**Basics**

* Only a person to whom an offer was made can accept; acceptance can only be addressed to the offeror (*Shogun*) (Mac 26)
* The knowledge/assumptions at time of acceptance are CRUCIAL for issues re mistake and misrepresentation
* **Motive** does not enter into the question of whether an individual has a right to recover under the contract (*Williams v Carwardine* (KB 1833) (p 50)
* Individual can’t accept an offer they are unaware of; Clarke had completely forgotten; could not have been an acceptance (*Clark* (p 51))
* offer can be determined by objective assessment of the offeror’s intention; intention found only in outward expressions (*Canadian Dyers Assn Ltd v Burton* (Ont HC 1920) (p 18)
  + Intention to create legal relations can be judged from subsequent **behaviour**
* In a store, presence of product is invitation to treat, it is then up to the customer to make offer (*Pharmaceutical Society v Boots* (CA 1953) (p 20))
  + Case where ABCA does not convict lady of theft because tags are “invitation to treat” and cashier accepted her offer (*Dawood* [1976])
* intention to create legal relations necessary to bind, regardless of consideration
  + apply OBJ test
  + Assumed yes in business; assumed no in family unless explicitly stated AND meant to be K (*Balfour* (CA 1919) (p 243))
  + parties expressly stating they do not wish to be bound, all G (*Rose & Frank Co* (CA 1923) (p 246))
  + Letters of comfort are not legally binding; have a market function (*Toronto-Dominion Bank* (ONCA 1999) (p 247))

**Electronic agreements** (SEE MAC 34):

* Shrink-wrap agreement: shrink-wrapped software box indicates purchase of software is subject to license found in manual or when software used (*ProCD* (US 7th Cir 1996) (p 61))
* Click-wrap agreement: user accepts terms of use by clicking on “I accept” button
* Browse-wrap agreement: no “I accept” button; rather, terms of use indicated on first/home page and continued use = acceptance (*C21* (BCSC 2011) (Supp))
  + Acceptance of terms comes thru action of taking advantage of the benefit of the product/website with knowledge of the terms
* ***Elec Transactions Act*** 
  + Signature can be fulfilled electronic signature
  + Required record can be electronic so long as it can be accessed
  + “Sent” means enters information system outside control of originator; on same information system, once it is retrievable by other party (s 18(1))
  + note information re distance sales contracts at s 47ish of BPCPA

**Auctions/Bidding**

* Bids become irrevocable if filed in conformity with terms and conditions under which the call for bids was made if such terms so provide (*R v Ron Engineering* (SCC 1981) (p 35))
* A **privilege** clause cannot overrule explicit or implicit term of a contract, unless P clause is explicit
  + P clause in *MJB Enterprise* said could accept any bid; but implicit term that only compliant bids could be submitted (SCC 1999)

**Offers to the public** (*Carbolic Smoke Ball Co* (CA 1893) (p 25)

* Unilateral offer to the world; accepted if K in mind when performing terms
* offer to public in certain contexts means waiving claim to be notified; must be revoked in same manner
* terms of K (if vague) will be interpreted purposively from the contract

**Consensus**

* legally enforceable agreement = “meeting of the minds” essential
  + USUALLY: *Byrne v Van Tienhoven* (re post acc rule)
* Absence will usually negate existence of K and render it void
* A person to whom an offer is made should be entitled to assume that the offeror still wishes to be bound unless they hear to the contrary

**Legal capacity**

* understand what it means to make a contract; Knowledge that you are binding yourself and what that means
* ***Infants Act***: If kid at time of K, not enforceable unless affirmed at 19, or partly performed or not repudiated within 1 year of age of majority; kid can enforce though
  + Exceptions for trustees (s 22)
* A contract which is negotiated in good faith, with no knowledge (or reasonable knowledge) of incapacity on the part of the other party, is not voidable for unconscionability (*Hart v O’Connor* (1985) (p 721) where P purchases land but P was not exploitive, was bona fide, and D had lawyer)

**Bilateral vs Unilateral Ks** *Helicopter Exploration* (1955) (p 66) (MAC 42)

* Courts should treat offers as calling for bilateral rather than unilateral action when the language can be fairly construed
* When a complementary action is contemplated, offerror in unilateral K cannot revoke K for want of performance if they fail to discharge complimentary obligation to perform

Revocation/Lapse of Offer

* Absent communication, revocation is not effective(no postal acc rule – risk on offeror)
* Offer can be revoked at any time, EVEN IF offer says it will remain open for X length of time
  + offeree should ensure the offer remains open thru **option contract**
* A reasonable time to accept an offer can be determined from the circumstances (look to conduct and language) (*Barrick v Clark* (p 103) (Mac 30))
  + In this case: demand, proximity of closing date, words used in the offer
  + Request to keep offer open does not enlarge reasonable time
  + The wife was not a party in the contract and therefore her request does not mean anything.
* you can’t accept an offer that you know doesn’t exist anymore – ndirect communication counts (*Dickinson v Dodds* (p 97))
  + no ***consensus ad idem*** at that moment; needed offer to continue to moment of acceptance
* unilateral K cannot be revoked once other party starts performing, but K ceases to be binding if party left it incomplete and unperformed (*Errington v Errington* (p 102) – dad said family could live in house as long as paying mortgage, get payment when done)
  + Note: presumes that in unilateral K the offeror is aware of commencement of performance

Communication/Mode of Acceptance

* communication of acceptance generally benefits offeror, but they can waive this requirement (*Carlill v Smoke Ball*)
  + offer impliedly indicates one does not require notification of acceptance
  + problem when elimination of communicating of acceptance imposes K (*Felthouse v Bindley* (1862) (p 72))
* Generally, if message of acceptance reaches **machine**, it will be said to have been communicated; would cause undue hardship on offeree otherwise
  + no universal rule of acceptance in cases on instantaneous communication; they must each be decided based on the intentions of the parties and the circumstances of the particular cases.
* acceptance is generally only effective if made according to prescribed procedure (*Eliason v Henshaw* (USSC 1819) (p 79))
* contract is formed when and where the acceptance is received (*Brinkibon v Stahag Stahl* (HL 1982) (p 88))
* **POSTAL ACCEPTANCE RULE**: A contract becomes binding the instant that the acceptance is put in the mail (*Household Fire & Carriage Accident Ins Co v Grant* (CA 1879) (p 81))
  + Halsbury’s: When rule applies. The view that best accords with the reasonable expectations of the parties is that the postal rule should apply wherever communication of the acceptance from a distance is required or contemplated, and the mail is neither expressly or impliedly ruled out by the offeror. This appears to be the view taken by modern Canadian courts in common law provinces.
  + Postal acceptance rule doesn’t work when explicitly denied or if it would create manifest inconveniences/absurdities (*Holwell Securities v Hughes* (CA 1974) (p 85)
  + Note postal rule means acceptance in jurisdiction of the offeree

