* ***Interpret communications*** 🡪***Puff? ItT? Offer(s)? Acceptance(s)? Rejection/counter offer(s)? Agreement to agree?***
* ***Is there a K? Multiple? Void? Consideration? Certainty? Implied terms? ITCLR? Modifications? Estoppel?***

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| **FORMATION OF THE CONTRACT** |

**OFFER AND ACCEPTANCE**

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| **INGREDIENT** | **IMPORTANCE** | **ISSUES** |
| **Offer** | -Indicates readiness to enter K (*Canadian Dyers*)-Sets terms | -Complete? Readiness to be bound?-To whom? (Offeree = ?)-Terminated? (*Revocation* – prevents acceptance; *rejection* by offeree; *lapse*) |
| **Acceptance** | -Agreement to be bound by terms of offer; timing | -Unqualified “yes”?-Communicated? |
| **Consensus** | -Both parties agree, same time, same K | -Is simultaneous, subjective agreement needed? |
| **Intention to create legal relations** | -Intention of parties to have *legally binding* agreement | -Are there public policy reason for (not) allowing i.c.l.r in given contexts? |
| **Certainty of terms** | -IDs what was agreed to | -Can terms be implied? Interpretation?-Can some terms be deemed irrelevant? |
| **Written record** | -Sometimes required by statute-Useful for evidentiary reasons | -Complete? |

**Offer**

***Offer and Invitation to Treat*** *– Are all details of eventual K clear? Would treating it as offer lead to absurdity?*

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| *Canadian Dyers Assn Ltd v Burton* – Ps wanted to buy house requested lowest price, Ds quoted, Ps waited 1.5yrs then said they’d like lower price, Ds quoted same price, held to be offer (Ps accepted, Ds send deed, Ps sent cheque, D then claimed no K) -Objective test of words/actions of parties to determine whether it was an ItT or offer (**mere quote ≠ offer rather ItT**, but here D’s was *more*, statement of readiness to sell); court will look at language, circumstances, subsequent actions (**objective test for intention; not subjective**) |
| *Pharmaceutical Society v Boots* – When/where does ItT/offer/acceptance take place in self serve pharmacy? Display of price/goods on shelf = ItT, customer makes **offer at till, cashier accepts** (vs. *Dawood* 2 clothes on 1 hanger, theft; customer makes offer, cashier accepts), goods sold in accordance with law |
| *Carlill v Carbolic Smoke Ball Co* – NP ad 🡪 K? Yes; **ad = *offer*** to world, she *accepted by using* ball by terms (K not w/ whole world, only those who accept by performing required actions)-Ads *usually* ItT unless language can be interpreted as offer by reasonable person; Court rejects argument that interpreting ad as offer would lead to **absurdity** – extravagant promise made b/c it would pay them do so -**Unilateral** K – no communication of acceptance needed, performance sufficient; **ad guarantee =i.t.c.l.r.** |

***Communication of Offer*** – *knowledge & motive*

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| *Williams v Carwardine* – Handbill asking for info re: murder for reward; P gave info b/c of conscience, not offer of reward (didn’t know of it); court ruled P entitled to **reward** – **performance** of condition sufficient, **motive irrelevant** (but she must have know of ad, posted in town; however **no judicial statement on condition of *knowledge* of offer made**\*\*); she’s within terms of K by giving info-Intention to accept NOT necessary (silent on whether knowledge of offer necessary for acceptance) |
| *R v Clarke* – 1 murderer gave info re: 2nd murderer, tried to claim reward he didn’t know about (no knowledge)-Court says you **can’t accept an offer you don’t know exists** or have forgotten exists; also if offer requires certain actions, offeree must come precisely within terms of those actions; *not entitled to reward b/c he did not act on reliance of offer* (reconcile with *WvC* above: for bi-lat K, knowledge required but motive irrelevant)-Knowledge of offer and intention to accept necessary for acceptance; cannot accept offer not known to exist |

**Termination of Offer**

***Revocation*** *(by offeror)*

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| *Byrne v Van Tienhoven* – tin plate sale communication, Ds sold to 3rd party, Ps sued; no consensus of minds 🡪 does K require **meeting of minds**? Not subjectively (but legally there was time where they met)-**Postal acceptance rule does NOT apply to revocations** (telegrams governed by PAR); revocation must be received by offeree to be effective – Ps get plates; Person accepting offer not known to him to have been revoked shall be in position to safely act upon footing that O&A = binding K on both parties |
| *Dickinson v Dodds* – Offer to sell property, acceptance to mother in law not delivered to seller, property sold to 3rd party 🡪 **sale to another as revocation** of original offer (no breach, b/c no K); get around this w/ option K-Indirect knowledge (of sale to 3rd party) = knowledge of withdrawal of offer-Issue of who is **agent** – is MiL had been agent, or if he had used PO, case would be stronger; promise to hold offer open not binding w/o consideration or deed-If offeror dies, acceptance impossible 🡪 same principle here for selling to 3rd party (offer dead) |
| **Option K (pre-K): *Prevents early revocation of offer***(as in *Dickinson*);Preliminary O&A, often with payment, that ensures offer will be kept open for a stated period (prevents revocation prior to acceptance or rejection of main offer); consideration = *quid pro quo* element, makes exchange legally relevant |

***Unilateral***

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| *Carlill v Carbolic Smoke Ball Co* – Unilateral K, P as offeree, already performed condition to accept, offer cannot be revoked; K in place; Ds in breach-K not with whole world but with all those who satisfy conditions; acceptance need not precede performance (contemporaneous here), no formal acceptance rqd; \*\*Co issued ad *revoking* after this case – too bad for e/o else |
| *Errington v Errington and Woods* – couple paying installments on house from father, he dies, widow tries to take it away; but K was *unilateral*, they are not *required* to pay, but as long as they continue to (perform condition), K cannot be revoked; **in unilateral K if offeree has already started to do what is necessary to accept, offer cannot be revoked** |

***Rejection and Counter Offer*** *(by offeree)*

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| *Livingstone v Evans* – D offered land @ $18K, P offered $16K, D said no, P accepted original price; Court says P’s **counter offer was a rejection** (mere inquiry is not), D’s ‘cannot reduce price’ was renewal of original offer (rather than rejection of counter offer; even though language ambiguous; context), P accepted original, making K binding for sale of land to P; judgment for **specific performance** |

***Lapse of Time***

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| *Barrick v Clark* – Parties negotiating land sale (changing value), P sent message saying accept price, we can close immediately but D was hunting; P sold to 3rd party in mean time; ruling for P; **lapse of time terminated offer** (how long lapse need be depends on wording/action of parties/nature of goods, etc.; if not in K, will be what is *reasonable* – rule of construction, objective test; what is being sold?) |

**Acceptance**

***Acceptance***

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| *Livingstone v Evans* – D offered land @ $18K, P offered $16K, D said no, P accepted original price; Court says P’s counter offer was a rejection, D’s ‘cannot reduce price’ was **renewal of original offer** (rather than rejection of counter offer; **even though language ambiguous**), P accepted original making K binding for sale of land to P; judgment for specific performance; ***can’t ADD to offer when accepting*** |
| *Butler Machine Tool v Ex-cell-o Corp* – not authoritative; **“Battle of the forms”** (sellers’ slip had price variation clause, buyers’ didn’t); Judgment for buyers on their terms; **Denning**’s reasoning unorthodox (sometimes terms are those ‘fired first’, ‘last’, or ‘combo’; look objectively at forms); frames it as offer – counter-offer – acceptance (by buyers); accepted on whose terms?? No K if irreconcilable differences |

***Communication of Acceptance***

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| *Felthouse v Bindley* – Uncle told nephew to do nothing to accept offer to buy horse; auctioneer sold it-**Silence cannot constitute acceptance**, that places unfair burden on offeree; even if the parties both want K, there is no K if offeree did nothing to accept the offer; offeror cannot indicate silence as means of acceptance; *some* communication is needed, even if just by action (//*Carlill*) |
| *Carlill v Carbolic Smoke Ball Co* – you don’t have to communicate acceptance to offeror as long as you take *action*; P’s use of ball = **acceptance by *action*** (not same as silence in *Felthouse*) |
| *Brinkibon v Stahag Stahl* – *Instantaneous Methods of Communication**-*Brit P bought steel from Austrian D, wants to sue for breach but acceptance was by telex – whose jurisdiction governs? **K legally binding *when* acceptance occurs AND *where*** acceptance communicated to offeror – i.e. Austria; Acceptance by telex effect on *receipt* (**no PAR for faxes**) |
| *Household Fire v Grant* – shareholder issue (issuing shares = ItT, offer to buy = offer)-**Postal Acceptance Rule** (PO as agent *for both parties*), acceptance communicated once it is in hands of PO, K is formed/binding; dissent said no, receipt required for acceptance/K |
| *Holwell Securities v Hughes* – Ps sent letter accepting, never arrived, D’s offer said acceptance must be in writing; Court agrees with *Household Fire* **dissent**; there are **certain types of Ks to which PAR will not apply**; K for land (or marriage) does not attract PAR; No PAR if in circumstances and subject matter, parties could not have intended binding K until offeree communicated acceptance or if it would lead to manifest inconvenience or absurdity; can use this to argue PAR cannot be used w/ regard to land |

