

# **CAN I GET OUT OF MY CONTRACT?**

## **VITIATING FACTORS**

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**DANIEL AGHION**  
**Barrister**

Ph: (03) 9225 7092  
Fax: (03) 9225 8025  
Mob: 0412 54 7092

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Latham Chambers  
Room 29, 11<sup>th</sup> floor  
500 Bourke Street  
Melbourne

Mailing address:  
C/- Gordon & Jackson  
Owen Dixon Chambers  
205 William Street  
MELBOURNE VIC 3000  
DX 94 Melbourne  
aghion@vicbar.com.au

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## INTRODUCTION

1. The verb “to vitiate” in this context means to destroy or impair the legal force of a document.<sup>1</sup> For those with an interest in etymology, the Latin root is vitare, from vitium, (defect), from which we also obtain the noun “vice”.<sup>2</sup> To add some spice to tonight’s topic, it can also mean to corrupt someone, to lower someone’s moral standards, to pervert, to deflower, to violate, and to make impure.<sup>3</sup>
2. Before you become too excited however, I am not speaking tonight on the ways in which contracts can be deprived of their effect by depraved or immoral acts. Instead, the term ‘vitiating factors’ is a convenient title for a range of remedies that are available at common law and in equity by which an otherwise valid and documented agreement can be robbed of its effect.
3. This appears to be a growth area of the law at present, particularly in relation to property transactions. I suspect that the increase is directly related to the economy, and to the capping of the spectacular growth in property prices that Victoria has seen over the past 5-7 years. Two years ago, I was racing off to the Supreme Court on behalf of developers who were unable to stump up the balance of purchase price on their developments, and wanted to get out before it all went pear-shaped. Last year, it was home owners and investors who had bought apartments “off the plan” and wanted to get out before settlement. A

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<sup>1</sup> Shorter OED.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

pattern has not yet emerged for this year, but it does seem to be distinctly related to somebody trying to get out of something somewhere.

4. Due to limitations of time, this presentation can only be a 'Cook's Tour' of the broad range of remedies that might vitiate an otherwise effective contract. Entire texts have been written about each category set out below. Hopefully, this presentation will provide a starting point for dealing with the client who comes in with an agreement that, at first blush, looks to be ironclad.

## **FACTORS GOING TO THE CONTENT OF THE AGREEMENT**

### **Common law mistake**

5. There are three types of mistake known to the common law:
  - a) common mistake (we both think that I am selling you a Mercedes SLK sight unseen, but it is in fact a Holden Commodore);
  - b) mutual mistake (I have two cars for sale: a Mercedes SLK and a Holden Commodore. I think that I am selling you the Holden, but you think that you are buying the Mercedes);
  - c) unilateral mistake (I know that I am selling you a Holden Commodore, but you think that you are buying a Mercedes SLK).
6. As you can see from the above examples, the nature of the mistake alleged might relate more to the extent to which you think you have lost out on the Mercedes than to any precise doctrinal distinction.

7. I do not wish to spend much time on the question of common law mistake. It does not arise often and, when it does, it is best dealt with as an equitable mistake. The authors of *Cheshire & Fifoot's Law of Contract* have now suggested that it the time is ripe for the demise of common law mistake altogether.<sup>4</sup>
8. There are however three brief points that I wish to mention.
9. The first is that the former distinction between mistake of fact and mistake of law is gone, and a mistake as to the law is as much a vitiating factor as a mistake as to the facts.<sup>5</sup>
10. The second point is that if a mistake is to be alleged, there must be convincing proof of the existence of the mistake.<sup>6</sup>
11. The third point is that the Victorian Court of Appeal has, in recent times, confirmed the test for unilateral mistake as being where:
  - a) one party, A, makes an agreement under a misapprehension that the agreement contains a particular provision which the agreement does not in fact contain; and
  - b) the other party, B, knows of the omission and that it is due to a mistake on A's part; and

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<sup>4</sup> 8<sup>th</sup> ed. [12.4].

<sup>5</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394; *David Securities Pty Ltd v Commonwealth Bank* (1992) 175 CLR 353.

<sup>6</sup> *Leibler v Air New Zealand Ltd (No.2)* [1999] 1 VR 1 at 15 per Kenny JA, Winneke P & Phillips JA agreeing.