Consideration

* assessed on promise-by-promise basis
* Lots of motivations for K, but ONLY ONE = CONSIDERATION: X desires what is to be given in exchange for his own promises in the K
* In a **unilateral K**, consideration by promisee is action completed at moment when K comes into existence; acceptance and consideration are blurred
  + **INCONVENIENCE = CONSIDERATION**
* Note: where parties agree to mutual rescission of prior agreement and substation of new agreement, new agreement is binding even though it may place increased burden on only one party
* Consideration can be implicit, and implied as a term of K to give K business efficacy
  + ***Duff-Gordon*** (NY 1917) (p 164): agreement placed no oblig on P to promote D’s designs, though business arrangement is made clear; found to be “instinct w/ obligation, imperfectly expressed”
  + if you take contract without consideration will it still make sense?
* Gratuitous promises cannot be contracted into, UNLESS money given for specific purpose which can be seen as of some benefit to promisor
  + *Dalhousie College* (p 156): raising funds for better efficiency, build more buildings, etc – not consideration for promise from donor
* Consideration as a duty to a third party: promisee obtains the benefit of a direct obligation that is enforceable
  + “We will do deal with Fu Chip, guaranteed, or you can sue us”

**Promises under seal**

* To be valid, promisor him/herself must affix seal to K containing promise
* “a gummed wafer is enough” when acknowledged by party executing
* used in absence of consideration; or if concern consideration is not valid

Certainty of Terms

* “common sense” approach considers contractual interpretation as a question of mixed fact/law (*Sattva*)
  + legally interpret surrounding factual matrix to find OBJ intentions
  + unless there is “extricable” question of law (wrong principle applied, etc)
  + consistent with **parol evidence rule**: factual matrix aids determination of written K as intended, not changing meaning of those words
  + Note implication of deference to lower courts
* Common law duty to **perform** honestly (*Bhasin v Hrynew* 2014 SCC 71)
  + Core: must not lie, knowingly mislead, or sabotage each other about matters directly linked to performance of the K
    - vs fraud:
      * A) requires intention false statement be relied on
      * B) is a tort; this allows DMGS on contractual breach
  + Part of a general organizing principle of good faith; examples:
    - Ks requiring cooperation
    - Ks giving one party discretion
    - One party using K power to evade K duty
    - Insurance cases with obligation to disclose facts material to risk being insured against
    - Employment Ks where courts have implied obligation not to be too harsh
    - For example, *Whiten* insurance case family in the snow
  + DMGS based on what Bhasin would get if Hrynew was honest

Vague/Missing Terms

**Three kinds of terms to imply** in a K (*Machtinger* (SCC 1992) (p 463))

* **1** Those implied factually by **custom** – implied as part of presumed intention
  + to infer: evidence that parties to K would have understood such a custom to be applicable
* **2** implied terms as factually necessary to give **business efficacy** to a K
  + are obviously assumed; implied on basis of presumed intention
* **3** not on basis of intention, but as “legal incidents of a particular kind of K, the nature and content of which have to be largely determined by implication”
  + K could exist without, but read in for fair functioning of agreement given relationship between the parties
  + Can only be displaced with express contrary agreement
  + Implied term in *Machtinger*: obligation of employer to provide employee with REA notice of termination (VOID BECAUSE OF STATUTE)
    - Intention of parties not at issue: legal obligations of the employer is
    - Court can as a matter of policy imply a term, even if not intended to be there (*Machtinger*)
* VAGUE: “should make every effort to find meaning in words used by parties to find whether K exists”
  + “best efforts” determinable by court and gov’t found to have not done its best
    - *R v CAE Industries Ltd* (FCA 1986) (p 114)
    - NOTE: not universally the case “best efforts” or “good faith” can be determined! NOTE: *Mannparr* (below) re NEGOTIATION, not PERFORMANCE

Agreements that contemplate negotiation

* “what can be made certain, is certain” - only question is: too vague to give K intention of parties?
  + intended K, and court can “fill the gaps” by determining what is REA
    - what did they OBJ agree to?
  + Able to determine price of lumber, delivery dates, etc in *Hillas v Arcos* (1932) (p 122) (MAC 58)
* There is no common law obligation to negotiate in good faith and it is not an implied term; ABSENT **objective criteria** towards which parties must negotiate (“market rental” etc)
  + “right to renew for further five years subject to good performance and renegotiation” = nothing in K expressly or impliedly – thus agreement to agree
  + Crown + AB reserve (*Mannpar Enterprises Ltd v Canada* (BCCA 1999) (p 134))
* “**agreement to agree**” means court not entitled to go to statutes or commlaw and read in REA price
  + re price of a commodity in *May & Butcher* (HL 1929) (p 119)

Misrepresentations

Pre-Contractual Statements

Mac 179

1. Statement of fact
2. That is untrue,
3. That is material, and
4. relied upon the other party as reason to enter K (NOT SOLE REASON)

* **Rescission** open – though disappeared K means NO DMGS
  + see *Guarantee*; see MacD 192
* If misrep constitutes **fraud**, maker is liable for DMGS for tort of **deceit**
  + **Negligent misrepresentation** is possible
* **Innocent misrepresentation** – neither careless/reckless nor fraudulent; remedy is very limited
  + can only rescind if: a) transaction can be undone and b) party moves quickly (LexisNexis – SOME ABIGUITY RE PART B)
  + If it is in the K, **Guarantee** indicates you can rescind IF THE MISREP IS SUBSTANTIAL
  + *Redgrave v Hurd* (CA 1881) (p 355)
* Misrepresentation as a term of the K permits the option of rescission if it goes to the root of the K
  + (or could terminate and pursue DMGS) (*Guarantee vs Gordon*; MacD 193)
* GENERALLY, **silence** cannot = misrepresentation (***caveat emptor***)
* Due diligence not required of representee
* **insurance law**: material misrep re risk they are taking on, untrue statement, they have right to cancel retroactively
* **opinion** from a knowledgeable party, can become an implicit statement of fact; if false, it is actionable (*Land & House Property Corp* (CA 1884) (p 359))
* There is a presumption that any statement made in an attempt to induce another party to enter into a contract is relied upon as a condition if the contract is eventually formed.
* Defined and examples at s 4 **BPCPA**; burden of proof on supplier (s 5)

