

## CHAPTER 7: VITIATING FACTORS

### QUESTION 1

Discuss what is meant by common mistake, mutual mistake, and unilateral mistake in the law of contract and explain the effect mistake will have on a contract.

#### Answer:

- Where a mistake is so fundamental to the contract that the courts will regard it as an operative mistake and the contract will be void.
- Common mistake is where both parties make the same mistake. In order to make the contract void the mistake must be fundamental.
- Common mistake as to the existence of the subject matter is likely to make the contract void, *Couturier v Hastie* (1856), *Associated Japanese Bank v Credit du Nord* (1988).
- In most cases mistakes as to quality of the subject matter do not make the contract void. *Leaf v International Galleries* (1950), *Great Peace Shipping v Tsavlis* (2003).
- A Mutual mistake is where both parties make a separate different mistake and so are at cross purposes. The courts will apply an objective test and will enforce this meaning. On occasions it is impossible to reconcile the two differences, *Raffles v Wichelhaus* (1864).
- A unilateral mistake is where only one of the parties to the contract is mistaken and the other party is aware of the mistake.
- A contract may be void for mistake where there has been a genuine mistake as to the actual identity of one of the parties to the contract and that party's identity is one of fundamental importance. But if the mistake concerns the other person's attributes as opposed to their identity then the contract will not be void. *Cundy v Lindsay* (1878), *Phillips v Brooks* (1912), *Lewis v Averay* (1972), *Shogun Finance Ltd v Hudson* (2004).

### QUESTION 2

A contract entered into where there is undue influence or duress is voidable but what constitutes: (a) duress, and (b) undue influence?

#### Answer:

- Duress means that one party has threatened physical violence or serious economic coercion on the other. It has developed as a principle of common law.
- The unlawful actions must be one of the reasons for entering into the contract but need not be the only reason. *Barton v Armstrong* (1976).
- Economic duress arises where a contract has been agreed to after extortion by one of the parties. The innocent party must show that an illegitimate threat or pressure was applied by the other party and it was significant in inducing them to agree to the contract and they had no practical choice but to agree. *Atlas Express Ltd. v Kafco (Importers and Distributors Ltd*

(1989), *Kolmar Group AG v Taxpo Enterprises Pvt Ltd* (2010). *CTN Cash and Carry v Gallaher* (1994).

- Undue influence covers situations where excessive persuasion has been applied by one party to the other. It has developed through equity.
- It may be actual undue influence, *Bank of Credit and Commerce International SA v Aboody* (1990) or it may be presumed if there is a fiduciary relationship existing between the parties. *Allcard v Skinner* (1887).
- Where a fiduciary relationship is not automatically presumed the court may be prepared to find that one existed from the facts of the case, *Hart v Burbidge* (2014).

### QUESTION 3

In October, Atomic Kat Ltd begins negotiations with Alcopops plc. for sponsorship for Atomic Kat, a famous pop group. In November, Natasha from Atomic Kat informs the rest of the members of the group that she is thinking of going solo. In December, Atomic Kat Ltd sign the sponsorship contract with Alcopops plc under which Atomic Kat Ltd agrees to promote Alcopops in return for sponsorship of £50,000 in Atomic Kat's forthcoming six-week Christmas tour. At the end of the first week on tour, Natasha announces publicly she is leaving the group.

Advise Alcopops plc. who have stated they would not have entered into the contract if they had known Natasha was leaving.