**CERTAINTY OF TERMS** – *necessary for legal K; contained in offer*

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| *May & Butcher Ltd v R* – agreement to agree to buy surplus tentage from Disposal Board (*R*)-Court found there was no binding K since an essential term (price) remained to be set; **agreement** **missing critical term** **cannot = K**; not acceptable to agree to settle on matter vital to K later; terms must be explicit (traditional approach); not authoritative (rules on *Sale of Goods Act*) |
| *Hillas v Arcos* – lumber agreement; HoL basically overturns *May & Butcher*; **businessmen** often make agreements in crude/summary form; up to **court to construe docs broadly**; uncertainty can be resolved (court will try to resolve uncertainty; find K)-Interpret wishes/intentions of parties (more modern approach than in *May & Butcher*, overrules it) |
| *Foley v Classique Coaches Ltd* – Parties had K for purchase of land; Supplemental Agreement for petrol purchase; D did so for 3 years, then bought elsewhere, P said SA = binding on Ds to buy petrol-Court followed HoL in *Hillas*; agreement to agree on price from time to time sufficiently **certain** b/c parties believed they had K, **acted like there was a K** for 3yrs (**implied term**: petrol be supplied at reasonable price) |
| *Sale of Goods Act,* ss. 12 & 13 |
| *Empress v Bank of Nova Scotia* – lease agreement w/ renewal clause to negotiate rent at market rate (**benchmark**) and as mutually agreed; landlord P ignored attempts to negotiate; While there is no common law obligation to **negotiate in good faith**, court found there was **implied term** requiring it for renewal (Ds used Ps’ duty to negotiate as ***shield*** against eviction, won); court tries to give proper legal effect to any clause parties intended (w/o constructing it); renewal clause not uncertain; try to give meaning to good faith, shifts in *Mannpar* |
| *Mannpar Enterprises v Canada* – D Gov had K with Ps to remove sand from Reserve for 5yrs plus renewal/renegotiation clause; Gov didn’t want to renew, Ps sued for damages, lost (no duty to renegotiate)-Differing result than *Empress*; no benchmark here; K drafted differently (no arbitration clause)-Differing use of duty to renew: good faith as **sword** by Ps here to get damages (vs. shield by Ds in *Empress*)-Renewal clause as **agreement to agree**; ***duty to negotiate is unworkable in absence of benchmark*** to measure it against objectively; uncertainty; ‘good faith’ not enough (Crown had fiduciary duty to Band, no DtN w/ P) |

**INTENTION TO CREATE LEGAL RELATIONS**

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| *Balfour v Balfour* – ***Family/Social Arrangements****:* W sues H for non-payment of $ (loses on appeal); Court said in family agreements there is strong presumption of **no ITCLR**; only consideration = love; OUT-DATED |
| *Rose and Frank v JR Crompton Bros* – ***Commercial Arrangements****:* Strong presumption that parties DO have ITCLR *unless* it’s explicit that they don’t, no policy reason to imply ITCLR then; no ITCLR here but today this case would probably go the other way based on parties’ actions (clause noting not legally binding/enforceable) |

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| **ENFORCEABILITY ISSUES** |

**MAKING PROMISES BIND – SEALS & CONSIDERATION**

**\*Consideration must have been given at time of Acceptance\*** (assessed promise-by-promise, not whole K)

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| ***Who* can be involved? (PARTIES)** |
| 1. Who is party to the K? 🡪 **Privity**2. **Circumventing Privity** – Trust, Agency, Employment, action to benefit 3rd party3. **Exceptions** to Privity – Statutory; 3rd party allowed to use K defences to tort claims |
| ***How* to ENFORCE the promise?** |
| **A.** Through ***K Devices*** 1. **Seal** (if person who *makes* promise affixes seal) – must be sealed by **Promisor** 2. **Consideration** (if person who *gets* promise gives consideration at time of agreement) – **Promisee**  |
| **B.** Through ***Promissory Estoppel***-Limitations on use: Only modify existing obligation; EQUITABLE; maybe not permanent |

**Nature of Consideration and Seals** – Consideration = “price of the promise” ≠ motive

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| *Royal Bank v Kiska* – P creditor sues D guarantor/promisor after D signed name by **word** **“seal”** (which P has written); Court said there is K based on *consideration* (not seal – only seal or representation of seal, not word seal, will suffice; must be sealed by promisor); P won (D as agent can’t enter K under seal for principal/debtor); Laskin dissent said no consideration, no seal, therefore no K, only party named can sue/be sued |
| *Thomas v Thomas* – dying husband’s oral declaration, home to wife; she paid bro/executor 1*l*/month, he ejected her, she sued; Court held 1*l* to be **consideration of value in eyes of law**, she wins; consideration ≠ motive |

**Forbearance** – promise NOT to do something typically not good consideration; must have *valid* claim to sue

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| *Callisher v Bischoffsheim* – P claimed D (Gov Honduras) owed him $, P agreed to forbear from suing in exchange for 600*l* (debentures) from D; D didn’t pay, P claimed breach and won; **promise to forbear = valid consideration** (if person has *bona fide* belief that he has reasonable ground for suing, then forbearance to sue = good consideration; if claim know to be unfounded, then no) |

**Past Consideration** – why would s/o promise to do s/t in exchange for s/t that *already* happened?

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| *Eastwood v Kenyon* – P paid for Sarah’s education whose D husband (promisor) promises to pay P back for it; P sues when he doesn’t; Court finds P’s **consideration is PAST** (paying for education) and **voluntary** (not requested by ward or D) and unrelated to D; voluntary promise w/o consideration; **past consideration is not good consideration for new promise made after benefit conferred and when benefit NOT conferred at request of promisor** (husband here); (*only 2 parties here, not 3rd party pre-existing like Pao On*) |
| *Lampleigh v Brathwait* – **Exception** to rule of Past Consideration**:** D committed murder, asked P to seek pardon; P goes through trouble to do so, D says after that he’ll give him $, regrets it, claims non assumpsit; ruling for P: **Past consideration** (P’s good deed) **may be good consideration for subsequent promise** ***if benefit conferred AT REQUEST of promisor*** (D) (vs *Eastwood*); ratio summarized/distilled in *Pao On* rules; FAIRNESS |

**Pre-Existing Legal Duty** – To public, 3rd party, or promisor 🡪 promisor now liable twice/ to 2 different parties

***Duty Owed to a Third Party***

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| *Pao On v Lau Yiu Long* – (Distils/broadens *Lampleigh* exception to PC?)Ps now liable twice (to D&FC)**Pre-existing duty owed to 3rd party can be good consideration** (promisee gets benefit of enforceable obl’n)*Act done before giving of promise to make payment or confer other benefit may be consideration for promise if:*1. Act done at promisor’s request2. Parties understood that act was to be remunerated (payment was to be made for service)3. Payment would have been legally enforceable had it been promised in advance)-(Promise of) **performance of pre-existing K obligation to 3rd party can be valid consideration (fresh)**-Duress vitiates consent, may render K voidable; commercial pressure (no alternative option) = duress (Ds argue duress but court rejects it in this case); (*do not muddle pre-existing duty to 3rd party w/ past consideration!!*) |

