LAWS 211

Misrepresentations | Consideration / Pre-existing duty | Damages | Economic duress | Foundations

Misrepresentations

Misrepresentations

Actionable misrepresentations are:
1) false statements relating to past or present matters of fact, which
2) induce the party to enter into a contract.

Misrepresentations are not promises: promises are an undertaking to do or refrain from doing something in the future. A promise is not a misrepresentation unless it was made without any real intent to ever make good on the promise; in that case, there has been a misrepresentation of the person's state of mind.

Causes of Action

Contract and Commercial Law Act 2017, s 35

[previously s 6 of the Contractual Remedies Act 1979]

Liability: only parties (not their agents)
For: innocent or fraudulent misrepresentations
Made by: that party or on behalf of that party
Damages: contract (misrepresentation treated as if it were a term of the contract)

Parties cannot be sued in tort (deceit, negligence) for negligent or fraudulent misrepresentations (s 35(1)(b)

Fair Trading Act 1986, s 9

Liability: parties or agents (agents s 45) *who are in trade*
For: misleading or deceptive conduct, or conduct that is likely to mislead or deceive
Damages: tort measure (*Cox & Coxon v Leipst*), including the ability for damages for lost opportunity (but not the contract measure of damages)

[the purpose of the Act is to prohibit misleading or deceptive conduct, not render representations binding]

Causes of Action cont'd

Tort

Liability: agents only (due to CCLA s 35(b) bar)
For: negligent (careless with duty of care) or fraudulent statements
Damages: tort measure as with the Fair Trading Act

- Generally real estate agents, as professionals, will owe a duty of care and be responsible for the accuracy of their statements

Breach of Term / Collateral Contract

Collateral contracts are contracts in which one party's consideration is the promise to enter into another contract. In land dispositions, all terms need to be recorded in writing so arguing that a separate collateral contract exists is a way to avoid the Property Law Act writing requirements. **Since the CCLA treats misrepresentations as if they are a term of the contract, and the same remedies can be obtained under that cause of action, arguing that a collateral contract exists is often not worth it.** Agents also usually do not have authority to bind their principal, so this could make proving breach of contract more difficult.

Damages

Contract measure of damages

Contract damages aim to put the parties in the position they would be in if the representation had been true.

Represented value - actual value OR cost of cure

The objective of tort damages is to compensate for the wrong done (the loss incurred). The objective of contract damages is to put the parties in the position they would be in had the representation been true.

Damages cont'd

Tort measure of damages

Tort damages aim to put the parties in the position they would be in if the misrepresentation had never been made (to compensate for the harm done).

Generally speaking,

damages = price paid - actual value

so the plaintiff cannot recover any damages under the tort measure if he has still made a good bargain overall (if the actual value is greater than the price paid).

Lost opportunity

The case of *Clef Aquitaine* held that damages could be recovered for the lost opportunity to enter into a similar agreement with more favourable terms on price. This principle was accepted by the NZCA in *Harvey Corporation v Barker*.

Clef Aquitaine succeeded *East v Maurer*, wherein the bargain was a losing one (in *Clef Aquitaine*, the bargain was still profitable) and the plaintiffs were also awarded lost profits from the other opportunity.

Alternative losing bargain

In *Yam Seng*, it was acknowledged that for parity of reasoning, if the defendant can show that but for the misrepresentation, the plaintiffs would have entered into a losing bargain anyway, then this can reduce the amount of damages that the defendant is liable to pay.

Agency

In situations such as a vendor/estate agent relationship, it can generally be assumed that the real estate agent has apparent authority to make representations about the property; that is, the vendor holds out the agent as having authority to make statements about the subject matter.

Damages

Damages equation

$B = $x + $y + $z

$B: The total (gross) benefit to be received under the contract.
$x: The amount of expenditure already incurred in performance of the contract
$y: The amount of expenditure remaining to be incurred if the contract were to be fully performed.
$z: The net profit (loss) that would have resulted had the contract been fully performed.

