal Estates v Melevende

2. **Restitution substantially impossible**
   a. Restitution is only possible if the parties can be placed in their original positions.
      i. CL requires this to be precise, however equity provides that precise restitution is not necessary - court can use its power to impose terms that substantially restore parties to pre-contractual positions so as to do justice between the parties. Equity indeed has the powers to make substantial restitution possible – Alati v Kruger
      ii. If value has deteriorated due to buyers fault, the buyer will need to compensate – Alati v Kruger
   b. Partial rescission is possible where full rescission would not be – Vadasz v Pioneer

3. **Intervention of the rights of third parties**
   a. If a third party in good faith has acquired rights under the contract for value, rescission is not possible. I.e. if goods initially obtained under a voidable contract, P’s rights to rescission are lost – Car and Universal Finance Co v Caldwell
   b. EXCEPTION: If P can rescind the contract before a third party gains title, then the third party must return the goods - Car and Universal Finance Co v Caldwell
      i. All reasonable steps – Taking all reasonable steps to rescind (even if not possible because initial fraudulent party cannot be found) will be sufficient – Caldwell
4. **Lapse of Time**
   
a. Lapse of time can be evidence of affirmation – *Coastal Estates v Melevende*
   
b. There is a notion of a ‘reasonable time limit’ – *Leaf v International Galleries*

5. **Rule in Seddon’s case (execution of the contract)**
   
a. When an executory contract has been completed by formal conveyance of title, the right to rescind for innocent misrepresentation is lost (i.e. not arising from fraud or a complete failure of consideration). In other words, full execution of a contract of this type will bar rescission – *Seddon v North Eastern Salt Co*
   

---

### A. UNDUE INFLUENCE

1. **Principle** – Undue influence is concerned with setting aside transactions that cannot reasonably be explained on the basis of friendship, relationship, charity or other ordinary motives – *Allard v Skinner*

   **Presumed Undue Influence (burden of proof on beneficiary to prove no UI)**

   **(1.1) Relationships, which by virtue of their type give rise to the presumption that influence, has been exercised** – can the weaker party point to a recognised class of relationship? If so, transaction gives rise to the presumption of UI (which the stronger party then has the burden of proof of rebutting):

   1. **INCLUDES:** Parent/child [loco parentis – *Rogers v Bank of NSW*]; guardian/ward; doctor/patient; solicitor/client; religious advisor/member of religion.
   2. **DOES NOT INCLUDE:** husband/wife; employer/employee; gov’t monopolist supplier/retailer

   **(1.2) Relationships of influence in fact (ad hoc factual relationship), where applicant establishes sufficient trust and confidence to give rise to a presumption of influence**

   1. Question here is whether the applicant establishes sufficient trust and confidence to give rise to a presumption of influence. I.e. is the beneficiary in a position to exercise domination over the other? Does the other depend upon the beneficiary due to trust and confidence placed in them? – *Johnson v Buttress; Tulloch v Braybon*
   
   2. **Onus of proof** - It must be affirmatively shown by the beneficiary that the gift was *the pure, voluntary, well-understood act of the mind* – *Huguenin v Baseley*
      
       a. Note: The age and condition of the ‘donor’ are irrelevant in so far as raising the presumption of UI is concerned.

   **IF PRESUMPTION IN (1.1) or (1.2) made out - Can the beneficiary rebut the presumption of influence?**

   1. Test: Onus is on the beneficiary to show that the other party had a clear understanding of what they were doing and freely entered the transaction – *Johnson v Buttress*
   
   2. **Factors** to consider in deciding whether presumption of UI is rebutted per *Johnson v Buttress* include:
      
      a. **Independent advice (most persuasive):** Evidence that the donor received competent, independent advice from a solicitor etc.
      
      b. Whether **sufficient consideration** was given (although not determinative)
      
      c. **Substance of the transaction** – whether it was a sole asset of high value, whether the donor was illiterate/weak minded/of low intelligence etc. – In such cases the presumption will be stronger and harder to rebut.
Test for actual Undue Influence (burden of proof on donor to establish UI)

1. **Test for actual undue influence** – Can the weaker party establish that the stronger party had actual influence over their mind at the time of the contract, causing them to enter into the transaction? – Allard v Skinner; Barclays Bank plc v O’Brien
   a. **Independent advice (most persuasive):** Evidence that the donor received competent, independent advice from a solicitor etc.
   b. Whether **sufficient consideration** was given (although not determinative)
   c. **Substance of the transaction** – whether it was a sole asset of high value, whether the donor was illiterate/weak minded/of low intelligence etc. – In such cases the presumption will be stronger and harder to rebut.

**Remedies**

2. If Undue Influence is established, there is a **right to rescind** the contract. Following rescission, consequential orders may be made to restore the parties to their pre-contractual positions.

3. **Third Parties** – Where B enters into a contract with C, it may be voidable if C had knowledge of facts sufficient to put a person on inquiry as to the possibility that A was exerting undue influence on B to enter it, and C failed to make such inquiries – Bank of NSW v Rogers
   a. (1) Did the third party have knowledge of facts sufficient to put a party on inquiry as to the existence of undue influence?
   b. (2) Did the third party fail to make inquiries?

**B. UNCONSCIONABLE BARGAINS/CONDUCT**

1. **Principle** – Equitable jurisdiction of the court to set aside transactions where one party is under a “special disadvantage” and the other party takes unconscionable advantage of this.

