

CONTRACT

Client wants to claim damages in contract:

1. Misleading or deceptive conduct – **s18 ACL**
2. Unconscionable conduct – **ss20,21 ACL**
3. Unfair terms – **s23 ACL**
4. Remedies
 - a. Damages – **s236 ACL**
 - b. Declare contract void – **s243 ACL**
 - c. Injunction – **s232 ACL**
 - d. Other orders – **s237-245 ACL**

Client wants to rescind the contract:

1. Misrepresentation (voidable) – *Redgrave v Hurd*
 - a. If innocent → only can rescind contract
 - b. Fraudulent → tort of deceit – *Derry v Peek*
 - c. Negligent → tort for negligent misstatements
2. Common mistake
 - a. Subject to implied condition (void) – *McRae CDC*
 - b. Equitable relief (voidable) – *Solle v Butcher*
3. Mutual mistake (void) – *Raffles v Wichelhaus*
4. Unilateral mistake (voidable) – *Taylor v Johnson*
 - a. Reification (mainly for common mistake; sometimes unilateral) – *Joscelyne v Nissen*
 - b. Non est factum (void) – *Petelin v Cullen*
5. Duress (voidable) – *Crescendo Management v Westpac*
6. Undue influence (voidable)
 - a. Presumed established category – *Johnson v Buttress*
 - b. Presumed on the facts – *Johnson v Buttress*
 - c. Actual undue influence – *Allcard v Skinner*
 - d. Third party – *Bank of NSW v Rogers*
 - e. Yerkey principle – *Yerkey v Jones*
7. Unconscionable conduct (voidable) – *CBA v Amadio*
8. If fail to prove unconscionable conduct, consider claim for unfair contract – **ss4, 9 Contracts Review**

Bars to recession

1. Restitution impossible – *Clarke v Dickson*
2. Affirmation – *Coastal Estates v Melevende*
3. Lapse of time – *Leaf v International Galleries*
4. Third party acquired rights prior to recession – *Car and Universal Finance*
5. Sale of land executed → no right to rescind for innocent misrepresentation – *Seddon's case*

TORT

For interference with land

1. Trespass to land (actual possession) – *Halliday v Nevill*
2. Private nuisance (actual and exclusive possession) – *Victoria Park v Taylor*

For interference with goods

1. Trespass (actual possession) – *Penfolds*
2. Conversion (actual possession or immediate right to possession) – *Penfolds*
3. Detinue (immediate right to possession) – *Reeve v Palmer*
4. Found goods – *Armony v Delamirie*
 - a. Employment – *Byrne v Hoare*
 - b. Occupier – *Armony v Delamirie*

Intentional economic loss

1. Tort of deceit – *Derry v Peek*
2. Injurious falsehood – *Palmer-Bruyn v Parsons*
3. Inducement of breach – *Hospital Group v Australian Rugby*

For pure economic loss

1. Negligent misstatement – *Hedley Byrne v Heller*
 - a. Direct recipient – *Shaddock v Parramatta*
 - b. Third party recipient – *Smith v Eris S Bush*
2. Professional negligence – *Voli v Inglewood Shire*
 - a. Client – *Hawkins v Clayton*
 - b. Third party beneficiaries – *Hill v Van Erp*
 - c. Standard of care – **s50 CLA**
3. Damage to third party property – *Caltex Oil; Perre*
4. Injury to third party – *Barclay v Penbarthy*
 - a. Death – no claim
 - b. Injury – claim in tort or action per quod
5. Defective structures
 - a. Residential building – *Bryan v Maloney*
 - b. Commercial building – *Woolstock v CDG*
 - c. Statutory claim – **Home Building Act**
 - d. Defective products – *Michillo v Ford Motor*
6. Breach – **s5B CLA**
7. Causation – **s5D CLA**

PROPORTIONATE LIABILITY FOR ECONOMIC LOSS OR PROPERTY DAMAGE

Under the Civil Liability Act

1. Failure to take reasonable care in tort or contract – **s34 CLA**
2. Liability limited to proportion court thinks just having regard to the extent of responsibility for the loss – **s35 CLA**
3. Limited by contributory negligence – **s34 CLA**
4. CAN contract out of proportionate liability – **s3A(2) CLA**

Under the Competition and Consumer Act

1. Breach of s18 ACL – misleading or deceptive conduct – **s87CB CCA**
2. Liability limited to proportion court thinks just having regard to the extent of responsibility for the loss – **s87CD CCA**
3. Limited by contributory negligence – **s87CD CLA**
4. CANNOT contract out of proportionate liability – **s87CF CCA**

COMMON LAW RIGHT TO RESCIND

Was the contract induced by a **misrepresentation**?

