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RESCISSION

- Equity has both exclusive and auxiliary jurisdiction to grant rescission.
- Exclusive – when equitable principles have been infringed (for example, property received in breach of fiduciary duty).
Auxiliary – when the matter before the court involves a breach of legal rights (for example, the transfer of real property pursuant to unconscionable conduct on the part of the transferee).
- Objective of rescission – to place both parties in the position they would have been in had the breach not occurred.
- Case – *Alati v Kruger* (1955) 94 CLR 214.
- A party to a contract may decide that it would rather get out of the contract than complete it or sue for damages for a breach. The ability to do this depends on whether there are grounds to rescind.
- Can only occur in very limited circumstances. Generally, these circumstances arise when the agreement or assent of the parties to the bargain can be questioned.
- In the pursuit of practical justice, equity will have regards to what would have happened in the absence of vitiating circumstance (*Cockerill v Westpac Banking Corp* (1996) 142 ALR 227).

Difference to Termination

- Termination – brings an end to future obligations of the parties to the contract.
- Rescission – ends all obligations and rights under the contract past and future by placing the parties in the position as if there had been no contract. Often referred to as rescission ab initio.

Requirements for Rescission

- The contract is in some way voidable or the assent of a party to the contract has been improperly procured such as by undue influence or duress etc.
- The party with the right to rescind elects to take that option rather than affirm the contract.
- Rescission is possible by way of restitutio in integrum – that is, restoration of the parties to their pre contract position.

Distinction between voidable and void contracts

- Void – cannot be rescinded because it is a nullity from its inception.
- Voidable – subject to a flaw (for example, it was induced by undue influence) but is valid until it is rescinded.

Statutory Rescission

- s137F *Competition and Consumer Act 2011* (Cth) – court may make orders for the purpose of preserving money or other property held by the person.
- S4(2) *Sale of Goods Act 1923* (NSW) – the rules of common law in regards to the effect of fraud, misrepresentation, coercion mistake or other invalidating cause shall continue to apply to contracts for the sale of goods.
- Statutory rescission is wider than the equity courts ability to grant rescission (*JAD International Pty Ltd v International Trucks Australia* (1994) 50 FCR 378).

MISREPRESENTATION

To invoke the “traditional” category of misrepresentation, there must be:

- A representation, and
- The representation must be of fact, and not opinion (provided the opinion is honestly held (*Bisset v Wilkensen* [1927] AC 177)).

If the representation is of an opinion and the opinion is not honestly held, the representation is **fraudulent**.

- The opinion therefore becomes a statement of fact because the person making the representation wants the other party to believe that the opinion is honestly held (*Smith v Land and House Property Corp* (1884) 28 Ch D 7).
- A statement of intention will be treated the same way as an opinion and will not constitute a misrepresentation if honestly held (*Edgington v Fitzmaurice* (1885) 29 Ch D 459).
- The representation must be false at the time it was made.
- If there are continuing and changing circumstances the representor is under a duty to correct the representation if aware of such changes (*With v O’Flanagan* [1936] Ch 575).
- It is not up to the representee to question or to satisfy itself as to the representation (*Redgrave v Hurd* (1881) 20 Ch D 1).

At common law

The additional element of fraud in making the representation is required (*Derry v Peek* (1889) 14 App Cas 337).

The representor must induce the representee to enter into the contract.

In order to constitute fraud, the representation must be made with:

- Knowledge of its falsity, or
- Without belief in its truth, or
- Recklessly was to whether it was true.

At equity

Permits rescission for innocent misrepresentation on the basis that intent to deceive was not necessary so long as there was “equitable fraud” (*Redgrave v Hurd* (1881) 20 Ch D 1).

MISTAKE

Three categories of mistake:

1. Common mistake – where both parties have made the same mistake.
2. Mutual mistake – where both parties are mistaken but each has made a different mistake.
3. Unilateral mistake – where only one party is mistaken.

* Traditionally, the mistake must have been one of fact and not law.

* However, mistake of law is now recognised (*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353).

Three consequences of mistake:

1. Prevents the formation of a contract
2. Renders the contract void at common law
3. Renders the contract voidable in equity

Common Mistake

- A common mistake which is fundamental renders a contract void at common law (*Bell v Lever Bros Ltd* [1932] AC 161).

- Tends to have limited application at common law and equity – courts tend to see the matter as one involving the construction of the contract even where the mistake concerns the very existence of the subject matter of the contract (*Mcrae v Commonwealth Disposals Commission* (1951) 84 CLR 377).
- Contracts which are not void at common law for common mistake can be set aside in equity if there is a common mistake as to facts or rights which are fundamental and the party seeking to set it aside is not at fault (*Solle v Butcher* [1950] 1 KB 671) – this authority however may be doubted in Australia in light of *McRae* and *Svanosio v McNamara* (1956) 96 CLR 186).

Mutual Mistake

- Goes to the formation of the contract and the reality of the agreement.
- In equity there is no authority permitting rescission on this ground.