- c) B lets A remain under the misapprehension and concludes the agreement on the mistaken basis in circumstances where equity would require B to take some step or steps, depending upon those circumstances, to bring the mistake to A's attention; then
  - d) B will be precluded from relying upon A's execution of the agreement to resist A's claim for rectification to give effect to A's intention.<sup>7</sup>
12. The test for unilateral mistakes resonates with equitable concepts, particularly estoppel and you can already see that the line between unilateral mistake and equitable mistake is virtually indefinable.

### **Non est factum**

13. Most of you will be aware that documents that are signed by mistake may be avoided by the party who mistakenly signed the document. This is one of the rare examples of common law ameliorating the harshness of its own rules. The traditional grounds upon which a common law defence of non est factum (lit: "not my deed") could be made out (fraud, forgery, misrepresentation, unconscionability, incapacity) are now largely subsumed into the various equitable and statutory remedies set out elsewhere in this paper. The authors of *Cheshire and Fifoot's Law of Contract* have expressed the view for some time

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<sup>7</sup> *Leibler v Air New Zealand* at 14.

that the defence could be safely left to “*whither away or be absorbed into the general principle of unconscionability*”.<sup>8</sup>

## **FACTORS GOING TO THE QUALITY OF AGREEMENT**

### **Equitable mistake**

14. It has been suggested that the doctrine of mistake could be reduced to the following unified principle:

*A court will set aside or rectify a contract, so long as no innocent third party will thereby be affected, when it would be unconscionable for one party to assert his or her legal rights arising from the contract, having regard to a mistake which has been made either by both parties or by one party which was known to the other.*<sup>9</sup>

15. As with all forms of relief in equity, the doctrine set out above looks to the conscience i.e. to the conduct of the parties rather than to the form of their bargain. This may be one reason why the seeds for vitiating an otherwise valid contract are more commonly found in equity than in the common law.
16. The doctrine of equitable mistake is rarely seen these days, most likely because of the strength of the trade practices provisions, which are dealt with elsewhere in this presentation.

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<sup>8</sup> 7<sup>th</sup> ed. [12.71], 8<sup>th</sup> ed. [12.71].

## Misrepresentation

17. This area has largely been overtaken by the statutory remedies that are available for misleading or deceptive conduct in contravention of section 52 of the *Trade Practices Act 1974* (C'th) and section 9 of the *Fair Trading Act 1999* (Vic). It still has some limited effect where the transaction is not 'in trade or commerce', but otherwise has become overshadowed by its simpler and more deadly statutory siblings.
18. The elements to an action for misrepresentation are:
  - a) a statement as to a fact;
  - b) that is false (i.e. either inaccurate or untrue);
  - c) made with knowledge of its falsity (fraudulent misrepresentation) or with a lack of care as to whether it is false or not (innocent misrepresentation);
  - d) that materially induces the recipient to enter into an agreement, irrespective of whether it was calculated to produce this result (fraudulent misrepresentation), or whether it occurs as a natural consequence of the making of the statement (innocent misrepresentation).
19. A misrepresentation will give rise to a right to rescind the contract, and not a right to damages.<sup>10</sup> The logic is that: "if I had been told that the true position was x, I would not have entered into the contract. I should therefore be restored

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<sup>9</sup> *Cheshire & Fifoot's Law of Contract*, 8<sup>th</sup> ed., [12.3], cf *Taylor v Johnson* (1983) 151 CLR 422.

<sup>10</sup> This is not to be confused with negligent or deceitful misstatements which, of course, give rise to the right to claim damages in tort (*Hedley Byrne v Heller* [1964] AC 465; *Derry v Peek* (1889) 14 App Cas 337).

to the position as if I had not contracted with the defendant.” The contract is not void, but voidable at the representee’s election. It is the choice of the representee as to whether it elects to rescind, or whether to affirm the contract. If affirmed, the innocent party will need to find a legal basis for an action for damages, such as breach of contract, negligent misstatement, misleading or deceptive conduct, or some other basis. The election to rescind or to affirm are inconsistent rights and the election of one will therefore extinguish the other. Once the election is made, it is binding and the right to claim the alternate remedy is lost and gone forever.<sup>11</sup>

## **Duress**

20. Duress involves the application of illegitimate pressure in order to put the victim in a position in which they had no reasonable alternative but to assent to the terms of the contract as proffered.
21. Like its brother action of misrepresentation, the common law action of duress has been almost entirely supplanted by the *TPA* and *FTA*, this time by the unconscionable conduct provisions. When considering sections 51AB and 51AC of the *TPA* and the factors enumerated in those sections, clearly conduct that amounts to duress at common law will also be an unconscionable trade practice.

