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# O F F E R S:

## Offer and Invitation to Treat:

Commercial Ks usually involve protracted negotiations/bargaining before actual agreement reached. Must determine significance of particular statements parties make during negotiation. What point statement during negotiation quality as a valid offer or mere puffs or invitations to treat.

**Offer**: clear statement of willingness to contract on certain terms. Specific enough terms

**Invitation to treat**: offer to receive offer (ie. price quotes, ad listings = ITT for convenience); negotiation starts with ITT. Ad that is more specific w/ guarantee/reward, gives more indication there is serious indication to offer something.

### Canadian Dyers v. Burton

Facts: P asked state lowest price for house; D replied. Year later, P asks for lower; D replied last price lowest. P treated as offer and accepted, sent cheque. D sent draft deed & said when ready to close. D’s solicitor says no K and returns cheque.

Issue: contract? price quotation or offer to sell?

No K unless offer to sell and acceptance of offer. Price quotation not offer, no more than ITT.

Intention/language/circumstances/subsequent actions 🡪 lawyer hired/deed

Objective test: reasonable person w/ similar knowledge - how would they evaluate intention, agreement?

Decision: more than price quotation, readiness to sell. D: price lowest I’m prepared to accept/deed/date for closing D also submitted deed.

### Pharmaceutical Society v. Boots

Facts: store sued for breaching a statute requiring certain drugs to be sold under supervision of a pharmacist.

Shelved goods = ITT. Customer makes offer by taking to cash register, accepting money is accepting offer.

Needs to prove that sale happened at cashier. They were in position of accepting offer and able to say no. Convenience: to revoke offer, can’t chase down consumer who has just grabbed something. If you accidently grab something off shelf, that would be accepting offer, wouldn’t be able to change your mind because would be breach of K – inconvenient. Whole scenario is convenient; both parties keep maximum freedom, ability to change mind.

Decision: display in store is an ITT.

### Goldthorpe v. Logan

Facts: Hair removal; R’s ad results guaranteed (no exemptions, exceptions or qualifications). Promise but results weren’t satisfactory; claiming damages for unskillful or negligently administered treatment

Issues: negligence by D caused loss or damages to P? K b/w D & P? Acceptance? Breach of K?

Ad w/ promise communication to public; intention for support and patronage for business, vendor seeking purchaser: “I undertake to remove hairs safely, promise to obtain satisfactory results.”

Unilateral offer; show ad = offer, specific guarantee. P performed, D didn’t deliver. No consumer protection legislation. Show ad contained contractual terms, once party accepts, if you don’t perform (remove hair permanently), breach K.

Rules of construction: rules court use to construct intention of parties; K made by evaluating totality of communications, conduct - part of the objective test

Decision: Plain meaning evaluated. D’s guarantee reckless; content to take risk of failure; won’t allow escaping responsibility/liability from enforceable promise. P’s consideration = detriment & inconvenience. Breach of agreement by D.

### Harvela Investments v. Royal Trust

Facts**:** Auction for shares, invite people to make offers and they compete. Hammer = acceptance. Harvela offered X; Leonard offers >X or 101,000 more than highest bid. Winner of shares would be majority shareholder.

Issue: Fix bid or auction? Referential bidding allowed?

Referential bidding: Know how much other offered.

Court looked at context, presumed intention of seller; invited to confidential offer and highest amount 🡪 objective person tests says fixed bid. Leonard’s bid invalid. H wins.

Ratio: legal nature of invitation = unilateral K. If offer received, Bank’s obligation to sell shares to highest bidder, obligation to other tenderer under unilateral K comes to end.

### R v. Ron Engineering

Facts: Contractor submits tender to build project for $X w/ deposit cheque. Their tender much lower than next lowest tender; after bids closed, realized mistake, argued not to withdraw tender but that it was incapable of being accepted. Argued mistake informed before decision made. No K, no legal basis for owner to forfeit deposit. Argue they’re entitled to revoke/recover deposit.

Issue: Revocability; contractors have right to withdraw tender & take deposit or should the company have to forfeit it?

Certain circumstances (rules/procedures set up for both parties to follow), ITT 🡪 offer. Negotiation becomes process contract. No common law duty to negotiate in good faith but must perform in good faith – integrity.

Tendering process:

**KA:**

Call for tenders: OFFER – to consider bids/treat tenders good faith & fairly/liability not to withdraw/ **irrevocable** if filed in conformity with T&C /consideration is bid prep/sets terms of KA & major terms of KB

Submission: ACCEPTANCE 🡪 of rules & procedures/KA formation/must comply with tender call requirements. Contractual rights/obligations to KA governed by express/implied terms. Offer/obligation to enter KB

**KB:**

Acceptance: Bid is offer to enter KB; owner accepts.

Contract: to complete project

Revocability depends on conditions to tenderers. Can withdraw or qualify tender before closing time. Right to recover tender deposit 60 days after opening of tender IF tender not accepted by owner. Deposit ensures performance by contractor-tenderer – recoverable under certain conditions (weren’t met by D)

Decision: contractor’s claim dismissed. KA principle term=irrevocability of bid. Valid offer & acceptance. Since deadline had passed, K formed.

### M.J.B. Enterprises v. Defence Construction

Facts: D (Defence Construction) call for tenders; doc’s say must be submitted according to certain specifications. Tender will go to lowest bidder unless K includes privilege clause explicitly states otherwise. Lowest tender included note with tender (qualification) thus invalidating his tender. Still awarded K. A says because lowest bidder's tender was invalid, should have been awarded K as next lowest bidder.

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? KA form? What obligations impose on owner?

Privilege clause: protects owners

Tender submission may lead to KA; possible for KA not to arise if tender invalid. Invitation to tender can be considered offer to consider tender if valid. Contract can only be completed with compliant bids.

**Implied term**: Based on custom/usage; By statute; as legal incidents of particular class or kind of contract; Facts/parties. Based on presumed intention of parties where implied term must be necessary to give business efficacy to contractor or as meeting “officious bystander test”

Implied terms one of the means of construction of K by court. Court evaluates relationship context to find out intentions; whole transaction, totality of communication.

KA NOT be concluded automatically by bid submission.Privilege clause cannot override term that you would consider only compliant bids. Privilege clause gives you opportunity not to select lowest bid. Not implied. Must put in contract.

Martel case stands for the ruling that there is an implied term/obligation of owner to treat all bidders fairly and equally.

Ratio**:** privilege clause in document only compatible with compliant bid but does allow R to choose tender other than lowest. Lots of work in submitting tender, reasonable to assume obligation on contractor to only accept compliant bids. Privilege clause gives some discretion over criteria but doesn’t include discretion to accept a non-compliant bid.

Intentions of parties, no proposition that in face of priv. clause, lowest compliant tender to be accepted. Reasonable to find implied obligation to accept only compliant tender

Decision: Sorochan non-compliant. R breached obligation to A and other tenderers that they’d only accept compliant bids. Damages generally measured for breach of K is expectation damages. Balance of probabilities support R would’ve award A contract if Sorochan had been disqualified. A 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.

Scope of duty of owner; court relied on specific language of tender to determine party’s obligations. Limits to K A, duty stops when K A expires (once K B created)

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

Strong dissent; gives city right to waive requirement they now consider unimportant.

## Communication of Offer

**Unilateral K:** One sided promises, lacks notice of acceptance (performance instead). No idea when other side started performing. As long as other side showing they’re in process of full/complete performance, court may say can’t revoke (Denning – equity). Consideration can also be performance.

**Bilateral K**: obligations 2 side, mutual promises, both parties to do something. Meeting of minds, need valid acceptance – formation of K once acceptance received. Can revoke anytime before acceptance communicated. Promise triggered by other side’s promise.

### Carlill v. Carbolic Smoke Ball – unilateral K

Valid reasoning to interpret ad statement as valid offer. Certain situations, peculiar K where only one party makes offer/promise binds a party whenever performs what’s required. Ad wording; liable for promises.

Facts**:** Ad: “Reward paid to anyone who contracts flu, colds, other diseases after using ball 3 x daily for 2 weeks according to directions. Money deposited in bank showing sincerity.” P bought ball, used as directed, got sick and claiming reward. Company rejected; guarantee mere simply a marketing tool, unreasonable to assume offer serious and extended to everyone.

D Argued:

1) Just a puff, it’s vague & uncertain

* it’s an offer to public, too vague to be treated as definite offer (ie. No time limit fixed on catching flu), terms wide enough to include people using ball before ad issued. Ad just a puff/proclamation, not promise or offer intended to mature into K if accepted. Intention was ball promotion
* Court: ad not vague/uncertain; ordinary person reads the ordinary meanings – simple terms.

2) Unreasonable to contract with the whole world

* Unilateral K. Court: not K with whole world, only those who properly accept & fulfill conditions

3) Lack of valid consideration

* Consideration: any act on P from which D derives benefit, advantage, labour, detriment, inconvenience sustained by P with consent, express or implied of D. Inconvenience sustained by one party at request of another is enough to create consideration.
* Court: P purchased/used smoke ball, she put herself at a disadvantage and gave up time. Consideration could be even something that you do in your detriment. Doesn’t need to be a benefit, something that you gain from.

4) No valid notification notice of acceptance, she never properly accepted it, didn’t receive notice of acceptance

* Ordinary law requires meeting of minds, offeror to be notified of acceptance. Acceptance doesn’t need to precede performance. Language/nature of transaction, doesn’t expect or require notice of acceptance apart from notice of performance. For both offer and acceptance to be valid, have to be properly communicated.
* Court: no notice of acceptance but the law has to protect the reasonable expectations of both sides. Implicitly waived their right for notice, performance = valid acceptance. Condition precedent is to get sick.

Objective test: public would read as if anyone used ball under directions and caught cold, entitled to reward. Re. time limit, smoke ball will be protection while in use, not indefinite protection. Money deposited in bank, intended to be understood by public as offer to be acted upon. Re. contract made to all, fallacy of argument, can’t contract with everyone. Offer made to all and contact with limited portion of public who accept by coming forward and performing condition on faith of ad

Ratio: if make extravagant promises, does because pays to make them, no reason why shouldn’t be bound to those promises, still liable. If offer to be bound, becomes K moment person fulfills condition – no notice of acceptance of K. If offeror expressly or impliedly intimates particular mode of acceptance sufficient to make bargain binding, only necessary for person to follow indicated mode of acceptance. Offer states sufficient to act on proposal w/o communication of acceptance, performance of condition is sufficient acceptance w/o notification

Unilateral offer: must perform. Court may say, unfair - he relied on the promise to his detriment, should be rewarded = equity. Offerer has power to set up conditions of K. Offeree performing conditions = valid acceptance. Act of performance = consideration.

Decision: ad =offer validly accepted, entitled to reward.

### Williams v. Carwardine

Facts: Ad for reward was posted by D for info leading to arrest/conviction of murder suspect. P =, provided necessary info, but only to ease conscience when believed she was dying. D refused to give P reward claiming she was induced to provide info not by reward itself, by other motives. P sued for breach of K.

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 proving his innocence and establishing someone else’s guilt. Crown offering reward for info leading to arrest/conviction. Clarke says fulfilled K that Crown offered – suing for breach of K.

Issue: Must offeree know of offer when performing act of acceptance?

Acceptance must come as response to offer. Offer must induce acceptance. Can’t act in ignorance and claim benefits of K. Clarke admitted had no intention of claiming reward, wanted to clear himself – didn’t act in reliance of offer.

Ratio: knowledge of offer important at time of acceptance. Bilateral K knowledge important but motive irrelevant. Clarke had no knowledge of offer.

# A C C E P T A N C E:

**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 write back and accepts original offer.

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

P: original offer never terminated, only counter offer.

D: original offer rejected; counter offer rejected.

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

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

### Butler Machine Tool v. Ex-cell-0 Corp.

Facts: Butler Machine Tool offered to sell machine tool to Ex-Cell-O. Offeror given precedence over terms in order. Ex-Cell-O made order for machine on different terms. At bottom of order wrote accepted order "on Terms & Conditions stated.” Butler replied, order to be delivered "in accordance with revised quotation". Ex-Cell-O experienced delay, couldn’t accept machine on time. Butler invoked price increase clause for period after which they agreed machine would be delivered. Ex-Cell-O refused to pay extra charge. Butler sued for breach of K. Ex-Cell-O argued price increase clause not part of agreement.

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

**Mirror Image Rule**: Regardless of mode of communication, acceptance must mirror the offer. If someone makes an acceptance that changes material terms of offer, counter offer which kills original offer.

Ratio: Last shot: K concluded on terms of last doc sebt by one or parties not objected. First shot: K concluded on terms of first doc. All shots: court must discover terms on objective basis. K concluded on all docs b/w parties where terms reconcilable to give harmonious result or K not concluded since differences irreconcilable.

Decision: last shot; sale concluded on buyer’s terms, didn’t provide for price variation clause

## Communication of Acceptance

When/where K concluded?

Factors: Existence of knowledge, consideration, intention to form legal relations, jurisdiction of courts

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**:** K concluded where/when acceptance mailed. Only applies to acceptance. Post office = agent for both parties**;** CONVENIENCE – more so for offeree: offeror has more power as they are in control of the contract, this rule provides the offeree with more power and protects the balance of interest of both parties.

Recipient rule: K made when and where acceptance received applies to instant communication.

Exceptions:

* when the express terms of offer specify acceptance must reach offeror
* when creates absurdity and inconvenience 🡪 if circumstances/subject-matter of K can’t have intended there should be a binding K until party accepting an offer had communicated acceptance
* all exceptions are meant for a case to case basis, courts will interpret contract itself
* objective test; words of K, subject matter

### Felthouse v. Bindley

Facts**:** P interested in buying horse from nephew. Misunderstanding about price, P offered to split difference. Would assume its $X if don’t hear back. Nephew didn’t reply, instructed D (auctioneer) to withhold horse from auction. D accidently allowed horse to be sold. P sues D.

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

Ratio**:** Silence isn’t acceptance; however, offeree can waive right to make silence = acceptance. Acceptance of offer not lead to binding agreement unless expressly communicated to offeror. P only would’ve been bound if nephew given written indication of acceptance. Nephew had intent to sell horse to P but didn’t communicate intention to uncle or do anything to bind himself. Property not belong to P, no right to bring action against D.

Decision: D wins

### Carlill v. Carbolic Smoke Ball

### Household Fire v. Grant

Facts**:** D, through agent, made written offer to buy shares in P’s company in London. Acceptance of offer mailed to him but never received. Entered as shareholder in P’s books. P went bankrupt and books shoed D owing price of shares. D refused to pay on grounds he didn’t receive acceptance, not shareholder. P’s liquidator sues.

Ratio**:** Mailbox rule upheld: offeror bound by offer even though acceptance not received. Binding K; once acceptance letter posted, acceptance completed. Post office common agent; acceptance when reached D’s agent. Mailbox rule balances parties’ interests. Offeror can make communication of acceptance condition of K, or can inquire if he doesn’t receive timely acceptance. Offeree would have to inquire if acceptance received before knowing if he’s bound. Fraud could result if acceptance depends on in being received by offeror.

Decision: P wins

### 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: 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”; postal rule doesn’t apply if express terms of offer specify acceptance must reach offeror. Requirement for “notice” held to invoke recipient rule.

Decision: parties did not intend that posting letter would constitute exercising option

### Brinkibon v. Stahag Stahl

Facts: R (Vienna sellers) sent telex containing counter-offer for steel to A. A (buyers in London)claimed sent acceptance in 2 ways – telex (verbal acceptance) & info re. opening letter of credit (as requested by sellers) which was acceptance by conduct.

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

Ratio**:** Telex = instant communication. K made when and where acceptance received (Vienna). Acceptor can usually tell whether sent message received. Offeror has no idea if acceptance sent. Convenient that acceptor should have responsibility of ensuring message received 🡪 postal rule should not apply.

## Electronic Contract Formation and Related Problems

Technical difficulties, human ignorance. Must evaluate surrounding circumstances – business practices, intentions. Postal rule not universal.

**Vienna Convention:** acceptance effective once received; general rule, not mailbox rule.

Legislation regulating particular means of contracting but really doesn’t impose any new K rules, just validates use of technology and says will accept it as equivalent as written form because you can save it.

### ProCD v. Matthew Zeindenberg and Silken Mountain

Facts**:** Bought software for commercial use, paid cheaper price. Warned there was license – box, license, pop up. Can conclude agreement in many was offeror specifies – conduct, installation, clicking button.

Ratio: shrink wrap license enforceable unless terms objectionable on grounds applicable to K in general. If buyer doesn’t want to be bound by terms in box, buyer has right to return goods (unused) and get refund, otherwise bound by terms.

### Rudder v. Microsoft Corp.

Facts**:** P subscribers of MSN; says D charged members, took payment from credit cards, failed to provide reasonable info re. accounts. Breach of K, fiduciary duty. P only read portions of membership agreement, didn’t notice Forum Selection Clause. Argue member agreement obscures forum selection clause, like fine print, must be brought specifically to attention otherwise severed from agreement. Relies on electronic format of agreements. Only see portions, anything not on screen fine print.

Ratio**:** Terms of K 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 K formation.

### Kanitz v. Rogers Cable

Facts: D (Rogers) K says conditions of K may change from time to time. K states changes either posted on website or emailed/mailed. Continued use = acceptance of terms. D added arbitration clause to K and posted notice on website. P argues improper notification.

Rules: Take it or leave it K; inequality of bargaining positions. Notice of amendment not unreasonably buried in agreement – plain language. Proper notice given, terms could be changed, website sufficient for communicating changes. All done in compliance with terms of service. Assume internet users sufficiently skilled to navigate page to page.

Decision: Arbitration clause not unconscionable. D didn’t take advantage of position to impose unfair condition.

# T E R M I N A T I O N O F O F F E R:

**Ways offers end:** Revocation/Counter offer/Lapse of Time/ Incomplete performance (unilateral K)/Death/Silence (rejection?)

## Revocation

### Dickinson v. Dodds

Facts: D offer of sale to P – “offer left over until Friday.” P gave D acceptance and informed too late, property already sold. Day before, D signed K w/ another party. P seemed to know when accepted D already sold property.

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

Can’t accept offer once another party has already accepted offer. Offer just offer, until accepted, no binding K. Consideration needed to make auxiliary K before real K to make offer more firm. Offer can be revoked by selling to someone else before waiting for initial party offered to accept. As long as you know it’s been sold, can’t accept.

