**Silvana Lovera**

**Contracts CAN**

**CHAPTER 2 : FORMATION OF THE AGREEMENT: OFFER AND ACCEPTANCE**

**Invitation to treat**:  
• A statement of willingness to entertain an offer; invitation to others to make an offer; terms can still be determined; often a prelude to a K.

**OFFER AND INVITATION TO TREAT**

DETERMINING IF OFFER OR INVITATION TO TREAT

* If all the essential details of the eventual contract are clear or can be worked out from the communication that has been made 🡪Offer
* If treating communication as an offer in a unilateral contract could lead to absurdity🡪it’s an invitation to treat
  + EXCEPTION --The offeror may take the risk of making a unilateral offer that could be accepted by many people, this will be determined by the plain reading of the offer ***Carlill***
* Standard of a Reasonable Person/public: how an ordinary person would understand a particular situations? Plain reading of the offer ***Carlill and Goldthorpe***
* Actions of both parties ***Canadian Dyers***
* Language: used to communicate to determine intent ***Carlill, Goldthorpe, Canadian Dyers***
* Normally a price quotation is an invitation to treat but Circumstances/ context may reveal an intention to make an offer(: e.g., may look at previous dealings btw the parties, common business conduct etc). ***Canadian Dyers***
* Display of Goods is an invitation to treat (***Pharmaceutical v. Boots***)
* Giving a mere price quote or placing goods on shelf for sale or publishing advertisement is not an offer but an invitation to treat: ***Pharmaceutical Society v. Boots***
* Advertisement is usually an invitation to treat not an offer ***Pharmaceutical***
  + exceptions would be ***Goldthorpe v Loga, n Caril*** *(court looked to how reasonable person would read the ad “guaranteed” “we promise”)*
* Auction: an invitation that invites bidders to make an offer, then auctioneer can choose to accept.***Harvela***
* Invitation for Tenders is not just an invitation to treat but is an offer to follow through the rules and procedures outlined and creates Contract A  ***MJB Ron Engineering***
* Intent and circumstances distinguish and offer from an invitation to treat ***Pharmaceutical society***
* Plain reading of ad determines if off or ITT ***Carlill Goldthorpe***
* Courts can infer terms of contr from previous dealings ***Goldthorpe***
* **An acceptance for a call for tenders** creates a binding unilateral contract between the person making the tender and the one calling for them (contract A). SIGNIFICANT PART OF RON ENGINEERING is the contract A contract B analysis...it breaks the process into two steps...ppl should be careful in invitation to bid because the terms they set out can be interpreted as an offer to contract. ***Ron Engineering***
* Unless explicitly treated, its presumed that one of the terms of the invitation to tender is compliance. You look at the invitation and its plain meaning. ***MJB***
* The obligation under contract A ends once the contract B is formed with one of the tendering parties ***Double N Earthmovers***

**Tenders**

* + - **Terms of Contract A** (**Implied**)
      * Irrevocability of bid (***Ron***)
      * Only compliant bids will be considered (***MJB***)
      * Owner has an obligation to treat all bids fairly and equally (***Martel Buildings***)
      * Owner has qualified obligation to accept the lowest bid (***Ron***)
        + Degree of obligation controlled by terms and conditions
      * Obligation of both parties to enter into a contract (Contract B) upon the acceptance of the tender (***Ron***)
      * **Exception:**
        + **Privilege Clause *(MJB)***

No obligation to award contract at all, or to accept lowest bid

Discretion not to award lowest bid is a discretion to take a more nuanced view of cost (ex. time, exp)

Clause cannot override the obligation that you will only consider compliant bids – **implied term**

**COMMUNICATION OF OFFER**

**General rule:** An offer must be explicitly communicated in order to be valid

* Offer can only be accepted by person to whom its made
* An advertisement can be an offer for a unilateral contract, but only those who fulfill the conditions ***Carlill***
* The maker of a general offer has a responsibility to limit the offer if it doesnt wish to make the offer to the whole world ***Carlill***
* Knowledge of the offer is essential for acceptance, motive for accepting the offer is not important ***Williams v Cowardine***
* Knowledge of an offer must be present at the time of acceptance, for the contract to be formed.The acceptor must act in faith or reliance of the offer, so that there can be a **meeting of the minds**. ***R v. Clark***

**ACCEPTANCE**

**GENERAL**

**What constitutes Acceptance**

* **Acceptance must be communicated**
* EXCEPTIONS:
  + - Unilateral Contracts—performance = acceptance and may exhaust what the acceptor has to do
    - Where offeror explicitly waives the requirement

**Acceptance and Counter Offer**

* When an offer is rejected, it is ended and cannot be afterwards accepted unless offeror consents to it. ***Livingston***
* A counter-offer is a rejection of the original offer, a mere inquiry is not *.****Livingston***
* If an offeror replies to the rejection, the reply “cannot reduce price” may amount to a renewal of the offer. The answer is dependant upon considering all surrounding circumstances**.**  ***Livingston***

**Battle of Forms**

* Denning J: in most **situations, it is the last shot that will conclude contract** (as counter offer kills the offer and K is based on counter offer), but sometime first shot will conclude it; but if terms conflict, the court should be free to apply the terms as they see fit for the contract to survive. Court has discretion to choose what to do. ***Butler Machine Tools***
* The point at which one party doesn’t object is where the court will say that the party has given consent. Party doesn’t have to sign off, can just act upon it (“I didn’t sign” is no defence if the document has been acted on) ***Butler Machine Tools, St John Tugboat***
* Court will look at contract as a whole to draw conclusions
* Two possibilities:
  + Contract can be concluded by harmonious synthesis of all terms,
  + or if the material points are not agreed upon and the differences are fundamentally irreconcilable so you cant produce a harmonious result🡪Contract is NOT CONCLUDED ***Butler Machine Tools***

**COMMUNICATION OF ACCEPTANCE**

\*\*CASE SHOWS THAT NOT ALL GENERAL RULES ARE UNIVERSAL...THERE ARE EXCEPTIONS\*\*\*

**General need for Communication**

* Communication is necessary to determine meeting of minds and mode of acceptance is Determined by offeror
* K is concluded and acceptance is valid when it is communicated to the offeror. ***Manchester***
* EXCEPTION: Acceptance for an offer of a unilateral contract does not need to be communicated to the offeror ***Carlill v Carbolic***
* Silence Cannot constitute acceptance. ***Felthouse v Bindley***
* offeror can stipulate particular way that terms must be accepted, then contract is formed as soon as offeree does the act that offeror stipulates, whether offeror knows or not, unless notice of acceptance by action is required ***Manchester***
* offeror can waive compliance with method of acceptance as long as it doesnt impose on offeree
* even where offeror has said what method of acceptance to use, but hasn’t said its the only way, an acceptance communicated in a diff way thats not less advantageous can be valid ***Manchester***

**Implied Communication of Acceptance**

* In some circumstances, conduct unaccompanied by written or verbal undertaking can= acceptance. Courts look to the circumstances ***St Johns Tugboat***
* If both parties behave like contract made, might still be binding ***ST Johns Tugboat***

**Communications by post**

* “**Postal Acceptance Rule**”: when acceptance sent by means of post office, communication of acceptance occurs when paper containing acceptance is put in hands of post office. The post office is the agent between the two parties ***Household Fire v. Grant***
* Applies where the parties have conducted themselves to demonstrate that they accept the post office to act as their agent.
* Even if letter of acceptance is lost or not received; it will still be treated as valid and binding
* Examples of how you can make the post office your agent
  + Send an offer by mail
  + Expressly stating in the offer that an acceptance by post is ok.

**Inapplicability of Postal Acceptance Rule**

* Will not apply if offeror requires different means of communication, for example or if he requires “actual” notice ***Holwell Securities***
* Postal Acceptance Rule won’t apply in 2 situations: **1** **where** **offeror says acceptance must reach offeror** **2 where would produce inconvenience and absurdity** ***Holwell Securities:***

**Instantaneous Communication/Recipient Rule**

* Contract is formed **when and where** the Acceptance is Received ***Brinkibon ltd(****acceptance received in Vienna, so K made in Vienna)*
* Generally, as long as the message of acceptance reaches the machinery in the offerors control it will have said to be communicated ***Brinkibon ltd***
* Suggested maybe place of acceptance should be where offeror expected to be located [avoid issues if trips]

**Waiving Communication of Acceptance**

* Can offeror waive need to know of acceptance if knowledge of acceptance for his benefit?
  + Yes in the case of unilateral contract ***Carlill***
* But problematic. Offeror can’t impose negative duty on offeree ***Felthouse*** (offeror said by offeree being silent, he would expect that horse was his)

**ELECTRONIC CONTRACT FORMATION AND RELATED PROBLEMS**

**Shrinkwrap (license/terms not available to buyer upon purchase)**

* Shrinkwrap terms are enforceable unless their terms are objectionable on grounds that apply to contracts in general. Buyers of goods who don’t want to comply with the terms on the box can return the boxes, but if they don’t they imply that they have accepted the terms ***ProCD***

**Contracts on Multiple Pages**

* Scrolling down a document is analogous to flipping pages (not fine print). Users have the responsibility to read all the terms and when they click accept create a valid contract. ***Rudder v Microsoft***

**TERMINATION OF AN OFFER**

**REVOCATION**

An offer can be terminated by the offeror if:

* The offeror revokes the offer before acceptance
* The offeror dies
* The offeror goes bankrupt

An offer can be terminated by the offeree if:

* The offeree accepts
* The offeree rejects
* The offeree counter offers

An offer can also be terminated by:

* Lapse of time- a reasonable amount of time-
* The conditions of the contract. Something that the contract was pending on that was outside of their offeror’s control.