Unilateral Mistake

- Not generally available at common law (*Taylor v Johnson* (1983) 151 CLR 422; *Solle v Butcher* [1950] 1 KB 671).
- Possible exceptions:
 - informal contracts
 - mistake as to the identity of the other party
 - mistake as to the nature of the contract (non est factum)
- Equity will order rescission where:
 1. The other party was aware of the mistake of the first party as to consent or subject matter.
 2. The other party deliberately takes steps to ensure the first party does not become aware of the mistake.
- Rescission in equity for unilateral mistake is based on fraud (*Taylor v Johnson* (1983) 151 CLR 432).

DURESS

- Concerns the use of illegitimate pressure upon the will of a party to a contract.
- Seen in terms of whether or not a party's will has been deflected (*Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) NSWLR 40).

Duress to the person

- Actual or threatened physical harm to the person of a party to the contract or a close relative (*Barton v Armstrong* [1976] AC 104).
- Must be dominant reason for entering into contract.
- Can apply notwithstanding the fact that the contract was advantageous to the oppressed party.

Duress to goods

- Actual or threatened detention damage or destruction of goods without lawful excuse.
- Operates in same way as duress to person.
- Payments made under duress are recoverable by way of restitution for unjust enrichment.

Economic Duress

- Illegitimate economic pressure (*Universe Tankships Inc v Monrovia v International Transport Workers' Federation (The Universal Sentinel)* [1983] 1 AC 366).

- A threatened contract may amount to duress (*North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] 1 QB 705).
- Mere pressure will not amount to duress.
- A threat of lawful conduct can be illegitimate if done in support of an unlawful demand (*J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539).

UNDUE INFLUENCE AND UNCONSCIONABILITY

Undue Influence

Two types:

1. Presumed undue influence
2. Actual undue influence

Presumed undue influence

Complainant has to show that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship to enter into the impugned transaction.

- Establishing the presumption – classes of relationship that attract the presumption:
 - a) Solicitor/client
 - b) Trustee beneficiary
 - c) Doctor/patient
 - d) Parent/child
 - e) Spiritual leader/follower
 - f) Guardian/ward
- These categories are not closed (*Union Fidelity Trustee Co of Australia v Gibson* [1971] VR 573; *McCullough v Fern* [2001] NSW 406).
- Rebutting the presumption – wrongdoer bears onus.
- Factors which may rebut the presumption are independent advice (*Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWLR 30) or the fact that the transaction was fair and reasonable.
- Spousal guarantees – A special case arises when the wife of a debtor is a guarantor and the husband has exercised influence over the wife to procure her agreement to the contract with the creditor. A wife need not prove actual or constructive notice (by the third party) of the undue influence – the conduct of the husband binds the bank, independently of agency or notice (*Yerkey v Jones* (1939) 63 CLR 649).
Unconscionability may also apply in such a situation (*Garcia v National Australia Bank* (1998) 194 CLR 395).

Actual undue influence

When one party has a position of ascendancy or power of domination over the other. In such a situation, the subordinate party had to have taken a position of dependence or subjection (*Goldsworthy v Brickell* [1987] Ch 378).

Requirements for proving actual undue influence (*Bank of Credit and Commerce International SA v Aboody* (1989) 1 QB 923:

* dominant party has capacity to influence the other;

- the influence is actually exercised;
- the exercise of influence is undue; and
- the relevant transaction was the result of the exercise of influence.

Unconscionable dealings/Unconscionable conduct

Extends to circumstances which:

- A party to a transaction was under a special disability in dealing with the other party, with an absence of any reasonable degree of equality between the parties, and
- That disability was sufficiently evident to the stronger party to make it prima facie unfair or unconscientious the he procure, or accept, the weaker party's assent to the transaction in the circumstances.

The onus is on the stronger party to show that the transaction was fair, just and reasonable (*Blomley v Ryan* (1956) 99 CLR 362).

Special circumstances necessary to raise the issue of unconscionability

(*Blomely v Ryan* (1956) 99 CLR 362)

- poverty or need of any kind
- sickness
- age
- sex
- infirmity of body or mind
- drunkenness
- illiteracy or lack of education
- lack of assistance or explanation where either is necessary
- Common characteristic: has the effect of placing one party at a disadvantage

(*Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447)

- some characteristic which seriously affects the ability of the innocent party to make a judgement as to his own best interests.
- The onus of proof initially falls upon the plaintiff to establish a sufficient degree of disadvantage, then shifts to the defendant to prove that the transaction was just and reasonable.

The place of third parties

Remedy may be applied against a recipient who has notice of the application of undue influence (*Bank of New South Wales v Rogers* (1941) 65 CLR 42).

Election

Where the right to rescind arises, it arises because the contract is voidable not void. Therefore, the party with the right to rescind must make the choice to elect between rescission or affirmation of the contract. These are mutually exclusive choice (*Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust* (1992) 182 CLR 26).

- Rescinded – contract is ab initio.
- Affirmed – contract valid and enforceable by both parties.

Delay in acting to rescind may be taken as an election to affirm.