

PART III- TERMINATION:

8. Free of Vitiating Elements

Failure to Create Valid Contract

- Mistake:
 - Law, Fact, Non est factum, Unilateral and Mutual mistake
- Misrepresentation
 - Innocent, Fraudulent, Negligent
- Undue Influence
- Duress

Mistake

- One or both parties formed erroneous opinion as to identity of subject matter or important term
 - Does not express their true intentions
- Types of Mistake:
 - Mistake of law – no relief
 - Mistake of fact - may get relief
 - Non est factum – not of my doing
 - Unilateral and Mutual mistake

Mistake of Fact

- Court may provide relief
 - Mistake as to subject matter of contract
 - General rule - contract is void
 - Mistake as to identity of the Party
 - Depends if the identity of the person is an essential element of the agreement
 - If essential may not be enforceable
 - If not essential – it will be enforceable

Mistake of Fact

- Non Est Factum:
 - Defense that may allow illiterate/infirm persons to avoid liability on a written agreement if:
 - Establish that they were not aware of the true nature of the document; and
 - Were not careless in execution
 - Applies only to type of agreement being signed not to the terms of the agreement

Unilateral and Mutual Mistake

- Unilateral Mistake:
 - A mistake by one party to the agreement
- Mutual Mistake:
 - Both parties have made mistaken assumptions as to the subject matter
 - Can be same mistake or different mistakes
 - Courts will not enforce agreements when the other party is aware of the mistake being made

Mutual Mistake

- Rules:
 - If both parties make the same mistake:
 - as to subject matter then the contract is unenforceable
 - As to identity of the parties
 - Deal with on a case by case basis
 - Rectification
 - Correction of a mistake that would have rendered the agreement impossible to perform

Misrepresentation

- Characteristics:
 - A statement or conduct
 - Induces the other party to enter into the contract
 - Must be a material matter
 - Must be a statement of fact and not opinion
 - Exception: expert opinion
 - Statement made before contract entered into

Misrepresentation

- Result of misrepresentation:
 - Voidable at the option of the injured party
 - Must rescind or lose the right if accept benefits under the contract
- Rescission
 - The revocation of a contract or agreement

Misrepresentation

- 3 Types
 - Type
 - Innocent
 - Fraudulent
 - Negligent

Remedy

rescission only

rescission and damages

rescission and damages

Remedy depends on type of misrepresentation

Fraudulent Misrepresentation

- Fraudulent Misrepresentation:
 - False statement of fact made by a person who knows or should know that it is false and made with the intention of deceiving another
- Tort – Deceit:
 - Arises when a party suffers damage by acting upon a false representation made by a party with the intention of deceiving the other

Misrepresentation by Non-Disclosure

- General rule:
 - No obligation to disclose
 - Exception:
 - Certain types of relationships or contracts
 - Contracts of utmost good faith
 - Insurance, Partnership (fiduciary obligation), special trust or confidence between the parties
 - Partial disclosure of facts has effect of rendering the part disclosed as false

Negligent Misrepresentation

- Negligence:
 - Newer form of misrepresentation
 - Statements that are sufficiently reckless but not quite fraudulent

Undue Influence

- Undue Influence:
 - A state of affairs whereby a person is so influenced by another that the person's judgment is not his or her own
 - Not in a fair bargaining position
- 2 Scenarios:
 - Special Relationship exists (trustee/beneficiary)
 - Special Relationship does not exist
- Onus on dominant party to prove otherwise

Undue Influence

- No undue influence if
 - Agreement was fair and reasonable in the circumstances
 - Full disclosure is made prior to the formation of contract
 - Weaker party free to seek independent legal advice
- Contract is voidable at option of weaker party

Duress

- Threat of injuring or imprisonment for the purpose of requiring another to enter into a contract or carry out some act
 - Threat can be to person directly or to person's family (or a close relative)
 - Contract is voidable at option of person once they come out from under duress
 - Threat to person and not person's goods

Discharge

- Performance
 - Tender of payment
 - Tender of performance
- Discharge
 - Termination
 - External events
 - Express terms
 - Implied terms

Performance

- Done according to terms of contract
 - Must be exact and precise for discharge
 - Anything less is a breach
- Act of performing a contract or the offer of payment of money due under a contract
 - Tender of Payment - when money paid at time and place required
 - Legal tender
 - Cannot be refused if tendered by buyer
 - Seller can refuse credit card, check, bill of exchange

Tender

- Debt:
 - If proper tender of payment is made and refused by creditor, interest stops running
 - Debtor need not attempt to pay again
- Tender of Performance of an Act:
 - Must deliver goods to proper place at proper time
 - If refusal by buyer seller need not tender again

Discharge by Other Means

- Termination as a Right:
 - Option to terminate by one party giving notice to the other
 - Contract provides for a termination right
 - If done improperly may be liable for damages for improper termination

Discharge - External Events

- Express Terms:
 - Occurrence of an event specified in contract
 - Condition Subsequent
 - Alters the rights or duties of the parties to a contract, or that may have the effect of terminating the contract if condition should occur
 - Force Majeure:
 - Occurrence of major unforeseen event that prevents the performance of a contract or causes damage to property

Discharge - External Events

- Implied Terms:
 - Occurrence of an event that by custom of the trade would normally result in exemption from liability
 - Condition subsequent are implied by the courts
 - Example: common carriers

Discharge - External Events

- Frustration:
 - Performance by a party is rendered impossible due to an unforeseen or unexpected change in circumstances
 - Results in the contract being discharged
 - Should be inserted into the agreement
- Self-Induced Frustration:
 - Doing something to avoid a contract
- Loss lies with the parties