***Duty Owed to the Promisor***

 *Duty to Pay More*

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| *Gilbert Steel v University Constr* (ONCA) – Ps had K with Ds to provide steel; after price increase, made oral agreement for Ds to pay more, they didn’t, Ps sue, Ds claim Ps gave no consideration for more $ (K variation)-Court says *no fresh consideration*; **prior duty to promisor *not* sufficient consideration**-Price increase unilaterally imposed; mutual abandonment (rescind/replace) of 1st K could be consideration but not the case here, was just a modification of existing K, w/o fresh consideration oral agreement unenforceable |
| *Greater Fredericton Airport v NAV Canada* (NBCA) – *Agreement to pay more* ***Exception***-Parties had K, NAV then said they’d only relocate equipment if GFA paid for it, which they agreed to do ‘under protest’, NAV did work, GFA refused to pay, then sues claiming no consideration, wins under duress claim***-Post-K modification*** *(on one side, GFA)****, unsupported by fresh consideration (****on the other side, NAV****), may be enforceable (****as long as there’s consideration in original K****) as long as it is est’d that variation NOT procured under econ duress*** (duress here, unlike in *Pao On*); no estoppel here (sword/shield); Result justified on basis of modern “commercial realities” (need to make adjustments), any other approach = fictional attempt to find cons.- NAV K’d w/ GFA b/c of agrmt w/ Gov (no choice) vs *Gilbert Steel*: parties went to market, freely contracted |
| *Promise to Accept Less* |
| *Foakes v Beer* – *Promise to Accept Less* (overruled by *Law and Equity Act*, s. 43)-P owed D $, promised to pay sum up front, remainder monthly in exchange for D not suing/accepting less; D then claimed interest, saying there was no consideration (court agrees); change in payment dates ≠ consideration-**Agreement to accept smaller sum (i.e. less) in satisfaction of a debt of larger sum is NOT good consideration** (D accepting less in exchange for promisor P’s promise to pay whole sum eventually is NOT consideration so D is not bound by K to accept less, can claim interest/full amount) |
| *Foot v Rawlings* – D owed P $ via promissory notes; P said pay lower monthly amount by *cheque* (usable immediately for P) and he wouldn’t take action against D for outstanding debt; D paid but P sued for balance; D wins (doesn’t have to pay remainder); **accord and satisfaction** (agrmt to compromise + new consideration)-Court says D’s payment of less *via cheque* = good consideration (detriment to him, benefit to P) for P’s promise not to sue; **accepting terms convenient to creditor can amount to consideration; payment by negotiable instrument** (different way) **like cheque can be consideration even if amount is less than cash debt** |
| *Law and Equity Act*, s. 43 – overrules *Foakes v Beer* (now **agreement to accept less in satisfaction of larger debt CAN be good consideration**); Equitable doctrine (like Promissory Estoppel)-If there is: *actual* part performance; expressly accepted; in satisfaction of greater obligation, section kicks in 🡪 then no need to look at consideration; cannot be used to enforce promise to pay MORE |

**MAKING PROMISES BIND – ESTOPPEL** – *Is there legal relations? Was there* ***Intention*** *TCLR?*

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| *Central London Property v High Trees House* – lower rent during war, then Ps sought difference-**Promise intended to be binding, intended to be acted on and in fact acted on, is binding** so far as its terms properly apply even if there is no consideration (Denning relies on Promissory Estoppel)-Estoppel used as **shield** by tenants against landlord trying to enforce higher rent (they relied on landlord’s promise, landlord estopped from claiming back pay but only to point of war’s end, they are entitled to higher rate after war, i.e. condition for lower rate, comes to end)-**Promise to accept less, acted on, binding despite no consideration** |
| *John Burrows v Subsurface Surveys* – can indulgences allowed by Ps (Ds consistently paid late, P did not invoke clause) in past be converted into promise for same indulgences in future? After disagreement, P claimed whole sum owing from Ds**-Friendly gesture NOT a binding agreement** (P did not waive right to seek enforcement), **if it is relied upon estoppel NOT available defence** (promise did *not* intend to alter legal relations); estoppel must feature *clear* promise; express promise needed to affect legal relations in absence of consideration |
| *D & C Builders v Rees* – Ps did work for Ds, Ds only paid portion saying take it or leave it, Ps under economic stress so took it, now claiming remainder – are P builders estopped from doing so on basis of their previous acceptance of smaller sum? NO, entitled to remainder-Creditor (P) barred from enforcing legal right only when it would be inequitable to do so-No true accord (Usually if Ds paid less & Ps accepted willingly it would have been ***inequitable*** to claim remainder even w/o consideration, but here there was duress 🡪 **promise under duress shouldn’t be estopped**) |
| *Combe v Combe* – Couple divorced, after 6 years she sought payment that he’d promised in lieu of divorce proceedings saying he was estopped from not paying; husband appeals and wins-Denning does not think it fair she get the $ (she waited 6yrs, earns more than him); no basis for claim other than Prom/E 🡪 Estoppel cannot do away with need for consideration as essential part of CoA-**Prom/E cannot be used as a CoA (sword), only as a defence (shield)**, only as *part* of CoA, to prevent party from insisting on legal rights when it would be unjust to allow him to enforce them; **LIMITS Prom/E** |
| *Waltons Stores v Maher* – removes sword/shield restraint on Prom/E in **Australia**; **can use Prom/E as sword** despite no underlying K; *there WAS an intention to create legal relations*-Maher started demolition prior to finalizing lease with Waltons who knew but left lease unsigned and later stated no intention to proceed; Maher sued claiming K, estopping Waltons from denying K-Both parties knew what they *should* be doing, just no finalized K, estoppel only used to *complete* K-Court held Waltons estopped form denying K; unconscionable for promisor to ignore promise-**Estoppel can be CoA where results would otherwise be unconscionable, and in absence of pre-existing legal relation if reliance on promise was reasonable expectation** |
| *M(N) v A(AT)* – He promised to pay her England mortgage if she moved to Canada so she did and he stopped paying and kicked her out; she sues, claiming **estoppel as CoA** (she relied on his promise to her detriment) – court ruled promise *not intended to create legal relations* (vs. above) and therefore estoppel can’t apply; **Estoppel cannot be used as a CoA/sword in Canada** |

**ENFORCEMENT BY AND AGAINST WHOM – PRIVITY** – horizontal or vertical

**Third-Party Beneficiaries**

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| *Lyons v Consumer Glass Co* – Mom buys bottle, blows out baby’s eye, baby sues/fails; not privy (mom could only sue for cost of bottle); **horizontal** privity case – tends to be **domestic/social situations** |
| *Tweddle v Atkinson* – fathers promise to pay P son to marry daughter; daughter’s dad dies, doesn’t pay, P sues his estate; horizontal privity (A & B are dads, C is son)-K b/t dads meant to *benefit* son but he is **not *privy* to K, therefore cannot sue (or be sued) under it**; love and affection not sufficient consideration-**Parties not privy to K cannot derive benefit from it (sue) nor are they subject to its obligations** |
| *Dunlop Pneumatic Tyre v Selfridge’s* – vertical privity; A suing C 🡪 No (P sold tires to Dew under K not to sell for less nor to sell to anyone who would sell for less; Dew sold to D who sold for less)-You cannot sue a 3rd party to K for breach unless other party to K was acting as *agent* for 3rd party-K was b/t A and B, and B and C, nothing b/t A and C 🡪 only person party to K can sue on it-Even if K provides 3rd party with enforceable right, still must be consideration (none here) |

**Circumventing Privity**

***Specific Performance***

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| *Beswick v Beswick* (CA) – Widow suing evil nephew in her capacity as executrix of her husband’s estate and also in her personal capacity to get $ husband had K with nephew to provide her-**Denning**: Equitable exception to general rule of privity where 3rd party is in trustee relationship and has rights arising from K (gives no authority – there is none!); **widow can sue/win in BOTH capacities** |
| *Beswick v Beswick* (HL) – Appeal from above; HoL rejects Denning’s reasoning; widow only has right to sue in her capacity as administratrix of will (3rd parties CANNOT enforce K); ruling for widow, specific performance ordered***-3rd parties cannot sue for breach of K to which they weren’t party even if K meant to benefits them******-Executor of will can sue for specific performance of promises made in K with deceased person*** |

***(Trust)***

***Agency*** *–* 3rd party B (agent) enters K w/ A *on behalf* of C (principal), K b/t A & C; privity does not apply

**Exception to Privity**

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| *London Drugs v Kuehne & Nagel –* ***Employment***-Ps had storage K with Ds including liability limitation clause ($40); Ds’ employees $30K in damages to items through negligence, Ps sued for damages – are employees liable separate from employers? Yes, but…-Employees can get access to K as defence/shield (but not as sword) 🡪 **narrow exception to privity**-Relax doctrine of privity *so as not to frustrate commercial practice*; Ds liable for $40 (could sue employees separately in tort); employees benefitted from LLC in K they were not privy to |
| *Fraser River Pile & Dredge v Can-Dive Services* ***– Subrogation*** – P’s boat sank due to negligence while chartered by Ds; Ps recovered through insurance co, IC sued Ds; BUT there was LoL clause in K b/t P and IC saying they wouldn’t sue charterers (waiver of subrogation; “no subrogation” clause) but Ps made another agreement to waive any right to waiver of subrogation – Can-Dive relied on waiver of subrogation – can Ds benefit as 3rd party to LoL clause in K b/t FR and insurance co? YES; **relaxes doctrine of privity**-Court looked to intentions of K’ing parties – to benefit 3rd party-Followed *London Drugs* analysis re: application of LoL clause on employees in order to enforce insurer’s waiver of its rights of subrogation against charterer; does not modify but **extends/broadens *LD* test’s application on Ks other than employment** as long as K explicitly or implicitly extends benefits to 3rd party and if 3rd party has been performing activities contemplated in K-**Crystallization of rights of 3rd party to K, but not other parties to K** |

