CONTRACTS CAN – 2013

# OFFERS

## Offer and Invitation to Treat:

Invitation to treat (ITT): indicates a willingness to negotiate a contract

* not a source of terms of contract (price quotations, ads)

Offer: statement that indicates willingness and readiness to complete a contract

* source of terms of contract
* does statement indicate intention to create legal obligations?

Note: Objectively establish intention of statement maker (reasonable person test)

* look at language, circumstances

### Cnd Dyers Association v Burton

Facts: P asked for lowest price for house, D replied.

Issue: Price quotation or offer to sell?

Intention and language/actions show intended to be offer

Objective test – reasonable person with similar knowledge, how would they evaluate intention, agreement?

C – more than price quotation. Decide it is an offer, and then a contract.

### Pharmaceutical Society v Boots

Facts: Boots sued for failing to sell goods under supervision of pharmacist

Issue: When does the offer and acceptance take place?

Goods on shelf – invitation to treat

Contract takes place at cash register – customer offers to buy, cashier accepts (takes money)

### Goldthorpe v Logan

Facts: hair removal ad – guaranteed results – no exceptions or qualifications

Didn’t work – claimed damages

Issue: was there a valid contract?

Ratio – normally ads are ITT BUT – looked at circumstances, language used and actions of both parties

Offer made to public - P accepted

Unilateral offer (ad=offer). Once party accepts, then if no performance, breach of K

### Harvela Investments v Royal Trust

Facts: Auction for share, invite ppl to make offers and compete. Hammer = acceptance. P offers X, Leonord offers Y (smaller than X) or 100000 more than highest bid.

Issue: Is this a fixed bid or auction? Is referential bidding allowed (where the parties know the other offer)

Ratio: invitation = unilateral K. Bank has obligation to sell shares to highest bidder. No obligation to other tenderer

• 2 step process:

1. Telex=offer of a unilateral contract to accept the

highest bid\*

2. Bilateral contract with the highest bidder

General presumptions:

• Putting goods for auction/request for bids = ITT

• Bids = offers •

Hammer fall = acceptance

*Sale of Goods Act,* BC, section 72:

• (b) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner, and until that announcement is made a bid may be retracted

### R v Ron Engineering

Facts: Contractor submits tender to build project, with deposit cheque. Their tender is much lower (realize after bid closed). Said incapable of being accepted, wants to withdraw offer and get back deposit.

Issue: Revocability; do the contractors have right to withdraw tender and take back deposit?

Tendering process:

Contract A (unilateral): (**Process Contract)**

Call for tenders = offer – offerer must consider bids fairly, liability of tenderer not to withdraw from bid

Submission = acceptance - must comply with tender call requirements

Contract B (bilateral): (**Main Contract)**

Bid is offer to enter into Contract B. The owner accepts.

Not a contract to complete the project.

Decision : contractor’s claim dismissed. Contract A means irrevocability of bid (main point)

**Privilege Clause –** right of owners not to accept the lowest or any submitted tender

### MJB Enterprises v Defence Construction

Facts: D call for tenders, saying must be submitted with certain specs. Privilege clause saying don’t have to choose lowest bidder. Lowest bidder has invalid tender, so awarded K.

Issue: Inclusion of privilege clause in tender K allows R calling for tenders to disregard lowest bid in favour of any other tender including non-compliant one?

Tender submissions may lead to Contract A – contract can only be completed with compliant bids.

Implied term (that bid must be compliant)

3 ways to imply terms

* 1. on basis of statute (can’t contract out of something)
  2. based on customs
  3. necessity of fact (case here – to keep integrity of process)

*A privilege clause* (such as not to accept lowest bid) CANNOT override the obligation to accept only compliant bids

Lots of work in submitting tender, obligation on contractor to only accept compliant bids. – Reasonable

Decision – D breached obligation to P to only accept compliant bids. BoP – Courts decide would’ve chosen P – awarded damages.

### Double N Earthmovers v City of Edmonton

Facts: Investigate and accepted mistaken/fraudulent bid. Bidder knew they didn’t have the right equipment. D says they trusted tender.

Ratio: Owner has no duty to investigate whether bid compliant. Only duty to treat bids fairly. When owner accepts compliant bid and enters Contract B on terms of tender documents, Contract A is discharged. – no further obligations to unsuccessful bidders.

## Communication of Offer

### William v Carwardine

Facts: ad f or reward posted by D for info leading to arrest/conviction of murder suspect. P gave info to ease conscience when thought she was dying. D refused reward, claiming other motives.

Ratio: Acceptance of an offer = legally binding agreement, regardless of motives for acceptance. Ad = offer for reward. P provided info, accepted the offer. P performed necessary conditions of offer, regardless of her motives, sufficient for binding K

### R v Clarke

Facts: Clarke wrongfully charged with murder – gave evidence to prove innocence and find someone else guilty. Crown offers reward, he said he fulfilled contract.

Issue: Must offeree have knowledge of offer when performing act of acceptance?

Acceptance must come as response to offer. He admistted had no intention of claiming reward -didn’t act in reliance of offer.

Ratio: knowledge of offer important at time of acceptance. Bilateral contract – knowledge important but motive irrelevant. He had no knowledge of offer.

### Carlill v Carbolic Smoke Ball

(Unilateral Contract)

Facts: Ad saying reward paid for anyone who contracts flu after using ball 3 X daily for 2 weeks. Money deposited in bank showing sincerity. P bought ball, used as directed, got sick then claimed reward. D said just marketing, unreasonable to assume offer serious and to everyone.

D argued: Just a puff, vague

Court said – not vague/uncertain. Ordinary meaning.

D argued: unreasonable to contract with the whole world.

Court said – Unilateral K – not contract with whole world, only those who properly accept and fulfill conditions.

D argued: no valid consideration

Court said : P purchased ball, gave up time and money. Consdieration can be something done in detriment (not just benefit)

D argued: No notification of acceptance (she never properly accepted)

Court: D implicitly waived right for notice, performance = valid acceptance, with condition precedent – to get sick.

Intention to create legal obligations – seen from guaranty in ads.

* Ratio: An ordinary rule of law is that acceptance of an offer requires the offeror to be notified in order that the two minds may come together.
* With *unilateral contract,* an offer is made to the public but the contract is not concluded with everybody (all the world).
* It is only formed with that limited portion of the public *who come forward and perform the condition on the faith of the advertisement* (following the indicated method of acceptance).

# Acceptance

**Acceptance**: can’t modify offer in any way/ should be clear/unequivocal/convey all terms of K/offer. Generally needs to be communicated to offeror. Must accept before lapse or revocation.

**Counter offer**: modifying original terms/creating new offer. Can reject, ignore, silence. Silence not acceptance unless stated would qualify. Inquiry is not rejection of original offer.

## Livingstone v Evans

Facts: D offers to sell land to P for $1800. P asks for lowest price, will give $1600 cash. D’s agent says price can’t be reduced. P writes back and accept original offer.

Issue: D’s telegram saying price couldn’t reduced renewal of original offer?

P argued that original offer never terminated, only the counter offer.

D argued that original offer rejected, counter offer rejected.

Ratio: Counter offer kills original offer. Can’t accept afterwards w/o consent of offeror. BUT – look at circumstances.

Final – D’s reply “can’t reduce price” renewal of original offer, so still open to acceptance.

### Butler Machine Tool v Ex-cell-O Corp

Facts: Seller (P) offered to sell machine tool to D. Buyer made order for machine on different terms. Seller had price increase clause – D argued not part of agreement.

**Battle of Forms:** no bargaining, both sides send forms back and forth

**Mirror Image Rule:** acceptance must mirror the offer. If someone makes an acceptance that changest the material terms of the offer, this is a counter offer and kills the original offer.

Ratio: Last shot – contract concluded on terms of last document sent by one parties that is not objected. First shot – Contract concluded on terms of first document. All shots: court must discover terms on objective basis.

1. contract concluded on all documents between parties where terms are reconcilable to give harmonious results.
2. Contract not concluded since differences irreconcilable.

### Dawson V Helicopter Exploration

Facts: D hires P to do some exploration. Need to find pilot, and P needs to get leave from army. They found pilot, so condition subsequent fulfilled. Find someone else – breach of contract.

Send letter of repudiation – no response (silence) not acceptance of this.

Issue: Was this a unilateral contract, that was revoked prior to performance? Or a bilateral contract accepted and completed w/ P’s promise to perform?

Ratio: If language allows, and both parties intended, courts try to construe offers as bilateral contracts. Both parties are protected from period prior to the beginning of performance

Principles:

If acceptance not expressly given – courts look at language used – can construct acceptance – also look at conduct of acceptor

If offeror controls conditions of cooperation of an offeree (in unilateral contract), not allowed to prevent performance/acceptance of an offeree.

## Communication of Acceptance

Offeror doesn’t need to specify mode of acceptance. If don’t, parties must communicate acceptance in way not less convenient than mode of offer. Must be reasonable (objective test).

**Mailbox Rule**: Contract concluded when acceptance mailed.

* For convenience – offeror has more power in contract, this rule protects balace of interest of both parties
* Post Office acts as agent for both parties

**Recipient rule:** Contract made when and where acceptance received

* Applies to instant communication

Exceptions:

* If express terms of offer specify acceptance must reach offeror
* If creates absurdity and inconvenience (if circumstances / subject matter of contract can’t have intended there should be a binding contarct until party accepting an offer had communicated acceptance
* Courts look at contract, language, subject matter – objective test

### Felthouse v Bindley

Facts: P wanted to buy horse from his nephew, but misunderstanding about price. Said would split the difference, assume $X if didn’t hear back. No reply, Nephew instructed D to withhold horse from auction. But accidently sold. P sues auctioneer.

Issue: Acceptance of offer need to be communicated to be effective?

Ration: Silence isn’t acceptance. Offeree can waive riht to make silence = acceptance. Acceptance of offer not lead to binding agreement unless expressly communicated to offeror.

Even if nephew intended to sell, he never communicated this to uncle.

\*\* - Offeror usually in control of mode of acceptance but courts are reluctant to allow silence to be specified as mode of acceptance.

### St John Tug Boat v Irving Refinery

Facts: agreement for tug boat on call. No explicit extension after time period expired, but continued to use it. New offer of the extended service given. No express oral or written notice of acceptance of offer.

Issue: Did the D’s conduct during period constitute continuing acceptance of offers?

Ratio: Conduct of an offeree, unaccompanied by verbal or written undertaking, could under certain circumstances be reasonsably constructed as valid acceptance

* Ex. Continuing service on terms previously agreed

### Timberwolf Log Trading v Columbia National Investment

Facts: TW had contract w/ previous owner to clear logs. May have oral contract – hard to decide on agreement. Did work on unprofitable areas, believed would aslo be able to log profitable areas.

