



ANU LAW STUDENTS' SOCIETY

LAWS1204 Contracts 2nd Semester 2003

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Question 1

75/100

Daniel v Isabella

D= Daniel, I=Isabella

The most suitable remedy Daniel will be seeking is damages. He would ultimately want rescission but this would be difficult considering the changes that have taken place to the restaurant and the time that has passed (*Henjo*).

The issues to be discussed in relation to D are:

1. Was he the victim of unconscionability, namely undue influence?
2. Can he claim damages under s52 of the Trade Practices Act (TPA) for misleading conduct?
3. Can D terminate?
4. What remedies, namely damages, can D claim?

Was D the Victim of Undue Influence?

Undue Influence is the extent to which one party has control over another to an extent that the relationship can influence the behaviour and decisions of the other party (*Johnson v Buttress*). Here, the onus is on the stronger party, in this case Isabella, that the weaker party's consent was free and informed.

There is little in the way of a presumed influence. I was his next-door neighbour and good friend but this does not cement her superiority over D. Therefore, D must prove that his decision was not free and informed by proving there was an actual influence. This would be difficult to prove as, although I has reasonable business experience, D did seek independent legal advice to confirm I's estimations (*Henjo*). Independent legal advice usually negates unconscionability (*Esanda*).

However, if D fails to prove undue influence, he may still have a reasonably successful action in unconscionably dealing. The law states that unconscionable dealing occurs where one party (the stronger- in this case I) has exploited or taken advantage of the particular weakness of another party (the weaker- in this case D) (*Amadio*). Unconscionability operates where a special disadvantage of one party makes the relationship between the parties unequal (*Amadio*). D was

clearly at a disadvantage to I. He was lonely and emotionally vulnerable as a result and this has been exacerbated by chronic alcohol abuse. Further, he has no business experience. The law states that this special disability must have been “sufficiently evident” to I and that she exploited this (*Amadio; Bridgewater v Leahy*). I was aware of D’s vulnerability and since D consulted her about his recent inheritance, she would have seen an opportunity to sell her business. She ultimately exploited his lack of expertise in not allowing him time to review the contract with his lawyer.

Unconscionability can only bring rescission under common law and since the restaurant has not lost significant patronage or changed substantially, this would not be advisable (*Henjo*). However, D can claim damages under s51AA of the TPA and s4(1) of the Contracts Review Act.

Can D claim damages under s52 of TPA for misleading conduct?

Misleading conduct is an offence under the TPA, which prohibits “in trade or commerce”, conduct which is misleading or deceptive (s52). Conduct is classified as misleading where it has the capacity to lead into or cause error (*Henjo*).

D could try to claim that I’s statement was a misrepresentation. For this to be proven, the statement must be one of fact and it must have been inducing (*Redgrave v Hurd*). The statement was not decisive, the language used was not definitive or factual, rather opinionated. However since I had the reasonable grounds to make such statements, it is likely to be regarded as indicating fact and hence, a misrepresentation (*Smith v Land*). There is no question that this was intended to be inducing. However, the integration clause excludes reliance on a pre-contractual statement. This does not matter as s68 of the TPA states that exclusion clauses cannot contravene the Act.

The fact that I remained silent when there was reasonable expectation that she fully inform D of the need for a license, can be considered misleading according to *Demagogue v Ramensky*. Further, she did not inform D that the success of the restaurant was partly due to the chef and that he was leaving (*Henjo*). For the purposes of s52, this was misleading.

However to claim damages, D must prove Causation, that the damage was not too remote and that he mitigated his loss (*Robinson v Harman*).

Causation: D must show that he was misled, that this induced him into a contract and that he suffered loss as a result (*Futuretronics*).

'But for' the misleading conduct and the misrepresentation, did D suffer loss (*Alexander*)? The loss was that he only made \$2000 per week and that he installed an outdoor area only to find he needed a license. This could have been intervened by the resignation of the Brazilian chef. Was the independent legal advice an intervening act? No. (*Henjo*)

Since he could not affirmatively establish Causation, it is unlikely that D could claim damages for misleading conduct.

Could D Terminate?

Termination severs the contract and discharges the parties of their future obligations. It is available for the breach of contract or repudiation (*Laurinda*)

The law states that D can only terminate for breach of a condition (*Tramways*) or a fundamental or grave breach of an intermediate term, such as that would rob D of substantially that whole benefit of the contract (*Hong Kong Fir*)

For this to occur, I's statement would have to be deemed promissory and be incorporated into the contract (*Tramways*). This is unlikely as since the integration clause excludes pre-contractual statements, the Parole Evidence Rule applied (*Heath Outdoor*)

What remedies in damages can D claim?

Damages aim to put the plaintiff in the position they would have been had the contract been fulfilled (*Robinson v Harman*).

Reliance: for wasted expenditure (*Amman*). Do could get the price of setting up the outside area.

Expectation: for loss of profits (*Amman*). \$5000 minus \$2000 per week expected = \$3000

If these actions fail, there is also the option of Estoppel in which D would probably succeed as an assumption was made, he clearly adopted it and he suffered detriment as a result (*Walton Stores v Maher*).

Conclusion

In light of this, D would be advised to pursue an action in damages for unconscionability under the TPA. Failing this, estoppel.