General Rules:

* An open offer can be revoked any time before offer is accepted. The revocation of an offer takes effect when it is communicated to offeree: ***Byrne v. Van Tienhoven***
* Mailbox rule does not apply to revocation of an offer because nobody can ever accept without thinking it might have been revoked (its unfair) ***Byrne v. Van Tienhoven***
* Communication of revocation can come indirectly (through a third party) or directly: ***Dickinson v. Dodds***
* The selling of a parcel of land to revoke the offer is analogous to if the offeror dies ***Dickinson v. Dodds***
* A promise to hold offer open is not binding unless there is consideration or a deed. Equity cannot be applied once the third party has acquired rights ***Dickinson v. Dodds***

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**UNILATERAL CONTRACTS**

**General Rule:**  Offer can be revoked up to any time before full performance/acceptance ***Carlill Carbolic***

**In general, the above is true, HOWEVER** when the offer knows that the acceptor has begun performing actions and intendes to complete them, so long as the acceptor continues with the performance required and does not cease to perform**.**: ***Errington v. Errington***

* Note in this case the court made a decision based on equity

To avoid problem of offer being revoked after performance started, **court says it should try to interpret contractual situations as bilateral** ***Dawson Helicopter***

**There are implied terms in a contract that an offeror will not prevent a party from performing their acceptance. *Errington v. Errington, Dawson Helicopter***

Court will try to find that there is a contract if possible. Will use all the means parties had in communication

**If they intended to** **make the contract we will do it**. ***Dawson Helicopter***

**Condition Precedent** is a promissory condition that triggers the existence of a contract and is out of the parties control ***Dawson Helicopter***

**Condition Subsequent:**  Terminates the contract (contract dies subsequent to something else happening)

* NOTE:
  + Contracts don’t say when something is subsequent or precedent…they focus on the “subject to”…can be the subsequent

**REJECTING AND COUNTER OFFER**

***\** COUNTER OFFER IS REJECTION OF ORIGINAL OFFER( look to situation where counter offer is made and other party responds with slightly different terms)—IT BECOMES NEW OFFER, BUT ORIGINAL OFFER CAN BE RENEWED *Livingston v. Evans***

**LAPSE OF TIME**

**In General**

* Court will determine if offer has elapsed based on a reasonable time ***Barrick v Clark***
* how does court determine? Looks to Context ***Barrick v Clark*** 
  + Looks at normal procedure in that kind of sale and look at the nature and character of subject matter, looks at language
  + Court looks to language, can see if there was urgency in concluding the contract, if surrounding circumstances said the same thing…(negated the fact that the nature of the matter didn’t seem to be urgent)

**Lapse of time as implied rejection**

* 3ways to approach: ***Manchester Diocesan Council***
  + 1 if offer not accepted within reasonable time 🡪treated as withdrawn
  + 2 if offeree does not accept within reasonable time🡪 treated as refused offer
* Context and evidence of intentions of parties are used by court to determine reasonable time (past relationships and practices/industry customs, facts of case, statute) ***Manchester Diocesan Council***

**CERTAINTY OF TERMS**

**INCOMPLETE TERMS**

GENERAL RULE

* An agreement in which a **critical par**t of the contract is **left to be undetermined** cannot be a valid an enforceable contract ***May and Butcher v R***
* Sale of Goods Act only applies when Contract is silent on Price ***May and Butcher v R***
* Court will try to save contract if the terms are not too vague ***Hillas v Arcos APPROACH MOR COMMON***

* Court will interpret broadly and fairly to imply that there is a contract where INTENTION is clear but missing some detail (Court looks to intention of parties and nature of business**) *Hillas v Arcos****[note this was an instalment contract: contract done over time]*
* **Where parties’ conduct demonstrate that they believe a contract has been formed**, an enforceable contract can be found even though the contract states that the price will be agreed upon from time to time. **Especially since parties acted as if there was a contract for 3 years;** **it was partially performed** ***Foley v Classic Coaches***

**VAGUENESS**

* When faced with vagueness in a contract, court must look to the context to determine the intention of the parties and look to the reasonable interpretation of words in the document to find meaning. ***R v CAE***
* Courts should make every effort to find meaning in words used by parties ***R v CAE***
* In a commercial context there is a presumption of intention to create legal obligations that the person claiming the legal obligations don’t exist has the onus to prove ***R v CAE***

**AGREEMENTS TO NEGOTIATE, GOOD FAITH, LETTERS OF INTENT**

* Parties who agree to agree on something in future have not created reciprocal obligations, not made contract
  + Because it could impose on people terms/risks they don’t accept
* Agreement to do transaction on **unspecified** terms **DIFFERENT** than agreement to **negotiate** to arrive at terms
  + Unspecified: subj of agreement = transaction
  + Negotiate: subj of agreement=process which transaction to b concluded
* Agreement to Negotiate can be enforced by the courts when combined with a benchmark for negotiations (ie when there is no machinery but there is a formula, the court can enforce.) *Empress( price not set but binding because benchmark given, agreed to neg in good faith and that market rate would not be unreasonable)*
* CL RULE: no Agreement to negotiate in good faith, but there may be a distinction when parties have a prior legal relationship *Empress( price not set but binding because benchmark given, agreed to neg in good faith and that market rate would not be unreasonable)*
* If there is no formula or objective benchmark to determine the term, then the court will not enforce a promise to negotiate in good faith. *Mannpar(different than empress cause no benchmark)*
* **Officious by-stander test:** If when parties were drawing up a contract a reasonable bystander were to come by, could he infer parties were intending to include something in the contract. ***Mannpar***
* A bare agreement to **negotiate in good faith is not sufficient** to enforce a contract because it is too subjective to be legally binding. ***Wellington***
* If a contract specifies a **clear mechanism for parties to follow in negotiation**, then the process could be enforceable ***Wellington***

**ANTICIPATION OF FORMALIZATION**

**General**

* Preliminary agreement (letters of intent) play an important role (allow planning, address complex issue in step-by step process), but may bind when one party doesn’t want it, or not bind when they parties hope it will
* ISSUE: whether parties intended to be bound by terms, if YES, whether terms are certain enough to give rise to a contract
* Contract to make a contract is not a contract at all ***Bawitko v Kernels***
* Initial agreement is only enforceable all important provisions that will be in the formal document are settled and parties intend that their agreement will be binding.  ***Bawitko v Kernels***
* Not a valid contract when parties agree to defer legal obligations until formal contract executed***Bawitko v Kernels***

**CH 9 INTENTION TO CREATE OBLIGATION**

**INTRODUCTION**

* **There are presumptions around intention to create legal obligations**
* **Family relations**: closely associated parties are presumed **NOT to intend legal relations** unless evidence to contrary ***Balfour, Jones v. Padattavan***
  + may be rebuttable if: detrimental reliance ***Errington,*** the parties are not close, or they expressly state otherwise
* **Business context** courts **presume** that parties **DO** have **an intention to contract**
  + but parties can expressly indicate they don’t want to be legally binding ***Rose and Frank***
  + **comfort letters** are specifically created not to be legally binding (can be inferred from the business practice) ***TD Bank***

**6) CONSIDERATION**

* Promise is not enforceable without consideration

3 Ways to Enforce a Promise:

1. Through a ***Seal*** – the best way to enforce a promise in a K
2. Through ***Consideration*** – you only need to worry about consideration if there is no seal
3. Through ***Estoppel*** – only need to worry about it in the absence of a seal and consideration

**4 Principles for Consideration**

**1)Consideration Must be Sufficient**

* Can be a promise to do something as well as a promise not to do something (**Forebearance** ***Arkin)***
* Must have economic or legal value; but need not be adequate ***Thomas v Thomas***
* Note: Motive does not equal consideration ***Thomas v Thomas***

