

INDEX

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1. **Recession:** setting aside transaction affected by a vitiating element which would render them unconscionable (void *ab initio*) (**Alati v Kruger (1955)**)
2. **Damages in Contract:** place P in position (as much as money can) would've been in had action complained of hadn't occurred (**Robinson v Harman (1848)**) (look forward to position would have been in if contract performed)
3. **Damages in Tort:** place P in position (as far as money can) would've been in had the wrong not been committed (**Livingstone v Rawyards Coal (1880)**) (look back to position would have been in if injury not occurred)
4. **Equitable Compensation:** restore person who have suffered loss to position they would've been in if there had been no breach of the equitable obligation (actual loss at time of assessment) (**Nocton v Lord Ashburton (1914)**)
5. **Restitution:** reverse D's gain made by wrongful/unconscionable act (prevent unjust enrichment, **David Securities v Commonwealth Bank (1992)**)
6. **Account of Profits:** require D to disclose all profits made as **consequence of breach** of equitable principle/CL right of P and transfer profits to P (Restitutory, prevent unjust enrichment, **Dart Industries v Décor (1993)**)
7. **Constructive Trust:** imposed where **unconscionable** (or equitable fraud) for owner of the property to assert or enjoy beneficial ownership of that property against the person for whose benefit the constructive trust is imposed (e.g. Breach of fiduciary duty) (**Muschinski v Dodds (1985)**)
8. **Specific Performance:** order of court directing one party to perform obligations under a contract (*in personam*) (**JC Williamson v Lukey & Mulholland (1931)**)
9. **Injunction:** prohibits/forbids a person or legal entity from performing an action OR requires a person or legal entity to do something (**Curro v Beyond Productions (1993)**)
10. **Declaration/Rectification/Delivery Up:**
 - o **Declaration:** pronouncement by court which states/**declares** legal/equitable conclusion/parties relative rights from determined set of facts (**Guaranty Trust of New York v Hannay [1915]**)
 - o **Rectification:** if written instrument doesn't reflect the common continuing intention of parties at time document executed court will allow amendment/modification of instrument (**Slee v Warke (1949)**)
 - o **Delivery Up:** documents (**Langman v Handover (1929)**) or goods (**Vavasour v Krupp (1878)**) delivered to **custody of court** under oath for purpose of cancellation or supervised destruction

Maxims:

- **Equity is equality**
- He/she who seeks equity must **do equity**
- He/she who comes to equity must come with **clean hands**
- Equity looks to the **intention** not the form

1. RESCISSION (Equity and CL)

Monday, 22 July 2019

Nature and Purpose

- **Setting aside** transaction affected by a vitiating element which would render them unconscionable (void *ab initio*)
- **Objective:** place parties in position would've been in had act complained of not occurred
- **Available:**
 - **CL:** limited circumstances (contract, e.g. fraud, misrepresentation or duress, **Load v Green (1846)**)
 - **Equity:** contracts, gifts and other transactions
 - **Pursuant to statute**

Self-Help/Restitution (Equity)

- **Self-help:** created by parties (but may require judicial interpretation and enforcement, e.g. Material breach)
- Can include **any term** in contract including breach consequences (can alter/supplement any statutory/CL contractual remedies)
- **Exercised by right-holder** giving notice of her election to rescind to other party (**Alati v Kruger (1955)**)
- **Penalty clauses:** parties assessment for damages (not judicial) (**Dunlop Pneumatic Tyre v New Garage (1915)**)
- **Andrews v ANZ (2012): equitable protection** for parties from privately-imposed penalties (**DOESN'T** cover agreed sum/property to be transferred/payable on occurrence of event other than breach of contract)