Issue: Can there be a contract, with no written contract, some negotiations – some logging done and no protest?

Ratio: Courts use test – whether reasonable bystander familiar with logging industry in BC would undertrsand there to be contract.

Look at:

* Customs of industry, circumstances
* Relationship between parties – business or consumer transaction, etc.

### Household Fire v Grant

Facts: D made written offer to buy shares in P’s company. Acceptance of offer mailed to him but never received. Entered as shareholder in P’s books. P bankrupt, books showed D owing price of shares. D refused to pay saying didn’t receive acceptance, not shareholder.

Ratio: Mailbox rule upheld: offeror bound by offer even though acceptance not received. Binding contract once letter posted – acceptance completed.

Post office common agent

* Dissent rejected and applied recipient rule.

### Holwell Securities v Hughes

Facts: D issue grant to sell property, contained clause stipulating there must be notice in writing within 6 months in order to exercise option. P sent letter exercising option, lost in mail, never received by D.

Issue: did P exercise option to buy property by posting letter to D he never received?

Ratio: Postal rule should only apply if doesn’t lead to “manifest inconvenience and absurdity”. Also doesn’t apply if express terms of offer specify acceptance must reach offeror. The requirement for “motice” was held to invoke the recipient rule.

### Brinkibon v Stahag Stahl

Facts: D (Vienna Sellers) sent telex containing counter-ffer for steal to P. P (buyers in London) claimed sent acceptance in 2 ways – telex (verbal acceptance) and info re opening letter of credit – acceptance by conduct.

Issue: contract made in location where acceptance sent from or where received?

Ratio: telex = instant communication. Contract made when and where acceptance received (Vienna). Receipt rule (contract made when and where acceptance is received) applies to instantaneious communications such as phone or telex/fax.

* Mailbox rule applies only if acceptance by mail is required or if that has been a regular business practice of parties
* Or if offer is made by mail and no acceptance requirements are specified

**Conclusions:**

* Acceptance snet by instantaneous communication generally binding when it is received
* Mailbox rule applies only to non-instantaneous communication of acceptance
* Offeror asking for acceptance to be posted can always expressly set terms of an offer requesting actual receipt of acceptance

## Electronic Contract Formation

### Rudder v Microsoft Corp.

Facts: P subscribers of MSN – says D charged members, took payment from CC’s. P only read portions of membership agreement, didn’t notice forum stelection clause. Argue agreement obscures clause, like fine print, must be brought specifically to attention otherwise severed from agreement. Relies on electronic format of agremeents.

Ratio: terms of contract on internet can be displayed on multiple pages, not like fine print. Users expected to follow links, become familiar with terms before agreement. Clicking “agree” is valid contract formation.

* Sufficient notice – scrolling down like flipping pages of paper contract.

### Century 21 Canada v Rogers Communication

Facts: Zoocase took material from Century 21’s website. They argued breach of contract for terms of use agreement – damages from loss of profit. Said can’t use for business purposes. D argues unilateral contract, no consideration, no notice.

Ratio:

**Browse Wrap Agreement** – act of browsing could constitute acceptance of terms of use of web agreement and formation of contract as long as a user of the web site continues to browse after reading the terms posted

* don’t need to indicate agreement by clicking on “I agree” button. All that is required is they use the product after being made aware of prdocut’s Terms of Use.
* Terms clear and person browsing website had enough time to read them prior to accepting them

### Electronic Transaction Act

**Signatures**

**11**  (1) If there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature.

(2) Subsection (1) does not apply to a signature for a record prescribed, or within a class prescribed, under section 21 (2) (d) unless the proof described in section 21 (2) (d) is present.

**Formation and operation of contracts**

**15**  (1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed

(a) by means of information or a record in electronic form, or

(b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

(2) A contract is not invalid or unenforceable solely by reason that information or a record in electronic form was used in its formation.

# Termination of Offer

## Revocation

### Dickinson v Dodds

Facts: D offers sale to P, til Friday. P accepts but too late, property already sold. Day before, D signed K with another paryt. P seemed to know this. When accepted.

Issue: Can offeree enforce binding K by accepting offer after being notified K already formed with another party?

Ratio: Offer could be revoked by indirect communication – once the person to whom the offer was made knows that the property has been sold to someone else, it’s too late for them to accept the offer and the contract is impossible to make.

* Promise to hold offer open not binding unless consideration or a deed.

### Byrne v Van Tienhoven

Facts: D mailed offer to sell tin plates to P on Oct. 1. P receive offer Oct. 11, immiediately accept via telegram same day. P also sends letter to confirm. D mailed revocation of offer on Oct. 8, received by P on Oct. 20, after P relied on contract. P

Issue: Withdrawal of offer have effect until communicated to offeree?

Ratio: Mailbox rule doesn’t apply to revocation (not valid once sent). Withdrawal of offer no effect until other party notified. Uncommunicated revocation invalid. Once acceptance sent, reasonable party to expect K completed.

* Revocation must be received by offeree (before acceptance) to be effective

\*\*If acceptance is posted after the revocation has been posted but before the revocation is received, acceptance is valid, the contract is formed

### Errington v Errington and Woods

Facts: Father buys house for son & daughter in law. Pays down payment, [uts title in his name. Told DIL if paid remaining mortgage weekly, would transfer title when house completely paid. Father dies before paid off. Widow sues for house.

Ratio: Unilateral contract – implied promise not to revoke once performance started. Father’s promise was unilateral K. As long as couple keeps paying, contract remains binding.

* Protects party acting in promise of offeror, acting in reliance on promise.

Generally – offers for unilateral contracts can be revoked anytime prior to complete fulfillment by offeree, but court rules offer could not be revoked by promisor once promise entered on performance of act.

**Conclusions:**

* Revocation of an offer is its termination by offeror
* Revocation is effective if it comes before acceptance and if it’s communicated to offeree
* Communication may not be direct from an offeror to an offeree and doesn’t need to be explicit
* Postal rule doesn’t apply to revocation
* Revocation of offer for a unilateral contract – complex issue dealt on case to case basis

**Conditional Offer –** an offer may contain a condition which, if rejected by the offeree, terminates an offer

Condition precedent – Dawson v Helicopter Exploration

* Non-fulfillment of a condition precedent = termination

**Rejection and Counter-offer -**  rejection = termination (livingstone v Evans)

* Counter-offer = rejection of original offer

## Lapse of Time

### Barrick v Clarke

Facts: D offers to purchase land from P. P sends counter offer to D with higher price, says deal could be closed immediately so want fast reply. Sends letter, saying return by X date. Delivered while out of town. Upon return, writes to accept but P already sold.

Ratio: Offer not accepted within reasonable period of time. Depends on nature, character, course of business negotiations, circumstances of offer, conduct of parties

Offer lapses if not accepted within a time limit determined by the offeror – if not specified, lapse within a reasonable time

* Court will determine what is a reasonable time using rule of construction (objective test)
* Depends on nature and character of item being sold, on normal or usual course of business in negotiations, circumstances of offer, including conduct of parties in course of negotiation

# Certainty of Terms

### R v CAE Industries

Facts: Gov’t & CAE negotiate purchase of aircfaft maintenance base. In letter, assured gov’t would employe “best efforts” to secure work for X man hours of labour, guaranteed X hours per year. Purchased base but work hours diminished. Sue for breach of contract.

Issue: Parties intend letter to be binding legal contract? Contract incomplete/vague to be rendered unenforceable?

Was contract intended?

Ratio: Both parties intended to enter K since terms of K partly performed. Intention found from circumstances, language, - K not incomplete of vague enough to be unenforceable. Language loose but intention to be binding commitments. Upon acceptance, binding K.

### Sale of Goods Act

**Ascertainment of price**

**12**  (1) The price in a contract of sale may be

(a) set by the contract,

(b) left to be set as agreed in the contract, or

(c) determined by the course of dealing between the parties.

(2) If the price is not determined in accordance with subsection (1), the buyer must pay a reasonable price.

(3) What is a reasonable price is a question of fact dependent on the circumstances of each case.

**Agreement to sell at valuation**

**13**  (1) If there is an agreement to sell goods on the terms that the price is to be set by the valuation of a third party, and the third party cannot or does not do so, the agreement is avoided.

(2) If the goods or any part of them have been delivered to and appropriated by the buyer, subsection (1) does not apply and the buyer must pay a reasonable price for the goods.

(3) If the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

## Incomplete Terms

### May v Butcher v R

Facts: A enters agreement with R for purchase of leftover tents. R sends correspondence confirming sale to A. Agreement for sale of goods and price to be subsequently fixed. Arbitration provision.

Issue: Terms sufficiently defined enough to constitute binding K?

Ration: If critical matter of K left undetermined, no K. You can leave certain things to be determined later but not acceptable t o agree party will in futre agree on matter that’s vital to K. Mere agreement to agree, not enforceable K.

Sale of goods Act not applicable (would later agree on price)

If silent, then it would’ve been used

Arbitration clause not used b/c no contract.

### Hillas v Arcos

Facts: P agreed to buy X amount of Russian timber at discounted price. If buy more, more discount. Clause said P able to buy X amount at 5% below official price. :ater revised price. D later enter K w/ other timber buyers for them to buy entire production of shipment. P sues for breach of K.

Issue: Terms of agreement clear enough to constitute legally binding K?

On appeal Ratio: terms of agreement, including clause 9 sufficient to create legally binding K. Both parties intended to make K, court may construe K as legally binding even if K silent on some details. K neither uncertain nor incomplete.

Courts should construe agreements fairly and broadly.

* Look at business practices, industry
* Courts shouldn’t make contracts for parties, or go outside the words they have used (except if appropriate)

### Foley v Classique Coaches

Facts: D operated fleet of motor coaches, purchase dland from P who operated gas station. D entered supplemental agreement to purchase all required fuel from P at price periodically agreed on. Arbitration clause – went to courts anyway. D tries to repudiate agreement.

Issue: Can D repudiate agreement making obligation to purchase gas from P no force/effect?

Ratio: Letter to repudiate supplemental agreement made no suggestion land would be returned. Just attempt to avoid binding obligation. Parties believed they had contact, acted as such. Partial performance.

“There is to be implied in the contract a term that the petrol shall be supplied at a reasonable price and shall be of reasonable quality”

Courts consider:

* Language and words of parties
* Factors that show intention of parties
* Parties’ previous relations
* Gravity of consequences of invalidating agreement for lack of certainty
* Vagueness against a drafter of agreement

## Agreement to Negotiate

Is there a duty to negotiate in good faith in Canadian common law jurisprudence?

