

CONTRACT B OVERVIEW

Termination (week one)

- Termination overview
- Termination by agreement; *McDermott v Black*
- Termination for breach

Breach of a condition (*Arcos Ltd v EA Ronaasen and Son*)

- Is it a condition? Consider:
 1. **Statutory Classification:** ie. Goods Act
Sale of Goods: there are implied conditions that:
 - S.17(a): the seller has a right to sell the goods
 - S.18: the goods correspond with the description
 - S.19: the goods are reasonably fit for purpose
 - S.20: the bulk of the goods correspond with the sample
 2. **Expressly stated by the parties**
 - *L Schuler v Wickman Machine Tool Sales*
 - s.15 Goods Act
 - s.41 Property Law Act
 3. **Intention of the parties**
 - Essentiality Test
 - A condition is a term that the parties regarded as essential/goes to the root of the contract
 - *Tramways Advertising Pty Ltd v Luna Park* – application of essentiality test, the innocent party wouldn't have entered into the contract unless assured of a strict and literal performance of the promise, he/she may in general treat himself/herself as discharged upon any breach of the promise, however slight
 - *Associated Newspapers Ltd v Bancks* – affirmed tramways essentiality test
- Application of *Arcos* (can terminate even if the breach is minor/breach was of little gravity or consequence)

Serious breach of an intermediate term

- *Test to be applied:* did the breach deprive P of substantially the whole benefit for which it contracted?
 - *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha Ltd* - creation of intermediate term and test that will be applied to determine whether one exists and has been breached
 - *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*
 - *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*
- Consider whether delay is a sufficiently serious breach

Breach of a warranty

- Only can be entitled to damages
- Once the contract has been terminated:
 - Both parties are relieved from further performance
 - Rights already accrued are not affected

Termination (week two)

• **Termination for Repudiation**

- *Test to be applied:* would a reasonable person believe that D did not intend or was unable to perform obligations that related to the whole contract, were conditions, or were otherwise fundamental to the contract?
- Distinguishing feature with termination: repudiation may occur **before** the time set for performance and may give rise to a right to terminate **before** an actual breach has occurred
- Consequences of repudiation: innocent party can either
 - 1/ accept the repudiation, terminate the contract, sue for damages
 - 2/ affirm the contract, lose the right to terminate and get damages, unless/until another breach occurs
- Repudiation may occur through words/conduct
- Consider:
 - Anticipatory breach
 - Conduct showing an inability/unwillingness to perform (*Carr v J A Berriman*)
 - Rep inferred from a combination of events (*Progressive Mailing House v Tabali*)
 - Instalment contracts (*Maple Flock v Universal Furniture Products*)
 - Envincing an intention not to be bound (*Shevill v Builders Licencing Board-express termination clause/right to terminate contract*)
 - Erroneous interpretation (*apply willy nilly test from DTR V Mona Homes, Woodward Investment Devt v Wimpey Constructions, Eminence Property Developments Ltd Heaney*)

➤ **Termination for delay**

- Essential time stipulation= express term in the contract that time is a condition/time is of the essence
- Non-essential time stipulation= time is not of the essence
- When can delay constitute repudiation:
 - 1/ where time is not essential, delay must constitute rep where delay demonstrates an unwillingness/inability to perform under the contract
 - 2/ where the breaching party is given notice to perform within a reasonable time but fails to do so
- **Steps:**
 - 1/ is time of the essence? If yes, time for performance is a condition = can elect to terminate for breach
 - 2/ If time is not of the essence= does delay constitute a sufficiently serious breach of an intermediate term?
If yes= may be able to terminate
If no= does the delay constitute a repudiation of the contract? If yes= can terminate the contract
 - 3/ If no= there are no grounds to terminate the contract= only entitled to damages
- Statute that may apply:

S.15 Goods Act 1958 (Vic)

- “Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract”.

S.41 Property Law Act 1958 (Vic)

- “Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law in accordance with the same rules.”

▪ Valid Notice

- When can notice be served: depends on whether a specified time for performance exists
 - contract fixes a time for performance (ie the job will be completed by 14 October)= can give notice setting a reasonable time for performance immediately following the breach
 - contract does not fix a time for performance (ie the job will be done as soon as possible)= need to wait until there has been a reasonable delay before giving notice setting a reasonable time for performance
- Is notice valid
 - Must specify the breach
 - Specify a time for performance (must be reasonable)
 - Warn that the contract may be terminated if notice is not complied with
- Failure to comply with notice: can constitute repudiation= give rise to a right to terminate the contract
 - If **time of performance is specified** but is not of the essence: after the due date the innocent party cannot immediately terminate for non-performance but can immediately give notice
 - If **time of performance is not specified**: the innocent party can give notice only after a reasonable time
- Consequences of termination without legal right to do so
 - Reasonable time period needs to be given- *Louinder v Leis*
 - The notice has to include the time for performance and that time must be reasonable and it must say that, that time is of the essence, after that time termination is allowed- *Laurinda Pty Ltd v Capalaba Park Shopping Centre*

Termination (week three)

- **Right to Elect:** where there is a right to terminate, party can elect to either:
 - 1/ terminate the contract and the contract is then at the end
 - 2/ affirm the contract and then the contract is on foot
- **Requirements of valid election:** aggrieved party must know
 - 1/ of the facts that give rise to the right to terminate
 - 2/ the innocent party must (by words/conduct) demonstrate an unequivocal intention to either terminate/affirm the contract
- **Consequences of election:**
 - 1/ affirmation/termination are irrevocable

- **Consequences of affirmation**
 - Affirmation keeps the contract on foot (*Foran v Wright*)
 - Innocent party may be able to completely perform his/her obligations under the contract and earn the contract price (*White and Carter v McGregor*)
 - Right to rely on subsequent events: (*Bowes v Chaleyer*- Eg: if the aggrieved party is later in breach so as to give the other party a right to terminate, the other party may then rely on this subsequent event and elect to terminate)

- **Consequences of termination**
 - Both parties are relieved from further performance and the innocent party can claim damages
 - A total failure of consideration allows for reclaiming of money paid (except deposits)
 - When a contract is terminated and land is not conveyed, instalments do not need to be paid, instalments paid are meant to be returned (except deposits) (*McDonald v Dennys Lascelles Ltd*)