Method 1: Benefits less expenditure remaining (**$D = $B - $y**)

Method 2: Wasted expenditure plus lost profit (**$D = $x + $z**)
Less salvage and part payment of defendant, then add breach related costs and mitigation costs. (methods 1 and 2)

Method 3: The long way (**promised position - actual position**)

Interests

1. **The expectation interest**: interest in benefits that would have flowed from full performance
2. **The reliance interest**: interest in being reimbursed for wasted expenditure in reliance/in performance/preparing to perform
3. **The indemnity interest**: interest in being reimbursed for diminution of assets / other losses
4. **The restitution interest**: interest in having restored to him any benefits conferred on the defendant pursuant to the contract.

Robinson v Harman

"The rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it to be placed in the same situation, with respect to damages, as if the contract had been performed."

The "market rule"

Damages are assessed at the time at which the seller could be expected to go into the market. Where there is an available market and the seller has a choice, the seller's speculation is for their own account.

Application in *Fulton Shipping v Globalia Business Travel (The New Flamenco)* [2017] 1 WLR 2581

The defendants repudiated their agreement with the ship's owner, the plaintiff, over two years early. With no possibility of a substitute charter for the old ship, Fulton Shipping decided to sell the ship and received US$24mil for that sale. The owners then sued for damages under the contract.
However, had the contract been performed, the ship's value would have ended up as only US$7mil; so, in selling the ship early, the ship's owners made a significant sum of money. In fact, they were in a better position after the breach than they would have been had the contract been performed.
Arbitrator: Selling the ship was a "practical necessity"
High Court: Selling the ship was an independent and separate matter
Court of Appeal: The benefit should be taken into account, because there was "no available market" for a substitute charter. If there was, the "market rule" would have applied. Because there was no available market, ordinary principles of mitigation applied: was selling the ship arising out of the consequences of the breach and in the ordinary course of business? Yes — so the profit should be taken into account.
Supreme Court: Selling the ship was an independent matter. It was not caused by the repudiation, it was not an act of successful mitigation, and the repudiation was not the legal cause of the sale. When the owners sold, they made a commercial decision at their own risk.

Profit or loss unknown

The best that one can hope for is the recovery of expenditure incurred in performance of the contract or in reliance on it.

1. **Plaintiffs who can't establish benefits may still be able to recover the wasted expenditure that the parties reasonably contemplated as likely to be wasted as a result of the defendant's breach**.
2. **Wasted expenditure will generally restore pre-contract position, that is coincidence not entitlement.** Law presumes that plaintiffs would at least recover expenditure (unless proven contrary)
3. **Onus is generally on the defendant to prove that the expenditure would not have been recovered even if the contract was performed.**
4. **An award for wasted damages may include expenditure incurred prior to and in anticipation of the contract.** So long as it is in reasonable contemplation. (*Anglia TV v Reed*). The issue is not whether the expenditure was caused by the breach, but whether it was **wasted** as a result of the breach.

Hadley v Baxendale (1854) 9 Exch 341

Hadley left a crankshaft with Baxendale, who was contracted to haul it to someone else. Baxendale didn't deliver on time, which delayed the repair work, and meant that Hadley's mill had to shut for longer and lost a contract. **The consequence of the mill closing was too remote; for all Baxendale knew, Hadley had a spare crankshaft.**

A defendant will be liable if the loss was within the reasonable contemplation of the parties at the time the contract was made as a likely or not unlikely result of the breach.

Then, a clarification in *The Achilleas*:

A loss can still be too remote even if meets the *Hadley v Baxendale* threshold. A defendant will escape liability if it cannot be reasonably inferred that they accepted responsibility for that loss.

A substantial difference between the loss incurred by the promisee and the remuneration received by the promisor may make it unreasonable to infer acceptance of responsibility (e.g. taxi driver).

