



Business Law (6th edn)

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Abstract

This chapter discusses how the manner in which a contract is concluded can potentially affect its validity. Before discussing the terms and details of a contract, it is important to note that a contract may fail due to one or both parties not possessing the capacity to establish a contract. Some of the common reasons includes a mistake by one or both parties, a provision that has been misrepresented in the negotiations, or the use of undue influence or placing the other party under duress in the process of concluding the contract. Some of the reasons listed in this chapter may be common, but the emphasis here is to identify where problems may occur that could prevent the successful operation of the contract despite fulfilling the essential features discussed in the previous chapters.

Keywords: contract, validity, undue influence, duress, essential features

Chapters 5 and 6 identified the movement from an agreement to a legal enforceable contract. Before the details of the terms of the contract, and how it is brought to an end are discussed, it is important to recognize that a contract may fail due to a party not possessing the capacity to establish a contract, it could involve a mistake by one or both parties, a provision may have been misrepresented in the negotiations, or the contract could have been concluded by using undue influence or placing the other party under duress. These factors have significant consequences on the validity of the contract and must be understood, in conjunction with the previous chapters, to ascertain whether the contract is void or voidable.

Business Scenario 7

Dewi is selling a plot of land in Derbyshire consisting of 200 acres. He is approached by Rahul who states that he is interested in purchasing, but only if he can be assured that the land is capable of sustaining his 200 herd of cattle.

Dewi provides this assurance despite the fact that he has no experience of this method of farming. Following the sale, Rahul discovers that the land is incapable of sustaining his cattle and they will have to be moved to another location (at great expense) and the land is worthless for his intended use.

Rahul's son, Minesh who is 15, recently took delivery of nine pairs of welted brogue shoes, four tweed jackets, and three waterproof caps which he ordered from a local bespoke men's tailor shop. The total cost was £1,300 and payment was due following an invoice being sent to his home address. Minesh has no intention of paying the bill.

Later Dewi, an 88-year-old man, decides to sell his house to his grandson, Geraint. Geraint has been dealing with Dewi's financial affairs for some time and has control over his bank accounts and may make payments on Dewi's behalf. He informs Dewi that he will draft the contract of sale to save Dewi any trouble as he is very grateful to be receiving the house at a very competitive price. The agreement between Dewi and Geraint is that Dewi will remain in the house until he dies, and will pay Geraint a nominal rent.

Geraint drafts the contract as arranged but this does not include the agreement for Dewi to continue to reside in the property. Further, the agreement does not state that Geraint is to be the purchaser, but rather his business partner is the buyer. Geraint does not inform Dewi of these changes and presents him with the contract, informing him to sign it immediately and not to waste his time by reading the document or seeking legal advice. Geraint pressurizes Dewi to sign the contract before he leaves the property.

Geraint's business partner does not pay any money for the property, but has taken out a large mortgage on it and has not made any repayments. Subsequently, the mortgage company wishes to repossess the property to recover its money.

p. 146 Learning Outcomes

- Identify how the law imposes restrictions on certain persons when forming a contract (7.2)
- Provide examples of illegal contracts (7.3)
- Explain the effect a mistake has on an agreement between the parties (7.4–7.4.2)
- Identify where a contract has been formed on the basis of misrepresentation, and the remedies available to the innocent party (7.5–7.5.6)
- Explain what effect the use of duress and undue influence has on the validity of a contract (7.6–7.6.2).

7.1 Introduction

Chapters 5 and 6 have identified the features necessary for an agreement to become a valid contract. Once agreement, consideration, intention to create legal relations, and certainty of terms has been fulfilled, a contract may be established. However, problems may exist in how the agreement was concluded that could affect its validity. What if one of the parties induced the other into the contract by misrepresenting an important aspect of the contract? What if one of the parties was clearly in a drunken state and could not understand what they were agreeing to? What if one party was told to agree to the contract or they would be shot? Some of the reasons listed (naturally) are more common than others, but the emphasis of this chapter is to identify where problems may occur that could prevent the successful operation of the contract, despite fulfilling the essential features.

7.2 Capacity to enter a valid contract

For an enforceable agreement to be created the parties involved must have the capacity to create a contract. This is particularly so where the person is vulnerable.

7.2.1 Minors

A minor is a person under 18 years of age (Family Law Reform Act 1969, s. 1) and has the capacity to establish most contracts. However, whilst this is generally true, situations exist where the minor requires protection and in those situations the contract established may be voidable, hence allowing the minor the ability to avoid the contract. Typically, contracts involving the sale of shares, the leasing of property, and contracts of partnership have been held as voidable, rather than void.

Steinberg v Scala (Leeds) Ltd (1923)

Facts:

A minor had been allotted shares in Scala and had made an initial payment, but was unable to meet future payments. As such, she brought a claim to end the contract and recover the money already paid.

Authority for:

The court allowed Steinberg to end the contract (it was voidable by the minor) but she failed in her action to recover the money already paid.

The minor may avoid such contracts within a reasonable time, and until they reach the age of majority, but must satisfy any debts whilst party to the contract.

Circumstances exist where a minor is bound by the contract. If the contract is for necessities, as defined under the Sale of Goods Act 1979, s. 3, then the contract will bind the minor.

Consider

Can the owner of the tailor's shop successfully recover the payment due for the clothes supplied to Minesh? Are they necessities, and given the nature of the items ordered, would the courts be more likely to follow the ruling in *Nash v Inman* or in *Peters v Fleming* (both are covered below)?

Nash v Inman (1908)

Facts:

A tailor had supplied several waistcoats and other items of clothing, at a cost of £123, to an undergraduate studying at Cambridge. When payment for the items was not made, the tailor sought to recover the money.

Authority for:

The court refused to allow the defendant to recover payment. The goods supplied were not 'necessaries' as the minor had a sufficient quantity of clothes.

'Necessaries' is a broad term, and whilst this can include food and clothing, it has been assessed as including items reflecting the minor's social status.

Peters v Fleming (1840)

Facts:

Whilst a minor, Mr Fleming obtained several items of expensive and ornate jewellery. He would not pay for the items although he had the means to do so.

Authority for:

The jeweller brought an action for payment when Fleming reached majority, and it was held that items such as a gold ring and gold watch (as supplied) *were* necessities for a rich young man. Designation of a necessary may depend on the status of the individual.

- p. 148 ↩ Where necessities have been provided, the minor is liable to pay a reasonable price (Sale of Goods Act 1979, s. 3), rather than, necessarily, the price established in the contract. Further, where the contract is not unduly harsh or detrimental to the minor, it will be binding.

Clements v London and North Western Railway Co. (1894)

Facts:

A minor had been employed as a porter at a railway and had agreed to join an insurance society that was organized by the railway's employees. The effect of this membership was, in part, to waive rights against the employer as provided under the Employer's Liability Act 1880, as the society provided a more comprehensive package of protection. This protection was beneficial in some circumstances, but, importantly in this case, provided for sums to be paid out in claims at rates lower than would have been available under the Act. When the minor was injured due to negligence on the part of the employer, he sought to have his membership avoided to enable him to claim under the Act. The Court of Appeal held he could not. The contract was binding on him, as, when considered as a complete package, it was beneficial.