Importance of communication: meeting of minds = valid offer and acceptance communicated. (exception = unilateral K or mail box rule [business convenience])

Revocation communication? Parties free to do what they want; unless offer made in specific form or consideration involved, not bound. Offeree can’t make a binding contract by acceptance of offer

Decision: too late to accept offer; not bound to hold offer by law or equity. Nothing prevent D from making K with Allan and entering binding agreement with him.

### Byrne v. Van Tienhoven

Facts**:** D mailed offer to sell tin plates to P on October 1. P receive offer October 11, immediately accept via telegram same day; P also send letter to confirm. D mailed revocation of offer on October 8, received by P on October 20, after P already made assurances to sell tin plates to another party. P brought action against D for breach of K/failure to deliver.

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 for party to expect K completed.

Decision: Withdrawal no effect, binding K entered when P accepted offer.

### Errington v. Errington and Woods

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

Ratio: Unilateral K, implied promise not to revoke once performance started. Father’s promise unilateral K, couldn’t be revoked once performance began. As long as couple keeps paying, K remains binding. Protects party acting in promise of offeror, acting in reliance of promise.

Usually unilateral K can be revoked anytime before complete performance. Denning applies equity.

### Dawson v. Helicopter Exploration Co.

Facts**:** A discussed w/ R exploitation of minerals deposits discovered. Agreement reached, A would show property depending on availability of transportation by R. R says if finds showings worthwhile, will proceed. R says will find pilot. R finds pilot but no longer interested. A seeks breach of K, damages.

Issue: Unilateral K revoked prior to performance or bilateral K accepted & completed w/ A’s promise to perform?

Ratio: Performance of K subject to 2 conditions: availability of transportation and ability to take leave. A obliged to remain ready for trip, would need to take leave upon notice from R. If not granted leave, postponed or other arrangements. If no pilot, no deal. A’s silence was not abandonment of action for breach of K. R committed breach of K, found pilot but reneged.

Decision: A wins

## Rejection and Counter Offer

### Livingstone v. Evans

## Lapse of Time

### Barrick v. Clark

Facts**:** R offers to purchase land from A. A sends counter offer to Clarke with higher price, says deal could be closed immediately so want fast reply. If accepted, R to send initial payment, formal agreement by X date. Letter delivered while R out of town, wife asks deal be open. R returns, writes to accept but A already sold.

Ratio: Offer not accepted within reasonable period of time. What reasonable time depends on nature, character, course of business negotiations, circumstances of offer. R said could be closed immediately, hoped would receive reply asap. Lapse is implied revocation or implied rejection.

Distinction from Dickinson v. Dodds – buyer unaware property sold.

# C E R T A I N T Y O F T E R M S

Possible parties may deny existence of K b/c crucial terms undetermined/vague/missing.

When parties omit something in K, try to agree on later or decide formula/machinery to fill info later. Some transactions unable to establish terms (esp. long term).

Courts look at reliance, find K if parties started performing. Trend towards flexibility and awareness of business practices. Try to save K. Evaluate intention/conduct/circumstances/language/ previous dealings & objective test.

Commercial setting, if claim no intention to create K, have burden of proof to show lack of intent. Presumption in commercial settings parties exchange promises with intent to be bound by K.

### R v. CAE Industries\*

Facts**:** Government & CAE negotiate purchase of aircraft maintenance base. Letter outlining assurances written & sent to CAE. Letter assured Government would employ “best efforts” to secure work for X man hours of labour, guarantee X man hours per year. CAE industries purchased base but workload diminished. CAE sues for breach of K.

Issues: Parties intend letter to be binding legal K? K incomplete/vague to be rendered unenforceable?

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

**Decision:** “Best efforts” general term, Government under obligation to secure man hours.

### May & Butcher v. R

Facts**:** A enter 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?

Ratio**:** If critical matter of K left undetermined, no K. You can leave certain things to be determined later but not acceptable to agree party will in future agree on matter that’s vital to K. Mere agreement to agree, not enforceable K. Unlike Hillas, no detrimental reliance?

Decision**:** Appeal dismissed.

### Hillas v. Arcos

Facts**:** P agreed to buy X amount of Russian timber at discounted price, if P decided to buy more, more discount. Clause 9 said P able to buy X amount at 5% below official price. Later, Russian wood agency put revised price list giving buyers smaller discount than P to receive. D later enters K with other English timber buyers for them to buy entire production of shipment. P sues for breach of K.

Industry: difficult to be precise about quality, price

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

Ratio**:** Terms of document, including Clause 9, not sufficient enough to allow courts to enforce legally binding K. Parties didn’t specify subject matter to be included in option, date, location or quantities of goods. Agreement to make agreement isn’t K. Each case should be decided on construction of particular document.

Decision: D wins.

Appeal by P to House of Lords:

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.

### Foley v. Classique Coaches Ltd

Facts**:** D operated fleet of motor coaches, purchased land from P who operated gas station. D entered supplemental agreement to purchase all required fuel from P at price periodically agreed on. Any despite, arbitration. D later tries to repudiate agreement. P seeks declaration agreement binding and injunction preventing D from purchasing gas elsewhere.

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 K, acted as such – partial performance. No reason for D’s attempt to repudiate,

**May & Butcher/Hillas/Foley**: some judges more formalistic, others look at broader context and protect reasonable expectation of parties depending on what seems fair.

Commercial rules: everybody for themselves until K concluded.

Problem with express/implicit agreement to negotiate: impossible to determine content of duty to negotiate, no basis to determine damages for breach of duty

### Empress v. Bank of Nova Scotia

Facts**:** Landlord Empress rented to Bank. Lease contained renewal clause stating tenant had right to review for 2 five year periods excepting rental for any renewal period which would be market rental prevailing at time as mutually agreed to. When lease going to expire, tenant exercised option to renew, suggested rental price and said willing to negotiate. Landlord didn’t respond until lease about to expire and said tenant to pay $15000 plus proposed price. Renewal clause says if landlord & tenant don’t agree on renewal rental within 2 months, agreement may be terminated at option of either party.

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”).

Case usually distinguished on benchmark (market rental rate)

Decision: Tenant wins; landlord didn’t negotiate in good faith.

### 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 years. P expected operation to be 10 years since required time to do reclamation work contractually obliged to do.

Issue: Clause uncertain? Implied term requiring D to negotiate for renewal in good faith?

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

### Wellington City Council v Body Corporate

Facts**:** Parties in process of negotiating new sale agreement. Leasee problems paying rent. Leasor put property on sale, contacted leasees saying they’d negotiate/willing to sell at best possible price. Leasor refusing to negotiate with leasee b/c trouble paying rent. Leasee say breached duty to negotiate in good faith.

Ratio: Process K or agreement to negotiate in good faith unenforceable for lack of certainty. No objective criterion can decided if party breached good faith.

### Bawitko Investments v. Kernels Popcorn

Facts**:** A approached by R w/ franchise inquiry. R given materials including standard franchise agreement w/ terms & conditions. Document intended to govern long-term business relationship, encouraged to retain professional advisors to understand terms and obligations. R met with A, oral agreement in anticipation of formal. A alleged to breach K. R wasn’t incorporated, didn’t seem ready.

Issue**:** Can oral K = complete, legally enforceable K? Or is enforceability subject to parties’ subsequent agreement on T&C’s of written franchise agreement?

Ratio: Oral agreement is contemplation of formal written agreement not enforceable due to lack of certainty, K to make K. If no agreement re. essential terms or terms nor agreed with reasonable certainty, concluded terms will be agreed at later date, until then, no completed agreement. R required to prove complete agreement at meeting. No meeting of minds, insufficient certainty – some terms remained open for negotiation. A considered terms of agreement not settled, invited R to comment and negotiate.

# I N T E N T I O N T O C R E A T E L E G A L O B L I G A T I O N

## Objective test

### Balfour v. Balfour

Facts**:** Husband gives wife monthly allowance. Go to England together, need to leave but she can’t due to illness. He writes suggesting they stay apart. She wants monthly allowance to continue, tries to enforce K.

Issue: Intention to create legal obligation?

Ratio: Common law doesn’t regulate relations b/w spouses. Consideration is natural love and affection. Strong presumption that family agreements not intended to create legal obligations/consequences. Neither party intended to create legally binding K. If did, D could sue for non-performance of wife’s implied/ixpress undertakings 🡪 flood gates argument. Onus on P; P didn’t prove.

Decision: No legal obligation; D wins.

### Rose and Frank v. JR Crompton

Facts**:** P agents for distribution of D’s products. Agreement b/w them vague. Clause says arrangement not formal agreement, not subject to legal jurisdiction – only for record of purpose and intention of parties.

Ratio: Strong presumption business agreements intended to produce legal consequences. If clear and definite expression of business parties not to be subject to legal jurisdiction, no reason in public policy why this shouldn’t be.

Decision: K not binding but orders and responses = enforceable K of sale.

|  |  |  |  |
| --- | --- | --- | --- |
| *Intention to create L/R* | *Setting/Context* | *Presumption* | *Burden of Proof* |
| Balfour v. Balfour | Family / social | NO intention to create the legal relation | Lies with the person rebutting the presumption – wife (P) |
| Rose and Frank v. JR | Business | Intention to create legal relation | The court looked into the context – the words are expressly stated |

### TD Bank v. Leigh Instruments

Facts**:** A (bank) received letters of comfort from R. A interprets letters to say Plessy would manage Leigh’s affairs, says they’re entitled to rely on this representation as Plessy’s policy unless given notice of change. R argues Plessy’s policy is subsidiaries like Leigh should manage own financial affairs.

Ratio**:** Comfort letter undertaking deliberately designed with intention not to create enforceable obligations. Doesn’t suggest Plessy would manage Leigh’s affairs. Intent: letter crafted to avoid suggestions Plessy had legal responsibility for loans – didn’t contain misrepresentations, nothing inconsistent with policy Leigh should manage own affairs.

Both experienced business parties; know it isn’t guarantee.

Decision: R wins

# C O N S I D E R A T I O N:

## Nature of Consideration

### Thomas v. Thomas

Facts: P is widow. Deceased’s will appointed brothers as executors to take possession of all houses subject to payments will mentioned including money for P’s benefit. Death bed, John said he wants P to have house living in plus all possessions or additional money instead. Brothers entered agreement which P entitled to leasehold property if a) she paid 1 pound/year in rent; 2) she kept premises in good repair; 3) she didn’t remarry. Brothers honour promise, P takes possession of dwelling. 1 Brother dies, other sought to eject P.

Issue: Binding K in conveyance of leasehold interest from executors to P? Did P provide sufficient consideration for conveyance?

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

Motive: wishes of deceased; not enforceable as contract.

Consideration: paid rent & kept dwelling good condition. No consideration re. deceased’s wish to benefit P. Respect for deceased’s wish merely represents motivation for the conveyance.

Decision: P wins. Widow paid rent (something of value and did something additional in consideration (kept dwelling in good condition, K is enforceable, agreement binding. Promise to not remarry not good consideration, remarriage clause interpreted as terminating condition.

## Past Consideration

### Eastwood v. Kenyon

Facts: P = guardian for infant whose father died. P spent money on infant for education/well-being, to do so, P borrowed money from Blackburn, secured by promissory note. Infant came of age and promised to repay P and amount of note, paid one year’s interest on note to Blackburn. Child married D who promised P that he’d pay off amount of note. D didn’t make any payments and P brings action against him.

Issues: Does past consideration provide justification for future claim of exchange? Can D’s action in past be extended into future as part of valid exchange in present? Is obligation contractual or just moral?

Ratio: Past consideration not consideration at all; P’s past consideration deemed impart purely moral and not contractual. Consideration also not at request of D or even his wife. D made commitment to repay years after consideration given; his commitment was express promise not supported by timely consideration thus, not enforceable.

Moral obligation is nudum pactum – voluntary promise w/o any consideration. Past consideration may be good consideration for subsequent promise if benefit conferred at request of promisor.

Decision: judgment for D.

### Lampleigh v. Brathwait

Facts: After 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 with King to obtain pardon. Afterwards, D promised P consideration of 100 pounds. D never delivered, P suing to get damages for breach of K.

Issue: Is consideration “past” if coupled with prior request?

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

If P did labour for D voluntarily, out of his own will, can’t recover monetary compensation for action. But if labour performed at D’s request and if promise of compensation follows labour, P entitled to recover. Promise made in recognition of benefit previously received can be enforced.

Decision: P wins

## Forbearance

### Callisher v. Bishoffsheim

Facts: P threatened to sue Gov’t of Honduras for alleged debt. D promised to provide bonds to value of X pounds if P promised not to sue for agreed time. When bonds not delivered, P claimed damages for breach of K. D claimed since no money had been due in first place, no consideration for promise to give bonds.

Consideration for contract sufficient; sufficient if contractor avoids some detriment or injury, in this case, D avoiding annoyance and expense of action.

If infer that P believed some money was due, his claim is honest and compromise of claim would be binding and would form good consideration.

Ratio: If agreement made to compromise disputed claim, forbearance to sue in respect of that claim is good consideration. If person in good faith believes he has reasonable ground for suing, forbearance to sue will constitute good consideration.

Decision: P wins

## Pre-Existing Legal Duty

## Duty to Third Party

### Pao On v. Lau Yiu Long

Facts: P owned all shares in private company – main asset building. D were majority shareholders in company that had just gone public – wanted building. Instead of buying building, they wanted to do share swap deal. P’s company would get shares in D’s company, vice versa. To keep D’s shares from going down in price, P agreed they wouldn’t sell 60% of shares for min. 1 year. Also agreed orally that D would buy shares at $2.50 (in case price of shares dropped). P then realized if shares rose, they’d miss out. K deprived them of benefit they hoped to gain by taking their price in shares. They said they wouldn’t complete deal unless got guarantee of payment via indemnity (security/protection against loss/financial burden). Got K on consideration of P that they’d sell their Shing On shares, D says P would be indemnified if shares were worth less than $2.50. Share price fell, D refused to indemnify.

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

Promise to perform or performance of pre-existing contractual obligation to third party can be valid consideration.

Duress, whatever form it takes, is coercion of will to impair legal validity of consent; duress may render K voidable but this must be claimed promptly.

Commercial pressure alleged to constitute duress must be such that victim entered K against their will, they had no alternative course open to them and they were confronted with coercive acts by party exerting pressure

D argued consideration for their guarantee was past and consisted solely of promise by P to D to perform their existing K with Fu Chip.

All 3 requirements of past consideration present in this case; promise not to sell shares done at D’s request. Parties understood restriction on selling must be compensated by benefit of guarantee against drop in price, and that such guarantee would be legally enforceable.

Not possible to treat D’s promise to indemnity as independent of P’s antecedent promise. It was at D’s request not to sell shares. Indemnity promise given b/c parties intended D should confer benefit of protection against fall in price.

Promise to perform or performance of pre-existing contractual obligation to 3rd party can be valid consideration.

Decision: contract itself is valid consideration for promise of indemnity; P wins

## Duty to Promisor

### Stilk v. Myrick

Facts: P contracted to work on ship owned by D, promising to do anything needed on voyage regardless of emergencies. After ship docked, 2 men deserted and after failing to find replacements, captain promised crew wages of the 2 men divided b/w them if they fulfilled duties of missing men as well as their own. After arriving at home port, captain refused to pay crew money he promised.

D argues: agreement b/w captain and sailors against public policy. Crews often depleted by death/desertion and if promise of advanced wages valid, exorbitant claims would be set up. Sailors could take dangerous measures unless captain would agree to any extravagant demand.

P argues: captain offered extra money without any pressure being brought by crewmen.

Ratio: Agreement is void for lack of consideration. No consideration for ulterior pay promised to remaining crewmen. Before sailed, undertook to do all they could under all emergencies of voyage. Sold services until voyage completed. Would be different situation if they had freedom to quit vessel at one of dockings or if captain erratically discharged the 2 men. Others may not have wanted to take on whole duty and agreement to do so may have been sufficient consideration for promise of advance wages. But, desertion is considered emergency as much as death, those who remain are bound by original K to exert themselves to utmost to bring ship in safely.

Decision: D wins. Captain not obliged to pay extra money b/c obligation to sail ship back was not valid consideration for subsequent agreement which varied the original one.

### Gilbert Steel v. University Construction

Facts: Sept 1969, P entered written K with D for supply of steel at fixed price for 3 building projects. University project called for 2 buildings to be erected. Before commencement of construction of first building, P announced price increase. Oct 1969, parties entered new K for supply of steel for first building at increased price. While first building under construction, P announced 2nd price increase. March 1970, P says entered binding oral agreement for steel supply for first building reflecting 2nd price increase. Further to oral agreement, written K sent to D but never executed. D continued to accept deliveries of steel but failed to make full payments against invoices reflecting 2nd price increase. Evidence that D orally agreed to 2nd price increase. P sued for breach of K for balance owing. Trial judge dismissed P’s claim, P appealed.

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

Ratio: Oral agreement was unenforceable for lack of consideration. No consideration on part of D to pay increased price since P was already bound, before oral agreement entered into, to deliver steel at original price agreed to in the written K of Oct 1969.

Court rejected argument that substituting new price in oral agreement, parties intended to rescind original contract. Consequently, there was no consideration in form of mutual agreement to abandon earlier written K and to assume obligations under new one.

No consideration in increased credit afforded by P to D as result of increased price (not consideration of “real substance”)

Estoppel can’t be used as sword, just shield. P can’t found his claim in estoppel (shield, not sword). Fact that D didn’t reject invoices reflecting higher price didn’t mean that he agreed to them and therefore, didn’t’ mean he was prevented from later repudiating them.

Decision: appeal dismissed.

### Williams v. Roffey

Facts: D (building contractors) entered agreement with owners to renovate flats. D to have renovations completed by certain date. D subcontracted work out to P (Williams). In performing work, P began to have financial difficulty because agreed price for work b/w D and P was too low. Difficulties concerned D b/c didn’t want to breach K with owners by finishing project late. D recognized they’d underestimated cost of work, agreed to pay P additional $ to ensure work completed by deadline date – variation to original K. D made only one payment and failed to make further payments. When payments stopped, so did P’s work. P sued D for remaining payments.

Issue: Can performance of existing contractual obligation be taken as consideration? Is this renegotiated agreement enforceable?

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. If following elements exist, D’s promise legally binding.

Glidewell’s 6 point test:

1. A entered in K with B
2. Before A completely performed, B has reason to doubt A will complete performance
3. B thereupon promises A additional payment to ensure performance on time
4. As result of promise, B obtains practical benefit
5. B’s promise not given as result of economic “duress” or “fraud” on part of A
6. Benefit to B is consideration

All elements satisfied. Only one raising doubt whether D obtained practical benefit. But, new agreement conferred 3 practical benefits on D.