Undertakings of reasonable care

Solicitors and other professionals generally undertake to exercise reasonable care; that does not mean they undertake to provide correct advice. In Ford v White & Co [1964] 1 WLR 885, the plaintiff engaged his solicitors White & Co to advise him on the purchase of land. The solicitors advised that there were no building restrictions (in breach of their duty of care) when in fact there were.
The plaintiff sought to enforce the solicitor's advice as if it were a warranty (he wanted represented value less actual value), but the Court held that the measure was price paid - actual value.
This is because the solicitors only contracted to provide reasonable care. **Damages should put the plaintiff in the position he would be in if reasonable care was taken**; i.e., he would be advised of the restrictions and not have bought the property. The harm of the reliance on the advice is therefore the price he paid for the property less the actual value. If actual value > price paid, $D = 0

Foundations

Offer

An offer is an expression of willingness to contract on certain terms, made with the intention (or apparent intention) that it will become binding immediately upon acceptance.

Would a reasonable person in the position of the offeree believe there to be an offer which would become binding upon the offeree manifesting assent to the offeror's terms?

Period of offer

An offer generally remains open for a reasonable period of time. As the master of his offer, the offeror can set as a condition of the offer a requirement that acceptance must occur before a set time.

An offeror may also promise to keep the offer open for a certain period of time, however this is a gratuitous promise and so the offeror is still free to revoke the offer at any time; this is because the promise to keep the offer open is not given for consideration.

A contract for **options** can be entered into in which a promise to keep the offer open for a certain period of time is given for consideration, usually a nominal sum of money.

Revocation of offer

The offeror is the master of his offer and can revoke the offer at any time before acceptance, so long as that revocation is communicated to the offeree. An offeror cannot revoke his offer in breach of any contract for options.

Evaluating the objective test

Consider:

- **parties' language and conduct**
- **the surrounding circumstances**
- **whether there is actually an offer, or whether it is just an invitation to treat (to negotiate)**

Acceptance

Acceptance must be:

- **unconditional**
- **unequivocal**
- **absolute**

It is a manifestation of assent to the **exact terms** of the offer.

Would a reasonable person in the position of the offeror believe that the offeree intended to accept the offer?

Counter-offers

Responding to an offer with a counter-offer is not valid acceptance. **Acceptance must be unconditional and absolute and show willingness to contract on the exact terms of the offer**. When a counter-offer is made:

- the original offer is declined and ceases to exist
- the former offeree becomes the offeror, and the former offeror becomes the offeree
- the same rules apply for acceptance as any other offer, except now the roles are reversed.

Consideration

For a contract to be valid there must be consideration from both parties (a **promise is not binding unless it is given for consideration**). This is:

- **a detriment incurred by the promisee**
- **a benefit gained by the promisor**

This is often the same thing, looked at from different perspectives.

Where the **contract is not performed immediately:** the consideration is not what is being transferred (e.g. a house, or $800,000) but the promise to transfer it (e.g. the promise to transfer the house, or the promise to pay $800,000).

Certainty

Historically, courts have insisted that an agreement can only have contractual force if it defines the parties' obligations with a sufficient degree of certainty and completeness.

Nowadays, it is about whether the parties intended to be bound. If this is the case, courts will strive to give legal effect to this agreement. So long as there is a sufficient skeleton of terms, the courts will try to fill in the gaps with what is reasonable.

Communication of Acceptance

Generally, there is no contract until the offeree communicates to the offeror their acceptance of the offer. There are exceptions to this:

- the postal acceptance rule
- the offeror can waive the need for communication of acceptance. In this case, the offeree need only manifest an intention to accept. Or, they may require performance of a particular act (a unilateral contract).

Default method of acceptance

Where no particular method is prescribed, the necessary form will depend on the **nature and circumstances** in which it was made. An oral offer may imply that an oral acceptance suffices.

Specified method of acceptance

An offeror can specify that acceptance needs to be made in a certain form, or communicated in a certain way. But, courts are reluctant to interpret such requirements as absolute unless the offer stipulates that **only** a specific method of acceptance is permitted; then it is considered a **condition** on the offer. Otherwise, they will accept an equally advantageous and expeditious method.

