

VITIATING FACTORS - Misinformation

Misrepresentation

- **Misrepresentation:** Making of a false statement, either expressly or impliedly, to induce another person to enter into a contract
 - False statement may be a term, collateral or misrepresentation

STEP 1: Must be in reference to an existing fact

- A statement of opinion can sit an implied statement of fact: ***Smith v Land & House Property Corp***
 - When there is an imbalance of information, then a statement of opinion by one who knows the facts implies that he knows facts which justify his opinion – eg a “most desirable tenant” - ***Smith v Land & House Property***
 - If a representation is a statement of opinion, and if that statement of opinion is not genuinely held, then there is a fraudulent representation, and there is misrepresentation as to an existing fact: ***Fitzpatrick v Michel***
- Similarly, for a statement of law to be held as a misrepresentation, it must be fraudulently stated: ***Public Trustee v Taylor***
- A misrepresentation as to the state of a man’s mind, in regards to a statement of future of future intention, is a misstatement of fact: ***Edgington v Fitzmaurice*** (very narrow category, normally statements of future intention are not misrepresentations)

STEP 2 Must be positive in nature

- Generally no duty of disclosure and silence is not a basis for relief
- Exceptions:
 - (i) From the nature of the relationships
 - When the defendant was a real estate agent who was advising and assisting a woman in financial problems, this brought him within the equitable requirements of full disclosure and fair open dealing
 - (ii) Half-truths
 - (iii) If circumstances change
 - When the payment was produced by the belief that the company had a probable cause for prosecution, the circumstances meant there was a duty to state that those facts no longer existed: ***Davies v London & Provincial Marine Insurance***

STEP 3: Must be reliance on the representation

- A representee who is seeking relief must be able to establish a causal link between the misrepresentation and the representee’s entry into the contract

STEP 4: Remedy - rescission

Misleading or Deceptive Conduct

STEP 1: Legislation

- **S18(1) ACL:** A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive

STEP 2: "In trade or Commerce"

- Refers only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character: **Concrete Constructions (NSW) v Nelson**
 - An employee injured due to his manager's deceptive conduct does not count as "in trade or commerce": **Concrete Construction**
- Means "within" not "in connection to": **Concrete Constructions v Nelson**
- Private sale of land between two individuals does not amount to conduct that is done in trade or commerce, unless the sale is done in the course of a business activity or a 'business context': **O'Brien v Smolonogov**
 - A block of six units being let out by an individual was in trade or commerce: **Havyn Pty Ltd v Webster**
- It does not matter that it was not "their" trade or commerce – fine to be the other parties: **Houghton v Arms**
- It is fine for an employee to make a statement as an extension of an employer's trade or commercial activities: **Houghton v Arms**

STEP 3: Misleading/Deceptive conduct – Need to look at the audience the conduct is directed to, to determine if it is misleading and deceptive

1. Directed at the public at large
 - In the case of representations to the public, of which this is one, must consider the "ordinary" or "reasonable" members of the class of prospective purchasers: **CSL v Nike**
 - The conduct must cause the representee to labour under some erroneous assumption: **CSL v Nike**
2. Directed to individuals
 - When monetary relief is sought by a plaintiff who alleges that a misrepresentation was made, the relevant audience is the individuals: **Butcher v Lachlan Elder Realty**
 - Look at the nature of the parties, character of transaction, contents of brochure: **Butcher v Lachlan Elder Realty**
 - Conduct is misleading when a person is led to believe things that are not true or correct: **Henjo Investments v Marrickville**

STEP 5: Remedies

- Court can give damages or any other order it thinks fit to prevent loss being suffered as a result of a breach of s18
 - Damages to compensate for loss – s236
 - Declarations that the contract is void, or is to be varied, or that a person is to refund money or return property – s243

Mistake

SITUATION 1: Parties in agreement (*Mutual Mistake*)