- Restrictions on the right to terminate**
- **Election**
 - Cannot terminate if electing to affirm the contract
 - **Two for an election to affirm a contract:**
 - **Knowledge:** of at least the facts giving rise to the right to terminate; and
 - **Unequivocal conduct:** consistent only with a choice to continue with the contract
 - It is not necessary to show that the aggrieved party formed an actual, subjective intention to elect; an “election is the effect which the law attributes to conduct justifiable only if such election has been made” [PB 25.60]
 - Conduct that will amount to an unequivocal election to affirm depends on-circumstances
 - If you grant an extension of time, you are not affirming the contract, you are simply extending the deadline AND you preserve your right to terminate in the future. If you grant an extension, it is not sufficient to indicate time is no longer of the essence (*Tropical Traders v Goonan*)
 - Conduct must be unequivocal (*Immer v Uniting Church*)

- **Readiness and willingness**
 - The party purporting to terminate was not **ready and willing** to perform the contract (Dissenting judgement: the innocent party does not need to be ready and willing- *Foran v Wight*)
 - Aggrieved party only has to show that they were not wholly disabled from performing, rather than actually ready and willing to perform (*Foran v Wight*)

- Relevant time for the innocent's party's ability/willingness to perform?
 - Actual Breach
 - Aggrieved party must demonstrate that they were ready and willing to perform at the time of the breach
 - Anticipatory Breach
 - An anticipatory breach occurs when a party shows (by words or conduct) its intention to break the contract, ie termination of a contract before actual breach
 - **If the repudiation was accepted** ⇒ termination is effective unless at the time of repudiation the aggrieved party had substantial incapacity to perform at the due date
 - **If the repudiation was not accepted** ⇒ the aggrieved party must perform unless the repudiation by the other party makes it futile for the aggrieved party to attempt to perform their obligations (*Foran v Wight*)

➤ Estoppel

- The party purporting to terminate is **estopped** from terminating the contract (*Legione v Hateley*)
- **Elements of estoppel**
 - Assumption
 - Inducement
 - Detrimental Reliance
 - Unconscionability
 - Reasonableness
 - Departure
- **Eg:** wording needs to be clear and unequivocal, person making representation needs to have authority (*Legione v Hateley*)

➤ Relief against forfeiture

- Innocent party is restricted to valid rights to terminate
- Only available in situations involving a property interest (usually land but doesn't have to be) (*Legione v Hateley*)
- Based on relief against 'unconscientious conduct' (fraud, accident, mistake, surprise)
 - 'directs attention to the specific question of why the [innocent party] ought not to be heard to assert the exercise of their legal right to terminate in answer to the claim by [the party in breach] for specific performance' (*Tanwar Enterprises v Cauchi*)- **DID THE VENDOR (def) CONTRIBUTE TO THE PURCHASERS (plt) breach? (strict application)**
 - If the purchaser breaches an essential time stipulation, there will be no relief unless the vendor contributed to the breach (*Union Eagle v Golden Achievement*; **but see Tanwar Enterprises v Cauchi**)

➤ Waiver

- Test: "the facts must be such that it would be manifestly unfair for the party which had earlier waived its legal rights later to adopt an inconsistent position to seek to enforce them"
- ***Agricultural Rural Finance Pty Ltd v Gardiner (2008)***
- Eg: ("don't worry about any consequences, we wont follow through")

Remedies for Breach (Week four)

Overview

1. Termination

2. **Remedies for breach of contract**

➤ **The measure of damages**

- **Compensation Principle**- where a party sustains a loss by breach of contract, he as so far as money can do I, can be placed in the same position with respect to damages, as if the contract had been performed (*Parke B in Robinson v Harmon*)
- **Expectation Damages:** compensate the plaintiff for the benefit s/he expected to gain from performance of the contract but has lost because of the breach
 - a/ direct loss = Loss directly linked to the defendant's breach of contract (eg the loss of value of the promised performance)
 - b/ consequential loss= Plaintiff may be entitled to recover damages to compensate him for losses beyond the direct loss of performance which have been incurred by reason of the breach (eg expenses reasonably incurred as a result of the breach)
 - c/ when the transaction involves defective work=
Two methods of calculating P's loss:
 - **Cost of cure:** cost of remedying the defect; ie the money P has to spend on substitute performance (eg cost of fixing house to get rid of mushrooms) (*Bellgrove v Eldridge, Tabcorp Holdings v Bowen Investments*)
 - **Diminution in value:** the difference between the market value of the property and the value it would have had if the contract had been performed (eg a wine glass that is a cm too short, want the difference of what it would be worth, don't want a whole new glass)
 - In general, damages are cost of rectification but it has to be reasonable (*Bellgrove v Eldridge*)
 - Test of unreasonableness would only be satisfied by fairly exceptional circumstances (*Tabcorp Holdings v Bowen Investments*)
- **Reliance damages:** A party may incur significant costs in reliance on a contract being performed
 - If a plaintiff cannot prove the benefit s/he expected to gain from performance of a contract, the plaintiff may instead be able to recover damages for expenditure incurred in reasonable reliance on the contract being performed (*McCrae v Commonwealth Disposals*)
 - will not be available where the defendant can establish that (even if the contract had been fully performed) the plaintiff would have not recouped his expenditure incurred in reliance on the contract being performed
 - reliance damages are awarded even when damages are difficult to calculate (*McCrae v Commonwealth Disposals*)
 - when you cant calculate expectation damages, look for reliance damages, this is where you want damages for expenses in reliance of the contract, the defendant has to prove you would have incurred the loss without the breach= loss making contract (*Commonwealth v Amann Aviation*)
- **Damages for loss of a chance**
 - the plaintiff may be able to show that he has lost the chance or the opportunity of obtaining a benefit
 - seen as a form of expectation damages