Authority for:

Where a contract is for the benefit of a minor, and does not place unfair responsibility on them, it is not voidable but rather binding and enforceable against the minor.

Conversely, where it places an unfair responsibility on the minor they may be able to avoid the contract.

Fawcett v Smethurst (1914)

Facts:

A minor had hired a car to help him move his luggage. The terms of its hire was for the minor to be liable for any damage to the vehicle regardless of whether this was caused by his negligence. The vehicle did cause damage through no fault of the minor and the court had to determine whether the contract could be enforced against him.

Authority for:

The court held the term was harsh and onerous and therefore the contract could be avoided.

Consider

The contract for Minesh's clothing would not be likely to be seen as unreasonable but they would also be unlikely to be seen as necessities. We are not told about Minesh's social status so we can assume these are not exclusive items for a country gentleman (using the argument in *Peters v Fleming*), but having supplied the goods without payment or a guarantee of payment on delivery, the owner of the tailor's shop will likely be unsuccessful in recovering payment.

p. 149 ↩ Despite the protection for minors, those entering into contracts with a minor are also afforded rights (under the Minors' Contracts Act 1987). The minor who, when reaching the age of majority, ratifies debts that were created during their minority, will have this ratification binding upon them (s. 1). Also, where a third party acted as guarantor for the minor in contracts that were unenforceable against them, this will not result in the contract being unenforceable against the third party (s. 2). Further, the Act consolidated the existing law allowing the remedy of restitution to be used to require the minor to return any property acquired under the contract, or any property representing this, in an unenforceable contract (s. 3).

7.2.2 Mental Incapacity

Persons who have been identified with a mental incapacity, and as such are defined under the Mental Capacity Act 2005 as a 'patient', are protected from entering contracts. The consequence is that any agreement made which purports to be a contract will be void. This is the situation even if the other party was not aware of the 'patient's' incapacity. There may be a different conclusion where the person is not considered to be a patient under the relevant legislation. In this scenario, there exists the ability for a contract to be established with a person suffering from a mental illness or some other form of mental incapacity. To avoid the contract, the mentally ill person must demonstrate that at the time of concluding the contract they did not understand the nature of the agreement, and the other party must or should have known of the mental incapacity present. The Sale of Goods Act 1979 has also provided guidance on how potential contracts may be viewed when they involve those without mental capacity. Under s. 3, if the contract is for necessities and the other party is unaware of the mental incapacity, the contract is valid and the price must be paid. If, however, the other party is aware of the mental incapacity, then only a 'reasonable price' must be paid. 'Necessities' is defined under the Mental Capacity Act 2005 as suitable to a person's condition in life and to their actual requirements at the time the goods/services were supplied (s. 7).

7.2.3 Intoxication

Persons who are drunk or under the influence of drugs when a contract is concluded are generally bound by the contract as it is presumed by the courts that they are aware of their actions. If the other party is unaware of the intoxication the contract is enforceable, but if the party is so intoxicated that they do not know the consequences of the agreement they are concluding, and the other party is aware, the contract is voidable.

7.3 Illegality

Illegality, in terms of contract law, refers to those contracts that will not be permitted (they are void) because they may be illegal in nature such as those contrary to statute (e.g. the Resale Prices Act 1976, where manufacturers conspire to regulate the price of goods), or against public policy. This includes a particularly wide range of scenarios, such as contracts that intend to prevent the prosecution by the State of an individual who is accused of some illegal act; and contracts that seek to promote immorality. ↵

Pearce v Brooks (1866)

Facts:

A woman was in the occupation as a prostitute and had hired a carriage for the purpose of carrying out this function.

Authority for:

When she refused to pay for the hire the owner could not recover the payments as the nature of the contract was illegal.

Such contracts have traditionally been held as void.

Parkinson v College of Ambulance Ltd and Harrison (1925)

Facts:

A charity was provided with a donation of £3,000 on the basis that the donor would be given a knighthood.

Authority for:

Whilst this was not against the law, it was held that such a situation would be contrary to public policy as it may involve public officials being corrupted.

Further examples of contracts that will fall victim to illegality include those involving contracts of fraud or those where a crime is to be committed.

Everet v Williams (1725)

Facts:

The case involved two highwaymen who entered into an agreement to share the proceeds of their activities from robberies committed together.

Authority for:

When these funds were not shared, the court would not allow the case to proceed for recovery.

It is also worthy of note that in this case the solicitors involved were fined for bringing the case to court and both highwaymen were hanged. Public policy arguments have also been used to restrict the post-contractual obligations placed on an employee through a restraint of trade clause (see 23.5). Note, however, some illegal contracts may have legal effects. ↩

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Tinsley v Milligan (1994)

Facts:

The parties were in a relationship where they purchased a property for the purposes of renting out rooms. However, the property was registered in the name of the claimant alone and this was to enable the defendant to fraudulently claim state benefits (the proceeds of which they would share). Following the breakdown of their relationship the claimant sought possession of the property whilst the defendant argued they both had equal shares in it.

Authority for:

The House of Lords held that the interest in the property be shared between the parties. Whilst the defendant had perpetrated a fraud, this did not prevent her action from succeeding as the claim did not rely on the fraud to be effective.

7.4 Mistake

Mistake is the area of law where the contract may be held void if the mistake was fundamental to the contract, as the parties did not have a true agreement. However, it is distinct from where the parties may have erroneously entered into a contract that is a bad bargain, or where one party later has 'second thoughts'. Also,

mistake is not concerned with the attributes of a particular item, for example buying a printer for a computer under the misapprehension that it had a scanner facility as well. Unless this feature was misrepresented to the buyer, the buyer has no claim under their mistaken belief.

In order for the mistake to enable the contract to be made void, it must be fundamental, and 'operative', which prevents the *consensus ad idem* that is required for a contract to be established. A mistake can be a common mistake (where both parties make the same mistake), mutual (where the parties are at cross-purposes—also known as bilateral mistake), and unilateral (where only one party is mistaken).

- *Common mistake*: Here the parties have made the same mistake. Typical examples include contracts involving property which neither party is aware no longer exists:

Couturier v Hastie (1856)

Facts:

Here the parties were negotiating for the sale of corn, but whilst the negotiations were proceeding, the carrier of the goods disposed of it.

Authority for:

It was held that there could be no contract as the goods being negotiated for were not available when the contract was concluded. However, being careless in a negotiation is not the same as an operative mistake and such a party may be liable for breach of contract.

p. 152 ← Another example of common/mutual mistake is demonstrated in the following case:

Solle v Butcher (1950)

Facts:

The parties had entered into an agreement for the renting of premises that they both believed was subject to a controlled rent. The rent established between the two was, as a consequence, artificially low.

