

## MODULE 1 – CONTENTS AND INTERPRETATION OF CONTRACTS (CONTINUED)

The identification of the terms of a contract oral statements, the Parol Evidence Rule, and exceptions thereto classification of terms exclusion clauses.

## MODULE 2 – VITIATING FACTORS

An essential part of every contract is the requirement for proper and appropriate consent by the contracting parties. If this is found not to exist then the contract may be rescinded by the innocent party and the party may have a right to claim compensation or damages. The right to claim damages however is not invariable. It depends on the total circumstances. For example if the contract is void ab initio then it is as if the agreement has never existed. In such a situation there can be no right to claim anything by either party. In other cases the contract may be rescinded for a mistake made in the agreement and no compensation may be available also in this instance. Rescission should be distinguished from 'repudiation of a contract'. In the case of repudiation the issue is not one of the factors which vitiate a proper consent (to entering into a contract) but subsequent conduct which amounts to a fundamental breach of the contract by one party. Repudiation is discussed subsequently.

The factors which, by law, are considered to have a potentially vitiating effect on contractual consent are, generally, as follows:

**1. Misrepresentation and Misleading or Deceptive Conduct, 2. Mistake, 3. Duress, 4. Undue influence, 5. Illegality (both common law and statutory) and 6. The Unfair Contracts provisions of the Australian Consumer Law.**

### MISREPRESENTATION AND MISLEADING OR DECEPTIVE CONDUCT

**Fraudulent misrepresentations**- These entitle the innocent party to: **1. rescind the contract 2. claim damages.**

**Negligent misrepresentation** -These are representations which are actionable in tort rather than in contract. Innocent misrepresentations. These also entitle the innocent party to: **1. rescind the contract (but only if the misrepresentation is a 'material' one) 2. claim damages.**

The common elements of both misrepresentations are: **The representation**- The representation may be made by words or by actions Silence does not constitute a representation unless, in the main, it is an insurance contract where there is a positive duty to disclose If only a portion of the truth is expressed then silence in respect of the balance may constitute a misrepresentation *Krakowski v Eurolynx Properties (1995) 183 CLR 563. Its falsity*- If the representation does not accord with the facts then it is false. If it is known to be false at the time it is made, and up until the entering into the contract, then the representation is fraudulent. Alternatively, a representation may factually be false but not known to the representor. In this latter case the representation is 'innocent'. **Its factual basis**- Often (speaking generally and in the broadest sense only), representations as to future events, the law and statements of opinion or intention are not statements of fact. However there are instances where all of these have been deemed by the courts to be statements of fact. **Reliance and materiality**

**FRAUDULENT MISREPRESENTATIONS** An allegation of fraud is a serious matter indeed. It may, after all, also constitute the ground for a criminal prosecution. In some instances, for example, a disaffected party has been known to save on legal costs by simply referring what is, at least ostensibly, a commercial matter to the police. To constitute actual, legal fraud, the representation must be: **1. known to be false**, and made deliberately or, alternatively, made with reckless indifference i.e. not caring whether it is true or false. **2. The leading case** is still the very famous *Derry v Peek (1889) 14App Cas 337* where the presence of an honest belief was held to preclude fraud. At issue here is the subjective state of mind of the representor. That is to say the issue is not what a reasonable person may have believed under the circumstances but what the representor actually, in his own mind, believed

**NEGLIGENT MISREPRESENTATIONS** This category is not specifically a remedy in contract but rather in tort. However, you will find, in due course, that a commercial action can possibly be framed in your Statement of Claim, as an action in contract, as an