1. actual performance of continued work
2. avoidance of penalty for delay of K b/w him and Shepherds Bush Housing
3. avoid expense of finding others to work

Contract not under seal requires consideration (Stilk v Myrick) As a result of bargain D got, P may not be able to complete contractual duties. D undertakes to make payment because by doing so, they gain advantage arising out of continuing relationship with promisee.

Decision: Judgment for P. D’s promise legally binding.

### Greater Fredericton Airport Authority v. NAV Canada

Facts: NAV’s responsibility to provide aviation services/equipment to GFA. GFA wanted to extend runway; longer runway was to become primary runway. NAV needed to move instrument landing system located on other runway to the one to be extended. NAV thought might be better to replace with another system. Disagreement re. who should pay for acquisition of new system. GFA says in letter wanted new runway to be operational and equipment “under protest”. NAV installed equipment. GFA refused to pay and parties agreed to arbitrate. GFA had no practical alternative but to agree to pay money they were not legally bound to pay. NAV implicitly threatened to withhold performance of own obligation until GFA capitulated demand to pay cost of new system. But, GFA never consented to variation, they agreed to payment “under protest”

Issue: Subsequent exchange of correspondence creating a binding contract?

Promissory estoppel: shield not sword. Imposes injustice to those who act in good faith and reliance on a promise

Under certain circumstances courts moved closer to idea that some practical benefit should be recognized as a substitute for the consideration.  Trying to distinguish their facts to enforce the promise.  The court of appeal is also willing to use estoppels as a sword not a shield but called it a waiver not estoppels

Not repealing consideration, just as long as there is no duress there is a reason to enforce the promise if there is practical benefit – but practical benefit doesn’t mean consideration yet because it hasn’t been defined.

In airport, no practical alternative – the judgment is based on duress, not on consideration

Ratio: Builds on decision in Williams v. Roffey and accepted post-contractual modification, unsupported by consideration, may be enforceable as long as its established that variation of contracts not procured under economic duress.

Commercial reality needs to be recognized and considered. Parties frequently varied and modified contractual obligations and law has to protect their legitimate expectations that modifications or variations will be regarded as enforceable.

Decision: GFA wins

## Promises to Accept Less

### Foakes v. Beer

Facts: A (Foakes) owed R (Beer) money. A sues and wins, R asked to be allowed to pay in installments. Agreement for lump sum to be paid then bi-yearly until end of debt. R’s lawyer drafts agreement that A gives up right to sue Foakes as long as he keeps paying according to payment plan. R pays full amount but A claiming interest.

Issue: R entitled to interest despite agreement that A didn’t need to pay it? Promise to discharge debt for less than original amount is valid consideration? Meaning of agreement – amount or interest? Agreement can be legally enforced? What was consideration? Whether strict rule of consideration should give way in face of commercial reality – should we consider practical benefit?

Ratio: Common law rule: agreement to accept smaller sum in satisfaction of larger sum isn’t good consideration. Case overruled by s. 43 of Law and Equity Act. Prevents parties from discharging obligation by part performance. Although agreement didn’t contemplate interest owed, could still be implied given enforceable agreement. But, promise to pay debt deemed not to be sufficient consideration as there was no additional benefit moving from Foakes to Beer that wasn’t already owed to her. No accord and satisfaction.

Decision: Appeal dismissed; Beer wins.

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

She was the one binding herself by saying if you pay me, I won’t sue you – unilateral k.

Criticisms: Court recognizing different form would be good even if lesser value. Blackburn: if parties agree that this is beneficial to them, we should accept it. Sometimes more valuable to get money, even lesser amount, then to wait and risk not getting anything at all.

Doesn’t recognize commercial reality that parties can actually make agreements that we should honour b/c they make sense. Blackburn didn’t use concept of practical benefit but says partial payment sometimes valuable.

A didn’t contract to pay installments at certain times, promise just that R wouldn’t taking proceedings if installments regularly paid. If A had been under no obligation to pay whole debt, his fulfillment of condition may have been consideration. But he was under antecedent obligation, payment at those dates, by forbearance and indulgence of creditor, couldn’t be consideration for giving up of interest.

Should strict rule of consideration give way in face of commercial reality? Consider practical benefit? Consideration more flexible w/ sale of goods/services. Debt usually follows Folks v. Beer.

### Re. Selectmove

Facts: Over extended period of time, Selectmove 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 back to company if it was unacceptable. Company made payments but not in strict accordance with alleged agreement. Crown then demanded entire payment in arrears.

Issues: Enforceable K? Consideration?

Counsel submitted there were practical benefits to Crown not enforcing debt against company which had financial difficulties. Enforcing debt could mean liquidation. Promise to perform an existing obligation can amount to good consideration if there are practical benefits to the promisee (Williams v. Roffey)

Ratio: Promise to pay sum which debtor already bound to pay not good consideration (confirms Foakes v. Beer). Williams v. Roffey principle not applicable where existing obligation to pay money. Only applicable where existing obligation is to supply goods or services.

Crown hadn’t accepted proposal so no K. If there had been acceptance, was there consideration? When collector and debtor reach agreement on payment of debt by installments, seems to benefit both. No precedents where this would be consideration. If there was agreement b/w company and Crown, unenforceable for lack of consideration.

Decision: Appeal dismissed.

### Foot v. Rawlings

Facts: Foot (A) owed Rawlings (R) large sum of money under series of promissory notes. R offered to lower amount/month and interest rate. Foot agreed and paid R series of post-dated cheques. Agreed that if any of cheques bounced, interest rate and sum of money payments would go back to their “actual” amounts. Agreement implied as long as necessary payments being made, Rawlings would not take any action against Foot. Although Foot had been complying with this agreement for over a year, Rawlings sued for balance of debt.

Issue: Valid consideration made to R? If so, sufficient enough to forbid R from taking action against A?

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

A hadn’t defaulted under terms of agreement. As long as A continued to give cheques and paid by bank, giving post dated cheques constituted good consideration for agreement by R to forbear from taking action on promissory notes. Since A continued to perform obligations, R’s action premature.

In case of debtor who owes creditor large sum under series of promissory notes as full payment of debt, as long as debtor continued to perform obligation and kept paying by post-dated cheques as subsequently agreed b/w the 2, creditors right to sue on notes was suspended.

Decision: Appeal allowed. Foot wins.

### Law and Equity Act s. 43

Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.

## Promisory Estoppel

### Hughes v. Metropolitan Railway Company

Facts: Hughes owned property leased to the Railway Company. Hughes entitled to require tenant to repair building within six months of notice. Notice was given on October 1874, tenants had until April to finish the repairs. On November 28, the tenant railway company sent letter proposing purchase of the building from Hughes. Negotiations continued until December 30th, nothing was settled. Six months elapsed, the landlord sued tenant for breach of contract and to evict the company.

Ratio: If parties entered into terms involving certain legal results, afterwards by act or consent, enter course of negotiation which has effect of leading one of parties to suppose strict rights of K will not be enforced or will be kept in suspense, person who otherwise might have enforced those rights not allowed to enforce them where it’d be inequitable re. dealings which have taken place between parties

Decision: Metropolitan Railway Co. Initiation of negotiations, implied promise that landlord wouldn’t enforce strict legal rights re. time limit on repairs. Tenant acted on this 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

Facts: Central London rented flats to High Trees for 2500/year. Due to WWII conditions, rent lowered. 1940, Parties entered written agreement to reduce rent by half. Neither party stated period reduced rent would apply for. Next 5 years, reduced rent paid. Flats began to fill. Central London sues for payment of full rent from June 1945 onwards.

D argues: letter was agreement that rent would only be half and agreement related to whole term of lease. P estopped from alleging rent exceeded 1250. By failing to demand increased rent before Sept. 1945 letter, waived rights to increased rent amount before Sept. 1945

Ratio: Denning relies on promissory estoppel; held promise intended to be binding, intended to be acted on and is acted on, binding even if there is no consideration. Estoppel used as shield by tenants against landlord who wanted to enforce higher rent.

Decision: Judgment for Central London (P). Scope of promise in this case, rent temporarily reduced until flats sufficiently filled – by early 1945, filled. Promise understood to apply only until conditions (flats only partly filled) ceased. When flats filled sufficiently, reduced rent ceased to apply. Full rent from Sept 1945 onwards.

### John Burrows v. Subsurface Surveys

Facts: D (Subsurface) purchased a business owned by Burrows for $127,000+. Part of purchase prices secured by promissory note for $42,000; note provided for monthly installment payment and contained an acceleration clause permitting creditor to claim entire amount due if delay 10+ days on any monthly payment. 18 months, D consistently 10+ days late. Each time, creditor accepted payments without protest or invoking acceleration clause. Finally, following disagreement, next time D late, P sued for whole amount owing.

Issue: Whether defence of equitable estoppel or estoppel by representation applies

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

No evidence to warrant inference that the appellant (plaintiff) entered into any negotiations with respondents (defendants) that had effect of leading them to suppose that the appellant had agreed to disregard the relevant part of the contract.

Decision: Appeal allowed; plaintiff/Burrows wins

### D & C Builders v. Rees

Facts: P (Builders) completed building work and sent bill for 482 pounds – remained unpaid for awhile. Eventually D’s wife agreed to pay only 300 if accepted in full satisfaction. P in difficult financial position, reluctantly agreed to accept. D’s wife knew they had to accept to avoid bankruptcy. P accepted cheque and gave receipt stating “completion of account” (wife insisted). P suing 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 credit accepts, inequitable for creditor to afterwards insist on balance. But, promise made under duress should not be estopped.

In this case, no true accord. D’s wife used undue pressure, threatened to break K unless P agreed to take partial payment. No equity in D to allow her to take advantage of equitable rule. No equity on D’s part to warrant departure from law. No one can insist on settlement obtained by intimidation.

Decision: P (Builders) win

### Combe v. Combe

Facts: P & D divorced; D to pay P allowance of 100*l.*/ year. P requested initial payment of 25*l.* & subsequent quarterly payments of 25*l.* D replied wouldn’t pay in advance, from that point, didn’t make any payments. Wife (P) sued seven years later, claiming 675*l.* in back payments. At that time, P’s income > D’s.

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

Ratio: Denning: *High Trees,* promissory estoppel can’t be used as sword. Doesn’t create new causes of action where none existed before; principle intended to "prevent a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties". Promissory estoppel only used as shield, as part of cause of action tp prevent party from insisting upon strict legal righst when it’d be unjust to allow to enforce. In this case, P couldn’t sue as separate and independent cause of action regarding the D’s breach of promise to make allowance payments. P could only succeed if demonstration of sufficient consideration to support the promise. She did nothing in reliance, didn’t do anything in exchange for his promise.

Decision: D wins.

### Walton Stores (Interstate) v. Maher

Facts: Maher owned property & negotiating with Waltons for lease of land. Wanted existing building demolished, new one erected. In reliance on representations made before K completed, Maher demolished building and started to erect new one. But K never came to completion because 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 to knowledge of the first party.

Ratio: Courts made exception to general rule that promissory estoppel can’t be used in absence of pre-existing legal relationship. Court held doctrine can be used in absence of pre-existing legal relation if there was reliance on promise that was a reasonable expectation and if departure from promise is unconscionable behaviour.

Two other factors:

1. urgency surrounding negotiation of terms
2. respondent’s executed counterpart deed and was forward to A’s solicitor. Assumption which R’s acted on was that completion of exchange was formality.

A under obligation to communicate with R within reasonable time after receiving deed and when learned demolition proceeding. Had to choose whether to complete K or warn R’s that they hadn’t decided on course to take yet. Not entitled to take deed and do nothing. A’s inaction constituted clear encouragement for R to continue to act on assumption they’d made. Unreasonable that knowing R exposing themselves to detriment by acting on basis of false assumption to adopt course of inaction.

Decision: A’s estopped from denying exchange occurred or denying existence of binding K.

### M(N) v. A (TA)

Facts: M promised to pay rest of A’s mortgage on home in England if she moved to Canada to live with him with view of marriage. Reliance on promise, A left job and moved. M didn’t pay off mortgage but loaned her $100,000. Later evicted A from home.

Issue: trial judge err in refusing to enforce promise A relied on in detriment?

A relies on Waltons v. Maher: non contractual promise can lead to equitable estoppel only when promisor induces promisee to assume/expect that promise is intended to affect their legal relations.

R argues court shouldn’t change law in circumstance where unfulfilled promise made in romantic relationship which by nature involves risk taking, many promises. Argues no evidence either party thought legal relationship created by the promise, that legal relations had been affected or promise was legally binding.

Ratio: Little evidence in Canadian authorities to indicate move towards more generous approach to promissory estoppel. In Waltons, reasonable expectation of legal obligation.

Decision: Appeal dismissed (A loses)

In increasing and decreasing pacts, modern law found other ways to relax old classical consideration concept by developing other means to protect creditor/promisor. Developed doctrine of equity or economic duress – way of finding relaxation.

## P R I V I T Y O F C O N T R A C T

### Tweddle v. Atkinson

Facts: John Tweddle (P’s father) agreed with William Guy (P’s father in law) for the latter to pay money to the P upon marriage. Guy died before making payment. P (William Tweddle) sued estate (Atkinson was the executor) for the promised sum.

Ratio: Courts ruled that promisee cannot bring an action unless the consideration from the promise moved from him. Consideration must move from party entitled to sue upon K. No legal entitlement is conferred on third parties to an agreement. Third parties to a contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it. No consideration moved from P to Guy and therefore P had no right to sue on K. Natural love and affection is not good consideration.

Person not engaged in K (3rd party) generally can’t sue or be sued on K. Love and affection not sufficient consideration.

Public policy consideration: these are specific contracts to protect interests of beneficiaries.

Decision: D wins

### Dunlop Pneumatic Tyre Co. v. Selfridge & Co.

Facts: Dunlop, a tire manufacturing company, made a K with Dew, a trade purchaser, for tires at a discounted price on condition that they wouldn’t resell tires at less than listed price and that any reseller who wanted to buy them from Dew had to agree not to sell at the lower price either. Dew sold the tires to Selfridge at the listed price and made Selfridge agree not to sell at a lower price either. However, Selfridge sold the tires below the price he promised to sell them for. Dunlop then sued Selfridge for an injunction from selling tires and damages.

Issue: whether Dunlop could get damages from Selfridge without a contractual relationship.

Dunlop tries to maintain retail price didn’t have direct K with party they are suing; yet want to sue for damages for breach of K. Selfridge and Dew have K, Dunlop & Dew have K but not Selfridge & Dunlop.

Ratio: three fundamental principles in law:

1. doctrine of privity: requires that only a party to a K can sue.
2. doctrine of consideration: requires a person with whom a K not under seal is made is only able to enforce it if there is consideration from the promisee to the promisor.
3. doctrine of agency: requires that principal not named in K can only be sued if promisee was contracted as an agent. In application to facts, Haldane could not find any consideration between Dunlop and Selfridge, nor could he find any indication of an agency relationship between Dew and Selfridge.

Decision: Dunlop's action must fail.

### Beswick v. Beswick

Facts: Beswick, coal merchant; nephew helped business. Peter had leg amputated; not in good health. Nephew anxious to get hold of business before Peter died. Went to solicitor who drew up agreement that Peter assigns business to nephew in consideration of nephew employing him for rest of his life and paying weekly annuity to Mrs. Beswick. Since latter term was for benefit of someone not party to K, nephew didn’t believe it was enforceable and didn’t perform, made only one payment of agreed weekly amount of 5 pounds. Nephew argued since Mrs. Beswick not party to K, wasn’t able to enforce due to doctrine of privity of contract. Solicitor mentioned Ruth in way to exclude her from K. She sues for damages and specific performance, sued as administrator of estate of late husband.

House of Lords: Awarded her specific performance, enforced original K on John forcing him to continue paying her. Common law equity – discretion of court whether it should be rewarded or not. Breakthrough creating in this situation exception – to award specific performance that would benefit 3rd party in K.

Ratio: Equitable exception to privity rule where 3rd party is in trustee relationship. Widow sues in her capacity as executor of estate and also personally capacity. Widow in personal capacity had no right to sue but had right as admistratrix of husband’s estate.

### London Drugs Ltd v. Kuehne & Nagel

Facts: Kuehne & Nagel storing transformer owned by London Drugs valued at $32,000. The agreement between the parties included limitation of liability clause which limited liability for damage to the transformer to $40. Two employees were moving the transformer with a forklift and negligently dropped it. London Drugs sued the two employees on the basis that they owed a separate duty of care and could not seek protection under contract.

Ratio: Employees protected from clause limiting their liability even though not parties to K. Employee could rely on limitation of liability clause if such clause expressly or implicitly extends benefits to employees and if employees have been acting in course of their employment and performing very services provided for in K b/w employer and customer when loss occurred. Limited exception to privity, employees may use as shield.

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

Facts: Fraser River Pile & Dredge Ltd. owned a derrick barge "Sceptre Squamish", that it chartered to Can-Dive Services Ltd. Can-Dive accidentally sank the barge while it was chartered. Fraser River collected on a $1.1 million insurance policy for barge. The original policy between Fraser River and insurer contained a subrogation clause which waived insurer's right of subrogation against any third-parties. Fraser River and their insurer entered an agreement which waived original subrogation waiver, intending to allow the insurance company and Fraser River to sue Can-Dive. In their defence, Can-Dive claimed that insurer already waived subrogation rights and so could not unwaive them.

Issue: Whether Can-Dive could rely on the waiver of subrogation in the original insurance policy

Ratio: Followed London Drugs analysis re. application of limitation of liability clause on employers in order to enforce insurer’s waiver of its rights of subrogation against charterer. Doesn’t modify test in London Drugs but extends application to K other than employment K as long as K explicitly or implicitly extends benefits to 3rd party and if 3rd party has been performing activities contemplated in K. Iacobucci says rule in London Drugs not meant to just be applied to employer-employee situations, need to consider factors/circumstances, analyze/apply policy reasons on a case-to-case basis.

# MISREPRESENTATION

Statements made before entering K fall into one of three categories:

* **Puff**: statements party makes to another without K or intent, no intent to include in K, sales talk. Statement on which no reasonable person would rely - has no legal consequences, no liability results.
* **Term**: obligations of K, only breach of obligations is construed in law as breach of K.
* **Representation**: significant statement of fact made in context of lead-up to K, part of negotiations, ad or other enticement to enter into K. Can be part of K if forms part of offer, **become terms**. Representation, unlike mere puff, is statement that reasonable person might rely on. **Concern is representations that don’t make into K but lead party to decided to enter into K.** Misrepresentation attracts serious legal consequences b/c of **untrue statements made to induce party into K.**

**Remedies**: Misrepresentation can sometimes allow other party to rescind K, tort damages for negligence or fraud.

## ELEMENTS OF MISREPRESENTATION

**Operative misrepresentation** (OR) requires:

1) **statement of fact**

2) That is **untrue**

3) That is **material** (important/relevant)

4) **Relied on** by other contracting party as reason to enter K.

