HYPOTHETICAL:

* Signed document
  + No ticket/chit or coatroom check
* Unsigned documents are relevant for discussing whether there is sufficient notice of a term (in an essay) could be relevant in talking about issues for signed agreements

STANDARD FORM CONTRACTS AND EXCLUSION CLAUSES

UNSIGNED DOCUMENTS

Thornton v Shoe Lane Parking

F: D were held liable for the personal injuries of P as a result of an accident. Notice said “all cars parked at owner’s risk”. **Not posted in a way that makes it easy to see. Would have taken a considerable amount of time to read.**

D: Wouldn’t expect a parking garage to exempt themselves of all liability 🡪 more effort had to be made

R: If terms are unusual/onerous, they must be brought to attention of the offeror with sufficient notice. **The exempting clause in this case is so destructive of rights that the court should not hold a person bound unless it is drawn to their attention in an explicit way (to give sufficient notice)**

* The more severe the conditions (more exclude liability/more surprising/less likely P would think they would be there) 🡪 The greater the steps have to be on the part of the D to give notice

Interfoto

F: D are advertizers and inquired about photos; P sent over transparencies. D never used them, were not returned until a month later. P sent an invoice for 3780$ as a holding charge. Note said: must be returned w/i 14 days, holding fee of 5$/day.

D: **Can make these arguments in a business context. Also, in principle it can be any kind of clause (not JUST exclusion)**

SIGNED DOCUMENTS

McCutcheon v MacBrayne (1964)

F: Appellant owned farm, asked brother to send car through D. Paid money, obtained a receipt and delivered the car to the D. Ship sank. There were elaborate printed conditions on the receipt. Employee forgot to get him to sign the risk note.

R: **Where two parties make a series of similar contracts containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied**.

* Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them
* **No implication can be made against a party of a term which was unknown to him**
* But if it had been signed 🡪 would have been binding

Tilden Rent-A-Car (1978)

F: Renting a car, asked whether he wanted additional coverage for $2 a day 🡪 yes. Signed and returned the document. The company says that the clerks only notify the customer about the clause when they ask, and when asked they say the customer would only be liable when the customer is intoxicated

R: Not necessary for the party denying knowledge of the terms to prove either (1) fraud, misrepresentation or (2) non est factum (where it wasn’t truly the signature of the person ex. duress)party seeking to rely on a onerous clause cannot rely on it without having taken **reasonable measures** to draw such terms to the attention of the other party

* **Signature does not always = consent**

Karrol v Silver Star Mountain Resorts (1988)

F: P broke leg on ski course, had signed document excluding liability

R: **She is therefore bound, unless she can establish (1) a reasonable person would have known that she did not intend to agree to the release she signed (2) that in these circumstances, the defendants failed to take reasonable steps to bring the content of the release to her attention**

* Affirms Tilden, brings it into L’Estrange framework 🡪 says it is **MISREPRESENTATION THROUGH OMISSION**
* DEnnings discussion in Thronton is the same problem 🡪 the question is what would it take a reasonable person’s attention to that clause

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| CASE | TYPE | DOCUMENT | CIRCUMSTANCES | CLAUSE | PARTIES | RESULT |
| *Thornton*  (car garage injury) | Exclusion | Not posted in a way that is easy to see | Would take a considerable amount of time to read, would block rest of cars (**hurried**) | Very destructive of rights | Con | ~~Exclusion~~ |
| *Interfoto* | **Liability** | Not obvious. | Just sent with the transparencies, nothing done to bring attention to it. | Very onerous | Com | ~~Liable~~  (only some) |
| *McCutcheon* | Exclusion | Elaborate printed conditions on a receipt; everything is already filled out | Monopoly on the business; if everyone read the contract would line out door; no attempt to bring to their attention |  | Con | ~~Exclusion~~ (because unsigned) |
| *Tilden* | Exclusion | Barely legible, on the back | Only notify customers when asked, say that they are only liable when intoxicated; employee knew he did not read it  **Hurried**  **Informal** | Onerous – would not anticipate it; **Inconsistent with the overall purpose** | Con | More should have been done  ~~Exclusion~~ |
| *Karrol* | Exclusion | Bold print, top of the front page | This is typical at ski races | Common feature of ski races, standard practice | Con |  |

Nature of the document

* How long is it? How small is the print? Is it presented in a way where you can see it easily? How obvious is the clause?