Equally advantageous and expeditious method

If the offeree accepts by some other method that is equally advantageous or expeditious as the method that the offeror has specified, then that constitutes valid acceptance. For example, sending by courier when the offer asks for post. This rule does not apply when, as a condition of the offer, the offeror has clearly stipulated that only a specific means of acceptance will be accepted.

Postal acceptance rule

When acceptance is made by post, then **acceptance and contract formation occurs at the time the letter is posted.** It is at this point that the contracting parties become bound. This has the effect of:

- protecting the offerees from attempts by the offeror to revoke the offer even after a letter of acceptance has been posted
- provides certainty to offerees

This rule does not apply when, as a condition of the offer, the offeree has stipulated that he must have ***received*** acceptance by a certain time.

Boots

Rule

A display of goods bearing marked prices is not in itself an offer to sell.

There is a suggestion from Goddard LJ that there are some situations in which a display of goods bearing marked prices *can* be an offer, but the principle that it is not an offer is not reversed merely because of a self-service scheme.

Why not an offer:

- **It's contrary to the principles of common sense and of commerce.** It doesn't make sense that Boots would make the offer there — if it's contrary to common sense, then it clearly won't pass the objective test for whether or not there is an offer.

And, referring to the Pharmaceutical Society's argument that the display was an offer which could be accepted the picking the item up:

- **The customer would be forced to purchase the item.** Once the customer has accepted, a binding contract would be formed and the customer could never change his mind. This is contrary to the reasonable belief that a customer could do so.
- **The shopkeeper would have no right of refusal.** If the display were an offer, and the customer could accept it by picking it up (or similar), then the customer could "insist on the shopkeeper allowing him to take it away". The shopkeeper might not want this; they might have already promised the item to another customer.

Pharmaceutical Society's arguments

1. **The display was an offer.**
2. **The customer picking up the item and placing it into their basket was acceptance**: but, acceptance must be unequivocal, and there are plenty of reasons for picking up and item and putting it in their basket that don't amount to a clear intention to be bound; they might want to inspect the item, check its price, or seek advice from the chemist. Customers reasonably expect to be able to swap basket items when they find something better or more suitable. Alternative means of acceptance — such as moving away from the shelf, putting articles on the desk, and queuing up — all present the same issues. But, crucially for the Society, they enable acceptance to take place before the pharmacist knows what is going on.
3. **"Supervision" under the statute required a right of refusal (the pharmacist must be able to intervene at the crucial moment.**

Boots' arguments

Boots argued that the customer made the offer. An invitation to select goods cannot have legal effects just because the customer takes them, otherwise:

1. **the customer would be forced to purchase the item:** when the customer makes the offer, the shopkeeper has right of refusal and the customer would not be forced to purchase an item just because he picks it up.
2. **the customer could leave without paying:** this ignores that there could be a "lien" on the goods until the price is paid, in which case, the shopkeeper could retain possession. So, even if the property passes top the customer, and even if he has custody of the goods, the shopkeeper could prevent the article from being taken away.

Sale of Goods Act

A sale is only a "sale" when property is transferred; otherwise an "agreement to sell". Where specific goods are identified, property passes when it is intended to pass. Unless a different intention appears, property passes when the contract is made (unconditional contract; goods in deliverable state). Postponement of delivery/payment is immaterial.

Lacis v Cashmarts [1969] 2 QB 400

In a self-service store, property shall not pass until the price is paid. That is the commercial reality and the practice of self-service stores. There's the "different intention" under Act.

Alternative argument for Boots

1. Boots could argue that, even if the contract was formed at the shelf, the price has not yet been paid. Based on *Lacis v Cashmarts*, there would be the intention that property would not pass until the price has been paid.
2. Since property has not passed, the contract is not a "sale" but an "agreement to sell" (Sale of Goods Act).
3. The price is paid under the supervision of the pharmacist, and at this point the sale occurs.