Collateral Contracts

Denning formulation fails (McCamus 732)

* representation made prior to formation of K is transformed into a term of a unilateral K that is collateral to the main K – breach = entitled to DMGS for expectation
  + “if you enter main K, I legally promise representation is true”
    - consideration is entering main K, assurance is other consideration
  + warranty guaranteeing truth of representation: liability for falsity not dependent on finding of fraud or negligence (McCamus 733)
* claimant must show on OBJ evidence that representation intended to be warranty – strict
  + (*Heilbut Symons* (HL 1913) (p 371) re rubber company)
* suspicion for warranties altering terms of main K (why not change written K?)
  + warmer reception in consumer transactions where representor has expertise (*Dick Bentley* (CA 1965) (p 376))
* **Denning’s** analysis could come in handy:
  + **1** representation made in course of dealings for a contract for the very purpose of inducing another party to enter K
  + **2** actually induced party to enter K; creates prima facie ground for inferring warranty; assumption can be rebutted

Parol Evidence Rule

* when parties intend written K to contain entire K, rule creates a presumption that a document that looks like a K is to be treated as the WHOLE K – courts will not accept in evidence terms of K which are oral and not in writing (*Hawrish/Bauer v Bank of Montreal* (SCC 1969/80)
* does NOT apply to misrepresentations OR implied terms
* outlawed in BC in consumer transactions – MACD P 71
* A STRONG REBUTTABLE PRESUMPTION: (from *Gallen v Allstate Grain Co* (BCCA 1984) (p 422))
  + WEAKER RULE when oral representation adds to document
  + WEAKER RULE when parties use standard form
  + WEAKER RULE when contradiction b/w general exclusion/exemption clause and a specific oral representation
  + STRONGER RULE when oral reprs explicitly contradict
  + STRONGER RULE where parties have negotiated
  + farmers got herbicide; was ruled that the oral representation before the actual CT was valid **CLARIFY FACTS/RESULT**

Condition Precedent

* If CP triggers K, no enforceable agreement before CP met
  + For ex, “if he likes the house….”
    - Can’t test objectively if he likes the house or not; previous K illogical
  + Often has unilateral K qualities; find Fluffy, that’s acceptance and CP – K does not exist until you find Fluffy (MacD 142)
* If CP part of K, K formed and solid; just need to meet condition for performance
  + Look for OBJECTIVITY – “subject to boss approving, good to go”
* All depends on **INTENTION**; look to the circumstances
* Courts prefer to conclude that a CP is to obligation; will look for K where it can
* Consideration when K already created: (ADD TO CONSID SECTION)
  + Wait until condition is fulfilled; detriment because accept risk they’ll be bound
  + Or work to bring about the condition
* When K formed, implied term to do what is necessary to do what is REA to fulfil condition; business efficacy
  + *Dynamic Transport* (SCC 1978) (p 332): arrangement of purchase/sale of land; because D (vendor) must apply for subdivision, K is subject to D using best efforts to obtain approval
    - Failure can leave open SP as P was pursuing here (MacD 144)
* third type of CP: cannot imply missing term that has SUBJ and OBJ qualities (*Wiebe* (BCCA 1986) (p 327)): “subject to selling the house” sounds OBJ, but REA price is SUBJ
  + situations like cannot imply terms fail for uncertainty

**WAIVING CP**

***Law and Equity Act* 54**: If performance of K is suspended until CP, can waive fulfillment of CP, even if dependent on those not party to K if

* **1** CP benefits only that party to K; AND
* **2** K is capable of being performed without fulfillment of CP; AND
* **3** 
  + **a)** where time is stipulated for fulfillment of CP, waiver is made before time stipulated
  + **b)** where a time is **not** stipulated for fulfillment of CP, the waiver is made within reasonable time
* For example, “fuck it, I don’t need to sell my house, let’s do it”

Standard Forms

* Parties do have an obligation to familiarize themselves with the contents of their contracts – a failure to do so can be justified only by special circumstances. (p 501)
* Battle of the shots: If aware of terms proposed by other and not objected, can be taken to have agreed; court will examine totality of exchanged docs + circs to decide what each party would REA conclude
  + try to have “last reasonably understood bid” (*Butler Machine Tool* (CA 1979) (p 56))
* conditions needed before K formed – need opportunity to reject terms
  + Only conditions given in REA time and are REA are binding; the more onerous a term, the more notice you need to make it binding – PUT THAT SHIT IN RED CAPS (*Thornton* (CA 1971) (p 478): P parks car, gets hurt; D claims not liable b/c of disclaimer)
* Signature alone does not = acceptance to terms inconsistent to object of K
  + need to take REA measures (*Tilden Rent-A-Car* (ONCA 1978)(p 492) (MacD 155)
* Knowledge of terms is tested subjectively - If you don’t sign it, it is not binding in consumer setting
  + *McCutcheon* (HL 1964): P got car shipped to mainland, but D ferry sunk; P did not sign, could say “I had no idea”
  + Past practice is enough to count as notice on subsequent occasions without attention being drawn if by virtue of earlier transactions there must have been knowledge of particular provisions (MacD 157) – for ex, commercial relations, they KNEW timing of truck etc
* Generally, when party signs, it is immaterial if one has not read it and does not know contents; no general requirement to take REA steps to ensure party signing reads onerous terms (*Karroll* (BCSC 1988) (p 497) (MacD p 156)
  + 3 exceptions to signature rules:
    - *Non est factum*
    - Fraud/misrepresentation
    - ***Tilden***: reason to believe signing party is mistake re terms, then signing party cannot REA have been taken to have consented to them; obligation here to inform
      * Spirit of the other two: not far from active misrepresentation
  + Relevant factors re reasonsable steps to advise: runs contrary to expectations; length and format of the document; time available for reading/understanding

Modification of Terms

* *Gilbert Steel* approach requiring consideration vs NBCA approach mandating no duress
* where parties agree to mutual rescission of prior agreement and substation of new agreement, new agreement is binding even though it may place increased parties on only one party
  + Consideration is mutual abandonment of rights under the initial K

Adding to Obligations

**past consideration:** “an act done before the giving of a promise to make a payment or to confer some other benefit” (*Pao On*)