Nature of the circumstances

* Are they conducive to reading the document? Are they rushed?

Nature of the clause

* Is the condition unusual or onerous? Would a reasonable person have expected it be in the document?

Nature of the parties

Think about what the overall contract is about – excluding liability that they would otherwise have

Think about who is writing the contract

Karsales (1956)

F: Agreement concluded, car was in third party’s possession and D had not seen it since the initial inspection. D examined the car and found that it was the same body, but had been badly damaged (new tires taken off, wireless set removed, chrome strips missing, broken pistons etc.). D refused to accept car. P is now suing for payment. Condition in agreement “no condition or warranty that the vehicle is roadworthy”

R: Obligation to deliver the car in substantially same condition as the original inspection (implied term)

* **DOCTRINE OF FUNDAMENTAL BREACH**: breach that is is one that goes to the root of the contract
* Which results in a performance totally different from what the parties had contemplated
  + As a result, the exclusion clause in the contract comes to an end as well.

Photo Production

F: Factor was destroyed by fire that the night-watchman deliberately set. Exclusion clause was included in the contract for security services. All due care was taken in hiring etc.

* Fairly cheap security

D: **Rejects decision in Karsales 🡪 fundamental breach doesn’t apply to commercial actors who have similar bargaining power. If true construction (*at the time the contract was made*) supports giving effect to clause 🡪 upheld (regardless of the breach)**

Hunter v Syncrude (1989)

F: Syncrude contracted for supply of conveyor systems, including 4 gearboxes. There was a clause: Warrants that goods are free of defects in design etc. Gearboxes failed, cost to fix is cloes to cost of the gearboxes.

Wilson:

* No fundamental breach 🡪 one part of larger contract for $4 million
  + **Fundamental breach can be found when: the conduct of one party deprives the other party of “substantially the whole benefit” of the contract**
* Nothing unfair or unreasonable in giving effect to the exclusion clause (equal bargaining power, both are familiar and experienced with contracts, no evidence that they were guilty of unfair dealings, were not deprived substantially of the entire benefit)
* Must maintain doctrine of fundamental breach:
  + 1. Is there a fundamental breach or not?
  + 2. If there was, would it be fair and reasonable to allow the party in breach to rely on the exclusion clause?
  + b/c allow courts to look at parties with equal bargaining power (cannot in unconscionability)
  + \*About the nature of the breach (not about when it was formed)

Dickson:

* Exclusion clauses are reflected in the price
* **Dispense with the doctrine of fundamental breach** and rely on unconscionability based on true construction (Wilson argues this requires an extension of the **doctrine of unconscionability)**
  + MUST have **unequal bargaining power** for the doctrine to apply
* Consider:
  + Was the contract a standard form contract drawn by the bailee
  + Were there any negotiation as to the terms of the contract or was it just a “sign here” document
  + Was the attention of the plaintiff’s drawn to the limitation clause
  + Was the exemption clause unusual in character
  + Were representations made which would lead an ordinary person to believe that the limitation clause did not apply?
  + Was the language of the contract when read in conjunction with the clause so that it rendered the agreement to protect property meaningless?
  + Having regard to all facts whether the enforcement of the limitation clause is a tacit approval of unacceptable commercial practices
* If on **its true construction** the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded

FUNDAMENTAL BREACH/UNCONSCIONABILITY POST-HUNTER

Fraser Jewellers

F: P operated jewelry store, contracted with a security company for an alarm system for annual fee, was to notify the police If the alarm system should be activated. Agreement provided that the company is not an insurer, scope of liability unrelated to value of property on premises, doesn’t guarantee anything, not liable for any loss/damage/injury. Liability limited to annual fee or 10 000, whatever is less.