OR also requires K be **concluded**, misrepresentation must relate to that particular contract.

## 1) STATEMENT OF FACT

**Statement of Fact**: OR must be statement about present/past fact. Promise about future should be term of K for it to have legal effect. OR cannot be a statement of law. Representation of fact may be inherent in statement of opinion and, at any rate, existence of opinion in person stating it is a question of fact. **Position of maker and relationship to recipient may have important bearing on whether an opinion or prediction can be an OR**. Where facts equally known to both parties expressions of opinion are just opinion. **Where facts aren’t equally known, opinion of one who knows facts best often involves statement of material fact**, **impliedly states knows facts which justify opinion** (*Smith v. Land and House Property Corporation*)

**Silence cannot be OR without duty to speak**. Some situations (e.g. insurance Ks and fiduciary obligations) party owes a duty of uberrimae fides to the other, more situations call for this duty today than in the past. Silence can be OR where answer to question would mislead reasonable person.

Silence doesn’t usually form basis of misrepresentation. Where no duty to speak, can’t be held liable for failing to contradict expression other party has. Must make sure you don’t contribute to creating that impression. Where duty to disclose certain facts to other party and remain silent, constitutes misrepresentation. Most common in contracts involving duty of good faith (ie. insurance K). Silence in relations where fiduciary duty, can be breach.

5 factors indicative of duty to reveal info (*Ontario v. Cornell Engineering Co.)*:

1. past dealing where **reliance** has been an "accepted feature"
2. one party explicitly assuming an **advisory role**
3. relative positions of parties with respect to **information and understanding of situation**
4. way in which parties **came into contact** and how that might **cause one party to rely on other**, and
5. whether "**trust and confidence**" is knowingly reposed by one party in the other.

Conduct may sometimes be interpreted as a statement; e.g. nods, winks, smiles

### Smith v. Land & House Property Corporation - STATEMENT OF OPINION/FACT

**Facts**: P offered hotel for sale stating currently leased to Fleck, "desirable tenant". Fleck had been late with rent, P threatened 'distress'. D agreed to buy hotel. Soon after, Fleck went bankrupt and D refused to perform. P sued for specific performance. D argued P's description of Fleck amounted to misrepresentation. P argued description was opinion, not fact.

Statement can involve facts & opinions, P’s statement can be considered mere expression of opinion. D didn’t know all facts, **assume P as landlord knows more facts.** Judge found giving opinion **implied there weren’t facts that would contradict opinion**.

**Decision**: D wins

**Ratio**: Statement must be one of fact.Where facts equally well known to both parties, what one of them says to other is often nothing but expression of opinion. However, if **facts aren’t equally known to both sides, then statement of opinion by one who knows facts best often involves statement of material fact.**

Demonstrates thin line b/w statement of fact & opinion.

## 2) FALSE STATEMENT

**False Statements**: Rescission is allowable, even where party making OR was innocent (i.e where thought statement was true (*Redgrave v. Hurd).* Where statement might be true OR false, benefit of doubt is usually given to maker of statement.

**Rescission**: revocation/cancellation of agreement

### *Redgrave v*. *Hurd* - FALSE STATEMENT

**Facts**: D placed ad looking for fellow lawyer to enter partnership who’d be willing to purchase residence from him. P represented to D that his law practice earned 400 pounds/year, showed receipts for 200 pounds & papers which he claimed represented another 200 pounds. In fact, papers disclosed only 5 or 6 pounds of business. When P found out, refused to perform K. D sued for specific performance and P counter-sued for rescission and damages in deceit.

P argued if D used due diligence, would’ve discovered falsity of representation. Court says in eyes of equity, not proper answer. Would be proper answer if D had been caught by statute of limitation like delay of action, but not case. No question of delay, nothing preventing equity. Effects of false representation not negated on ground that person to whom it was made was guilty of negligence, especially negligence regarding not examining documents relating to K. Courts consistently held **vendor not allowed to benefit from his misrepresentation.**

**Decision**: No books to check, D can’t be guilty of negligence. Insufficient to say party to whom representation made wasn’t able to prove he entered into K replying upon misrepresentation. As long as it’s **material representation, inference of law that party induced to enter K based on that representation**. For **P to have chance, D must’ve shown by conduct he didn’t rely on representation or was supposed to check books.**

**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 is not relevant if person is induced to enter into K by false representation.**

## 4) RELIANCE

**Reliance:** Party to misrepresentation must rely on misrepresentation, must lead party to enter into K (*Redgrave*); doesn’t have to be only reason why entered K - OR doesn’t have to be only or main reason, just a reason (*Edgington v. Fitzmaurice)*

* Evidence for reliance includes: facts, subject on L, and who parties are (relationship).
* Untrue statement can be relied on for these purposes even where person to whom statement is made given opportunity to check veracity of statement. (*Redgrave v. Hurd)*

## EFFECT OF MISREPRESENTATION – Rescission

i) Rescission: Misrepresentation, if 4 elements established, leads to rescission.

**Rescission**: parties placed in **position before K** (**restitutionary** nature) - **equity**. Most cases, property transferred back and forth b/w parties. Rescission describes discharge of K, sometimes by agreement b/w parties and where not by agreement, denotes setting aside of K due to defects in K at formation that arose from misrepresentation(*Redgrave v. Hurd*)

ii) Impossibility of Rescission

**Impossibility of Rescission**: rescission impossible because P couldn’t restore shares transferred in same condition. 3 years passed, P had worked mine for profit. Shares had been converted from cost book principle to joint stock corporation (*Clarke v. Dickson)*

Equity will sometimes allow rescission by using **money compensation to allow for use of property and deterioration**. (*Wiebe v. Butchart's Motors Ltd.).*

Some authority that property that can’t be return can be substituted by money compensation - particularly likely in cases of fraudulent misrepresentation (*Kupchak v. Dayson Holdings Co. Ltd.)*. Unclear whether principle was meant to apply generally, or only to fraudulent misrepresentation.

**If P affirms K after learning of OR, rescission is waived**. P can do this by dealing with subject matter of K, continuing to use it, or making other arrangements with contracting party to take OR into account.

Rescission only available if P acts within **reasonable time**. If P delays, guilty of **laches** (affirmation by process of time\*). In *Kupchack,* problem first raised in Sep. 1960, action not until Nov. 1961, considered insufficient delay for argument of laches.

Kupchak v. Dayson Hordings– **IMPOSSIBILITY OF RESCISSION; FRAUDULENT MISREPRESENTATION**

**Facts:** DH fraudulently induced K to purchase shares in motel company in exchange for 2 pieces of real estate. By time K learned of fraud and sought to rescind, some of real estate had already been sold, other parts redeveloped. Courts found fraud; shares hadn’t been altered so could easily be returned to DH but K’s property changed.

Account & indemnity: one party gives $ compensation to other to account for use/deterioration of property due to remedy of rescission.

Restitution by compensation: giving $ to compensate for property that can’t be returned to previous state before K (what K wanted)

**Decision**: DH must compensate K for property.

Where **restitution impossible, court will apply equitable principles and order restitution by compensation or account for use.**

Affirmation: If P, knowing about misrepresentation, affirms K, rescission unavailable 🡪 *Kup* didn’t affirm K.

Delay: Laches, where innocent party waits too long before exercising right to rescission, won’t be available 🡪 no laches in this case

Consider: 1) length of delay, 2) nature of acts during interval

Bringing action indicated repudiation of K by Kup 🡪 Kup sufficiently protected by equitable remedies available regardless of delay

**Ratio**: No rescission for misrepresentation if 3rd party has acquired rights or when *restitutio in integrum* (restoration to orginal condition) impossible or if action to rescind not taking within reasonable time, or K executed\* (except in fraud) or if injury party affirms K. **When rescission impossible, injured party may get monetary compensation.**

Test for rescission for fraudulent misrepresentation:

1) rescission practical and restitution possible?

2) Claim to rescind submitted in timely fashion?

### Sodd Corp v N Tessis

* In the case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion.
* However, if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best very often involves a statement of a material fact.

### B.G. Checo Int’l Ltd v B.C. Hydro

* + BC Hydro called for tenders to erect power lines.
  + BG Checo International Ltd. was interested in making a tender and did a survey of the land by helicopter. They noted that the area was in the process of being clear-cut. BG Checo issued a tender and won.
  + The tender was incorporated into the contract and included terms stating that BG Checo would have no part in clearing a right-of-way to the land. Once the agreement was made no further clearing was done which resulted significant difficulties for BG Checo.
  + BG Checo sued in tort of negligent misrepresentation and in the alternative breach of contract, a fraud (which was sidetracked0. The key issue is the case was whether the terms of the contract precluded BG Checo from suing in tort.
  + They made a very specific claim. “We would have made this contract, but on very different terms, had the situation been properly represented.”
* Contract law should take precedent over tort due to the primacy of private contracts/interactions
* Damages, per K law, should be the cost of clearing (the additional costs borne due to misrepresentation)
* Under tort law, the damages would be to let BG Checo submit a higher bid, as they would have before Contract B (returning you to state before the contract, as per tort philosophy of damages)
* SCC held that the limitation clauses in the contract did not negate Hydro’s duty of care.
* Held that actions in contract and tort may be concurrently pursued unless the parties by a valid contract explicitly indicate that they intended otherwise.
* Iacobucci in dissent said that a contract precluded the concurrent liability, but the majority of SCC held that the mere fact that the parties have dealt with a matter expressly in their contract does not mean that they **intended** to exclude all the rights to sue in relation to that matter (in this case, tort).

## Representations and Terms

### Hielbut, Symons & Co. v. Buckleton

* The nature of the business was misrepresented (whether or not it is a rubber company, and the profit potential due to number of trees)
* The party ‘tricked into contract’ claimed he only bought the company because of its nature as a rubber company. He was losing money, and he made a claim for damages for fraudulent misrepresentation and alternatively, a claim for damages on the grounds of breach of warranty.
  + It was found **not** to be fraudulent misrepresentation
* Fraud takes “a hell of an effort” to prove, unless someone was behaving very recklessly.
* A person is not liable in damages for an innocent misrepresentation no matter in what way or under what form the attack is made, therefore if rescission is not possible there is no remedy.
* An affirmation at the time of sale is a warranty, provided it appears on evidence to be so intended, else it is only an innocent misrepresentation.
* A collateral warranty must be proved strictly, not only the existence of such terms but the existence of *animus contrahendi* must be clearly shown.

### Leaf v International Galleries [1950] (CA)

* There is a bar to rescission when an argument for repudiation is rejected
* When a client wants a rescission, what do you have to do?
  + Need to establish that it was a false statement
  + Does really matter if it was a term or a warranty, it is still a breach of part of a contract
* How would we measure the damages in contract law?
  + Asking them to give you the cost as if the contract is completed, as if the promise is complete. I.e. the position you would be in had you been given a Constable photo
  + So, you would be compensated the difference in market value
  + However, you can use the misstatement in many different ways and make a wide variety of different damage claims/claims in tort and K
* Facts:The P bought a painting from the 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.
* The other party still claims that the painting is a Constable
* Ratio:If the k cannot be ended through breach of k, then it cannot be argued that a term is misrepresentation and should be ended in rescission (there is a bar to rescission when an argument for repudiation if rejected.
* Holding: Find for the D

## Parol Evidence Rule

### Hawrish v. Bank of Montreal

* Hawrish, a solicitor, signed for the indebtedness of a newly formed company, Crescent Dairy, a cheese factory, after the new company’s line of credit was nearly maxed out
* Bank gave Hawrish an oral statement that he was only signing for existing indebtedness, and would be released from the guarantee once the bank received a joint guarantee from the company’s directors (despite what the contract actually said)
* The bank brought action against Hwarish for his full guarantee, $6000
  + Hawrish argued that despite the written contractual terms, he should only be bound by the terms of the contemporaneous oral agreement
* The court upheld the traditional principle that any agreement collateral or supplementary to the written agreement may be established by parol evidence, provided it is one which could be made as an independent agreement without writing and that it is not in any way inconsistent with or contrary to the written agreement.
* In the case of conflicts between an oral guarantee and a written K, must go with written. Court finds for the bank.
  + Bank can’t guarantee/warrant for something that is contrary to what it is contracting to

### Gallen v Butterley (1984) (CA)

* Parol Evidence Rule
* Facts: Contrary to oral assurances the buckwheat sold to the P by the D did not act as a blanket and smother weeds
* Ratio: Parol Evidence Rule = there are 7 principles:
  + 1. Rule of evidence – evidence can be introduced to establish an oral agreement separate from the written agreement. But in the case of two agreements made at the same time that contradict each other, the written one is stronger evidence.
  + 2. This is not an absolute principle
  + 3. There are exceptions
  + 4. The rationale of the principle does not apply with equal force where the oral representation adds to, subtracts from, or varies the agreement recorded in the document, as it does when the oral agreement contradicts the document.
  + 5. There is a presumption in law that a document that looks like a k is treated like a whole k. Therefore, it is very difficult to get around this presumption when what is oral is in total contradiction with what is written
  + 6. A unique document forms a stronger presumption than a standard form, though both have a strong presumption.

7. The presumption would be less strong where the contradiction was between a specific oral representation and a general exemption clause that excludes liability for any oral representation than it would in a case where a specific oral representation

# TERMS OF A CONTRACT

**Terms**: contractual obligations owed from one party to another; offers that other party has accepted. Breach of terms give rise to remedies in law.

**Representations**: Pre-contractual statements, mere side statement with no legal consequences.

Court looks at intentions of parties, conduct (words, behaviour) rather than thoughts so intelligent bystanders would reasonably infer term was intended (objective test)

## Terms vs Representations

* **Skill/knowledge of statement maker**: If maker expert in transaction area or has access to special info regarding K, court takes that to be more than mere representation. Such person is taken to be in best position to guarantee accuracy of statement, induces party to enter K
* **Significance of** **statement**: if important, key to K, likely party & court likely construe as term
* **When statement made**: if statement made when or around when agreement sealed, likely for court to say intended it to be terms. But NOT major indicator that statement was necessarily a term – can still argue it was a mere statement.

## A) Express & Implied Terms

* **Express terms**: terms expressly agreed upon by parties; oral OR written.
* **Implied terms**: terms implied into K, parties don’t need to agree at outset of K.
  + Implied by**:** custom, usage, necessity or operation of law.
  + **Implication by custom/usage**: established tradition, past b/w parties, always stated certain terms would be part of K. If at future date, party forgets, court will use doctrine of estoppel; party denying term will be denied/estopped from making such claim b/c traditionally had term in K – too bad they forgot to include it, must be part of K.
  + **Nature of business or established industry practice**: Everyone in business area said to know existence of given traditions. Usually implicit part of every K, no need to spend time going over unspoken terms. Party may claim unaware of industry practice – need evidence
  + **Nature of contract**: certain key words in business area that specifies certain obligations or consequences? If court finds certain terms, based on K, terms have certain meanings. Courts will imply consequence based on use of key words. Parties can exclude implied terms by making express provisions in K to exclude operation or term - exclusion may be implied by wording of rest of K. If rest of K contradicts term, court will say couldn’t have been intention of parties to imply such a term – contradicts rest of K.
  + **Implication by necessity**: trying to make K work as ought to work, give K business efficacy. If don’t imply term, likely K wouldn’t work as it ought to.
  + **Implication by Operation of Law**: *BC Sale of Goods Act*, R.S.B.C. 1996, c. 410, s. 20

**Official Bystander Test**: term can only be implied if necessary in business sense to give efficacy to K. Term implied must be so necessary to facilitate to K that it’s obvious even to bystander. Without implication, K may not work as it was intended to.

Court will consider many factors:

* what rest of K stipulates
* actions of parties
* nature of business or trade
* intentions of parties entering into K

**Implication of operation of law:**

Terms provided by statute are implied into K. Common example: *Sale of Goods Act*. Conditions relating to title of goods, description, quality and fitness. Where term implied by statute, term usually statement of common law (Ie. provisions in *Sale of Goods Act*, not really different from common law)

Parties can contract out of such terms - will assumed to have contracted out of terms if all provisions in K contradict what statute says. BUT law can prohibit contracting out of statutory implied terms. In BC, parties can’t K out of *Sale of Goods Act* when it involves a retail sale.

Court doesn’t want to imply oral terms of K so as to not disturb intentions of party - avoid injustice to one party or another. Parol evidence rule: exclude any term that isn’t written down. BUT implied terms can be written or oral. If trying to enforce PER, does that prevent us from implying unwritten terms into K?

🡪 if implication of oral terms makes sense in context of written K, implication still possible regardless of PER.

**Implication in Context of Parol Evidence Rule: LIMITED**

**Parol Evidence Rule (PER):** when parties intend written evidence of K to contain entire K, court won’t accept oral terms of K that haven’t been reduced to writing.

* Rule might apply where one party arguing that some terms in K are written but others are oral (collateral).
* Rule raised by other party to argue oral terms can’t be accepted so as to vary what appears to be complete K in writing.

**Flexible approach to oral terms that appear to contradict what’s in writing**; courts consider context of K as much as actual words, often conclude parties couldn’t have intended that writing alone represents what they agreed. In context of intention, little place for parole evidence rule to operate.

## B) Primary & Secondary Obligations:

* **Primary**: basic promises made in K; primary obligations not performed, or if default, breach gives rise to secondary obligations.
* **Secondary**: consequences for not performing obligations in K. Secondary obligations = remedies.

Primary obligations must be breached to activate secondary obligations.

Common law obligations, must imply these terms into K. Remedies, especially damages, are implied terms, especially when parties don’t provide for them in K. Liquidated damages: parties make provisions for damages – excluding application of implied term which is damages or remedies.

## C) Conditions and Warranties:

**Condition vs. Warranty:** Depends on effects of breach.

* **Condition**: 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

**D) Intermediate or Innominate Terms:**

### *Hong King Fir v. Kawasaki* – INTERMEDIATE/INNOMINATE TERMS

**Facts:** P owned vessel, rented to D for 2 years with P ensuring seaworthiness. Ship became un-seaworthy, required 15 weeks to become seaworthy. D wrote twice to repudiate agreement. TJ held even though unseaworthy for 15 weeks, K not frustrated and not entitled to be repudiated for breach of K.

