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**First question is always: what does aggrieved pt want?**

1. Does the problem raise an issue as to vitiating factors?
2. What relief/remedy does the aggrieved pt seek?
3. Is rescission available? If yes, then consider any of these *vitiating* factors:
   a. Undue influence and *Yerkey v Jones* principle;
   b. Unconscionable conduct at general law and under ACL;
   c. Unfair contract terms under ACL or CRA (subject to application requirements)
   d. Mistake
   e. Misrepresentation at CL
   f. Misleading or deceptive conduct under ACL

4. If rescission is *barred*, then consider:
   a. Unconscionable conduct under ACL
   b. Unfair contract terms under ACL or CRA (subject to application requirements)
   c. Misrepresentation at CL if a relevant tort can be made out
   d. Misleading or deceptive conduct under ACL

*In an exam situation, there will be 2 obvious vitiating factors, discuss those 2 the most. If you have time, mention the other ones that are less likely to succeed*

**Rescission**

The process of ‘unwinding’ a contract – pts restored to their pre-contractual positions (*restitutio in integrum*)

- Following the approach in equity, this requires pts be restored to their *substantial* (rather than *precise*) starting positions: *Alati v Kruger*
- The consequence of rescission is that the contract is treated as though it never existed, **so damages for breach of contract cannot be claimed**
  - Outcome of rescission achieves objective of **tort (but not contract): put P in position he/she would have been had the tort not been committed**
- Cf: **termination** – brings performance of contract to an end and relieves the pts from future obligations, but does not affect accrued rights and liabilities

**Approaches to Rescission**

1. **CL approach (strict)** – must be able to restore pts to their exact or precise starting positions
2. **Equity approach (flexible)** – putting pts or returning pts to their substantial starting positions

⇒ this approach has prevailed: *Alati v Kruger*

**Distinction between void and voidable contracts**

If a vitiating factor is established, it may render the contract (or gift) void altogether (of no effect) or merely voidable.

- **Usually voidable** – contract remains on foot unless innocent pt exercises their right to rescind contract (right to rescind exists; but does not apply automatically)
- **Void (limited circumstances): *nemo dat quod non habet*** (you cannot give what you do not have) – no contract in the first place, no legal title can pass
Limits on rescission

The innocent pt may be able to rescind the contract *ab initio*, but that right may be lost due to a variety of factors. Similarly, there are a number of facts which the ct takes into account when considering whether to order rescission of a contract (or gift).

Factual Bars

**Rescission impossible**

Where rescission is factually impossible (i.e. inability to restore pts to their pre-contractual positions): *Alati v Kruger*

<table>
<thead>
<tr>
<th>Alati v Kruger (1955) 94 CLR 216</th>
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<tbody>
<tr>
<td>(authority for equitable position prevailing in Australia)</td>
</tr>
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</table>

**Facts:** Alati sold fruit business to Kruger. Contract was induced by a fraudulent misrepresentation (vitiating factor) regarding the weekly earnings. Kruger sought to rescind the contract on the basis of this vitiating factor. Business deteriorated, Kruger made a loss, had to close business.

**Issue:** Had Kruger lost his right to rescind given his conduct in relation to the deterioration of the business?

**Held:** Rescission valid.

Dixon, Kitto, Webb and Taylor JJ: “it is necessary to apply the doctrines of equity and equity has always regarded as valid the disaffirmance of a contract induced by fraud even though precise restitution in integrum is not possible if the situation is such that by the exercise of its powers including the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, it can do what is practically just between the pts and by so doing restore them substantially to the status quo”

- Precise restoration not needed under equity, so long as substantial restoration was possible
- While the business had deteriorated while Kruger had been in possession, the business remained (in substance) what it was before the contract had been entered into, and appropriate financial adjustments could be made to restore the pts substantially to their pre-contractual positions

**Distinctions:** Court noted that result would be different if:

- Kruger acted unconscientiously and abandoned business completely, resulting in loss of goodwill
- Subject-matter had been completely destroyed

Legal Bars

(i) **Affirmation**

If an innocent pt affirms the contract, the right to rescind is lost – unless the innocent pt did not know of their right to rescind: *Coastal Estates v Melevende*

<table>
<thead>
<tr>
<th>Coastal Estates v Melevende [1965] VR 433</th>
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<tbody>
<tr>
<td>(affirmation must be clear and unequivocal)</td>
</tr>
<tr>
<td><em>This was a controversial decision.</em></td>
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</table>

**Facts:** 1960: Mr Melevende entered into contract to purchase seaside property. Contract was induced by fraudulent misrepresentation (vitiating factor). 1961: M became aware of the misrepresentation. He continued to make payments and tried to sell the land. 1962: After seeking legal advice, M became aware of his right to rescind the contract.

