Contents

Breach of Contract

A. Introduction

1. What was the breach?

- The contract between P and D required D to __________(e.g. deliver goods/service/maintain/build). D breached the contract by _________(e.g. failed to deliver/ breached the warranty of quality).
    - If there are vitiating factors, go to step C.1 (recission)
    - If it is possible to frame it as debt, go to step C.2 (debt)
    - If there is relevant liquidated damages clause in the contract, go to step C.3 (liquidated damages)

2. What was the loss? – profit? Expenditure?

B. Does P need an Interm/Interlocutory injunction?

In the cases where there are ongoing damages, P can apply an interim/interlocutory injunction to preserve the status quo (if in VIC, under s37 of Supreme Court Act) – preventing D from doing something that would make the eventual resolution of the dispute meaningless or cause irreparable harm before trial.

Party seeking the injunction must undertake to pay damages to D if it turns out at trial that the injunction was not merited.

- **Interim injunction**: ex parte (one party only before court); sought in urgent circumstances; lasts only days until both parties can return
- **Interlocutory injunction**: inter partes (all parties before court); lasts until date of trial
- Other interlocutory orders
    - freezing orders;
    - search order.
- Undertaking to pay payment
    - This incentivises parties not to seek injunctions lightly. Damages on the undertaking operate similarly to contract damages.

1. ***Step 1: Does p have a legal, equity or statutory right***?
    - P must identify a *legal, equitable or statutory right* in support of which the injunction is sought (*Leanah*)
        - Identify the cause of action first — breach of contract

2. ***Step 2: Is there a prima facie case?***

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the threshold to be met for interlocutory injunction is unsettled in Australia. The current Australian position is that the plaintiff must show a prima facie case that if the evidence presently provided is proven at trial, there is <u>sufficient likelihood of success</u> to justify preservation of status quo pending trial. (Beecham, as refined by O'Neill)

- In *Beecham*, the High Court held that the plaintiff must show a *prima facie* case in the sense that if the evidence presently provided is proven at trial, *<u>there is a probability that at trial the plaintiff will be entitled to relief</u>*.
- In the UK case *American Cynamid Co*, Lord Diplock suggested that there need only be a 'serious question to be tried', which was followed by Australian courts until *O'Neill*.
- In the later case O'Neill, Gummow and Hayne J followed the UK case and held that the plaintiff only need to show '*<u>a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial</u>*'.
  - ➢ Note Kirby J's dissent that 'serious question' test better because it doesn't pre-determine the rights of parties based on limited predictions of success.

3. ***<u>Does the balance of convenience favour granting an injunction?</u>***
   - Even if P has a sufficient likelihood of success, the court has discretionary power to determine by weighing up whether granting the injunction is appropriate in all the circumstances (*Saunders*)
     - ➢ Relevant factors
       - ✓ Likelihood of success of P : stronger prima facie case → more weight in P's favour
       - ✓ Irreparable injury to P: will damages adequately compensate P if D is allowed to proceed? If not → injunction more appropriate
       - ✓ Hardship to D: will the injunction cause D disproportionate hardship?
       - ✓ Hardship to third parties: are there innocent third parties who would be affected?
       - ✓ Adequacy of damages to P
       - ✓ Adequacy of undertaking as to damages for D: can P actually pay if undertaking called upon?
       - ✓ Delay on P's part: has P delayed in seeking the injunction? → weighs against granting

C. Are self-help remedies available?

1. Recission
   a. ***<u>Common law recission</u>*** – available only for *<u>fraud and duress</u>*
      Note: common law rescission is useful where rogue has *<u>stolen property and sold it to a chain of parties</u>*. (facts analogy to Caldwell)

When P is a victim to a <u>fraud/duress</u>, common law rescission is available to set aside a transaction. Both parties must make <u>precise restitutio in integrum</u>. (Clarke)

P must elect to rescind their contract (Daly; Alati). Legal title immediately revested in the owner upon selection (Caldwell).

- Election must be clear and unequivocal act – normally communicated to other party
  - Methods of election
    - ✓ verbal or written notice
    - ✓ serving writ seeking rescission
    - ✓ Exception: where fraudster *<u>deliberately evades communication</u>* – other acts sufficient (*Caldwell*)
  - It is unclear whether P must know of a right to elect or whether mere knowledge of facts supporting that right suffice (*Sargent*)
- P will lose their right to rescind if they <u>affirm</u> the contract e.g. claiming compensatory remedies (Maguire)
- Courts *<u>cannot adjust what to be given back</u>* – if P or D cannot give back what they have obtained, recission is not available.
  - In *Clarke*, P bought shares in fraudulent mine in Wales; mine worked, dividends taken, company restructured; shares became worthless. P discovered fraud 3 years later; sought common law rescission. The court refused because shares cannot be restored into the same state.
  - In *Hunt*, P obtained interest in land from fraudulent vendor; had possession and use of land. Recission was refused because common law cannot adjust for that use and complete *restitutio* is impossible.
  - In *Caldwell (*a UK case but may apply in Australia*)*, P sold a car to rogue Norris, cheque bounced and Norris disappeared. The car had been sold by Norris to Motobella (not BFPV) who then sold to Car & Universal (BFPV). P told AA and police, searched streets, attempted recaption of car.
    - ✓ English CA said that P's action (telling AA and police + attempting recaption) was sufficient election. *<u>Title immediately revested in P upon election</u>* and Motobella could not give title to Car & Universal even (*nemo dat quod non habet*) so Car & Universal gets nothing despite being BFPV.

b. ***<u>Equitable recission</u>*** – available for all other vitiating factors

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As P is a victim of fraud/duress/misrepresentation/mistake/undue influence/unconscionable dealing/breach of fiduciary duty, equitable rescission is available to set aside a transaction.