Must assess whether occurrence of event substantially deprives party who has further duties to perform the whole benefit which was intention of parties as expressed in K. It’s occurrence of event, not fact there was an event caused by breach that determines whether innocent party is relieved of obligations (*Jackson v. Union*). Outcome of breach is crucial in determining this fact.

Problems with separating terms into conditions and warranties – often, one must wait until actual breach to see if consequences so serious innocent party should be able to terminate K. When consequences of breach not so serious, term is warranty. If serious, condition.

**Ratio**: in addition to traditional common law categorization of terms of K into 2 groups (conditions: breach leads to repudiation; warranties: breach leads to damages), there are intermediate/innominate terms (neither conditions nor warranties).

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

Often have to wait until actual breach to see if consequences so serious that innocent party should be able to terminate K. If at creation of K, term called immediate/innominate, can’t predict whether breach of term will go to root of K - waits to see actual situation. If consequences serious, result in terms of remedy is same as if term was condition b/c other party said to have repudiated K. If consequences not so serious, result is same as if term is warranty, K can’t be terminated b/c of breach, party didn’t repudiate obligations under K.

If term intermediate, doesn’t *become* condition or warranty upon breach; remains intermediate. Simply leads to remedies for breach that are akin to condition or warranty. If obligation to be performed more than once, first time remedy can be akin to warranty but next time if consequences more serious, remedy can be that of condition.

## E) Conditional Obligations

Obligation A: Party X & Y. Party Y has obligation to fulfill and breaches. Not serious breach, K won’t be breached based on that. Is this term an intermediate term because found it wasn’t such a serious breach? Or is it a warranty? After successive breaches, would want K terminated. Beginning to appear like repudiation of obligation. At first incident, could be warranty but at 2nd or 3rd breach, can become more like condition.

Conditions & warranties can imply quality or state of things. Remedies should attach to breach of different terms. That way, all parties are aware what consequences are for breach of certain terms of K.

**Conditions precedent:** obligation that must be performed BEFORE other obligations in K can become enforceable. Enforceability of K depends on condition precedent. Note: can have condition precedent to an obligation in K or to an entire K. Distinction necessary: when condition precedent refers to entire K, parties have no obligations yet so one party will pull out of obligation even before K started. In case where already existing K and condition precedent refers to particular obligation within existing K, then parties can’t pull out of obligation without being sued for breach.

**Conditions subsequent**: brings obligation in K to an end.

To determine whether condition is one or other, courts construe K based on party’s intentions.

## F) Performance

Court adopted new way to look at issue: substantial performance of obligations. Payment on basis of *quantum merit* – if substantial performance of obligation, party should be entitled to some money.

**ii) Substantial Performance**

Obligations of K can be concurrent. Party’s part performance not dependant on performance by other parties. Both parties expected to equally perform obligations at same time so each party is able to sue other for failure to perform.

What is substantial performance? Depends on facts of each case

### *Fairbanks Soap v. Sheppard* – SUBSTANTIAL PERFORMANCE

**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. D counterclaimed for K price.

**Issue**: whether D had substantially completed K (machine) to entitle payment.

**Decision**: No substantial performance. P entitled to refund. At time of asking for more $, still needed substantially more skills/knowledge to complete work.

**Ratio**: Certain circumstances, general rule (no recovery for K to do work for lump sum until work fully completed) could be interpreted to mean recovery for K to do work for lump sum is possible if work is “substantially” completed. **BUT** Deliberate abandonment of K before substantially completed won’t allow for claim for payment for work performed. Party in default must provide evidence from which any new K to accept and pay for work done could be inferred. *Quantum meruit* not applied against contractor who withholds performance for strategic reasons.

### Sumpter v. Hedges (1808 Eng. CA)

F π K’d to erect bldgs. When work partly done, π said could not complete. Δ completed work himself. π sues for QM. TJ found K was abandoned.

H π’s Appeal dismissed.

\* If K for lump sum, may not recover until work completed.

\* Can’t recover on QM unless new K entered into.

\* Δ did not have option to take or not take benefit of work done.

Party in default can sue in QM where fresh K can be implied if Δ has benefit of work. New K may be implied where innocent party has choice whether to take benefit. Here no choice, no QM.\*\*

### *Stevenson v. Colonial Homes* – PARTIAL PAYMENT OR DEPOSIT – AMBIGUOUS LANGUAGE “DOWN PAYMENT”

**Facts:** K for cottage purchase. P refused to complete K, sort of in default but even if party in default, entitled to money if partial payment only, not deposit. A argued sum was partial payment of purchase price, thus entitled to return of money subject to any of D’s rights to sue for damages or breach of K. D defined $ as deposit, says entitled to keep $ as being forfeited by P, countersued for damages of breach of K.

**Issue**: Whether A entitled to return of money depends on whether money deposit or part payment for K price.

Where "down payment" made under K expressly or by an examination of its terms shown to be a part payment rather than deposit, and default by buyer, seller is not entitled to forfeit payment, must return if buyer terminates K, subject to seller’s right to damages for buyer's breach. If deposit, A not entitled to have money returned if they rescinded or defaulted on K (entitled to return if R defaults).

**“Deposit” should’ve been used instead of “down payment”. Ambiguous language shouldn’t be used in K,** court shouldn’t have to determine implied meaning when other language available.

**Standard form requiring interpretation**. K said money was down for partial payment, but in “for office use only” part of K, box saying deposit received. Unlikely A’s attention directed to “office use only” box. Couldn’t determine A’s intention merely by word “deposit” in box – insufficient to impose on payment characteristics of deposit.

**Decision:** A wins; even though A defaulted, entitled to return of part payment subject to R’s claim for damages for breach of K.

**Ratio**: to determine if payment is deposit or part-payment, court will assess intention of parties in circumstances as indicated by actual words of K and evidence of what was said. Deposit (money paid in advance to guarantee performance of K) not recoverable when K set aside. Part-payment on account of purchase price recoverable.

### Machtinger v. HOJ Industries Ltd. [1992] 1 S.C.R.

**Issue**:

* In the absence in an employment contract of a legally enforceable term providing notice on termination, on what basis is a court to imply a notice period, and what extent intention plays?

**Facts:** not mentioned in the book.

**Application:**

* Intention is important for some (fact) but not all terms (law). Reasonable notice falls into law. Employment terms fall under the category of a legal term.
* This type of term cannot be contracted out. The term sought to be implied must be a "necessary condition" of the contractual relationship.
* Found that there is a contractual duty to provide reasonable notice of termination.

**Ratio:**

**TEST**: **If legal term, test of “necessity” is applied** - must be necessary for the fair functioning of K. Terms may be read into the contract where they are implicitly REQUIRED by the nature of the K. Not the same as being necessary for the very existence of the K, but necessary in a practical sense to the fair functioning of the agreement (ie, the K could operate without it, but it would not be fair).

# EXCLUSION & LIMITATION CLAUSES

* **Limitation clauses**: Limit liability party in breach must pay
* **Exclusion clauses**: excludes liability entirely

**Standard form K**: one party (often stronger) makes pre-designed K. Must interpret fine print terms, often contains limitation/exclusion clauses. Conventional wisdom is that parties would come together to draft K and include terms they want.

**Secondary obligations**: Conventional wisdom is that damages must be true estimate of losses suffered by aggrieved party. Limitation clauses, CONFLICT - contravention of common law principles. Courts usually interested in protecting interests of weaker party b/c implication weaker party unaware terms are there or if aware, usually doesn’t understand full implications of exclusion/limitation clauses.

## A) Notice

### *Parker vs. South Eastern Railway Co.* – EXCLUSION CLAUSE/UNSIGNED DOCUMENTS/NOTICE

**Facts**: P left bag in D’s cloakroom receiving a ticket that said “see back”. Limitation of liability clause on back, P didn’t read clause.

**Issue**: Whether knowledge of terms & whether P bound by terms on ticket. Sufficient notice given to P?

**1) If ticket recipient didn’t know/see writing on ticket, shouldn’t be bound.**

**2) If knew writing present or believed writing contained conditions, should be bound.**

**3) If knew writing present, but didn’t know/believe writing contained conditions, nevertheless, bound if given ticket in manner he could see there was writing on it 🡪 Jury to decide whether this was sufficient notice.**

Written document unsigned, must be independent evidence that person agreed to conditions. If party receiving writing knows or ought to have known there were written conditions, even if party does not read them or know what they are, party is bound by conditions. May be exceptions were receiving party shouldn’t reasonably expect writing to contain conditions – then party not be bound.

In this case, D allowed to assume P can read English and is attentive in way reasonably expected by a customer a railway cloakroom. P knew, and reasonable person in circumstance would know there was writing, therefore clause forms part of K.

Simple notice requirement, nothing more. First step court takes is to ask if there was notice: if innocent part knew or ought to have known about exclusion/limitation.

**Ratio**: Signed documents, agreement proved by signature. In absence of fraud, immaterial that party hasn’t read agreement and doesn’t know contents. For **unsigned documents, party imposing condition (or an exclusion clause) must take reasonable steps to give other party notice of condition**. What constitutes reasonable steps is objective test—not whether party knew of condition but whether party imposing condition did what was reasonably sufficient to give other party notice of condition.

***Thornton v. Shoe Lane Parking Limited* – EXCLUSION CLAUSE/UNSIGNED DOCUMENT/NOTICE/PARKING LOT OFFER & ACCEPTANCE**

**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.

**Issue**: Did P have notice of term before entering K? Notice come before or after entering K?

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

Lord Denning on formation of K in parking lot: ticket no more than voucher/receipt for money paid on terms which have been offered and accepted before ticket issued. Offer accepted when P drove up to entrance and by movement of car, turned light from red to green, and ticket thrust. K concluded and couldn’t be altered by any words printed on ticket itself. Therefore, exempting condition not part of K.

**Ratio***:* Court shouldn’t bind party by unusually wide & destructive exclusion clauses unless drawn to their attention in most explicit way. Notice must come before agreement.

If those terms come before K, P bound. If terms come after K, can’t be bound. Usually companies argue ticket is offer, taking ticket is acceptance. Present case distinguished: offer contained in notice of entrance advising of charges and everything you do is at own risk. Court says offer accepted when P drove to gates, lights green and ticket automatically issued. After that point, K couldn’t be altered by words on ticket – ticket dispensed after offer accepted. Excluding liability for personal injuries: new term thrust at P after K completed.

**Decision**: P didn’t have notice. Terms excluding liability not part of K. D didn’t do enough to give sufficient notice of terms.

**Policy concerns**: responsibility for injuries. Assume conditions won’t negate personal rights, infringement of personal rights.

## Signature as Notice

**Signature inapplicable where misrepresentation:** buyer didn’t have notice of exemption clause even though she signed receipt purporting to exclude liability b/c false impression was made when buyer asked what form said (*Curtis v. Chemical Cleaning & Dyeing*)

**Sometimes signature enough:** In absence of fraud or misrepresentation, person bound by agreement which he signs regardless of whether read or not. Not reading K isn’t reason for refusing to abide. In this case, K on one sheet with limitation provisions highlighted in bold letters, language clear & unambiguous (*Fraser Jewellers v. Dominion Electric Protection Co.)*

### *Tilden Rent-A-Car Co. v. Clendenning* – SIGNATURE AS NOTICE, LIMITS L’ESTRANGE – SIGN W/O READING BUT NOT GIVEN NOTICE

**Facts:** D rented car from P, signed K w/o reading - general practice for P’s clerks not to point out limitation clause. K said it was without limits but also said P not liable for damages caused if car driven while impaired. D didn’t read terms, just asked for additional coverage, clerk knew didn’t read form. D drove car into pole, later pled guilty to driving under influence. P says insurance coverage didn’t apply. Exclusion clause was taking back PRIMARY obligation.

Modern commercial practice, many standard form printed documents signed w/o being read/understood. Many cases, parties seeking to rely on terms of K know/ought to know that signature of party doesn’t represent true intention of signer - often unaware of stringent and onerous provisions contained. Where there is onerous term that’s “inconsistent with overall purpose for which K entered, something more should be done by party submitting K for signature than merely handing over to be signed”.

D thought only liable if so intoxicated incapable of proper control of car. **Provisions inconsistent with complete K offering complete coverage for additional premium** - clerk aware D didn’t read, **signature didn’t represent complete agreement of unusual and onerous terms inconsistent with true object of K.** **CONTD**

**Decision**: P didn’t take reasonable measures to inform D of onerous provision; P can’t rely on provision.

**Ratio**: Signatures may not be perfect method to ensure notice, **doesn’t by itself mean acceptance of unusual and onerous terms that are inconsistent with true objective of K.** P seeking to rely on such stringent/onerous terms shouldn’t be able to do so in absence of first taking reasonable measures to draw such terms to attention of other party. **In absence of reasonable measures, not necessary for party denying knowledge of such terms to prove either fraud, misrepresentation or *non est facturm* (no intention to be bound), what’s reasonable is question of facts in each instance.**

### McCutcheon v. David MacBrayne Ltd. – PREVIOUS DEALINGS

**Facts:** P had brother-in-law ship car on D’s ferry. Ferry sank due to negligent operation, car lost. P previously signed K with D exempting D from liability but no such K signed on this occasion. P not familiar with limitation of liability clause found in previous Ks.

K on this occasion oral, no documents exchanged until K complete. If P had signed K as before, would have no case but this time, no K signed. **Previous dealings relevant to prove knowledge of terms and agreement to them, may be basis for saying terms of K frequently agreed to in past can be imported into K. However, no implication can be made when party unaware of term to begin with.** Present case, P unaware of term, therefore can’t be imported into oral K.

**Decision**: P wins

If party consistently signed K in past and fails to sign at occasion of dispute, if can be shown party had notice based on objective assessment of previous practices, court will hold party had notice of such terms. (criticism: objective test often seems subjective as in this case)

**Ratio**: Previous dealings b/w parties relevant only if prove 1) knowledge of terms (actual, not constructive) and 2) agreement to terms in previous dealings. If previous dealings show person know of and agreed to term on 99 occasions, can be imported into 100th K without express statement but without proving knowledge, nothing

### Delaney v. Cascade river Holidays Ltd. (1983) (BCCA)

**Facts:** Deceased hastily signed a waiver after having paid for the trip.

**What the case stands for:**

The release contained provisions so onerous and unusual that it was the duty of Cascade to see that the provisions were “effectively called to the attention of the other party under the penalty of their being held non-binding on the latter party.”

(majority found that could not prove causation for the negligence action so the exclusion clause was irrelevant)

Minority found negligence so: what about the clause? Negligence *was* explicitly excluded. How to get around this?

* + - * 1. “not part of the contract” argument – the deceased made arrangements over the phone. He paid before he signed the contract. Notice of the terms was not contemporaneous with entry into the contract (payment).
        2. But it is a signed document. *Tilden Rent-a-Car*. Where there is a document signed, you can only treat it with due deference if the party that signed it could have been expected to read the contract. This is the situation here. In this case, the clause was so onerous that the defendants had to bring it specifically to the attention of the plaintiff.
        3. Does a strict construction and then looks at fairness (per Wilson Hunter) – should have given more notice of the exclusion clause given that it allowed for negligence like this.
* When consid’g exclusion clause, ask (Nemetz in Delany v. Cascade River Holidays):
* Was there considn for clause and is it even a part of the K?
* Were onerous terms of clause brought to notice of signor? (Think of Tilden)

### Karroll v. Silverstar Mountain Resorts [1988]

Circumstances of the signing were such that a reasonable person (competition organizer witnessing the signing) would not have known that the signor did not intend to agree to what she signed. The purpose of permitting the signor and others to engage in such an activity and where and how the exclusion clause was represented were also considered in the reasonable steps test. The waiver was found to exclude liability.

### Schuster v. Blackcomb Skiing Enterprises [1995]

*Delaney’ s* decision is followed and it is held that the 2 step test of requiring (1) *reasonable steps* must be considered in examining whether the party relying on the unusual exclusion clause did what was necessary to bring it to the other party’s attention and (2) that the *purpose of the relationship and the nature of the venture involved* must be considered.

 In examining the “reasonable steps test” the court referred to *Karroll* v. *Silver Star Mountain* where the circumstances of the signing were such that a reasonable person (competition organizer witnessing the signing) would not have known that the signor did not intend to agree to what she signed. The purpose of permitting the signor and others to

## E-contracts

### Zhu v. Merrill Lynch

disclaimer which is extremely broad and excludes almost all liability for any poor performance may be unenforceable.

## Fundamental Breach

### Tercon Contractors Ltd. V. British Columbia [2010]

The facts of Tercon arose out of a tendering contract between Tercon Constructors Ltd. ("Tercon") and Her Majesty the Queen in Right of the Province of British Columbia (the "Province") which issued the tender call. The key issue in the case was the interpretation of provisions in the contract relating to the eligibility to bid and a damages waiver which excluded compensation resulting from participation in the tendering process.

Tercon brought an action seeking damages, alleging that the Province had considered and accepted an ineligible bid and that, but for that breach, Tercon would have been awarded the contract. The trial judge agreed and awarded approximately $3.5 million in damages and pre- judgment interest to Tercon.

**Issues to be determined**

1. Did the province breach the tender contract by accepting a bid from an ineligible bidder?
2. Does the exclusion clause bar a claim for damages for breach of the tendering contract?

**Holding**

* Yes
* No, on an interpretation of the clause that found that it did not apply to the circumstances of the breach.

**Rule of law**

On the issue of the enforceability of exclusion clauses, courts must undertake a three-part inquiry for enforceability:

* As a matter of interpretation, does the clause apply to the circumstances established in evidence?
* If it applies, was it unconscionable at the time the contract was made?

If it applies and is valid, should the court nonetheless refuse enforcement based on an overriding issue of public policy?

# Excuses for Non-Performance of Contract

## Duress

**DURESS:** action essentially forces “weaker” party to accept K; common law doctrine, duress is coercion of will that vitiates consent.