* Were not pointed out to him 🡪 didn’t read the agreement.
* Store was robbed (50 000), liability limited to $890

R: No fundamental breach (considering Wilson’s approach). Didn’t choose between their approaches 🡪 according to Hunter, Dickson: if unconscionable or Wilson: unfair or unreasonable 🡪 Little difference between the two

* Question is was there an **abuse of bargaining power?**
* **The remaining question is whether the terms of the provision are so unusual in character or so unfair or unconscionable that their enforcement would constitute an unacceptable commercial practice (hybrid)**

Plastex v Dow

F: P provides pipeline systems to carry natural gas. Dow sold resin that it knew was defective before entering into the contract, and knew that P would use it to carry natural gas. Loss of reputation🡪 lose customers 🡪 bankruptcy

* Exclusion clause eliminating all liability

D: Unconscionable – cannot be relied on

R: **Inequality of bargaining power can be created through knowledge (one possessing all, other with no way of knowing)**. Weaker has to rely on the stronger to inform them.

* Unconscionability can apply to contracts between commercial parties
* He gets to unconscionability; inquiry is triggered by he finds there has been a fundamental breach

Tercon (2010)

F: Terms in a contract requiring that the successful bidder must go through pre-qualification process to submit a proposal. Bid goes to 2 companies one of whom is not qualified.

* Ministry has an exclusion clause: : No proponent shall have any claim for compensation of any kind whatsoever as a result of participating in the RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim

D: decided because of true construction 🡪 does not cover this form of liability, even if itw as ambiguous 🡪 contra proferentem would mean the court would interpret it in favour of the P

All agree on fundamental breach: **doctrine laid to rest and replaced with public policy**

**Enforceability of exclusion clauses:**

* **(1) Whether as a matter of interpretation the exclusion clause even applies to the circumstances establishes in evidence** (kind of clause in the kind of contract)
* **(2) Whether the exclusion clause was unconscionable at the time the contract was made (ex. unequal bargaining power)**
  + About the formation of the contract, not the breach
  + Has to be unequal bargaining power but between equal parties but it happens in between them (Plastex)
* If it is held to be valid and applicable, a court may undertake a third inquiry:
  + **(3) whether they should refuse to enforce the valid exclusion clause because the existence of an overriding public policy (onus lies on the party seeking to avoid enforcement)**
    - **🡪** Serious criminality or egregious fraud (ex. *Plastex*)
      * without this 🡪 contracts should be enforced
    - **DOESN’T have to go to the root of the contract**
    - **Don’t have to have unequal bargaining power to get into policy** 
      * **But for the first two steps yes?**
* **Vs unconscionability 🡪 equal bargaining power and its not subject to Tilden, Karroll and there is full notice** 
  + **This picks up some things that fundamental breach would have**
  + **They say that they are prepared to look at the nature of the breack** 
    - **Still staying within the paradigm of fundamental breach**
    - **This is different than Tilden/Karrol because they are concerned aobut when the contract is formed**
* **Still concerned about looking at the nature of the breach and whether or not to apply the exclusion clause**
  + **Fundamental breach IS dead though**
  + **Use Plastex – shows that we can use unconscionability in a creative way**
  + **Dickson’s approach in Hunter is good authority (endorced by the SCC in Tercom)**
  + **Carsales, Photo productions and Wilson in Hunter are not really usable**

Commercial:

* For unconscionability don’t do two analyses
* So if there is a question that asks you about unconscionability, say that you will deal with it in the unconscionability part
* Read the question and make sure its asking about a Tercon analysis
* If you’re not sure, do it.
* Do Tilden/Karrrol and if you think there is a possibility of a Tercon analysis (is there something about the BREACH here? Because Tercon is about whether the breach has a certain quality/character and something about it that you can argue it offends public policy; but if you can’t find your way into that structure, then it probably won’t be a tercon analysis)
  + Tell the history briefly, tercon is not relevant because it is oriented towards X context and this context is Y contect
  + Exclsion clause in a commercial context with a breach
    - In theory there is nothing to say that you can apply it in a consumer context
    - The difference between it and tilden/karrol is that they become more difficult as the context becomes more commercial, but tercon applies down also – you can go down but not up