**2)Consideration Must Move from the Promisee *Thomas v Thomas, Dalhousie College***

* Can be to the **benefit** of the **promisor** or a **third party**, --OR--Can be to the **detriment** of the **promisee** (or both) ***Dalhousie College***
* **Must be given in reliance of the promisor’s promise and with the intention to create a legally binding K. *Dalhousie College (****man promised money, school did renos but would’ve done them anyways...renos not done in reliance of the money...not consideration****)***
* Promises are enforceable where there is consideration, which **must arise from the parties to the contract themselves** and must confer some tangible benefit to them. Reliance can **only establish consideration where there is some direct, personal interest** on the part of the promissor. ***Dalhousie College***

**3) Consideration has to be fresh, NOT PAST CONSIDERATION**

* it has to be given in exchange for that promise, not for any other purpose ***Eastwood v Kenyan***
* **EXCEPTION**: **Past consideration will be good consideration** when done at **promisor’s request** and **understood** **to be remunerated** by a payment in exchange for some other benefit ***Lampleigh(****told guy to go fetch pardon, paid him upon his return...it was obvious he would renumerate)*

**4) In the absence of Duress or Fraud**

* **Test for Economic Duress [SEE BELOW FOR PAO ON]**
* Problem of exploitation resolved through Economic duress ***Nav Canada***
* TEST FOR ECONOMIC DURRESS (test comes from ***Pao On)***
  + **Victim entered into contract against will**
  + **Not any alternative course available to innocent party (simply had to do it)**
  + **Not any independent advice provided to innocent party**
  + **Innocent party protested at time of coercion**
  + **Innocent party tried to avoid making contract/were coerced**

**FORBEARANCE**

* **Forbearance**= a promise not to do something
* Forbearance to sue is good consideration, and money paid in exchange for a promise not to sue is a valid and enforceable legal contract.
* **The promise is not binding if**:i) The forbearer knows the claim against the other party is invalid. If the claim is doubtful or not known to be invalid, the promise is still binding; ***Arkin***ii) The forbearer deliberately conceals facts from the other party, knowing these facts will enable the other party to defeat the forbearer, and iii) The forbearer did not seriously intend to pursue the claim.

**Adjusting Pre-Existing Obligations**

**Pre-Existing duty to Public**

* **A pre-existing duty can be sufficient when you provide something more than is required under the pre-existing duty *Glassbrook***: *coalmine agreed to pay for police services during strike; although police bound by law to protect w/out payment, they had gone beyond their duty and were entitled to be paid*

**Duty Owed to a Third Party**

* A pre-existing contractual duty can be enforced by a third party if not given economic under duress. The consideration that flows to the third party is the ability to enforce the contract ***Pao On***
  + The duty owed is not “fresh”…A isn’t doing anything fresh but is getting the benefit of Bs promise
* Promise to perform a pre-existing duty does create something legally new and valuable. When B accepts As promise to do the existing duty, B gets the power to enforce the duty, in addition to the fact that C can enforce it. B gets the benefit of a direct obligation that he can enforce ***Pao On***

**DUTY OWED TO PROMISOR**

* Arises when:
  + **Promise to pay more**: b promises to pay more and a promises to do same thing. Court might find consideration if promise to rescind old contract and replace with a new one
* **OLD VIEW: you** **can’t have valid consideration** when all that the promise is, is to undertake what one has already promised to do for the person one promised to do it for. ***Stilk Gilbert Steel***

**New Rule**

* **Pre existing legal duty owed to a promisor can be valid consideration** for a later promise if the promisor **gets practical benefit from the new agreement** (even though neither party suffers a detriment)**and if it is not given under economic duress.** ***Williams v Roffey Nav Canada***

**Promise to Accept Less**

* ***Foakes v. Beer (confirmed in Re Selectmove—****d owed money to crown, made agreement to pay less instalments—crown demanded full amt****)*** traditional common law position is that payment of a lesser sum is not good consideration for an agreement to pay a greater sum
  + **OVERRULED BY LAW AND EQUITY ACT S 43:**

**Waiver and Promissory Estoppel**

* **Person said or done something to lead another person to believe that a fact or right exists, and makes that person do something in reliance of it. Allowing the person who made these statements to go back on them is inequitable. Courts use estoppel to prevent them from going back on it.**

**BEFORE/ANTECEDENCE**

* House of Lords confined estoppel by representation to representations of existing fact, rather than intention of some future matter. It cannot be a statement of belief, opinion or prediction. There was no accord and satisfaction for settlement of previous debt**.*Jordon v. Money (1854, HL)***
* Estoppel may be applied to existing facts not promises of future conduct ***Jordon v. Money (1854, HL)***

**First Signs of Promissory Estoppel**

* First known instance of the concept of promissory estoppel: if one party acts in a way that lead the other party to suppose that the **strict legal rights arising under the contract will not be enforced, or will be kept in suspense, the person who otherwise might have enforced those rights wi**ll not be allowed to enforce them where it would lead to inequity. Referred to in High Trees by Denning ***(Hughes v. Metropolitan Railway)***
* KEY CASE ***High Trees(****Landlord and tenant had agreement for rent at rate of 2500/ During wartime, tenant had trouble filling it and landlord agreed to rent being 1250, until they could reasonably fill with tenants again (no new consideration given*).:**. When a promise (including to accept a smaller sum in discharge of a larger sum) is intended to be binding, intended to be acted on, and is acted on, then it is to be honoured by the court even without consideration. (This is a fusion of law and equity). Doesnt say if reliance has to be detrimental. Just has to be reliance**
* To use estoppels, it must be evident and clear that the party leads the other party into believing that he will not enforce their legal rights; letting them take advantage is not a waiver of this right—its friendly indulgences. ***John Burrows***
* Promises to accept less made under duress should not be estopped. There has to be true accord and satisfaction ***DC Builders***
* Promissory Estoppel cannot be used as a cause of action where none existed before, it can only be used to prevent a party in a pre-existing contractual relationship (defendant or plaintiff) from insisting upon his strict legal rights when it would be unjust from him to do so.***Combe v Combe***
* It can never do away with the necessity of consideration ***Combe v Combe***

**Clarification of Sword Shield**

* **It means you are using a defensive shield to stop someone from going back on a promise**
* **A P can still use it, but can’t use it as a sole cause of action; there has to be an existing legal relation**

**When can one actually claim estoppel?**

* **When there’s a variation of a contractual relation**
* **When a new promise an attempt to modify term of contract (usually agreement to accept less)**
* **It should not be used as a sole cause of action**

**Developments in Common law Re Estoppel**

* ***Walton Stores***  expanded the doctrine of estoppels outside use as merely the defence for the modification of contractual obligations.
* ***Walton Stores:*** **Australian Court** held that estoppel can be used to create legal obligations if there is a **promise,** **reliance on it**, and it is **unconscionable not to uphold the promise** (even in absence of pre-existing contractual relations)

**Development in British Columbia**

* A necessary element of a promissory estoppel is the **Ps assumption that P and D will enter into a** **legally binding agreement (intention to be contractually bound) and that it is unconscionable for the person to go back on their promise.** There is little evidence of Canada moving toward a more flexible extended approach to estoppel. ***MN v ATA (****lady moved to Canada thought bf would pay her mortgage, he never paid)*.

**Privity of Contract**

* Only party to a contract can sue upon it. For a party to sue consideration must flow from the party. However a party not named in the contract can sue if the promise was acting as their agent ***Dunlop Pneumatic***

**Third Party Beneficiaries /who can sue for breach of contract?**

**Common Law Rule**

* Third party beneficiaries cannot **generally** sue for enforcement of contracts because **consideration must flow from persons** entitled to sue**.** It’s not fair to be able to sue but not be sued ***Tweddle v Atkinson***
* Love and affection are not sufficient consideration ***Tweddle v Atkinson***

**Exceptions to Privity/Way Third Party can Acquire Benefits**

* **Statute**
* **Party to contract sue on behalf of 3rd party for specific performance**
* **Special relationship among parties**
  + **Trust-** reluctant to imply relationship unless explicitly clear as intention of one making contract
  + **Agency-**reluctant to imply relationship unless explicitly clear as intention of one making contract
* **Employers**
* **Subrgogation—**two parties agree that one party who has a right will give that right to someone else so they can enjoy interest in that right. You substitute one person in place of another in reference to a local claim

**Specific Performance**

* A contracting party can sue for specific performance on behalf of the third party ***Beswick 2***
* ***Beswick 2*** the court found that Mrs Beswick **could sue** because she was the **administratix** of the estate (she was suing as the agent of her husband—who was privy to contract) said she **could not sue** in her **personal capacity.**