Modern analyses emphasis on legitimacy of pressure, rather than will of person receiving that pressure. Doctrine usually seen as making K voidable at option of weaker party. Problem with voidability: might not be possible to void K if performed and restitution isn’t possible (ie. If third parties adversely affected by voiding K)

## CATEGORIES OF DURESS

**A. Duress to Person:**

* Physical compulsion of person; threat to physical well-being
* Treat of imprisonment, wrongful imprisonment, or prosecution
* Threat to person’s near relative (ex. child)

Sometimes said must be some family relationship b/w weaker party and third party who is threatened, arguable that other close relationships should be sufficient. Duress doesn’t have to be sole, or even main, reason pressured person entered K– Must just be ‘a’ reason

## B. Duress to Goods or Property

* Threat to damage/take property

Payments made under protest and under circumstances of practical compulsion (i.e. to obtain land purchaser obliged to retransfer to a third party) can be recovered (*Knutson v. Bourkes Syndicate)*

If party compelled to sign K for nominal but legally sufficient consideration under imminent threat of damage to property, plea of coercion or compulsion would apply **(***Occidental Worldwide Investment Corp. v. Skibs A/S Avanti: the Siboen and the Sibotre)*

## C. Economic Duress

Traditionally, duress couldn’t be based on commercial/economic pressure alone, ***Knutson*** ***v. Bourkes Syndicate*** closes proposition. Reluctance grounded in idea that economy based on pressures and differing economic strengths. Now accepted there are limits to legal acceptability of such pressures.

**i. Traditional Duress Test**

### *Pao On v. Lau Yiu Long* - TRADITIONAL DURESS TEST

**Facts**: P owned shares in private company & building. D majority shareholders in company that just went public – wanted building, wanted to do share swap. To keep D’s shares from going down in price, P agreed wouldn’t sell 60% of shares for min. 1 year. Agreed orally D would buy shares at $2.50 (in case dropped). P then realized if shares rose, they’d miss out, said they wouldn’t complete deal unless got guarantee of payment via indemnity (security/protection against loss/financial burden). Got K on consideration of P that they’d sell their Shing On shares, D says P would be indemnified if shares were worth less than $2.50. Share price fell, D refused to indemnify. **D argued new indemnification agreement entered under duress**

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?

Duress may render K voidable but must be claimed promptly. Commercial pressure alleged to constitute duress must be such that victim entered K against their will, had no alternative course open to them and were confronted with coercive acts by party exerting pressure.

**Ratio**: for economic duress in contractual situation, **commercial pressure not enough. Must be coercion of will that vitiates consent; see test. Must be shown payment made or K entered wasn’t voluntary act.**

**Decision**: Decision to enter 2nd K calculated business risk, no one foresaw shares dropping – no coercion of will to vitiate consent.

## ii. Testing for “Legitimacy” \*\*

Modified approach shifted emphasis from “coerced will” to whether threat or duress was “illegitimate” (traditional approach held that legitimacy of pressure was irrelevant). Two considerations relevant for determining legitimacy :

* + 1) nature of pressure
  + 2) nature of demand which pressure applied to support

Law usually regards threat of unlawful action as illegitimate, whatever the demand (ie “blacking” ship in *Universe Tankships v. Intl. Transport workers federation*) If threat is to take lawful action, court will turn to nature of demand.

Doesn’t matter if demanding party thought entitled to do so (*Knutson v. Burkes Syndicate*)

## Iii) Economic Duress in Canada

### Greater Fredericton Airport Authority v. NAV Canada\*\* - ECONOMIC DURESS & CONSIDERATION

**Facts**: NAV’s responsibility to provide aviation services/equipment to GFA. GFA wanted to extend runway; Disagreement re. who should pay for acquisition of new system. NAV installed equipment. GFA refused to pay and parties agreed to arbitrate. GFA had no practical alternative but to agree to pay money though weren’t legally bound to pay. NAV implicitly threatened to withhold performance of own obligation until GFA gave in. GFA never consented to variation, they agreed to payment “under protest”

**Issue**: Subsequent exchange of correspondence creating a binding contract?

**Under certain circumstances, practical benefit should be recognized as substitute for consideration. Not repealing consideration; as long as no duress, reason to enforce promise if there is practical benefit.** In airport, no practical alternative – judgment is based on duress, not on consideration.

K Voidable means can be rendered void at option of weaker party. Tries to reject the idea of illegitimacy. Tenets of economic duress if legitimacy not in table: promise must be extracted as a result of exercise of pressure, whether characterized as demand or threat. Exercise of that pressure must be such that they had no practical alternative but to agree to terms (if other practical alternatives were available, econ duress must fail at this stage) **CONTD**

**Ratio**: Builds on decision in *Williams v. Roffey* (**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**. If following elements exist, D’s promise legally binding) Accepted **post-contractual modification, unsupported by consideration, may be enforceable as long as its established that variation of contracts not procured under economic duress**.

**Commercial reality needs to be recognized and considered.** Parties frequently varied and modified contractual obligations and law has to **protect their legitimate expectations that modifications or variations will be regarded as enforceable**.

## UNDUE INFLUENCE

**Undue influence**: improper/unconscious use of power over another to induce person to enter K

* established in 2 ways:
  + 1) actual undue influence
  + 2) special relationship b/w parties; proof of relationship raises claim of undue influence UNLESS other party can rebut presumption
* Equitable doctrine; remedy is rescission
* Duress, falling short of common law requirements, may constitute undue influence in equity
* **Duress** focuses on circumstances surrounding creation of particular K, **undue influence** looks at broader relationship b/w parties, UI focuses on ideas of trust and confidence
* Doctrine is rooted in influence, not threat, although hard to distinguish b/w the two
* Aim not to save people from consequences of own folly, but save from being victimized by others

**1. Establishing Relationship of Undue Influence**

**English Case:**

Royal Bank of Scotland PLC v. Etridge (No. 2) **- THREE SITUATIONS OF UNDUE INFLUENCE; NON-COMMERCIAL RELATIONSHIP**

**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. Cases of true UI, usually no specific acts of persuasion; **not confined to cases of abuse of trust and confidence**

**Issue:** Can wife claim undue influence?

**Decision**: YES, Wife can claim undue influence

Three situations to establish relationship of UI:

1) **Actual UI**: actual pressure (ie. Duress), usually economic duress; weaker party proves actual UI and causal conneciton b/w influence and transaction

2) **Irrebuttable Presumption of UI**: inequality of bargaining power; obligation on stronger to look after interest of weaker; weaker need only prove special relationship. Party acquires influence over another who is vulnerable and dependent

- Not likely in commercial relationships

- Complainant need not prove he actually placed trust and confidence in other party; sufficient to prove existence of type of relationship

- Doesn’t in itself involve presumption that influence was unfairly exploited

- Stronger party must explain how wasn’t in fact unfair exploitation of other party

- Examples: Parent/Child, Solicitor/Client, Trustee/Beneficiary

* + - 3) **Rebuttable Presumption of UI:** weaker proves nature and existence of relationship + **disadvantage** (except gift, bequest; evidentiary burden shifts)
    - - Party must prove placed trust or confidence in other (or relationship of vulnerability, dependence, etc) and **provide proof of quesitonable nature of transaction**
    - - One party doesnt have to dominate other; situations where just some sort of trust and confidence in relationship can be enough
    - - transaction that isn’t reasonably expected to occur b/w parties is necessary to give rise to rebuttable evidential presumption of UI
    - **Ratio**: Creditor must take reasonable steps to bring home to individual guarantor risks he’s running by signing guarantee (wife for husband). Transaction not reasonably expected to occur b/w parties is necessary to give rise to rebuttable evidential presumption of UI. UI may not require “manifest disadvantage” – term shouldn’t be used. D must provide explanation why inference shouldn’t be drawn.
    - **Notes**:
    - - Commercial relationships: court assumes parties capable of looking after themselves
    - - Non-commercial relationships: court interferes to protect weaker
    - - Will be cases where wife’s signature of guarantee in her share will call for explanation; UI has connotiation of impropriety
    - - When husband forecasting future of business, expressing hopes & fears, degree of hyperbole nature – shouldn’t readily treat such exaggerations as misstatements.

**Canadian Case:** Categorization of relationships largely accepted in Canada

### *Geffen v. Goodman Estate* – ESTABLISHING PRESUMPTION OF UI; REBUTTAL

**Facts**: Family members contest validity of 2 different wills. Home left in FS to daughter with mental disorder; brothers want to ensure estate remain in family, created trust providing life estate to daughter and remainder to grandchildren. Daughter dies, her children try to claim her brothers exerted UI on their mother

**What must P establish to trigger presumption of UI?**

**1) Relationship one which creates potential for domination?** through manipulation, coercion or outright but subtle abuse of power. To dominate will of another simply means to exercise persuasive influence over him. Ability to exercise such influence may arise from relationship of trust or confidence OR other relationships also.

**2) Nature of transaction:** if commercial, P must show K unfair in sense P unduly burdened or D unduly benefited. If not commercial, don’t need to consider burden/benefit.

**CONT’D**

**Decision**: No UI. Bequest (inheritance, gift, donation) so burden/benefit didn’t apply.

a) very little contact b/w sister & brothers

b) received indepent advice

c) trust in accord w/ her wishes

UI meant to protect integrity of weak or momentarily weak from entering into disadvantageous transactions.

**Ratio:** P must **establish presence of dominant relationship to give rise to presumption of UI**. Onus shifts to **D to rebut** (show P acted in full, free and informed, had independent advice). **Magnitude of disadvantage or benefit is cogent evidence** re. Whether UI exercised.

## UNCONSCIONABILITY:

* **Unconscionability**: Unconscientious use of power arising out of circumstancess around creation of a contract

**Canadian Formulation:** Equitable doctrine; involves examination into relationships (like UI) but focuses on circumstances around a particular agreement (like duress), often involves short-term relationships. Concerned with situations“tantamount [equivalent] to fraud” rather than abuse of trust/confidence

### *Morrison v. Coast Finance* – ESTABLISHING UNCONSCIONABILITY

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

**Issue:** Unconscionable transaction?

**Decision**: YES, unconscionable, mortgage set aside.

Claim of UI failed b/w there was consent, no special relationship of trust/confidence – D strangers.

**Unconscionability doctrine separate from UI.**

\* UI attacks sufficiency of consent,

\* unconscionability invokes relief against unfair advantage gained by unconscientious use of power

**Ratio:** Proof of unconscionability requires:

* + - 1) Proof of inequality arising out of ignorance, need or distress of weaker which left them in power of stronger
    - 2) Proof of substantial unfairness of the bargain obtained in favour of stronger
    - 🡪 creates presumption of fraud; stronger party must rebut presumption by proving bargain fair, just and reasonable

### Marshall v. Canada Permanent Trust (1968)

Facts – action for specific performance of a sale of land. Trust claims that Walsh was mentally incapacitated when he signed the agreement and therefore it was not binding.

Issue: How far does the vendee have to go to make sure the vendor is in the right mind? Was he taking advantage?

Found: In looking at unconscionability, it is irrelevant if Marshal knew of Walsh’s mental state. All that must be established for the defendant to get rescission of the contract is:

1. Walsh was incapable of protecting his interests – found yes
2. that it was an improvident transaction for Walsh – found that it was equitable – he had not made a bad K for himself.

**Unconscionability remedy**: not bound not bound to rescission (could be unfair to 3rd parties) and unenforceability – can be creative (*Morrision*); traditional remedy of rescission or unenforceability, possibility only part of K rescinded/unenforceable (*Hunter*)

**Reformulation:**

Harry v. Kreutziger – UNCONSCIONABILITY TEST REFORMULATED **– COMMUNITY STANDARD TEST; BOTH TESTS STILL APPLICABLE**

**Facts:** P sold boat/fishing license to D on false & reckless assurances P could obtain another license. Boat undervalued, P unable to obtain new license.

**Decision**: Unconscionable. D took advantage of P’s background (inarticulate, semi-deaf, poor, uneducated, ill-advised). P entitled to rescission.

**Ratio**: Lambert J. **REFORMULATED** *Morrison* Test: whether transaction, seen as whole, sufficiently divergent from community standards of commercial morality that it should be rescinded

- Influenced by Lord Denning’s suggestion in *Lloyd’s Bank v. Bundy* that all doctrines to protect weaker parties could be merged into a simpler doctrine of inequality of bargaining power

Reformulation makes doctrine more open-ended, less structured by intricate list of prerequisites, but terms unclear (Ex. What’s morality?)

**A Doctrine of “Unfairness” for Subsequent Events?**

Traditional unconscionability/UI/duress test focuses only at circumstances at time of formation or before – but K may become unconscionable in future

**Statutory Unconscionability:** Some statutes deal with unconscionability or unfairness, and don’t always agree with common law

Business Practices and Consumer Protection Act ss.4-10: deceptive acts and practices; unconscionable acts.

* Applies to **consumer** transactions (rare that it will be business-business)
* Concern: individual being taken advantage of by business. Primarily for people purchasing items for household.
* Deals with sellers of goods or services, and also people who **advertise** and promote. *Manufacturer may be subject despite no privity* of K.
* Not open to allow suppliers to relinquish their rights under *BPCPA*.
* “Deceptive acts or practices” – any representation or conduct that has capability, tendency, or effect of deceiving or misleading consumer. Deceptive act may occur before, during, **or after** consumer transaction.
* If there is allegation of deceptive conduct 🡪 burden on **supplier**.
* Unconscionable acts: not expressly defined; may consider all surrounding circumstances the supplier knew or **ought to have** known; 8c: “total price **grossly exceeded** the total price at which similar subjects of similar consumer transactions were readily obtainable by similar circumstances.”
* Remedy: Transaction not binding on consumer; if a mortgage, there is list of remedies in 10(2).
* Unsolicited Goods or Services: Can’t force goods on people (s.11).

## Comparing Unconscionability, Duress & Undue Influence

|  |  |  |
| --- | --- | --- |
| **Duress** | **Undue Influence** | **Unconscionability** |
| * Inequality of bargaining power * No independent advice * Abuse of power by stronger party * Unfair advantage – commercial transactions or Gifts (*Geffen*) | * Inequality of bargaining power * No independent advice * Abuse of power by stronger party * Unfair advantage – only for commercial transactions, NOT gifts (*Geffen*) | * Inequality of bargaining power * No independent advice * Abuse of power by stronger party * Unfair advantage |
| * Ignorance not required * **Coercion of will (by thread or demand)** * Consent vitiated * No alternative * can include fraud * ***Pao On & Gordon v. Roebuck* Tests** | * Ignorance, need or distress of weaker party * Can be unconscions influence * **Pre-existing relationship b/w parties; raises presumptions of unequal relationship (need evidence to provse otherwise)** * Lack of consent * ***Royal Bank of Scotland* (3 types)** * ***Geffen* Test** | * Ignorance, need or distress of weaker party * **Surrounding creation of K + intended in *Hunter* to include unfair situations after K formed** * **whether transaction, seen as whole, sufficiently divergent from community standards of commercial morality that it should be rescinded** * consent vitiated * Often fraud/irregularities * ***Morrison* & *Harry* (Community Standard) Tests** |

## ILLEGALITY

## CATEGORIES OF ILLEGALITY:

K illegal b/c law disapproves of it’s making, purpose or performance**;** law makes disapproval known by **statute, regulation or common law**

* + Often overlap b/w statutory illegality & common law illegality
* Illegality isn’t status readily assigned to K; **law usually reluctant to interfere much with what parties can/can’t agree to**

## A. STATUTORY ILLEGALITY

Courts look at **whether making of K** is illegal, whether **purpose** of **performance** of K is made illegal

**Purpose of K or manner performed can be** **censured** based on certain principles depending on statute (ie. regulations, bylaws). If K found illegal, rendered unenforceable. Where express prohibition of K, innocence of party doesn’t matter (like strict liability)

* *Re Mahmoud & Isphani:* K is created for illegally selling oil without a license; K unenforceable even if parties didn’t know license required (innocence doesn’t matter)

Illegality can make outcome of K illegal (ie. selling drugs). If C doesn’t know about illegality of K between A and B then C can bring claims against B; doesn’t apply if C knew it was illegal and consented. Some statutes require license be obtained before performance of K.

**Intentions of Parties:** Presumption in favour of legality of K - intention to break law must be proven to revoke this presumption. Courts look at intentions of parties to violate law or if knew K was illegal. If innocent party who didn’t intend to violate law or didn’t know K was illegal, may still enforce K. Court can impute intent if party confirms K after finding out later illegal

**Old Approach:** Automatically renders certain contracts void/unenforceable

Differentiates 2 situations:

**i) Formation of K Illegal:** Statute might make creation of particular type of K unlawful

Courts reluctant to say formation of K impliedly prohibited by statute, expressly ok. If statute makes formation of K illegal, K unenforceable

**ii) Performance of K Illegal:** Statute may make particular purpose unlawful

Act of making K may be legal BUT object of K is illegal**.** Whether making of K illegal depends on whether intent to break law at time K formed or performed**.** If illegal intent on one side only, only that party unable to enforce K

* If K incapable of being lawfully performed, intrinsically illegal. If K capable of being lawfully performed, illegality depends on whether parties intended to break law in forming K. Presumption in favor of legality – to prove illegality, must prove intent to break law (*Maschinenfabrik Seydelmann K-G v. Presswood Bros Ltd.)*
* Party that doesn’t have illegal intent at outset can acquire it later if party knowingly participates in illegality *(Ashmore, Benson, Pease & Co Ltd. v. A. v. Dawson Ltd.)*

**Modern Approach:** Discretionary; courts see whether by invalidating K, purpose of statute would be undermined or furthered. Look at conduct of parties in its entirety, purpose of statute. Older approach not abolished, adds another layer of possibilities to pre-existing law.

* Difference b/w K with object of doing very act prohibited by statute and K whose performance involves **illegality only incidentally** *(St. John Shipping Corp. v. Joseph Rank Ltd)*
* Whether or not statute makes K illegal depends on **public policy considerations** in light of: **mischief statute designed to prevent; statute’s language, scope, purpose; consequences for innocent party; other relevant considerations** (*Phoenix General Insurance Co. of Greece v. Halvanon Ins. Co. Ltd)*
* When determining statutory illegality, courts should **consider whose actions meant to be controlled by statute** (*Canada Permanent Trust Co. v. MacLeod*)
* Factors courts will weigh include: **serious consequences for invalidating K, social utility of consequences, determination of class of persons for whom prohibition enacted** (*Royal Bank of Canada v. Grobman*)

***Still v. Minister of National Revenue (1998)* – MODERN APPROACH: Statutory Illegality/Effects of Illegality**

**Facts**: Still misinterpreted “permanent status” letter, believed in good faith she was lawfully entitled to work; later denied uemployment benefits. Turned down on the grounds that her K with the co was illegal.