2. **Test** – Commercial Bank of Australia v Amadio
   a. (1) Weaker party must show they suffered from a ‘special disadvantage’ at the time of the transactions. - (need to pick apart the facts and argue why there is collectively enough information to meet the legally recognised standard of a ‘special disadvantage’.
      i. NOT merely a weakness of bargaining power, but severe evaluative incapacity that places them at a serious disadvantage as against the other party to the contract, by affecting their capacity for judgment.
      ii. **Examples of situations where a ‘special disadvantage’ may be made out include:**
         1. Elderly/infirm – Amadio
         2. Illiterate/language barriers – i.e. lack of understanding of the nature of agreement – Amadio
         3. Mental/physical illness, inexperience, poverty – Bromley v Ryan
         4. Infatuation or ‘love’ leading to dependence and control – arguably infatuation itself is not enough, i.e. there was other factors present in this case such as extreme emotional pressure, threats of self-harm etc. – Louth v Diprose
         5. Alcoholism (just being drunk not enough) – if party trying to procure favourable bargain brings alcohol to the bargaining table with knowledge that other party has drinking problem – Blomley v Rya
Topic 6 – Misrepresentation

A. Common Law Misrepresentation

Elements

1. A false statement of material fact - A statement of past/present affairs that is demonstrably true/false.

   a. Test per With v O’Flanagan:
      
      i. If it is an outright statement, simply need to prove that the statement was false;
      ii. If it is an opinion/statement of law, prove no reasonable grounds;
      iii. If it is a statement of intention or future intention, prove no honest belief.

What may amount to a misrepresentation?

b. Advertising/promises (puff) – Mere advertising or assurances as to the future will not be a misrepresentation as such statement not generally considered to be statements of fact – Magennis v Fallon

c. Opinion – Statements of opinion will not be considered to be a misrepresentation, as they at least imply that the person actually holds the intention or opinion professed. If this is not so, there will be a fraudulent misrepresentation – Bathurst v Regional Council

   i. ‘It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it as much a statement of fact as anything else.’ – Edgington v Fitzmaurice

d. Statements of law – but not when they regard representations as to a persons private rights: these will be held to be a representation of fact for the purposes of the distinction – Cooper v Phipps

e. Statements of present/future intention – unless the promisor doesn’t genuinely believe them, in which case there is a present misrepresentation as to the state of mind - Edgington v Fitzmaurice

f. Silence – The general rule is that silence does not constitute a representation. However, there are three qualifications to this general rule:

   i. Nature of contract - A duty to disclose may arise from the nature of the contract into which the parties propose to enter.
      1. The principal example is a contract for insurance. I.e. a person has a duty to disclose all relevant facts, which may influence the decision of a prudent insurer to contract.

   ii. Half-truths – Even if literally true, a statement is a misrepresentation if it gives a false impression because it is a half-truth.
      1. Dimmock v Hallett – a vendor of an estate represented that the farms on it were fully let, but omitted to say that the tenants had given notice to quit, and his representation was held to be false.
      2. Krakowski v Eurolynx Properties – where negotiations for the sale of property had taken place on a particular footing, a representation that the terms of the lease instrument were unaffected by any other contractual arrangement was implied from
the failure to bring a separate agreement with the lessee to the purchaser’s attention.

iii. Change in circumstances – If circumstances change between the time that a representation is made and the time when the representation is acted upon (i.e. the contract is entered into), the statement becomes a false statement of fact.

1. If a person who has made a representation, which is not immediately acted upon, finds that the circumstances change, that person must disclose the change to the representee before the representation is acted upon – With v O’Flanagan

2. Was the statement intended to induce entry into the contract & did it actually do so?

   a. There must be intention on the part of the representer that the representation reach and induce a class of persons for which the representee is a member – Peek v Gurney

   b. The statement must actually induce entry by the representee:

      i. Presumption - where there is a misstatement of material fact, inducement into a contract will be presumed, subject to a rebuttal by B showing that A did not rely on the statement – Holmes v Jones; Redgrave v Hurd

      1. A representee’s failure to conduct due diligence is irrelevant and should not be considered – Redgrave v Hurd

      ii. Need not be sole reason for contracting - Need not be the sole reason, must merely be a ‘real’ inducement that materially affected the representee’s decision as a matter of fact – Holmes v Jones

B. Remedies for Misrepresentation at Common Law (constitutes its own action in tort)

1. Fraudulent Misrepresentation

   a. Definition – Representer knew it was false; without belief in its truth; or was reckless/indifferent as to the representations truth – Derry v Peek

   b. Remedy - Rescission, damages via tort of deceit – difference between the value of the property at purchase and what the misled party paid – Gould v Veggelas

2. Negligent Misrepresentation

   a. Definition:

      i. A duty owed by the representor to he representee to take due care to ensure that the representation is true and reliable;

      ii. Failure by the representor to take such due care; and

      iii. Loss or damage caused by the falsity of the representation.

   b. Remedy - Rescission, damages via negligent misstatement

      i. Note: This tort can apply to pre-contractual statement (see Esso Petroleum v Mardon)

3. Innocent Misrepresentation

   a. Definition – Representor did not know that the statement was false.

   b. Remedy - Rescission only. No common law right to damages – Dick Bentley Productions v Harold Smith Motors.