**Employment**

**A limitation of liability clause can extend to employees according to the following test:** ***London Drugs***

* (1) The limitation of liability clause must, **either explicitly or implicitly [intention of the parties**], extend its benefits to the employees (or employee) seeking to rely on it; AND
* (2) **The employees** (or employee) seeking the benefit of the limitation of liability clause must have been **acting in the course of their employment;** AND
* (3) **The employees must have been performing the very services** provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.
* This is a limited exception to Privity, just for Employees to use as a SHIELD in liability clauses. ***London Drugs***

**Subrogation**

* Subrogation may be an exception to privity as a defence ***Fraser***
* When sophisticated commercial parties enter into a contract of insurance, that expressly extends the benefit of a waiver of subrogation to a class of third party beneficiaries, the third party should be able to benefit ***Fraser***
* The test for limited liability used in ***London Drugs*** also applies to Subrogation clauses as an exception to the general rule of privity ***Fraser***
* It extends its application on contracts other than employment contracts as long as the contract explicitly or implicitly extends its benefits to the third party and if the third party has been performing the activities contemplated in the contract ***Fraser***
* In ***Fraser*** it seems that, rather than in London drugs where they want to protect the employees, they are saying that the parties can’t go back and take the benefit back. They have to inform them

**TERM 2**

**CONTENT OF THE CONTRACT**

**Classification of Terms *Hong Kong Fir***

**Conditions- breach gives rise to termination or damages (innocent party elects)**

**Warranties- breach gives rise to damages only**

**Indeterminate/Innominate terms-those which are neither conditions nor warranties.**

* **however, should be noted that labelling a term condition or warranty is not necessarily determinative; intention of parties based on context can come into account *(Wickman)***

**TheTEST the court used to determine if the breach of Indeterminate term will lead to termination or damages**

* **Does it deprive the party to of substantially the whole benefit of contract?**
  + **Court looks at how much position of injured party has worsened and if its reasonable for you to be expected to continue after such a breach has occurred**

**Is it a Representation or Collateral Warranty?**

* **COLLATERAL WARRANTY (CONTRACT)=** For a collateral warranty one party, in consideration of the other party entering into the main K, makes a guarantee as to the truth of a statement - A contract, the consideration for which is the making of some other K (“if you make such a K, I will give you $100”)
  + **A collateral warranty must be proved strictly (as it is a contract in itself);must prove existence of CONSIDERATION AND, *animus contrahendi—*INTENTION to create legal obligations *Heilbut***
  + **Merely answering a question does not suggest that a party intends for a statement to be legally binding *Heilbut***
* Court will also look into whether agreement was followed by formal agreement in writing. If this is the case, then the court will likely not see the rep as included in the written terms of the K. **It is hard to establish that the parties who have reduced their agreement to writing would want something to be part of the contract, that they hadn’t written down *Heilbut***
* If you claim breach of collateral warranty, you are claiming breach of contract, which can lead to damages, ***but not right to rescission****.* You are **staying in the contract**, but you’re claiming that the other side who warranted the truth of a statement, is breaching their promise as to the truth

**MISREPRESENTATION & RESCISSION: Representation of Term**

**MISREPRESENTATION & RESCISSION**

      A significant statement of fact made in lead-up to K to induce another person to make K with the offeror. If false, then= a misrepresentation.

* **Rescission is the remedy for misrepresentation *Redgrave v. Hurd—****P tried to sell law practice. Misrepresented earnings. Said D should have checked book to see true earning*)

      Rescission is a restitutionary remedy aimed at putting parties back in pre-K position

**How to tell if Misrepresentation?**

**1)    A statement of** **fact**

**a) FACT NOT opinion, statement of law belief, promise or prediction**: e.g. can be “*this apartment has never been renovated*” can’t be “*you can sell this apartment for much more $ in a few years*”

       Must be about something in present or past, but **not something that is to occur or exist in future**. Statement of promise about the future are contracts (i.e. a term)

       **Position of the maker of the statement** influences whether opinion has sufficient basis in fact to constitute a mis rep.

      e.g. ***Smith .v Land***: when **equal knowledge** btw parties, what one says to **other=opinion** (statement only about the condition of one’s mind); but if **facts not equally** known, then opinion usually **involves statement of fact** (cuz it’s implied he knows facts which justify opinion)

      E.g. ***Esso Petroleum***: D was trying to lease gas station. Gave P estimate that he’d be making certain profit. Was Prediction, but **because he’s an agent** of an oil company (and in a higher position of knowledge), this was **taken to be a statement of fact**

**b) A statement**: usually, silence can’t form basis of misrep (At CL, parties have no duty to supply facts even if they know info relevant)

**2)    Untrue**

       If maker of statement knows it’s false, then **tort of fraudulent misrep**.

* If maker of statement doesn’t know it’s false, then, it’s is an **innocent misrep and innocent misrepresentation does not preclude rescission (if innocent party acting reasonably *Leaf)* *Redgrave v. Hurd—****P tried to sell law practice. Misrepresented earnings. Said D should have checked book to see true earning*) **Rescission is the only remedy, damages never awardedfor innocent misrepresentation *Heilbut***

**3)    Material**

       “Substantial,” “go to the root of the K”...misreps. about unimportant matters are immaterial or **“puffs”**

**4)    Relied upon** as a reason for entering the K

**a)     Just one reason for entering K**: Misrep. **Doesn’t have to be sole reason** for entering the K, just “a reason”—connected to materiality in that person unlikely to rely on statement if it is not material to K

**b)    No duty to check representations:** An untrue statement can be relied upon even when person to whom statement is made if given opportunity to check as to the truth of the statement (***Redgrave v. Hurd—****P tried to sell law practice. Misrepresented earnings. Said D should have checked book to see true earning*)

**Types of Misrepresentation**

**Innocent Misrepresentation:** when a party makes a misleading statement without knowing that is untrue.

* **innocent misrepresentation does not preclude rescission *Redgrave v. Hurd—****P tried to sell law practice. Misrepresented earnings. Said D should have checked book to see true earning*)
* **Rescission is the only remedy, damages never awardedfor innocent misrepresentation *Heilbut***

**Negligent Misrepresentation:**party having duty of care makes false statement ***Hedley***

* Can claim damages in torts (negligence) &/or **rescission** (in contracts)

**Fraudulent:** false statement without belief of its truth or recklessly careless of whether true or not ***Derry Peek***

* can claim damages in torts (for deceit) &/or **rescission** (in contracts)

**Because there are limitations to rescission, one should always try to make an alternative claim in tort. This is because the threshold for what you have to prove in tort is not as high as that in contract; limitation period may be longer in tort; damages could be higher**

**Concurrent Liability in Contract and Tort**

      If a K is **rescinded for misrep**, then, as the K has disappeared, there is **no basis for a claim to damages in contract**. Damages might, however, be awarded through a **claim in tort**

* **Actions in contract and tort may be concurrently pursued unless contract excludes tort liability *BG Checo(****P claimed negligent representation and breach of contract/breach of warranty because Hydro didn’t clear woods. P would’ve made k but at higher price)*

 **Liability for negligent misrepresentation may be found both in contract and tort where there is a special relationship creating a duty of care** ***Sodd Corp, Hedly Byrne,*** *(no K btw representor and recipient, but recipient did rely on the info to enter into a K with a third party. Representor, because of special relationship & position and knowledge, owed a duty of care to the recipient, who made claim for negligent misrep*

* **Negligent Misrepresentation can be claimed in K if a collateral warranty induced someone to enter into contract. *Sodd Corp***

**Test for Negligent Misrep** (***Queen v Cognos)***

**1)** Must have a special relationship

**2)** Untrue, inaccurate, misleading

**3)** Must have acted negligently in making statement

**4)** Representee must have relied in a reasonable manner on that rep

**5)** Must have been detrimental to representee

   When P claims damage, they will always say that they would have never made the K but for the mis-statement…but doesn’t have to prove strict but for –sufficient to show that statement was material to decision to go ahead

**Bars to rescission (*Kupchak)*:** as rescission is an equitable remedy, there are a number of limitations. When rescission would result in further unfairness**,** it cannot be granted. **IF rescission not possible and can be substituted with monetary compensation**(***Kupchak v Dayson—****p exchanged land for motel found out earnings of motel fraudulent, sued for rescission but third party acquired land*

**1)Impossibility of restitution** ***in integrum*** (i.e. restoration to the original condition)

       When what has been transferred cannot be returned or cannot be returned in same condition,

       This might occur when am **innocent third party has acquired rights**

       When **property cannot be returned**, rescission can be **substituted by monetary *compensation***

**2)   Execution/Full Performance** of the contract is a bar to rescission if contract has been executed in **INNOCENT MISREPRESENTATION**(***Leaf)***. But NOT a bar in **FRAUDULENT/NEGLIGENT MISREP** as long as other limitations to rescission would not bar the remedy ***Kupchak v Dayson*** *p exchanged land for motel found out earnings of motel fraudulent, sued for rescission but third party acquired land*)

**3)    Affirmation:** No rescission if P, knowing of misrep., proceeds w K as if it weren’t problematic (affirm K= waive right to rescission)

**4)    Delay:** No rescission if P hasn’t acted w/in a reasonable period of time. Unwarranted delay = guilty of LACHES (a forms of affirmation). Must look to circumstance to determine what a reasonable period of time is (***Leaf***). Laches does not preclude seeking damages in tort for fraud or negligence.