Authority for:

The Court of Appeal held that there should be a rescission of the contract, with the proviso that a new tenancy for the premises be offered on the normal, average rent.

The court decided the case on the basis of an equitable mistake. The ruling in *Solle* was changed (disapproved), and the original view of common mistake as provided in *Bell v Lever Bros Ltd* was followed by the Court of Appeal in the following case.

Great Peace Shipping Ltd v Tsavliris Salvage International Ltd (2002)

Facts:

The ship *Cape Providence* had sustained serious damage at sea. Tsavliris offered its salvage services and a contract was established. Tsavliris contacted a London broker to find a ship to assist and entered into the hire of the *Great Peace* (as the closest vessel) for a minimum of five days. However, the *Great Peace* was 400 miles away, and another available vessel was closer. Therefore, the brokers were informed to cancel the contract for the *Great Peace* and establish a new contract for this closer ship. Tsavliris refused to pay for the hire of the *Great Peace* on the basis that the contract was void for common mistake.

Authority for:

The case has removed the ability to grant rescission for common mistake as to quality (the contract is not voidable in equity). The remedy for common mistake is that the contract is void (where it involves a fundamental mistake).

It was held that there is no basis on which a contract is to be rescinded due to mutual mistake where, at common law, the contract is valid and enforceable.

More recent guidance as to the principles which exist for the establishing of common mistake were provided in the following case:

Triple Seven MSN 27251 Ltd v Azman Air Services Ltd (2018)

Facts:

The parties had entered into two five-year agreements for the lease of aircraft. The agreements were made on the basis that the aircraft would be used to carry out airlifts for Hajj and Umrah pilgrimages—which required regulatory approval that had not been obtained. At the time of establishing the contract, the parties shared the mistaken belief that such approval could be gained when actually the approval had already been refused. A claim was made to hold the contract void for common mistake.

Authority for:

Common mistake could not be granted because the mistake was not sufficiently fundamental (essentially and radically different) from what the parties had understood. Nor was the contract impossible to perform. Importantly, the court identified the following six principles on which a contract can be held void for common mistake:

1. At the time the contracting the parties must have substantially shared an assumption as to the existence of a certain state of affairs.
2. That shared assumption must have been fundamental to the contract.
3. That shared assumption must have been wrong at the time the contract was made.
4. Due to the wrong assumption, the contract or its performance would be essentially and radically different from what the parties believed to be the case, or impossible to perform, having regard to the shared assumption.
5. The parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the shared assumption was wrong.
6. The contract must not have made provision in the event that the common assumption was mistaken (e.g. in allocating risk between them if problems arose in the contract).

- *Mutual mistake*: It is a possibility that in the negotiations for a contract, both parties are at cross purposes as to the nature of the contract or its subject matter. These instances are uncommon, but not without authority:

Raffles v Wichelhaus (1864)**Facts:**

The parties contracted for the sale of cotton, the cargo on the ship the *Peerless*, sailing from Bombay. However, in fact there were two ships called the *Peerless* sailing with cotton from Bombay, and the parties were referring to different vessels.

Authority for:

There could be no contract as the parties were mistaken as to the subject matter. If the court could have identified from the parties' evidence that one specific vessel was being referred to then a contract would have been established, but as this was impossible to deduce from the evidence, the contract was held void.

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- *Unilateral mistake*: The more common form of mistake is where one party is mistaken as to the terms of the contract or the identity of the other party. This, by its nature, involves the mistake by one party and the cases described in 7.4.1–7.4.2 demonstrate its application.

7.4.1 Mistake in the Terms of the Contract

There may exist situations where the contract may be held void because the written contract contained contradictory information compared to the agreement established orally, and this is evident to the other party who attempts to rely on it.

Consider

The contract established by Geraint is different from the terms as explained by him to Dewi. The agreement for the purchase, but for Dewi to continue residing in the property until his death, is a significant aspect of the agreement which is missing from the written contract.

Hartog v Colin & Shields (1939)

Facts:

The written contract provided that in the sale of hare skins, the price would be established on the basis of the weight of the items (price per pound). The oral agreement had previously concluded that the price would be established on the basis of the number of skins (price per skin), which was a more common calculation in the trade.

Authority for:

The buyer would have been at a great advantage if the written contract was allowed to proceed on this basis and it was clear that he must have been aware of the mistake.

Unlike in *Hartog*, the written contract may be signed, not necessarily as a record of oral negotiations, but simply as a method of contracting in this form. Where a person has signed a document without reading it, the courts will not readily provide a remedy just because they later discover the content of the contract and disagree with it. In the absence of a **misrepresentation** or some form of **duress** being applied for the signing, there may be no escape from the contract. However, the courts have allowed a defence to be raised of *non est factum* (it is not my deed). There are safeguards to the use of this defence and it will not be available where the signor has been careless or negligent in signing a document (such as signing a blank document and allowing the other party to complete it later—as in *United Dominions Trust Ltd v Western*). It may be of use where the signor is vulnerable and has had their vulnerability exploited by the other party. ↵

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Consider

Dewi is an older man and could be seen as being vulnerable. It could be argued that he was careless in signing a contract without first reading it but given the relationship between the parties, the *non est factum* defence may be available.

Foster v Mackinnon (1869)

Facts:

An elderly man with very poor eyesight was misled into signing a document that he was informed was a guarantee, but was in reality a bill of exchange.

Authority for:

Despite the 'narrow use' and availability of the doctrine, here the signor was under a disability, he signed a document whose terms were fundamentally or radically different from those which he thought he was signing, and he was not negligent (in this respect careless) in the signing. As a consequence the contract was void.

The requirement of a fundamental or radical difference to the nature of the contract is somewhat harsh but is in line with the narrow use of the plea.

Gallie v Lee (Saunders v Anglia Building Society) (1970)

Facts:

Here an elderly woman mistakenly signed a contract believing it was to assign her house to her nephew, but in reality was signing a sale to her nephew's business partner for £3,000. The business partner did not pay the money, nor maintain repayments on a mortgage he had placed on the property. When the mortgage company wished to repossess the house, the now deceased woman's family attempted to have the contract avoided due to mistake. The House of Lords would not allow the claim to succeed as the contract she signed was not sufficiently different from the one she believed she was signing, and she had not exercised sufficient care in reading the document before signing.

Authority for:

Mistake as to the terms of a contract, in the absence of misrepresentation, will not enable the signor to avoid the contract where it is not fundamentally/radically different from what the signor believed they were agreeing to. The plea of *non est factum* will not generally be allowed of a person of full capacity.

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Consider

The contract is very different from that which Dewi thought he was signing. Also, unlike in *Gallie v Lee*, Dewi has been pressurized to sign the contract without having the opportunity to obtain legal advice or even to read it. Thus, the authority in *Gallie v Lee* may be distinguished.