- Eg: damages for loss of a chance have been awarded
 - For the loss of the chance to pursue a **potentially successful commercial opportunity** (*Commonwealth v Amann Aviation*)
 - High Court was prepared to take the prospect of renewal into account in calculating damages available to Amann; prospect of renewal was an opportunity of real commercial value that would have been contemplated by the parties as accruing to Amann by reason of its performance of the contract
 - Breach of contract has deprived the plaintiff of a **chance to succeed in a contest or game** (*Howe v Teffy*)
 - Damages for the loss of the **chance to receive theatrical engagements** (*Chaplin v Hicks*)

- Calculating loss of chance: Damages are calculated with reference to the probability of the plaintiff actually attaining that benefit.
Eg: the plaintiff proves that it had a 25% chance of making a profit of \$100,000. How much would it be awarded in damages? - \$25,000

- Limitations on the award of damages
 - The primary limitations to damages are:
 1. **Causation**: requires the plaintiff's loss to have been caused by the defendant's breach
 - Test: 'But for' the breach the loss would not have occurred (applied in a common sense manner) (*Alexander v Cambridge Credit Corp*)
 - Causation test is divided into two categories (but for test and further public policy considerations and value judgements) (*March v E & MH Stramare*)
 2. **Remoteness of damage**: sets limits beyond which the defendant's responsibility for the loss will not extend
 - Defendant may be liable for:
 - a. *the damages which...the party ought to receive in respect of such breach of contract should be such as may*
 - i. *fairly and reasonably be considered either arising naturally, that is, according to the **usual course of things**, from such breach of contract itself, or*
 - ii. **such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it** (rule laid down in *Hadley v Baxendale*)
 - the defendant can only be liable for extraordinary losses if he is aware of them (*Victoria Laundry v Newman*)
 - even if causation is satisfied, a loss can be too remote to be recoverable when it exceeds what the defendant could fairly be regarded as having contemplated and willing to accept (*Alexander v Cambridge Credit*)
 - 3. **Mitigation**: the reasonable steps that have been / should be taken by the plaintiff to reduce his loss
 - Rule 1: Plaintiff is required to take reasonable steps to reduce its damages (*Burns v MAN Automotive*)
 - Rule 2: If the plaintiff incurs additional costs in taking reasonable steps that are unsuccessful, it may recover those costs (*Simonius Vischer v Holt*)
 - Rule 3: The plaintiff cannot recover for avoided loss (If the plaintiff reduces its damages by any action (reasonable or not) it only receives its damages for actual loss)
 - 4. **General exclusion of compensation for non-pecuniary loss**: damages are usually not awarded to compensate non-pecuniary losses, ie disappointment, anxiety, distress or loss of reputation (**subject to exceptions, *Baltic Shipping***- *objective of the cruise was to provide enjoyment and relaxation*)

5. **Loss of bargain damages and termination under a term**

- If a plaintiff exercises a right to terminate under the general law, then the plaintiff can claim loss of bargain damages under the general law (**Shevill Principle**)
- If the plaintiff exercises a contractual right to terminate and has no right to terminate under the general law, then the plaintiff cannot claim loss of bargain damages unless the contract entitles the plaintiff to do so (***Shevill v Builders Licensing Board***)
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Liquidated damages + remedies (week 5)

➤ Liquidated Damages

- Parties to a contract may specify an amount which is payable to the plaintiff in the event of breach (genuine pre-estimation of loss suffered as a result of breach)

➤ The rule against penalties

- if a clause requiring the payment of a sum of money is not a genuine pre-estimate of the damage suffered as a result of the breach, the clause will be a penalty
- Penalties are invalid and unenforceable
- **Consequences:** penalty clause is held to be a penalty, the innocent party will **not be entitled to the sum payable** under the terms of the contract
- **General principles** (*Dunlop Pneumatic Tyre Co v New Garage*)
 - “Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet **the expression used is not conclusive**”
 - “The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; **the essence of liquidated damages is a genuine covenanted pre-estimate of damage**”
 - “The question whether a sum stipulated is penalty or liquidated damages is a **question of construction** to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach”
 - It will be held to be penalty if the sum stipulated for is **extravagant and unconscionable in amount in comparison with the greatest loss** that could conceivably be proved to have followed from the breach
 - It will be held to be a penalty **if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid**
 - There is a presumption (but no more) that it is penalty when “a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage”
 - It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility

➤ When does the rule apply?

- **Australian pre 2012:** Australia law assumed same as English law (only applies where the liability to make the payment is dependent on the breach)
- **Australian current position:** (*Andrews v ANZ Bank- Law in Australia post 2012*)
 - Relief against penalties is available **even if event triggering penalty is not a breach of contract** (shift from UK position)

How to find out if it is a liquidated damage or penalty

Gordon J's 6 step process in *Paciocco*

1. Identify the terms and inherent circumstances of the contract, judged at the time it was made (*Dunlop*)
2. Identify the event or transaction which gives rise to the imposition of the stipulation (*Dunlop & Andrews*)
3. Identify if the stipulation is payable on breach of a term of the contract – if yes, the rule against penalties can apply at **law**

4. Identify if the stipulation, as a matter of substance, is collateral to a primary stipulation in favour of one contracting party. If so, does it impose an additional detriment on the other contracting party, upon the failure of the primary stipulation, of a kind that would act as security to encourage satisfaction of the primary stipulation? If yes, then the rule against penalties can apply at **equity**
5. If the answer to either question 3 or 4 is yes, then further questions arise (at law and in equity: **Andrews**) including:
 - Is the sum stipulated a genuine pre-estimate of damage?
 - Is the sum stipulated extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved?
 - Is the stipulation payable on the occurrence of one or more or all of several events of varying seriousness?
6. If the answer to question 5 is that the sum stipulated is not a genuine pre-estimate of damage and is extravagant and unconscionable in amount in comparison with the greatest loss that

Distinguishing b/n an (invalid) penalty clause + a (valid) liquidated damages clause?

- Test: a clause stipulating a sum payable on breach of a contract will be a penalty where the sum is “*extravagant and unconscionable in amount to the comparison with the greatest loss that could conceivably be proved to have followed from the breach, rather than a genuine pre-estimate of the loss likely to be caused by a breach of the contract*” [PB 28.10]

Is the clause a genuine pre-estimate of loss?