**FORMAL PRE-REQUISITES FOR ENFORCEMENT**

**Writing Requirements** – Ks for transfers of interests in **land** must be in writing; writing as *evidence*

*Law and Equity Act*, s. 59

**Parol Evidence Rule** – Where parties intended written evidence of K to be exhaustive of terms then court will look solely to those terms to settle dispute (reject additional oral evidence as inadmissible); PER only applies to *express* terms, not implied; **way around PER = claim multiple Ks**

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| *Gallen v Allstate Grain Co* – Ps entered K to buy crop on D’s oral assurances; product performance contrary to oral agreement, Ps sued for breach of warranty, Ds claim oral evidence inadmissible, no K-Court rules there are multiple Ks, **PER not absolute RULE but rather PRINCIPLE**; oral rep can add to written K, even subtract/vary (as long as they don’t *contradict*, it’s okay – parties cannot have intended that, then PER would apply, reject oral submissions in absence of strong evidence that they were intended to prevail)-Oral agreement admitted, Ps win, oral rep prevails |

\*\*In consumer transactions, PER doesn’t apply (oral evidence admitted)\*\*

**\*\* End of Term 1 \*\***

**TERM 2**

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| **THE CONTENT OF THE CONTRACT** |

**REPRESENTATIONS AND TERMS** – rep *outside* K but can affect it; more signif, more likely to be term

* ***Term*** in K (in offer) 🡪breach 🡪 Dmgs OR Term’n (prosp’ve: 1° oblgns cease, 2° remain) 🡪 CL remedy
* ***Operative Misrep*** outside K 🡪 Voidable/Rescission (*total*: no 1° or 2° Os; = get rid of K; **≠** void/never was K) 🡪 Equitable

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| *Heilbut, Symons & Co v Buckleton* – D’s agent bought shares from P’s agent, D claims statements re: “rubber co” = rep (not term), co sour, D lost $, brought action for breach (of *term*); how do you know if stmt = **term or rep?** Court says = **Q of** **intention** (binding or no?); parties **not liable for damages from innocent misrep** as was here; P/App wins (stmt = rep not term, no breach/damages possible for rep) |
| *Leaf v International Galleries* – D sold art to P as being painted by certain artist; P realized untruth 5yrs later, wants to get rid of it, get $ back; D refuses, P brings action for **rescission (eliminate K, no damages)** claiming innocent misrep, he paid $ on reliance; **doctrine of merger** – s/t *can’t be term AND rep*, nature as term overwhelms, treat it as breach of K not misrep (can’t affirm AND terminate, must *elect*), too much time lapsed to exercise right of term’n (right waived/K affirmed, and no resc possible), P must keep painting, appeal dismissed |

**CLASSIFICATION OF TERMS** – 1° obligations (main/pre-cond; vs. 2° = remedial/dmgs)

* Essential =**Condition** --*breach*--🡪 = Repudiation (goes to heart/essence) 🡪 Termination (or affirm K/carry on)
* Non-essential = **Warranty** ----*breach*----🡪 **≠** Repudiation (just breach), **≠** Termination 🡪 Only damages

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| *Hong Kong Fir v Kawasaki Kisen Kaisha* – **Cond v warranty** (categ’n of 1° obs); P rented ship to D charterers, repairs/time, Ds repudiated, Ps sued for wrongful rep’n (yes, win); Diplock J **invents intermediate terms** – **seriousness of *conseq’s* of breach *can’t be predicted*** when entering K; if innocent party deprived of *essence* of K, for breach of that term, same remedies as for condition avail (if not serious, treated as warranty) |
| *Wickman v Schuler* – German Ds have manuf’ing K w/ Eng Ps w/ clause: “*condition* of this K” (weekly client visits), Ps fail to do so, D repudiates saying = breach of condition (right to terminate) – court says no, clause would be near imposs to do, calling s/t **“condition”** doesn’t lead auto to right of term’n for breach (construction) |
| *Fairbanks v Sheppard* – Doctrine of **substantial performance** (of entire obl’s); D K’d to build machine for P who gave deposit, when nearly done D refused to complete w/o more $, P sued to recover deposit/losses, D countered for K price (was enough work done by D to = subt’l/enough completion to trigger P’s obl?); court says D conduct = **abandonment of K**, no subst’l completion, no new K, P entitled to deposit, K cancelled |
| *Sumpter v Hedges* – **Entire v severable** cond’s; P had K to build for D, part way through said couldn’t afford to finish, so D completed; P tries to recover for his work; Law: **K for work for *lump sum* = entire obl**; P could raise inference of new 2° K to pay for work done on **quantum meruit** K (artificial; for labour) for D’s benefit, but must include option for D *not* to take benefit – here it is *real property* (can’t expect D to leave it half done!) |
| *Machtinger v Hoj* – **Implied terms**; P dismissed w/o notice, sues for wrongful term’n (wins), should court imply notice period for termination in emplmt K? YES; **Bases upon which term can be implied** in K: custom/usage, necessity (=?), law (not on basis of presumed intent but as legal incident of class of K, necessity *to* K); intentions not at issue, rather legal obl’s of employer, implied in law as *necessary* incident of class of K |

**EXCLUDING AND LIMITING LIABILITY** – //LD clause (1 party E/LL, other’s LDs E/L as result)

\*ELC – other party not entitled in case of breach; LLC *limits* recovery (limit on: quantum, procedural, time)

\*Scrutiny of E/LLCs under 2 CL categ’s: **Notice** & **Construction**/Interpretation (was it meant to apply here?)

**Notice Requirement** – by *both* parties (knew clauses were terms, part of O&A; uncertainty – how much/far?)

***Unsigned Documents*** (Common Law cases)

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| *Thornton v Shoe Lane Parking* – P sues parkade for injuries, ticket has some conditions, others posted *inside* including LLC (after K forms); party must have opp to read terms AND then opp to realistically back out of K prior to acceptance (not possible here); **LLC presented *after* K formed not term of K**, **unenforceable**, P wins |
| *McCutcheon v David MacBrayne* – P arranged to ship car through D, didn’t sign usual risk note, K was oral, car sinks due to D’s staff neg, P sues, D argues risk note (LLC) is implied term (sig in past); NO **cannot construct sig from past sigs**/previous sigs; **Sig as critical**/final (strict interp), possible but unlikely to be inferred; Ds liable |

***Signed Documents*** – *L’Estrange* doctrine (signed = better, satisfies notice)

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| *Tilden Rent-a-Car v Clendenning* – D rented car from P, K included **EC denying coverage** for accidents after consuming alcohol, D told it was ‘full non deductible cov’, hit pole after drinking, attempts to collect under insurance, P appealing, D wins: **term as onerous**: **P must prove it took *measures to notify*** other party – **sig alone not good enough** (must draw attn); figure less sympathetic (drinking biz man!) than *Karroll* (not her fault) |
| *Karroll v Silver Star* – K case (but prolly better as estoppel – no worry then re: O&A/consid); P broke leg in competition at D resort, alleges D neg, D denies respons’y (**P signed** doc before releasing D from lblty, says she **didn’t read it**); is indemnity agrmt binding? Court says P bound, D not liable (**not reading s/t is NOT excuse**)**3 situations where sig will NOT hold s/o to K**: 1. *NEF* (no misrep; P bound unless can est. rsnble person would have known she didn’t intend to agree to release & D failed to take steps to bring it to attn) 2. Misrep (mistake in signing b/c of what other party said) 3. Other party *knew* of mistake (but wasn’t at fault) – takes adv (none here) |

**Fundamental Breach & Its Aftermath** – DoFB only applied to **ELCs** (not LLCs)

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| *Karsales v Wallis* – **Bad law**;D bought car through hire-purchase co (P bought car, sold to finance co who let it to D); D saw car week later, terrible cond, D wouldn’t accept it, P sued for 10ms payments (claiming exemption through EC) – P’s breach = fundamental? Denning: even if person had notice, **can’t use exempting clause for breach of *fund’l* term** (Denning invents FB as *doctrine* of law); D wins, doesn’t have to pay, = FB |
| *Photo Production v Securicor* – P factory destroyed by fire by D security co neg; P sues (E/LLC), trial J ruled for D; Denning @ CA reversed (no exemption for FB); D appeals liability/wins; this case definitely **overrules DoFB** (leg’n had also done so), says Q of whether EC can applied to FB is Q of ***construction***; equal parties, P should carry risk; implied obl to use due care breached BUT **clear words necessary *and* present exempting Ds** from conseq’s of own doing (liability excluded); **implied term in commercial K**: businessmen would realize |
| *Tercon Contractors v BC* – Tendering K, Ps bid, D prov, clause said only 6 bidders, one teamed up w/ ineligible party, won bid/got K, P sues D for damages for amount of K; trial J said D breached, defence of **EC** did not exclude P’s claim, BCCA reversed (clause as clear); P appeals – majority says trial J right, D **not exempt from liability**, used **construction** (**EC doesn’t operate**, *too ambiguous*); Binnie dissenting: clause too broad  |