### Empress Towers b Bank of Nova Scotia

Facts: Landlord Empress rented to Bank, with renewal clause. Rental price would be market rental at times as mutually agreed to. Landlord waited until lease about to expire and said tenant to pay $15,000 plus proposed price.

Ratio: Clause says market rental rate but also market rental rate to be mutually agreed. No common law to negotiate in good faith but implied term of good faith negotiation (“mutually agreed”)

### Mannpar Enterprises v Canada

Facts: P held permit with Crown to remove/sell sand and gravel on Indian reserve. Permit had initial term of 5 yrs, with renewal clause. P expected operation to be 10 yrs since required time to do reclamation work contractually obliged to do.

Issue: Clause uncertain? Is there an implied duty requiring Department to negotiate a renewal in good faith (as per Empress?)

Ratio: Gov’t negotiating on behalf of Band – fiduciary duty. Unlike Empress, no benchmark like market price. Language in agreement indicates Corwn’s desire to have freedom in deciding wheterh or not to agree on extension – left to be renegotiated. No duty to negotiate in good faith.

Renewal clause in contract mere agreement to agree – contract didn’t provide formula or objective measure to determine rent (such as fair market value )

## Anticipation of Formalization

Enforceability of letters of intent, and informal preliminary agreements.

Look at degree of formality/certainty, and intention of parties, factual matrix

### Bawitko Investments v Kernels Popcorn

Facts: P wishes to get franchise. Received info package including 50 pages draft agreement. Handshake, oral “You’ve got a deal”.

Issue: Can oral contract in itself constitute complete and enforceable contract?

Is oral contract complete? Or some elements yet to be settled in final formal agreement?

Ration: Oral agreement in contemplation of formal written agreement not enforceable due to lack of certainty. Contract to make contract.

* If no agreement re: essential terms nor agreed w/ reasonable certainty, no completed agreement. No meeting of minds, insufficient certainty.

### Wallace v Allen

Facts: P wants to buy business from D (neighbor). LOI, have date set for formal signing – importance of LOI words (say they must decide more later). P starts to work for business, family moves, D tells everyone that P new owner, deposit funds to close. D worried, backs out of deal.

Issue: Can a LOI for purchase of business create binding contract?

Ratio: Language and conduct show parties clearly express the LOI to be bound by terms – later incorporated into contract.

Facts: commercial transaction, experienced business ppl

Conduct: P already owner of business basically

Language: intended to create formal agreement in future

# Consideration

What constitutes valid consideration?

* Clear and unambiguous (certainty)
* Sufficient not adequate
  + May be nominal (peppercorn)
  + Sentimental motives not sufficient (*Thomas v Thomas)*
* Given at time of promise for which it is the price
* Fresh not past
* Must move f rom the promise but not need to reach promisor
* Legal

## Nature of Consideration

### Governors of Dalhousie College v Estate of Arthur Boutilier

Facts:

Subscription by D – pledge to give $5000 to improve college - promise to pay.

Issue: was there valid consideration?

No – subscription paper is not enough – no reciprocal promise - subscription w/o consideration

Ratio – consideration must move from the promise at the time of and in exchange for the promise which is sought to be enforced

### Thomas v Thomas

Facts: P is widow. Husband promised house before died – sons agreed that P entitle to property if she paid 1 pound/yr in rent, ,kept in good repair, didn’t remarry. 1 brother dies, tries to eject P

Issue: Did P provide sufficient consideration for conveyance of contract?

Ratio: Consideration is something of value in eyes of law, consideration must move from promise; consideration must be sufficient but need not be adequate

Motive = not enforceable as contract

Decision: Consideration by paying rent and keeping dwelling in good condition

Deceased’s wishes motivation but not consideration.

## Past Consideration

### Eastwood v Kenyon

Facts: D guardian for Sarah. Borrowed money for her education. She grew up, promised to pay back after. Husband D promises also – doesn’t pay back.

Issue: Consideration made in the past – no request from Sarah. Can request be implied? Is obligation contractual or moral?

Ratio: past consideration not consideration at all. P’s past consideration deemed in part purely moral and not contractual. Not at request of D or wife. D made commitment to repay years after consideration given. Express promise not supported by timely consideration – not enforceable.

Moral obligation is nudum pactum – voluntary promise w/o any consideration.

### Lampleigh v Brathwait

Facts: D killed 3rd party, requested P help him get pardon from King. P agreed to perform labour for D and decided to travel at his own expense to meet w/ King to obtain pardon. Afterwards, D promised P consideration of 100 pounds. Never delivered, P sued to get damages for breach of K.

Issue: Is consideration “past” if there is a prior request?

Ratio: past consideration may be good consideration for subsequent promise if benefit was conferred at promisor’s request.

### Pao On v Lau Yin

Pao On – private company (Shing on)

Lau – public company (Fu Chip)

Share swap deal. D worried shares go down in price – agreed wouldn’t sell 60% of share for min 1 yr. – realized couldn’t make money that way. (also protected) – bad idea. Made subsequent deal – P would breach contract unless indemnified. Share price fell, D refused to indemnify. Argued no consideration

Ratio: past consideration can sometimes be good consideration if

1. Act was done at promisor’s request
2. Parties understood that act was to be remunerated
3. Payment would have been legally enforceable had it been promised in advance.

## Pre-existing duty and consideration

### Stilk v Myrick

Facts: P contracted to work on ship owned by D. 2 men deserted – captain promised crew wages of 2 men divided if fulfilled duties of missing men. After arriving home, refused to pay crew.

Ratio: agreement void for lack of consideration. No consideration for ulterior pay.

Courts: performance of a contractual duty already owed to a promisor NOT good consideration for a second promise by the promisor

### Gilbert Steel v University Construction

Facts: P and D entered K for steel for building. P announced price increase, new K for supply of steel. While under construction, P had 2nd price increase. Said oral binding agreement. D continued to accept deliveries of steel but failed to make full payments.

Issue: was oral agreement legally binding or did it fail for want of consideration?

No consideration for new price agreement. No mutual agreement to abandon earlier written K and assume new obligations.

Estoppel can’t be used as a sword.

### Williams v Roffey Bros.

Facts: Contractor had agreement with owners to renovate flats by certain date. Subcontracted to P. – fincncial difficulty. D didn’t want to breach K, by finishing late. Agreed to pay P additional $ to work before dealine. Variation to original K.

Issue: Can performance of existing contractual obligation be taken as consideration?

Ratio: Pre-existing legal duty owed to promisor may be valid consideration for subsequent promise if promisor derives practical benefit from agreement and if subsequent promise not given under economic duress.

Broader concept of consideration. Both can benefit from contractual modification

### Greater Fredericton Airport Authority v NAV Canada

Expands on Williams v Roffey

## Promise to Accept Less

Accord and satisfaction generally required if one party has fully performed the agreement.

### Foakes v Beer

Facts: A owes R money. A, allowed to pay in installments. Interest still owing. Agreement that R wouldn’t sue.

Issue: Is R entitled to interest despite agreement that A didn’t need to pay it?

Whether performing an existing duty could substitute consideration?

Ratio: Agreement to accept smaller sum in satisfaction of larger sum isn’t good consideration

Her promise was withdrawing right to sue, but what consideration is she receiving?

### Re: Selectmove.

Facts: Over extended period of time, S failed to pay employee deductions to Crown. Managing director met with tax collector to discuss problem. Tax collector asked for proposal to deal with money in arrears. Company made proposal and tax collector allegedly said he’d have to seek approval but would get bak to company if it was unacceptable. Company made payments but not in strict accordance w/ alleged agreement. Crown then demanded entire payment in arrears.

Issues: Consideration?

Promise to pay sume which debtor already bound to pay not good consideration (confirms Foakes v Beer)

Williams v Roffey not applicable where existing obligation to pay money. Only for goods and services.

### Foot v Rawlings

Facts: Foot owed R large sum of money under porissory notes. Agreement to pay lower rates. Foot agreed and paid R series of post-dated cheques.

Ratio: Payment in portions by different mode (promissory notes – post dated cheques) sufficient consideration.

# Promissory Estoppel and Waiver

### Hughes v Metropolitan Railway Company

Facts: Hughes owned property leased to Railway. Tenants had six month to complete repairs on house. Sent letter proposing purchase of building – negotiations continued. After six months, landlord sued for breach of K.

Ratio: If parties enter into terms, and then have negotiation which has effect of leading one party to believe strict rights of K won’t be enforced, person who would enforce not allowed to where it would be inequitable.

Decision: Implied promise w/ beginning negotiations tahat landlord wouldn’t enforce strict legal rights re time limits. Tenant acted on promise to their detriment. By entering negotiation, both parties made it inequitable that 6 month period would be measured as deadline.

### Central London Property v High Trees House

Facts: High trees leased flats for 2500/yr. During war, agreed to lower rent by half (non tents) – formal agreement, modified by oral agreement. After war, P asked D to pay for time since war ended. D argued that change of agreement is for full period. Also that estoppel would prevent. They never asked for the $ before, so they waived their right to increase rent.

Decision: Denning – no consideration – statement given w/ respect to future facts (will not charge full amount). Docrtine of promissory estoppel.

Requirements for promissory estoppel:

* Must be a clear promise (representation of future rights
* That other side has acted upon it (in reliance)
* Must show that promise had inducee the other to action
  + BUT FOR (wouldn’t have done it w/o promise)

## The Nature of the Representation

### John Burrows v Subsurface Surveys

Facts: D purchased business owned by B. Promissory note for $42000 – monthly installment payment with clause saying can claim entire amt if delayed 10 days. 18 months, D consistenly late. Each time aceepted w/o protest. Disagreement, so next time D late, P sued for whole amt owing.

Issue: where defence of equitable estoppel applies?

Ratio: passive conduct of P not taken as waiver of rights to seek enforcement as K but only indulgence. Where no consideration or deed, relaxation of terms must be clear or unequivocal.

### D&C Builders v Rees

Facts: P completed building work – sent bill for 480 pounds. D’s wife agreed to pay only 300 if accepted full satisfaction. P had no coice, accepted. – receipt of “completeion of account”. P sued for balance. D said there was binding settlement, accord and satisfaction.

Ratio: where true accord where creditor voluntarily accepts lesser sum in satisfaction, debtor acts on accord and creditor accepts., inequitable for creditor to afterwards insist on balance. BUT promise made under duress should not be estopped.

Wife used pressure, threats to break K. no equity in D to allow her to take advantage of equity rule.

### Combe v Combe

Facts: P & D divorced. D to pay P allowance of 100p/year. D woouldn’t pay after initial. P sued 7 yrs later for full amount. Her income greater.

Issue: Can breach of a promise give rise to a cause of action against the individual who cause the breach? Sufficient consideration for promise?

