**STANDARD TERM CONTRACTS – SIGNED**

The basic premise in contract law is where a document containing contractual terms, the signing party is bound. It is wholly immaterial whether he has read the document or not, unless the signature was obtained by fraud of misrepresentation (L’Estrange v Graucob).

However, it seems as if \_\_\_\_\_ signed this contract in circumstances that possibly amount to misrepresentation, allowing \_\_\_\_\_ to not be bound by the term. \_\_\_\_\_\_ must show that in the circumstances, a reasonable person in the position of \_\_\_\_\_\_\_\_\_(person who had her sign) would have known she did not intend to agree to the term (Karroll). To determine this, we would first consider the nature of the clause. \_\_\_\_\_\_\_\_(talk about nature of the clause). Next, we would consider the nature of the document

**If contract signed, signer is bound by terms UNLESS:** *(Onus on person trying to get out of contract)*

1. **In the circumstances, a REASONABLE PERSON would have known the signer did not intend to agree to the release they signed** (Karroll)

* ***Tilden Factors:***
  + 1. **Nature of the clause**
    - How onerous is the clause?
    - Is the condition inconsistent with the express terms of the contract?
      * Tilden – contract for insurance, but really getting no insurance…
    1. **Nature of the document**
    - Small font, back page, wordy document?
      * OR: is it very visible?
    1. **Nature of the transaction**
    - Entered into in haste?
      * Rental car scenario (Tilden)
    1. **Nature of the parties**
    - Consumer transaction VS. Commercial transaction
    - STRONG business vs. WEAK business
      * Business people are held to a higher standard (Fraser)
      * BUT: There can STILL be inequality
        + Vulnerability from external factors (Bundy)
        + Informational inequality (Plas-tex)
        + Level of education (Harry)
        + Old age (Morrison)
        + First-time business person

***AND:***

1. **The issuer failed to take REASONABLE STEPS to bring the content of the release to the signers attention** (Karroll)

* **What is REASONABLE will also depend on the Tilden factors**
  + MORE will be required if:
    - The clause is onerous
    - The document is convoluted
    - It is a consumer transaction
    - The transaction is a haste

IF THE TWO FACTORS ARE MET = fraud or misrepresentation

Signature does not equal consent (return to La’strange v Gralcob)

**UNCONSCIONABILITY**

**FIRST APPROACH**

Argue that it MEETS the traditional standard of unconscionability set out in Morrison:

**There is a PRESUMPTION of unconsionability when there is:**

1. **An unfair deal, AND:**

* Argue WHY the deal is unfair
* Why is the deal so disadvantageous to one party?

1. **Unequal power between the parties**

* Argue WHY there is unequal power
  + Relationship of trust?
  + Relationship of reliance?
  + Vulnerability of weaker party
  + Informational inequality between the parties? (Plas-tex)

**\*\*\*Bad behavior on behalf of the stronger party**

* False assurances?(Harry v Kreutziger)

THEN: The stronger party will then have an opportunity to ***REBUT*** this presumption

* Will argue:
  + Bargain was just and fair
  + No advantage was taken
* Predict their arguments, then STRIKE THEM DOWN

**SECOND APPROACH**

If the court does not find that it meets the traditional standard of unconscionability set out in Morrison, the situation does reach the standard of unconsionability set out in Lloyd’s Bank v Bundy

***\*\*No proof of bad behavior on stronger party required***

***\*\*Victim does not need to be extraordinarily vulnerable***

1. **Is there an improvident deal?**

* Is the consideration moving from the stronger party grossly inadequate?

1. **Is there inequality in the positions of the parties?**

* Relationship of trust?
  + EX: Sick family member (Geffen)
  + Conflict of interest? (Bundy, Morrison)
* Relationship of reliance?
  + EX: Financial institution (Morrison)
* Vulnerability (doesn’t have to be extreme)
  + Family love (Bundy)
* Informational inequality between the parties? (Plas-tex)
* Absence of independent advice?
  + But: Did the party suggest independent advice?

1. **Is there an external pressure?**

* One with natural love and affection?
  + Must be in addition to that of a normal market economy

**THIRD APPROACH**

Lambert’s “Community Standard’s Approach” from Harry v Kreutziger

* Looking at the bargain holistically, ask:
  + Is the transaction sufficiently divergent from community standards of commercial morality?

**MISTAKE – Makes the contract go away (RESCIND)**

***Even if mistake pertains to just one term!***

1. **Look to the contract to see if it provides the party who will bear the risk if there is a mistake** (Miller Paving)
2. **Argue common law doctrine of mistake (VOID AB NITO) RESCIND CONTRACT**
   1. **Mistake regarding existence of some quality, that makes the thing essentially different from the thing it was believed to be (Bell v Lever)**

* Referred to as a mistake in KIND, not QUALITY
  + Oats/new oats 🡪 NO, just a quality difference (Smith v Hughes)
  + Termination/Termination with payment 🡪 NO, just quality difference (Bell)
  + Boat/Far away boat 🡪 NOT different in kind, just quality (Great Peace)
  + Release of all claims/forgot unpaid claim 🡪 NOT different in kind (Miller Paving)
* LOOK AT PARTY CONDUCT:
  + Did not want to cancel until they KNEW they could get a closer boat
  + Indicates the service was NOT fundamentally different….
* **DOES NOT APPLY:**
  + **If the party trying to rely on mistake was negligent (McRae)**
    - EX: entertaining a belief without any reasonable ground
    - EX: deliberately inducing the belief in the mind of the other party

1. **In the alternative, Johny could argue the equitable doctrine of mistake (VOIDABLE)**