Both parties must make *<u>substantial restitutio in integrum</u>. (Alti) Court may impose terms on recission to achieve 'practical justice. (Alati).*

If P cannot make restitutio in integrum back to D, P cannot get rescission (Maguire)However, pecuniary rescission (Hartigan) or partial rescission (Vadasz) is possible.

P must elect to rescind (as quick as possible before things change too much) their contract (Daly; Alati). Upon election, recipient holds legal title on constructive trust for original owner.

- ***Did P elect to rescind?*** Election must be clear and unequivocal act – normally communicated to other party
  - Methods of election
    - ✓ verbal or written notice
    - ✓ serving writ seeking rescission
    - ✓ Exception: where fraudster deliberately evades communication – other acts sufficient (*Caldwell*)
  - It is unclear whether P must know of a right to elect or whether mere knowledge of facts supporting that right suffice (*Sargent*) knowledge of facts may be sufficient.
- ***Can the court adjust the things given back by imposing terms?*** The Court can use its power to *impose terms* that substantially restore parties to pre-contractual positions so as to *do justice* between the parties. (*Alati*)
  - Possible adjustments
    - ✓ Use of property during period held – rent/hire value for that period
    - ✓ Money held by vendor e.g. purchase money – interest for period held
    - ✓ Stock (consumables) – value of stock
    - ✓ Goodwill – objective value (may be nil)
    - ✓ Lease even if no longer existing – value of lease for period it existed
    - ✓ Property in hands of third party – pecuniary rescission (value of property)
  - Loan agreement can be rescinded on terms of *counter restitution of loan money received* (*Maguire*)
    - ✓ In *Maguire*, solicitor (D) breached fiduciary duty when lent money to his client (P) and attempted to claim possession of P's family home upon failure to repay. The HCA held that rescission available for breach of fiduciary duty, but only *on terms that P must make counter restitution of the loan money*.
      Note: cannot get both recission and consequential losses
  - Courts may make adjustments for P's permanent improvements which were *not mere 'matters of taste or personal enjoyment'* (Brown)
    - ✓ In *Brown*, P purchased farming land and improved the land, then discovered fraud and sought credit for improvements when returning land. HCA held that purchaser was entitled to adjustment/credit for improvement, but only *objective improvements that increase value for anyone*.

- Note: is partial rescission possible? it is unclear whether *partial rescission* is available in Australia.
    - ✓ English court rejected partial rescission as it would make court the moderator of the private affairs of all the families in England (*Myddleton*)
    - ✓ Australian courts seem attempt to award partial rescission
        - In *Vadasz*, D misled that guarantee only covered future debts. HCA held that the guarantor liability was unenforceable for past debts and only enforceable for future debts.
        - In *Bridgewater*, testator left all his property to his male nephew in his will and none to his daughters. Daughters fight for the will and the court tried to work out what the nephew would have gotten if the daughter had been properly represented. Nephew was then subjected to a contractual liability to which he had never agreed.

- ***Proprietary consequences of equitable recission***
    - Before election: Mere equity — inchoate interest; power to rescind; NO constructive trust
    - After election: Equitable title arises — typically constructive trust
        - ✓ Elect after insolvency cannot establish constructive trust
            - In *Daly*, P left money with D then D went insolvent. P tried to establish constructive trust to claim from fidelity fund. The Court refused it because P hadn't elected before insolvency. Constructive trust must pre-exist insolvency to get property back

- ***Does any discretionary considerations bar the recission?***
    - Affirmation
        - ✓ Positive acts consistent with affirmation (claiming SP; suing for damages for breach; ACL damages) will bar recission
        - ✓ Delay with acquiescence may be effective affirmation
    - Delay and acquiescence/prejudice
      Note: delay may be adjusted by interest during the period of delay (*Hartigan*)
        - ✓ Delay and acquiescence – P appeared to accept the transaction; connected with affirmation
        - ✓ Delay and prejudice - D or third parties reasonably acted to their detriment in reliance on delay
            - In *Weldon*, there was 26-year delay but nothing had changed, so rescission was still allowed.
            - In *Hartigan*, D argued that P delayed in bringing her rescission claim. Bryson J excused this delay because it was the poverty resulting from the gift caused the delay. However, there was also long delay before the trial, which was not excused. As a consequence, interest on the pecuniary rescission amount only ran from the commencement of the hearing, not from when the gift was made or when proceedings were filed. She lost the interest that would have accrued during that lengthy pre-trial preparation period.