**Issue:** Was Melevende’s conduct an affirmation of the contract such that rescission was not possible? (Was an attempt to sell the land an affirmation of the contract?)

**Held:** Rescission valid

1 *ab initio*: from the beginning
“it is necessary to make a binding election to affirm that the defrauding party should have known of the right to rescind; as well as the falsifying facts”

An election to rescind must be clear and unequivocal (by words or conduct) or else the contract remains on foot and is affirmed.

- To prove the existence of an affirmation, onus lies on pt who wishes to continue contract to prove that the innocent pt has sufficient knowledge of his rights at any relevant time
- Continuation is inconsistent with rescission; unless the innocent pt did not know of their right to rescind.

(ii) Restitution impossible

Recession is only possible if the pts can be placed in their original positions. Precise restitution is not needed, and the ct can use its power to impose terms to do substantial justice.

<table>
<thead>
<tr>
<th>Vadasz v Pioneer Concrete (1995) 130 ALR 570</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Where substantial restitutio in integrum is impossible, ct may may order partial rescission)</td>
</tr>
</tbody>
</table>

Facts: Vadasz was a director of a company that carried on business as a concrete piling contractor. Company fell into financial difficulties and Pioneer, supplier of ready-mixed concrete, threatened to stop supplies unless Vadasz provided a personal guarantee. Vadasz understood guarantee would be limited to company’s future debts to Pioneer – a belief which Pioneer actively encouraged and of which it had been aware. When company folded, Pioneer sued Vadasz for supply of concrete both before and after the guarantee.

Held: Partial rescission

- While Pioneer had obtained Vadasz’s guarantee of the company’s past debts by misrepresenting the true nature and effect of the document (personal guarantee), Vadasz had been fully aware that he was guaranteeing all of its future debts
  - Rescinded past debts (due to misrepresentation), but guaranteed future debts
- Where substantial restitutio in integrum is impossible, the ct will use its power to impose terms that will create justice in the case e.g. partial rescission

(iii) Third parties

If a third pt, in good faith, has acquired rights under the contract for value, recession is not possible.

<table>
<thead>
<tr>
<th>Car and Universal Finance Co Ltd v Caldwell [1965] 1 QB 525</th>
</tr>
</thead>
<tbody>
<tr>
<td>(an unequivocal act communicating the wish to rescind a contract can override 3rd pt rights)</td>
</tr>
</tbody>
</table>

Facts: Caldwell (original car owner) sold a call to a rogue, Norris, who paid £10 cash deposit and left another car as security and gave a cheque for £965. The next day, cheque was dishonoured and the car left as a deposit was turned out to be stolen. Caldwell immediately reported the incident to the police and asked for assistance in finding his car. Norris had acquired a voidable title to the car as the contract was induced by fraudulent misrepresentation. Norris then sold the car to a 3rd pt a few days later

Sale of a car – the buyer was a rogue buyer of the car. Cheque from buyer of car was dishonoured and he vanished. He had actually managed to on-sell the car to an innocent 3rd pt. Road-buyer bought to an innocent 3rd pt. When the cheque was dishonoured, the seller (original owner) immediately informed the police and asked for assistance in finding the car.

Issue: Whether actions taken by Caldwell were sufficient to constitute rescission?

Held: YES – Caldwell successfully rescinded the contract.
• He had taken all steps possible to demonstrate that he no longer wishes to be bound by the contract. He should not be prejudiced by the fact that his endeavours failed to locate Norris (TIMING WAS REALLY IMPORTANT HERE).
• General requirement that notification of rescission be communicated to the other pt can be waived if communicated is impossible

(iv) Lapse of time
Lapse of time can be evidence of affirmation.