* NOTE: analysis below is only manner to find past consideration valid for new K agreement
  + For ex, the 19th century horse guy
* can be valid for if:
  + **a)** at promisor’s request
  + **b)** parties understood the act was to be remunerated by some benefit
  + **c)** the conferment of benefit to the promisee must have been legal enforceable had it been promised in advance
  + Implicit in this view that benefit is not a gift
  + Applied in *Pao On* (PC 1979) (p 173) (MacD 103)
    - P owns all shares in company A and reaches agreement with company B; engage in share swap; P also enters deal w D (company B shareholders), and second deal with shareholders later changed (**CONFIRM**); issue is consideration in second side deal
  + Past consideration is the deal made in the past with company B (Fu Chip):
    - a) this was at the D’s request
    - b) the parties understood that deal would be remunerated in the buyback
    - c) this payment (indemnity) would be legally enforceable if made in advance

**Agreeing to pay more**:

* promisee has no fresh consideration moving to promisor agreeing to pay more
* *Gilbert Steel* approach: [1976 ONCA] (MacD 108) (p 178)
  + Steel price goes up, oral agreement to pay more; D refuses to pay
  + No consideration, not enforceable
  + Rejected: agreement to give god price; pervious K rescinded; more credit; not repudiating invoices creates promissory estoppel
* *Williams v Roffey* approach: [1990] (MacD 108) (p 182)
  + Should reflect intentions of parties where bargaining powers are fine (**no duress**) and where consideration reflects party’s intentions
    - Look for party obtaining benefit or obviating a negative; not fatal if no detriment to one party
  + K to renovate 27 flats; hired P as subcontractors; financial issues; worried contractors might not finish on time
  + P had no detriment, but D got benefit of not hiring others + ensuring job done on time
* *Nav Canada* approach: (2008 NBCA) (MacD 109) (p 186)
  + Feds/airport in K with Nav Canada for certain duties; NC refused (as in K) to relocate equipment unless airport pays: protest airport agrees, then refuses to pay
  + No need for consideration for **non-duress** amendment to K
  + Really about commercial efficacy and protecting expectations that modifications will be enforceable
  + Criticisms of traditional consideration doctrine:
    - Overincludes those made with consideration under duress
    - Imposes injustice on those in good faith relying on K modification
    - Developed before recognition of **economic duress**

**Agreeing to pay less**:

* ***BC Law and Equity Act***; **s 43**: Part performance of obligation either before or after breach of it, when expressly accepted or rendered pursuant to agreement with creditor without consideration extinguishes obligation
  + Expressly accepted: “thank you I accept this in full satisfaction of the obligation”
  + Rendered pursuant to an agreement; “just gimme 50 and we’ll call it even”
    - Render the part performance; extinguishes the entire obligation
* What it doesn’t talk about is if you haven’t yet produced the part performance
  + Case law says binding, but still issues (see 15-01-22)
* Historically, you want your creditor to accept a partial payment, you have to think about the consid issue (*Foakes v Beer* (1884) (MacD 110) (p 192)
  + $1.00 can be consideration for most things, but it cannot be consideration for $2.00
  + if multiple creditors said so, it was binding
    - Policy: classic way for insolvent groups to agree with creditors; no creditor should be advantaged over others

Breach and Termination

**Repudiation**:words or conduct evincing intention not to be bound by K (**Guarantee**); result of K will be essentially different than that which parties considered (MacD 301)

* does not end K: 2nd party “accepts repudiation”, then elects to terminate
* termination ends primary obligs of K, but not secondary (MacD 302-03)

***Sale of Goods Act[[1]](#footnote-1)***

* **15(2)**
  + condition breach: right to treat K as repudiated – can terminate or seek DMGS + affirm K
  + warranty breach: may claim damages
  + whether it is one or the other depends on the construction of the K, not necessarily the label (**15(3)**)
* For certainty: can insert clause stating breach of X term permits cancellation (15-02-03)
  + “time is of the essence”
* **15(4**): if buyer accepts goods, breach of condition by seller to be treated as warranty (unless otherwise agreed)
* implied under **s 16**:
  + condition re seller has right to sell/lease
  + warranty that buyer can enjoy goods and are free from charges in favour of 3rd party
* **S 17**: implied condition that goods correspond w/ description
* **s 18**  re other conditions
* **s 19**: sale by sample implies condition bulk = sample; also condition that buyer has REA opportunity to compare bulk/sample
* primary obligations as those parties will perform if all G; secondary obligs enforceable if a primary obligation breached

“**innominate/intermediate**” terms: did breach’s consequences deprive party of substantially whole benefit it was parties’ intentions they should obtain from K (FACTUAL INQUIRY) SEEMS WHOLE K

* consequencess are serious: remedy = condition
* not so serious: remedy = warranty (cannot terminate)
* despite breach, remains innominate term: only remedies for particular breach = W/C
* according to article, if you have gotten main consideration, probably can’t terminate
* to determine, look forward: may involve what appears possible to happen in future
  + consider: proportionality, purpose of K
* Applied in *Hong Kong Fir* (CA 1962) (MacD 138) (SEE 15-02-03) **REVIEW**
  + did the Charterers have a right to end the K because of “seaworthy vessel”?
    - Reponse to breach could itself be breach; it is refusal to perform
    - Seaworthiness can be temporary or permanent

**Anticipatory Breach** (15-02-03): “I will breach the K; performance not due till X, but I’m telling you now”

* Can accept breach and sue immediately
* OR, can affirm, and wait until X to see if they breach; no obligation to mitigate until X
* If it’s the kinda breach where nothing is gonna happen, you have to mitigate
* Can treat conduct as anticipatory breach – manifestation of intention not to perform
  + “whether the party renunciating has acted as to lead REA person to conclusion that he does not intend to fulfill his part of K” (McCamus 693)
* plays into **Hong Kong Fir** – is it a breach of a condition that would have effect of depriving party of substantially whole benefit it was intention of parties that he should obtain from primary obligs under K (McC 694)

**Breach**

* If objective intention is that K should have effect even if there is termination you give effect to it (2NDARY OBLIGS)
  + Limitation periods in **Guarantee** intended to apply even in event of termination for repudiatory breach
    - Even if Guarantee in breach for wrongful rescission, limitation for bringing an action still in effect
      * Term in **Guarantee** permitting rescission for misrepresentation

|  |  |  |  |
| --- | --- | --- | --- |
| Term | Terminate? | DMGS? | Restitution |
| Condition OR  Innominate w  Severe conseqs | YES | YES | AFFIRMED K: NO  TERMINATED K: YES |
| Warranty OR  Innominate with  Non-severe | NO | YES | NO |