Equity

- **Jurisdiction:**
 - **Concurrent:** "conscience of the law"
 - **Exclusive:** protection of equitable rights/interests (e.g. breach of fiduciary duty)
 - **Auxiliary:** invoked when transaction has been procured in breach of equitable principle (e.g. unconscionable conduct/undue influence (**Blomley v Ryan (1956)**), mistake and misrepresentation)
- **Perpetual Trustees v Burns [2015] Keenan J:** "scope **broader** [than CL] in cases involving unconscionable dealings, and even broader in cases of fraud, than in less reprehensible cases such as innocent misrepresentation... availability of rescission in equity for unconscionable conduct and catching bargains is very old and versatile"
- **Damages:**
 - **Innocent misrepresentation:** rescission but NO damages
 - **Fraudulent misrepresentation:** rescission and damages (deceit)
- **Alati v Kruger (1955) (HC):** place parties as near as possible to position they were in before contract concluded
 - **Facts:** K purchased shop from A, A fraudulently misrepresented value of weekly takings, K applied to court for rescission of contract of sale, shortly before hearing K closed business and landlord took possession
 - K **couldn't return** to A what purchased from A because landlord had taken possession of premises

- BUT still entitled to rescission (**allowances** for deterioration in property to restore *status quo ante*)
- A **aware** K forced to close business but hadn't taken action to mitigate loss K might suffer
- **Maguire v Makaronis (1997):**
 - **Facts:** A loaned \$250,000 to R, secured over another property, used to purchase farm, one repayment, breach of loan, A sought to recover mortgaged property, R counter sued for breach of fiduciary duty
 - "To set aside the Mortgage purely in its operation as a security without conditioning that upon repayment, would be to reform the transaction in an **impermissible fashion**. It would be to strike don the security interest without ensuring repayment of that which was paid in return for it"
 - **Decision:** "whole transaction rescinded and, so far as possible, the parties remitted to their original position" (recession was **conditional** on repayment of the loan)
- **Termination vs rescission (McDonald v Denny Lascelles Ltd(1933) per Dixon J):**
 - **Termination:** brings to end **future obligations** of parties (right to terminate for breach depends upon nature of term/obligation breached, damages may exist independently of right to terminate)
 - **Rescission:** ends all obligations/rights under (past, present and future) by placing parties in position would've been in if no contract (*ab initio*: at the beginning, as if never existed)

Elements

1. **Vitiating Factor** (making contract voidable)
 2. **Election**
 3. **Restitutio in integrum** (restoration to positions before contract) possible:
 - **CL:** precise *restitutio in integrum* (any change in benefit to P precludes recession (**Hunt v Silk (1804)**))
 - **Equity:** flexible (returned "**substantially**" to their original position (**Clarke Dickson (2858)**))
- **Voidable and void contracts:**
 - **Void:** CAN'T be rescinded because nullity from the very beginning (never been enforceable)
 - **Voidable contract:** rescindable if subject to flaw/vitiating factor (valid until rescinded)

Vitiating Factors

- **Assent of party** improperly procured by fraud, misrepresentation, duress or unconscionable conduct
- **Not exhaustive:** available for unconscionable conduct and breach of fiduciary duty (**Maguire v Makaronis (1997)**)

Misrepresentation

- **Requirements:**
 - **Representation** AND
 - Representation must be of **fact** (not opinion)
- More than mere **puffery** (**Mitchell v Valherie (2005)**)
- **Opinion:** fraudulent if not honestly held (statement of fact) (**Smith v Land and House Property Corp (1884)**)
- **Intention:** fraudulent if not honestly held (**Edgington v Fitzmaurice (1885)**)
- NOT honestly stated beliefs on matters of **law** (**Eaglesfield v Marquis of Londonderry (1876)**)
- **Timing:** false at time it was made and acted upon (**With v O'Flanagan (1936)**)
- Right to rescind lost after **contract completed** (**Seddon v North East Salt Co Ltd (1905)**)

- **Must induce** other party to enter contract (**Gould v Vaggelas (1985)**):
 - **Relied upon**
 - **Calculated to induce**
 - **Known** by representor to be false
 - BUT doesn't need to be **sole inducement** (**Derry v Peek (1889)**)
- **CL**: must be **fraud**/intention to induce OR representation forms contract **term** (**Hedley Byrne v Heller [1964]**)
 - **Fraud at CL**: representation made with:
 - **Knowledge** that it is false
 - **Without belief** in its truth
 - **Recklessness** as to its truth
- **Equity**:
 - **Innocent misrepresentation** (intent to deceive not necessary if **equitable fraud**) (**Redgrave v Hurd (1881)**)
 - **Contact term**: likely right to rescission lost (English, **Academy of Health v Power (1973)**)