1. Was there a **false statement** of a **past/present fact**?
 - a. **Identify** the representations and **classify** the statements
 - i. Was it a statement that was either **true or false** at the time they were made?
 - ii. Was it puff, an opinion (*Bisset v Wilkinson*), misstatement of law (*Eaglesfield v Marquis of Londonderry*) or misstatement as to a future matter?
 1. General rule: misrepresentation does not apply – *Bathurst Regional Council*
 2. Exception: Does it contain an **implied representation as to a present fact**? – *Bathurst Regional*
 1. Did the representor honestly hold the view expressed?
 2. Did the representor have reasonable grounds for holding that view?
 - b. Requires a **positive statement or conduct** by the representor to the representee – *Walters v Morgan*
 - i. General rule: cannot be made via silence – *Smith v Hughes*
 - ii. Exceptions: where there is a duty to disclose
 1. Was this a case of a half-truth where a representation of fact is made, but at the same time, there is a failure to disclose something important, such that in the end an overall misleading representation is made? – *Dimmock v Hallet*
 2. Was there a failure to correct a statement that becomes false, such that the failure to disclose amounts to a misrepresentation? – *With v O’Flanagan*
2. Did the statement **actually induce** the representee to enter into the contract? – *Peek v Gurney*
 - a. Did the representor **intend** to induce the other?
 - b. Did the representee **rely** on the representation when entering into the contract?
 - i. Is a question of fact – did the representation reach and mislead the mind of the representee?
 1. An opportunity to verify the facts does not disprove reliance – *Redgrave v Hurd*
 2. A representee who knows a representation is false in a material particular is not defeated if they did not know the extent of the falsity – *Gipps v Gipps*
 - c. Does not need to be the sole of main inducement
3. **Onus of proof** - *Holmes v Jones*
 - a. Generally: onus on representee to show misrepresentation and inducement
 - i. HOWEVER, where there is a misstatement of a material fact, inducement will be presumed, and onus is on representor to disprove reliance
4. **Consequences**:
 - a. If **innocent** misrepresentation:
 - i. Contract **voidable** – plaintiff can exercise right to rescind the contract
 - ii. No claim common law right to damages – *Dick Bentley Productions v Harold*
 - b. If **fraudulent** misrepresentation:
 - i. Contract **voidable** – plaintiff can exercise right to rescind the contract
 - ii. Prospect of damages in **tort of deceit** (see page.14) – *Derry v Peek*
 - c. If **negligent** misrepresentation:
 - i. Contract **voidable** – plaintiff can exercise right to rescind the contract
 - ii. Prospect of damages in **tort of negligence** – *Hedley Byrne v Heller & Partners*
 1. Did the representor:
 1. Owe a *duty* of care;
 2. *Breach* that duty by failing to take reasonable care as to the truth of the representation;
 3. Which *caused* loss or damage to the representee?

Was the contract entered into under a misapprehension or mistake?