(this would require arguing a definition of "supervise" that merely means watch/oversee/superintend/guide; as the pharmacist still has no right of refusal).

Alternative argument for the Society

1. Argue for a meaning of "supervise" which requires a right of refusal.
2. Since a contract gives rise to a binding obligation, even if the property had not passed, Boots would still have to sell the goods.
3. Since the pharmacist cannot refuse to sell the goods, he cannot supervise.

Chapelton v Barry

The Barry UDC were found to have been negligent in hiring out chairs that were not safe. But, an exclusion clause printed on a ticket issued after Chapelton paid the price meant that they would not be liable. Chapelton appealed.

[*it is possible that if the same case arose today, the courts would find that the exclusion clause did not clearly cover negligence anyway, even it it were a term* - White v John Warwick & Co - *held that an exclusion of liability for personal injury was not specific enough for negligence*]

Chapelton argued that the display of chairs and the message, which stated that the chairs were for hire, named a price, and then requested that a ticket be obtained from an attendant, was an offer. ***If it was an offer then it would be too late to alter the terms of the contract after it was formed;*** *the ticket is a receipt.* In *Olley v Marlborough Court*, it was found that an exclusion clause on a hotel wall was not clear enough to cover negligence, and too late anyway as the contract had already been formed.

Held:

1. **The display of deck chairs was an offer.**
2. **Even if the display were not an offer, it was not a contractual document;** it was not reasonably expected or known to contain contractual terms.
3. **Even if the document was contractual, there was insufficient notice**; the more extortionate the term, the more notice must be given (Denning LJ in *Thornton v Shoe Lane Parking*, and the *Interfoto* case which related to a high fee for late return of transparencies).

Why was the display an offer?

1. "respectfully requested" on the sign
2. no restriction on how far along the beach you could take chair
3. no obligation to return chair; the attendant comes and gets it
4. display was often left unattended for long periods

Grounds for plaintiff if facts arose today for property damage

1. The display was an offer accepted before any question of notice of the exemption clause (**the too late argument**)
2. Regardless of the offer, the **ticket is not a contractual document** as it is not expected to contain contractual terms.
3. Regardless of the offer, or the document, there was **insufficient notice** of the terms on the back
4. The exemption clause was **too ambiguous** as it did not clearly exclude anything other than breach of contract.
5. In New Zealand, the **Consumer Guarantees Act** provides damages for reasonably foreseeable loss (s 18). Goods must be of reasonable quality and you cannot contract out of liability.

Consideration / Pre-existing duty

Privity

The common law view of privity is that:

Only parties to the contract will obtain enforceable rights or be subject to enforceable obligations under the contract

However under ss 12 to 18 of the CCLA, third-party beneficiaries can enforce promises.

s 12: Entry point

A third-party beneficiary can enforce a promise if:

- the promise is in a deed or a contract
- the person must be designated by name, description or reference
- the person doesn't need to be in existence when the deed or contract is made. (s 12(3))

...except when s 13: No intention

Section 12 does not apply (i.e. beneficiary cannot enforce promise) if there was **no intention to create an obligation enforceable by the beneficiary**. The default position is that s 12 does apply, so the parties need to prove that there was no intention to create an obligation enforceable by the beneficiary.

ss 17 and 18: As if they were a party

Section 17 states that an obligation can be enforced by the beneficiary as if they were a party to the contract (so cannot be denied a remedy on the basis that they were not a party). Conversely, s 18 states that the promisor has all available defences as if the plaintiff was a party.

s 14: When you can't vary

A promise caught by s 12 can't be varied without the beneficiary's consent if:

- the position of the beneficiary has been materially altered by the beneficiary's reliance, or by anyone else's reliance, on that promise. **They don't need to have knowledge of the precise terms of the promise.** OR
- the beneficiary has obtained judgment or an arbitral tribunal's award against the promisor