**PAROLE EVIDENCE RULE**

**Parol Evidence Rule**: operates to prevent parties to a contract from altering the terms of a written document considered to be the final expression of their agreement. If the terms of the contract were recorded in writing, extrinsic evidence is not admissible to determine the terms of the contract. Modern practice is to treat the parol evidence rule as a strong presumption i.e. it can be rebutted (***Dynamic Transportation)***

**Parole evidence can be admissible to clarify subject matter of contract. For example, to id the property, and define what is meant in the K. Some external evidence should be allowed if it’s important to finish the description in land. *(Dynamic Transportation* [1978] S.C.R.—**agreement for sale of land, K not certain—parole evidence would make it more certain

**Parol Evidence Rule**:**:** A rule of substantive law that operates to prevent parties to a contract from altering, contradicting or varying the terms of a written document considered to be the final expression of their agreement**. If the terms of the contract were recorded in writing, extrinsic evidence is not admissible to determine the terms of the contract**. Modern practice is to treat the parol evidence rule as a **strong presumption** i.e. it can be rebutted.

**Collateral agreements to the main agreement may be established by parole evidence so long as they could be seen as independent and not contrary to the main agreement *Hawrish(****lawyer signed for guarantee and was told wouldn’t have to cover all)*

Parole evidence rule is a rule of **CONSTRUCTION** (opposite rule of law…i.e. can help us interpret the full meaning of contracts) ***Gallen(****company promised that pesticide would not kill grains, but K said they wouldn’t be responsible for damage))*

**Parol evidence rule is only a strong presumption (i.e. it is rebuttable)** & is not absolute ***Gallen***

* Presumption is the **weakest** where there is **no contradiction** (just adds to main doc) ***Gallen***
* **Presumption is the strongest** if there is a **contradiction** of specific term—presumption in favour of the document, ***Gallen***

Courts should look to both written and oral contracts and try to interpret them **HARMONIOUSLY** together in order to give effect to the true **intention** do the parties ***Gallen***

**Discharge by Performance or Breach**

* **General Rule:** Parties discharge K obligations by fully performing ***Sumpter v Hedges ((sailer who died week b4 k over, widow couldn’t be compensated)***
* . Must parties perform absolutely everything?
  + **No. They have to substantially perform. IE the other party has to have the full benefit of the K (dependent on facts of case) *Fairbanks(****d made soap machine but it didn’t make soap)*
* **How does court determine substantial performance?**
  + If one **breaches a** **warran**ty, this means that the K **hasn’t been perfectly performed**, but it has been **substantially performed** ...Injured party can still claim damages.
  + BUT if one **breaches a condition**, it may **not have been** substantially performed .
* **Can the party who abandoned K recover for work done even if there has not been substantial performance?**
  + Yes. But courts must look at whether the **innocent party** **has AFFIRMED what has been performed**
    - **Courts must infer “new contract**” that shows the non-breaching party’s acceptance of what was done...both sides must be in agreemen***t Fairbanks Sumpter v Hedges(****P gets nothing as he abandoned contract and D had no choice but to accept work done)*
* On this basis a party can recover through ***QUANTUM MERUIT*** *(reasonable compensation for the value of the work that as been done—restitutionary remedy*). ***Fairbanks***
* **BUT, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done.*Sumpter v Hedges(****p started building on Ds land, D finished it but had no option but to accept after P stopped)*

**Downpayments & Deposits *Stevenson***

      **Deposit**: money paid in advance to bind K *guarantee* its performance (no refund when the contract is set aside.)

      **Part/ Down payment:** merely money pre-paid on account of the purchase price (is recoverable)

* If there is ambiguity, Court will read the K in CONTRARY to one who drafted it
* To determine if the payment is a deposit or a part payment the court will look at the contract itself:
  + words used
  + placement of words
  + the intention of the parties placement of words – were the words “deposit” or “down payment” in the main body of K where easy to see, or in the section for admin use only?
  + & the circumstances.

**Standard Form Contracts and Exclusion Clauses**

* **Standard form contracts:** Ks not truly drafted by both parties; one party dictates terms on take it or leave it basis
* Usually the result of unequal bargaining power. The question is whether the weaker party actually assented to the exclusion and limitation clauses.
* Terms of concern are those that exclude or limit the liability of the stronger party. Courts have been willing to disregard some part of the K or to make them unenforceable (to level the playing field, so to speak).

**General rule**: limitation of liability clauses can be enforceable. Look to:

**1)    INCORPORATION of clause w/in the contract**

**Notice**

**UNSIGNED DOCUMENTS**

**In the case of unsigned documents the party imposing a condition (or an exclusion clause) has to take reasonable steps to give the other party notice of the condition**... ***Parker***

(***Parker, Thronton, Tilden*):** both parties must have knowledge that clause is there

o   Notice must be given **at or before time of agreement**  (***Thornton v Shoe Lane***)

o   Must be notice of all of clause. **Details given after K not contractually binding** (***Thornton v Shoe Lane*)**

o The court should not bind a party by unusually **wide and destructive exclusion clauses unless they are drawn to their attention in the most explicit way. The more onerous the more explicit the notice must be *Thornton v Shoe Lane***

o One can infer that **adequate notice has been given by reference to previous dealings only if they prove (1)knowledge of theterms and (2) assent to the terms in the previous dealings**. ***Mcutcheon***

* If previous dealings show that a person knew of and agreed to a term on 99 occasions, itcan be imported into the 100th contract without an express statement, but without provingknowledge, there is nothing. ***Mcutcheon***

**SIGNED DOCUMENTS**

* ***L’Estrange*** – Signature EQUALS notice **EXCEPTIONS:**
* There is **no general requirement** to take **reasonable steps** to **ensure** the party signing a K **reads and understands exclusion clauses**. ***Karoll***
* **However, where** **party seeking to enforce exclusion of liability clause** **knew or ought to have known of the other party’s mistake or ignorance**, signature CANNOT equal notice. In such cases, reasonable steps must be taken to ensure the party reads and understands ***Tilden Karoll***
* **The party seeking to rely on such STRINGENT and ONEROUS terms should not be able to do so in the absence of first having taken *reasonable measures* to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum; Tilden***
* Things to consider when steps must be taken
  + Terms contrary to party’s expectation ***Tilden***
  + Length and format/reading time ***Tilden***
  + Physical incorporation. ***Tilden***
  + Past dealings, type of K, purpose of relationship between the parties**. *Delaney, Schuster***
  + **Compensation might be given when person is inexperienced and unaware of standard practice *Grieven.* These cases are FACT DEPENDENT**

**3)    VALIDITY**

***Tercon*** 4 part-test to determine if exclusion of liability clause valid

* + ***First consider if its incorporated then apply this test:***
  1. **Does statute invalidate the clause?**
  2. **Is clause clear and apply to event that occured? (depends on interpretation of parties intention)**
  3. **Was clause Valid (or invalid because unconscionable)?**
  4. **Should the court nevertheless refuse to enforce because of public policy?(eg serious criminality or fraud)**

A disclaimer which is **extremely broad and excludes almost all liability may be unenforceable.** Nature of business and what one would expect is considered in deciding this kind of case YOU SHOULD CONSIDER UNCONSCIONABILITY WHEN DEALING WITH CASES LIKE THIS ***Zhu v Meryll Lynch***

**4)    IMPLIED TERMS:**

·       Implied terms may prevent enforcement of the exclusions/ limitation of liability clause

* **3 types of implication: *Machtinger v*. *Hoj(****employment K with no clauses for reasonable notice. Fired guy with no notice. But statute says u need 4 weeks notice. Regardless of K, there was implied term by law in K and they breached this. You can’t contract out what’s implied by law)*
  + **(1) Implication by fact/neccesity** – based on the intention of the parties. Necessary to give business efficacy
  + **(2) Custom and usage** – must be evidence to support that the parties understood the custom or usage was applicable.
  + **(3) Implication by operation of law** – they **do not depend** on contractual **intention**. Implied as legal incidents of a particular class or kind of contract.
    - **Test of implication in law: Necessity** – is the term necessary, in the practical sense, to the fair functioning of the agreement given the relationship of the parties?