#### Answer:

- A misrepresentation is a false statement of fact made by one party to the contract to the other party, with a view to inducing the other to enter into it. *Bisset v Wilkinson* (1927) and *Smith v Land and House Property Corp* (1884); *Esso Petroleum v Mardon* (1976).
- For a statement to be a misrepresentation it must be false – this includes half truths and statements which become false after they are made *With v O'Flanagan* (1936).
- The statement must be pre-contractual and not become part of the contract (if term of the contract then the action is for breach of contract see chapter 8).
- The statement may be oral, written or through conduct. *Spice Girls Ltd v Aprilla World Service BV* (2002). Atomic Kat knew that Natasha would be leaving the group before the contract with Alcopops was signed. If they represented that the group would be continuing when the contract was made this may amount to an actionable misrepresentation.
- The statement must induce the other party to enter into a contract: *Attwood v Small* (1838), *Zurich Insurance v Hayward* (2016) Alcopops have stated that they would not have entered into the contract had they known Natasha was leaving the group.
- Effect of a misrepresentation is to make the subsequent contract voidable.
- Types of misrepresentation: A fraudulent misrepresentation is a statement made knowing it to be false, or believing it to be false, or recklessly not caring whether it be true or false *Derry v Peek* (1889). Remedies are damages and usually rescission. A negligent misrepresentation is where the maker believes in its truth but has no reasonable grounds for such belief. Under the Misrepresentation Act 1967 the burden of proof falls on the party

making the statement to show the misrepresentation was innocent. Remedies are damages and rescission (but damages may be awarded in lieu of rescission s2(2)MR Act 1967).

- In this case it may be that the misrepresentation is fraudulent, however it might be easier for Alcopops to pursue negligent Misrepresentation since the burden of disproving negligence falls upon Atomic Kat.

#### QUESTION 4

Lulu owns a luxury watch and jewellery store in Brighthelm. She receives an e-mail order for two top-of-the-range watches, costing £2,000 each, from Terry who claims to be from Anex Design, an interior decorating company which requires the watches quickly as retirement presents for two of their long-serving employees. Lulu has the watches in stock and she agrees to sell them on receipt of a company cheque. The cheque arrives the next day and Lulu sends the watches to Anex Design.

The following day Heather comes into the store and wishes to buy a diamond ring, priced £1,000. Heather writes out a cheque, but Lulu explains that the store does not take personal cheques. Heather replies 'You must know my face—I'm the famous actress Heather Miles. I live here in Brighthelm' and shows Lulu her equity card which contains a photo and the name 'Heather Miles'. Lulu looks up the phone book and sees that a Heather Miles lives in Brighthelm. She accepts Heather's cheque and lets her take the ring away.

The cheques from Anex Design and Heather Miles are dishonoured. Lulu has now discovered that Anex Design does not exist and the watches have been sold on to Chris and Barbara, and that the diamond ring has been sold on to Kia. Advise Lulu.

#### Answer:

- Where one party or both parties are mistaken about an aspect of a contract they have entered into, the contract is usually still valid. But where the mistake is fundamental to the contract, the courts may regard it as an 'operative' mistake which makes the contract void.
- A unilateral mistake is where only one of the parties to the contract is mistaken and the other party is aware of the mistake. In this scenario on both cases Lulu is mistaken but the other parties are not and therefore the mistakes are unilateral ones.
- Where there has been a genuine mistake as to the actual identity of one of the parties, to the contract, and that party's identity is one of fundamental importance, then the contract will be void for mistake. If the mistake concerns the other person's attributes as opposed to their identity then the contract will not be void for mistake but may be voidable for fraudulent misrepresentation.
- Where the parties make a contract at a distance from each other, post, e-mail, telephone, it is easier to establish that the identity of person placing the order is of fundamental importance to the contract, *Cunday v Lindsay* (1878).
- But the innocent party cannot claim to intend to contract with a party that does not exist. *Kings Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* (1897). Anex does not exist and therefore the contract will not be void for mistake. The contract may be voidable for fraud

but if Chris and Barbara have bought the watches in good faith Lulu will not be able to reclaim the watches from them.

- Where the parties contract face to face, as in the case of Lulu and Heather, it is presumed that parties intend to contract with the person before them not with the person she is alleging to be. *Philips v Brooks* (1919), *Lewis v Averay* (1971). Although on occasions the courts have found evidence of an operative mistake to the identity of one of the parties making the contract void, *Ingram v Little* (1960). In the light of the circumstances in this scenario it is likely the courts will follow *Lewis v Averay* (1971) and find there was no operative mistake as Lulu intended to sell the ring to the person opposite her. Although the contract may be voidable for fraudulent misrepresentation if Kia has purchased the ring in good faith Lulu will not be able to reclaim the ring from her.