**Issue**: Can P claim benefits?

**Decision**: Yes, P can claim benefits.

**Traditional approach:** would’ve voided Still’s employment: relief shouldn’t be available to party if it would undermine object or purposes of statute (to have permits for working in Can)

**Modern approach:** Court may grant relief for illegal K depending following factors: **legislative purpose, remedy being sought, public consequences of finding K unenforceable, determination of class of persons for whom prohibition**. Courts account for reality: finding illegality dependant on purpose of K, not simply whether there was breach or not. Court compares penalty (consequences) of a breach with remedy being sought; penalty for breach (void K and benefits denial) disproportionate to P’s innocent breach, considers public policy.

Still didn’t intend to violate law, innocent, thought she had right to work;

## B. COMMON LAW ILLEGALITY

Common law developed various categories of public policy that can make K’s illegal. Heads of public policy aren’t closed but difficult to get courts to accept new ones; importance of heads of public policy change over time.

**1. Contracts in Restraint of Trade**: Most common illegality issue.

Party to employment K **agrees to not work/use skills in given location for time period to prevent competition to other party** – may be core of K or form part of larger agreement.

* Not **all restraints of trade are contrary to public policy**, some are acceptable – **justifiable** if there’s legitimate reason for them (*Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company*)

**Must balance freedom of contract w/ society’s interests:** must balance demand for competition and availability of talents with principles that parties should be free to protect their own interests by agreeing to what they please. Courts careful to ensure there was true agreement, and that what parties are trying to protect is in fact a legitimate interest.

**Mercantile vs. Labour contracts:** Different attitude towards restrictive covenants in employment K’s as opposed to those in K’s for sale of business (*Elsely Estate v. J.G. Collins Insurance Agencies Ltd*. & *Warren v. Mendy*). To decide whether RC in restraint of trade and so illegal, consider geographic and temporal scope of covenant.

**K for sale of Business:** (ie: selling business to another party and party wants to protect business) if restraint for small area for short period of time, likely to be legitimate; if restraint for large area & long time, K likely illegal and unenforceable.

**2. Contracts to Commit a Crime**

K to do what law forbids is illegal – can include contracts to do wrongs that fall short of a crime AND contracts to commit a crime.

* Court wouldn’t enforce K to pay sum of money to assured’s rep if he committed suicide by his own hand (*Beresford v Royal Insurance Co*.)
* Court wouldn’t enforce K with purpose of defrauding tax authorities (*Alexander v. Rayson*)
* Wrongs **can be more amorphous & private in nature** – Court wouldn’t enforce K involving adultery. No court will lend aid to enforcement of illegal, immoral or fraudulent contracts (*Byron v. Tremaine*)
* If have K and sign another K, 2nd K unenforceable b/c parties knew couldn’t have been carried out w/o breaking first one (*Wanderer’s Hockey Club v. Johnson*)
* court used to find immoral Ks illegal but this isn’t used today!

**3. Contracts Prejudicial to Good Public Administration**

Where individuals have K to corrupt public officials or otherwise **undermine good government**.

* K found illegal, not in payment of remuneration, but in tampering with public officer (*Carr-Harris v. Canadian General Electric Co.)*

**4. Contracts Prejudicial to the Administration of Justice**

Administration of justice, including courts, many examples of K having negative effect on administration of justice:

* Agreement to **suppress prosecution** illegal, can’t be enforced (*Peoples’ Bank of Halifax v. Johnson*)
* **Bribes**; K to pay witness remuneration beyond statutory fees (*Hendry v.* *Zimmerman)*

**5. Contracts Prejudicial to Good Foreign Relations**

Friendly foreign governments protected by public policy. Illegal to assist hostile government BUT doesn’t mean can’t contract with citizen of enemy country. Ks with peoples of any nationality to carry on business within enemy territory can be legal and valid.

* Illegal to have K to raise money to support hostilities against friendly government (*De Wutz v. Hendricks*)

## C. EFFECT OF ILLEGALITY

Illegality made K void or unenforceable like strict liability rule. Court may still enforce K in favour of innocent party who isn’t aware of illegality. Statute/regulation may expressly provides for consequence of particular illegality.

* May be question of whether what statute/regulation provides meant to be exhaustive or consequences, basic responses may be added – refers to interpretation of statute
* Label of “illegal” or “unlawful” doesn’t necessarily mean criminal

**Basic Effects of Illegality:**

Court won’t enforce K; court won’t come to aid of parties to carry out of K.

* No court will lend aid to one who founds case of action on immoral or illegal act – no right to be assisted (*Holman v. Johnson*)

One party can enforce K but other can’t. Not possible if K truly void. Performance under illegal Ks can often have some effect.

**Still v. Minister of National Revenue – Modern Approach: Statutory Illegality & Effects of Illegality**

**Facts:** P misinterprets permanent status letter, believed in good faith she was entitled to work; denied UI benefits.

**Modern Approach:** Rejects idea that simply because K is void under statute, it’s illegal and voidable (rejects strict liability). Where K expressly or impliedly prohibited by statute, court may grant relief to party for public policy reasons. May refuse to grant relief if against public policy.

K **may be declared illegal but relief granted after consideration of purpose of statute; may be held not to be illegal and therefore enforceable**

Courts considers effect of K’s unenforceability on innocent party

**Result:** P was entitled to benefits, acted in good faith and penalty would’ve been disproportionate to alleged breach

**Effect Under “Modern” Approach to Illegality**

Effect of illegality is not distinctly separated from question of labelling K as illegal in first place. Effect of making a K illegal is wrapped up in question of whether K should be described as illegal at all.

**Potential effects of illegality considered in context of purposes of statute; purposive approach used to fashion remedy more in keeping with purpose of statute.**

***Still v. Minister of National Revenue* – Modern Approach**

Modern approach rejects understanding that simply b/c K prohibited by statute, it’s illegal and therefore void. Alternative ways of expressing legal conclusion:

- K may be declared illegal but relief granted under guise of an exception

- K held not to be illegal, therefore enforceable.

Purpose and object of statutory prohibition relevant when deciding whether K enforceable or not.

**Decision**: P not disentitled to unemployment insurance on ground of illegality. Public policy weighs in favour of legal immigrants who have acted in good faith. In public interest, not contrary to public policy, to grant benefits to P.

*Still* only dealt with statutory illegality. Old law on recovering property still applies even in context of statutory illegality. And, old law on unenforceability still applies to common law illegality. However, no reason why more flexible “modern” approach could not be used across board in any illegality case.

## Severance

Effect of restrictive covenant that’s in restraint of trade usually to render whole K unenforceable if restrictive covenant is essence of the K, or (which is more usual) to have restrictive covenant severed from K if it can be severe

### Shafron v. KRG Insurance Brokers (Western) Inc. [2009]:

FACTS:

* Applicant agreed to a restrictive covenant when he sold his insurance agency and began a three year employment contract with the buyer
* Buyer changed the name of the agency to the respondent's name
* 3 years later, the buyer renewed the applicant's employment in a new employment contract that included the respondent as a party
* Contract contained a restrictive covenant
* Buyer sold the agency to another buyer who also renewed the applicant's employment
* Employment contract with the second buyer also contains a restrictive covenant
* Applicant worked for the second buyer for a number of years and then went to work for a competitor after the contract with the second buyer ended
* Respondent sought to prevent the applicant from working for the competitor.

ANALYSIS:

* A restrictive covenant is a type of clause that may be included in an employment contract seeking to limit the ability of an employee to solicit the employer’s other employees or customers following the termination of the employment relationship
* A restrictive covenant may extend as far as to attempt to prohibit an employee from competing with the former employer for a certain period of time

RATIO:

* Decision reinforces the courts’ traditional approach to restrictive covenants
* Employers cannot expect a court to assist them by fixing any defects that might reside in such clauses
* Particular attention must be paid to crafting an unambiguous clause that contains reasonable direction regarding its geographic and temporal scope, as well as no more than a reasonable restriction on the type of activity that will be prohibited
* Where an employer is seeking to include a non-competition clause into an employment contract, they will also want to include a non-solicitation clause

# REMEDIES

**Remedy**: legal action available to innocent party when other party to K breaks contractual obligation owed.

* **Types**:, damages, specific performance or injunction, equitable damages

## B) DAMAGES

Damages arise from breach of primary term, usually monetary payments. Not all monetary payments = damages, monetary payments could be claimed in debt or for price of contractual good already passed under K.

**Nominal damages**: existing in name only

**I) Interests Protected: Expectation, Reliance & Restitution**

* **Expectation interest:** party expecting certain profits/sales from K can sue for damages in event of breach. Damages usually directed to protect this interest. As far as money can achieve it, put innocent party in position would’ve been if **K performed** (*Robinson v. Harman*). \*Fulfill gain\*

Calculating damages for unfulfilled expectations:

1. Difference between K price and market price
2. Difference in market value of what was delivered and market value of what ought to have been delivered

* **Reliance interest:** Put party in position would’ve been if **hadn’t entered K**. Party usually asking for monetary damages to compensate for wasted expenses (ie. money spent facilitating K or to undo losses suffered by virtue of defaulter’s breach which party wouldn’t have suffered in absence of K) \*Compensate for loss\*

🡪 reliance interest may be preferable method for calculating damages when difficult/impossible to assess expectation interest of innocent party (ie. future profits may be difficult/impossible to calculate), costs or losses may be more easy to determine.

🡪 money wasted must not be what would’ve been incurred anyway or money spent on something P could put to another use

* **Restitution Interest:** Prevents unjust enrichment by party who breached K. Damages based on restitution interest considers unfair gains or benefits that have accrued to D in course of his breach \* Prevents unfair gain\*

**Where expectation interest is difficult to calculate or speculative: Reliance Interest**

### *McRae v. Commonwealth disposal Commission* – RELIANCE INTEREST in lieu of EXPECTATION INTERST

**Facts**: D sold P wreck of oil tanker said to contain oil. P spent money trying to salvage tanker, found none. Claim for wasted expenses & lose profit.

Damages = difference in market value of what ought to have been delivered and what was delivered. Needs to have been tanker at location, no tanker delivered – can’t value non-existent thing. Expectation interest fails b/c impossible to prove.

Claim for lost profit rejected as too speculative, P has no starting point, can’t establish suffered any damage unless can show tanker delivered in performance of K would’ve had some value – can’t show this. BUT when K alleged is K that tanker was in particular place and breach assigned is that there was no tanker there, damages claimed measured by expenditure incurred on faith of promise that there was tanker there – now have starting point - reliance interest met.

**Ratio:** Reliance damages awarded when P unable to prove expectation interest. Where non-breaching party can’t meet burden of proof re. net profits may be entitled to recover damages, damages measured by reference to expenditure incurred and wasted in reliance on promise given. Burden then on D to establish expensive incurred would’ve occurred anyway or used in some other way (to reduce amount of reliance damages)

**Decision**: damages awarded to P on ground D breached implied undertaking that tanker was there.

Subject of K was provision of wrecked tanker that only indirectly led to profits. Distinguished from *Chaplin v. Hicks* re. chances of success. In *Chaplin*, very subject of K was giving direct chance to win. Distinction criticized, only point of bidding on tanker was chance to win.

Sunshine Vacation Villas v. Hudson Bay Co***.*** **– NOT BOTH RELIANCE & EXPECTATION INTEREST – ONLY ONE**

**Facts:** D grants licenses for P to operate in D’stores after D’s K with existing licensee terminated. P discovers D renews K with existing licensee. P sues for breach of K, want expectation interest - loss of capital/potential for earnings (position P would’ve been in if hadn’t entered K) and loss of profits (position P would’ve been if no breach)

Court decides expectation interest too speculative. P had to choose one of expectation or reliance interests. Normal measure of damages should be expectation interest but in this case, b/c timing of breach, too early to determine if profits were going to be made, any claim for lost profits too speculative. Court gave damages based on reliance interest, won’t grant reliance interest where granting interest would be to save innocent party from bad bargain.

**Decision**: Reliance interest only; loss of capital but not loss of profits

**Ratio:** Can’t recover for loss of capital AND loss of gross profit (reliance AND expectation interest) b/c they’re alternatives to each other. Wrong to make awards based on mix of both. P could elect to claim expenses but if D could show P would’ve incurred loss had it completed K, only nominal damages should be awarded.

**Where contract would have resulted in loss to innocent party: Bad bargain**

Bowlay Logging v. Domtar – **NO RELIANCE INTEREST, ONLY NOMINAL DAMAGE, BAD BARGAIN**

**Facts:** P contracted to cut/skid/load logs for D who was to haul logs. D breached of K, didn’t supply enough trucks. P spent more $ than was paid.

**Decision**: P gets nominal damage only.

If loss greater through breach that otherwise would’ve been, damages would be sensible to put P in position would’ve been without breach.

Usually law places P in place where would’ve been if breach hadn’t occurred. Court said losses suffered by P didn’t arise from breach, breach saved P from incurring further losses - reliance interest not available to P. No loss suffered from breach, losses incurred b/c K was bad bargain, won’t grant reliance interest to save P from bad bargain.

**Ratio**: Law of K compensates P for damages resulting from D’s breach BUT not damages from P making bad bargain where would’ve lost money even if K fulfilled - can’t put P in better position that if K performed, can’t reward P’s inefficiency. Can’t opt for reliance in place of expectation when expectation is provable (in this case, zero or –ve profits). Onus on D to prove none of P’s costs would’ve been recovered. Limits on claims for wasted expenditure.

### Attorney General v. Blake [2001]

In exceptional cases where the normal remedies of damages, specific performance and injunction are inadequate compensation for a breach of contract, the court can, if justice demands it, grant the discretionary remedy of requiring the defendant to account to the plaintiff for the benefits received from the breach of contract.

**II) Remoteness of Damages:**

P’s responsibility to establish entitlement to claim damages & establish amount of damages claimed.

**Remoteness**: law imposes limits on type/scope of damages party can claim. Loss may be rightly attributable to breach of D, but law may consider loss to be “too remote” to make D liable for damages.

**Causation**: must be connection b/c breach and damages claimed, chain of causation must not be broken. Factors that break chain of causation: intervening event, third party, P’s action.

### *Hadley v. Baxendale* – TEST FOR REMOTENESS

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

**General rule**: if loss flowing from breach too remote, can’t be recovered

**Test for Remoteness**: Damages should be such as 1) may fairly and reasonably be considered either arising naturally (usual course of things) from breach of K **OR** such as 2) may be reasonably be supposed to have been in contemplation of BOTH parties at time K made as probable result of breach of it. Special circumstances should be communicated to D at time K formed.

- **OBJECTIVE TEST for imputed knowledge**; **special circumstances require actual knowledge**

Special circumstances need to be known at time K entered b/c necessary to allow other party to assess whether wishes to take on risk of being responsible for consequence of breach in surrounding circumstances. If special circumstances not known by party breaking K, could only be liable for damages which normally would arise. Knowledge of details of special circumstances unnecessary, general nature only.

**Application**: D didn’t know P didn’t have extra shaft BUT P told clerk that mill was stopped. D didn’t think mill closure would be probable result of delivery delay.

Two branches of test differ in type of knowledge required of D in order for P to claim damages. Purpose of rule to limit claims for damages, about risk allocation – who’s in better position to measure and insure against risk. When entering K, should know potential damages.

**Ratio**: Key concept is predictability: if predictable consequence of breach, damages paid. **Consequences predictable when breaching party presumed to know OR because info that breaching party received from P**. Breach based on ought to have known (imputed - based on nature of K) or what D knew given info communicated at time of K – must be evidence of communication/actual knowledge about special circumstances.

**Decision**: new trial

### Victoria Laundry (Windsor) Ltd. v. Newman Industries – HADLEY REMOTENESS TEST EXPLAINED/REFINED

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

Three levels of claims in issue of remoteness:

1) Manufacturer: high level of knowledge, higher level of responsibility

2) Vendor: intermediate knowledge, intermediate responsibility

3) Carrier: limited knowledge, limited responsibility

Two types of knowledge possessed:

**Imputed knowledge**: knowledge of matters arising from “ordinary course of things.” P able to claim damages arising “naturally” from K (first branch of *Hadley* test). Everyone assumed to have imputed knowledge of ordinary circumstances whether they have or not.

**Actual knowledge**: Knowledge which D actually possesses – knowledge of special circumstances outside the ordinary course of things (second branch of *Hadley* test – more complicated). D needs to have actual knowledge of special circumstances at outset of K to enable him to decide whether or not to enter into K. Operation of 2nd rule makes damage from special circumstance recoverable.

**Ratio**: Only damages which are reasonably foreseeable as arising from breach are recoverable – depends on knowledge of parties. Not necessary to prove wrongdoer contemplated loss, enough if they could foresee loss likely to result: reasonable contemplation. Must have special knowledge of special circumstances **CONTD**

To determine what’s “reasonably supposed” and “probable result”, damages may be recovered if loss or factor leading to loss is “serious possibility” or “real danger”

P able to recover damages that would arise in ordinary course of business (loss of profits) but not for special circumstances not in normal course of contemplation unless D given actual knowledge.

### Koufos v. Czarnikow (The Heron) – REMOTENESS: criticizes VICTORIA LAUNDRY

**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?

Damages have to be more than foreseeable; must be sufficiently likely to make them recoverable – at time K formed – criticizes *Victoria Laundry*.

**Ratio**: For losses flowing naturally from breach or loss that should’ve been foreseeable, crucial question is whether on info available to D when K made, should D or reasonable person in D’s position have realized such loss was sufficiently likely to result from breach.

If party want to protect themselves against risk that appear unusual to other party, can direct other party’s attention to it before K made. Then, court wouldn’t need to consider in what circumstances other party will be held to have accepted responsibility in that event.

**Decision:** Loss of profit recoverable as damage; P wins.

Distinction in remoteness:

In **contract**, question whether on info available to D when K made, D should or reasonable man in his position would’ve realized that such loss was sufficiently likely to result from breach of K to make it proper to hold that loss flowed naturally from breach or that loss of that kind should’ve been within his contemplation.

In **tort**, imposes much wider liability. D liable for any type of damage which is reasonably foreseeable as liable to happen even in most unusual case, unless risk so small that reasonable man would feel justified neglecting it.

**III) Quantification of damages:**

P has responsibility to establish amount of damages lost as a result of D’s breach

**Damages for goods delivered which don’t meet K specifications** is: difference b/w market price of goods contracted for and price of goods actually delivered.

🡪 in this case, D’s responsibility to establish market price for goods delivered

**Difficult to quantify**: some Ks very **speculative** and others may involve **opportunities for winning a one-time benefit** (ie. lottery or pageant).