7.4.2 Mistake as to the Identity of the Party

Mistake in this area is linked with misrepresentation. Cases involve the rogue obtaining the possession of the victim's property and by doing so obtaining a voidable title. This title may be removed where the victim takes steps to avoid the contract before the rogue passes the goods on (which they generally will wish to do so as to realize any value in the goods obtained). If the goods are transferred to a buyer purchasing the goods in good faith, then the goods' title transfers to the buyer. There is no general principle of good faith included in contract law (as it appears in the law of agency, some employment relations, relationships involving fiduciary obligations, and so on); however, in *Yam Seng Pte v International Trade Corporation* a term of good faith and fair dealing was implied into the contract. Similarly, in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* the Court of Appeal considered the scope and extent of an express good faith clause. The court held that, unlike *Yam* where the good faith clause should be interpreted broadly, here it was interpreted restrictively and required the parties to work together honestly. It further considered that there was no need for the implication of good faith into the contract and hence declined to pursue the matter. Ultimately, the question of good faith in contract law generally will need further clarification by the appeal courts, but parties would be wise when using these and incorporating them into contracts (expressly) to clearly define and articulate their extent and what they will mean for the parties.

This is somewhat unfair but essentially the courts deal with the two innocent parties to the mistake, the victim of the rogue who has lost their property, and the innocent buyer who is subject to a claim for recovery of the goods from the victim (the rogue is unlikely to be found and hence subject to a claim against them). The courts have generally held in favour of the innocent buyer rather than the victim of the rogue's fraud. This is because the victim had the power not to allow goods to leave their possession without verifying the identity of the rogue and their attributes (or quality—essentially whether the rogue had sufficient funds to pay for the goods). The courts will then only allow a contract to be held void for mistake where the rogue's identity was crucial to the conclusion of the contract.

The mistake as to the identity of the parties occurs where one party believes they are negotiating with a particular person, when in reality they are dealing with someone else. The first examples given are where the parties have not met in person (face-to-face). This has often been an 'easier' case to prove of mistaken identity because the victim can more readily claim that they reasonably believed they were dealing with the person the rogue held himself out to be. ↩

Cundy v Lindsay (1874-80)

Facts:

The case involved Mr Blenkarn, who purported to be a sales representative of a firm called Blenkiron & Sons. He previously hired property in the same street as the firm and had written to the claimants from this address seeking to obtain linen goods. Blenkarn entered into a contract through the post with the claimants for the purchase of a consignment of handkerchiefs, and sold these on without making payment. The claimant had to go beyond proving fraud by Blenkarn (fraud would render the contract voidable, and unless set aside before the goods are passed on, a bona fide purchaser would obtain a good title). The House of Lords held that the claimants had intended to deal with Blenkiron, and not Blenkarn, and as this was a fair mistake, the contract was void.

Authority for:

The Lords held that Lindsay was aware of the genuine and reputable firm (Blenkiron & Sons), and had provided the goods on credit due to the contract being, it believed, with this firm. Mistake as to identity was easier to find in this case as the parties never met in person, but rather communicated via the post.

This case was decided due to the mistake over the identity of the other party, but how would the courts determine situations where it is not the identity of the party in question, but rather their creditworthiness?

Kings Norton Metal Co. Ltd v Edridge, Merrett & Co. Ltd (1897)

Facts:

A company provided goods to a fraudster claiming to be a representative of a reputable firm. However, whereas as in *Cundy* the firm existed and was reputable, in *Kings* the firm did not exist.

Authority for:

The case demonstrated that mistake as to the attributes of the other party is insufficient to establish mistake, and the identity of the party was not crucial. The goods had been passed on to another buyer in good faith, and as there was no 'mistake' as to the rogue's identity, the claimants were not entitled to the return of the goods.

The previous cases considered mistaken identity where the parties had not met face-to-face. Where the parties have actually met in person, there is a strong presumption that it will prevent a claim for mistake as to identity. ↩

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Phillips v Brooks (1919)**Facts:**

A rogue entered the claimant's jewellers shop. He purchased a number of items and presented a cheque as payment. The staff were uncomfortable at the man taking the products by merely leaving a cheque but he managed to convince them to allow him to take a ring. He identified himself as Sir George Bullough of St James's Square. The jeweller was aware of a person of that name and checked that he lived at that address. The jeweller allowed the rogue to leave with the ring and, when the cheque was dishonoured at the bank, sought its return. However, the rogue had already sold the ring to a pawn broker and disappeared. The claimant argued for the return of the ring as there had been a unilateral mistake as to identity.

Authority for:

The claim failed. The contract was not void for mistake as, when parties transact in person, there is a presumption that they deal with the person in front of them, not with whom that person claims to be. Significantly, the jeweller could not convince the court that they would have only sold the ring to Sir George Bullough.

However, this line of reasoning has to be considered in light of the House of Lords decision in *Shogun Finance v Hudson*:

Shogun Finance Ltd v Hudson (2003)

Facts:

The case involved a rogue impersonating one Mr Patel. Mr Patel had no knowledge or involvement in the fraud, with the rogue producing documents of sufficient quality to convince the finance company of his assumed identity (a driving licence in Mr Patel's name). The court held that the rogue had not obtained a good title to the car and it belonged to the finance company, not the innocent third party (Hudson) who purchased it.

Authority for:

Contracts formed on the basis of mistaken identity, where adequate checks have been performed to ascertain the identity of the other party, will make the subsequent contract void—not voidable.

Innocent purchasers of goods are protected under Part III of the Hire Purchase Act 1964 and s. 23 of the Sale of Goods Act 1979, which provides innocent purchasers with good title against the owner where the contract is voidable. However, despite Hudson's arguments, the Lords held that this contract, involving mistake as to identity, resulted in the contract being void, and as such the Hire Purchase Act 1964 was of no use. The key element was the identity of the rogue. Here, the finance company believed it was dealing with Mr Patel, through the documentary evidence provided. The company only intended to deal with Mr Patel and would not have provided the seller of the car with the permission to allow ↵ anyone other than Mr Patel to take possession of the vehicle. The company had performed adequate checks to verify this information and as such the contract between the rogue and the finance company was void. As being void, rather than voidable, the title could not be passed on to Hudson.

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7.4.3 The Remedy of Rectification

Rectification is an **equitable remedy** available in the case of mistake where a written agreement between the parties fails to reflect the actual agreement that was reached. The courts have an option, if they believe that a contract did not reflect the true intentions of the parties at the time of the agreement, to have the relevant terms changed. This is particularly relevant where one of the parties has deliberately intended, through false and misleading information, to induce the contract.

Hurst Stores and Interiors Ltd v ML Europe Property Ltd (2004)

Facts:

ML Europe made substantial changes to a draft contract with Hurst Stores before it was signed. Hurst was not informed, or aware, of these terms and signed the final contract on the basis that it contained the same terms as the previous draft.

Authority for:

It was held by the Court of Appeal that ML Europe must have known Hurst was unaware of the changes to the final contract and consequently ordered that the contract be changed back to the previous draft.

7.5 Misrepresentation

Chapter 8 identifies the importance and significance of determining whether a statement made in the course of negotiating a contract will be determined as a term or a representation. A breach of a representation will not enable a breach of contract claim, but may, however, lead to a misrepresentation that makes the contract voidable. An action under misrepresentation is available if the untrue representation is considered 'actionable'. This means that there is a legal remedy available where a false statement of fact (not opinion) is made that induces the other party to enter the contract.

Therefore, to determine an actionable misrepresentation the elements outlined in **Figure 7.1** must be satisfied.



Figure 7.1 Actionable misrepresentation

7.5.1 A Statement of Material Fact

Statements of fact are sometimes difficult to separate and distinguish from opinions. If the statement can be determined, objectively, as being true or false, this may assist in identifying whether it is a fact or opinion.

←

Consider

When Rahul enquires about the sustainability of the land on sale by Dewi, is Dewi's response an opinion or a statement of fact? Given that Dewi has provided his assurances, and if Rahul has no way of determining whether Dewi has knowledge of use of the land for this purpose, it would likely be considered a fact rather than opinion. This would be an important distinguishing of the rule in *Bisset v Wilkinson*.

Opinions cannot, by their nature, be objectively tested as true or false, whereas facts can be tested in this manner (although in *Smith v Land & House Property Corp.* a statement of opinion also contained a fact and hence enabled a claim for misrepresentation).

Bisset v Wilkinson (1927)

Facts:

A vendor's assurances of the suitability of land for sheep farming, when the purchaser was aware the vendor had no knowledge or experience of this type of farming, was held to be an opinion rather than a fact.

Authority for:

The statement was held as an opinion. However, in relation to a statement of law, the courts traditionally hold that such a statement is not a fact. This is due to the presumption that everyone has access to the law and everyone should be aware of the law and be in a position to assess if it is correctly stated.

Exceptions to this rule were evident in cases such as *Laurence v Lexcourt Holdings Ltd*, where a statement as to the extent of planning permission when dealing with the use of premises was held to be a fact rather than an opinion.

- *Silence as misrepresentation*: The general rule of contract is that silence cannot amount to a misrepresentation, even if the disclosure of such information would in all probability dissuade the other party from contracting. Naturally, there are exceptions, and if there is a material change in the circumstances, if remaining silent would make a statement misleading, if the parties had a fiduciary relationship, and in cases where the contract is one of good faith, then an actionable misrepresentation is possible.
- *Material change in circumstances*: There exists an obligation to provide (volunteer) information to the other party if the facts materially change between the issuing of the statement and the acceptance of the contract.

With v O'Flanagan (1936)

Facts:

A doctor who was selling his practice had a duty to disclose material changes between the agreement and the conclusion of the contract.

Authority for:

The information originally provided regarding the income from the practice (approximately £2,000 per annum) was correct, but in the time between the agreement and the sale, the doctor had become ill and his patient list substantially declined, along with the income.

Whilst silence generally will not be considered a misrepresentation, in this instance the court considered the doctor had a duty to disclose the information.

Spice Girls v Aprilia World Service BV (2002)**Facts:**

An advertising campaign by a scooter manufacturer involved pictures of the pop group The Spice Girls including a member of the group (Geri Halliwell). However, at that time Halliwell had already decided to leave the group and the remaining members were aware of this decision.

Authority for:

It was held to be a misrepresentation as the group had an obligation to inform Aprilia and for it to take this into account when determining the advertising campaign.

- *Duty to answer questions truthfully:* If a person is asked a question during the negotiations, and an answer is offered (although there may be no legal duty to answer questions), there is an obligation that the answer is truthful. This places an obligation on the person issuing the statement to provide a full and complete answer, which does not mislead the other party.

Consider

As Dewi has offered an answer, and given he could have simply refused to reply or identified his lack of expertise in this area so as not to mislead Rahul but did not, his answer will likely be considered a misrepresentation.

Further, a true statement, but one that misleads the other party, can amount to a misrepresentation.

Nottingham Patent Brick & Tile Co. Ltd v Butler (1886)

Facts:

A solicitor, acting for the seller of land, was asked by the prospective buyer if there were any covenants applying to it. The solicitor replied he was unaware of any, which was true, but only because he had not looked at the documents. In fact, restrictive covenants did apply to the land.

Authority for:

Even though the statement was true, it still amounted to a misrepresentation.

- *Evidence of a fiduciary relationship:* A fiduciary relationship is one involving trust and can typically be seen in relationships of partners of an undertaking, solicitor and client, doctor and patient, and so on. In these situations, it is presumed that any material fact must be revealed to the other party and if this is not volunteered, then the silence can be held to be a misrepresentation.
- *Contracts of good faith:* In certain contracts, especially those involving contracts of insurance that require *uberrimae fidei*, 'utmost good faith', there must be a full disclosure of relevant factors that would influence a decision to enter an agreement or not. This includes volunteering information even if a question regarding the fact is not asked (*Lambert v Co-op Insurance Society Ltd*).

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Hood v West End Motor Car Packing (1917)

Facts:

There was a failure to disclose the fact that goods were to be carried on the deck of a ship rather than covered from the elements, and as such enabled the insurance company to avoid its obligation to provide cover.

Authority for:

The court held that regardless of whether there was a negligent or intentional failure to disclose material facts, the fact of the failure to disclose was the relevant consideration in cases of misrepresentation.

7.5.2 The representation was false

In order to amount to a misrepresentation, it must be found by the court that the statement was in fact false.

Consider

Dewi's representation is false. He has no experience of using the land to sustain cattle and this is not a matter in which a reasonable person would hazard a guess.

Thomson v Christie Manson & Woods Ltd (2004)

Facts:

Christie's (a famous auction house) presented two vases which were represented as 'a pair of Louis XV porphyry and gilt-bronze vases'. The buyer argued this was false although it was agreed that Christie's had represented that it had grounds for holding its opinion.

Authority for:

The representation at issue here was not of the vases themselves (this would be an opinion) but rather of the identification and opinion of Christie's. This was not in issue and was therefore not false.

7.5.3 The Innocent Party Believed the Statement to Be True

The innocent party must have considered the statement to be true to enable them to proceed with an action for misrepresentation. This does not place an obligation on the innocent party to check the validity of the statement made, unless there are tangible reasons in which it would have proved necessary to question the validity.

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Redgrave v Hurd (1881-82)

Facts:

A lawyer bought into a partnership having been told it had an income of £300pa. He had an opportunity to examine the accounts but he declined. It transpired that the actual income was £200pa.

Authority for:

The lawyer had relied on the statement. He was under no duty to verify the representation (even though he had the opportunity to do so) and was thus allowed to rescind the contract.

7.5.4 An Inducement to Enter the Contract

For a statement to amount to a misrepresentation it must have been of sufficient importance and materially relevant to induce the other party to have entered into the agreement. This does not necessarily mean that the statement was the only consideration in the innocent party's decision to enter the agreement, but it must have been an important factor and the innocent party must have relied on the statement.

Edgington v Fitzmaurice (1885)

Facts:

An investor in a company bought debentures on the basis of the incorrect details within the company's prospectus, and the investor's own research.

Authority for:

Even though the investor carried out his own research, he still relied on the details in the prospectus and this enabled the claim of misrepresentation.

Consider

Rahul has entered into the contract on the basis of Dewi's assurances and he believed the statement to be true. The next stage is to determine which form of misrepresentation has been committed.

7.5.5 Three Types of Misrepresentation

Having identified that a misrepresentation has occurred, and this is established as actionable, the next stage is to identify which type of misrepresentation it is. This is important as it affects the remedies that are available.

- p. 165
- *Fraudulent misrepresentation*: This involves a false statement that has been made knowingly or recklessly. This entitles the innocent party to claim rescission of the contract and/or damages, and sue in the tort of deceit. As the type of misrepresentation here is 'fraudulent' this goes beyond carelessness. Due to the problems inherent in establishing sufficient evidence to sustain such an allegation ...

Long v Lloyd (1958)

Facts:

The claimant purchased a lorry from the defendant following his viewing of an advert. The advert identified the lorry as being in exceptional condition but, on inspection, there were evident defects with it. Undeterred, the claimant continued with the purchase. Problems began with the vehicle on the first journey and, following an offer by the seller to contribute half the costs of repair, the claimant accepted. A further journey saw the vehicle breakdown completely and the claimant sought to rescind the contract for innocent misrepresentation.

Authority for:

On accepting the offer of paying costs towards the repairs needed for the lorry, the claimant became aware of its defects and had affirmed the contract by taking it back.

... many claimants attempt to seek a remedy under negligent misrepresentation:

Derry v Peek (1889)

Facts:

The case involved Derry and other directors of the Plymouth, Devonport and District Tramways Company, which issued a prospectus stating it was to run trams by steam power (which was to be lucrative). It issued the claim on the assumption that such authority would be granted by the Board of Trade, which ultimately refused much of the permission, save for limited sections of the tramway. This led to the company being wound up and the directors were sued for fraud. The House of Lords held the directors were not guilty of fraud as they genuinely believed the statement, and it was not made recklessly.

Authority for:

To establish fraud committed in a misstatement, the *defendant* must have known the statement to be untrue, or had no reasonable grounds upon which to maintain the belief that it was true, or have acted recklessly in making it.

- *Negligent misrepresentation*: This involves a false statement being made which induces the other party to enter a contract. However, it does not involve fraud, and so is easier to prove, as the party making the statement is unable to show that they believed the statement to be true, or held a reasonable belief that

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it was true.

Consider

Dewi made a representation with no knowledge of its truthfulness and would be unlikely to demonstrate reasonable grounds for him holding the belief in the assurance made. It is possible that it could be fraudulent, but it may be easier to prove a negligent misrepresentation and on this basis Rahul could seek a remedy for rescission (as he has no use for the land for his intended purpose) and damages (covering the costs associated with moving the cattle to a new location).

A finding of negligent misrepresentation entitles the innocent party to claim rescission and damages. The Misrepresentation Act 1967 s. 2(1) provides that once the claimant has demonstrated that a misrepresentation has been made, the burden then switches to the *defendant* to establish to the court's satisfaction that they believed the statement to be true, and also held reasonable grounds upon which this belief could be established. Further, as the Misrepresentation Act 1967, s. 2(1) provides a remedy for negligent misrepresentations, and the courts have held that this calculation should be made in the same way as for those awarded in cases of fraud, a claim for misrepresentation may actually provide the claimant with a 'better' monetary damages award than if a claim of breach of contract had been made.

- *Innocent misrepresentation*: This involves a false statement, but in the honest, albeit mistaken belief that it was true (see *Oscar Chess Ltd v Williams* in 8.2). This entitles the innocent party to claim rescission as the contract is voidable, and if this is not possible, it may provide for a damages claim in lieu of rescission under the Misrepresentation Act 1967, s. 2(2). To demonstrate innocent misrepresentation the party needs to establish that they believed the statement that was made, and they had reasonable grounds upon which to hold this belief.

7.5.6 Remedies for Misrepresentation

The remedies available for misrepresentation depend upon the type of misrepresentation involved (fraudulent, negligent, or innocent).

- *Rescission*: The remedy of rescission is an equitable remedy where the party has the option to set the contract aside and the parties are returned to their pre-contractual position. In order for the parties to be placed back in their original position the court may order any money paid, or any property which has been transferred, to be returned to the relevant parties. The court, through s. 2(2) of the Misrepresentation Act 1967, has discretion as to whether to provide a remedy of rescission, and in practice this is often impossible. The remedy of rescission is available for all types of misrepresentation, and as in situations of misrepresentation the contract is said to be voidable, the innocent party is able to rescind (avoid) the contract but this right must be exercised within a reasonable time. The right to rescind the contract has to be communicated to the other party to be effective, and once this is chosen, the contract cannot be revived.

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- In situations that involve fraudulent misrepresentation, it may be more difficult to communicate the intention to rescind. This is usually because by the time the fraud has been discovered, the rogue has disappeared. There is still a possibility of communicating rescission in this example through conduct such as seizing the goods that the rogue had sold; or by performing some act which is consistent with communication (e.g. informing the police).
- **Damages:** A simpler method of remedying the loss sustained due to a misrepresentation is through an award of **damages**. Here, an amount of money is awarded to the innocent party to compensate them for any losses sustained. In the case of fraudulent misrepresentation, the damages are intended to place the party in the position they would have been if the fraud had not been committed (reliance damages)—Misrepresentation Act 1967, s. 2(1) as applied in *Royscot Trust v Rogerson*. Damages can be awarded in contract and tort (such as fraud)—*Derry v Peek* (see 7.5.5), and of course through statute.

For those who have been subject to an innocent misrepresentation, the courts have the discretion to award damages under s. 2(2) of the Misrepresentation Act 1967 in place of rescission. To be able to succeed in a claim for damages under this section:

1. the misrepresentation must have been such as to allow the innocent party to rescind the contract;
2. the claimant must prove that the contract has been (or ought to have been) rescinded;
3. the court must consider the award of damages, rather than awarding rescission, to be equitable.

Damages are rarely awarded under this section, and when they are, the assessment is based on the contractual remedy of damages that seeks to place the parties in the position they would have been had the representation not been untrue.

7.6 Duress and undue influence

Freedom of contract relies on the presumption that those who enter into contracts do so under their own free will. If a contract is established on the basis of violence (or a threat), or unlawful economic pressure, this may be considered a case of duress, whereas if a party has unfairly exploited its relationship with the other party this may amount to undue influence. In each of these situations the contract will be held to be voidable: duress on the basis of the common law, and undue influence in equity. Note that, as undue influence is based on equity, the courts may use other equitable remedies to prevent an unjust outcome.

7.6.1 Duress

There are two types of duress that may be exercised against a party—physical and economic.

- **Physical duress:** There are, in modern times, relatively few cases that involve claims of duress on the basis of violence, or the threat of violence. As one could imagine, this is common sense, as if the person was in such a state of fear that they would agree to enter the contract, they are unlikely to seek to have

the contract avoided because of this act or threat. There have been examples of the use of this form of coercion and these are outlined below. Physical duress occurs when the party who has entered into a contract has done so on the basis of violence or the threat of violence.

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Barton v Armstrong (1975)

Facts:

The managing director of a company based in Australia, Mr Barton, agreed to purchase shares from the chairman of the same company, Mr Armstrong. The price of the shares was very favourable to Armstrong because Armstrong had threatened to have Barton killed unless he entered the contract.

Authority for:

The Privy Council held that the contract should be voidable due to duress.

Consider

Dewi was pressurized into signing the contract created by Geraint. However, it is unlikely that the level of pressure exerted would be sufficient to establish duress. There was no threat of violence, it was his suggestion to pass on his property to his grandson, and there is no economic element to enable a successful claim of economic duress.

- *Economic duress*: It has proved very difficult in the past for the courts to set aside a contract for economic duress as difficulty exists in establishing where business pressure in commercial dealings becomes an actionable threat. Negotiations in commercial contracts are often based on exploiting financial weaknesses of the other party, or extracting the very best deal due to a need to sell goods quickly and raise funds immediately. These types of negotiation are quite legitimate, and hence criteria were necessary to give greater guidance as to the point where economic pressure amounts to duress:
 - illegitimate pressure (which need not be unlawful), such as exerting unacceptable levels of pressure which go beyond those normally expected in commercial negotiations:

R v Attorney-General for England and Wales (2003)

Facts:

The claimant was a member of the SAS and the Bravo Two Zero patrol. Various members had begun writing about its missions and publishing books. In some instances, this included distorting the truth (blaming dead and still serving colleagues) and in any respect, the actions were seen as being motivated by commercial gain. These tactics were causing problems within the patrol and consequently, the Ministry of Defence introduced confidentiality clauses (preventing future publications) for those who wished to continue serving in the SAS. R was one of the members of the patrol who was required to sign the new agreement (failure to do so would result in a return to unit—widely seen as a punishment).

Despite signing the agreement, six months later he decided to leave the service and wished to write a book about his experiences. The State applied to the court for an injunction to prevent the publication and R argued the agreement should be set aside. He said he signed it under military orders and argued both duress and undue influence.

Authority for:

R's arguments failed. He was clearly acting under military orders, and the pressure this causes, but he still had a choice not to sign it. The State was entitled to introduce the clause and as this was reasonable, it did not amount to illegitimate pressure.

- whether the party claiming duress demonstrated protestations against the contract;
- whether the party had any alternative to proceeding with the contract, evidenced by the availability of independent advice that could have better informed the claimant:

Atlas Express Ltd v Kafco Importers & Distributors (1989)

Facts:

Atlas, a delivery firm, entered into a contract with Kafco to transport goods at prices determined on the size of the loads. However, the first load was considerably smaller than estimated, and it proved to be uneconomical to continue the service, therefore Atlas informed Kafco that it would refuse to make any further deliveries unless the price was renegotiated to include a minimum price. Kafco did not wish to do this (if for no other reason than it involved higher costs) but felt compelled as it had a dependency on a contract with a high-street retailer (Woolworths), and did not have time to arrange

for a new delivery service. It was held that the contract was based on economic duress and therefore voidable. Kafco had been forced to renegotiate the terms of the contract that involved illegitimate pressure, and it had no real alternative but to agree to the change.

Authority for:

A contract established on the basis of economic duress will not be enforceable. Here, the defendant was performing an existing contractual obligation which was incapable of amounting to sufficient consideration to enforce the agreement.

7.6.2 Undue Influence

p. 170 The party who has been subject to undue influence may have the contract set aside by the courts. It is the exploitation of the power one party has over another that will make the contract voidable, and this generally occurs when an individual's vulnerabilities are subjugated. The claimant merely has to demonstrate that they would not have entered into the contract except for the undue influence.

Williams v Bayley (1866)

Facts:

A father, an elderly man, entered into a contract with a bank to guarantee his son's debts. This action would prevent the son from being prosecuted for fraud.

Authority for:

The House of Lords held the contract voidable as the father had not entered the contract freely.

In situations where there is no fiduciary relationship between the parties, the party wishing to rely on undue influence must demonstrate that they would not have entered into the contract but for the influence. Alternatively, in situations where a fiduciary duty does exist (such as with a solicitor and their client or doctor and patient) insofar as the party claiming undue influence has been subject to a disadvantage as being party to the contract, undue influence is presumed. The onus is on the other party to disprove the allegation.

Consider

Dewi was dependent on Geraint for his financial arrangements and relied on his advice. Geraint therefore has a duty not to disadvantage Dewi in his financial dealings and this fiduciary relationship

may enable Dewi to avoid the contract.

The courts have also extended the concept of a fiduciary relationship.

Goldsworthy v Brickell (1987)

Facts:

An elderly woman became dependent upon her neighbour to manage her substantial and valuable farm. The neighbour provided the woman with advice and eventually was given a tenancy of the farm on very favourable terms, without the woman having any other advice on the matter.

Authority for:

The Court of Appeal held that a fiduciary relationship existed between the parties and therefore the contract was voidable.

The courts had traditionally considered that no fiduciary relationship exists between a husband and wife.

p. 171 However, an important ruling was provided by the House of Lords: ↵

Barclays Bank v O'Brien (1993)

Facts:

The case involved the husband persuading his wife to agree to a mortgage on their jointly owned house that he stated was for a maximum of £60,000 and for three weeks. This was a short-term loan to assist his business (which the wife had no ownership of). The reality was there was no limit on the mortgage or its duration. The bank had not followed the instructions of its head office that the parties should have been informed of the details of the mortgage.

Authority for:

It was held that the wife had no access to independent advice, and she had suffered undue influence in agreeing to the mortgage. The bank was aware of the possibility of abuse in this situation and hence the contract was deemed to be voidable. This has led banks, in particular, to be very careful with regard to informing clients about the consequences of contracts that are being signed and the importance of advice.

Information from the parties' solicitors is effective in this regard.

Royal Bank of Scotland v Etridge (No. 2) (2001)

Facts:

Mr and Mrs Etridge decided to buy a property but wished to purchase it in Mrs Etridge's name only. There were various sources to finance this, including the couple's former home. Mr Etridge was responsible for all the preparation for the financing—Mrs Etridge took no part in these proceedings. Two mortgages also formed part of facilitating the purchase—one being from the claimant company (RBS). RBS had its own solicitor who prepared the relevant paperwork which Mrs Etridge signed without reading (trusting her husband) and without asking any questions of its contents. Sometime after the purchase the bank sought to repossess the property and in attempting to avoid the action, Mrs Etridge claimed she was subject to undue influence by her husband.

Authority for:

The House of Lords held that Mrs Etridge had a responsibility to read the papers before signing them and she should have taken legal advice prior to committing to a loan secured on property. There was no undue influence. However, the Lords did say that reasonable steps to hold a private meeting between the solicitor and Mrs Etridge should have taken place where the risks can be clearly set out.

7.6.2.1 Restriction of rescission

In the event of undue influence being established, the courts have the option to rescind the contract. However, being an equitable remedy, it is a remedy that is provided at the discretion of the court, and the right to rescission may be lost if the party is deemed to have affirmed the contract (such as not making any outward sign of protest against the contract), if they unduly delay in seeking to rescind, or if the contract involved property which has been sold on before the complainant brought their claim. ↵

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Conclusion

This chapter has outlined how contract law seeks to protect vulnerable groups, the impact of mistakes and misrepresentation on the contract, and the effect of unfair influence or duress applied in the formation of a contract. The book continues the examination of contract law by discussing the terms of the contract, representations made in negotiations, and the use of exclusion clauses in restricting a party's potential liability in contract and tort.

Summary of main points

Types of contract

- In unilateral contracts, only one party is promising to perform some action—in exchange for a specific act.
- In bilateral contracts, the parties share promises.
- A void contract is one which has no legal effect.
- A voidable contract allows the injured party in the proceedings to affirm or avoid the contract.
- Unenforceable contracts prevent the application of the contract.

Capacity

- Minors (those under 18 years old) may enter most types of contract. Restrictions exist in relation to forming and enforcing certain contracts.
- Mental incapacity can make an agreed contract void if the person is defined under the Mental Capacity Act 2005 as a 'patient'. In other situations the contract may be enforced against them, particularly when considering 'necessities'.
- Intoxication, whether through drugs or drink, generally has no consequence on the effectiveness of the contract unless the party is so intoxicated that they could not understand the consequences of their actions and the other party was aware of this.
- Certain contracts are illegal and are made void due to public policy or because they involve criminal actions.

Mistake

- The contract may be void due to an operative mistake.
- Where the parties are at cross-purposes as to the nature of the contract or its subject matter the agreement is void.
- A unilateral mistake involves the mistake of one party as to the terms of the contract or the identity of the other party.
- A party who has signed a contract on a misapprehension of its contents or effects may be able to claim *non est factum* and have its effects set aside.

Misrepresentation

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- Misrepresenting a fact that is false that the innocent party believed to be true and inducing them into the contract enables the party to seek the remedy of rescission and/or damages depending on whether the misrepresentation is fraudulent, innocent, or negligent. It makes contracts voidable, not void.
- Damages are generally not awarded if the misrepresentation was innocently made. However, under the Misrepresentation Act 1967, the court may award this in lieu of an order for rescission (s. 2(2)).
- The option of rescission may be lost if the contract is affirmed. Affirmation may also be effective through lapse of time.
- Silence, as a general rule, cannot amount to a misrepresentation unless:
 - this would be misleading,
 - the contract is one of good faith where information must be volunteered,
 - there has been a material change in the facts between the agreement and the contract, or
 - where the parties are in a fiduciary relationship.

Duress

- Duress may consist of physical duress (violence or the threat of violence), and will result in the contract being held voidable.
- The House of Lords extended the concept of duress, beyond physical violence, to include unacceptable economic pressure where the other party had no option other than to proceed with the contract.

Undue influence

- As opposed to physical or economic threats, undue influence involves the exploitation of the other party's vulnerabilities. This can include exploitation of a fiduciary relationship.
- Relationships such as doctor and patient, parent and child, and solicitor and client generally have a presumption of undue influence if the contract cannot be explained by their relationship.

Summary questions

Essay questions

1. Assess the development of the rules in establishing an actionable misrepresentation. Focus on the parties' obligations to provide information and how this is interpreted in light of the general rule that silence cannot amount to a misrepresentation.
2. 'It is much better, when possible, to claim for a breach of a contractual term than to argue a misrepresentation has occurred.'

Critically assess this statement.

Problem questions

1. Eric is searching for a residential property to rent. He views a flat being offered for rent by Fabulous Flats and Furnished Properties (FFFP) Ltd, a very commercially aggressive firm which attempts to sign residents to contracts as soon as possible. Following his viewing of this first flat, FFFP ask Eric to sign a tenancy contract that includes the following clauses:
 1. FFFP is not responsible for any damage or loss to individuals or their belongings as a result of any act of negligence by the company or its staff.
 2. It is a condition of this contract that the tenant is responsible for the safety of all visitors to the premises and to ensure the flat is maintained in a good condition (i.e. it is at a minimum kept clean).

p. 174 ← Eric, despite having not read the contract, signs it even though he smells strongly of alcohol and appears quite confused.

Sometime later, FFFP visits the property rented by Eric to ensure that all is well. Discovering that there are no fire extinguishers in the property, and having another person who has already expressed an interest in renting the premises, FFFP invoke clause 2 and seek to terminate Eric's contract for breach of the condition.

Advise the parties of their legal rights in this situation.

2. Mohammed runs a spa and healthcentre under the name Leisure, Endurance Gym in Oxford Street Ltd (LEGOs). Membership of LEGOs is available to members of the public following the completion of an application form and agreeing to a minimum 12-month contract. Membership costs £600 per year.

As part of its advertising campaign, Mohammed produces a leaflet to be distributed in the local area. The leaflet describes the features of the spa as including an extensive free weights area and a swimming pool of Olympic standard.

Siobhan reads one of the leaflets and visits LEGOs the following day where she signs the contract and pays £600 for membership. When she arrives at the spa later in the week she visits the free weights area to discover that this consists of no more than a rack of ten dumbbells. Disappointed, she decides to go to the swimming pool as Siobhan is a keen diver and intended to use the facility to work on her technique. However, the pool was only 7ft in depth and not suitable for diving.

Advise Siobhan on any misrepresentation claim she may have against LEGOs.

You can find guidance on how to answer these questions **here** <https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-7-indicative-answers-to-end-of-chapter-questions?options=name>.

Further reading

Books and articles

Adams, J. and Brownsword, R. (2007) 'Understanding Contract Law' Sweet and Maxwell: London.

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McLauchlan, D. (2005) 'Mistake of Identity and Contract Formation' *Journal of Contract Law*, Vol. 21, p. 1.

Online Resources

Visit the online resources https://oup-arc.com/access/marson6e-student-resources#tag_chapter-07 for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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