**Economic Duress**

* But we lack SCC guidelines, but most of the cases examine variation of the existing K, rather that duress being exercised to induce one to enter the original K

|  |
| --- |
| **TEST FOR ECONOMIC DURESS: *Pao On***  **ONUS OF PROOF: THE ONE WHO SEEKS TO ENFORCE MODIFICATION HAS TO PROVE ABSENCE OF DURESS**  **Coercion was such that capable of vitiating someone’s consent/corner someone**   * 1. **Was there any alternative course available to innocent party? (simply had to do it)**   2. **Did the innocent party get any independent advice? [ DIFF FROM NAV CANADA]**   3. **Did the Innocent party protest at the time of coercion?**   4. **Did the Innocent party try to avoid making contract?** |

In ***Nav Canada*** court says that the examination of duress is usually done in the context of contractual modification (as NSSC not binding on possible application of the doctrine to the formation of the K in BC, but persuasive)

      Court in ***Nav***said***Pao On***test should be flexible to address issue at hand. Don’t necessarily need to go through all four steps; it’ll depend on the circumstances.

      **Legitimacy of pressure (***Scarman*- ***Universe Township*) doesn’t need to be considered—**conduct will usually be legitimate or legal, but may still be coercive Legitimacy (legality or good faith) of pressure is not what is important; **rather, the impact on the victim**.

      **KEY**: no alternative can be available to the innocent party

**UNDUE INFLUENCE**

* One party misuses it’s position of superiority in relation to another party and the other party makes a contract it wouldn’t ordinarily intend to make
* Focuses on relationships

**TEST FOR UNDUE INFLUENCE *Geffen***

1. **Is there evidence of actual undue influence?IF no--**
2. **Is there potential for undue influence in the relationship?** If yes→ Undue influence presumed.
   1. **Certain relationships are presumed to prima facie qualify** (STILL REBUTTABLE)
   * Solicitor—Client **,**Trustee—Beneficiary Doctor—Patient**,** Parent—Child**,** Teacher—Student...if not🡪
   1. **Look to whether the Nature of relationship could give rise to presumption of undue influence:** Onus on P to prove there is potential for the D to dominate his will through manipulation, coercion, abuse of power, etc.
3. **Inquire into whether there is disadvantage in the transaction**
   1. **If it was commercial transaction...**Onus on P to show that contract was unfair either because P unduly disadvantaged or D unduly benefited...mere fact that he’s giving more than he’s getting might not be enough...could be bad bargain
   2. **Where consideration not an issue** (gifts)P doesnt need to prove manifest disadvantage . court concerned that **benefits not be tainted**

**Onus then shifts to D** to establish that despite the influential relationship, there wasn’t undue influence in *this particular contract*. If D doesn’t do this, P will have his case

**NOTE: Responsibity of Creditors:** The creditor must always take reasonable steps to ensure an individual guarantor knows the risks he is undertaking unless it’s a commercial relationship. Doesn’t have to inquire into whether or not there has been undue influence ***Etridge***

**Unconscionability**

Circumstances “tantamount to fraud” that involve an unfair advantage gained by the unconscientious use of power against a weaker party. Contrasted with undue influence which is concerned more w abuse of trust and confidence & lack of sufficient consent

***Morrison***.

**TEST FOR UNCONSCIONABILITY *Morrison***.

**(1)Proof of INEQUALITY of bargaining power between the parties arising out of the ignorance need or distress of the weaker party** – which leaves the weaker under the unconscientious use of power of the stronger

Was weaker party incapable of protecting his interest?NOT IMPORTANT IF STRONGER PARTY AWARE OF WEAKER’S INCAPACITY***Marshall***

**(2)Proof of Substantial UNFAIRNESS of the bargain** (*will weaker party benefit from trans or is it to their detriment?)*

*Was it an improvident transaction for the weaker party?*

**→** Now, there is a **presumption of fraud**, and the **Onus shifts to D** to rebut it by showing that the bargain was fair, just and reasonable

**These requirements are CUMULATIVE. YOU NEED TO FIND BOTH for UNCONSCIONABILITY,There also needs to be causality: the bargaining power has to have been used to cause the unfair transaction. *Marshall***

OTHER UNCONSCIONABILITY TEST *Harry v Kreutziger*

**Community Standards of Commercial Morality Test”** – **If the transaction as a whole is sufficiently divergent from community standards of commercial morality, it should be rescinded**

**NOTE: both tests are bcca. use test that favours your client**

**Comment: There is a STATUTE for unconscionability. B*usiness Practice and Consumer Protection Act.***

**Illegality and Public Policy**

**Illegality** used to deny enforcement of contracts or to make them void

**Common Law Illegality:** illegal on grounds that they are harmful to society and contrary to public policy

**Statutory Illegality:** statutes sometimes implicitly or explicitly state that certain contracts are unlawful by saying directly that a K is illegal or that performance of such K could be illegal

* Very FACT specific...each case turns on its facts ***Still v*** *Minister***.**

**Constantly Evolving**

**Old Approach**– **Very strict – A K that is impliedly or expressly illegal by statue is VOID *ab initio* *Still v Minister***

**Modern Approach:.** Where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party, when **it would be contrary to PUBLIC POLICY/PUBLIC INTEREST GOOD? Court must look to PURPOSE of legislation and determine if OBJECTIVE would be better served or not by enforcing the K (**look to consequences to the individual ans social utility of the legislation)**. *Still v Minister(****p was legal immigrant who made a mistake and thought she was allowed to work in Canada)*

**Restrictive Covenants in Employment Contracts**

**UNREASONABLE restraint of trade is ILLEGAL at common law. *JG Collins v Esley***

**Test for determining reasonableness of restrictive trade clause:**

1. **Look to nature of business and nature of employment** 
   1. **Consider Proprietary interest of employer** (employer argue that employee got knowledge only by virtue of working for him...done so that employers won’t lose consumers to former employees)...lots of training/specialized areas/time resources invested in area might make RC more reasonable
2. **Public interest in competitiveness of market** 
   1. **Time**
   2. **Geographic area:** Must consider adequacy of consumer choice w/in the market (would consumers be worse off if they could not do business in this area?). If there are a lot of agents compared to consumers, it may not matter to consumers. E.g. if there are only 2 doctors in a city of 1,000,000 – will hurt consumers.

**Ambiguous Restraint of Trade Agreements are Illegal**

**IF a Restrictive Covenant in an employment K is ambiguous, it will be considered unreasonable and thus *prima facie void and unenforceable. KRG insurance(*** *clause said “greater Vancouver area” but its not legally defined, fought over whether richmand was GVA)*

**USE OF SEVERANCE**: ***KRG insurance***

Use of severance is restricted (as involves re-writing K and expensive litigation means employees wouldn’t bring to court anyway)

1. **Blue pencil severance (***taking out the illegal part)* **can only be used sparingly and in cases where the part being removed is clearly severable, trivial, and NOT part of the MAIN part of the restrictive covenant.**
2. **Notional severance (***court reads down illegal part to be unenforceable)* **CANNOT be used in the construction of restrictive covenants in EMPLOYMENT contracts .**
   * **Because otherwise it invites employers to impose unreasonable restrictive covenants on employees with the only sanction being that the court will still enforce what might have been valid if it’s found unreasonable. It would also change the terms of the covenant and risk assumed by parties by making it reflective of what the judges think should be in the K. There’s no “bright line” test of reasonableness for court to determine.**

**Remedies**

**Start with the Remedies** – *what* *the parties would want*. Then go back to determine if there’s a K, and what roadblocks there might be on the way to realizing the remedies. How might these remedies be overcome? Finally, are the remedies possible in the situation?

**There must be a Breach of a Term** in a K before a K remedy can be provided (recall misrepresentation, where no breach is needed

**Types of Remedies:**

1. **Common-Law**

* Termination – For this to apply the term has to be a condition
* Damages – breach of a warranty will do

→ CL remedies render the K VOID.