* The doctrine was developed by Lord Denning in the Court of Appeal of England in the case of Solle v Butcher.
* However, the use of the doctrine is not without controversy.
* In the 2002 case of Great Peace Shipping, The England Court of Appeal reversed itself and killed the equitable mistake doctrine as they determined it was a confusing area of the law.
* More recently, in 2007 the Ontario Court of Appeal in Miller Paving held equitable mistake as still existing in Canadian law
* There are strong policy reasons to why equitable mistake should still be a doctrine utilized in Canadian law..
  + POLICY

***Parties under a common misapprehension either as to the facts or as to their relative and respective rights, provided that:***

* + 1. **Misrepresentation was fundamental, and:**
    2. **That the party seeking to set it aside was not himself at fault (Solle v Butcher)**
* EX: Not being diligent about your business (Miller Paving)
  + Unreasonably incompetent
* Bring advice of external advice to show not at fault!! Likely not incompetent ☺
  + EX: Butcher, not incompetent
    - Relied on Solles advice – Solle at fault, not Butcher (Solle v Butcher)

**FRUSTRATION**

***TEST FOR FRUSTRATION***

***Consider the nature of the contract, and the circumstances in which it was made***

***Was the contract made on the footing that a particular thing or state of facts should be in existen***

1. **Was the change UNANTICABLE?**

* Look for evidence – notorious fact law was coming down?
* ***MAKE NOTE OF MISSING INFORMATION AT THIS STAGE!!***
* Would due diligence from reasonable people would have revealed the event? Likely anticiable…
* UNANTICABLE:
  + Fire (Taylor v Caldwell)
  + Zoning legislation
    - But make note – need more information to whether the legislation could have been anticable
* FORESEEABLE, and Frustration N/A
  + Economic problems/labour conditions in ordinary course of events (Can Govt Merchant)
  + Economic problems and labour/supply shortages post WW2 (Davis Contractors)
  + Economic report requirement, in Kesmat

1. **Did it alter the deal:**
   1. **RADICALLY**

* **Define the ROOT of the contract**
* Look to the nature of the contract and the circumstances it was made
  + Can be outside the terms!!
    - Advertisements inducing the party to enter the contract (KBK)
    - Prices tied to certain things (KBK)
    - Clauses limiting other uses (EX: non-compete, can’t be grocery store) (KBK)
    - How was the price for the contract calculated? (KBK)
  + RADICAL DIFFERENCE:
    - Buying pre-subdivided land, and not being able to sell individual purposes (Capital Quality)
  + NOT RADICALLY DIFFERENT:
    - Buying a package of land (1 parcel) and not being able to subdivide it (Victoria)
    - Neon sign/can no longer illuminate neon sign at night (Claude Neon)
  1. **Make it IMPOSSIBLE TO PERFORM**
* Absolute impossibility, OR:
* Severe impracticability or performance, due to:
  + Extreme difficulty
  + Extreme expense
  + Injury
  + Loss
* NOTE: 50k contract, 25-50k cost 🡪 DID NOT MEET THRESHOLD (Kasmat)

**MISREPRESENTATION – party wants to get OUT of contract**

***EQUITABLE – Rescind the contract!***

**TEST FOR MISREPRESENTATION (Redgrave)**

1. **If it is a material representation,**

* *This is what is up for argument*
  + ***STATEMENT OF OPINION CAN BE FACTUAL REPRESENTATION*** *(Smith v Land)*
    - When facts are NOT equally known by both parties
      * Party A makes statement of opinion to party B, and party B not in position to know the facts
        + EX: “Most desirous tenant” = statement of fact, buyer not in position to know the qualities of the tenant and would rely on that representation (Smith v Land)
  + ***SILENCE CAN BE A MISREPRESENTATION***
    - *Failure to be explicit, or failure to be unclear*

***Quasi-test for silent misrepresentations:***

1. The circumstances might lead a party to falsely believe in a certain state of affairs,

**AND:**

1. The other party is in a position to know what the state of affairs is and how important it is
2. **Calculated to induce him to enter into the contract**

***It is PRESUMED he was induced by the representation to enter the contract***

***To rebut the presumption:***

It must be shown:

1. *The party whom the representation is made had knowledge of the facts contrary to the representation*

***OR***

1. *He stated in terms or showed clearly by his conduct that he DID NOT RELY on the representation*

**Misrep found – rescind contract**

UNLESS: impractical/unjust to rescind (Kupchak)

* THEN: compensate parties equivilant to put them back in the place before the contract was carried out
  + EX: payment equivilant to property value @ time of sale + interest

**MISREPRESENTATION: Collateral Warranties**

***Party wants a term ENFORCEABLE, to get damages!***

**2 competing tests:**

* Heilbut –
  + Commercial
  + House of Lords
  + Based on facts
* Dick Bentley –
  + Consumer
  + Court of Appeal of England
  + Based on facts

Heilbut Symons

**TEST:**

***Affirmation at the time of sale IS A WARRANTY, provided it was INTENDED TO BE***

* Intention of the parties can only be induced by the totality of the evidence
* Burden is on the party claiming there was a collateral contract to prove intention

Dick Bentley

***TEST FOR INTENTION***

**PRIMA FACIE INTENDED AS WARRANTY (objective inquiry)**

1. If representation is made in the course of dealing for a contract
2. For the very purpose of inducing the other party to act on it, **AND:**
3. It actually induces him to act on it by entering into the contract

Emphasize that the buyer COULD NOT have known – appeal to the judge as a human being

**REP-MAKER: Can rebut the presumption if he can show:**

1. It was really an innocent misrepresentation
2. Was not negligent in making the representation, **AND:**
3. Not reasonable in the circumstances for him to be bound by it

Consumer contract (whereas Heilbut was a business contract)