

Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 13 – real or genuine consent

1. Consent is an essential feature for a valid and binding contract.
2. There are a variety of situations at law that may place some doubt on whether both or either of the parties in a contract genuinely consented to their contract and these include:
 - mistake;
 - misrepresentation;
 - duress;
 - undue influence; and
 - unconscionable conduct/contracts.
3. Where a party to the contract makes an error in judgment or a poor commercial decision, the contract usually remains valid and binding on the mistaken party.
4. There are very few mistakes that the courts will recognise as excusing a party from performing their contract.
5. There are mainly three forms of legal mistakes that may allow a contract to be avoided:
 1. common mistake;
 2. mutual mistake (*Raffles v Wichelhaus*); and
 3. unilateral mistake: *Cundy v Lindsay*, *Phillips v Brooks* and *Lewis v Avery*.
6. Depending on the circumstances of each case, a mistake may make the contract void or voidable.
7. **Non est factum.** This phrase means “not my document” and applies where a party who signs a written contract claims that it was signed under a mistake. This legal defence is only available to a limited group of people who require documents to be read over to them, eg blind or illiterate: see *Petelin v Cullen*.
8. A “misrepresentation” may be described as a false statement of fact that induces another to enter into a contract. If a misrepresentation is recognised as being part of the contract then it may create contractual remedies.
9. There are three types of misrepresentation:



- (a) fraudulent misrepresentation;
 - (b) innocent misrepresentation; and
 - (c) negligent misrepresentation: see *Shaddock v Parramatta City Council*.
10. A party induced to enter into a contract through fraudulent misrepresentation can rescind the contract and/or sue for damages in the tort of deceit.
 11. A party induced to enter into a contract through a misrepresentation that is innocent, but not also negligent, can rescind the contract but has no right to damages.
 12. A party induced to enter into a contract through a misrepresentation that is innocent and also negligent can rescind the contract and/or sue for damages.
 13. The right to rescind can be lost because of:
 - affirmation;
 - unreasonable delay;
 - the impossibility of restitutio in integrum; or
 - conflict with the rights of an innocent third party.
 14. Up until 2011 the *Trade Practices Act 1974* (Cth) dealt with various types of false, deceptive and misleading statements either inside or outside a contract. Section 52 was a widely drafted law prohibiting any form of misleading or deceptive conduct. This is a much wider concept than the common law issues of misrepresentation. Sections 53 – 64 target specific forms of misleading or false statements or conduct. See Chapter 19 for new consumer laws dealing with misleading and deceptive conduct and other unfair practices.
 15. Note that the Fair Trading Acts in the States and Territories mirrored these provisions of the *Trade Practices Act 1974*. The new ACL replaced these State laws after 2011: see Chapter 19.
 16. **Duress.** Where a party induces the other party to make a contract by violence, or threats of violence, the contract is voidable. The threats can be to the party or to a close associate: see *Barton v Armstrong*.
 17. Undue influence occurs where one contractual party is in a position to influence or dominate another. A contract induced by undue influence is voidable.
 18. Undue influence is the illegitimate use of persuasion by one party (the dominant party) to overbear the will of the other party (the subservient party).
 19. Presumed undue influence arises in certain recognised relationships including:
 - parent over child;



- doctor over patient;
 - solicitor over client; or
 - religious advisor/worshipper: see *Allcard v Skinner*.
20. Actual undue influence is where there is no recognised relationship and so there is no presumption in favour of undue influence. Undue influence must be proved in such situations.
 21. The common law will not usually interfere with a valid contract simply because it is unfair to one of the parties.
 22. Unconscionable contracts involve a stronger party taking some advantage of a weaker party with a legal “disability” and forcing that weaker party into some unfair bargain: see *Bridgewater v Leahy* and *Commercial Bank of Australia v Amadio*. In such cases, the contract is usually void.
 23. In more recent cases such as *Louth v Diprose* and *Hurt v Freeman*, the courts have been prepared to recognise “love” or “infatuation” as a “disability” that prevents a party properly protecting their own interests. Sometimes this may allow a weaker party to have a contract set aside as “unconscionable”.
 24. The *Contracts Review Act 1980* (NSW) gives a court the power to review a contract that is unjust/oppressive/unconscionable. Applications must be made to the court within two years of the contract. Courts must consider whether the contract is unjust, taking into account the public interest and all the circumstances of the contract.
 25. The Act itself sets out a non-exhaustive “shopping list” of specific factors that a court may examine in deciding the issue of unconscionability: see *Baltic Shipping v Dillon* and *Commercial Bank of Australia v Amadio*. The Act grants courts both principal and ancillary remedies.
 26. The Act does not generally apply to commercial contracts and action must be taken within two years of the contract.
 27. In New South Wales, ss 83 – 100 of the *Industrial Relations Act 1996* allow an employee to seek remedies where their dismissal was unfair, harsh or oppressive.
 28. Sections 51AA, 51AB and 51AC of the *Trade Practices Act 1974* (Cth) prohibited unconscionable conduct by a corporation in trade or commerce. Note the new provisions about unconscionable conduct in ss 20-22 of the *Competition and Consumer Act 2010* (Cth) (see Chapter 19 for the new consumer laws).
 29. Many statutes/industrial legislation in most jurisdictions allow an employee to seek remedies for unfair dismissal, eg *Fair Work Act 2009* (Cth).