Ratio: Promissory estoppel can’t be used as sword. Doesn’t create new causes of action where none existed before. P could only succeed if sufficient consideration to support the promise – she did nothing in reliance, didn’t do anything in exchange for promise.

### Walton Stores v Maher

Facts: Maher owners of property – negotiation w/ Maher for lease. Wanted building demolished – sense of urgency. In reliance on representation made before K completed, Maher demolished and started building new one. K never came to completion b/c Waltons Stores didn’t sign lease.

Assumption that K would come into existence or promise will be performed – other party relied on that assumption to his detriment.

Ratio: Exception to rule that promissory estoppel can’t be used in absence of pre-existing legal relationship. Doctrine can be used w/o pre-existing legal realtino if there was reliance on promise that was a reasonable expectation and if departure from promise is unconscionable behaviour.

Also urgency, and K almost completed – took deed – just a formality. Also knew of demo and didn’t say anything,

### M (N) v A (AT)

Facts: M promised to pay rest of A’s mortgage on home in England if she moved to Canada to live w/ him. View of marriage. Reliance on promise, A left job, moved – M didn’t pay off mortgage but loaned her $100000. Later evicted her.

Issue – should enforce promise A relied on in detriment?

Ratio: no evidence in Cnd authorities to indicate move towards more generous approach to promissory estoppel. In Waltons, reasonable expectation of legal obligation. Here, romantic relationship so no legal relation. No unconscionable behaviour – just risks in marriage.

# Intention to Create Legal Obligations

General rule: both parties must intend to enter into legal relationship in order to form a contract. Objective test for finding intention

* Look at facts, part performance
* How certain are the terms?
* What is the nature of relationship of parties?
* How would reasonable person view this agreement?

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| --- | --- | --- | --- |
| **Intention to Create Legal Relations** | **Setting/Context** | **Presumption** | **Burden of Proof** |
| Balfour v Balfour | Family/social | NO intention to create legal relation | Lies w/ person rebutting the presumption (wife) |
| Rose and Frank v JR | Business | Intention to create legal relation | Court looked into context – words expressly stated |

### Balfour v Balfour

Facts: husband gives wife monthly allowance. Go to England together, need to leave but she can’t – sick. He suggests they stay apart. She wants monthly allowance, tries to enforce K.

Issue: Intention to create legal relations?

Ratio: CL doesn’t regulate relations between spouses. Consideration is natural love and affection – Presumption family agreeements NOT intented… Otherwise, D could sue wife for non-performance. Flood gates argument.

### Rose and Frank v JR Crompton

Facts: P agents for distributin of D’s products. Agreement vague. Clause says arrangement not formal agreement, not subject to legal jurisdiction – only for record of purpose.

Ratio: strong presumption business agreements intended to produce legal consequences. Clear and definite expression of business partines not to be subject to lega jurisdiction – no reason in public policy this shouldn’t be.

### TD Bank v Leigh Instruments

Facts: Plessy told TD Bank in comfort letter that would manage Leigh’s affairs “in such a way as to meet their financial obligations”. TD Bank thinks Plessy saying would pay for obligations.

Ratio: Comfort letter undertaking deliberately designed w/ intention not to create enforceable obligations. Both experienced business parties, should know it isn’t guarantee.

# Privity of Contract

### Tweddle v Atkinson

Facts: Fathers of bride and groom agreed to give money to P upon marriage. Father in law dies, P sues estate. P not a part of contract.

Ratio: Courts ruled that promise can’t bring action unless consideration from the promise moved from him. Consideration must move from party intitled to sue upon K. No legal rights conferred on 3rd party to agreement. No obligations either (can’t be sued if doesn’t marry daughter)

### Dunlop Pneumatic Tyre v Selfridge

Facts: Dunlop had contract w/ Dew to sell tires. Agreed not to sell under certain price. Selridge sells below list price, Dunlop sues.

Issue: Can Dunlop sue Selfridge?

No, third party to contract.

3 Principles:

1. Doctrine of privity: requires that only a party to a K can sue
2. Doctrine of consideration: person not under seal of K only able to enforce it if there is consideration from promise to the promisor.
3. Doctrine of Agency – requires that principal not named in K can only be sued if promise was contracted as an agent.

## Specific Performance – 3rd Party Acquiring Benefit

### Beswick v Beswick

Facts: agreement that nephew got business when husband died if continued to pay money to P (wife). P can’t sue b/c third party.

BUT equitable exception to privity rule – 3rd party in trustee relationship.

P had right to sue as administratix of husband’s estate. No loss to estate, only nominal damages. So sued for specific performance.

Also, sometimes can sue on behalf of third party – ex. Husband pays for holiday, sue on wife’s behalf if she gets sicks.

## Exceptions to Privity of Contract

### London Drugs v Kuehne & Nagel

Facts: Contract between London Drugs and storage company. Employees damage transformer. Employees of K&N. Limitation of liability clause for warehouse - $40. Employees third party to contract.

Ratio: Employees protected from clause limiting their liability even though not party to K. Employees can rely on limitation of liabililty clause if cu

1. contract expressly or implicitly extends benefits to employees and if
2. employees have been acting in course of their employment and performing very service provided for in K between employer and customer when loss occurred.

### Fraser River Pile & Dredge v Can-Dive Services

Facts: FRPD owned barge that it chartered to Can-Dive. CD accidently sank barge while it chartered. FRPD collected on insurance policy for barge. Policy contained subrogation clause waiving insurer’s right of subrogation against third-parties. Known to CD. Subsequently, insurance contract changed, FRPD and insurer entered agreement to limit CD’s protection from lawsuits.

Courts find: having contracted in favour of CD as within class of potential 3rd party beneficiaries, FR and insurer can’t revoke unilaterally their rights. – once developed into benefit.

Once CD started enjoying benefits, can’t change the contract.

Contracts – Term II

# Representations and Contract Terms

**Puffs** – statements made prior to K – no intention to be legally binding

**Misrepresentations** – pre-contractual false statement of past or present facts – to induce to enter K

* innocent, negligent, fraudulent
* remedy is rescission

**Terms-** contractual obligations

* conditions, warranties, innominate
* test is intention of the parties – judged objectively (by words, conduct, business, circumstances)
* remedy is damages

## Elements of Misrepresentation

1. Statement of past or present facts – NOT an opinion
2. That is false
3. That is Material (important)
4. Relied on by other contracting party as reason to enter K

### Redgrave v Hurd

Facts: P made ad to sell house and find lawyer for part of business. Said income was 300-400 pounds. Showed papers and receipts showing less, offered to D but D didn’t read. D sold practice, moved and bought house. Business actually worthless.

* Innocent misrepresentation – not required to use due diligence

Ratio: K can be rescinded due to material false representation: “man is not to be allowed to get benefit from statement which he now admits to be false.” Failure to exercise due diligence NOT relevant if person is induced to enter into K by false representation.

\*Statement of fact must be material

\*Note – conduct can be misrepresentation

\*Silence generally not – may imply MR

### Smith v Land & House Property Corporation

Facts: P offered hotel for sale stating currently leased to “desirable tenant”. He had been late with rent,, went into bankruptcy.

Ratio: Statement must be one of fact. Where facts equaly well known to both parties, one of them saying something may be opinion. But if facts not equally known to both sides, then statement of opinion by person who knows the facts best may be a statement of fact.

\* needs to be statement of past/present facts – not opinion

## Remedies for Misrepresentations

**Rescission –** parties placed in position before K – restitutionary nature (equity)

Contract is voidable – choice of the innocent party

* Problem if it is partially performed

Limitations:

* Impossibility of restitution
* Execution of contract
* Affirmation of K (despite knowing of MR
* Delay/laches

### Kupchak v Dayson Holdings

Facts: DH fraudulently induced K to purchase shares in motel company in exchange for 2 pieces of real estate. Learned of fraud, lawyer involved, stopped payment – said wanted to establish rescission. D tried foreclosure b/c no payment. Courts found fraud – one property sold and changed substantially – shares hadn’t ben altered so could be returned, but P’s property couldn’t be returned. Rescission impossible.

* Where restitution impossible, Court can apply equitable principles- order restitution by compensation
* Note, not affirmation or delay in this case
* If K is executed – except in case of fraud, rescission not allowed

Ratio: No rescission for MR if:

* 3rd party has acquired rights,
* or when restituio in integrum is impossible,
* or if the action to rescind is not taken within a reasonable time,
* or K is executed (except w/ fraud)
* or if injured party affirms the K

2 Part test for fraudulent MR:

1. is rescission practical and restitution possible?
2. Was the claim to rescind submitted in a timely fashion?

**If rescission is impossible then injured party may get monetary compensation** (here fair market value for property plus interest)

### Leaf v International Galleries

Facts: P bought a painting from D advertised as a “Constable”. 5 years later, the P was told it was not a Constable and tried to take it back to the D to get his money back.

Ratio – no rescission available for innocent misrepresentation when K is executed and reasonable time for a claim lapses

* Doesn’t matter if executed – may still get rescission

## Collateral Warranty/Collateral Contract

Test: whether a statement is to be regarded as a term o the contract or as a representation depends upon the intention of the parties

* Court reluctant to award collateral contracts – don’t want to impose obligations on parties
* Treated as separate K – need agreement, consideration, intention

### Heilbut v Buckleton

Facts: P claimed “tricked into contract” claiming only bought the company b/c of its nature as a rubber co. Nature of the business was misrepresented – whether it’s a rubber co, and profit potential due to a shortage of trees. Made a claim for damages for fraudulent misrepresentation and claim for damages for breach of warranty.

* Found not fraud – take a lot of effort to prove
* “bringing it out” – not enough for collateral contract – no intention

Ratio: person not liable in damages for innocent MR no matter in what way or under what form the attack is made, therefore if rescission is not possible there is no remedy.

Affirmation at time of sale is warranty, if evidence shows so, else it is only an innocent MR

Collateral warranty must be proved strictly, not only the existence of such terms but the existen of animus contraheni (intention) must be clearly shown.

\***intention required**

\*Note- in SGA – merchant/buyer relationship – deemed to have made collateral warranty – presumption of fact, burden of proof on merchant to rebut.

**Collateral Warranty –** damages in contract law to protect:

*Expectation interest* – monetary value of what innocent party would’ve received had K been fully performed

* cost of cure
* difference in value
* nominal damages (no loss proven)

*Reliance interest* – monetary value of what innocent party has spent in reliance on K (wasted expenses)

*Restitutionary Interest*

# Negligent Misrepresentation – Torts and Contracts

### Sodd Corp v N Tessis

Facts: D, chartered accountant and trustee in bankruptcy, made false representations about value of goods in warehouse. P submitted tender based on this. Exemption clause saying purchaser has inspected assets.