...and when you still can: s 15

Even if variation is prevented by s 15, the contract can be varied if the parties and the beneficiary agree, or if:

- the deed/contract contained, when the promise was made, an express provision to the effect that the promise can be varied, **AND**
- that provision (but not necessarily its exact terms) are known to the beneficiary, **AND**
- the beneficiary had not materially altered the beneficiary's position in reliance on the promise before that provision became known to the beneficiary, **AND**
- the variation or discharge is in accordance with that provision

s 16: Just and practicable

If a variation is prevented by s 14(1), or it isn't certain whether it's prevented, the Court can make an order authorising the variation if it is **just and practicable to do so.** If the Court is satisfied that the beneficiary has injuriously relied on the promise, then the court must make an order of compensation.

Pre-existing duty rule

The performance or promise of performance of an existing contractual duty cannot constitute good consideration.

Foakes v Beer [1884] 9 AppCas 605

An agreement by a creditor to take from his debtor a lesser sum in settlement of a debt of a greater sum is unenforceable for want of consideration.

Stilk v Myrick - Campbell

The agreement to split the deserted sailors' wages among the remaining crew was void (unenforceable) for want of consideration, because the sailors were doing something which they were already obliged to do.

Stilk v Meyrick - Espinasse

The agreement to split the deserted sailors' wages among the remaining crew was void on the grounds of "just and proper policy", from *Harris v Watson*. In West Indies voyages, crews were often thinned greatly by death and desertion. We would not want to encourage extortion — so, even if the agreement itself is not objectionable (which, in this case, it wasn't as the captain volunteered the extra money), we would not want to encourage to try to get more money in times of danger. We should nip them in the bud.

Since the Espinasse report has the case as being decided on the grounds of public policy, the ratio is effectively sandboxed to shipping contracts. It is not a general rule.

Williams v Roffey

Facts: Defendants agreed to pay extra sum per completed flat to the plaintiffs. It was accepted that the original price was too low, and the plaintiff would not be able to perform unless the extra money was paid.

Issue: Was there consideration for Roffey's promise to pay the extra money, when Williams was already contractually obliged to complete the flats?

Held: Practical benefits would be valid consideration for the promise to pay more, namely:

- **they would ensure that the work continued and did not stop**
- **Roffey, as the head contractor, would avoid the penalty for the delay that would arise if their subcontractor did not do the work**
- **they avoided the trouble and expense of having to find someone else to do the work.**

In *Ward v Byham*, a man promised to pay his child's unmarried mother GBP1 per week. She sued when he stopped paying. Her promise to also ensure the child was "happy" went beyond her statutory duty and was found to be consideration for the husband's promise. This was described as a "practical benefit" in *Williams v Roffey*.

In *Williams v Williams*, a plaintiff who deserted her husband and reached an agreement for maintenance money sued when the husband did not pay. He argued there was no consideration so he did not have to pay the maintenance money. But, the Court held that the wife could return to the husband and end the desertion; then she would be able to claim even more money. So, by entering into this agreement, the husband had limited what he had to pay his wife.

Antons Trawling v Smith

- Suggests that **consideration might not be needed at all**
- At least affirms the *Williams v Roffey* practical benefit.
- [93] *Stilk v Myrick* cannot be taken to control these cases where there is no duress or any other policy issue; we should give effect to reasonable expectations of the parties.
- [93] Consideration **signals intent to be bound** and is not an end in itself. It shouldn't be needed for a variation because the original agreement is support by variation — so it's clear there is an intention to be bound.
- [92] Cites Professor Coote, who suggests that a pre-existing duty cannot constitute consideration and that we should consider doing away with the requirement for consideration for a variation.

But:

- *Antons* only applies to variations - not requirements for contracts where there is a pre-existing legal or statutory duty?
- If an intent to be bound and "action" is enough for an agreement to be binding, and consideration not needed for a variation - why not get rid of it completely?
- Inconsistent with CoA in *Fuel Espresso* ("familiar rule").