Frustrated Contracts Act

- Allows:
 - Court to apportion loss equitably between the parties
 - Recovery of deposits and/or advances
 - Retention of funds to cover expenses when only part performance has occurred
- Some provinces have Frustrated Contracts Act, others are subject to the Common law

Discharge - Condition Precedent

- A condition that must be satisfied before a contract may come into effect
 - Contract prepared and signed, only performance is postponed
 - Discharged if condition not met
 - Inserted for the benefit of the one party, not both

Discharge - Operation of Law

- Discharged by operation:
 - Enemy states
 - Specific legislation
 - Bankruptcy
 - Bills of Exchange Act
 - Doctrine of Laches
 - Statutory Limitations
 - Mergers

Discharge by Agreement

- Waiver:
 - Express or implied renunciation of a right or claim
 - Consideration if neither party has fully performed
 - If one party fully performed but the other has not, performed party may waive rights to performance
- Novation:
 - Mutual agreement to amend the terms or parties to an existing agreement

Discharge by Agreement

- Material Alteration:
 - Major alteration of an agreement that has the effect of discharging the contract and replacing it with another
- Substitute Agreement:
 - Substitution may effect the discharge

Discharge by Agreement

- Breach of Contract:
 - Failure of a party to perform a contract according to its terms
 - One party may have right to discharge agreement
 - Express repudiation
 - Implied repudiation
 - Fundamental Breach
 - Warranty
 - Condition

Breach of Contract

- Breach:
 - Party has right to Damages, Rescission or Both
- Repudiation:
 - A refusal to perform a contract
 - Can be express or implied
- Condition:
 - An essential term of a contract
 - Breach allows the other party to end the contract

Breach of Contract

- Anticipatory Breach
 - Advance determination that a party will not perform at the time for performance
 - May end the contract or continue with the contract
 - If continue one takes the chance the contract may be discharged in another way in the interim

Breach of Contract

- Repudiation
 - If partial performance can only rescind if repudiation goes to root of contract
- Doctrine of Substantial Performance
 - Cannot rescind a contract if it has been substantially performed
- Subsidiary Promise
 - Warranties where a sale of goods is concerned
 - Allow for damages but not rescission

Breach of Contract

- Implied Repudiation- inferring can be risky
 - Not expressly repudiated but through statements or conduct
 - Inadequate performance over a period of time may be implied repudiation
- Fundamental Breach
 - Breach that goes to the root of the contract
 - Allows injured party to rescind contract and sue for damages

Exemption Clauses

- Construed strictly against the party who inserted them (especially in standard form marketplace contracts)
- Allows parties to avoid exemption clauses
- Depends on the construction/ wording of the contract

Breach of Warranty

- Warranty:
 - In a sale of goods, a minor term in a contract, the breach of which allows one to sue for damages but not rescission
 - Conditions may become warranties

Remedies - Compensation

- Right of injured party to sue for compensation for the loss suffered
 - Loss or injury must be proven
 - Courts attempt to place party into position would have been had the contract been performed i.e. original position
 - Can take the form of monetary damages, specific performance, or quantum meruit

Remedies - Damages

- General Damages:
 - Restitution for losses naturally expected from a breach of contract
 - Put party into position they would have been had the contract been performed
 - Represents compensation for losses
 - Losses must flow naturally from the breach can cannot be too remote

Remedies - Damages

- Special Damages:
 - Specific damages that would flow from a breach of contract
 - Do not arise naturally or generally from the normal course of events following such a breach
- Punitive Damages:
 - Not compensation but punishment when actions were deceitful, malicious or offensive

Extent of Loss

- Contemplation Test:
 - Reasonable foreseeability
 - Recoverable Damages that the parties may reasonably contemplate as flowing from breach
- Special Circumstances:
 - Any loss that might occur from special circumstances relating to the contract that parties might reasonably be expected to contemplate at the time the contract is made

Remedies - Mitigation

- Obligation of an injured party to reduce the loss flowing from a breach of contract
- Must take steps to mitigate losses
- Find a new buyer or Find a new seller

Remedies - Liquidated Damages

- Bona fide estimate of the monetary damages that would flow from the breach
 - Attempt by the parties to estimate damages in the case of a breach e.g. deposits
- If unreasonable amount then penalty clause
 - Penalty clauses are unenforceable
 - Like punitive damages which are not allowed for ordinary breaches

Remedies – Specific Performance

- Equitable remedy
 - Granted when damages would be inadequate
 - Requires the defendant to carry out the agreement according to its terms
- Discretionary remedy
 - Force the party to do something they agreed to do
 - Must be a unique subject matter
 - Land, antiques, rare goods

Remedies - Injunction

- Equitable remedy
 - Orders the person(s) named therein to refrain from doing certain acts
 - Prevent party from doing something they agreed not to do
- Discretionary remedy

Remedies – Quantum Meruit

- Usually in situations of services or mixed goods/services
- Remedy not based on the contract but upon quasi-contract
- Available if contract has been partly performed
- Courts concerned with compensation for the work performed

Summary

- Contracts
 - Promises enforced by the courts
- Requirements
 - Intention, Offer, Acceptance, Consideration, Capacity, Legality, Requirement of Writing
- Free of vitiating elements
 - Mistake, Misrepresentation, Duress and Undue Influence

Summary

- Terminate/Discharge a Contract
 - Performance, Law, Frustration, Agreement, or Breach
- Remedies
 - Monetary damages - restore party to original position
 - Specific Performance - limited situations
 - Injunction - prevent someone from doing something
 - Quantum Meruit

Employment Contract

- Introduction whereas
- Duration
- Position
- Hours of work
- Confidential Information
- Remuneration
- Expenses
- Leaves
- Termination/Separation
- Notices
- Jurisdiction
- Employee Personnel Policy
- Training & Development
- Monitoring
- General
- Signatures/Date