→ CL doesn’t mind “piling on” the remedies

1. **Equitable**

* Specific Performance-court enforces party to do what it has promised
* Injunction- usually negative- do not do something but they could be positive. These are usually a temporary measure.
* Rescission
* Restitution- Ensures that the wronger would not benefit from the wrong.
* It is up to the discretion of the court to decide on a case by case basis whether or not to apply equitable remedies

1. **Statutory**

### COMMON LAW

### Damages

**Types of Damages**

* **Compensatory-** law of contract should provide an adequate remedy that would ideally put a person in the position the person would be had the contract been fully performed
  + **It’s difficult for court to ascertain what the value should be for damages**
* **Aggravated/ damages for mental distress**-Additional compensatory damages awarded when the defendant acted in a reckless, high handed or malicious manner.
* **Punitive-**Non-compensatory damages awarded to the plaintiff for the purposes of disciplining the defendant and deterring the defendant and others from such behaviour in the future. Punitive damages are relatively seldom awarded in Canada, and if so, the amounts are typically, but not always, small.
* **Liquidated**-Amount payable upon the breach, the quantity of which is determined in the contract itself and is enforceable. The injured party cannot recover in excess of this amount for the given breach.
* **Penalty-** Amount specified in the contact to be paid in the event of a breach of contract.  Penalties are not enforceable because they are designed to punish and are thus contrary to the compensation philosophy of damages.

**Limitations to Damages**

* **CAUSATION**: P must prove link btw breach and loss (cause in **fact**)
* **REMOTENESS**: damages must be within the reasonable contemplation of the parties at the time of the K (cause in **law**)
* **DUTY TO MITIGATE**: Innocent party must also show that they tried to *MITIGATE* the loss. Back to the rational market place…you must mitigate as not doing so is ***wasteful***. if you don’t mitigate, you wont lose right to claim damages, but the amount you can get will be reduced. This limits right to damages but not right to seek specific performance.

### The Interests Protected

**NOTE:** claim for damages should be made on the basis of evidence u have at hand. You always try to maximize the interest of your client by trying to use **expectancy measures first**...it’s maximum means of damage and reliance is rather a substitute or alternative way of recovering damages

**1)Expectation Interest (cost of cure/ performance/ completion OR LOST PROFITS):** Putting the non-breaching party in the position he would have been in **had the term been complied with**.

* This is the ideal and will give the max amount of damages. Goal is to compensate—no more, no less
* If it impossible to calculate expectation interest due to uncertainty, they cannot be awarded ***Mcrae***
* Expectation interests necessarily includes reliance interests. **Can claim both** expectation and reliance interests **as long as P not over-compensated**
* There is a dilemma that often arises construction contracts in determining whether expectation damages should be the cost of cure or the cost of difference in value.
  + ***Ruxley 1996 HL pool*** Cost of Cure 30 000 dim of value 2500...court picked diminution of value
    - There might be subjective value for P...like the pool did
    - If R didn’t cure the pool, then he could be unjustly enriched
    - There is a balance of interests: the freedom of contract v. Unreasonableness in market practice (should court award damage that protects freedom of contract even if that damage rewards waste?)

**After *Ruxley:*** Courts now really look into whether the cost of cure is REASONABLE or completely out of proportion to the benefit that’s been obtained

They also look into what the parties really intend to do with the money [ie do they intend to rebuild or]...unless there is this intention the cost of cure would not really be what is awarded

HL makes these decisions case specific

**2)    Reliance Interest:** Compensates P for **expenditure wasted in reliance of K,** not lost expectations (i.e. out of pocket expenses in reliance of K).

* Can be claimed as a substitute measure when one has evidential difficulties w proving expectation interests (***McRae***)
* **Reliance interests cannot be claimed in lieu of expectation interest if party would have been** **worse off if K fully performed**. The law of contract compensates a plaintiff for damages resulting from the defendant’s breach, but not for damages resulting from the plaintiff making a bad bargain. ***Bowlay (****P wanted reliance interest as if K had continued without breach P would have lost more than he did with breach)*
* To prove reliance, P needs to prove: ***McRea***  *wrecked tanker P tried to get, spent money but some cap expend not waste*)
  1. **P had spent $,**
  2. **P spent $ in reliance of promise,**
  3. **$ was wasted**: Only compensates for truly “wasted” expenditures; e.g. if capital expenditures remain in P’s hands, it won’t be factored into reliance compensation (***McRea***)
     + Breaching party to argue reliance would’ve been wastedD ALWAYS TRIES TO ARGUE THIS ***McRea***

**Damages For Mental Distress**

* When a commercial K is to provide pleasure to a person, and breach has a resulted the innocent party having mental distress they should be compensated (***Jarvis v Swantours***, *lawyer contracted for peace of mind on his vacation – he did not get it*)
* Damages for mental distress can be awarded for a commercial contract even if psychological benefits aren’t the reason the K was concluded (i.e. are incidental) as long as such mental distress is within **reasonable contemplation of the parties** (***Fiddler, Farmly).*** If you use ***Hadley*** test, mental distress often in the reasonable contemplation of parties to a commercial K time the K was made
* **Wrongful dismissal cases**- in ***Vorvis*** SCC said to award damages fo**r mental a separate actionable wrong done by the employer in addition to wrongful dismissa**l - Dissent in ***Vorvis*** disagreed w this - stick to test of remoteness (was mental distress from wrongful dismissal in reasonable contemplation of the parties?)

**Punitive Damages**

**Punitive damages** are awarded to punish for a misconduct that departs from ordinary standards of decency (malicious, oppressive conduct) and **claim for punitive damages must be independently actionable** (as a claim in tort or independent contractual obligation to act in good faith eg employment K) ***Fidler(****d denied p disability benefits she was* ***entitled*** *to. SCC found metnal distress but no separate wrong so no punitive damages.)*

* + **Punitive damages must be proportionate to the purpose that needs to be achieved and this purpose should be able to be achieved without awarding other damages**
* **True aggravated damages arise out of aggravating circumstances and are not awarded under the principles of *Hadley***

**Liquidated Damages**

* FIX the amount of damages recoverable in the case of a breach.

**Nowadays less likely that liquidated damages will be deemed penalty clauses *JG Collins***

* Striking down a penalty clause is a blatant interference with freedom of contract. It should **only be done** for the purpose of **providing relief against OPRESSION**. ***It has no place where there is no oppression JG Collins***
* ***A penalty clause should function as a limitation on the damages recoverable***—if the actual loss turns out to exceed the penalty, the party should be allowed to recover only the agreed sum. ***JG Collins***

**Words are NOT determinative –whether penalty/ liquidated damages is a matter of construction**

* Penalty –amount disproportionate to loss suffered & maybe unconscionable – generally not enforceable (goes against compensatory purpose of damages) BUT sometimes liq damages have effect of penalty as they are oppressive – the court will then treat them as a penalty and wont enforce them
* Alternatively, a penalty clause that is NOT oppressive will be treated as a liquidated damages or limitation of liability clause

**Forfeiture Clauses**

* **Forfeiture clause** – lets party who receives payment to keep payment

**When can a buyer Recover Payments? *Stockloser(****p buying ds business in instalments, k contained forf clause, p missed payment d kept previous ones. P couldn’t get money back)*

* **Where there is NO forfeiture clause**, **if money is handed over in part payment** of the purchase price and then the buyer defaults, then so long as the seller keeps the k open and available for performance, the **buyer cannot recover the money**, but once the seller rescinds the contract or treats is as at an end the buyer is **entitled to recover** their money in law, but the **seller can claim damages.**
* **Where there IS a forfeiture clause** or the money is expressly **paid as a deposit** a party may have a **remedy in equity** but two things are necessary:
  1. the **forfeiture clause must be of a penal nature** (out of proportion to damages)
  2. **it must be unconscionable for the seller to retain the money**.

**Considerations when determining damages**

**DUTY TO MITIGATE**: Innocent party must also show that they tried to *MITIGATE* the loss. Back to the rational market place…you must mitigate as not doing so is ***wasteful***. if you don’t mitigate, you wont lose right to claim damages, but the amount you can get will be reduced. This limits right to damages but not right to seek specific performance

**Quantification**

Courts **looked into whether the costs of cure would be reasonable or whether they be disproportionate to the benefit obtained** ***(Nu-West)***

**Innocent party is entitled to reasonable damages in order to rectify losses resulting from breach *Nu-West Homes***

* They are expected to behave reasonably **NOT PERFECTLY. Thus** parties placed in emergency situations act reasonably and will **not be disentitled** to recover the cost of the measures **merely because the party in breach could suggest that other less costly measures** could have been taken. ***Nu-West Homes(****P contracted w D to build a house for them - serious deficiencies in D’s work - P tried to claim the cost the having the basement redone –CA said it was reasonable)*

**COURTS MAY NOT AWARD COST OF CURE IF IT IS OUT OF PROPORTION TO BENEFIT P RECEIVED (unreasonable in relation to the loss suffered). *Ruxley Electronics v Forsyth (1996, HL)(*** *Swimming pool 1 ft shallower than K’d for – P sues for cost of cure to redo pool to right depth – evidence that P wasn’t going to use $ to redo pool so maybe unjustly enriched – giving P amount of $ to redo pool woulda been unreasonable)*  
**BUT:** A P may place **unusual importance** on a feature that would **usually not be too important at all**. P should not have to justify what he contracted for (e.g. what if Forsyth built pool for Kobe Bryant?). Courts thus must weigh **subjective value w market value**…may still not award an amount if its unreasonable/