Gloria Jean's v Daboko

Consideration is required for a variation to be enforceable, and this is satisfied by a practical benefit.

- The no-consideration position in *Antons* was obiter. So was *Teat*.
- Not for judge to hold that no consideration required.
- But could uphold "practical benefit" argument as this was affirmed in *Attorney-General for England and Wales v R*.
- Practical benefit to Jireh/Daboko was that Ms Borisova's husband would be more likely to finance the operation.

Nav Canada v GFAA

A [variation] unsupported by consideration may be enforceable so long as it is established that the variation was not procured under economic duress,

(**onus is on alleged coercer to prove no economic duress; variation unsupported by consideration only enforceable if no economic duress)**

Consideration must move from the promisee

[common law position - before Privity Act]

If consideration does not move from the promisee it may reinforce that a gratuitous promise is unenforceable. Even if the promisor has received consideration, but that consideration has not come from the plaintiff, the plaintiff cannot enforce the promise as they are a stranger to the consideration.

- *Price v Easton*
- *Tweddle v Atkinson*

Economic duress

Atlas Express v Kafco

"the defendants' apparent consent to the agreement was induced by pressure which was illegitimate and I find that it was not approbated. In my judgment that pressure can properly described as economic duress, which is a concept recognised by English law, and which in the circumstances of the present case vitiates the defendants' apparent consent to the agreement"

Nav Canada v GFAA

Established this general framework for economic duress:

1. **Was there an exercise of pressure?**
2. **Did the allegedly coerced party have no practical alternative but to submit?**
3. **Then: Did the coerced party submit to the variation?**
    a. Was the promise supported by fresh consideration?
    b. Did the coerced party make the promise under protest or without prejudice?
    c. If not, did the coerced party take reasonable steps to disaffirm the promise as soon as practicable?

If no consideration, more sympathetic to finding economic duress. If there is, this lends weight to there being no economic duress but this is not guaranteed. Unjust for a promise otherwise procured through duress to be enforceable just because of nominal consideration (**suggests courts may look at adequacy of consideration**)

Easiest way to establish duress. Failure to voice objection could prove fatal to a plea of duress (ignores Scarman's comment re: victims and bullies)

Usually, once the treat of a breach has lost its persuasive force. This can be once the other party has performed, or, once the other party has performed, just refuse to pay.

- **Illegitimate pressure is not a requirement for the doctrine of economic duress.** (but if it were; Lord Scarman said it was determined by considering the nature of the pressure and the nature of the demand, which are almost certainly a threatened breach and a request to do more than is required under the existing contract).
- **A threat of a breach is a "lawful" "right which can be exercised subject to [remedies]**. So pressure is generally legitimate.
- Therefore, the illegitimate requirement adds unnecessary complexity. **It is the impact on the victim, not the legitimacy of the pressure, that is important for economic duress.**

- [58] Fresh consideration and no protest = ED plea questionable
- [59] **MUST** repudiate as soon as practicable
- [60] Legal advice not relevant
- [61], [63] Coercer's good faith not relevant (**impact, not legitimacy of pressure is relevant)**
- Also consider *Mason v NSW* (1959) per Windeyer J: protest is equivocal and could be a serious assertion of a right or a statement that the payment is grudgingly made.

McIntyre v Nemesis [2010] NZCA

The basic elements of economic duress are:

1. **Illegitimate pressure which compels the victim to enter the contract,**
2. **No reasonable alternative but to submit.**

- coercion is hard to define, but in many cases it is seen as the coerced party's **free will having been overborne**
- economic duress does not require physical crippling, nor does it require a total deprivation of free will
- limits on coercion and pressure come from society: "surely that's not legal"
- considering whether there is coercion:
    - look at availability of alternatives
    - whether or not they protested
    - whether or not they were independently advised
    - whether they took steps to avoid the contract after entering it

(this differs from Lord Scarman in Universe Tankships *who noted that the victim's silence should not assist the bully.*