- It'll be a penalty if it is “all out of proportion” to the damage likely to be suffered as a result of the breach (**AMEV-UDC Finance v Austin**)
 - **Mason and Wilson JJ:**
 - Courts do not require perfect arithmetical accuracy in the pre-estimate of damages
 - Will be a penalty if it is “**all out of proportion**” to damage likely to be suffered as a result of the breach
 - Courts should not be too ready to find the requisite degree of disproportion – parties should have freedom to settle for themselves rights and liabilities following breach of contract
- Pre-estimated damages clause should be upheld unless the amount recoverable is “**out of all proportion to damage likely to be suffered**” / The possibility that the amount recoverable may exceed the lessor’s actual loss did not invalidate the clause (**Esanda Finance Corp v Plessnig**)
- Look for when it can be a penalty= is it “extravagant and unconscionable” or out of proportion? (strict test)

➤ Specific performance

- “a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties’ rights are settled and defined in the manner intended.” (*JC Williamson v Lukey*)
- **Requirements**
 - The contract must have been made for good consideration
 - The contract must be enforceable at common law
 - Damages must be inadequate to compensate the wronged party for the breach (**Dougan v Ley**)
 - The court must choose to exercise its discretion to award the remedy
 - Eg: Court considered that there would be no specific performance if: (**Dougan v Ley**)
 - Damages were insufficient
 - Requires on going court supervision
 - No mutuality (ie both parties couldn’t obtain specific performance)

➤ **Injunctions**

- Order a party to perform a contractual obligation; or
- Order them to refrain from committing a particular breach
- Usually granted to restrain the breach of a negative stipulation in a contract (ie a term stating not to do something) (***Curro v Beyond Productions***)
- where a contractual provision stipulates a requirement that, if broken, renders the provision worthless and non-compensable, damages are likely inadequate (***Curro v Beyond Productions***)

➤ **Damages under Lord Cairns Act**

- Legislative provisions in all Australian jurisdictions allow the courts to award damages either in addition to or in lieu of specific relief (ie specific performance or injunction)
- Current Victorian equivalent: *s.38 Supreme Court Act 1986*
 - *“If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance”*
- Awarding equitable damages:
 - Where a court does not wish to grant specific performance or an injunction on discretionary grounds; or
 - Where a payment is more convenient to award
 - Where it is necessary to award damages in addition to specific performance to fully do justice between the parties
- Assessment of equitable damages:
 - When awarded in lieu of specific performance, equitable damages are to be assessed according to the same principle as common law damages
- Necessary to look at the issue of specific performance from both parties – equitable damages can be awarded (***JC Williamson Ltd v Lukey & Mulholland***- wasn't in this case)

Action for debt (week 6)

- **Debts and damages = Difference between them:**
 - **A party may be entitled to recover a debt** even where that party has breached the contract and where the contract has been terminated in response to the breach
 - A party claiming **damages** must prove that there has been a breach of contract and a loss has been suffered, whereas in an **action for debt** it is for the party against whom the debt is being claimed to prove any defence of payment
 - The **principle of mitigation of loss** applicable to a claim for damages does not apply to the recovery of a debt (*Wine v Carter*).

- **Requirements of an action for debt**
- **Two requirements must be satisfied:**
 - 1/ Contract must impose an obligation to pay a certain or ascertainable sum of money;
 - 2/ The right to payment of the sum must have accrued

- **When does the right to the debt accrue?**
 - A debt will accrue where consideration for that money has been given, ie the party claiming the right to sue for a debt has earned the payment by performance

- **What amounts to performance?**

Consider whether the obligations were

 - **Entire:** one party must perform completely before the other party is obliged to perform
 - **Divisible:** entire obligations rule applies only within each part of a divisible contract
 - **Substantial performance:** allows a party to recover the contract price even though the contract has not been fully performed – where the performance which has been rendered is nonetheless substantial

- **Entire obligations** one that is wholly performed for a party to be entitled to payment for that performance
 - A party who has only partly performed an entire obligation will not be entitled to payment of the contract price or any part of the price (*Cutter v Powell*)

- **Divisible obligations**
 - A divisible obligation is where the party intended the contract price and performance to be divided into corresponding parts (*Steele v Tardiani*)
 - Party will be entitled to payment of each instalment of the contract price for which the required performance has been given
 - Each divisible part may be “entire”

- **Is the contract entire or divisible?**
 - Depends on:
 - the presumed intentions of the parties and
 - the circumstances of each case
 - **Contract will be entire:**
 - If it appears that the parties intended that only exact and complete performance would be accepted
 - More likely to be construed as entire where it provides for a single sum of money payable on completion of performance
 - **Contract will generally be divisible where:**
 - Payment and services are divided into instalments

➤ **Periodical payments**

- **Supreme Court Act 1986 (Vic), s.54:**
 - “all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) are to be considered as accruing from day to day and are apportionable in respect of time accordingly.” (*Nemeth v Bayswater*)

➤ **Substantial performance**

- Where a plaintiff has substantially performed his obligations under the contract the doctrine of substantial performance may allow recovery of the contract price, less a payment of damages to the other party as compensation for the incomplete work.
- To determine whether there has been substantial performance, consider:
 - The performance rendered
 - The nature of the defects in that performance
- Court’s approach to determine whether there has been substantial performance (*Hoening v Isaacs; Bolton v Mahdeva*)
- if entire performance a condition precedent and you perform substantially then you can claim some, however if the breached condition goes to the root of the contract then wouldn’t have to pay but if its substantial you would have to pay some (*Hoening v Isaacs*)
- if there isn’t substantial performance, the plaintiff could not recover (*Bolton v Mahdeva*)

➤ **Payment independent of performance**

- Where parties to a contract make the payment of a sum of money independent of performance of the contract, the sum will be owing as a debt as soon as the time for payment arises (*McDonald v Dennys Lascelles*)

➤ **Deposits and instalments**

- Deposits: Paid as a guarantee of the purchaser’s genuine intention to perform the contract in return for the vendor entering into the transaction
- Eg: Sale of land – contract may require payment of purchase price prior to conveyance
- If the contract is terminated before conveyance:
 - Purchaser can claim money back= Right of the vendor to claim and retain instalment money was dependent on performance (transfer of title) ⇒ no unconditional right to the instalment (*McDonald v Dennys Lascelles*)