**Damages can be awarded for LOSS OF CHANCE:** BUT may be denied damages if loss too speculative. Court should do its best to assess damages, even it if it’s difficult (even if they have to guess). ***Chaplin(****beauty queen sued for loss of chance to win pageant. Court assessed damages because odds were determinable*

* Contrast w ***McRae***, where the K was for finding a tanker (not oil), oil incidental to it. Not predictable. Here, the lady had a real chance of winning a prize and the chance was “worth something”; you could calculate the chance that should have had to get the profit (she had a 1/4 chance). Also, the very subject of the k was a chance to win

**Remoteness**

* Limits the recovery of damages: the wrongdoer may not be liable for all of the losses causes by their breach, even if they caused them in FACT.
* \*\*\****Hadley*** is seminal case. USE IT FIRST
* ***Hadley v Baxendale*** is an umbrella test for **all cases of compensatory damages: economic loss OR non economic loss *Fidler***

**General rule is that if the loss flowing from breach is too remote then it cannot be recovered.** ***Hadley***

**Where two parties have made a K that one of them has broken, the breaching party will be liable for: *Hadley (****carrier was late in delivering crank shift to P. This halted Ps business completely but carrier wasn’t told the special circumstances and was not reasonable to assume losses would flow from breach)*

1. **Obvious Damages which may *fairly and reasonably be considered as arising naturally* from such a breach, i.e. in the usual course of things (any reasonable person would know this)**
2. **If the K is made under SPECIAL CIRCUMSTANCES and the D does not know (either from P or 3rd Party) about the special circumstances, the D will ONLY be liable for the damages that would be within their reasonable contemplation. (**ask would a reasonable party see this loss as flowing from the ordinary breach of K?)

**Remoteness in K different than Torts *Heron 2***

This is because ***Victoria Laundry(****P ordered a boiler Delivery was late 5 months but lost normal profits and lucrative govt contract (D didn’t know). Compensated for natural but not special loss)* framed the test for **remoteness as *“*damages which are REASONABLY FORESEEABLE POSSIBILITY as arising from the breach”—real danger “in the cards” [NOT probability]**

***Heron* criticized *Victoria Laundry* and said one needs to distinguish K remoteness from Torts remoteness**

**CRUCIAL QUESTION:*“*Would a**  **reasonable person in the breacher’s position** would have realized the loss **was SUFFICIENTLY LIKELY** to result from breach*?*]***Heron 2(****D was late in delivering Ps sugar, market fluctuations known. Price fell and P lost profits. D held liable as knew about market fluctuations)*

* + **This is because K different than Torts.** In contracts, if one party wishes to **protect themselves against a risk**, they can **direct the other party’s attention to it before the contract is made.** In torts there are rules that generally discourage negligent behaviour.

**NOTE:** these cases hinge on their FACTS

**Time Measurement and Damages**

***Semhalgo*** *P wanted to buy house, vendor sold to someone else, P wanted SP but then elected damages in lieu of. Damages assessed at time of judgement*

* **Damages for breach of K for sale of general goods** – calculated at date of breach, because the non-breaching party mitigate
  + **MITIGATION**:A person who has suffered an injury or loss due to breach of contract should take reasonable action, where possible, to avoid additional injury or loss. The failure of a plaintiff to take protective steps after suffering an injury or loss can reduce the amount of the plaintiff's recover.
* **Damages in lieu of specific performance** –**calculated at date of judgment**, NO DUTY TO MITIGATE.
  + NOTE: A claim for SP revives K as D can avoid breach by performing before judgement, so **SP has effect of postponing date of breach**. **For these reasons it is not inconsistent with CL to assess damges in lieu of SP at the time of trial and no duty to mitigate, as K still alive.**

**Equitable Remedies (Specific Performance and Injunctions)**

**Equity follows the Common Law** – So, first determine what the Common-Law would award in Damages.

* **If not satisfied,** then turn to Equity to try specific performance, or damages in lieu thereof.

Only after ***Kupchak*** did Equity have anything to do with awarding money as compensation in lieu of rescission – but still, money is awarded only in lieu of an equitable remedy, like specific performance

**Requirements for Obtaining an Equitable Remedy: TTTUB RRM**

1. Unique Item – Damages won’t do, because a party can’t go out into the market and get a new one
2. BFP is not Effected – “Equity’s darling.” Can still get Damages in Lieu – (see ***Kupchak***)
3. The K has not been Affirmed – EG – Laches (see ***Leaf v. International Galleries***)
4. Requesting Party has clean hands himself
5. Requesting Party can and will perform his obligations
6. The Remedy won’t impose “Undue Hardship” on the party ordered to perform
7. The Remedy isn’t to perform a Personal Service (see ***Warner Bros***.) – [altered by statute now]

* Too hard for the court to enforce the remedy – to ensure it’s been performed

1. Mutuality of Remedy – both parties should be able to get the same remedy

**Specific Performance**

**Available only where damages are** **inadequate** (e.g. ***Beswick v Beswick*** – wife wanted to get the exact K to get $ from dead hubby’s biz – damages would not suffice)

**Specific Performance is granted when the subject-matter of the contract is “unique”** – when the property has a quality important to the purchaser that **can’t be duplicated elsewhere**. The court determines the uniqueness of the property when the breach takes place, innocent party decides if to keep K alive and sue for damages or ask for SP. ***John Dodge(****P contracted to buy land and D backed out of deal. P wanted SP cuz land unique)*

* **A party is not obliged to mitigate** if seeking specific performance ***John Dodge Semelhago***
* **If awarding SP will lead to further inequity, the court will not award** it - You’ll only get damages in equity when specific performance is unavailable (***Roth v Tyler*** *court awarded $ as to not break up marriage when P couldn’t purchase house he K’d for as wife wouldn’t sign lease)*
* NOTE: land not always considered unique anymore ***Semelhago***

### Injunction

**Injunctions to Enforce Contracts of Personal Service**

**Specific performance can be granted** to enforce a **negative covenant** in a personal service K (EG – **thou shalt not work for anyone else) when:**

1. to grant it would **not** be tantamount to ordering the D to **positively perform her K** **or starve**, and
2. when **damages wouldn’t be a more appropriate remedy**,

**However**, it **will never be granted for performance of a positive covenant for personal service.** : ***Warner Bros (****P wants injunction for neg covt prohibiting D from working elsewhere. Granted)*

**Interlocutory Injunctions:** in the interim – until the court decides the matter. Only used in an emergency – EG – when one of the parties is fleeing the country (rare)

**Considerations when determining whether an interlocutory injunction is appropriate: *Zipper(****P hired D, d broke competition clause and took Ps main client. P denied interlocutory injunction...how would d pay damages if he had no job? wait to see result of trial)*

1. Is there a **SERIOUS QUESTION** to be tried?
2. Will the applicant suffer **IRREPARABLE HARM** if it’s refused?

* Irreparable Harm – The Type of harm, not the magnitude: a type of harm which can’t be measured monetarily, or cannot be cured.(eg suffer loss to business rep)

1. **BALANCE OF CONVENIENCE: Which of the parties** will suffer **THE GREATER HARM** if the injunction is granted or refused?

* Bargaining strength of the parties is important here – Equity won’t grant an interlocutory injunction against a weaker party if it would be more harmful to him on a balance. Is the party seeking the injunction going to benefit from the harm to the defendant.

**3)** **Restitution Interest** (***Equitable***): Bases damages on **what the breaching party unjustly gained, not what the non-breaching party lost**In cases where the **normal remedies** of damages, specific performance and injunction are **inadequate** the **court can, grant** the discretionary (equitable) **remedy of requiring the defendant to be held accountable to the Plaintiff for the benefits the D received from the breach of contract—**also applies where P suffers no loss from Ds breach. **.** ***AG v Blake(****traiter spy gained money from book deal AG sued to get the benefits spy unjustly earned. AG lost nothing)* **:** Note this case doesn’t give a clear scope of the remedy. It says *Blakes* is exceptional, but doesn’t say what “exceptional” cases are.

**This approach has been followed in Canada. It has also been followed in purely commercial cases**

**TEST*AG v Blake***

1. **It must be “just and equitable” that D should receive no benefit from his breach**
2. **Other Damages would not suffice**

When you don’t have a loss its difficult to claim remedies for a breach.

Eg: One breaches a K not to publish something. One doesnt not have to pay the profit they earned from breaching and publishing, but rather just the amount that they would have had to pay in order to be able to publish.