1. Are both parties under the same misapprehension (**common mistake**)?
 - a. As a matter of construction, is the contract **subject to an implied condition** such that if the condition fails, the contract fails and is **void** at common law? – *McRae v CDC*
 - b. Is **equitable relief** available, such that contract is **voidable**? - *Solle v Butcher*
 - i. Were the parties under a **common misapprehension** either as to facts or their relative and respective rights? - *Solle v Butcher; affirmed in Taylor v Johnson*
 - ii. Was the misapprehension **fundamental** (substantial/significant/serious)? - *Solle v Butcher; affirmed in Taylor v Johnson*
 - iii. Is the party seeking to set it aside **not at fault**? - *Solle v Butcher; affirmed in Taylor v Johnson*
 - iv. Are the circumstances such that it would be **unconscionable** for the party who seeks to uphold the contract to have it enforced? - *Svanosio v McNamara*
2. Are both parties mistaken as to the other's intentions (**mutual mistake**)?
 - a. On an **objective view** of the parties' dealing and surrounding circumstances, is it possible to say that one party has the '**right**' **understanding** of the bargain? - *Raffles v Wichelhaus*
 - i. If yes, the parties have a contract on those terms and it is only one party who is mistaken
 1. Can the mistaken party seek relief on the grounds of **unilateral mistake**?
 - ii. If no, contract is **void** - *Raffles v Wichelhaus*
3. Is one party mistaken as to a fundamental term (**unilateral mistake**)? - *Taylor v Johnson*
 - a. Was the **other party aware** that the first entered into the contract **under a serious mistake**? - *Taylor v Johnson*
 - b. Did that party **deliberately seek to ensure that the first did not become aware** of the mistake? - *Taylor v Johnson*
 - c. Consequence: contract is **voidable** - *Taylor v Johnson*
4. Was there a **misapprehension as to the nature/effect** of the doc signed such that the plea of **non est factum** is available?
 - a. Elements - *Petelin v Cullen*
 - i. Is the signer under a **relevant disability**?
 1. Cannot be mere carelessness – *Saunders v Anglia Building Society*
 - ii. Did the other party **know** of the disability and **exploit** it?
 - iii. Was there a **fundamental difference** b/w effect of the doc signed and what the signer believed it to be?
 - b. Onus of proof lies on the party who seeks to disown their signature
 - c. **Consequence**: contract is **void**
5. Has there been a mistake in drafting a written agreement such that **rectification** is possible?
 - a. Can the party seeking rectification provide convincing **proof of a common intention** which existed up to the time of the creation of the written instrument, and which is not reflected in the written agreement? – *Joscelyne v Nissen*
 - i. Very high evidentiary bar (i.e. email, earlier draft of contract)
 - b. If so, court can make a rectification order that the contract be changed so that the mistake or error is eliminated
 - i. Usually for common mistake BUT can be used as a remedy for a unilateral mistake - *Leiber v Air; A Roberts & Co v Leicestershire County Council*
 - c. Is rectification **barred**?
 - i. Has a third party acquired rights for value under the contract in its original form? – *Smith v Jones*
 - ii. Is the contract no longer capable of being performed? – *Borrowman v Rossel*

Was the contract entered into under duress?

1. Was there a **threat of a wrongful act** which forces another to agree to a demand? – *Crescendo Management v Westpac*
 - a. Was the threat against a person – physical violence, imprisonment, or against a third party?
 - b. Was the threat against goods or property – damage or destruction?
 - c. Was the threat against an economic interest – threaten the economic well-being which would cause purely economic loss to victim?
 - i. Was there a threat to not perform an existing contract for extra payment?
 - ii. Was there a threat to not perform existing contract to enter into a new contract?
 1. If consideration for new contract is not given – duress made out
 2. If consideration for new contract is given – must consider whether the plaintiff felt as though they had a genuine choice? – *North Ocean v Hyundai*
2. Was there illegitimate or **improper pressure**? – *Crescendo Management v Westpac*
 - a. Did the demand and threat cross a certain threshold of pressure to become improper?
 - i. General rule: conduct must be unlawful
 1. Position in NSW: no lawful duress – *ANZ v Karen*
 2. Although HCA position is unclear – *Thorne v Kennedy*
 - b. Onus on plaintiff alleging duress to show pressure was illegitimate
3. Did such pressure **induce entry** into the contract? – *Crescendo Management v Westpac*
 - a. Did duress have a causative effect?
 - i. Need not be the sole cause
 - b. Onus is on defendant to show it contributed nothing to the decision to enter into the contract
4. **Consequence**: contract is **voidable** – *Crescendo Management v Westpac*

Was there undue influence, such that the will of the weaker party is overborne by the stronger party? - Anderson v McPherson

1. Does a special relationship exist between the parties such that there is a **presumption of undue influence**?
 - a. Does the relationship belong to an **established category** giving rise to a presumption of influence?
 - b. If not, can some other special relationship **be established on the facts** giving rise to a presumption of influence? - *Johnson v Buttress*
 - i. Does the benefit flow on from the weaker party to the stronger party?
 - ii. Was there trust and confidence involved so as to give rise to a presumption of influence?
 1. Relevant factors: education, mental or physical disability, emotional dependency, age, lack of business knowledge or acumen
 - c. Onus of proof on **stronger party to rebut the presumption** of undue influence? – *Allcard v Skinner*
 - i. Must prove the weaker party was acting independently and of their own free will
 1. Did the weaker party seek independent legal advice?
 1. Was advice given in the presence of the stronger party?
 2. Was advice thorough?
 2. Did the weaker party act spontaneously?
2. Was **actual undue influence** in fact brought to bear in a particular transaction?
 - a. Onus on weaker party - can they prove the other party exerted undue influence?
3. Is the party exerting undue influence a beneficiary through a **third party**? – *Bank of NSW v Rogers*
 - a. Is the contract of guarantee between the plaintiff and a third party?
 - b. Does the third-party creditor have actual or constructive notice of the possibility of undue influence?
4. Is this a contract of guarantee such that the **Yerkey principle** applies? – *Dixon J in Yerkey v Jones*
 - a. Is it a long term, publicly declared relationship, short of marriage, b/w members of same/opposite sex?
 - i. NOTE: suggestion that this principle should apply equally to all vulnerable parties in personal relationships - *McMurdo P in Agripay v Byrne*
 - b. Was wife's decision to act as the husband's guarantor procured by husband's influence? – *Garcia v NAB*
 - i. Did the wife fail to understand the purport and effect of the transaction? (onus on wife)
 - ii. Was the transaction voluntary?
 1. Did the wife gain any benefit from the transaction?
 - iii. Does the lender understand that the wife may repose trust and confidence in her husband in matters of business, and therefore that the husband may not fully and accurately explain the purport and effect of the transaction to the wife?
 - iv. Did the lender fail to take steps to explain the transaction to the wife?
5. **Consequence**: contract is **voidable** – *Anderson v McPherson*