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<sup>11</sup> See *Sargant v ASL Developments* (1974) 131 CLR 634 per Stephen J at 641, per Mason J at 655-6.

22. There may still be some residual role for the common law claim for contracts that are not in trade or commerce, or in business to business transactions where the victim is a public company or where the price of the supply exceeds \$3 million.
23. As to cases that are not in trade or commerce, they are probably better pleaded as undue influence cases, as to which see below.
24. As to cases involving public corporations or supplies greater than \$3 million, Australian courts have signalled that it will be rare for duress to be proven in transactions between powerful corporations.<sup>12</sup> It is, after all, an attack upon the freedom to contract that is probably better dealt with through the existing equitable doctrines of undue influence and unconscionable conduct.
25. While it might seem strange to envisage a claim by BHP Billiton that it was 'heavied' into a billion dollar deal concerning construction of a processing plant at its latest mining concession, there are in fact plenty of such cases, principally concerning the threat to break an existing contract in order to secure better terms.<sup>13</sup> I suspect that these cases stem from the law's unease with the notion that on some occasions a party might find it commercially advantageous to break the contract and take the risk of an adverse result in the courts.

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<sup>12</sup> See, eg, Kirby P in *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 at 107, 109.

## Misleading and deceptive conduct

26. As we all know, section 52(1) of the *Trade Practices Act 1974* (C'th) provides that:

*A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.*

27. Section 9(1) of the *Fair Trading Act 1999* (Vic) provides a mirror provision for persons instead of corporations, while section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (C'th) provides a mirror provision for financial services. Financial services include such things as giving advice as to or dealing in a financial product. A financial product includes such things as investments, a security (e.g. a mortgage), a contract of insurance. It does not however include loans.<sup>14</sup>

28. The *TPA* and the *FTA* provisions have a number of substantial advantages over the common law, and even equitable, doctrines. Some of the more important advantages are:

- a) the reference to 'conduct' includes refusal to do an act, which itself includes 'refraining from doing that act'.<sup>15</sup> This leads to the conclusion that silence, where there is a duty to speak, is itself actionable,<sup>16</sup> a position that arguably exists in the common law already, but not clearly so.

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<sup>13</sup> e.g. *Parkesinclair Chemicals (Aust.) Pty Ltd v ASIA Associates Inc* [2000] VSC 362; *T A Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Ltd* (1955) 56 SR (NSW) 323; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; cf *Pao On v Lau Yiu Long* [1980] AC 614.

<sup>14</sup> *ASICA* s12BAA & s12BAB.

<sup>15</sup> *TPA*, s4(2)(a) & (c).

<sup>16</sup> *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

- b) where a representation is made as to a future matter, and the representor does not have reasonable grounds for making it, the representation shall be taken to be misleading. Further, unless the representor adduces evidence to the contrary, it is deemed not to have reasonable grounds for making the representation.<sup>17</sup> The onus is therefore shifted to the defendant to disprove the misleading nature of the statement.

This does not mean however that every future statement is taken to be misleading. A representor who honestly intends to comply with a promise at the time that it is made, but subsequently resiles from it, is simply making a pre-contractual promise and is not making a misleading representation. This point is discussed in some length by Ormiston JA in *Futuretronics International Pty Ltd v Gadzhis*,<sup>18</sup> a case that involved the successful bidder at an auction who subsequently refused to sign the contract of sale. The fact that the property in question was the ghastly ‘spaceship’ in Centre Road, Oakleigh, not far from here, might have had something to do with Mr Gadzhis’ reluctance to proceed with the sale.

- c) the protection against the plaintiff’s claim for damages being discounted for contributory negligence, or otherwise being apportioned between plaintiff and defendant.<sup>19</sup>
- d) the cocktail of remedies that can be accessed by the use of sections 82 and 87, or a combination of the two.

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<sup>17</sup> *TPA*, s51A.

<sup>18</sup> [1992] 2 VR 217 at 233-42, esp. 240-1.

## Unconscionable conduct

29. In the heady days of the Mason and Deane High Court, when the star of equity was in the ascendant, this doctrine was described as the power of the court to intervene “*to vindicate the requirements of good conscience*”.<sup>20</sup>
30. The focus of the enquiry is to look to the “*conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so*”.<sup>21</sup>
31. The elements required to prove unconscionable conduct are:
- a) the weaker party suffers from a special disability. The categories are not closed, but include: poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.<sup>22</sup> It also includes emotional dependence.<sup>23</sup>
  - b) the special disability is ‘sufficiently evident’ to the stronger party.
  - c) the stronger party takes advantage of the weaker party’s special disability.
  - d) the weaker party suffers detriment.