- Third party right - if an innocent 3P BFPV w/o N has the property, rescission not possible but D may still be required to make pecuniary rescission (*Hartigan*)
    - In *Hartigan*, P gave farm and cows (including Murray Blue Bulls) to D believing religion required it; D sold farm to third parties (BFPV) and used proceeds to pay debts; P left D and sought rescission on basis of presumed undue influence (spiritual advisor and acolyte). Bryson J said rescission was prima facie available as undue influence established, but farm in hands of BFPV so cannot recover property. D must pay fair value of farm.
    - In *McKenzie*, P swape farm with agent's property which was significantly cheaper than P's farm. Farm was subsequently sold to BFPV. The court ordered D to pay difference between actual values of the two properties at date of sale.

      Note: compensation or pecuniary rescission? Both reach same result.
- Hardship: Court may refuse specific relief where granting it would impose undue hardship on D, but the threshold is high. (*Patel*)
    - ✓ Must be *extraordinary and pervasive*
    - ✓ In *Patel*, Mrs Ali had extraordinary and pervasive hardship (cancer, amputation, husband gaoled, sale frozen by trustee in bankruptcy, didn't speak much English etc) which meant damages would be adequate, particularly given the fact the sale of the house had already been delayed for 4 years.
- Lack of clean hands: court will refuse specific relief where P has *misled the court or abused its process*; OR granting relief would enable P to achieve a *dishonest purpose* (*Spry*)
    - ✓ In *Summers*, P failed to disclose that the liquor licence attached to the hotel may be revoked when he contracted to sell a hotel to D. After the contract was signed, the liquor licence was revoked and D refused to go ahead with the sale. P sought SP and the High Court refused because the *failure to disclose material facts indicate a lack of clean hands*.
    - ✓ *must relate to transaction* complained of – cannot be general immorality (*Argyll*)
        - In *Argyll*, Duchess sought injunction to restrain Duke from publishing article as it would breach confidence arising from marital relationship. Duke argued Duchess lacked clean hands because she had affairs. Injunction was still granted because general immorality is irrelevant. The lack of clean hand *must relate to the breach of confidence that is the subject of the relief* sought.
        - In *Hubbard*, Church sought injunction to restrain publication of its secrets. One secret was that the church had a list of people it regarded as enemies and it was acceptable to kill them. The court said church did not come to equity with clean hands given the nature of its secrets. Injunction refused.

2. Debt

- Debt: 'the contractual conditions which trigger payment have arisen'/ a specified obligation under the contract has been completed, and that payment has not been received. (*Barnett*)
- Distinction from damages: No need to prove loss, causation, remoteness or mitigation. When the plaintiff claims a debt, the question is simply whether the sum is due. (*Barnett*)
- Advantages: Mitigation does not apply. Very limited defences.
  - *White and Carter (Councils) Ltd v McGregor*: D repudiated advertising contract on day of making; P refused to accept repudiation; performed for full 3 years; claimed in debt. Succeeded — mitigation irrelevant to debt claim.
  - *Jervis v Harris*: Landlord claimed in debt for repairs; statutory procedure for damages did not apply — debt claim proceeded.

3. Liquidated damages

General principle*: where there is a liquidated damages clause in the contract, the doctrine of penalty may operate to void the clause or render it voidable if the clause is in fact a penalty unless the clause protects a 'legitimate interest'. (Paciocco)*

- ***Is this a clause to which the penalties doctrine applies?***
  - In common law, penalties doctrine only applies if the payment is triggered by *breach of contract* (*Interstar Wholesale Finance*)
  - In equity, doctrine of penalties applies when there is a primary stipulation in favour of a second party, with a collateral stipulation (upon failure of the primary stipulation) imposing *extra detriment* on the first party. (*Andrews v ANZ*) - *Note: UK (Cavendish), Singapore (Denka), NZ all declined to follow Andrews.*
    - ✓ If the payment is an additional/alternative stipulation paying for an extra right, then the doctrine does NOT apply.
      - In *Metro-Goldwyn-Mayer Pty Ltd v Greenham*, the contract for hiring of films conferred the right to a single screening only. The exhibitor's obligation to pay for each additional screening was a fee payable for the provision of additional services. The penalty doctrine does not apply despite the fee is a far higher one.
- ***On the facts, is the clause a penalty?***
  - A clause is NOT in fact be a penalty if the party imposing it had a *legitimate interest in enforcing the primary stipulation*. (Paciocco)
    - ✓ In *Paciocco*, the Court held that bank has a legitimate interest in imposing fees to stop people from not paying their debts, overdrawing the account and making profit.

        - Note: Australia aligned with UK/Singapore/NZ on Question 2 after diverging on Question 1 — arguably closed the door through Question 2 after opening it wide with Question 1.
    - A fee must be <u>extravagant and out of all proportion</u> to be a penalty. (*Paciocco*)
- What are the consequences if the clause is a penalty?
    - Common law: the clause is void.
    - Equity: the liquidated damages are only enforceable to the extent of actual loss.