* Courts find duty of care – negligent misrepresentation
* D’s rep falls outside exemption clause

Ratio: liability for neg misrep can be found both in contract and tort where there is special relationship creating duty of care

## Exclusion Clauses and Liability for Neg Misrep

### BG Checo v BC Hydro

Facts: BC hydro called for tender to erect power lines. BG CHeco did survey of land by helicopter. Saw area in process of being clear-cut. They issued tender and won. K had term saying 3rd party had responsibility to clear trees for access – BC hydro responsible for some valleys and gulleys. P didn’t include cost of cutting trees in tender, so spent more than thought. Sued for tort of neg misrep and breach of K.

Courts say

* Terms of tender made it into the K
* But also pre-contractual statements can result in negligent misrep – had a duty of care – should’ve known that ppl contracting would rely on statement
* Limitation clause in K didn’t negate duty of care

Ratio: actions in K and tort may be concurrently pursued unless parties by a valid K explicitly indicate they intended otherwise.

Mere fact that parties have dealt w/ matter expressly in their K doesn’t mean they intended to exclude all rights to sue in relation to that matter in tort

## Entire Agreement Clauses

* State that entire agreement between parties is contained in written contract – all previous negotiations do not form part of K (not terms)
* Consequence for misrep claims – prevents a claim b/c entire agreement clause states that parties have not relied upon any pre-contractual representations

### Taurus Ventures v Intrawest Corp

Facts: K to purchase property in Kadenwood. Representations made before that access would include ski trails. Had entire agreement clause.

Issue: Whether pre-contractual representations may give rise to damages, where the K entered into doesn’t address matters about which reps were made, and includes entire agreement clause?

* Finds can’t sue in tort law
* Treat entire agreement clause as exclusion of liability clause
* Equal knowledge, no duty of care – exception for fraud

Ratio: entire agreement clause excludes T from claiming in tort. Negligence need not be expressly referred to in an exclusion clause in order to exclude an action in negligence. Parties both sophisticated, commercial entities. – not standard adhesion K

## Parol Evidence Rule

### Harwish v Bank of Montreal

Facts: H signed for indebtedness of newly formed company, Crescent Dairy, a cheese factory, after the new company’s line of credit was nearly maxed out. Bank gave H oral statement that he was only signing for existing indebtedness, and would be released from guarantee once bank received joint guarantee from directors – although this was different than what K actually said. Bank sued K for full guarantee, $6000.

Ratio: court upheld traditional principle that any agreement collateral or supplementary to written agreement may be established by **parol evidence,** If:

* It could be made as independent agreement w/o writing and
* Not inconsistent with or contrary to written agreement

Bank can’t guarantee/warranty something that is contrary to what it is contracting to.

### Bauer v Bank of Montreal

Facts: Bank made mistake – didn’t properly register book of debts. Client got caught by liability.

SCC upheld exclusion of liability clause

Ratio: confirmation of general principle that oral evidence which contradicts the main written K is inadmissible under parol evidence rule.

### Gallen v Butterly

Facts: Contrary to oral assurances the buckwheat sold to the P by the D didn’t act as a blanket and smother weeds.

Ratio:

* Many cases where evidence of oral statement is relevant and may be admitted – written agreement isn’t whole K, in support of interpretation of K, to correct a mistake or error in written K, to show misreps, etc.
* Parol evidence rule isn’t absolute
* It is presumption that collateral agreement can’t be admitted if inconsistent with or contradicts the written terms.
* Presumption strongest when oral representation is alleged to be contrary to the document, and less strong when it adds to the document
* It is more rigorous where parties had produced and individually negotiated doc than where printed form used

## Classification of Terms

Terms vs. Representations

Impact: determines type of remedy available, and what is happening with K

Test: objective intention of the parties

**Representations**

* Made prior to time of K
* Leads to rescission

**Collateral Warranty**

* Made prior to K
* May lead to terms

**Terms**

* Made at time of K
* Promise that statement is true
* Leads to damages always, maybe termination

Express Terms: directly and voluntarily agree in writing or orally

Implied Terms: - found as part of K by implication

Used to decide content of K on basis of:

* Custom or usage
* Operation of facts (business efficiency and reasonableness necessitates it)
* Law (CL or statute)

## Importance of Terms

* Determines parties’ contractual obligations
* Important to determine remedies available for their breach
* Resolves whether a breach gives rise to a right to damages or the innocent party has an option to terminate the K in addition to right to damages
* Can be classified by parties, statute (ex. SGA), or courts

**Primary obligations** – what are parties expected to do in performance of K?

**Secondary obligations** – what happens when party fails to perform primary obs? What are remedies provided for breach of primary ob?

## Condition vs Warranty

* Depends on effects of breach
* Both lead to damages

**Condition:** the most important term. Breach renders K fundamentally different from original K, gives rise to termination

**Warranty:**  breach effect not as serious, doesn’t necessarily lead to termination of K

**Intermediate/innominate term:** if court unsure if condition or warranty

### Hong Kong Fir v Kawasaki

Facts: Owners chartered boat to charterers for 2 yrs. Promised that it would be seaworthy and would deliver at certain time. Delivered it but understaffed, engine problem. They fixed the problem and delivered, but Ps wished to repudiate the K. Should be able to terminate K for breach of K?

* Problem – often must wait until actual breach to see if consequences so serious innocent party should be able to terminate K.
* See if the event has consequences on the performance of K – does it deprive party to perform substantially whole benefit of K?
* New category – innominate terms

Ratio: in addition to traditional CL characterization of terms into 2 groups, conditions and warranty, there are intermediate terms

Test to determine if condition or intermediate term is the nature of event and its practical effect – does it deprive party to perform of substantially whole benefit of K?

* At time of K, if hard to decide, special category – innominate terms
* Have to wait for breach, see what consequences of breach are to determine what remedies are available

### Wickman v Schuler

Facts: W selling S’s product. Agreement that they would send representatives to car manufacturers to solicit orders, 6 ppl a week. Wouldn’t miss any (have replacement). Wording says “condition”.

Issue: Meaning of word “condition”

* Meaning of term – analyze K as a whole
* Remedies available, read with C. 7 – material breach, doesn’t seem reasonable – would lead to absurdity

Ratio: Contract should be interpreted as a whole and word “condition” should, on facts of this case, be given an ordinary meaning not as a term which will entitle innocent party to repudiate K in event of a breach.

If parties intend to give a condition such effect they must make that intention clear

# Discharge by Performance or Breach

* Normally presumption of “entire contracts” where buyer not liable for payment until performance is complete
* This can be problematic – new rule adopted
* Substantial performance of obligations. Payment on basis of quantum merit – if substantial performance of obligation, party should be entitled to money
* Depends on facts of each case
* If P abandons K, they can raise the possibility of a inference of a new K – pay for work on QM basis
* For this, must given option to D to take or not take benefit of work done

### Fairbanks v Sheppard

Facts: D contracted to build machine for P for $X. D paid part of $X on account. When machine nearly completed, D refused to do more unless paid more of $X. P sued to recover partial payment and for other consequential losses. Do counterclaimed for K price.

Issue: Whether D had substantially completed machine to entitle payment.

* Found not substantially completed, needed more skills/knowledge to complete

Ratio: the general rule of entire contract can be interpreted to mean recovery for K to do work for a lump sum is possible if the work is “substantially” completed (even if defective)

* BUT – quantum meruit not applied against contractor who withholds performance for strategic reasons

### Sumpter v Hedges

Facts: P contracted to erect buildings. When work partly done, P said couldn’t complete. D completed work himself. P sues for QM. Found K was abandoned.

* If K for lump sum, may not recover until work completed.
* Can’t recover on QM unless new K entered into
* D didn’t have option to take or not take benefit of work done

Ratio: Party in default can sue in QM where fresh K can be implied, if D has the benefit of work. New K may be implied where innocent party has choice whether to take benefit. Here not choice, no QM.

The mere fact of the appellant remained in possession of their land isn’t evidence upon which an inference of a new K can be found.

### Jedfro Investments v Jacyk

Facts: 3 business ppl, I, J, M – want to join forces and buy property in US, sell it and flip it. Needed extra $ to do so from lender. Ran into crisis – foreclosed upon by J’s company, Air Products. I argued that parties in breach of join venture agreement.

Issue: Was the K abandoned?

Ratio: abandonment discharges a K only if it amounts to new K where parties agree to abandon old one. New K made explicitly or implicitly but must be clear.

More than simple ignorance of K obligation is needed to establish repudiation.

### Howe v Smith

Facts: P enters K to purchase land from D. Gives $500 deposit and part payment of purchase money. Then doesn’t pay remaining, doesn’t complete K. Entitled to return the deposit?

Ratio: Whether, in absence of express stipulation, a party in default who paid money as a deposit on the signing of a K, could recover that deposit or he has lost all right to performance by the other party, would depend on what terms are to be implied.

### Stevenson v Colonial Homes

Facts: K for cottage purchase. P refused to complete K, said entitled to return $1000 as part payment (not deposit). Argued was partial payment of purchase price, thus entitled to return subject to D’s rights to sue for damages for breach of K. D said deposit, and P forfeited. Language said “down payment” on K, but office use only form said deposit.

* A wins – didn’t direct attention to “deposit”

Ratio: to determine if payment is deposit or part payment, court looks at intention of parties in circumstances – indicated by words of K and evidence of what was said

If payment is deposit ($ paid to advance guarantee of K), no return when K set aside.

If $ paid is part payment on account of purchase price, then it is recoverable (but P is subject to claim in damages).

# Standard Form contracts and Exclusion Clauses

* Set by one party and offered to other party to agree – often all-or-nothing deals
* Often contain exclusion or limitation of liability clauses
* Consumer protection leg. to protect weaker bargaining side from unfair K
* Force majeure
* Entire agreement
* Amendment
* Severability clauses
* Justification of STC – social utility, business convenience, efficiency
* Enforcement:
  + General principles of K law require enforcement of standardized terms regardless of whether party signing it has read it or not
  + BUT – courts have developed methods of control
  + Legislation prevents unfair K and oppressive terms
  + Methods – challenging incorporation, examining/strictly interpreting content, validity, and considering public policy
* Is the term properly incorporated?
  + 1. Signature 2. Notice

## Unsigned Documents – Ticket Cases

### Thornton v Shoe Lane Parking

Facts: P injured in D’s parkade. Ticket said P bound to posted conditions, including exemption from liability clause. Conditions weren’t in view of P before he purchased ticket.

**P must have reasonable notice of conditions before formation of K to be bound by them. Exempting condition is especially onerous and require explicit notice**

* Denning said for formation of K in parking lot – offer accepted when car pulls up and gets ticket. Ticket is the receipt or voucher. K is concluded and can’t be altered by words printed on ticket itself.