Termination and construction

McC 1052

15-02-05

* “Entire K” – payment to be made in lump sum at conclusion of work
* Construction law has this rule re no *quantum meruit* except if new K except:
  + **1.** If there have been payments along the way
  + **2. Substantial performance**: defective, but K substantially performed (*Fairbanks* [1953] (MD 145))
    - distinction between refusal to perform part of K and completed work defectively done: was K performed substantially in conformity with specifications?
      * minor defects/deviations: contractor may have to pay for these (CED)
        + for ex, house with 2 coats of paint instead of 3 in one room
    - CED: “to what degree K was substantially completed following appropriate review and inspection”
* **Right to perform under protest** (**S. 62 *Law/EQ Act***(ONLY IN BC)):
  + Must communicate within REA time that performance is under protest
  + Right to compensation not affected by person administering K unless person has no interest in subject matter of K and is indie of errbody who does
* in building Ks, *quantum meruit* traditionally only available on basis that new K formed between parties because D has no choice to take the benefit of P’s work (*Sumpter v Hedges* [1898](MacD 145))

Damages

MUST ESTABLISH:

* **1** breach of primary obligations
* **2** amount of loss
* **3** REA of claim (not too remote + we mitigated)
* money to allow injured to make up for damage caused by breach
* But in the end working out how to get from current position to what position would be to day if performance had occurred
  + See contingency discussion at 15-02-12: if I am to deliver X for Thursday, and I breach, and your warehouse burns down on Friday, don’t get anything it seems
* No DMGS for “**merciful breach**”: if D can show performance would have caused greater losses to P, unfair for D to cover P’s expenses
  + Bowlay doing the logging; but D breached and didn’t bring enough trucks; D shows every truck was a loss for them *Bowlay Logging* (BCCA 1982) (MacD 314)
    - claim for reliance DMGS here rejected; D shows that if K performed, P would have made a loss
* Interests may overlap; can claim combined so long as P does not get double recovery (*Sunshine Vacation Villas* (BCCA 1984) (MacD 314))
  + Sunshine has K with HBC to open up more travel agencies
    - claims both reliance and expectation interest on conflicting standards
      * Giant loss of capital as if no K
      * AND megaprofit as if K had succeeded

**Expectation interest**: usual one; parties enter K expecting other party to fulfill obligs – expectation DMGs to put that party in position they would have been if obligations fulfilled

* Two ex from MacD 310
  + Printer bought for 100; seller fails to deliver and P buys for 120
    - DMGS 20 – fulfills buyer’s expectation to pay 100 and get the printer
  + Printer delivered but it is wrong one; DMGS here is difference in market value bw market value of what is delivered and what arrives
    - Worth 120 on market; gets 80 machine; was expecting 120 machine for 100; so 40 in DMGS + 80 = value expected

**Reliance interest**: basically wasted expenditure relying on the other

* When in doubt, DMGS will put you at break even (*Sunshine Vacation Villas*)
  + Note: unpredictable industry; can’t get in experts saying anything, very speculative
* Printer costs 120 on market, to be delivered for 100; printer arrives is worth 80; reliance says 100 has been spent on getting something worth 80; worse off from the k by 20
  + This would be better to claim expectation
  + But if printer on market was worth 90, would be better to go with reliance CLAARIFY
* Opportunity cost: would never know where you stood until K was over

**Restitution Interest** (McCamus at p 682/1036)

* Restitution interest available to those who elect to disaffirm a K because of repudiatory breach
  + Could be of greater value than K DMGS
* Note separate claim of unjust enrichment against parties who have gained when they should not have; only works if party chooses to take advantage of what you did

Quantification

* P must satisfy amount lost
  + Can’t know for sure =/= can’t relieve wrongdoer of necessity of paying DMGs
* **Chances**: quantity of DMGS x likelihood of attaining (*Chaplin* v. *Hicks* (1911) (MacD 323))
  + $500 prize x 50% chance = $250 DMGS
  + Note: this is distinct from K re commodity that only indirectly leads to chance of profit
* look to what K was to accomplish if done correctly (MacD 327)
* cannot recover DMGS that are grossly out of proportion to good to be attained or nature of the defect
  + Standard is REA (*Thunderbird* (ABCA 1975) (MacD 328/333))
    - Tbird has fix all sorts of deficiencies; can’t make it too fine a set of balances for aggrieved party; they might “want it just that way”
  + *Ruxley* (MacD 328)by contrast re 7 foot pool: huge waste of 30k, like case re pipe
    - “symbolic DMGS” for 2500 for expectation his pool would be bit deeper
    - Appropriate to look at P’s intention: HL did not think he intended to rebuild pool
* P might place unusual importance on a feature that would often not be important; court should not go too far to require P justify wishes
* DMGS for goods delivered/accepted which do not conform w/ description are the difference bw market price of goods that ought to have been delivered and those delivered

**mental distress** **DMGS** ((MacD 325) (*Fidler* para 47):

* **1**: an object of the K was to secure a psych benefit that brings mental distress upon breach w/in REA contemplation of
  + NOTE: K can have multiple purposes
* **2**: degree of mental suffering caused by breach was sufficient to warrant compensation
* fits within standard **Hadley** formulation
  + does NOT require D to have acted shockingly etc
* **EXPECTATION** of gaining intangible fun – compensation is analogous to profit (*Jarvis* 1973 CA p 825)
  + distress in dog asphyxiation case is a **RELIANCE** loss (from annot-syll)
* SCC prefers “mental distress” DMGS > aggravated DMGS (MacD 324)
* not usually available in employment context
* in *Fidler*, insurance company found to be rough, causing mental distress, but not AGGR/PUN separate actionable wrong

**Aggravated DMGS**:

* compensation for intangible injuries arising from indie wrong like punitive (NOT **Hadley**)
* Does not require psychological test

**Punitive DMGS**

* **1** to punish; ONLY IF compensation not sufficient to act as punishment, deterrence, and retribution
* **2** Must depart markedly from ordinary standards of decency, in situations that can be dscribed as malicious, oppressive to court’s sense of decency
* **3** There must be an “independent wrong” – could be a tort
  + This could be a breach of K duty of good faith
    - * Insurers from hell after house burns down (*Whiten* 2002 SCC p 846): insured have duty of good faith, and reciprocal duty to treat insured fairly; saying they scammed was outrageous