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| CASE |  | DON’T UPHOLD | UPHOLD CLAUSE |  |
| *Karsales* | Exclusion/Com | Went to the root of the contract |  | ~~Upheld~~  **FB** |
| *Photo Production* | Exclusion/Com |  | Low price – couldn’t have reasonably expected much. Language indicated they intended for the clause to operate. | Upheld |
| *Hunter* | Exclusion/Com |  | Wilson: Both familiar and experienced with contracts, equal bargaining power, no evidence that they were guilty of unfair dealings, were not deprived substantially of the entire benefit  Dickson: ~~FB,~~ not unconscionable | Upheld |
| *Fraser* | Exclusion/Com  BUT: difference levels of bargaining power (small family business – large corporation) |  | Not deliberate/wilful, overall contract has not been destroyed🡪overall purpose still in place (difference in quality not kind): F~~B~~ **one sheet of paper, clause was highlighted and bold block letters, clear and unambiguous language, no limit on time, was not rushed or pressured**  Commercial actors are held to a higher standard.  Clause makes sense – low fees.  NOT unusual. | Upheld |
| *Plastex* | Exclusion/Com | Inequality in knowledge  Knew about risk, did not disclose, deliberately withheld info and induced P to enter into agreement |  | ~~Upheld~~  UNCON |
| *Tercon* | Exclusion/Com |  | No unequal bargaining power, Minister’s behaviour is not so aberrant as to forfeit the protection of the exclusion clause on policy | ~~Upheld~~  (but based on construc.) |

DURESS

NavCan (2008)

Facts: Nav Can implicitly threatened to withhold performance if the AA did not pay money that it was not bound to pay. Never acquiesced to the variation, agreed under protest.

Reasons:

* **Distinguishes between commercial pressure and coercion**
* Onus is on the party seeking to enforce the variation (NavCan) to establish that it was not procured under economic duress or that the other party is precluded from raising the duress doctrine for having subsequently affirmed the variation
* Duress:
  + **(1) Promise must be extracted as a result of the exercise of pressure, whether characterized as a demand or a threat**
    - There was pressure, threat to breach contract by withholding performance by implication
  + **(2) The exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer’s demand to vary the terms**
    - Could they have gone to a third party to obtain performance?
    - Could not unilaterally withdraw from the ASF agreement and turn to another service provider
  + 🡪 *Prima facie* case set out
    - (3) **Was there consent?** Consider:
      * (1) Whether the promise was supported by consideration
        + Actual benefit?
        + No fresh consideration
      * (2) Whether the coerced party made the promise under protest or without prejudice
        + Wrote letter under prosest
      * (3) If not, whether the coerced party took reasonable steps to disaffirm the promise as soon as it was practicable
        + Resist payment?
        + Cannot wait years (cannot just be regret)
      * Who came to whom??
        + Are they creating the situation that they are claiming put them under duress?
      * Independent legal council? If they did not disaffirm right away may be forgiven b/c of lack of legal council
      * Good faith? 🡪 can counter a finding of duress

UNDUE INFLUENCE

* Equitable doctrine (not about whether there is a contract)
* Can also be dealt with through unconscionability

Geffen v Goodman Estate (1991)

F: Tzina struggled with depression, her mother gave her a life estate and when she died the property would be divided amongst her grandchildren. She wrote another will before she died where she gave it directly to Tzina. Her brothers (worried about the estate & upset their children were cut out) seek council. Tzina agreed to set up a trust with brothers as trustees. After her death, her son was not happy and tried to have it set aside arguing it was unduly influenced.

Wilson: No evidence of undue influence. But does the relationship suggest undue influence?

* Certain relationships will be presumed of influence until the contrary is shown (solicitor client, doctor patient, parent child, guardian ward, future husband fiancé)
* In relation to gifts, makes no sense to insist that the donor demonstrate that their generosity placed them at a disadvantage
* Must show:
* **(1) Start with an examination of the relationship between the parties**
  + Includes relationships already recognized
* **(2) Examination of the nature of the transaction**
  + Commercial: should have to show: that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it
  + However, where consideration is not an issue (like this case) 🡪 inappropriate to put a P to the roof of proving undue disadvantage or benefit in the result
    - It is enough to establish a dominant relationship
  + Once P proves the relationship 🡪 onus moves to the D to rebut it
    - **P must be shown to enter into the transaction as a result of their own full free and informed thought (showing no actual influence, had independent advice etc.)**
  + Here *prima facie* case is made out
    - But the primary motivation was to advance Tzina’s welfare, she did receive independent advice
      * Successfully rebutted the presumption

La Forest:

* The distinction between commercial and non-commercial transactions should not be drawn
* Commercial context should also just have a rebuttable presumption of undue influence with special relationships
* Would also not agree that the law will never interfere with a contract that does not lead to a material disadvantage, even where it is clear that the process leading up to the contract has been tainted

UNCONSCIONABILITY

* Unequal bargaining power (normally quite substantial)
* Holds that even if there was consent by both of the parties, it would still be wrong to hold the weaker party to the deal that they knowingly got into (vs. undue influence where there is something about the parties that makes the transaction questionable in terms of free will)

TRADITIONAL DOCTRINE

* Whether by reason of distress, recklessness or wildness, want of care, and when the facts show that one party has taken undue advantage of the other by reason of the circumstances
  + Will not be allowed to stand

Morrison v Coast Finance Ltd

F: P was persuaded by 2 men to borrow $4200 from the respondent bank on a mortgage of her home and lend the proceeds to the 2 men so one could repay the bank $2000 for two cars.

R: **Must have inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which led them into the power of the stronger and substantial unfairness of the bargain obtained by the stronger**

🡪 presumption of fraud which the D then has to rebut and prove the bargain was fair, just and reasonable

D: Set aside mortgage, no requirement for A to repay money

**Traditional doctrine** (one very strong, one very weak) 🡪 doesn’t change traditional concepts of contract law

Lloyd’s Bank v Bundy (1975)

F: Bundy (D) was a farmer, he mortgaged the property (only asset) for the sake of his son (who’s company was having difficulties). Assistant Bank manager suggested further charge, considered them overnight, showed them to his solicitor, executed. Son’s company got worse, new AM went to farm with form filled out, ready for signature, bank was prepared to continue the son’s company to draw money, said it would have the effect of reducing the level of borrowing. Bank then stopped allowing them to draw. Bank insisted on the sale of the property

R: Undue influence does NOT depend on wrongdoing 🡪 based on **own needs, desire, infirmity and the other party does not need to be acting unethically**.

* Victim not given independent legal advice (can be fatal), other party doesn’t have the best interests in mind (not fatal though)
* 4 factors here:
  + 1. Consideration moving from the bank was grossly inadequate
  + 2. The relationship between the bank and the father was one of trust and confidence (relied on the advice implicitly to advice him about the transaction)
  + 3. The relationship between the father and the son was one where the father’s natural affection had much influence on him
  + 4. There was a conflict of interest between the bank and the father, yet the bank did not realize
    - This is in relation to the special interest point
  + These are cumulative factors

There can be a special relationship w/o unconscionability, ad unconscionability w/o a special relationship

In the fact pattern, think about whether there is a trust between the two parties and how that might play in terms of an unconscionability analysis in terms of how Bundy is discussed

Harry v Kreutziger (1978)

R: **Where claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need, or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain**

* Then stronger must show that it was fair and reasonable

|  |  |  |  |
| --- | --- | --- | --- |
| CASE | PLAINTIFF | DEFENDANT |  |
| Morrison | 79 y/o woman, meagre means, She had no means of repaying the money, house was her only asset; no independent advice (wanted & asked for help); **no expectation of reward or profit** | Knew the facts, she was obviously ignorant and inexperienced, gross overreaching (received application from two men, who were to benefit), were there when she asked for advice and said it was more than she agreed to | Gross abuse & inequality  **YES** |
| Bundy | Mortgaged property (only asset) for the sake of his son (blinded by love), exceptionally agreeable, **trusted the bank**,  Wasn’t super vulnerable (has some business experience, not impoverished)  **Got less than nothing from the deal** | Went to farm with filled out form, said bank was prepared to allow Son’s company to draw money, didn’t have any independent legal advice or leave forms with him to consider – did not fulfil obligation to Bundy (he is assuming they are helping him). **Special relationship.** Unlikely he understood what was explained to him.  (no evidence of improper behaviour though) | **YES** |
| Harry | Hearing defect, Aboriginal, mild, inarticulate and retired, **not widely experienced in business matters**  Wanted to retain his licence  Like Bundy 🡪 inexperienced, physical problems, nice person  **Sold boat for 4500, worth 16 000**  **Application for another licence was denied** | Assured him falsely or recklessly, proceeded aggressively with full knowledge of the value of the licence, pursued him aggressively  More like Morrison🡪 motives are suspect | **YES** |

MISTAKE

Smith v Hughes (1871)

F: Contract to buy oats, P says he expressed that he wanted old oats, gave sample. Entered agreement, the oats were new. D refused to take back the oats. P brought action against the seller.