Ratio: court should not bind a party by unusually wide and destructive exclusion clauses unless they are drawn to their attention in the most explicit way.

### McCutcheon v David MacBrayene

Facts: P had BIL ship car on D’s ferry. Ferry sank due to negligence. P previously signed K w/ D exempting D from liability but no such K signed on this occasion. P not familiar w/ limitation of liability clause found in previous K. This time, K was oral, no documents until after K complete.

* P wins – unaware of term, therefore can’t be imported into oral K.

Ratio: Previous dealings between parties are relevant only if they prove

1. Knowledge of the terms (actual and not constructive) and
2. Assent to the terms in the previous dealings.

If previous dealings show that person knew of and agreed to term on 99 occasions, it can be imported into 100th K w/o express statement, but w/o proving knowledge there is nothing.

### Machtinger v Hoj.

Facts: Credit dealer who worked many years for dealership, entered into employment K for indefinite period of time. They fired him w/o cause , w/o notice.

Issue: on what basis can court imply a notice period , what extent is intention to be taken into account in fixing implied terms of reasonable notice?

Ratio: reasonable notice period is implied term of employment K and intention of contracting parties isn’t relevant to terms implied as matter of law (only to terms implied as matter of fact).

Test:

* Implication of a term as matter of law – “necessity”, or whether term sought to be implied is a “necessary incident” of K

### Tilden Rent-A-Car v Clendenning

Facts: D rented car from P, signed K w/o reading. Restriction in small and fading letters. He signed it in hurry while rushing out of airport, though had dealt w/ company many time before. Drove into pole, driving drunk. Exclusion clause saying insurance doesn’t apply.

* Practice for SFC to be signed w/o being read or understood.
* Party should’ve have known that signature doesn’t represent true intention of signer
* Didn’t inform D of onerous provisions – so P can’t rely on it.

Ratio: Party seeking to rely on such stringent and onerous terms shouldn’t be able to do so in absence of first having taken **reasonable measures** to draw such terms to attention of other party.

\*Signature generally but not always amount to a proper incorporation

In absence of reasonable measures, it isn’t necessary for party denying knowledge of terms to prove fraud, misrepresentation or non est factum – **what is reasonable is the question of facts in each instance**

## Exclusion and Limitation of Liability Clauses

**Exclusion of liability –** except liability for breach of contract, but waive right to sue

**Limitation of liability** – limit liability party in breach must pay (admit breach)

* Incorporation – by signature or notice
* Interpretation – language and scope of the release
  + Release consistent w/ purpose of K?
  + Does it cover event that happened?
  + Contra preferentem (against the drafter)
* Nature of the venture – engaging in hazardous and exciting activity

Recreational Activities

### Karroll v Silver Star Mountain Resorts

Facts: P participated in ski competition. Collided w/ other skier. Signed waiver before event – had participated before. Claimed didn’t read it, but had time to. No vague terms, no small print – it was emphasized.

* Incorporation/interpretation not problematic – she knows it is hazardous
* Clause enforced
* Statute – Occupier’s Liability Act – contracting out occupier’s duty of care

Ratio: duty to take reasonable steps to advise of EOL clause depends on: nature of K, lenth/format, time available for reading and understanding.

Purpose of K to engage in hazardous activity, K voluntarily embarked, EOL clause consistent w/ purpose of K – no fine print, no unusual terms, and she was experienced racer.

### Loychuk v Cougar Mountain

Facts: Ziplining – guide sent 2nd person down, and they collided. One was recent law grad, one fitness centre owner – knew about exclusion clauses. Argued unconscionable, clause unenforceable and past consideration.

* Courts enforce clause – no problem with incorporation or vagueness – read waiver in standard way
* Unconscionability requires power imbalance + substantial unfairness – here nature of activity clearly dangerous
* Consideration was being allowed to continue w/ activity

Fundamental Breach

**Fundamental Breach** – a breach that deprives one party of all the benefits of K – goes to the roots of K – can’t exclude liability for this breach

* Denning wanted this to be rule of law
* Still somewhat alive in Canada
* Tercon provides guidelines – analytical framework

### Tercon Contractors v BC (Transportation and Highways)

Facts: BC issued request for RFEP – 6 responses for building highway. Then RFP. B worked w. other company to submit bid. T though that wasn’t compliant bid. Contract A – implied terms that treat all bids fairly. T said BC accept ineligible bid. Exclusion clause in tender – it was incorporated. Question of how to interpret.

* Majority awarded damages to Tercon
* Lay fundamental breach doctrine to rest
* Agrees w/ analytical approach from Binnie (dissent)

Ratio: Framework:

1. Whether as a matter of interpretation, clause applies to circumstances of case
2. If exclusion clause was unconscionable at time of K formation
   1. Power imbalance
   2. Proof of substantial unfairness
3. If clause if valid and applicable, should court nevertheless refuse to enforce it b/c of overriding public policy concerns?

E-Commerce

### Kanitz v Rogers Cable

Facts: Rogers added arbitration clause to agreement. Unilateral modification of K, after K formation. Didn’t inform. Had outages – customers unhappy. Group started class action, but b/c of arbitration clause were prevented. They posted notice on main page.

Ratio: reasonable for customer who uses Internet to go to main page for notice of changes to K.

There was clear inequality of bargaining power of parties, but notice of amendment wasn’t unreasonably buried in agreement. – plain language.

Arbitration clause was held no unconscionable – both parties obliged to arbitrate and resulting contractual arrangements were not improvident.

# Frustration of Contract

* Discharge of K in the future
* Event occurs making performance impossible or illegal – parties didn’t allocate the risk
* Before doctrine of frustration – *pacta sunt servanda* – contracts must be upheld

**Elements of Frustration:**

* Subsequent supervening event occurs (after K formation)
* Event not foreseeable
* Not self-induced
* Causes radical change of contractual relation
  + Makes purpose of K impossible or drastically more difficult

**Test:**

* Event must occur after formation of K, can’t be self-induced
* K must be totally different from what parties intended
* Distinction between complete fruitlessness and mere inconvenience
* Must be permanent, not temporary or transient
* Can’t be foreseeable
* Must affect nature, meaning purpose effect and consequences of K

\*Burden of proof on party wanting out of K

**Limitation of Frustration:**

* If foreseeable
* It is more difficult or expensive to perform
* Where there is a *force majeure* clause – can excuse from performance – can suspend K for certain amt of time

### Paradine v Jane

Facts: P leased land to J – brought action for rent not paid. Civil war occurred, D said that enemy of the King invaded the land w/ army, so he couldn’t use land.

* Military occupation didn’t frustrate lease K – strict *pacta sunt servanda*

Ratio: frustration is part of the risk a party has to bear

### Taylor v Caldwell

Facts: D rented out music hall to P. After first week, concert hall burned down. P sued D saying frustration – can’t use concert hall anymore.

* Look at nature of K – implied term of existence of building

Ratio: Court said implied condition to excuse parties in case that performance becomes impossible w/o default of contractor. The parties contracted on the basis of continued existence of particular person or chattel.

### KBK No 138 Ventures v Canada Safeway

Facts: Parties made K to sell building. K for purchase of property- to create mixed commercial/residential development. Zoning law changed.

* Purpose wasn’t for sale of building, it was for development
* Frustration by change of law – illegality

Ratio: Frustration occurs when there is such radical change in significance of obligation that thing undertaken would, if performed, be different than thing contracted for.

Even though K contained clause allocated risk in case of re-zoning leg in the P, parties didn’t actually contemplate such a change. Any reasonable person in the position of the parties likely wouldn’t have contemplated such an event.

# Protection of Weaker Parties

## Duress

* Illegitimate pressure that leaves victim w/ no practical alternative but to submit to threat
* Coercion of the will so as to vitiate consent
* Common law doctrine
* Remedy: rescission
* Can be duress to person, good or property
* Economic duress – commercial pressure not enough
* Modified test for duress from NAV Canada

### Pao On v Lau Yiu Long

Facts: Pao On – private company (Shing on)

Lau – public company (Fu Chip)

Share swap deal. D worried shares go down in price – agreed wouldn’t sell 60% of share for min 1 yr. – realized couldn’t make money that way. (also protected) – bad idea. Made subsequent deal – P would breach contract unless indemnified. Share price fell, D refused to indemnify. D argued new indemnification agreement entered under duress.

Ratio: duress, whatever form it takes, is a coercion of the will so as to vitiate consent. In a contractual situation, commercial pressure isn’t enough.

**Duress Test:**

1. Did person alleged to have been coerced protest?
2. Did he have an alternative course open to him? (option must be reasonable)
3. Was he independently advised?
4. After entering K, did he take steps to avoid it?

Modification of the Contract

### Greater Fredericton Airport Authority v NAV Canada

Facts: NAV had responsibility to provide aviation service to GFA. GFA wanted to extend runway, disagreed about who should pay. NAV installed new equipment, GFA refused to pay. GFA had no alternative – never consented, agreed to payment under protest.

* For economic duress in modification of K (not formation):
* Commercial reality needs to be recognized – parties frequently vary and modify K – will be regarded as enforceable

Ratio: needs to be threat, and pressure that no practical alternative. No need for illegitimate pressure.

Pressure leads to variation of K

Next, focus should be:

* Whether coerced party contested to variation
* Was there consideration?
* Promise made under protest?
* Party took reasonable steps to disaffirm promise as soon as practical?

## Undue Influence

* Induced by improper persuasion exercised by someone in special relationship w/ victim
* Remedy = rescission
* Equity – focus on nature of relationship
* Protects from unfair use of persuasion – moral duress (domination of will)
* Persuasion in relationship – actual or presumed
* Actual: direct evidence of influence (pressure short of duress)
* Presumed trust inferred from relation
  + A. Recognized types of relationships = Irrebuttable + questionable transaction
  + B. Special circumstances = rebuttable presumption + questionable transaction

### Geffen v Goodman Estate

Facts: Family members context validity of 2 different wills. Home left is FS to daughter w/ mental disorder – brothers want to ensure estate remains in family – create trust providing L/E to daughter and remainder to grandchildren. Daughter dies, children claim brothers exerted UI on their mother. They had her best interests at heart, and she had outside legal advice.

Ratio: P must establish presence of dominant relationship to give rise to presumption of UI.

Then onus moves to D to rebut it. Must show that P acted full, free and informed and had independent advice.

Magnitude of disadvantage or benefit is cogent evidence going to issue of whether UI was exercised.

### Royal Bank of Scotland v Etridge

Facts: Wife gave guarantee to bank (interest in home as security) for husband’s debt. When bank attempted to enforce charge and take possession of home, wife claimed UI from husband.