Remoteness

* Unlike torts, in K it is what is contemplated when K is made, not when K is broken
* **First branch** of *Hadley*: arising naturally
  + Reference to terms of the K are CRUCIAL; don’t need to know background, circs, etc
  + **EXAMPLE**: K to buy red VW Golf; shows up with white F Focus; any buyer can claim difference in value of car delivered under first branch
* **Second branch** of *Hadley*: special circs (MacD 320)
  + **1**: special circs need to be known at time of K entered into by both parties
    - need to be able to assess should I enter or no?
    - general nature; often implicit (you would know he’s entering into sub-Ks)
    - In *Hadley* itself, did not know broken shaft had shut down mill
  + **2:** DMGS must be REA supposed as probable result
    - REA in his position would realize such losses sufficiently likely to result from the breach to hold that loss flowed naturally from the breach or should have been within contemplation
    - Unlike torts, DMGS that are FS but minimally likely are too remote
* Example, *Heron II* (HL 1967) carrier knew they were carrying sugar and heading to Basra where they knew there was a sugar market
  + This was enough to claim DMGS for losses on the sugar market after delay
* Example II, *Victoria Laundry* (CA 1949) (MacD 321) late delivery of boiler caused P to turn down very profitable gov’t K
  + Got lost regular profits, but not extraordinary profits
  + Endorses “on the cards”, though *Heron II* overturns

Mitigation + Time of Measurement

* Up to D to show P could have mitigated
* Duty to take REA steps to deal with a breach; can be any reaction
  + When P learns of breach, or w/in REA time
  + REA is interpreted liberally (**Nu West**)
* Normal rule that you value property/service to be delivered at time of breach
  + Based on idea you REA ought to have mitigated at that time
  + EXPLAINER: X breaches K with Y and does not deliver car worth 10k; X turns around and immediately buys another car for 10k
    - Date of breach assessment as purchaser is placed in same financial situation as if K had been kept (*Semelhago* (p 881))
  + OR assessed at earliest date P can be assumed to mitigate

LIQ DMGS, deposits, forfeitures

* Relef against penalties and forfeitures granted under **s 24** of **Law and Equity Act**
* Acceleration clause (MacD 338) regards a K that calls for higher payments in event of certain events occurring; **s 25** of **Law and Equity Act** permits relief against these in context of mortgages and sales for land

**LIQ**

* Genuine pre-estimate of compensation expressly agreed upon for failure to perform failure obligs
  + NOT put in better position
* Like condition/warranty, a LIQ DMG could be a penalty

**PENALTY** (MacD p 336)

* EQ doctrine: LIQ DMGS holding party *in terrorem* or to overcompensate
* Party enforcing has to show it is genuine pre-estimate of loss
* If fixed sum, but breach might cause DMG far less: presumption
* If single lump sum payable for several events of varying DMG: presumption
* Weaker party can consent to provision and continue to affirm K and clause
  + “breach = $1000”, penalty clause; causes $5k DMGS, can insist upon penalty
  + if you agree to fixed DMGS, cant use penalty doctrine to get rid of it
  + just void for purposes of holding party in breach to pay DMGS
  + can be cases where this is overridden: for example, 10k penalty but a million in DMGS – this were not the kind of DMGS intended (strict construction of K)
* Note movement towards considering this an issue of unconscionability

**DEPOSIT/FORFEITURE – 20% tends to be okay**

* BREACH: forfeited as remedy; PERFORMED: applicable towards payment
  + Irrelevant if it is pre-estimate of loss or not
* preliminary payment often used: to confirm acceptance of K; OR to be acceptance; OR to trigger other party’s obligations
  + also **CP** to other party’s oblgs becoming enforceable
* EQ relief from forfeiture similar to claiming LIQDMGS = penalty; CONFIRM W JB
  + **1** forfeiture must “penal” – out of all proportion to injured parties’ loss
  + **2** unconscionable for seller to retain
  + JB: “true deposit” (one REA in proportion to vendor’s risk) is by definition no unconscionable
* NOTE: JB says trend to amalgamate doctrines of penalties + forfeitures
  + Look to unconscionable result

S Performance (+ Injunction)

Equitable Remedies

MacD 349 (JUST MACD FOR SP)

Can claim if: not claiming too late (“laches”); not seeking labour; can show common law remedies are inadequate to compensate; can show K has not been terminated or avoided

* **equitable DMGS** when SP or injunction appropriate but unavailable (or P chooses)
  + money substitute for SP or injunction
  + usually that order would cause undue hardship on third party or defendant
* Why are DMGS inadequate for P?
  + subject matter is unique – cannot be bought anywhere else
  + In real estate: UNIQUE TO THE EXTENT A SUBSTITUTE IS NOT AVAILABLE (884)
    - Particularly relevant re devlopers (don’t view it as unique ergo no SP)
    - But of course can apply in certain contexts (first case – was unique)
* Order for SP (OR INJUNCTION) K is not terminated, it is affirmed (MacD 347)
* Court may not order if hardship upon D or third parties (BFPFVWN)
  + Will protect third party w/ existing K w D if K could be performed if K w P were ordered performed
* Obligations performed over time like construction generally not ordered
* Court will generally not order injunction or SP where it would force D to perform personal service (*Warner Bros* (1937))
  + Never “if effect of so doing would be to drive the D either to starvation or to SP of the positive covenants”

**Mitigation**

* If injured party declines to accept repudiation and insist on performance – NO DUTY TO MITIGATE
* Is P failing to mitigate by unREA maintiaining claim for SP?
  + *Semelhago* mandates “some fair, real and substantial justification”
  + Onus on D to show P acted unREA in seeking SP
  + no right to SP => should mitigate 99/100 times; but the contrary is logically possible
* Date of award is date of judgment (in practice, date of trial) (*Semelhago*)
  + Note in *Semelhago* this was luxurious; permitted “DBL recovery” of sorts with own house going up in price as well
* If you do have legitimate claim to SP, at certain point P acting REA should mitigate
  + **Asamera** re stocks: had legitimate reason not to buy replacement shares, but when clear claim no hope of success P acting REA should have bought new shares or litigated on DMGS
    - (for ex, controlling share in a company)
    - EQ DMGS given cut off at certain point

Rectification

Sylvan Lake Golf (SCC 2002)

* EQ remedy to prevent fraud (or equivalent) where written K contains mistake
* Rectification for unilateral mistake available if:
  + **1** P must show existence and content of oral agreement inconsistent w/ document
  + **2** P must show D knew or ought to have known re mistake
    - attempt of D to rely on it must be fraud or equivalency
    - mistake can be innocent or fraudulent
  + **3** P must show precisely how document can be made to express prior intention
  + **4** convincing proof – though still on BoProb
* **Due diligence** is not required
* K is retroactively changed to say whatever
* NOTE: this is not a remedy for BREACH