➤ **Deposits: General rules**

- **If the contract is performed:** the deposit becomes part of the purchase price
- **If the purchaser terminates the contract for the vendor’s breach / repudiation:** purchaser can recover the deposit
- **If the vendor terminates the contract for the purchaser’s breach / repudiation:** vendor can retain / recover the deposit
- Vendor can keep the deposit if the purchaser has breached (*Bot v Ristevski*)

➤ **Mitigation and the action for debt**

- Where a party owing payment repudiates, the other party may choose not to accept the repudiation by the other party and instead complete the performance of his obligations under the contract and sue in debt for the contract price (*White and Carter Ltd v McGregor*)
 - **Principle:** a party may choose to affirm a contract following repudiation, complete his obligations and sue in debt for the contract price, subject to two limitations: 1/ The party claiming payment must be able to completely fulfil his obligations under the contract **without the co-operation of the other party;** and

2/ The party choosing to affirm the contract following repudiation by the other party must have a **legitimate interest in pursuing that course of action**

Two exceptions

1. Without the co-operation of the other party

- The party claiming payment must be able completely to fulfil his obligations under the contract **without the co-operation of the other party**
- *White and Carter v McGregor*: the plaintiff could go ahead and place the advertisements on litter bins without any assistance from the defendant

2. No legitimate interest

- Per Lord Reid in *White and Carter v McGregor*: *“It may well be that, if it can be shown that a person has **no legitimate interest, financial or otherwise**, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself”*
- *Clea Shipping v Bulk Oil*

Frustration (week 7)

➤ Frustration as an excuse for non-performance

- The disruptive event may be of “*such catastrophic proportions that it goes well beyond what the parties could have anticipated at the time of making their contract.*” [PB 15.05]
- “Frustration discharges a contract where, without fault of the party seeking the discharge, events occurring after the contract is made render performance of the **contract radically or fundamentally different** from that which was undertaken by the parties under their contract.” [PB 15.05]

➤ When is a contract frustrated?

- **Test:** “Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.” (per Lord Reid in ***Davis Contractors v Fareham***; approved by the High Court in ***Codelfa Constructions v State Rail***)
- **BREAKING DOWN TEST**
- Compare the contract that the parties agreed to
with
- The state of affairs produced by the disruptive event
 - Are they radically / fundamentally different?
 - If yes, the contract may be frustrated

➤ When can a contract be frustrated?

1. **Destruction of the subject matter-** When a contract depends on the continued existence of something, it should be implied that if that no longer exists the parties should be excused (***Taylor v Caldwell***)
 2. **Disappearance of the basis of the contract-** A contract may be frustrated where the event in question destroys the basis or purpose of the contract
- Each case must be judged on its own circumstances. In each case one must ask itself:
 - a. What, having regard to all the circumstances was the foundation of the contract?
 - b. Was the performance of the contract prevented?
 - c. Was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?
 - d. If all those questions are answered in the affirmative, I think both parties are discharged from further performance of the contract (***Krell v Henry***)
 - Breached condition doesn't go to the root of the contract/revolve around the contract= cannot terminate (***Herne Bay Steamboat v Hutton***)
 - Foundation of the contract was totally destroyed/ *fundamentally different situation from that contemplated when the contract was entered into that it is properly to be regarded as having come to an end at the date of acquisition by the Crown* (***Brisbane City Council v Group Projects***)
3. **State of affairs essential to performance-** disappearance of a state of affairs necessary to enable the contract to be performed in the manner contemplated by the parties

- doctrine of frustration must be applied in narrow limits (*Tsakiroglou v Noblee & Thorl*)
 - test for frustration: "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" (*Davis Contractors v Fareham*)
 - **changed circumstances** such that 'without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would **render it a thing radically different from that was undertaken by the contract**' (*Codelfa Construction Proprietary Limited v State Rail Authority of NSW*)
 - Broad view of defining the contractual obligation; as with implied terms, in frustration it is **permissible to look at the extrinsic circumstances, the context in which the contract was formed to ascertain the common assumptions underpinning the contract** (*Codelfa Construction Proprietary Limited v State Rail Authority of NSW*)

4. **Illegality**- A contract may be frustrated due to illegality
 - a. Could be in time of war due to a prohibition dealing with the enemy (*Fibrosa Spolka Akcyjna v Fairbairn*)
 - b. Could be where the law has changed after the contract was made to prohibit performance
5. **Delay**- A contract may be frustrated by events that cause or are likely to cause an inordinate delay in the performance of the contract/ must be sufficient delay

TEST- to determine whether a contract is frustrated by delay, the courts compare the

 - a. Probable length of the delay with
 - b. The remaining duration of the contract (*National Carriers v Panalpina*)

➤ **Limitations on the doctrine of frustration (Codelfa)**

1. The frustrating event must not have been provided for by the parties in their contract
 - force majeure – construction of the clause – need to look at clause and see if its broad enough to cover the situation- process of construction
 - look at contract and whether parties considered
2. The event must not have been foreseeable by the parties at the time of making the contract
 - if it was reasonably foreseeable cant turn around and say it was frustrated
 - davis case (delays)
3. The frustrating event must have occurred without fault by the party seeking to rely on frustration

▪ **Consequences of frustration**

➤ **Under Common law (Fibrosa v Fairbairn)**

- Rights accrued prior to frustrating event remain enforceable
- Can cause injustice where one party had to perform prior to frustrating event while other party's performance was due thereafter
- The common law approach is largely to leave the losses caused by the frustration of the contract with the party on whom they fall
- However, this rule is subject to the "total failure of consideration" rule
 - If no consideration has been given for the payment it must be repaid

➤ **Under Statute**

Australian Consumer Law and Fair Trading Act 2012 (Vic)

- The *Fair Trading Act* 1999 (Vic) was repealed on 1 July 2012
- It has been replaced with the *Australian Consumer Law and Fair Trading Act* 2012 (Vic)
- Part 2C of the old FTA has been replaced by Part 3.2 of the new Act
- There are no substantive changes to the frustration provisions but there are new section numbers.
 - S.32ZG = new s.36
 - S.32ZH = new s.37
 - S.32ZI = new s.38