* Question of notice – did the bank have any notice that there was duress (may be constructed notice)

Ratio: bank must take reasonable steps to bring home to individual guarantor the risk he is running by standing as surety.

Transaction that isn’t reasonably expected to occur between parties is necessary to give rise to rebuttable evidential presumption of UI.

## Unconscionability

* Unconscientious use of power arising out of circumstances around creation of a K
* Concerned with bargain/contract itself – looks at bargaining powers + unfair bargain
* Equitable doctrine
* Remedy = rescission
* Focus on reasonableness of a transaction

### Morrison v Coast Finance

Facts: D persuaded P to mortgage her home and lend money to strangers for their debts (and buy new cars). P old & poor, didn’t get independent financial advice.

* CL doesn’t provide protection for person’s folly – but would be unfair

Ratio: a presumption of unconscionability requires:

1. Proof of inequality in position of the parties - ignorance, need or distress of weaker party, which leaves them in power of stronger party
2. Proof of substantial unfairness of the bargain in favour of stronger party

Stronger party must rebut the presumption by proving that bargain was fair, just and reasonable.

### Harry v Kreutziger

Facts: P sold boat/fishing license to D on false and reckless assurances P could obtain another license. Boat undervalued, P unable to obtain new license. D was aggressive in selling, P was inarticulate, poor, semi-deaf.

* New test introduced
* Can use both tests
* Found unconscionable b/c D took advantage of P.

Ratio: New test: whether transaction seen as a whole is **sufficiently divergent from community standards of commercial morality that is should be rescinded**.

### Marshall v Canada Permanent Test

Facts: Elderly man in nursing home. Sold a piece of his land, took a $100 deposit. Action for SP for agreement to sell land (from buyer)

* D entitled to rescission of K - unconscionabillity

Ratio: not material whether P was aware of D’s incapacity. It was enough that P aware that price agreed upon by D was less than actual value of land.

Onus on P to show that price given for land was fair price and he failed to establish that.

# Illegality of Contracts and Public Policy

Statutory Illegality

* Look at a) whether making of K is illegal, whether purpose of performance of K is made illegal
* Court may grant relief for illegal K depending on factors: legislative purpose, remedy being sought, public consequences of finding K unenforceable, determination of class of person of prohibition.

### Still v Minister of National Revenue

Facts: Still misinterpreted “permanent status” letter, believed in good faith that she was lawfully entitled to work. Legal immigrant – working and got laid off, denied EI benefits. Turned down b/c wasn’t legal for her to work.

* Look at purpose of statute
* Look at policy reasons for why not to grant relief – would declaring K illegal further objectives of statute?

Ratio: Modern approach to law of illegality rejects understanding that simply b/c K is prohibited by statute it is illegal and void. If K expressly or implicitly prohibited by statute, court may refuse to grant relief to a party, when it would be contrary to public policy, reflected in the relief claimed, to do so.

Contract Contrary to Public Policy at CL – restraint of trade

Severance – effect of restrictive covenant that's in restraint of trade usually to render whole K unenforceable (if RC is essence of K), or to have RC severed from K if possible

### KRG Insurance v Shafron

Facts: Restrictive covenant preventing P from working in “Metro Vancouver”.

* Modified test of reasonableness from Collins – is the interest entitled to protection, time and space too broad? Impact on competition in general.
* Depends on nature of K – ambiguous RC prima facie unreasonable and unenforceable
* Notional severance – courts narrowing down – NOT possible
* Blue-pencil – deleting w/o adding or varying a K - limited (narrow) application - here NOT possible

Ratio: Severance is applied to allow courts to alter terms of original agreement in accordance w/ intention of the parties when they entered into K.

Blue pencil and notional severance shouldn’t be invoked in cases of ambiguous/unreasonable RC in employment K. – these RC will be void/unenforceable.

\*If clause vague, can’t enforce it. – courts won’t fix any defects

# Damages

* Money awarded to claimant as compensation for loss suffered from breach of K
* Assessed on expectancy principle – at time of breach, - not absolute rule
* Claims to damages limited by causation, remoteness, and duty to mitigate

## Types of Interests Protected

**Expectation Interest:** compensation for lost profit, or cost of substitute performance

**Reliance Interest:** Compensation for expenditures made towards performance of K

**Restitution:** restoration to P of a benefit conferred on D to which later is not entitled. (disgorgement of profits)

\*can’t sue for both expectation and reliance – only one

SGA provision – measure of damages is difference between contract price and market price or current price of the goods at time when they ought to have been delivered.

### McCrae v Commonwealth Disposals Commission

Facts: D sold P wreck of oil tanker said to contain oil. Bought info of where it would be found. Gov’t agency mapping wrecks after war. Like lottery – chance to find boat full of oil. P spent money trying to salvage tanker, found none. Claim for wasted expenses and lost profit.

* Expectation interest impossible to prove – no actual tanker
* Can get reliance interest – for that specific event, not for regular use
* D breached implied undertaking that tanker was there

Ratio: if non-breaching party can’t meet burden of proof for net profits, maybe can recover damages for expenditures incurred and wasted in reliance on promise.

Burden on D to establish that expense incurred would equally have been wasted (in order to reduce amount of reliance damages) .

### Sunshine Vacation Villas v HBC

Facts: D grants license to operate in D’s stores after K w/ existing licensees terminated. P discovers D renews K w/ existing licensees. P sues for breach of K, wants expectation interest – loss of capital/potential for earnings, and loss of profits.

* Expectation interest (profit) too speculative
* Gave damages based on reliance interest – but won’t grant if it saves innocent party from bad bargain
* Awards loss of capital but not profits

Ratio: Can’t recover for loss of capital and loss of gross profit b/c they are alternatives – can’t mix.

P could elect to claim expenses but, if owner could show that P would’ve incurred loss had it completed K, only nominal damages should be awarded.

### Attorney General v Blake

Facts: B member of secret services. Employment K that couldn’t disclose info for rest of his life. Defected to KGB. Later, after into no longer secret, wants to write book about life.

Crown wants to enforce employment K – so doesn’t profit. No reliance, no expectation interest – no loss from Crown.

* Disgorgement of profit and damages – restitution of benefit that was conferred to Blake out of his wrongdoing

Ratio: exceptional cases – remedies of damages, SP, injunction all inadequate, court can grant remedy of requiring D to account to P for benefits received from breach of K.

## Quantification of Damages

Difficulty in assessing amount

### Chaplin v Hinks

Facts: Competition for actresses. Public would pick 12 who’d received K’s. P one of 50 to be selected, didn’t respond to letter from D b/c she was away and returned too late. Taking away opportunity deprives P of something w/ monetary value. Breach of K by organizer.

* Gave her amount she would’ve received if she was in lowest category of 12 girls that won

Ratio: fact that damages can’t be assessed w/ certainty doesn’t relieve wrongdoer of necessity of paying damages for breach of K

P awarded damages for loss of chance of selection.

Calculating Amount of Expectancy Damages – Use of Land

* Costs of repairs/performance vs market value?
* Law and economic efficiency vs environmental goals
* Courts v legislature?

### Groves v John Wunder Co

Facts: K between D and P to level land of gravel pit site – not worth very much $. D chose to take all good gravel and leave, didn’t even start to perform contractual obligations.

Issue: diminution in value or cost of repair as damages? What is economically efficient and fair?

* If someone repudiates K, don’t have a choice – need to find someone else to repair

Ratio: in construction K, law attempts to give injured party what he was promised and cost of remedying the defect is awarded as compensation for breach.

Owner is entitled to compensation for what he has lost – cost of performance test.

Fixing Defects

### NuWest Homes v Thunderbird Petroleum

Facts: R contracted to build house for A in accordance w/ plans and specs. House partly completed, serious problems w/ construction. A gets new contractor. TJ held breaches by R sufficient to justify A’s treating K as terminated and hiring new contractor. A removed floor, re-did work, demolished and rebuilt fireplace. A sues for cost of fixing. TJ awarded partial amount b/c some demolition unnecessary.

* Defects weren’t trivial
* A acted reasonably – decided against completing other major reconstruction that could’ve been completed – other imperfections, didn’t fix

Ratio: where a builder is in breach of obligation under building K, owner is entitled to damages measured by cost of making good defects and omissions - **unless cost is unreasonably high in relation to value to be gained by expenditure**

Intangible or Non-Economic Loss

* Traditional rule – only economic loss and physical harm (financial terms)
* Denning creates “peace of mind” exception – P contracted for enjoyable holiday – entitled to damages compensating his mental distress directly caused by breach
* Cnd Courts – not exception but rather merely consistent application of rule in Hadley v Baxendale (Fidler v Sun Life)

### Jarvis v Swans Tours

Facts: P went to Europe for 2 wk holiday. Saw brochure – upon arrival, most promised amenities weren’t there.

Ratio: cases where one can recover damages for mental distress, disappointment and discomfort as result of breach of K for package holiday.

Right measure of damages is to compensate P for loss of entertainment and enjoyment which P was promised and didn’t get.

# Causation and Remoteness

* D’s breach must be cause of the loss
* But it doesn’t need to be only cause of D’s loss – needs to break chain of causation
* P bears burden of proving: that D’s breach caused its loss, that consequences are certain
* Factual causation leads to legal causation (remoteness)
* \*Note- remoteness is determined at time of making K
* Remoteness doesn’t apply to punitive damages

### Hadley v Baxendale

Facts: P’s crankshaft broke, hired D to deliver broken one to model new one. D promised next day delivery, very late. P needed it, so lost profits and sues. D didn’t know didn’t have replacement. They didn’t promise to compensate for loss – argued damages too remote.

Ratio: general rule that if loss flowing from beach is too remote, can’t be recovered.

Must be:

1. Arising naturally from the breach
2. Within reasonable contemplation of the parties (objective test) \* 1st Hadley rule

If K made under special circumstances - must be communicated to the D, and known to both parties. Then damages will be amt of injury that would ordinarily result from breach of K under special circumstances. \*2nd Hadley Rule

### Victoria Laundry v Newman

Facts: Delay of new boiler delivery – P lost potential profits.

* 2 types of knowledge:
* Imputed knowledge: matters arising from “ordinary course of things” P able to claim damages arising naturally from K
* Actual knowledge: that P actually possesses – knowledge of special circumstances outside ordinary course of things.
* Merges 2 prong rule in Hadley into single test – depends on knowledge

Ratio: only damages that are reasonably foreseeable as arising from breach are recoverable (objective test). What is reasonable depends on knowledge of ordinary circumstances, but need actual knowledge of special circumstances for special recovery

\* The wrongdoer doesn’t need to contemplate the loss. They need to foresee the loss was likely to result

### Koufos v Czarnikov (The Heron II)

Facts: P chartered vessel to ship sugar. Long delay, fall in price of sugar. P sold sugar for less than if arrived on time.