Rescission

* Rescission is a remedy available to respresentee, inter aliea, when other party has made false or misleading misrepresetntations
  + *Void ab initio*
  + Parties are taken back to position they were in just before K
* bars to rescission:
  + A) when what has been transferred cannot be returned to previous condition
  + B) execution of K for innocent misrepresentation (MAYBE)
  + C) if plaintiff affirms K
  + D) unREA delay (laches)

Contractual Abuses of Power

* All geared towards setting aside K on the whole – not about individual terms
* Generally rescission
  + Are some cases these days that say we will give DMGS in lieu of rescission

Duress

* There is duress to person and duress to goods
* Economic duress – all really comes down to pressure of the circumstances
  + **1** K variation must be extracted by pressure in form of demand or threat
  + **2** exercise of pressure must be such that coerced party has no practical alternative but to comply
    - independent legal advice irrelevant
  + If theses two are met, focus shifts to whether party consented; consider wholistically:
    - **1** whether promise supported by consideration
    - **2** whether coerced party protested variation or not
    - **3** whether coerced party took steps to disavow variation on timely basis

Undue Influence (EQ RESC)

MACD 229; JB’s SYLLABUS

* Undue influence: it’s really a persuasion problem; you took advantage of relationship
* **1st** category: proved on the facts (DIRECT PROOF OF UI)
* **2nd**: actual U.I.
  + **1.** Relationship
    - **a)** list of relations creating irrebuttable presumption of influence
      * lawyer, doctor, parent, etc
    - **b)** can establish: relationship of trust and confidence
  + **2.** transaction not readily explicable on its face
    - =/= manifest disadvantage
  + once you prove, onus on D to rebut
    - Must prove: **1** the deal is fair and also **2** that the deal was not formed under undue influence
      * even if it’s OBJ all G
* **indie legal advice** seems to go a long way, though is not a surefire
* **Third party context** (*Royal Bank v Etridge* (2001) (p 688)– re wife putting up assets as security for husband’s business) – when will the bank be stuck with the wife rescinding?
  + Any non-commercial relationship; any personal relationship: bank needs to make inquiries to save selves from UI (I THINK)
  + If they take REA steps to ensure no UI, they are in the clear (for ex, indie legal advice)
  + Note: notice is a threshold question
  + Commercial entities capable of looking after selves and understanding risks involved in giving guarantees

Unconscionability

* Victim is basically always a person (could be one man company)
* **1** Must be inequality of barg power because of ignorance, need, or distress
  + inequality of bargaining power must be used
    - Doesn’t have to be a tort but there must be some notion of knowingly taking advantage
* **2** And substantial unfairness
* This raises presumption of unconscientious use of power arising from these circs that it was fraud and stronger party must show it was fair/REA
* Also looking a bit more towards the results here; whereas duress is a bit more about the process?
* **Lambert**: “suffic divergent of contemporary standards of commercial morality”
  + Criticism it is smell test; not enough guidance on any of it
  + maybe he’s saying that those two factors are just things to consider?
    - Go by precedent

Waiver + Exclusion clauses

*Dunn v Vicars* ( (Supp)

* Waiver: party waiving has:
  + **1.** Full knowledge of rights
  + **2.** Unequivocally and consciously intends to abandon them
* If exclusion clause applies (even on strict interpretation against party invoking it), only two ways out:
  + **1** unconscionability of agreement when it was made
    - RE formation, NOT breach
  + **2** public policy
    - Binne sets bar at “reckless danger to public”
    - Two examples from CAs:
      * Incompatible with statute: inconsistent with mandatory motor vehicle liability insurance
        + NOTE: public policy vs statutory policy?
      * Ordinary fraud: you can’t K out of fraud
* *Tercon* itself found province relying on exclusion clause was in breach of public policy because of legitimacy of the tendering process (?)
* *Loychuk* upholds sweeping exclusion clause on *Tercon*
  + Risky sports seen as one in which exclusion clauses are REA and appropriate
* ALSO Tinden situation
  + Know they have not read and it is contrary to the meaning of the K (approx.)
* holds that Ks can only be enforced between the parties to the K

Privity

* + often got around using doctrine of agency
* Limited exception made out for use as a defence:
  + **1** Clear intention that third party is able to do this
  + **2** third party is performing very services contemplated and meant to apply to
  + Logic: giving effect to the appropriate allocation of risk in these contexts
* Note: Consideration often used to justify the doctrine
* *London Drugs* case
* *Fraser*: charterers rights crystallized at moment of original K
  + Amendment is ineffective if it is retroactive and concerns this clause
  + Re subrogation clause (right of insurer to pursue third parties)
* Exceptions relate to risk allocation

**Assignment** (MCC 316)

* Creditor assigns debts to assignee; “assignee of the creditor”
  + Assignee can bring claim against debtor from creditor in creditor’s name
    - BUT assignee is legally entitled to control lawsuit
  + SEEMS LIKE: must give notice to debtor, and effective thenceforth
* All defences still available to debtor
* Can’t assign burden of a K (seems to just be debt)

Smith and hughes seems to say: if I am guaranteeing it is an original, in theory that makes it void

* Another theory would be that I knew you thought it was X; so that creates K on those terms
* Conventional analysis: you think guarantee, I think it is; no K

FROM CLASS NOTES 03-26

MISTAKE

**Common mistake** (from *Great Peace*):

* **1** Common assumption re existence of a state of affairs
* **2** No warranty by either party
* **3** Non-existence must not be attributable must not be attributable to either’s fault
* **4** Non-existence must render performance of K IMPOSSIBLE
* **5** State of affairs may be existence of consideration or circs which must subsist if performance of K adventure is possible
* RESULT: VOID
  + IF: mistake re underlying fact changes “identity” of subject-matter
    - *Bell v Lever Bros*: performance no “essentially different”; still about severing the employees
    - Would have to be something like title; something very extreme
* If goods perished before K (without knowledge): VOID (**SGA**)
  + Perish after sale is made? VOID as of that moment
* In all cases we studied, the mistake was attributable to fault; the risk lay where it fell
  + If K covers risk of factual circumstance being different, analysis is BREACH
    - In *McCrae* got **reliance loss**, for having to go look for tanker
* **EQ MISTAKE** from Denning (MacD 202):
  + **1** mistake re facts or anything is fundamental
  + **2** party seeking to set it aside is not at fault
  + **3** EQ
* Smith v Hughes cases are re formation mistakes; these are mistakes re factual or legal circumstances surrounding the K