R: Were ad idem – the contract was for the purchase and sale of oats. Mistake will not relieve the buyer because they did not specify specific terms.

* The purchaser is bound unless the vendor was guilty of some fraud or deceit upon him and that a mere abstinence from disabusing the purchase of that impression is not fraud or deceit
* Must have mutual mistake for the contract to be void
* The courts are only willing to find an implied term for something regarding **KIND not quality**

*Bell v Lever Bros*

F: Lever bros appoint Bell and Snelling, who do things that would have justified Lever from terminating their appointments. They join with another company and terminate Bell and Snelling, in contracts give 30 000 and 20 000. Lever bros find out and want eh contract set aside for mistake.

* No fraud on part of Bell or Snelling
* In commercial context, you must do you due diligence
* **Parties may be mistaken in the identity of the contracting parties, the existence of the subject matter of the contract at the date of the contract, or in the quality of the subject matter of the contract**
  + Mistake in quality will not affect assent unless it is the mistake of both parties, and is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be

D: Subject matter was not destroyed by the mutual mistake

McRae v Commonwealth Disposals (1951)

F: D entered into contract with P to sell oil tanker. P undertook considerable expense but found no tanker. The tanker never existed, it was just a rumour. P does not want there to be a mistake because he wants damages from breach of contract. D tries to rely on mistake.

R: Mistake was not something that they could not have known about 🡪 fault of the D. Must have known the P would rely. P did not make an assumption in the same sense.

* **There was a contract – and the Commission breached it. Entitled to damages.**
* If the party who is relying on mistake is at fault, courts are less likely to find mistake

EQUITABLE MISTAKE

* A contract that did form, but as a matter of equity it would be unfair to enforce it (here it is voidable)

Solle v Butcher (1949)

F: Butcher owned flats, Solle was repairing them, wanted to rent. Advised Butcher that the flats were not subject to rent control; entered a 7 year agreement for $250/year. Rent was controlled but could have been taken out of rent control by satisfying certain conditions. By the time Butcher realized, couldn’t fulfil conditions. Solle suing for overpayment. Butcher claiming mistake.

R: **CL mistake would not apply here (didn’t engage the core of the agreement, make it a different kind).**

Equitable mistake:

* (1) the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, if one party, knowing that the other is mistaken about the terms of an offer or the identity of the person why whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake
* (2) If the parties were under a common misapprehension either as to facts or as to their relative and respective rights, providing that the misapprehension was fundamental and that the party seeking to set I aside was not himself at fault
  + Lower bar than Belle v Lever

Great Peace Shipping

F: Defendant was hired to assist a vessel; sought assistance from Great Peace who was closest to the vessel. Turns out that P was farther away than expected. D tried to find someone else, then cancelled the agreement with P. Unwilling to pay the cancellation fee, said it was a mistake.

R: CL mistake: (i) Common assumption as to the existence of a state of affairs (ii) No warranty by either party that the state of affairs exists (iii) non-existence of the state of affairs must be be attributed to either party (iv) non-existence of the state of affairs must render performance of the contract impossible (v) the state of affairs may be the existence or vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible

\*These are not really adding anything, but if we find them helpful use them

**Ends doctrine of equitable mistake**

* Was not impossible to perform the contract – therefore it does not meet the criteria for CL mistake.

Miller Paving

F: Miller contracted to supply materials. Signed an agreement where Miller acknowledged that it had been paid in full. Then discovered unpaid deliveries, billed again. Miler is suing for further payment, relying on mistake.

D: Dismissed.

R: Allocated risk to Miller. CL mistake does not apply, not fundamentally different. To engage equitable, must show it was not his fault. It was his fault.