Issue: Can P recover damages for result that D not unlikely to know could arise?

* Reasonable foreseeability higher than torts
* Confirms Hadley test – not Victoria

Ratio: D should, or reasonable person in their position, realized that loss was sufficiently likely to result from breach of K – loss flowed naturally from breach or within contemplation

Higher than torts b/c can direct attention to other party to protect from risk

## Duty to Mitigate

* P can’t recover losses he could’ve avoided had he acted reasonably
* May include steps to mitigate
* Don’t need to act perfectly
* If asking for remedy of SP, no duty to mitigate

### Southcott v Toronto Catholic School Board

Facts: Corporation formed specifically for purchase of specific building. Didn’t sell due to breach of School Board. Sued for specific performance. Only wanted that one building, so didn’t mitigate.

* There is a duty to mitigate – commercial transaction
* Courts decide not to order SP of real estate transaction of commercial nature
* Property not automatically considered unique

Ratio: D has onus of proving that P failed to mitigate loss. BOP, must show:

1. Opportunities to mitigate loss were available to P and
2. P unreasonably failed to pursue opportunities

Reasons for failure to mitigate – fair, real, substantial justification for claiming SP, lack of finances

Factors for determining uniqueness and availability of SP – remedy of damages is inadequate to do justice + P has fair justification for SP

## Time for Calculating Damages

* General rule – time of breach is time for calculating damages (Asamera)

### Semelhago v Parmadevan

Facts: 2 private parties, negotiating sale of house. Buyer not able to get property – insists on SP, or damages in lieu of. His property improved, plus that property. When should damages be assessed?

* If courts doesn’t award SP – awards damages in lieu of SP – equitable damages
* Like enforcing the K – pushes assessment of damages to time of trial

Ratio: SP – property must be unique – substitute no readily available

Where vendor reneges in anticipatory breach, innocent party has 2 options: accept repudiation and commence action for damages, or insist on performance. Claim for SP – postpones date of breach – so assess damages at date of trial.

### Asamera Oil v Sea Oil & General

Facts: Loan of shares in oil exploration company. Stock price significantly fluctuate. What is value of loss?

* Nothing about uniqueness
* Punished for waiting/speculating

Ratio: general rule – time of breach = time of assessment of damages

Imposes on injured party obligation to mitigate on date of breach – period after that is reasonable in all the circumstances. By claiming SP and/or damages a P doesn’t avoid its duty to mitigate.

BUT – if substantial and legitimate interest in seeking SP – P maybe can justify inaction – failing plea for SP, might recover losses which in other circumstances might be classified as avoidable.

## Non-Economic Loss Claimed – Mental Distress

* Traditional rule – damages deal w/ economic loss and physical harm
* Denning’s “peace of mind” exception (Jarvis v Swans)

### Fidler v Sun Life Assurance

Facts: P was on disability payments for chronic fatigue syndrome. Did investigation, thought she was capable of other work. Terminated insurance payments. They paid her before trial, but she continued to sue for damages for mental distress.

Ratio: is purpose of commercial contract to provide peace of mind (either if it is essence of K or part of bargain,) – it’s within reasonable contemplation of the parties that its breach would cause mental distress

\* right to compensatory damages arises out of contractual breach not from aggravating circumstances

True aggravated damages arise out of aggravating circumstances and aren’t awarded under principles of Hadley v Baxendale

Punitive damages awarded to punish misconduct that departs from ordinary standards of decency. Claim for punitive damages must be independently actionable (claim in tort or contractual obligation to act in good faith).

## Aggravated and Punitive Damages

### Whiten v Pilot Insurance

Facts: Family’s house caught on fire, left in cold. Insurance money made 1 payment of $5000 then cut off rent payments. Claimed arson, but lots of evidence that this wasn’t true. Tried to force them to settle for less.

* For punitive damages, need actionable wrong – in insurance, this could be duty of good faith (beach of K itself)
* Emphasize principles of blameworthiness of D, proportionate to vulnerability of P

Ratio: punitive damages awarded – breach of contractual duty of good faith (separate actionable wrong) in case of breach of insurance K

Punitive damages awarded in exceptional cases for malicious, oppressive and high-handed misconduct that offends court’s sense of decency

### Honda v Keays

Facts: Employee w/ chronic fatigue syndrome. Sent back to work by insurance co – increased absences. Employer dismissed.

* Same analysis of Fidler and Whiten for punitive damages
* Comments on quantum of damages in wrongful dismissal cases

Ratio: rejected “Wallace” type of aggravated damages

Principles of compensation in Hadley v Baxendale should apply.

Confirmed Whiten analysis of punitive damages = separate actionable wrong of a high-handed manner of employer breaching a duty of good faith

## Liquidated Damages, Deposits and Forfeitures

**Liquidated damages -**  genuine pre-estimate of loss determined by parties at time of making K (prediction of financial consequence of breach)

* To compensate injured party
* Enforceable – can’t claim anything else

**Penalties** – extravagant and unconscionable in amount in comparison to greatest possible loss (disproportionate to least serious of types of breach)

* Like a threat to the wrongdoer
* Unenforceable
* Goes back to default – CL assessment of damages

**Limitation of Liability**  - not pre-agreed amount, just a cap on what damages can be awarded (may be less)

Look at: - matter of construction

* Are words conclusive?
* Intention of parties at time of K
* Circumstances/consequences that transpire after breach

### Shatilla v Feinstein

Facts: D sells wholesale dry goods business to P. Agreed that wouldn’t sell dry goods, clothes, etc, with LD clause of $10,000. D became director of company selling men’s clothes. Issue: Is is LD clause or penalty?

* Is it a bona fide pre-estimate of the damage?

Ratio: If damages are uncertain, law permits parties to agree beforehand as to amount paid in case of breach. If penalty – look at facts of each case.

An agreement for payment of a fixed sum on any one of a number of breaches, some trivial and some serious, is presumed to be void as a penalty since “the strength of a chain is its weakest link”

### HF Clarke v Thermadaire

Facts: Restrictive covenant – LD damages clause = gross trading profit. This was much greater than actual loss.

Ratio: parties can make pre-agreement, but must yield to judicial appraisal of its reasonableness in circumstances.

Sum will be held penalty if it is **extravagant and unconscionable** in amount in comparison w/ greatest loss that could conceivably be proved to have followed from breach.

Formula of gross trading profit wasn’t defined and departs markedly from any reasonable approach to recoverable loss or actual loss.

### JG Collins Insurance Agencies

Facts: don’t have, don’t care. Enforceability of restrictive covenant. – binding.

Clause that states “in the event of breach, sum of $1000 for liquidated damages. P claimed losses greater than $1000 – it’s a penalty, not LD.

Ratio: power to strike down penalty clause is blatant interference w/ freedom of K and is designed for sole purpose of providing relief against oppression for party having to pay stipulated sum.

**It has no place where there is no oppression.**

**A penalty clause should function as a limitation on damages recoverable**. If the actual loss turns out to exceed the penalty, the party should be allowed to recover only the agreed sum.

Deposit and Forfeiture:

Deposit: prepaid money that could constitute:

* Preliminary payment securing performance of K (confirms acceptance of K and triggers performance of other party)
* Party payment of K price – part of primary obligation)

Forfeiture clause: pre-agreed remedy payable after breach:

* Available to injured party who receives a deposit in case of a default/breach of K of another contracting party
* To recover forfeiture the breaching party has to show:

1. Forfeited amount out of proportion to damages
2. Must be unconscionable for the injured party to retain forfeited money

\*Note- this occurs when the innocent party already has the money. Need to look to equity to get it back. Even if it says okay to keep in K, maybe be unconscionable to do so.

### Stockloser v Johnson

Facts: Machinery sold under K that provided for installed payments. K expressly states paid installments would be forfeited if buyer in default. Buyer didn’t keep up w/ payments, title not transferred. P suing to have installment returned.

Ratio: **No forfeiture clause:** if money handed over in part payment of purchase price and buyer makes default as to balance….once seller rescinds the K or treats it as at an end, the buyer is entitled to recover their money in law, but the seller can claim damages.

**Forfeiture clause**: or money expressly paid as deposit, party may have remedy in equity but 2 things necessary:

1. Forfeiture clause must be of penal nature
2. Must be unconscionable for seller to retain money.

# Equitable Damages

* Designed to prevent breach of primary obligations
* Factors to look at:
  + What does CL say about situation?
  + Will damages be adequate?
  + Conduct of p – must come to equity w/ clean hands
  + Must act in timely manner
  + Hardship to D or third party
  + Reluctant to award SP for personal service (ex. Construction)

**Specific Performance:**

* Court order for party to perform obligations in K
* Where damages inadequate
* Uniqueness of property on date of actionable wrong
* Substitute not readily available
* Mitigation – not a duty when entitled to SP

**Injunction**

* Order from court to do or not to do something

### John E Dodge Holdings v 805026 Ontario

Facts: P is purchaser of land for motel to be built near amusement park. Couldn’t get road access. Wants SP, not damages.

Issue: Is property unique, SP granted?

* Purpose of building hotel intended to operate is different than purchase of land as investment (Southcott)

Ratio: to be unique, property must have quality that not readily duplicated, and relates to use of property and purpose intended to follow.

Time when a determination of the uniqueness of the property is to be made is the date when an actionable act takes place.

### Warner Bros. v Nelson

Facts: D (Bette Davis) breached K to perform exclusively for P. P sought injunction against D to prevent her from breaching contractual agreement not to do any entertainment-related work for other parties w/o consent.

* Negative injunction (can’t work for others) – similar to enforcing personal service.
* Usually won’t grant this but here court justifies
* Will grant injunction if doesn’t amount to SP

Ratio: court granted injunction. Found award of damages not appropriate remedy b/c couldn’t reasonably and adequately compensate for the D’s **special, unique, extraordinary and intellectual services and no adequate damages were available.**

### Zipper Transportation v Korstrom

Facts: P wanted to enforce interlocutory injunction to prevent person from working for stolen client (against restrictive convenant) – until the end of the trial.

Ratio: The Court of Appeal applied a different test considering ***irreparable harm*** and ***balance of convenience*** and denied the injunction; holding that if the injunction is upheld, no benefit would accrue to Zipper by regaining the Piston Ring runs and that no irreparable harm would result to Zipper if the relief is denied since it was possible to quantify damagesàSo let Korstrom keep the “stolen client” (Piston ring) until the result of the trial is known.

Restitution

### Shafron v KRG insurance Brokers

Facts: employment K, RC – too broad.

Ratio: SCC confirmed that rectification is an equitable remedy correcting mistaken written records (which differs from a prior oral agreement of the parties) but not dealing with the intention of the parties and lack of clarity of the terms of contract