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# Contract

## Interlocutory Injunctions

Plaintiff may seek interim (ex parte) or interlocutory injunctions in order to preserve the status quo pending a trial.

### Step 1: Is there a legal, equitable or statutory right infringed?

- The plaintiff must show that they have a legal, equitable or statutory cause of action: *Lenah*.
- The power of the court to grant interlocutory injunctions ‘when it is just and equitable’ to do so are not free standing: *Lenah*.

### Step 2: Does the plaintiff have a prima facie case?

- a prima facie case does not require > 50% chance: P need not show that it is more probable than not that at trial P would succeed: *O’Neill*.
- P need only show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial: *O’Neill*.
  - The degree of likelihood required would depend on the nature of the rights asserted and practical consequences likely to flow: *O’Neill*.

### Step 3: Does the balance of convenience favour granting an interlocutory injunction?

- Ultimately a balancing act: weigh the hardship to the plaintiff if the injunction should have been granted but was not, against the hardship to the defendant if the injunction should not have been granted but was.
- relevant factors include:
  - plaintiff’s likelihood of success.
  - ‘irreparable’ injury, hardship and (in)adequacy of damages to the plaintiff.
  - ‘irreparable’ injury, hardship to the defendant **and third parties**.
  - adequacy of undertaking as to damages for the defendant.
  - delay on the part of the plaintiff (again, mere delay in itself is insufficient).

## Rescission

### Common law and equitable rescission

#### Step 0: Point of Election

- A plaintiff cannot both rescind the contract and also receive compensatory remedies as those affirm the contract or transaction: *Alati; Maguire*.
- P must elect to rescind the contract: *Daly; Caldwell*.
- [Note: once it is rescinded, the contract is extinguished ab initio – cf termination by breach].

#### Step 1: Identify the vitiating factor

| Common law rescission:                                                                                                                                  | Equitable rescission:                                                                                                                                                                                                                                                                                                                                 |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <u>Only</u> <ul style="list-style-type: none"><li>○ Fraud (fraudulent misrepresentation): <i>Clarke v Dickson; Caldwell</i>.</li><li>○ Duress</li></ul> | <ul style="list-style-type: none"><li>○ Fraud (fraudulent misrepresentation): <i>Alati v Kruger; Vadasz</i>.</li><li>○ Duress</li><li>○ Misrepresentation (negligent or innocent).</li><li>○ Mistake</li><li>○ Undue influence: <i>Hartigan</i>.</li><li>○ Unconscionable dealing</li><li>○ Breach of fiduciary duty: <i>Maguire; Daly</i>.</li></ul> |

## Step 2: Availability

|                               |                                                                         |
|-------------------------------|-------------------------------------------------------------------------|
| Common law rescission:        | Equitable rescission:                                                   |
| available for contracts only. | available for contracts, gifts (see <i>Hartigan</i> ), and conveyances. |

## Step 3: Election

### (a) The need to make election

- A plaintiff cannot both rescind the contract and also receive compensatory remedies as those affirm the contract or transaction: *Alati; Maguire*.
- P must elect to rescind the contract: *Daly; Caldwell*.
- Unclear whether P must know of a right to elect (i.e. legal rights) or whether mere knowledge of facts supporting that right suffice: *Sargent*.

### (b) How to make an election

- Election must be an unequivocal and overt act:
  - a manifestation of P's choice between affirmation or rescission of the impugned transaction
- Election must be communicated to the other party  
Examples:
  - verbal or written notice: does not require a formal statement or legal language.
  - conduct insistent with continual existence of the contract:
  - demand repayment of purchase price
  - recaption or repossession of sold goods
  - (maybe) non-performance of a contractual obligation which the other party is aware.
  - serving a writ on the other party of an action in rescission: see *Alati*.
- Exception to the communication requirement:
  - Where a fraudster have absconded and deliberately attempted to evade communication, it is enough for the plaintiff simply to make the intent to rescind known to the world (by telling the police and automobile association and attempted to repossess the car): *Caldwell*.