Australian Consumer Law and Fair Trading Act 2012 (Vic)

S.36:

- Money that was paid before the contract was frustrated must be repaid, and money that was owing before the contract was frustrated need not be paid

S.37:

- However, if the recipient incurred expenses related to the contract, and the court considers it 'just' in the circumstances, it can allow retention or recovery in whole or part up to the total amount that was paid or owing

S.38:

- If one of the parties has received a non-monetary but nonetheless valuable benefit before the contract was frustrated, the other party will recover an amount that the court considers 'just' having regard to all the circumstances of the case

Vitiating Factors: Abuse of Power (week 8)

➤ Undue Influence

• **Relationships of Influence**

➤ On the exam:

- 1/ define undue influence
- 2/ see if there is actual undue influence (class 1)
- 3/ then consider presumed undue influence (class 2)

➤ There are different classes of undue influence:

- Undue influence may be actual or presumed
- Presumed undue influence is commonly divided into two categories

➤ **Class 1: actual undue influence** – where the plaintiff affirmatively proves that the defendant exerted influence on the plaintiff to enter into the transaction

➤ **Class 2: presumed undue influence (*Hartigan v International Society for Krishna*)** – made up of:

- **Class 2A: deemed relationships** of influence – namely relationships, which as a matter of law raise the presumption that influence has been exercised; and
- **Class 2B: relationships of influence in fact** – relationships falling outside Class 2A, where the complainant establishes that he generally reposes such *trust and confidence* in the wrongdoer that a presumption of influence should be made

• Deemed relationship of influence

Eg: parent/child, guardian/ward, solicitor/client, doctor/patient

• Relationships of influence

- Such a relationship may be shown by evidence that the plaintiff placed **confidence and trust** in the defendant and relied on the defendant for guidance
- *Johnson v Buttress*

➤ Rebutting the presumption

- When a relationship of influence gives rise to a **presumption of influence**, the court must determine whether the presumption has been rebutted

- requires establishing both that the plaintiff “*knew and understood what he or she was doing, and that he was acting independently of the influences of the dominant party*” [PB 35.50]

- Influential consideration in deciding **whether a plaintiff was acting independently** is whether:

- the plaintiff was given competent advice by an independent and well informed adviser, and
- whether there was adequate time to reflect on that advice

- While independent advice is a matter of vital importance in most cases, there is **no rule of law** that, in order to rebut a presumption of undue influence, the plaintiff must be shown to have received such advice

- The recipient of a benefit may prove by other means that the plaintiff exercised an informed judgment

- An independent judgment is not established by showing that the proposal came from the plaintiff ⇒ the court will consider the **circumstances of the case and the age, character and experience of the plaintiff**

- if the party without the power (Westmelton) are of sound mind and facts show they are able to make a decision= the presumption can be rebutted (**Westmelton v Archer**)

➤ **Unconscionable Dealing:** “exploitation by one party of another’s position of special disadvantage”

- **Basic elements and background**

The doctrine of unconscionable dealing operates where:

- 1) the plaintiff was under a **special disability** in dealing with the defendant, with the consequence that there was an absence of any reasonable degree of equality between them
 - Adequacy of consideration
 - A transaction may still be unfair and unreasonable from the point of view of the person under a special disability, even though adequate consideration has moved from the defendant
 - On the other hand inadequacy of consideration may be important in supporting an inference that a disability existed and in showing that unfair advantage was taken of it
 - Fullagar J in **Blomley v Ryan** – the circumstances which may place a person under a special kind of disability
 - The list of possible “special disabilities” is infinite, but can encompass such categories as:
 - **Mental disorder**
 - **Drunkenness** *Blomley v Ryan*
 - **Lack of knowledge or education** *CBA v Amadio*
 - **Emotional dependence** *Louth v Diprose/ Bridgewater v Leah*
- 2) The disability was **sufficiently evident** to the defendant to make it prima facie unfair or ‘**unconscientious**’ that they continue
 - requirement of knowledge by the def of the plaintiffs disability
 - wilful ignorance **CBA v Amadio**
 - Where these elements are established, there is an equitable **presumption** to the effect that the improvident transaction was a consequence of the special disadvantage, and that the defendant has unconscientiously taken advantage of the opportunity presented by the disadvantage
 - The onus is accordingly cast upon the defendant to show that the **transaction was fair, just and reasonable**
- DEANE J: THE TEST:
 1. Whether the Amadios were suffering under any special disability?
 2. If the special disability is made out – did the Bank have such knowledge of the disability as to make it prima facie unfair or unconscientious that they accept the Amadios’ assent to the guarantee?
 3. If elements 1 and 2 are satisfied a presumption arises that the transaction is not fair – the onus is on the Bank as the stronger party to rebut this presumption – they need to prove that the terms of the transaction were in fact “fair, just and reasonable”

* easy to prove on the facts that they wouldn’t have entered into the contract if they knew that it was more than a 6 month one.

- **Duress**
 - **Basic elements of duress**
 - pressure/threat applied by one party to induce the other party to enter into a contract or to modify an existing contract
 - There are two elements to duress; stated by Lord Scarman in *Universal Tankships Inc of Monrovia v International Transport Workers Federation*:
 1. **There must be pressure amounting to compulsion of will** (ie something that overrides true or free consent)- pressure that overrides true consent
 2. **That pressure must be illegitimate**
 - 1/ was there any pressure?
 - 2/ does that pressure go beyond what the law is prepared to consider as legitimate?
 - look at the nature of the pressure (eg blackmail – illegitimate) and work out whether you think it goes beyond whether its legitimate
 - **Duress and coercion of the person**
 - causal link between pressure and entering into contract = sufficient for duress, the def has to prove that his pressure didn't affect the plaintiffs decision to sign (**barton v Armstrong**)
 - **Economic duress**
 - **Issue to consider:**
 1. Whether a new contract that has been procured under pressure should be regarded as voidable or whether it should be regarded as a valid compromise or settlement of a claim
 2. Much will depend on whether there was a threat by the defendant not to perform as opposed to a mere statement of position and whether that threat was a factor which caused the plaintiff to renegotiate the contract

Factors court will consider:

- Whether there was an alternative remedy
- Whether there was a protest at the time the pressure was exerted
- How quickly the aggrieved party sought to have the contract set aside after the pressure was lifted
- Whether the aggrieved party received independent advice
- illustrates the application of the concept of duress to threats to discontinue performance of an existing contract (*TA Sundell & Sons Pty Ltd*.)