**Mutual mistake regarding terms of the K**

* must decide what REA 3rd party would infer from K and conduct of parties (*Staiman Steel* (p 544))
  + only where circs are latently ambiguous that REA bystander could not infer common intention that there will be no K: for ex two ships Peerless from Bombay

**Unilateral Mistaken Assumption – the Oats test** (p 546) (MacD 207) (McC 532)

* Irrelevant except in cases of fraud
  + in *Smith v Hughes*, use of word “old” would have created a collateral K (or a misrepresentation, or tort of deceit, etc)
* If seller is aware of buyer’s mistake re quality of oats, fine, *caveat emptor*
* IF seller aware that buyer understood K stipulating the oats were old: *consensus ad idem* gone
  + Equivalent to SNAPPING UP
* Analysis 1: If age of oats are not a term of the K, what age one party thought is irrelevant
  + Collateral K has no ad idem
* Analysis 2: agreeing because you believe old =/= believing other party contracted them old
* If one party has chance to inspect, all good, *caveat emptor*

**SNAPPING UP**

* non-mistaken party does not have to show they knew mistake; “ought to have known”
  + K can be set aside in equity if one party knew the other is mistaken re terms of offer – DENNING

**TENDERING CONTEXT**

* In tendering process, where mistake not known until after K A formed, unilateral mistake has no effect on K A (*Ron Engineering* (SCC 1981) (p 35, 554)
  + Could not affect K A when neither knew at time K was made – mistake re SUBJ intention, not OBJ offer/acc
  + Usually a deposit that is forfeited for breach (including refusal for perform KB)

**Mistaken Identity** (*Shogun* (p 583))

* You intend to offer physical rogue, creating **voidable K**
  + liable to be set aside at instance of mistaken party if before BPFVWN involved
* No interaction, intending to deal with “identity” they pretend to be - VOID
  + Mistake has to be re other person’s very identity, not some attributes of them
  + VOID: BFPFVWN gets screwed

*Non Est Factum*

* “that is not my doing” = K is void (effect on third parties irrelevant)
  + Disputes party should be responsible for K despite it naming them and contains signature
    - For ex, third party in *Shogun* case; not a party to the K at all
* document signed must be fundamentally or radically different and party cannot have been negligent (this is the test) (*Saunders v Anglia Bldg Soc* (1971) (p 591))
  + also (*Marvco Color Research Ltd v Harris* (SCC 1982) (p 593) – son-in-law screws parents)
* No negligence relevant re allocation of risk

Frustration

* **1** unforeseen
  + “ought to have foreseen”
* **2** not the fault of the parties
* **3** performance is “radically different” (**HIGH THRESHOLD**)
  + CF “essentially different” in *Bell v Lever Bros*
  + Destruction, death, illness, method (maybe), purpose (maybe), change in the law
    - What did parties intend? Did they both intend Suez canal as only method?
* Zoning cases:
  + change in subdivision law made K impossible to perform
  + *KBK*: vendor can still convey land but unexpected zoning change made economics of deal radically altered – court points to K price explicitly tied to floor space ratio
* Any routine risk is covered by one’s responsibility, unless parties agree otherwise
  + If parties bearing risk want better deal, shoulda done it
* Consequence in BC: allow for severance (where possible) of parts of K wholly performed (or wholly performed but for payment)
  + Separate Ks that have not been frustrated
  + Common law: K takes immediate halt
    - No further enforceable primary or secondary obligs

**Frustrated K Act**

* Previously, if one party had done work, could only claim under unjust enrichment
* Act puts in place rule that each party must compensate other for anything done under K
  + If value what was done lost because of frustration, that loss in value is = shared
    - Joint ventureres theory
    - If one party has done 10k in work, other party owes 5k

Estoppel

**Promissory Estoppel**

* **1.** Legal relationship
* **2.** Assurance/promise/conduct that use of promisor’s rights will be altered
* **3.** Promisee relies on it (acts on it)
* **4.** negative consequences if promisor allowed to resile promise (also detriment to promisee in costs already incurred)
* **5.** Doctrine is equitable: will only operate where fairness/unconscionability demand it and where equity does not militate against using it (**AGAIN CONFIRM THE EQ W JB**)
* Effect: **suspension** (and possibly termination) of the use/effect of existing rights according to the promise/assurance
  + Traditionally, cannot result in expansion of existing obligation or creation of a new one
  + Is presumptively suspensory
* Application in *High Trees* ([1947](p 203) (MacD 117))
  + Promised cheaper rent during WWII; now P seeking full rent
  + Promise intended to be acted upon; was acted upon, is binding for that period promised (WWII)
* Application in *Dunn v Vicars* (BCCA 2009)
  + Boht parties put in capital; plan A they sell, plan B one moves in and pays out other
  + Moves in, but not perfectly with plan B – V estopped from enforcing strict rights because induced Dunn to act on assumption that property would be hers if she takes over responsibility

**The Australian development** in *Walton Stores* (1988) (p 230) (MacD 121)

* PE used in absence of legal relationship and creates one
* Work to start immediately, K already agreed; Waltons said nothing as other party began work
* **1**. Conduct from Waltons indicates K fine; **2**. Promisee relies and starts building; **3**. Will be negative to not complete K; **4**. EQ to intervene
* doctrine viewed positively in *M (N) v A (AT)* [2003] (MacD 123) (p 239)
  + romance; promise to pay mortgage if you move to Canada
    - not in realm of legal relations

**estoppel by representation**

* **1** representation
* **2** reliance
* **3** detriment to resile
* Told other party a fact; party relied on that fact; representor can’t “deny” the fact, “oh it’s diff, I’m basing performance on the real facts”
  + Induced them to believe X fact and act on it; deprives person who makes statement of their right to rely upon the actual facts
* a shield, not a sword; though can be part of a cause of action
* Proprietary estoppel can be a sword (see MacD 115)
  + Statements or inaction leads one to believe they are going to acquire rights over someone’s property

**Estoppel by convention**

* **1** parties’ dealings must have been based on shared assumption of fact or law; estoppel mandates manifest representation by statement/conduct mutual assumption
  + could arise from silence
* **2** party must have conducted self in reliance on shared assumption, actions resulting in a change of its legal position
* **3** detriment would flow to party asserting estoppel if other party can resile from convention
* For example, contracting that all boxes contain hazardous materials, even though they don’t
  + “handle with care”
  + can’t turn around and say “but they didn’t all contain hazardous materials” – we are both held to the truth of this statement by estoppel
* This has to be an assumption that is consciously shared; not just assumed without thinking (*Ryan v Moore*)

1. (see 15-01-29 if need be) [↑](#footnote-ref-1)