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<sup>19</sup> *Henville v Walker* (2001) 206 CLR 459, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.

<sup>20</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394 at 446, per Deane J.

<sup>21</sup> *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 at 474, per Deane J.

<sup>22</sup> *Blomley v Ryan* (1956) 99 CLR 362 at 405, per Fullagar J.

<sup>23</sup> *Louth v Diprose* (1992) 175 CLR 621.

32. It is a defence to show that the transaction was fair, just and reasonable, but the onus is on the stronger party to prove it.<sup>24</sup>

### **Undue influence**

33. An equitable doctrine that is less commonly seen in Australia, but conceptually remains distinct from unconscionable conduct.
34. The focus of the enquiry is whether there has been “*an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor’s will or freedom of judgment in reference to such a matter*”.<sup>25</sup>
35. Undue influence is to be distinguished from unconscionable conduct: “*In [undue influence] the will of the innocent party is not independent and voluntary because it is overborne. In [unconscionable conduct] the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.*”<sup>26</sup>
36. Put another way, with unconscionable conduct, the victim is incapable of understanding the transaction because of the victim’s special disadvantage. With undue influence, the victim may understand the transaction, but is unable to bring an independent mind and will to the transaction because of the

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<sup>24</sup> *Amadio*, per Deane J at 474.

<sup>25</sup> *Johnson v Buttress* (1936) 56 CLR 113 at 134, per Dixon J

<sup>26</sup> *Amadio* at 461, per Mason J.

influence of the stronger party. Strictly speaking, *Louth v Diprose* is an example of undue influence and not of unconscionable conduct.

37. Undue influence can either be actual, which arises on the particular facts of the case, or presumed, where the parties are in a relationship that gives rise at law to a presumption of undue influence. Examples of relationships that might give rise to the presumption are parent and child, solicitor and client, doctor and patient.
38. With presumed influence, it is a defence to show that the transaction was not 'manifestly disadvantageous', but this is not a defence to cases of actual undue influence.<sup>27</sup> In cases of actual influence, the onus is on the beneficiary of the transaction to show that the victim brought a free and independent mind to the transaction.

### **The 'special equity' of wives**

39. A particular form of undue influence is the special category of husband and wife. The special category is derived from the comments of Dixon J in *Yerkey v Jones*,<sup>28</sup> as applied in *Garcia v National Australia Bank Ltd.*<sup>29</sup> It creates a 'special equity' for wives, and now possibly for de facto partners as well, to set aside transactions in which they become surety for their husband's financial affairs.

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<sup>27</sup> *CIBC Mortgages v Pitt* [1994] 1 AC 200.

<sup>28</sup> (1939) 63 CLR 649 at 683.

<sup>29</sup> (1998) 194 CLR 395.

40. It is historically based upon equity's 'special tenderness' towards wives, but as Kirby J points out in *Garcia*, the origins are obscure, and may be based upon equitable relief prior to the Married Women's Property Acts.<sup>30</sup>
41. The elements that create the special equity are the trust and confidence inherent in the matrimonial relationship, and that the wife is a volunteer i.e. she derives no or minimal benefit from the transaction. Payment of living expenses such as food, electricity and clothing are incidental benefits that do not necessarily displace the position of the wife as volunteer.<sup>31</sup>
42. There are two types of 'special equity' that might arise from a matrimonial relationship. In 'type 1' cases, the wife does not bring a free mind & will to the decision. She may understand the transaction, but this is irrelevant. In 'type 2' cases, the wife does not understand effect of the transaction at all.
43. The distinction is important for creditors, who are facing an allegation of undue influence. In 'type 1' cases, nothing but independent advice will be sufficient to displace the presumption. In 'type 2' cases, it is a defence if the creditor reasonably supposes that wife has an adequate comprehension of her obligations.<sup>32</sup>

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<sup>30</sup> *Garcia* at 422.

<sup>31</sup> *Bylander v Multilink* [2001] NSWCA 53.