Vitiating Factors: Remedies (week 9)

- **Rescission:** Rescission is a form of relief which, in appropriate circumstances, is available to victims of vitiating factors such as undue influence, unconscionable dealing and duress
- Equitable form of relief – provides for substantial restoration if not all
- Common law
 - Rescission only allowed in cases of fraud, duress or where there has been a total failure of consideration
 - Common law only recognizes rescission if precise restoration is possible
- Equity
 - Recognizes rescission for a wide variety of vitiating factors
 - Equity recognizes rescission even though precise restoration is not possible, provided that substantial restoration is possible
- Rescission must be communicated

- **Restitutio In Integrum**
 - Substantial restoration: the principles will do what is practically just between the parties and restore them substantially to the status quo (*Alati v Kruger*)
 - Partial rescission: equity did not require complete restitution of the position which existed before the courts but allowed its remedies particularly an order for monetary accounts to be utilised to achieve practical restitution and justice (*Vadasz v Pioneer Concrete*)

It has been interpreted in subsequent cases as authority for the following principle:

- Where a case has been made out for a contract to be set aside in equity, the court must consider what would have happened in the absence of the vitiating factor
- The court should set the contract aside in its entirety only if, had it not been for the vitiating factor, the victim would not have entered into the contract at all
- If the victim would have accepted some obligation in the absence of the vitiating factor, then partial rescission should be granted and the victim held to that obligation

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- **Bars to Rescission**
- **1. Affirmation:**
 - A party will be unable to rescind a contract that is avoidable by reason of a vitiating factor if they have previously elected to affirm it
 - Generally notice of avoidance or affirmation must be given to the other party; this may be done expressly or impliedly by conduct that clearly manifests the relevant intention
 - Words and conduct ordinarily required to constitute an election must be unequivocal in the sense that they are consistent only with the exercise of one of two sets of rights and are consistent with the exercise of each other
 - An election once made is irrevocable

- **2. Intervening 3rd party rights**
 - if a 3rd party benefits from the contract then cannot rescind and screw them over (*Hartigan v International Society for Krishna*)

Vitiating Factors: Statutory Vitiating Factors

- **Unconscionable conduct under statute**
 - **Part 2-2 of the Australian Consumer Law**
 - **Section 20 of Schedule 2 of the Australian Consumer Law**

- (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time
 - unwritten law= common law/cases
- (2) This section does not apply to conduct that is prohibited by section 21 or 22

Scope of the prohibition on unconscionable conduct

- Part 2-2 of the ACL regulates unconscionable conduct in *trade or commerce*
 - Transactions between individuals in their private capacity are not covered
- Section 20 prohibits unconscionable conduct “*within the meaning of the unwritten law*”
 - What does the phrase “unwritten law” in section 20 mean?

Vitiating Factors: Misleading or Deceptive Conduct (week 10)

➤ Relevant provisions in the Competition and Consumer Act 2010

1. Was there conduct? Does S.18 of Schedule 2 of the Australian Consumer Law apply?

- “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”
- If s18 applies then:
 1. a person who has suffered loss by the conduct is entitled to claim damages to compensate them for that loss: **s.236 ACL**
 2. The court is also given the power to grant any other order that it thinks fit to prevent loss being suffered as a result of a breach of s.18, including a declaration that a contract is void or is to be varied or that a person should refund money or return property: **ss. 237 and s243**

2. Was the conduct in trade or commerce?

- **Section 2(1) of the ACL** provides that the phrase “trade or commerce” means:
 - (a) *trade or commerce within Australia; or*
 - (b) *trade or commerce between Australia and places outside Australia**And includes any business or professional activity (whether or not carried on for profit)*
- Davies J described the **concept of “in trade or commerce”** as “*a complex one and the precise limits of what is or is not trade or commerce or what act is in or is not in trade or commerce cannot be definitely stated... In marginal cases, the circumstances of the case must be considered and many factors must be taken into account.*” [PB 33.25]
- **Concrete Constructions v Nelson** – Majority of HCA held that:
 - “*in trade or commerce*” means that the conduct has to be made towards a person with whom the corporation has dealings of a trading or commercial nature, and must itself relate to dealings of a trading or commercial nature. It is not enough for the conduct complained of to be *incidental* to the corporation’s business

3. Consider the relevant audience

- **If the conduct is directed to the public at large** (or sections thereof): ordinary or reasonable member of the class (eg ads on tv) (**Campomar Sociedad v Nike International**)
 - **Test:** “*Where the persons in question are not identified individuals to whom a particular misrepresentation has been made ... but are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class.*”
 - Whether it is likely to mislead or deceive ordinary or *reasonable members of the public?*
- **If conduct is directed to specific individuals:** it is necessary to consider nature of parties, character of transaction and what parties knew about each other (**Butcher v Lachlan Elder Realty**)
 - **Test:** “*It is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.*”
 - **Look at nature of the parties, character of the transactions from Butcher**

Misleading conduct

- Conduct is regarded as misleading if it has the capacity to lead into or cause error: ***Henjo Investments***
- Error occurs when a person is led to believe things that are not true or correct
- s.18 can be contravened without anybody *actually* having been misled; it is sufficient if they were likely to have been misled as long as there was a real, not remote chance of that occurring
- **Test to determine whether conduct is misleading/deceptive:**
 - “Consistently with regard to the natural meaning of the terms of s.52 [now s.18 ACL], the question is whether in the light of all the relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive.” (per Black CJ in *Demagogue v Ramensky*)
- context = take everything into consideration (***Butcher v Lachlan Realty***)
- puff
- **Silence=** Silence or the failure to disclose information may be misleading or deceptive
 - silence is misleading where duty to disclose information exists; however, this test is no longer applied (***Henjo Investments v Collins***)
 - Needs to be some reasonable expectation that fact will be disclosed/silence was misleading – use this case (***Demagogue v Ramensky***)
 - **Test:** In the light of all relevant circumstances constituted by acts, omissions, statements or silence, has there been conduct which is or is likely to be misleading or deceptive? (***Demagogue v Ramensky***)
 - Silence must be deliberate (***Demagogue v Ramensky***)
 - Determine whether there is a reasonable expectation to disclose (***Miller Insurance v BMW Aust Finance***)
- **Representations about future matters**
- *S.4 of Schedule 2 of the Australian Consumer Law*
Section 4 of the ACL:
 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 providing 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 [the ACL] 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 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 that person has reasonable grounds for making the representation
- **Promises-** if you promise to perform and you fail to perform, that conduct is misleading and deceptive (*Futuretronics v Gadzhis*)