Mistake

- Traditionally mistake must've been **mistake of fact not law** (**David Securities P/L v CBA (1992)**): mistake of law is now also recognised as grounds for rescission)
- **Common mistake**: both parties have **made the same** mistake (**limited application in Aus** both at CL and in equity, **McRae v Cth Disposals Com (1951)**)
 - **CL**: mistake fundamental to contract (**Bell v Lever Bros Ltd [1932]**) (2 and 3 confirmed in **McRae**):
 - Common assumption** as to existence of a state of affairs
 - No warranty** by either party that the state of affairs exists
 - Non-existence of state of affairs must not be attributable to the **fault** of either party
 - Non-existence of the state of affairs must render performance of contract **impossible**
 - State of affairs may be the **existence/vital attribute** of the consideration to be provided or the circumstances which must subsist if performance of the contractual adventure is not possible
 - **McRae v Commonwealth Disposals Commission (1951)** (HC):
 - **Facts**: M won tender from Cth to dispose of wreck of tanker situated on reef off coast of Qld, M spent considerable sum on specially out-fitting ship and organising expedition to salvage wreck, but discovered neither wreck nor reef actually existed, M sought to recover expenses, Cth argued contract void because of mistake (only tender fee recoverable)
 - NOT a case of common mistake:
 - ◆ M **relied** upon Cth assurance wreck and reef existed
 - ◆ **Contract valid** and Cth liable for damages for breach
 - If contract voided for common mistake Cth would've been **estopped from relying** on mistake as defence because (caused and perpetuated by its own servants)
 - **Equity**: set aside if common mistake as to fundamental **facts/rights**
 - Party seeking to set it aside is **not at fault** (**Solle v Butcher [1950]**)
 - BUT "difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been **fraud or misconception** or a

condition can be found express or implied in the contract" (*Svanosio v McNamara (1956)*)

- Fraud in "**wide equitable sense** which includes unconscionable dealings" (*Taylor v Johnson (1983)*)
- **Mutual mistake:** both parties are mistaken but each has made a different mistake
 - **CL:** goes to **formation of contract**/reality of agreement (*Raffles v Wichelhaus (1864)*: "no *consensus ad idem*, and therefore **no binding contract**")
 - **Equity:** no authority permitting rescission on this basis because contract *void ab initio* (no contract)
- **Unilateral mistake:** only one party is mistaken as to nature/subject matter of contract
 - **CL:** not generally available at CL (*Taylor v Johnson (1983)*, *Solle v Butcher (1950)*), **exceptions:**
 - **Informal contracts**
 - Mistake as to **identity** of other party
 - Mistake as to **nature of contract**
 - **Equity:** available where:
 - One party **aware of other's mistake** as to content/subject matter of contract **AND**
 - Deliberately takes **steps to ensure** mistaken party doesn't become aware of mistake
 - Based on **fraud** (*Taylor v Johnson (1983)*)

Duress

- Use of **illegitimate pressure** upon will of party (deflected in some way, *Crescendo v Westpac (1988)*)
- **Concurrent jurisdiction**
- **Duress to person** (*Barton v Armstrong [1976]*):
 - **Actual/threatened harm** to physical integrity of party to contract **OR** close relative
 - Must be **dominant reason** for entering contract and (regardless of being advantageous)
- **Duress to goods** (*Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd (1991)*):
 - **Actual/threatened** damage/destruction of goods without lawful excuse
 - **Operates** in same way as duress to person
 - Payments made under duress are recoverable by way of restitution for **unjust enrichment**
- **Economic duress:**
 - **Illegitimate economic pressure** (*Universe Tankships v Monrovia ' Federation [1983]*)
 - **Crescendo Management:** **commercial pressure** illegitimate where unlawful threats/unconscionable conduct
 - **Mere pressure** that is not unlawful won't amount to economic duress
 - **Threat of lawful conduct** illegitimate if made in support of unlawful demand (*J & S Holdings v NRMA (1982)*)
 - **Test** (*Crescendo Management Pty Ltd v Westpac Banking Corp (1988)*):
 - i. Whether any applied pressure **induced** the victim to enter into the contract
 - ii. Whether that pressure went **beyond** what the law is prepared to countenance as legitimate ("illegitimate if it consists of unlawful threats or amounts to unconscionable conduct")