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| **EXCUSES FOR NON-PERFORMANCE OF THE CONTRACT** |

**MISREPRESENTATION AND RESCISSION** (untrue rep, take parties back to position when K entered into)

\***Operative misrep** needs: **1)** *Stmt of fact* (not op) **2)** *Untrue* **3)** *Material* (goes to root) **4)** *Reliance* (rsn to enter K)

\***Bars to Rescission**: **1)** Impossibility of restitution **2)** Execution of K **3)** Affirmation (P elects) **4)** Delay (*laches*)

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| *Redgrave v Hurd* – P sells office, says worth $$, D buys/discovers worth less, refuses to complete; P brings suit for SP; D alleges misrep, counterclaims for rescission; P won @ trial; D appeals; Court rejects trial J saying b/c D didn’t examine papers, can’t be said to have relied, or can’t win due to own neg; **No duty to examine** **accuracy of stmts**, if D fails, still **operative misrep**; K *rescinded*, but no damages (P didn’t *know* stmts untrue); **innocent misrep can affect K** (need not be fraudulent) – equity allows rescission |
| *Smith v Land and House Property Corp* – P hotel sale, ‘desirous tenant’ – no, D refuses to complete trans’n; P files for SP, D claims misrep re: tenant (P claim opinion); P’s stmt = misrep, K rescinded; when facts *not equally known* by parties, **SoOp by party w/ knowl (P) amounts to assertion of fact**, which was untrue (tenant bad) |
| *Kupchak v Dayson Holdings* – Ps bought motel shares from D, learned reps re: past earnings false, stopped payments, Ds sold/tore down parts, P action for rescission (denied @ trial, ***restitution impossible***); Court orders D to **pay $ sub for return of property now changed (equitable)** – compens’n given for misrep through restit’n |

**MISTAKE** – Unilateral, mutual (both but differently), common (same); relates to s/t believed *at/before* K’ing

**\***When it operates to affect K, is exception to principles of **risk allocation***, caveat emptor,* and freedom of K

**Introduction**

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| *Smith v Hughes* – D took oats sample, bought, arrived/not old, D refused to complete K, demanded P take them back, P files claim; was **age of oats term of K? NO**; Cockburn J: ***caveat emptor*, buyer beware**, stuck w/ K, D omitted to make age term of K, no breach, must pay; Blackburn J: even if parties’ intentions differ, P estopped from denying D’s views if P acted as if they were correct (K on D’s terms); Hannen J: 1 party’s mistake could affect K but that party’s M **has to be M re: *terms* of K, AND known to other party** – then K void/no K; **UM as to terms only operates if other party aware of M** and by insisting on continuing w/ K, party acting unconscionably 🡪 remedy = ? (K change, unenforceable, void/never existed…) |

**Mistaken Assumption** – that world looks/works certain way (not M of *terms*); can be uni or bilateral

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| *Bell v Lever Bros* – D Co paid P employees to leave, could’ve terminated for cause; D/Co claims shouldn’t have to pay under K b/c there was MA/MoF; Atkin says no, K not void, compens to be paid (D’s lose); **Mistake is as to *quality*, won’t affect assent to K unless: = M of** ***both* parties** **AND s/t that makes if** **fundamentally diff** than believed; Sets out diff aspects of M: **M of ID/subj matter** (negate consent, void K), M as to existence (can void), M K’ing to get what you already own (title: void), CM as to Q (assumption) will void K only if quality was so *fundamental* to K so as to destroy ID of subj matter; (CL; no equity) |
| *Solle v Butcher* – D repaired house w/ P, rent mistake; P sued to recover over$, D countered for **rescission for M**; Court grants rescission, K ***voidable***, choice given to tenant P (pay stat rent or end lease); Denning using equity (rescission b/c of M), can have **UM *assump* that can allow K to be aff’d at equity** as long as ‘unconscientious’; K set aside in equity if: M of 1 induced by material misrep of other (even if not fraud’t); other party knows, allows K to conclude on M terms, parties under CM as to facts (M fundam’l); reduces imp’ce of *Bell* (only CL, this **brings in equity**); expands how CM can affect K from *Bell* to allow M re: ‘facts’, ‘rights’ if fundamental/unconsc’s to avail of it; M as to quality that don’t pass *Bell* could meet this test/affect K @ equity; allow court to set K aside “on terms” (broad ability to court to roll back K, part of it, add cond’ns/new obl’s) |
| *McRae v CDC* – Ds K’ed w/ Ps re: sale of wrecked oiltanker; Ps spent $ on salvage; tanker doesn’t exist; Ps sue for breach/deceit/neg; Ds argue no liab for breach b/c K void for common M; parties made CM but Ds are rspble/were reckless; proper construction of K = K contained promise that tanker existed (implied), Ds K’ed as much, **can’t rely on M as a/voiding K b/c any mistake induced was their fault**; Ps win damages for breach; **allocation of risk** as central to K (M should only operate re: risks parties did not contemplate/provide for in K) |
| *Great Peace* – Rolls back law of M to pre-*Solle*;D K’ed w/ Ps to salvage vessel, includes cancel. clause for Ds; Ps far away (mistake), Ds cancel, Ps claim for 5 day cancel; Ds argue K entered on shared assump re: Ps prox’y to vessel, K void @ CL or voidable at equity; Court says Denning wrong in *Solle* to add equity, **everything stops at *Bell*, if CL uninterested in mistake, K valid**; (\*Denning actually right, equity says a lot, *Bell* not wrong in that way, didn’t look @ equity b/c case was presented as mistake, but this case right to take issue w/ Denning re: remedy); diffs re: miles don’t matter, K still possible (**Cdn courts don’t like this, prefer *Solle***) |
| *Miller Paving v B Gottardo Constr* – **Cdn case** that engages w/ *Great Peace*; no remedy b/c no matter what law is (*Solle, Bell, GP*), CM doesn’t matter; Ps had K w/ Ds to supply mat’ls for highway, agreed all paid, P realizes left s/t out, sends 2nd invoice, Ds refuse; Ps file claim; **K allocates risk** of receiving $ to Ps, can’t rely on M (must show subj has *fund’lly* changed – no, or it’s not their fault – it is, can’t rely on equity); *Solle* as flex’le, just |

**Mistake as to Terms** – “Snapping up” offer containing error

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| *Smith v Hughes* – Old oats M; age of oats ≠ term; **no obl’n for P to correct** M’n belief of D if P not responsible for MB through own misrep; allows **UM to affect K but has to be M re: *terms*/K content**, not assumptions |

**Mistake and Third-Party Interests**

***Mistaken Identity*** – as basis for rescission of K

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| *Shogun Finance v Hudson* – **Rogue** went to buy car through P, said name was Patel (real person), got car (K1); R sold car to 3rd party D, disappears (K2); P sues D for conversion, argues K w/ R void OR rescission for mistaken ID; K is w/ person named (Patel), not R🡪R has **no K, so no property interest** in car, can’t pass to D (***nemo dat***), P gets car back; K entered face to face, diff than from distance; CL says P’s K is w/ rogue, equity says K voidable at behest of P; R fraudulently induced Ps into K, can’t lead to binding K |

***Non Est Factum*** – **CL** device; ‘not my doing’; forgery/justifiable mistake, inn party not respons; **makes K *void***

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| *Saunders v Anglia Bldg Socy* – Aunt signed *w/o reading*, nephew’s biz partner said K confirmed gift, really let him grant mtg to Ds; he defaulted, Ds foreclose/reposs, her estate sues/loses; **To use NEF, diff must be significant/radical, go to *nature*; other party must be responsible for or aware of fraud** (esp in comm’l transact); BoP on P to demo no neg (hard if of full capacity!); **can’t rely on own neg** to get out of K, no NEF |
| *Marvco Color v Harris* – Confirms *Saunders*, lib’zes NEF; H&W Ds re-signed mtg (told M re: date) was really *new* mtg, can they can claim NEF, was misrep was to nature or just contents? Knew it was legal doc, failed to read **(= neg ≠ NEF**); as b/t parties, Ps innocent, Ds neg – law must take acct; Ds neg, no NEF; K/mtg valid |

