

Standard Form/Signed Contract

1. Note traditional rule (*McCutcheon*)
2. Navigate *Tilden v Karrol*
 - *factually different not legally different
 - Both cases broaden the conception of misrepresentation: 1) Party seeking to rely on an onerous term knows or ought to know signature doesn't represent intention of signer
 - 2) Party needs to take reasonable steps to draw the attention of the signor to that clause
 - Questions to look at: 1) Nature of the parties
 - **Tilden* and *Karrol* are both consumer trans.
 - **Fraser Jewelers*- business' treated differently than consumers
 - What about if they aren't savvy? (*Plastex*?)
 - 2) Nature of the transaction?(hurried, personal interaction v non-personal interaction)
 - **Tilden*- was not enough time to read the agreement, on the back, no attention drawn to it
 - **Karrol*- on the front, big letters, time to read
 - 3) Nature of the clause - how expected is it, what is relationship with overall contract
 - **Tilden*-reasonable person would not expect clause
 - **Karrol*- clause is a common feature
 - *Photoproduction can be used in this context perhaps
 - 4) Nature of document (long/short, small print/large print, simple/complicated)

Random Stuff

-*Scott v Wawanesa Mutual Insurance* - shows strict contractual interpretation against broader/more liberal/ *contra proferentem* doctrine

Mistake

- Common law doctrine of mistake-contract was never formed-void ab initio
- 1) CL mistake - *Miller Paving*- look at contract to see what it says
- Bell v Lever Bros* - new states of facts make the contract different in kind than it was
- *bar is pretty high
- *NOTE* if there are multiple parts of contract (4 coffee shops to be painted - assume that it is severable
- 2) *Solle v Butcher* - Great Peace Shipping overrules doctrine in UK
- *fundamental mistake that leads to unfair consequences-cannot be mistake of person
- Miller Paving* allows doctrine of equitable mistake
- *reliance factor can offset losses allotted by contract
- Diff between *Miller* and *Solle*
- **Miller paving* made a pretty sub-par mistake, *Butcher* couldn't have prevented his mistake
- Extra cases: *McCrae*- cannot rely upon doctrine of mistake because it was their own mistake and it was not reasonably induced by another

Representation and Terms

- Heilbut, Symons*- Warranty= defendant in consideration of the plaintiff doing something promised something in return
- *courts are weary of such promises as they should be contained in the contract instead of externally
- Test: 1) Evidence of intention (BOP plaintiff)
- 2) External policy concern about restricting breadth of contractual scope (4 corners argument)
- Dick Bentley*- Warranty depends on conduct of the parties: 1) Did objective behaviour of D induce P to act on it? this is prima facie warranty
- 2) BOP then shifts to D to rebut presumption by showing innocent misrep, that it was without fault, and it would be unreasonable in the circumstance for him to be bound by it
- *however, if D should have known better/didn't do due diligence than this cannot be rebutted

Standard Form Extra's

- Thorton v Shoe Lane Parking*- Customer can be held to ticket if a) knew there was writing on ticket and that writing contained conditions (b) knew there was writing on the ticket and had received reasonable notice that the writing contained conditions
- *relationship between severity of clause and notice
- Interfoto*- Even in business context, where the clause was expected, it clause is more severe than expected can be found to not hold
- McCutcheon*- signature = consent, in repeated contracts there will be presumed knowledge, circumstances must be conducive to reading
- Tilden*- Clause was on the back, not alerted to clause (in fact negative knowledge), plaintiff says wouldn't have signed if he had known, Company knew he hadn't read it, circumstances were not conducive to reading, contract was not a result of formal negotiation
- Karroll*-Affirms that plaintiff is bound by the release if:
 - 1) RP would realize that the person signing did not read the contract
 - 2) person did not draw reasonable attention to the clause in question
- *release does not fly in the face of the contract, short, easy to read, no fine print, attention drawn to it, indication that party had read it
- **McLachlin* notes that even had they not read it, *Silverstr* had taken reasonable steps to draw attention to it
- *narrows *Tilden* to exceptional circumstance where RP

Fundamental Breach

- Hunter v Syncrude*- shows distinction between *Wilson* and *Dickson* that informs amalgamation in later cases
- Fraser Jewellers*- business nature of contract plays into courts conclusion that *Fraser* was bound by term
- *doesn't matter that he didn't read it, wasn't forced, language of term was clear, highlighted, plain language
- Plastex*- inequality of bargaining power in a business transaction fueled by asymmetric knowledge, court is willing to infringe to not allow exclusion clause to stand

Duress

-Greater Fredericton Airport - 3 conditions:

1) Consent was obtained under pressure (demand or threat) 2) no practical alternative but to agree to demands 3) there was bad faith, vitiation of consent...was there true

Unconscionability

-Goes beyond consent, looks at fairness

-Traditional approach looks close to fraud, whereas new doctrine is wider

-3 basic issues: 1) Bargaining power of alleged victim was previously impaired by ones needs/ desires or infirmity (look at ordinary course of business) 2) Pressures or undue influences on the victim by or for the other's interest 3) Was resulting bargain patently unfair

*can then rebut presumption by proving the bargain was fair, just, and reasonable

-Basically need to decide whether victim is closer to Morrison, Harry, or Bundy

*Morrison- Grossly unfair transaction, woman is victim of fraud, seems to be very susceptible

*Bundy- Denning makes an argument about market forces of law v paternalistic nature of the courts

*there cannot be independent advice to wronged party
*inadequate consideration, father was influenced by son, was let down in trust relationship

*not impoverished or naive, no overt improper behavior, but inequality in bargaining power (bank taking advantage of son and trust relationship)

-Harry-no overt deception, but aggressive pressure that was ultimately immoral

-Similar theme in Harry and Morrison is pressure

Frustration

-Paradine v Jane- Risk should be allocated through contract, with risk being measured by price

-Taylor v Caldwell- What would a RP in position of contracting parties have implied into the contract

*if this term is violated, there will be found to be frustration

-Can Govt Merchant Marine Ltd v Can Trading Co

*if it possible to hold that reasonable men could have contemplated taking the risk of the circumstances changing when the contract was made=no frustration

-Claude Neon General Advertising Ltd v Sing

*while circumstances underlying the contract changed, change did not alter fundamental nature of thing being exchanged

-Davis Contractors- cause of delay was not any new state of things, could have been anticipated, underlying notion that the mistake of contractor was within employment scenario which erases frustration

-Capital Quality Homes- As land was already subdivided, and relied on legislation to be of value, court found contract was frustrated

-Victoria Wood - Different from Capitol quality as the land was not previously subdivided, and thus could be used for other purposes (Claude Neon)

-KBK- More than mere knowledge (Victoria)

*deal centered on development, court uses external evidence to show that contract had only purpose that had been destroyed

-Kesmat- another example of foreseeability

*also suggests that the frustration was not cost was not so onerous or unreasonable so as to render performance of the contract impractical