- (i) **Mistake as to existence of a subject matter: *McCrae v Comm.***
1. Look at the intention of the parties
 2. To see if there was an implied condition precedent to the formation of the contract that the subject matter was in existence
 - a. If there is, then this would give rise to a right to termination
 - Equally mistaken (can't induce) and makes the contract essentially different
 - b. If there is not, then see if the defendant warranted existence of the subject matter
 - If it was a breach of an essential condition → give rise to a right to termination
 - If there was a warranty, then the contract would still be on foot, and the defendant would be liable for breach
 - ***McCrae***: only proper construction was that there was a promise that there was a tanker in the position specified, as the parties relied and acted upon that assertion
 - c. Probably wasn't an important mistake
- (ii) **Mistake as to the quality of subject matter**
- ***Bell v Lever Brothers***: A mistake as to the quality of the thing contracted for will not affect assent unless it is:
 - a. the mistake of both parties, and
 - b. is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be:
 - Not realising that there were grounds to terminate a contract is not a mistake that gives a right to rescission: ***Bell v Lever Brothers***

Note:

- ***Solle v Butcher*** held that equity could find a mistake voidable if the parties were under a common mistake that was fundamental and the party seeking to set it aside was not at fault
 - ***Great Peace Shipping*** (HoL) – overruled *Sole v Butcher*
 - Would be doubtful if *Solle v Butcher* applied in Australia
- (iii) ***Common mistakes as to title after the completion of sale of land***
- After the completion of the sale of land the contract cannot be set aside on the ground that the purchaser was induced into it by an innocent material misrepresentation: ***Svanosio v McNamara***
 - Exception: it may be possible to obtain relief on the ground of common mistake after a contract for the sale of land has been completed, if there has been a total failure of consideration: ***Bingham v Bingham***
 - EG if they contracted for land they actually owned
 - This would make the contract void

SITUATION 3: Common mistake in recording the agreement

- Courts have an equitable power to *rectify* a written contract

Must prove:

1. The final agreement is intended to be an embodiment of the antecedent bargain/common intention: ***Maralinga v Major Enterprises***

- Clear this is not the case when the other party clearly said no (“sign or the deal is off”) when asked to change the contract: **Maralinga v Major Enterprises**
- 2. There was such an antecedent bargain/common intention in the first place: **Pukallus v Cameron**
 - There must be evidence to support the exact agreement of the common intention – eg reference to the land: **Pukallus v Cameron**

SITUATION 4: Parties not in agreement

(i) Mistake as to terms – makes the contract voidable in equity

1. One person enters into a contract under a serious mistake about its content in relation to a fundamental matter: **Smith v Hughes**
 - The mistake must relate to the contractual terms: **Smith v Hughes**
2. The other party is aware that circumstances exist indicating that the first person is entering into the contract under a serious mistake about the content: **Smith v Hughes**
 - TEST: whether a reasonable person, looking at the conduct of the seller, would believe they are assenting to the terms: **S v H**
3. The second party deliberately sets out to ensure that the first party does not become aware of the existence of the mistake, either by positive acts or omitting to bring it to their attention: **Taylor v Hughes**
 - Johnson had mistakenly believed the price was \$15000 per acre, and Johnson appeared to deliberately set out to make sure she did not become aware of her mistake

(ii) Mistake as to identity – use offer/acceptance analysis

a. Not face to face

- If the rogue party pretends they are someone else who is a more reputable business or a real person the court is likely to find there is no consensus → void: *Cundy v Lindsay, Shogun*
- If a rogue party pretends they are a fictitious entity, the contract will not be void, only voidable: *Kings Norton v Elridge*

b. Face to Face

- Where the rogue is in person – the presumption is that there is consensus ab idum that you are contracting with the person who is there, and the contract is voidable: *Lewis v Avery*

(iii) Mistakenly signed documents

- If a person proves that he or she signed a document without carelessness and believing it to be fundamentally different from what it was, they are not bound by the signature: **Petelin v Cullen**
 - Available to those who are unable to read owing to blindness or illiteracy, or who through no fault of their own are unable to understand a document
 - Heavy onus on the defendant who seeks to establish it

(iv) Electronic Transactions Act 1999 (Cth) s15D, Electronic Transactions Act 2000 (NSW) s 14D

- Courts may provide relief where a person makes an 'input error' in the course of a transaction with an automated system – if the person making the error do so as soon as possible after learning of the error, and did not receive any material benefit and was not given an opportunity to correct the error