**Rectification** – **Equitable**, discretionary; mistake in/dispute over written record; usually w/ PER; heavy onus

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| *Bercovici v Palmer (QB)* – **Mutual mistake**; difficult to get court to rectify (1 party says K correct, so takes convincing); P Ks to sell 2 retail biz’s to D, res cottage gets in accidentally; P claims Rect (delete Lot 6), D c-claims Rect (chg Block 33 to 33A); court satisfied **BARD** that neither intended cottage to be in, was mistake of lawyer (K was biz, not resid’l; no mention in memo/price; D never demanded it; lang =‘both’=2); P wins |
| *Bercovici v Palmer (CA)* – D appeals above; Proof req’t almost crim BARD (written K ≠ intention of parties); court **looks at how parties behaved before/after K**: D never went to Lot, never paid tax/insured; Rect stands |
| *Sylvan Lake Golf*  – Leading case on **Rectification**; Parties agreed to buy golf club, P right to dev res area, bought D’s interest; D’s lawyer subbed ‘ft’ for ‘yds’ in K,  area to 1/3, P didn’t read/signed, sought Rect; Court sets out **Test for Unilat M**: no UM re: actual K, just *recording*, 1 party didn’t realize (really bilat M re: written but other party not owning up, can gain), don’t use to argue void/able, just K exists should say s/t else; **4 cond prec (high hurdles) for Rect in context of UM**: **1)** Previous oral inconsis w/ written **2)** Other party knew/ought to have known of M (constructive knowl) **3)** Able to show doc can be rewritten to express parties’ intent **4)** BoP: 1st 3 demo’d by ‘convincing proof’ (not BARD, civil Bal/P hard when K that says otherwise!); no req re: P’s carelessness, due dil not Cond Prec for Rectification; K rectified to sub words of oral agrmt in |

**PROTECTION OF WEAKER PARTIES** – law as paternalistic; tends to be equitable, origins in CL; doctrines came from idea that Ks based on *consent* (vs. mistake, misrep based on *knowledge*)

**Duress** – Rooted in CL, historically voids K, now **usually voidable** at option of coerced/weaker party; force precludes true K assent; looks at process of consent (not before/after)

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| *Greater Fredericton Airport v NAV Canada* – Ps agree to pay more ‘under protest’; Ds complete, Ps refuse to pay, was P’s promise obtained under **econ duress** and thus unenforceable? There was pressure, was it legit? Not like *Pao On*: pressure to *enter* K, this is **re: *modification*** to D’s advantageNew Test for Econ Duress: **1)** Promise (K chg) extracted as result of exerc of ‘pressure’ (demand/threat) **2)** Exc of pressure such that coerced party had no practical alt’ve but to agree (to demand to vary terms)THEN look if coerced party ‘consented’: **1)** Was promise supported by consideration? **2)** Did coerced party make promise under protest? **3)** If no, did they take reasonable steps to disaffirm promise as soon as practicable? Doesn’t make K voidable, just makes variation **unenforceable** (Ps don’t have to pay)*Pao On* extends duress, made it equitable; in context of **modification to existing K** |

**Undue Influence** – Equitable; power induces other to enter K (**ongoing unequal rlnsp**; exploit); attacks suffic’y of consent; remedy = voidable or unenf 🡪 **rescission** (not avail if would affect 3rd party not @ court)

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| *Geffen v Goodman Estate* – G-ma’s new will leaves estate to Tzina then to her kids, later trust says estate to be distrib’d among *all* g-kids; did T’s bros exercise UI in trust? Wilson J concerned w/ est’g whether UI enough (*content*); comm’l tr’axn must have *unfairness* est’d (Ks), non-comm’l no such req’t (wills) – look to consid’n (did stronger party give much less? To trigger presumption of UI, P must est **1)** Rlnsp (presumed UI, irrebuttable OR UI actually est’d) YES (w/ bros) **2)** Contents of transact (commercial tr’axn, est unfairness OR non comm’l trans, no req’t) trust // gift, not comm trans, **existence of req rlsnp w/o more sufficient to trigger PoUI; D/As must rebut** – no, but she had **indep advice**, agrmt was in accord w/ her wishes so no UI (trust upheld) |

**Unconscionability** – Focuses on *circ’s of K creation*; re: various aspects of K, various remedies (usually **rescission**, K voidable); Unconsc’y is ***in* K** (not *process* like D&UI)

**Test for Unconscionab’y** (invokes relief from unfair adv gained by unconsc use of power by strong agst weak)**:**

**1)** Must be inequality in position of parties from ignorance/need

**2)** Prove subst’l unfairness of brg’g obtained by stronger = PoFraud (looks like ST UI but UI about consent, unconsc about *outcome*); stronger party must rebut PoF by proving bargain was fair/just/reasonable: *Morrison* Test

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| *Morrison v Coast Finance* – **Creates doctrine of unconsc’y** (≠ UI); Rogues L&K convince widow to give mtg to D in return for $, lends $ to L&K, they buy car, give her (valueless) prom notes & security doc, they don’t pay her back, she wants mtg set aside for UI; trial said rlnsp insufficient, no PoUI; **Equity reluctant to give remedy that will affect 3rd party** rogue (rescission), mtg given back to P (flexibility of equitable remedies), prom notes to D (K not undone, just add obls) |
| *Lloyds Bank v Bundy* – **Bad Law**; Dad used house for son as collateral, P bank foreclosed on son’s assets, seized house, sued evict D; **Denning** sets out numerous doctrines, all rest on **in=y of brgn power**, merges doctrines, doesn’t deal w/ unfairness not present @ K creation 🡪 *Hunter* creates DoUnfairness to deal w/ unfairness arising later; P bank’s consideration inadequate (they benefitted greatly, dad didn’t); dad wins; Test: CSoCM |
| *Harry v Kreutziger* – P Indian had boat w/ valuable licence, D bought for much less, P sues (K void for uncons’y), dismissed at trial; McIntyre J used doctrine as is, P **not =** to D, **bargain unfair**, **K set aside** (***Morrison* test** of inequality + unfairness = PoUnfairness rebuttable by strong party); Lambert J *reformulates* test of unconsc’y (no burden on weak party to prove own weakness!): test as aspect of single Q: whether transaction as whole sufficiently divergent from **community standards of commercial morality** to be rescinded (***Bundy* test**); P wins, K rescinded, boat/$ back (P not = to D, improvidence of bargain shown) |

**ILLEGALITY** – Stat’y or CL; K illegal b/c law disapproves of its form’n/intent/perf’ce/effect (but not crim)

**\*\***Renders *whole or part* of K **void** or **unenforceable**

**Old approach**: *Formation* of K illegal vs. *perf’ce*/*obj’ve* of K illegal; consider intentions/knowledge of parties

**Modern approach**: Consider stat purpose, whether making K illegal will further object of statute (*Still*)

**Contracts Contrary to Public Policy** – Heads of PP (CL) = **Restraint of trade** (non compete; consider scope); K to commit crime/*ex turpi causa*; Ks prejudicial to: good pub admin, admin of justice, good foreign relations; morals

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| *KRG Insurance Brokers v Shafron* – D sold business to P, stayed on as employee, later left to work for comp’r in Richmond; Ps brought action to enforce **restrictive cov** signed by D: 3yrs non compete @ “Metro CoV” 🡪no legal meaning); **emplmt Ks special**; court can’t interpret mng to RC, won’t rectify, clause meaningless/no RC to interpret; can’t strike out (blue pencil) ‘Metro’, not // parties’ intentions; puts breaks on notional severance (read down K to make enforceable), must be *clear line* crossed; RC unenf’ble, D free to keep working in Richmond |

**EFFECTS of Illegality** – Historically made **K unenforceable/(void)** (CL but has migrated into equity, = complex); **recovery** of property/$ transferred generally *difficult*; **severance** (into multiple Ks to save parts; ‘*blue pencil’* – strike out only, no adding; *notional* – court can add, write in, change obl’s to save K, alter what parties have to do); **unenforceable** for one or both parties; **nothing**:

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| *Still v Minister of National Revenue* – P thought she was authorized by CIC to work, paid EI benefits, became PR, laid off, applied for EI, denied b/c K illegal/invalid; court says was honest mistake, she was acting in good faith, **K valid** (**no point to illegality**, would be too far reaching), it is **in PI**, not against PP to grant her benefits |

**FRUSTRATION** – Excuses for not performing K that arise ***after* K** in place; impact on K is from *point when prob arises*; must be: **1) unforeseen** (*Can Gov Merchant*) **2) not caused by parties** (*Maritime National Fish*) **3) purpose of K impossible/too difficult** (*Taylor v Caldwell* F’d*; Capital Quality* F’d*; Victoria Wood* not F’d)

**\***Termination (s/o doesn’t perform 1° obl’s (repudiates), other party can terminate from that point on, 1°s of both cease, no effect of previous ones or 2°s, *choice of 1* party) vs. Frustration (from pt of frust’g event *both* 1° and 2°s cease, to extent already done remain enforceable – can be lopsided, *no choice* for parties 🡪statute steps in)

\*Rarely works for econ/dom/pol changes; best argmt = nat’l disasters, death/severe injury, wars; (*force maj*//ELC)