1. Did the contract allocate risk?
2. Was there CL mistake?
3. Was there equitable misake?

|  |  |  |  |
| --- | --- | --- | --- |
| *Smith* | Oats | Wanted old oats | ~~CL mistake~~ |
| *Bell* | Paid for termination | Didn’t have to pay for termination | ~~CL mistake~~ |
| *McRae* | Tanker | No Tanker  **At fault** | ~~CL mistake~~  (b/c of fault –would have been classic) |
| *Solle* | No rent control, $250/year | Rent control $140/year  **Not at fault** | EQUITABLE mistake |
| *Great Peace Shipping* | Nearby | Farther than expected | ~~CL mistake~~  **~~Overrides Equitable~~** |
| *Miller* | Paid in full | Not paid in full,  **P at fault** | ~~CL mistake~~  ~~Equitable mistake~~ |

FRUSTRATION

* Fact that make the contract different AFTER it forms
* Makes them voidable

Paradine v Jane

F: P leased lands to D, brought an action for rent D had not paid. War had made it so he was unable to live on the land, kept him out. No fault of his own.

D: For P.

R: Freedom of contract 🡪 should have dealt with the possibility of the event in the contract

Taylor v Caldwell (1863)

F: P and D entered into a contract where Ds had agreed to let P use a venue. Entertainment was so essential, parties could not have contemplated their agreement without it. Hall was destroyed by a fire. No fault of either party.

D: For lessee

R: Find an implied condition that the parties should be excused if the performance becomes impossible. Contracted on the basis of the continued existence of the venue.

Can Govt Merchant Marine v Can Trading Co (1922)

F: A contracted with Can Trading to transport lumber. Both parties knew that the ships were under construction. Vessels were not reading in time, voyage could not proceed. A claimed the contract was frustrated.

D: No frustration

R: **If** **reasonable persons situated as the parties were must have agreed that the promisor’s contractual obligations should come to an end of that state of circumstances should not exist then a term to that effect may be implied**

* **If is important to remember that no such term should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances being what they in fact proved to be when the time for performance arrived**

This was not an extraordinary occurrence, therefore appellants assumed that risk.

Davis Contractors

F: P contracted to build 78 houses for municipality (D); unexpected circumstances & no fault of either party, adequate supplies of labour were unavailable, took much longer. Contractors claimed the contract was frustrated and entitled to more money.

D: No frustration 🡪 No new state of things that they couldn’t have foreseen, contractor makes his tender and the tender must necessarily take into account the margin of profit that he hopes to obtain

R: **Simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract**

* Purely objective
* Removed this metaphoric person and says that person is really just the courts
  + Takes out the reasonable person. Just asks the question if the contract was something radically different than what it was.
  + (1) no fault of either party (2) incapable being b/c of radical change (3) not reasonably foreseeable
    - better to use actual language of the court
    - Go straight to Davis contractors for the law, but use earlier cases for the factual comparions (Taylor v Caldwell)

LEGAL CHANGE

Claude Neon General Advertising v Sing (1942)

F: Contracted for a neon sign, rent for cost of construction and maintenance for 60 months. Lighting restriction were introduced when Canada entered WWII. D argues frustration b/c of a change in law.

D: For P.

R: Contract did not become impossible, gets less benefit but not useless.

Capital Quality Homes

F: P buys lots from D within intention of creating a subdivision with the intention of selling each lot separately

* Between time of signing and closing, there was a regulation that required consent from regulatory committee for the sale – impossible to get consent in time.
* Buyer left with 26 lots that he could not develop. Price paid was for value as developed lots.
  + Now, could only get 1 deed
* Argued it was frustration

D: Frustration applies

R: Destroys the foundation of the agreement (nothing else that they would have been buying them for)

Victoria Wood Development

F: Land was NOT subdivided, just sold. There is knowledge between buyer and seller that it would be subdivided.

D: Not radically different

R: The land can be used for something else, does not go to the root of the contract.

The question here is how you interpret the contract in terms of its fundamental content, does the frustrating event radically change that?

Canada Safeway

F: Safeway owned property it wanted to sell. KBK wanted to buy to develop for mixed commercial and residential condos. City planners submitted an application to rezone and reduce the floor space ratio after they entered into a contract. KBK said it had been frustrated and demanded they return the first installment. Safeway entered into another agreement where the purchase price was lower.

D: For KBK. It was frustrated.

R: Had more than mere knowledge. Paid price per square foot, clause 1 specifically referred to intentions for developing.