

terms, they are said to have engaged in duress and the contract is voidable.

#### **Contract is voidable for duress (duress is duress)**

- One of the parties has imposed on the other party with force.
- The threat of force is sufficient to the threatened party's decision whether or not to enter into the contract.
- The threat must be:
- to the personal safety of the other party or to that of their loved ones (duress is duress)
- to the safety of the other party's goods or property (duress is duress)
- to the other party's economic or financial well-being, interest or economic status (duress is duress)

#### **Unlawful influence**

- If one party has influence over the other party and they take advantage of that influence such that the other party is not really exercising their independent judgment, the contract will be voidable on the grounds of undue influence (duress is duress).

#### **Four classes of undue influence**

- **1. Presumed undue influence**
  - Some classes of relationships automatically give rise to the presumption of undue influence:
    - doctor and patient,
    - trustee and client,
    - trustee and beneficiaries,
    - parent/parent and child, or
    - religious leader and follower
  - The presumption can also arise where the relationship is one of confidence where the stronger party gives advice and guidance and is relied on by the weaker party. The stronger party knows the advice will be relied on. (duress is duress)
  - When the presumption arises, it is then up to the other party to prove that there was no undue influence exerted.

#### **2. Actual undue influence**

- Actual undue influence is where the transaction was entered into as a result of actual undue influence.
- The party asserting undue influence must prove it must show that the influence was exerted at the time of entering into the contract and that it was undue (i.e. it was an unconscionable use of any special capacity or opportunity that may have existed on either side and that affected the weaker party's will or freedom of judgment).
- Circumstances that constitute duress can also

- After we have established whether a contract has been formed (offer, acceptance, agreement) and consideration and all that, we can look at what the contract actually says - what is it that the parties have agreed to include in the contract - these are the terms of the contract.
- In the terms of the contract are the specific details of the agreement, including each party's rights and obligations.

#### **Express terms**

- Express terms are those terms explicitly agreed upon by the parties.
- There can be an oral or written or implied term.
- A term may be stated in a contract or verbally.
- If terms are not followed, they are said to be breached.
- Even in a case that a contract can be written, oral or a combination of both.
- How do you determine what are the terms of the contract?
- If the parties reduce their contract into writing, then the terms of the contract are what is written.
- But sometimes statements can be made by either parties, even those statements can be stated as terms of the contract.
- Not all statements made would be considered terms of the contract. Courts have made the following distinction:
  - Representation as fact.
  - Sales pitch.

#### **Representations**

- These are statements of fact made by one party before or at the time of making a contract to induce an offeror to enter the contract.
- They are not regarded as terms, so they don't form part of the contract.
- This means even if they are breached, no action can be taken for breach of contract, but an action may be in misrepresentation (breach is breach)
- Under the Australian Consumer Law (breach is breach)

#### **Sales pitch**

- These are considered to be mere sales talk that is never intended to be taken seriously. No remedy available under contract law.

#### **Terms, conditions and warranties**

- Whether a statement is a term of the contract or a representation that is not part of the contract depends on the intention of the parties.
- The Court applies an objective test (duress is duress)
- What would a reasonable person, aware of the circumstances of the case, believe to be the parties' intention in regard to the statement?
- The court will look at the following objective factors:

- A collateral contract is a secondary contract in which the representation or promise the other party has entered into that main contract (duress is duress)
- If the representation turns out to be untrue or the promise is broken the other party can sue for breach of the collateral contract (duress is duress)
- Even if the collateral contract is breached, the main contract, the other party cannot terminate the main contract.
- Only entitled to damages for breach of collateral contract.

#### **Exclusion clauses and warranties**

- Exclusion clauses or statements are common terms in a contract.
- A disclaimer is a statement that a party will not be in breach despite failing to perform one or more of their contractual obligations. They are used to limit or exclude liability for certain events.
- Examples: "No refunds", "Discontinued sale of food goods" (duress is duress)
- So, when a party is in breach of a law, they may try to rely on an exclusion clause to get out of trouble.
- Whether a disclaimer will effectively protect the party from liability for breach of contract depends upon:
  - The exclusion clause must be incorporated into part of the contract.
  - The exclusion clause must be interpreted to be wide enough to cover the breach.
  - The nature and extent of the exclusion clause must not have been unconscionable to the innocent party.
  - The clause cannot exclude certain statutes.

#### **Unconscionable**

- Like any term, the exclusion clause must be part of the agreement between the parties.
- If it is a signed document or an unsigned document?

#### **A. Signed documents**

- Signature rule: terms contained in a signed document will normally be part of the contract, regardless of whether they have been read or not (duress is duress)

#### **B. Unsigned documents**

- If the document is unsigned, need to consider:
  - Did the reasonable person have regard to the document as one that would contain contractual terms? If no, then can't rely on the exclusion clause (duress is duress)
  - If yes, then can't rely on the exclusion clause (duress is duress)
  - If the document is unsigned, need to consider:
    - Did the reasonable person have regard to the document as one that would contain contractual terms? If no, then can't rely on the exclusion clause (duress is duress)
    - If yes, then can't rely on the exclusion clause (duress is duress)

- Whether a term is a condition or a warranty is a legal question.

- The other party will be entitled to damages in the event of:
  - any breach of contract, whether total or partial, actual or anticipatory, conditional or warranty.
  - breach of a condition, or
  - breach of a warranty, or
  - breach of a condition, or
- The objective of the court in making an award of damages is to restore the other party to the position they would have been in if the breach or misrepresentation had not occurred, that is, if the contract has been performed properly.

#### **Contractual remedies**

- If the other party can demonstrate to the court that an award of damages is not a satisfactory remedy, the court may decide to provide an equitable remedy, such as:
  - specific performance, or
  - injunction.
- An order of specific performance:
  - A court order directing the party in breach to fulfil their contractual obligations (duress is duress)
- An injunction:
  - A court order forbidding someone from engaging in particular conduct that will be a breach of the law or infringe the legal rights of another (duress is duress)

#### **Consumer guarantees and remedies**

- The ACL is primarily concerned with protecting the interests of consumers against unfair practices of traders and providing adequate remedies to consumers where there is a breach of the ACL.
- The ACL protects consumers against:
  - unconscionable conduct.
  - misleading or deceptive conduct.
  - unfair contract terms.
- The ACL also has been given consumer rights which buying goods and services, establishes product safety laws and information standards, establishes product liability and establishes manufacturer's liability for defective goods.

#### **Unconscionable conduct**

- **Unconscionable** is a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- Section 33 doesn't require conduct to be deliberate.
- A person who suffers loss because a business has contravened s33 can commence legal proceedings against the business and seek one or more of the wide range of remedies offered by the ACL:
  - The range of remedies provided by the ACL is much wider than that available in common law for misrepresentation or breach of contract.
- Alternatively the business can lodge a formal

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**G Thomas**

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