**Development of the Doctrine**

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| *Paradine v Jane* – K for lease of land, during war, D’s land invaded by Prince, drove away cattle/expelled him, P sues for rent, D claims shouldn’t be charged b/c couldn’t enjoy land, not his fault; Court says no, K in place, doesn’t matter (things didn’t pan out, doesn’t matter); D arguing frustration before it exists, rejected |
| *Taylor v Caldwell* – P had K w/ D to use music hall, hall burnt down; look at minds of parties: **purpose of K can’t be achieved**, K made no ref to poss’y of disaster; court says **frustration operates through *implied term***(parties couldn’t have meant to continue); intro’s F but doctrinal reason (implied Ts) no longer correct |
| *Davis Contractors v Fareham UDC* – K to build, supplies unavailable, not fault of parties, work took 22 not 8ms, Ps claim K F’ed, entitled to sum on *QM* basis + K price; Court: implied terms way from *Taylor* too artificial (**unforeseen circ as implied is illogical!**); rather: F occurs when**, w/o default of either party**, **K obl incapable of being performed**, b/c circ’s for perf’ce would render thing **radically diff** from that K’ed for;  in time needed to complete not enough to = F, cause of delay *could have been foreseen*; P can’t get out of terms |

**Application of the Doctrine**

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| *Can Govt Merchant Marine v Can Trading Co* – **Econ argmt, rarely successful**; P/Apps K’d w/ Ds to move lumber Van to Aus; labour dispute b/t Ps & builders, *vessels ready late*, trip couldn’t be made; Ps claim K F’d b/c ships unfit to sail at time set for perf’ce; terms not implied when **RP could have foreseen risk**, delay not due to *extraord* circs; if Ps relieved of conseqs, Ds would suffer major loss 🡪 Ps not relieved of obl’ns, K *not* F’ed |
| *Capital Quality Homes v Colwyn Const Ltd* – P K’d w/ D to buy 26 lots to **sub÷**; after sale executed but before title transferred, **law passed** restricting owner’s right to convey; people knew law was coming, but law was enacted earlier than expected – is **K F’d? Yes**, parties discharged from perf’ce, P can recover $ paid from D |
| *Victoria Wood v Ondrey* – P K’d w/ D to buy 90ac; D knew P intended to **sub÷**, but **leg amdmt passed** b/t K signing and sale completion restricting dev area/prohibiting sub÷ dev; P sought dec that K F’d/return of deposit – **K F’d? No**, vs. *Capital Quality*, **fdn of K not destroyed** (not cond’l on ability to sub÷; based on *wording* of K); developer always conscious of **risk** of zoning/changes (could insert conditions in K, persuade D to assume risk); above case = series of separate Ks so F’d, here = one big K so OK |
| *Maritime National Fish v Ocean Trawlers* – Self induced F; P/Apps chartered trawler from D, applied to Min for **licences, only got 3 for 5 trawlers**, up to Ps which ones, they didn’t pick trawler from D so couldn’t use it, tried to return it claiming no longer bound by K – is K F’d? NO, Ps aware of legislation, took risk that all licences wouldn’t be granted, was their act/election that prevented vessel from being licenced (could have chosen any 3); **F must not be due to act/election of party to K** |

**Effects of Frustration** – *FCA* relaxes need for total failure of consideration in order to recover $ paid pre-F

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| *Frustrated Contract Act* – All Cdn jrsdns (except NS) have stat regime that takes over *once K F’d*; based on law of **restitution**; BC: **s.3** gov bound; **s.4** applicable to *part* of K (if wholly performed 🡪 sever) **s.5(2)** every party entitled to *restitution* from other party for benefits created by party’s part/perf of K; **s.5(4)** If F’ing event caused loss in value to benefit conferred, parties *split* that loss (apportioned equally) |

\*To sever, must make sense apart (O&A, intention, consideration, separate prices)

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| **REMEDIES** |

**DAMAGES – RATIONALE** - 2° oblig’s rather than remedies/relief (sustain/give meaning to 1°; non-discret’y )

-Sources = CL, Equity, Statute; often present by implication (if party puts them in = “liquidated dmgs”)

**\*\*Sole purpose = compensate** (no more, no less)

**The Interests Protected** – Dmgs intended to provide, by way of *right*, $ sub for 1° Os not performed

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| *Fuller and Purdue* – 3 purposes (point of K = forward looking, arrange future, eliminate surprises b/t parties)1. **Restitution** interest (not really K claim; for breach you get s/t you never would have gained if K performed – doesn’t relate to cost incurred, only to what D gained: disgorgement, hand over gains; unusual/D-focused)2. **Reliance** interest (undo harm which P’s reliance on D’s promise caused P; put P in as good a position as he was in *before* promise made/*backward* looking; deals w/ costs wasted; tort-like; common when lost profit amount difficult to quantify or doesn’t look like good basis to claim – *McRae*) 3. **Expectation** interest ($ award to put P in place they would have arrived if K fulfilled; *forward* looking) |

**The EXPECTATION Interest** – the usual reason for damages (e.g lost profit; e.g diff b/t market and K price)

**The RELIANCE Interest** – Compens for wasted expenditure or undo loss P would have avoided if no K (// tort)

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| *McRae v CDC* – Non-existent oil tanker; Ps incurred costs prepping relying on D’s promise, D tried to get out for mistake (NO), damages for P = ? *When Exp Int hard to assess, P can often recover for Reliance Int instead*-**Expectation interest difficult/impossible to determine** (don’t know what P would have gained) but there is alt/more certain way to assess dmgs (reliance: how much Ps spent), court says **P entitled to recover for wasted expenditure** (end up w/ loss 🡪 get dmgs; but P must mitigate; e.g. equipment bought still usable) |
| *Sunshine Vacation Villas v The Bay* – D told P they would get license to open travel agency in shop, P’s relied on promise, spent $ prepping/gave up other opps, Ds cancelled; clear breach, what does P get as dmgs?-Court says you cannot collect dmgs for *both* EI and RelI – *P can choose* (if P got both, they’d be in *better* position through breach; no absolute prohibition though, argue on facts); no double compensation-**When assessment of dmgs for loss of profit (expectation interest) speculative, dmgs can be awarded on basis of reliance interest (loss incurred)** |

**Restitution** – Leading case (HoL intro’s idea of awarding **restit’ry dmgs** in *absence of fiduciary relationship*)

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| *Attorney-General v Blake* – D security/intel member & double agent, signed non disclosure, wrote book; P brought action for ALL profits/won; Court says even though no breach of fiduciary relationship (he was no longer spy/FO had ceased) and gov had no lost costs BUT *D’s conduct so shocking, damages can be measured by benefit gained by wrongdoer* from own breach (court doesn’t define what situations); round about way of doing what law says shouldn’t be done (ordering SP); **even though P didn’t suffer loss/incur expenses, D still must hand over profit to P as measure of dmgs awarded (conduct especially shocking)** |

**DAMAGES – QUANTIFICATION PROBLEMS**

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| *Chaplin v Hicks* – Beauty contest/**loss of chance**; //*McRae* – when K is inherently unpredictable (can’t predict outcome, there’s gamble/chance) – if you take chance away from s/o, how do you award dmgs?-Court says jury must do best they can, but amount will be matter of guess work (assess; come up w/ rsnble amt)-**Fact that dmgs cannot be assessed w/ certainty does *not* relieve D of necessity of paying dmgs for breach** |
| *Groves v John Wunder* – **Multiple amounts of damages**: Lease for gravel removal, D delib took only best, left unlevel; cost to perform over $60G, if land had been leveled value = $12G; P won $15G (value + interest) at trial, appeals; Correct doctrine is **cost of remedying defect = proper measure of dmgs** (rather than diff in value); *Ds liable for cost of what they promised to do, P entitled to compens’n for what he lost (work promised)*, to diminish dmgs would favour bad faith D; no unjust enrichment when result = give P what D promised; Olsen dissenting: aim of dmgs = compensation not punishment, dmgs recoverable = diff b/t market value of property in condition delivered and market value had D fully performed (i.e. would affirm judgment for lower dmgs) |
| *Jarvis v Swans Tours* – **Mental distress dmgs**; P booked Swiss vacation through D, disappointed, gets dmgs for breach (diff in value of holiday under Gen Dmgs) but can he get **dmgs for MD? YES**; Denning: *brochure stmts = reps/warranties, breach gives rise to dmgs* – how much? Difficult to assess but no more than in PI case for loss of amenities; P entitled to comp for loss of entrtmt/enjoyment promised/not delivered; dmgs increased 4x |