Election

- Party with right to rescind must make **choice** between rescission and affirmation (**Immer v Uniting Church (1992)**)
 - **Rescinded: void *ab initio***
 - **Affirmed: voidable** transaction becomes valid and enforceable by both parties
- **Election (Sargent v ASL Development Ltd (1974)):**
 - **Expressly/implied** from conduct
 - Must be **clear/unequivocal/irrevocable act** of rescission
 - **Express:** verbal, by written notice or through conduct
- Must be **aware of facts** giving rise to right to rescind before election (**Immer v Uniting Church (1992)**)
- Usually effective by giving **notice** to other party (**Car & Universal Finance v Caldwell (1965)**)
- **Daly v Sydney Stock Exchange (1986):**
 - **Facts:** advised to invest despite firm being in poor financial situation, collapsed
 - **Brennan J:** "when a gift of property is made to a donee who has failed to discharge his fiduciary duty to the donor, the gift may be set aside so that the donee holds the gift on a **constructive trust** for the doner"
 - "**Irrespective of the fairness** of its terms, equity regards a contract made between a fiduciary and the person to whom he stands in a fiduciary relationship as **voidable** if the fiduciary has breached his fiduciary duty in respect of the contract"
 - Parties who elect have an **equitable interest** in the property from the beginning
 - Must show **fiduciary relationship AND "money was received** by the firm for/on behalf of Dr Daly/as trustee"
- **Car & Universal Finance v Caldwell (1965):**
 - **Facts:** D sold car to Norris, on-sold car to firm who had notice of the fraud, sold to P (bona fide without notice), reported, when car found D and P both laid claims
 - **Issue:** whether D's actions were effective to rescind sale at CL prior to sale to D (without communication)
 - "**Affirmation** of a voidable contract may be established by any conduct which unequivocally manifests an intention to affirm it by the party who has the right to affirm or disaffirm"
 - "That an **innocent party** or parties may suffer does not in my view of the matter justify imposing on a defrauded seller an impossible task"
 - "He has to **establish, clearly and unequivocally**, that he terminates to contract and is no longer to be bound by it. If he **cannot communication** his decision he may still satisfy a judge or jury that he had made a final and irrevocable decision and ended the contract"
 - Must be within a **reasonable time**
 - "If one party, by absconding, **deliberately puts it out of the power** of the other to communicate his intention to rescind which he knows the other will almost certainly want to do, I do not think he can any longer insist on his right to be made aware of the election to determine the contract"

Partial Rescission (Equity)

- **Traditional position:** rescission must be total (unwinding part of a contract is not rescission)
- **BUT** to "**do what is practically just between the parties**" equity may order rescission of contract on terms
- **Vadasz v Pioneer Concrete (1995) (HC):**
 - **Facts:** V director of company in financial difficulty, PC (supplier) needed personal guarantee from V to continue supplying, induced by PC representative that guarantee related only to future indebtedness

- **Equity follow the law** but allows for greater **flexibility**
- "Equity didn't require complete restitution of position which existed before contract but allowed its remedies, particularly order for monetary account, to be utilized to achieve **practical restitution** and **justice**"
- **Practical justice:** "court must look at what is practically just for both parties, not just A"

Bars to Rescission

1. CL: **substantial *restitutio*** not possible (**Vigers v Pike (1942)**)
2. Party with right to rescind has **affirmed** contract (**Coastal Estates v Melevende (1965)**)
3. Defences of **laches, acquiescence or hardship** (**Hartigan v International Society (2002)**)
4. Interests of **third party** adversely affected (bona fide purchaser for value without notice) (**Cars v Caldwell (1964)**)
5. **Innocent misrepresentation** and contract is completed (**Watt v Westhoven (1933)**)
6. Party seeking rescission has engaged in **unconscientious behaviour** (**Vadasz v Pioneer Concrete (SA) (1995)**)