### **A side note: solicitors' certificates**

44. There has been greater use of the doctrines of unconscionable conduct and the 'special equity' of wives in recent times, hence the proliferation of solicitors' certificates by wary financiers.
45. Solicitors' certificates serve the very practical purpose of palming off responsibility for assessing the quality of the assent given to the transaction, from the financier to the solicitor who is called upon to sign the certificate. Unless you want to be named as a third party to a dispute between a bank and a guarantor, or a bank and an unsuspecting wife, you should take extreme care with the signing of these certificates.
46. For fear of telling some 'there but for the grace of God go I' stories, it is not sufficient to sign a certificate on the basis that you recognise the signatures because you have acted for the guarantors on a previous occasion. Nor is it sufficient to certify that you have explained the transaction to the guarantor (in English), when the guarantor does not speak a word of English. Don't laugh. These are just two of the examples that I have encountered of certificates signed by your colleagues.

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<sup>32</sup> *Garcia* at 406-7.

## STATUTORY CONTROLS

### Unconscionable conduct within the meaning of the unwritten law

47. Section 51AA of the *Trade Practices Act 1974* (C'th), section 7 of the *Fair Trading Act 1999* (Vic) and section 12CA of the *Australian Securities & Investment Commission Act 1989* (C'th) in terms, prohibit a person or a corporation<sup>33</sup> from engaging in conduct in trade or commerce that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
48. The clear intent is to import into the statutory trade practices regime the equitable doctrine of unconscionable conduct. It therefore imports the principles contained in *Amadio* as a minimum. It may arguably also import all other 'conscience' based equitable doctrines (undue influence, special equity of wives), but the point has not yet been determined with any certainty.
49. The advantage is that the statutory remedies become available to support the equitable doctrine. "*The advantages of prohibiting in the Act what is already addressed by equity lie in the availability of remedies under the Act, the potential involvement of the Commission, including the possibility of representative actions being brought by the Commission in cases where it seeks an injunction, and the educative and deterrent effect of a legislative prohibition.*"<sup>34</sup>

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<sup>33</sup> "a person": *FTA*; "a corporation": *TPA & ASICA*.

<sup>34</sup> *Trade Practices Amendment Bill*, Attorney General's 2nd reading speech, 3 November 1992, Hansard p2408.

50. The High Court has made it clear that section 51AA of the *TPA* is not a ‘panacea’ against all conduct that is considered to be unfair or ‘against conscience’, but is limited to the more narrow equitable doctrine of unconscionable conduct.<sup>35</sup> This means that special disability must be shown. The mere fact that the other side is driving a hard bargain, or has put you in a ‘no win’ situation, is not sufficient to attract the operation of section 51AA.<sup>36</sup>

### **Statutory unconscionable conduct**

51. Sections 51AB & 51AC of the *Trade Practices Act 1974* (C’th), sections 8 and 8A of the *Fair Trading Act 1999* (Vic), and sections 12CB & 12CC of the *Australian Securities & Investment Commission Act 1989* (C’th), in terms provide that a person or a corporation<sup>37</sup> shall not engage in conduct in trade or commerce in connection with the supply or possible supply of goods or services that is, in all the circumstances, unconscionable.
52. Section 51AB is limited to consumers of domestic goods, but section 51AC extends the operation of the *TPA* to business supplies to private corporations, where the price of the supply does not exceed \$3 million.

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<sup>35</sup> *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

<sup>36</sup> *ACCC v Berbatis*, per Gleeson CJ at [11-17].

<sup>37</sup> a person: FTA; a corporation: TPA & ASICA.

53. A discretionary list of factors is enumerated in both sections 51AB and 51AC, directed to matters such as bargaining power, compliance with unreasonable conditions, understanding of documents, undue influence or pressure, availability of goods or services elsewhere.
54. Section 51AB does not apply to large ‘one-off’ financial transactions, such as mortgages (*Begbie v State Bank of New south Wales Ltd* (1994) ATPR 41-288). This is now irrelevant however, as the *ASIC Act* applies to ‘financial services’ (now excluded from the *TPA*), including the supply of ‘financial products’ (which includes “a security”). An action in relation to a mortgage could therefore be brought under the *ASIC Act*.
55. Sections 51AB and 51AC are different to section 51AA, and are intended to operate on a broader basis than simply importing the unwritten law.<sup>38</sup> They will therefore be available when the conduct of the defendant ‘goes against conscience’, measured by reference to the enumerated factors. It is a very broad and wide-ranging remedy.

### **Contracts for the sale of land**

56. The following rights of rescission or avoidance in relation to contracts for the sale of land are granted to purchasers by the *Sale of Land Act*:

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<sup>38</sup> *ACCC Simply No-Knead Franchising Pty Ltd* (2000) 104 FCR 253, per Sundberg J.