**Leaf v International Galleries [1950] 2 KB 86**
(lapse of time can be evidence of affirmation of contract)

**Facts**: Selling of painting. 5 years later, when trying to auction the painting, Leaf was told it was not made by the real painter. He claimed rescission of contract against International Galleries to get back his money.

**Held**: Rescission barred – too much time has lapsed.
• The innocent pt must elect to rescind a contract within a reasonable period of time, and that the particular period of time is governed by whether the delay is sufficient to constitute unequivocal conduct amounting to affirmation.
• Period of time between contract formation and the decision to rescind was too prolonged – right to rescind lost.

(v) Rule in Seddon’s case
Where a contract for the sale of land has been executed, the right to rescind for innocent misrepresentation is lost.

**Seddon v North Eastern Salt Co [1905] 1 Ch 326; Svanosio v McNamara (1956) 96 CLR 186**
(very narrowly applied rule only applies in cases of innocent misrepresentation (NOT fraudulent misrepresentation))

**Held**:  
• In a contract for the sale of land, if the contract has been executed (settled/completed), the right to rescind for an innocent misrepresentation is lost  
• This rule applies to sale of any interest in land and to some sales of shares.

**BUT**
Equity may intervene to rescind a contract by restoring the pts substantially to the status quo, where the contract is induced by fraud and precise restitutio in integrum is impossible: **Alati v Kruger**

**Sale of Goods Act 1923 (NSW)**

s 4 Savings  
(2A) Without affecting the generality of subsection (2), the rules of equity relating to the effect of misrepresentation apply to contracts for the sale of goods, but such a contract may be rescinded under those rules for a misrepresentation even though either or both of the following apply:  
(a) the contract has been performed.

➤ Provides that incorporation of a representation as a term of the contract does not deprive the representee of the remedies for misrepresentation.
Topic 5: Vitiating Factors: Undue Influence, Unconscionable Transactions and Unfair Contract Terms

A. Undue Influence (VOIDABLE)

Focus on relationship between pts & impairment of consent

Solving an Undue Influence Question

1. What category of undue influence applies?
   a. Does special relationship belong to an established type giving rise to a presumption of influence? (1A)
   b. Is there some other special relationship that can be established on the particular facts giving rise to a presumption of influence? (1B)
   c. Was undue influence in fact brought to bear in a particular transaction (actual)?
   d. Does the Yerkey principle apply?

2. Who has the onus of proof?
   a. If presumed, can the presumption be rebutted by the stronger pt?
   b. If actual, can the weaker pt prove that the other pt exerted undue influence?

3. If 3rd pt situation, does 3rd pt have actual or constructive notice?

Result: Contract is voidable and may be rescinded
   • Provided pts can be substantially restored to pre-contractual position (think: bars to rescission)

An equitable doctrine concerned with the exploitation or abuse of a relationship of trust and confidence.
   • The relationship must go “beyond mere confidence and influence. It must be a relationship involving dominion and ascendency by one person over the will of the other, and correlative dependence by the other” (Edelman J, Anderson v McPherson (No 2) [2012] WASC 19)

Undue influence can be presumed where:
   • Presumed – a confidential relationship between the pts gives rise to a presumption of influence where the stronger pt must rebut; or
   • Actual – where the weaker pt carries the burden of proving there was influence

ONUS: lies on pt seeking to uphold the contract (stronger pt) to rebut the presumption that transaction wasn’t the result of undue influence: Allcard v Skinner (gift case – clergyman & member of sisterhood)
   • “A presumption will be rebutted if it is proved that the gift was a spontaneous act of the donor acting under circumstances which enabled him/her to exercise an independent will”

1. Presumed Undue Influence

“special relationship”

1A. Type or class of relationships give rise to the presumption that influence has been exercised.
Classes that give rise to presumption that influence has been exercised:
   Parent & child; Doctor & patient; Solicitor & client; Priest & disciples
   ➔ this list is not exhaustive: Johnson v Buttress

To attract this presumption, the benefit has to flow from the weaker pt to the stronger pt (it only operates in a one-way direction)
   • In situations where the traditionally “weaker pt” is the stronger pt, e.g. child being more business-savvy than the parents, this will be a category 1B or 2 but not A (not a class)