### (c) Consequences of making an election

|                     | Common law rescission                                                     | Equitable rescission                                                                                                                                                                                                                                              |
|---------------------|---------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Before election     | No title.                                                                 | Mere equity: <i>Latec; See Daly</i> . <ul style="list-style-type: none"><li>◦ <i>Daly per Brennan and Wilson JJ</i>: plaintiff failed to make the election before Patrick Partners went insolvent – so he was unable to establish a constructive trust.</li></ul> |
| ◦ Passed onto BFPV? | BFPV prevails & takes title.<br>Note pecuniary rescission.                | BFPV prevails & takes title: <i>Latec</i> .<br>Note pecuniary rescission.                                                                                                                                                                                         |
| After election      | Legal title immediately revests in the plaintiff: <i>Caldwell</i> .       | A 'full blown' proprietary interest – legal title will be held on constructive trust for the plaintiff: <i>Latec; See Daly</i> .                                                                                                                                  |
| ◦ Passed onto BFPV? | BFPV cannot take title because of <i>nemo dat</i> rule: <i>Caldwell</i> . | BFPV prevails & takes title: <i>Latec</i> .<br>Note: pecuniary rescission against the Def still available ( <i>Hartigan</i> ) [see below].                                                                                                                        |

## Step 4: Requirement of Restitutio in integrum (RII)

|                       |                                                          |
|-----------------------|----------------------------------------------------------|
| Common law rescission | Equitable rescission                                     |
| Requires precise      | Only requires <b>substantial</b> Restitutio in integrum. |

|                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| or complete RII.                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Not where Ps had briefly taken possession of the land: <i>Blackburn v Smith; Hunt v Silk</i> . | The Court can use its power to <b>make adjustments</b> that substantially restore parties to pre-contractual positions so as to do practical justice between the parties: <i>Alati</i> .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                              | But <b>Impossibility</b> to achieve even substantial RII will be a bar: <i>Clarke v Dickson; Maguire</i> .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|                                                                                                | <p><i>Alati</i> - Buyer:</p> <ul style="list-style-type: none"> <li>• Fruit shop: returns the fruit shop</li> <li>• Use/possession of the shop: pay rent for the period</li> <li>• Stock &amp; chattel: return those still in possession + money value for those sold/dissipated</li> <li>• Goodwill: no compensation need because (i) query whether there is any goodwill in the first place and (ii) the deterioration of goodwill is <b>not due to the buyer's fault</b> (i.e. the goodwill will have deteriorated anyway even if no transaction occurred).</li> <li>• Lease: the buyer stopped paying rent and landlord repossessed. Adjustments can be made by asking the buyer to pay 'the difference between the rental value of the shop and the rent payable to the landlord'.</li> </ul> <p>(see below – discretionary bar)</p> | <p><i>Alati</i> - Vendor:</p> <ul style="list-style-type: none"> <li>• Pays back <b>money</b></li> <li>• Plus <b>interest</b> for the period</li> <li>• <b>Improvement:</b> Vendor needs to pay for <u>the costs</u> of improvement as long as they are not matters of taste or personal enjoyment: <i>Brown</i>.</li> </ul> | <p><i>Clarke v Dickson</i> (although sued under CL, may well be barred even under equitable rescission):</p> <ul style="list-style-type: none"> <li>○ The mines were worked.</li> <li>○ Dividends were paid out.</li> <li>○ Corporate structure were changed.</li> <li>○ The Co now went insolvent.</li> </ul> <p>All of these meant that even substantial RII is impossible.</p> <ul style="list-style-type: none"> <li>• Note: Clarke can sue in deceit.</li> </ul> <p><i>Maguire</i>: the Ms lent money to buy a farm on a mortgage of their home. the lawyer borrowed from CBA and on-lent it to the Ms – breach of fiduciary duty.</p> <ul style="list-style-type: none"> <li>○ Since the Ms. cannot repay the loan and the interest, it was impossible to achieve substantial RII – so rescission not available.</li> <li>○ <i>Cf Amadio</i>: the court set aside the whole guarantee – this was because the Amadios did not receive any reciprocal benefit so there was nothing for <i>them</i> to return.</li> </ul> |
|                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                              | <p>Note: possibility of partial rescission?</p> <p><i>Vadasz</i>: the P guaranteed the debts incurred by his company. the guarantee was misrepresented to be relating to only future debt when in fact it was both past</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |