

22. CONTRACT LAW: VITIATING FACTORS

What are "vitiating factors"?

These are factors that either destroy (make void) or undermine (make voidable) an apparently valid contract. Where the con-

tract is void, the parties must be returned to their pre-contractual position, a process known as **restitution**. Where the contract is *voidable*, the party seeking to avoid it will apply for **rescission**, again returning them to their pre-contractual position. Rescission is a discretionary, equitable remedy, and will *not* be granted where: (a) the contract has been affirmed; (b) substantial restitution is not possible; (c) a third party has acquired rights in the subject-matter in good faith and for value.

What is "lack of form"?

While most contracts are "simple" contracts (i.e. there are no formal requirements), some (e.g. those concerning land) must be in writing or evidenced in writing in order to be valid.

What is "duress and undue influence"?

Duress (whether physical or economic—*Universe Tankships v ITWF* [1983]) and **undue influence** (the abuse of a privileged position of influence) make a contract voidable.

What is "illegality" and "public policy"?

A contract is void if it is illegal in either its object (e.g. a contract to commit a crime) or its manner of performance (e.g. unlicensed trading). Contrary to the general position, any money/goods exchanged are *not* recoverable (*Parkinson v College of Ambulance* [1925]).

What is "mistake"?

There are *three* situations where a mistake by one of the parties will make the contract void:

- (1) Mistake as to the nature of the subject-matter (but not mistake as to its quality) (*Raffles v Wichelhaus* [1864]).
- (2) Mistake as to the existence of the subject-matter (*Strickland v Turner* [1852]).
- (3) Mistake as to the identity of the other party, but *only* where the *precise* identity of the that party is crucial to the other's decision to enter the contract (*Cundy v Lindsay* [1878]; *Shogun Finance v Hudson* [2004]).

What is "misrepresentation"?

A misrepresentation is an untrue statement made during pre-contractual negotiations. Whether it is an operative misrepresentation, and the consequences if it is, depend upon the:

- (1) **Nature of the statement**—it must be a statement of fact (not law, opinion, or intention). Generally, remaining silent cannot amount to a misrepresentation (*Fletcher v Krell* [1873]) except where: (a) it is a failure to notify a change in material circumstances (*With v O'Flanagan* [1936]); (b) it is a "half-truth", thereby creating a false impression (*Nottingham Patent Brick and Tile Co v Butler* [1886]); the contract is one of utmost good faith (e.g. insurance contracts).
- (2) **Nature of the inducement**—the misrepresentee must have relied on the truth of the statement in deciding to enter the contract (*Atwood v Small* [1838]; *Redgrave v Hurd* [1881]), though it need not be the sole factor in the decision (*Edgington v Fitzmaurice* [1885]).
- (3) **Nature of the misrepresentation**—an operative misrepresentation makes the contract voidable. If it is fraudulent, the innocent party can also claim damages in the tort of deceit. If it is negligent, they can also claim damages under the Misrepresentation Act 1967. If it is innocent, they can claim damages in lieu of rescission under the Misrepresentation Act 1967.