Was there **unconscionable conduct**?

1. Is the weaker party under a **special disability or disadvantage** in dealing with the other party such that there is an absence of any reasonable degree of equality between the two? – *Deane J in CBA v Amadio*
 - a. Does the disability **seriously affect** the weaker party's **ability to make a judgement** in their best interests?
 - i. Non-exhaustive: poverty, need of any kind, sickness, age, infirmity of body or mind, drunkenness, illiteracy, lack of education, lack of assistance or explanation where necessary – *Fullagher J in Blomley v Ryan*
 1. Limited English + reliance re: financial affairs – *CBA v Amadio*
 2. Infatuation + crisis – *Loth v Diprose*
 3. Lack of financial assets + reliance + emotional connection + situation of urgency – *Thorne v Kennedy*
 - ii. Cf. no special disability re: gambling - *Kakavas v Crown Melbourne*
 1. No special disadvantage; capable of making rational decisions; plaintiff was not unique victim
2. Was the disability **sufficiently evident or known** to the stronger party? – *Deane J in CBA v Amadio*
 - a. Actual knowledge or recklessness – NOT constructive knowledge
 - i. Includes wilful ignorance
3. Did the stronger party **exploit that disability** unconsciously in order to obtain the weaker party's consent to the transaction? – *Deane J in CBA v Amadio*
 - a. Onus is on the stronger party to prove transaction was fair, just and reasonable
4. **Consequence**: contract is **voidable** - *CBA v Amadio*

Consequences where the contract is void vs voidable

1. If **void**, the contract was a nullity from the beginning
 - a. No legal title can be passed
 - b. Contract unable to change rights/obligations
2. If **voidable**, it remains on foot unless the innocent party exercises a right to rescind the contract
 - a. If right to rescind exercised, must be overt by word or conduct – *Car and Universal Finance Co v Caldwell*
 - a. Parties are substantially restored to pre-contractual positions – *Alati v Kruger*
 - b. No damages are recoverable
 - a. However, an action for restitution may be available to recover money

BARS TO RESCISSION

If a right to rescind is made out, is the right barred?

1. Are there any **factual bars** to rescission?
 - a. Impossibility of *restitutio in integrum* – is it impossible to substantially restore the parties to their pre-contractual positions? – *Clarke v Dickson*
 - i. Has there been destruction of subject-matter?
 - ii. Was the subject-matter perishable?
 - iii. Was it a contract for services?
2. Are there any **legal bars** to rescission?
 - a. Has the plaintiff **affirmed** the contract, thereby losing his or her right to rescind?
 - i. Did the plaintiff know of the factual matrix giving rise to the right to rescind?
 1. If they did not, right to rescind is not lost – *Coastal Estates v Melevende*
 - ii. If yes, was affirmation clear and unequivocal (by words or conduct)?
 - iii. Onus on defendant to prove affirmation
 - b. Has a reasonable amount of **time lapsed** so as to amount to affirmation? - *Leaf v International Galleries*
 - i. Was there was ample opportunity?
 - ii. Was the delay sufficient to constitute unequivocal election of affirmation?
 - c. Has a **third party** acquired rights under the contract of value in good faith?
 - i. Was the transfer of title to the third party done so prior to rescission? – *Car and Universal Finance*
 1. If yes, third party rights prevail and no right to rescind
 2. If no, plaintiff has right to rescind
 - d. Has a contract for the sale of land been executed (full performance by both) such that **Seddon's rule** applies?
 - i. Right to rescind for *innocent* misrepresentation is lost – *Seddon's case*
 1. NOTE: contract for sale of goods may nonetheless be rescinded for innocent misrepresentation even though contract has been performed - s4(2A)(b) Sales of Good Act