- a) the purchaser's right to avoid a terms contract on the failure to disclose the existence of a mortgage;<sup>39</sup>
- b) the purchaser's right to avoid a terms contract where the vendor mortgages the land;<sup>40</sup>
- c) the purchaser's right to rescind an 'off the plan' purchase within 14 days of being advised of a an amendment to the plan of subdivision that materially affects the lot;<sup>41</sup>
- d) the purchaser's right to rescind an 'off the plan' purchase where the deposit moneys exceed 10 per cent, or are not held in the required manner;<sup>42</sup>
- e) the purchaser's right to rescind an 'off the plan' purchase where works affecting the natural surface level are not disclosed;<sup>43</sup>
- f) the purchaser's right to rescind an 'off the plan' purchase if the plan of subdivision is not registered within 18 months of sale (or such other period as is specified);<sup>44</sup>

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<sup>39</sup> *Sale of Land Act 1962*, s6(3).

<sup>40</sup> *SOLA*, s7(4)(a).

<sup>41</sup> *SOLA*, s9AC(2).

<sup>42</sup> *SOLA*, s9AA & 9AE(1).

<sup>43</sup> *SOLA*, s9AB & 9AE(1).

- g) the purchaser's right to avoid an 'off the plan' purchase if the land was not marked out at sale, and within 18 months of sale the vendor gives Council notice that there is a substantial discrepancy between any boundary of the land and that boundary shown on the plan;<sup>45</sup>
- h) the purchaser's right to avoid an 'off the plan' purchase if an amendment is made to a plan of subdivision which restricts or limits the use of the lot (excluding an amendment resulting from a recommendation by a public authority or government department, or an amendment relating to the final location of an easement);<sup>46</sup>
- i) the purchaser's right to avoid a contract for the purchase of a lot affected by a body corporate where there is no current insurance policy as required by the regulations under the *Subdivision Act 1988*;<sup>47</sup>
- j) the purchaser's right to avoid a terms contract entered into in contravention of the *Sale of Land Act*;<sup>48</sup>
- k) the purchaser's right to avoid where the contract contains provisions that contravene the requirements of the *Sale of Land Act* as to the holding of deposits (subject to the Court's right to excuse the contravention);<sup>49</sup>
- l) the purchaser's right to terminate certain types of contract within the 'cooling off' period;<sup>50</sup>

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<sup>44</sup> *SOLA*, s9AE(2).

<sup>45</sup> *SOLA*, s9AH(2).

<sup>46</sup> *SOLA*, s10.

<sup>47</sup> *SOLA*, s11(2).

<sup>48</sup> *SOLA*, s14(1).

<sup>49</sup> *SOLA*, s.28(1) & (2).

- m) the purchaser's right to rescind for a failure to supply information required by section 32 of the *Sale of Land Act* (subject to the Court's right to excuse the contravention);<sup>51</sup>
- n) the purchaser's right to rescind a terms contract where a legal practitioner whose principal place of business is within 50kms of the GPO acts for both vendor and purchaser (subject to the Court's right to excuse the contravention);<sup>52</sup> and
- o) the right to rescind where a dwelling house on the land is so destroyed or damages as to be unfit for occupation.<sup>53</sup>

## REMEDIES

- 57. The remedies that are available have been canvassed at various points during this presentation. To recap:
- 58. A party may be able to treat the contract as void ab initio, in which case the contract will be treated as never having been in existence. Alternatively, the contract may be valid, but may be able to be rescinded from a certain point in time. In the latter situation, rights that have accrued under the contract will be preserved.<sup>54</sup>

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<sup>50</sup> *SOLA*, s31(2).

<sup>51</sup> *SOLA*, s32(5) & (7).

<sup>52</sup> *SOLA*, s33(3)(b) & (4).

<sup>53</sup> *SOLA*, s34(1).

<sup>54</sup> cf *SOLA*, s30 "rescission".

59. Alternatively, if the problem is not so much the existence of the agreement but its terms, there may be a basis for rewriting the agreement, by seeking rectification of the written document, or perhaps orders that the contract be performed in a certain way. It is beyond the scope of this presentation to consider the specific facts that might give rise to a rectification argument.
60. There may be some other equitable remedy that might be called in aid, such as a constructive trust or equitable charge.
61. There may also be the right to demand a refund of monies paid, interest foregone, or damages, either in lieu of or in addition to some other remedy.
62. You will forgive me for giving the topic of remedies such short shrift. It could be an entirely separate presentation in itself. Besides, there should be something left for the brief to advise.