Statutory Remedies: (applicable Misleading/Deceptive Conduct+ Statutory Unconscionability) (week 11)

Overview of remedies for misleading/deceptive conduct

- If you find that s.18 (misleading or deceptive conduct) or s.20 (statutory unconscionability) have been contravened = consider the availability of statutory remedies under s.236 (damages) and s.237 (other orders the court may make)
 - s.236: P is entitled to compensation for loss suffered
 - s.237: court may make any order that it thinks appropriate to compensate P for loss or prevent P from suffering loss
 - s.243: provides non-exhaustive list of orders
- **Requirements for compensation**
 - 1: Breach of s.18 or s.20
 - 2: Some loss or damage has been (or is likely to be) suffered
 - 3: There is a causal connection between the breach and the loss or damage
- **Remedies under statute**
 - **Loss or damages under s.236**
 - (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 action against that other person, or against any person involved in the contravention
- Misleading or deceptive conduct may cause loss or damage in two different ways:
 1. Requisite causal connection is established because the **plaintiff relied on the defendant's conduct**; e.g. the plaintiff entered into a transaction with the defendant or third party
 2. **Third party relied on the defendant's conduct** and thereby caused loss to the plaintiff; e.g. the defendant made untrue statement about the plaintiff's products and the plaintiff subsequently lost sales; plaintiff's loss or damage = determined by reference to the consequential loss of profits
- **The measure of damages**
 - usually tort based unless it comes under murphy exception
 - **In tort law (RELIANCE LOSS)**: awards of damages are calculated to put the plaintiff in the position they would have been in had the tort not been committed (*Gates v City Mutual Life*)
 - **In contract law (EXPECTATION LOSS)**: awards of damages are calculated to put the plaintiff in the position they would have been in had the contract been properly performed
 - Be aware of how this difference could result in a different quantum in any given fact scenario, depending on whether a tort or contract measure of damages was adopted (*Murphy v Overton- exception*)
- **s.237 of the ACL**
 - Gives the court the power to grant any other orders it sees fit to prevent loss or likely loss suffered as a result of a contravention of various provisions, including ss.18 and 20

- A non-exhaustive list of the orders the Court might make it set out in s.243
 - more broad to s 236
 - start with s236 and see if it applies and then go to s237

Orders listed in s.243

Orders include:

- an order declaring the contract void (as of a certain date, or always);
- an order varying the contract;
- an order refusing to enforce the contract;
- an order for the return of money or property;
- an order for the payment of money;
- an order to repair or provide replacement parts;
- an order to supply services;
- an order to vary, terminate or otherwise affect an instrument for the transfer of land

➤ Loss or likely loss

- Relief under s.237 can only be awarded if the applicant suffers or is likely to suffer loss or damage (*Marks v GIO*)

➤ Discretion

- Courts have discretion about whether to grant an order under s.237 and they take all relevant circumstances into consideration in deciding whether to do so (*Henjo v Collins Marrickville*);
- Exercise of discretion under s.237 is not limited by analogy to common law or equity
- Contract can be rescinded under s.237 even if rescission under the unwritten law is barred
- But principles of the unwritten law may be a guide: *Henjo Investments Pty Ltd v Collins Marrickville*

➤ Causation

- The words “loss or damage **by conduct**” in ss.236 and 237 require some causal link between the loss suffered and the contravening conduct
- “the common-sense approach requires no more than that the act or event in question should have materially contributed to the loss or injury suffered.” (Gaudron J in *Henville v Walker*)
- If the defendant’s breach has ‘**materially contributed**’ ... to the loss or damage suffered, **it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage.** (*Henville v Walker*)
- One way of proving causation is by showing that you suffered that loss by acting in reliance on the misleading conduct: *Henjo v Collins Marrickville*
 - Misleading conduct does not necessarily cease to have causative effect merely because the applicant makes his own enquiries
 - However, if the person who makes independent enquiries completely discounts what the respondent said, the misleading conduct may cease to have any operative effect
- The defendant’s breach need not be the sole cause of the plaintiff’s loss; it need only be a cause or factor: *Henjo v Collins Marrickville*

➤ Disclaimers and Exclusion Clauses

- A party may attempt to avoid liability by invoking an exclusion or disclaimer clause. Generally these will be held to be ineffective, as a violation of the policy of the ACL, unless they go to prove the non-existence of an actual element of the contravention, such as causation (reliance) or the misleading nature of the conduct.
- Issue with an exclusion clause- doesn’t apply/ cannot contract out of the ACL

Contracting out of liability

1. You cannot contract out of liability under the ACL or its predecessors simply by inserting a disclaimer or exclusion clause (see e.g. *Henjo Investments*)
2. An exclusion clause will not support an estoppel by convention with regard to the ACL in same way as for the common law doctrine of misrepresentation (*Byers v Dorotea*)
 - estoppel by convention= means that the parties adopted a particular state of affairs when they contracted

A disclaimer or exclusion clause can only affect statutory liability if:

3. In some circumstances a contractual exclusion clause may be sufficient to show that conduct is not actually misleading or deceptive (see e.g. *Butcher v Lachlan Elder Realty*)
 - Eg: the disclaimer in the brochure in Butcher had the effect of preventing the agent's conduct from being misleading – the brochure conveyed the message that the agent did not guarantee the representation's accuracy
4. An exclusion clause might also be enough to prevent the claimant from showing that they reasonably relied on the misleading conduct, thus preventing them from proving that the conduct