🡪 Court must consider what P’s chances of success were had K been performed

**More than one quantum of damages**: Court must consider fundamental reasons why damages are awarded in order to decide which figure is appropriate

### *Chaplin v.* Hicks – QUANTIFICATION OF DAMAGES: CHANCES OF SUCCESS

**Facts**: Competition for actresses, public would pick 12 who’d receive K’s. P one of 50 to be selected, didn’t respond to letter from D b/c she was away, returned too late. Taking away opportunity deprived P of something with monetary value. Breach of K by organizer of acting/beauty contest.

**Decision**: P awarded damages for loss of chance of selection.

Impossible to say P would’ve been one of 12 chosen - couldn’t have sold her chance b/c personal to her. **CONTD**

**Ratio**: Fact that damages can’t be proven with certainty, doesn’t relieve wrongdoer of necessity of paying damages for breach of K.

Distinguished from ***McRae v. Commonwealth****:* Chances of success. In *Chaplin*, subject of K was giving direct chance to win. In *McRae*, subject of K was provision of wrecked tanker that indirectly led to chance of profit. Distinction criticized, only point of bidding on tanker was chance to win.

### *Nu-West Homes Ltd. v. Thunderbird Petroleums Ltd.* – QUANTIFICATION; FIXING DEFECTS, COSTS MUST BE REASONABLE

**Facts:** R contracted to build house for A in accordance with plans and specifications. House partly completed, serious problems with construction become evident; 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 because some demolition unnecessary.

**Decision**: Defects weren’t trivial. A decided against completing other major reconstruction that could’ve been completed, thus acted reasonably.

**Ratio**: Where builder in breach of obligation under K, owner entitled to damages measured by cost of fixing defects and omissions (general rule) unless cost unreasonably high in relation to value to be gained by expenditure. Law satisfied if party placed in difficult situation by breach has acted reasonably in adopting remedial measures – won’t be held disentitled to recover cost of measures merely b/c breaching party can show alternative, less burdensome/costly measures could’ve been taken.

If P acts reasonably in adoption of alternative measures, will get cost of performance. Restriction on rule which attempts to put P in position where he has building contracted for. If cost of rectifying defect or omission is large, courts won’t slavishly force completion of K. Aggrieved party expected to act reasonably but not perfectly.

**IV) Aggravated Damages or Mental Distress Damages**

Damages awarded for P’s injured feelings/emotions arising from breach of K by D.

Calculating aggravated/mental distress damages considers purposes of K; must entail opposite emotion to that which arose as result of breach

### *Vorvis v. ICBC* (1989) – AGGRAVATED & PUNITIVE DAMAGE REQUIREMENTS – IAW – DISMISSAL

**Facts:** P lawyer fired w/o cause or reasonable notice. Two years before being fired, P harassed by boss which caused medical stress. Offered 8 months severance if accepted cause but refused, got one month. Claimed breach of K and emotional consequences.

**McIntyre**: Aggravated damages may be awarded in WD cases where acts complained of are IAW, takes into account intangible injuries.

Aggravated Damages Test:

1) Precedents: precedents against recovery don’t necessarily defeat claim but precedents in favour of recovery likely looked at favourably

2) Conduct causing intangible injury can’t precede breach and must aggravate breach

3) Conduct causing intangible injury must be IAW, could bring independent action and receive legal remedy (ie. torts)

🡪 Vorvis fails all elements: aggravated conduct (harassment) was BEFORE dismissal; not IAW

Punitive damages only awarded for conduct of nature deserving of punishment b/c of its harsh, vindictive, reprehensible and malicious nature (must be IAW but needn’t be independent tort, can be contractual wrong) 🡪 either party had right to terminate employment K

**Wilson (Dissenting):** Remoteness test in *Hadley*: Whether D should reasonably have anticipated; NO IAW requirement for AD OR PD

**RATIO**: Mental distress damages: USE HADLEY (later applied in Fidler)

**Decision**: No AD or PD for P; only ordinary compensation.

### *Fidler v. Sun Life Assurance (2006)* – TEST FOR MENTAL DISTRESS DAMAGE (USED *HADLEY*, not *VORVIS* AGGRAVATED DAMAGES TEST)

**Facts:** P denied disability benefits for which she was entitled. P sued for mental distress & punitive damages

**Issue:** Can P recover damages for mental distress? punitive damages?

**Decision**: P can recover damages, mental distress reasonably within contemplation of parties. Can’t recover punitive damages, good faith found.

SCC: MDD don’t differ from other K damage; should all be recoverable for damages parties should’ve anticipated at time of K. Doesn’t mean mental distress damage always available: normally not in commercial K’s; annoyance & frustration don’t count.

**\*\* (see notes below for approach from Ireh) Mental damages should be situated within general *Hadley v. Baxendale* principle: loss should’ve been in reasonable contemplation of parties due to imputed OR actual knowledge.**

*Hadley v. Baxendale* Test

1) Whether damages claimed naturally arise from nature of contract (Imputed knowledge (test 1)) or

2) Whether D was aware that damages claimed would arise given his/her prior knowledge of special circumstances/contracts entered into by P (Actual knowledge (test 2)).

**If fail, proceed to *Whiten’s* Punitive Damages Test; if pass, THEN proceed to:**

*Fidler* Test for MDD:

1) object of K was to secure psychological benefit, brings mental distress upon breach within reasonable contemplation of parties

2) degree of mental suffering caused by breach was of degree sufficient to warrant compensation

Promise in relation to state of mind doesn’t have to be “very essence” of bargain for mental distress damages to be reasonable - just has to be apart of bargain. Mental distress damages unusual in commercial K b/c likelihood of breach of K causing mental distress not ordinarily within reasonable contemplation of parties.

**Ratio**: True aggravated damages arise out of aggravating circumstances and are not awarded under reasonably foreseeability principles of *Hadley v. Baxendale*. Punitive damages awarded to punish for misconduct that departs from ordinary standards of decency (malicious/oppressive conduct) - claim for punitive damages must be independently actionable (as claim in tort or independent contractual obligation to act in good faith). Punitive damages should be resorted to only in exceptional cases.

**Punitive Damages:** claim D deserves to be punished b/c of conduct or nature of breach. Punitive damages, usually a fine, go to P when awarded - only resorted to in exceptional cases.

*Hill v. Church of Scientology of Toronto, Vorvis v. ICBC & Fidler* common thread: To estimate **PD, impugned conduct must depart from ordinary standards of decency ie. malicious, oppressive, offensive, high handed to courts sense of decency**.

### Whiten v. Pilot Insurance Company – PUNITIVE DAMAGES REQUIREMENTS

**Facts:** P’s house burns down, D trying to force them into settlement accusing P of arson but had no proof.

**Issue:** Can P get punitive damages?

**Decision:** P awarded punitive damages for breach of contractual duty of good faith (IAW) in of breach of insurance K (breach of duty to pay loss).

**Ratio**: Punitive damages awarded for exceptional cases for malicious, oppressive and high-handed misconduct that offends court’s sense of decency. Test from *Vorvis* requires IAW but doesn’t need to be an independent TORT, can be breach of contractual duty. **Purpose**: retribution (punish), deterrence, denunciation (send message)

Awards should be **reasonable** (rational test), **rational** (no higher than to serve purpose) and **proportional** (D’s blameworthiness, P’s vulnerability and uniqueness of interest harmed by D’s misconduct)

1) Rationality test: misconduct so outrageous that PD rationally required to act as deterrent?

2) Technical test: a) IAW and b) D’s conduct being high handed, malicious, arbitrary misconduct markedly different from normal behaviours.

Distinguished from *Vorvis* & *Wallace* b/c awards punitive damage & not in employment context.

**Separate actionable wrong (IAW)** could be:

1. **CONTRACT**: breach of K to act in good faith. Duty to act in good faith is independent of breach of some other obligation in breach of K.
2. **TORT**: Contractual IAW as breach of implied term to act in good faith doesn’t bar P’s rights to bring IAW action in tort. P has 2 choices i) bring separate action still on contract or ii) bring another action under tort
3. **FIDUCIARY OBLIGAITION**: P could bring action based on breach of fiduciary obligation. Fiduciary obligation is duty to act in good faith.

### *Hill v. Church of Scientology of Toronto* – PUNITIVE DAMAGES: MALICIOUS, OPRESSIVE, HIGH-HANDED, OFFENSIVE

**Facts:** See Torts notes under “defamation”. P is Crown launching lawsuit against D after contempt proceeding where allegations against Hill found untrue and w/o foundation.

**Ratio**: To attract PD, impugned conduct must depart markedly from ordinary standards of decency, situations described as malicious, oppressive, highhanded, offensive to court’s sense of decency.

**V) Time for measuring damages**:

**General rule**: right to damages arises upon breach of K; date when breach occurred usually used in calculating damages.

* Not absolute rule b/c can result in injustice to P. SO, court may decide appropriate date - may be day of hearing in court.

**Other guidelines for assessing time for measuring damages:**

•Where K involves ongoing/continuous obligations, damages to be assessed as at various times when performance was due

•In some jurisdictions, court won’t use date of breach when it’d be unreasonable to expect P to have known of breach at that date.

•For Anticipatory Breach, party can decide to make early assessment of damages, in which case damages accessed at date innocent party accepted breach (*Hochster v. De La Tour).*

•Damages may be calculated based on contract price

•If currency conversion issue, accepted conversion rate based on operative rate on day of payment.

### *Semelhago v. Paramadevan* - TIME FOR DAMAGE ASSESSMENT – UNIQUE GOODS, SPECIFIC PERFORMANCE

**Facts**: P was going to buy house, takes mortgage on existing house to finance new one. D breaches; both P’s house and land in question increased in value. P sues for specific performance or damages in lieu, asks for damages at date of trial instead of date of breach.

**Decision**: P awarded damages based on trial date instead of breach date, property unique, value may have changed, requires specific performance.

**General rule for K of sale**: damages to be assessed as of date of breach BUT rule not absolute, especially when resulting in injustice to party.

🡪 Rationale for general rule: if purchaser compensated based on goods value at date of breach, can purchase equal goods; placed in same financial situation as if K kept.

Where **good** to be purchased is **unique** (CL says all property unique) **purchaser generally entitled to specific performance.** **Inappropriate to insist on applying date of breach as assessment date** when purchaser of unique asset has legitimate claim to SP and elects to take damages instead, **value of asset may have changed**.

SP claim also seen as reviving K to extent that D who’s failed to perform can avoid breach if, at any time up to date of judgment, performance is tendered. In this way, claim for SP has effect of postponing date of breach. Date for award in such case ought to be date of judgment, but for practical purposes will usually be assessed as of date of trial, as its usually not possible to predict date of judgment when evidence is given.

**Ratio**: Specific performance shouldn’t be granted w/o evidence that good is unique to extent that substitution wouldn’t be readily available - shifts onus to P to prove SP should be available (specific performance given in this case b/c all property is unique).

Damages calculated at date of trial rather than date of breach, possibility that P gains more than what they lose in breach BUT truer/closer substitute for specific performance.

**VII) Liquidated damages:**

**Liquidated damages:** Parties may decide at outset to fix damages that will apply in event of breach; part of secondary obligations. Liquidated damages expressly agreed upon; provisions on liquidated damages may address all claims or specific claims to damages.

Liquidated damages vs. Penalty clause:

Damages compensate for losses, meant to place parties in position they’d been in had breach not occurred (common law principle) Thus:

1. Liquidated damages can’t be stipulated in way that places P in better position that he would ordinarily have been.
2. Must not serve as threat to defaulting party

🡪 where LD places P in better position or constitutes threat to D, interpreted as **penalty**

### Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. – LIQUIDATED DAMAGES vs. PENALTIES TEST

**Facts**: P, tire manufacturing company, made K with Dew, trade purchaser, for tires at discounted price on condition that they wouldn’t resell tires at less than listed price and that any reseller who wanted to buy them from Dew had to agree not to sell at lower price either. Dew sold tires to D at listed price, made Selfridge agree not to sell at a lower price either. BUT, D sold tires below promised price. Dunlop sued D for an injunction from selling tires and damages.

Tests for differentiating penalties from liquidated damages:

1) **PENALTY**: if sum stipulated in K extravagant & unconscionable compared with greatest loss that could conceivably be proved to result from breach

2) **PENALTY** presumption when “single lump sum made via compensation for occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage”

Regardless of above rules, where stipulated sum is genuine pre-estimate of damages – especially where breach of K is of nature that makes precise quantification impossible, sum agreed upon not construed as a penalty. It could be case that such pres-estimation was simply intention of parties at outset of K.

**Ratio:** Provision will be liquidated damage if contains nothing unreasonable, unconscionable or extravagant. When liquidated damages stipulated in way that places P in better position that he would ordinarily have been or serves as threat to defaulting party, interpreted as PENALTY.

**Implication where liquidated damages clause is found to be penalty:**

Court won’t enforce liquidated damages clause against defaulting party where clause is found to be a penalty. Aggrieved party will then be entitled to damages based on actual losses incurred

Determining whether clause is LD or P, court seeks to know who insisted clause should be put in K – insister usually stronger party. Court asks who’s disadvantaged by clause –usually weaker. Even where weaker party breaks K terms, permitted to ask court to disregard penalty clause BUT stronger party who introduced penalty can’t ask court not to enforce penalty clause

### *J.G. Collins Insurance Agencies Ltd. v. Elsley* – LIQUIDATED DAMAGES & PENALTIES; LOSS GREATER THAN LD AMOUNT

**Facts:** P buys insurance business from D, non-competition clause which stipulates if breach, D pay $1000 LD. Breach occurred; P claimed $1000 not enforceable as it was penalty clause not LD b/c fixed sum for breach of clause that could have varying degrees of seriousness in terms of consequences of breach. P claimed losses > $1000.

**Decision**: D wins (thought to be weaker party). If damages greater than LD amount, LD may act as ceiling.

**Ratio**: Power to strike down penalty clause is blatant interference w/ freedom of K, only for providing relief against oppression for party having to pay stipulated sum – if no oppression, no penalty clause struck down. Penalty clause should function as a limitation on recoverable damages. If actual loss turns out to exceed penalty, party should be allowed to recover only agreed sum.

Stronger party who introduced penalty can’t ask court not to enforce penalty clause.

Where sum determined to be LD, P recovers sum in K regardless of actual losses (too low, too bad). Case criticized b/c not entirely clear D was in fact weaker party in need of protection of equitable doctrine.

**Deposits and Forfeiture:**

**Deposit**: money paid as part payment towards obligation in K. If party paying deposit fails to complete payment, party forfeits deposit as remedy to other party - parties can make provisions for this in clause in K at start of negotiations.

**Relief from forfeiture**: can grant relief against forfeiture to party who paid deposit; must argue sum forfeited is a penalty.

### Stockloser v. Johnson – FORFEITURE CLAUSE

**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 installments returned.

**Ratio**: **NO** forfeiture clause, money paid as party payment and buyer defaults, once seller rescinds K or treats as end, buyer entitled to recover money (but seller can still claim damages). **YES** forfeiture clause or money expressly paid as deposit, party may have remedy in equity but 2 things necessary:

1) forfeiture must be penal in nature

2) must be unconscionable for seller to retain money

**Decision**: No remedy for P, finds clause penal in nature BUT not unconscionable (buyer had use of machinery)

**Other monetary claims:**

Different from damages, include: debt, monetary compensation for money paid or property transferred and equitable damages.

**Debt**: claim for recovery of debt is claim for a contract sum. In K for sale of goods, where one party has delivered goods, it’s called an “action for price.” Debt itself is primary obligation, not subject to principle of mitigation.

**Recovery of amounts paid where failure of consideration, where property has been transferred or service has been rendered**: Applicant sues for compensation for lack of consideration OR want money for goods/services delivered

Where there has been **partial performance** by one party then K is terminated, party who has partially performed K can make claim for **quantum merit** (ask for payment based on what’s been done or make a claim in restitution)

## C) EQUITABLE REMEDIES

Designed to prevent breach of primary obligations. Two primary types:

* **Injunction**: order from court to do OR not to do something
* **Specific performance**: court order issued for party to perform obligations in K (flaw: no mutual trust, no real relationship b/w parties anymore)

Factors Courts consider before granting equitable remedies:

1. What does common law say about situation?
2. Will **damages** – common law remedy – be **adequate**?

- John E. Dodge Holdings v. 805062 & Sky Petroleum v. VIP Petroleum

1. **Conduct of P**: he who comes to equity must come with **clean hands**
2. P must act in **timely manner**
3. **Hardship to the D or third parties**
4. Extended obligations
5. Obligations of personal service

- Warner Brothers v. Nelson

1. Mutuality of remedy

### *John E. Dodge Holdings v. 805062 Ontario* – DAMAGES ADEQUATE? SPECIFIC PERFORMANCE, PROPERTY

**Facts:** Purchaser of land for motel to be erected near amusement park.

**Issue**: Specific performance to be granted?

**Decision**: SP granted, property is unique.

**Ratio**: SP available for goods where products unique but K for land NOT automatically rendered specific performance, particularly if land to be used as investment or for early resale.

## Equitable damages:

### *Warner Bros. Pictures Inc. v. Nelson* – INJUNCTION, OBLIGATIONS OF PERSONAL SERVICE (OLD CASE – CRITICIZED)

**Facts:** D breached K to perform solely and excluslively for P. P sought injunction against D to prevent her from breaching contractual agreement not to do any entertainment-related work for other parties without P’s consent.

**Issue**: Negative injunction granted?

**Decision**: Negative injunction granted. Usually court won’t enforce covenant for personal service. If granting injunction has same effect of forcing personal service, usually won’t grant BUT court justifies this injunction.

**Ratio**: Award of damages not appropriate remedy since couldn’t reasonably and adequately compensate D’s “special, unique, extraordinary and intellectual” services - no adequate damages available.

**Justification**: injunction reasonable (only 3 years); difficult to estimate damages P will suffer by D’s breach, damages wouldn’t adequately compensate for D’s breach.

If granting injunction doesn’t amount to SP, will grant injunction (court thought injunction wouldn’t amount to SP, although gave actress little choice but to perform). May be possible to get around prohibition of literal enforcement on employment contracts with grant of injunction “not to work for someone else” if it can be justified.

Effect of principle is to **confine remedies of SP and injunction** in practice to obligations of **simple transfer of property, possession or both where property is special/unique** in some way or to **achievement of specific result that isn’t a personal service**.

### Zipper Transportation v. Korstrom (1997)

Applying the test as set out in *Elsley* v. *J. G. Collins* the court held that the agreement was ***reasonable*** and that it ***would not be contrary to public interest*** to enforce the injunction.

### Zipper Transportation v. Korstrom (1998)

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 damages 􏰀 So let Korstrom keep the “stolen client” (Piston ring) until the result of the trial is known.