**DAMAGES – REMOTENESS** – narrower test than in tort (liability wider in tort)

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| *Hadley v Baxendale* – **Test for Remoteness** (certain, occupies field); K for new mill shaft for P, delay in D delivering, loss of profit for P, are dmgs too remote? Ds didn’t know of *particular circ’s* (would be diff today)Where 2 parties made K which one breaches, dmgs other ought receive should be such as may fairly and rsnbly be considered either (2 branches differ in type of knowl D will have to be shown to have had for P to recover):**1.** a) **Arising naturally** (according to usual course of things from such breach of K itself, i.e. GDs) ORb) Such as may rsnbly be supposed to have been in **contemplation** of both parties at time of K as probable result of breach 🡪 as long as you can fit claim in one/both of these, can get dmgs; (no need to know circs; just **terms**)**2.** If **special circ’s** under which K made were communicated by Ps to Ds (and that mean P will suffer particular loss), thus *known to both parties*, dmgs must be “reasonably supposed” to be “probable result” of breach |
| *Victoria Laundry v Newman* – Ps bought boiler from Ds (Ds knew P biz needs boiler), delivered late, P sues for loss of profits (could have got new customers *and* K w/ Ministry); Court summarizes law of dmgs; no loss recoverable beyond what would have resulted if intended use had be that *reasonably within contemplation* (“obvious” use: only usual dyeing Ks, not special Min K); Ds didn’t know of poss of K w/ Min, **P only entitled to recover loss resulting that was RF at time of K**; extension/analysis of *Hadley* test |
| *Koufos v Czarnikow (The Heron II)* – P chartered boat from D to ship sugar, arrived late, price of sugar had dropped (P had planned to sell ASAP); Court sees synonyms from *Victoria Laundry* as making it too easy; **remoteness test**, as limit to liability, **is** **more restrictive/narrower in K than tort** (in K party seeking to protect self against risk can direct other party’s attn to it pre-K, no opp to do so in tort); “not unlikely” = ° of prob’y < chance but still not very unusual and easily foreseeable; Q = whether **on info available at time of K should D, or RP in his position, have realized loss was sufficiently likely to result from breach** (immediate sale of sugar should have been in contemplation, damages not too remote) |

**DAMAGES – MITIGATION – Duty on P**; Courts vigilant in monitoring rsnble steps; impecuniosity no excuse

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| *Asamera Oil Corp v Sea Oil* – D had K obl to **return shares** to P, didn’t b/c he had sold them unbeknownst to P; P brings *claim for dmgs but not til years later* – D unhappy, **shares skyrocketed in value** in interim (value on market high); Court considers that P may have ability to claim equit rem (SP) but after time if D doesn’t perform ER, P must accept, move to CL remedy of dmgs but *P has waited too long*, should have gone to **market** to get shares, didn’t **mitigate**, claim will be for less (can’t just sit by/wait for opportune time to institute legal prcdgs) |

**TIME OF MEASUREMENT OF DAMAGES –** Where you fix time important for quantum (market fluctuates, values change; ongoing losses/lost Ks; costs involved, e.g. storage of abandoned goods); usually date of *breach*

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| *Semelhago v Paramadevan* – P agreed to buy house under constr from D, paid deposit, mtg’d old house, D reneged, P remained in old house which rose in value by trial; if court can’t give SP b/c seller doesn’t own it/invlmt of 3rd party, can give **$ sub (equitable damages)**; presumptive time for dmg assmt is *at time of breach*; but**date of trial/judgment used for assessing dmgs when P getting $ award instead of equitable remedy** (SP, injunction) court wants to give SP/injunction but can’t b/c of 3rd party (get $ in lieu of SP) |

**LIQUIDATED DAMAGES, DEPOSITS AND FORFEITURES**

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| *Shatilla v Feinstein* – D sold biz to P, signed non compete in case of **‘any breach’** would pay **$10G** as LD, ‘not penalty’; D breached, P sued; in order for LD claim to survive/not be characterized as penalty, must be able to defend on basis that **at time of K’ing, it was** ***reasonable* pre-estimate** of dmgs; **penalty unenforceable** (still other remedy); $10G for *every* breach no matter value🡪*penalty if varying amounts not considered* |
| *HF Clarke Ltd v Thermidaire* – P had K to distribute D’s product w/ **non compete clause** (in case of breach P to pay D “by way of **LDs**” amount = to gross trading profit (**formula**) through sale of competitive products; **common to put in formula if it’s reasonable**, but here when formula applied yields result far in excess of loss of net profits (overcompensates); LD formula = penalty (excessive/pun’ve); lesser dmgs to be awarded by trial J |
| *JG Collins Insurance v Elsley* – *When penalty clause fails, doesn’t deprive P of remedy, just reversion to reg law of dmgs*; SCC holds RC in emplmt K binding, included non compete that if D breached, would pay “$1000 as LDs, not penalty”; court did not think the restrictive cov was too bad a restraint on trade (as D claimed), party is in breach, must pay dmgs; Ps claimed they suffered *more*, RC shouldn’t be enforced b/c it’s penalty – court says no, **penalty can only be raised as defence/shield, not sword**; sum named = max recoverable, not penalty |
| *Stockloser v Johnson* – D sold plant/machinery to P for total sum payable by instlmts, D remaining owner til all paid; K term: if P defaulted on pymt, D could terminate K, keep all pymts made; P defaults, D terminates, P sues to recover – NO, **express forfeiture clause permits D to keep $; for s/t to be a deposit, you must call it that**; when can you get it back? *Possible remedy in equity* (to get rlf from forfeiture) if: FC *penal* in nature AND *unconscionable* for seller to retain $; here FC is penal but *not* unconsc for D to retain (P took gamble, lost) |
| *Law and Equity, s. 24* – Court may relieve against penalties/forfeitures and in doing so can impose any term as to costs/expenses/damages/compensation and other matters it sees fit-I.e. **Statutory version allowing relief from forfeiture of deposit** |

**EQUITABLE REMEDIES –** Matter of conscience; order by court to do s/t (unfulfilled promise); *discretionary*

\*Tend to be on their own (if you want SP – relates to 1° obls – unlikely to get dmgs (2° obls)) 🡪 *election*

\* **Specific Performance** (have *right* to damages; have a *claim* to SP)

* Court order to do *all* oblig’s; (//injunction for ALL oblig’s; always + aspect, to *do* s/t)
* Usually obligation to transfer property interest in unique/ID’able object/goods/land; work orders *unusual*

\* **Injunction**

* Order from court to do *isolated/certain* obligations = (can be + or -, mandatory or prohibitory)

\*Factors to consider (none determinative)

* What would **CL** do? (K? Broken? Remedy? Adequate? – If **dmgs sufficient**, court won’t order SP, etc)
	+ ERs not possible if 1° oblgs gone (b/c of term’n, void, or rescinded/avoided, or unenforceable)
* Show won’t cause **hardship** on a/o including D (usually means **3rd party**)
* Show you deserve remedy (**“clean hands”** doctrine); equity = conscience-based; look to P’s bhvr/pos in K
* Show: come in timely fashion (**no undue delay**/laches); depends on circ’s, length, acts done in interval
* Show you won’t make court work too hard (Court must monitor compliance; won’t grant if too complicated, or over long time, incl pers serv – should be straightforward obligation); **mutuality**

***Specific Performance*** – If ordered, K cannot be terminated (it is affirmed); pref for dmgs particular to CL

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| *John Dodge Holdings v 805062 Ontario* – K for **sale of land** near Wonderland, P purchaser = hotel builder, wanted SP; *is property* ***unique*** *enough* to merit SP (instead of dmgs?) – YES; **to receive Eq Rem of SP, must prove CL remedies not adequate**; SP only granted if P can demo property in Q unique in sense that sub not readily avail (D claims other commercial prop available, court disagrees, this **piece of comm real estate *unique***) |
| *Warner Bros v Nelson* – **K for pers service** b/t P producer & D: D to render ‘exclusive’ services to P, *not* to K w/ a/o else; D breaches, P claim K binding, **seek injunction *restraining* D from acting in breach** (+dmgs); no clean hands for SP, try injunction (can be *prohibitory* or order to DO something); K valid, no restraint of trade, not ordering her to *do* s/t (court generally *won’t enforce* + work order, or neg inj’n ‘not to break K’ that = + order for SP or would drive D to starv), but rather *not* to do s/t; **uniqueness satisfied** (D famous, dmgs insufficient); **court won’t enforce negative covenant that is effectively + one**, won’t compel D to be slave to P for period of time! Injunction granted for specified services for period of K or 3yrs (whichever shorter) |

**Flow Charts for argument**

*What will party want?*

* Damages? 🡪 Then must argue valid K, must refer to breached *term* (not representation)
* Get out of K? 🡪 Rescission (find operative misrep; make sure no bars – restitution imposs, execution of K, affirmation of K, delay/laches); Termination (find breach of condition – ends 1°s, leaves 2°s alive)

*Try to get what you want in K*

* **Construction** of K 🡪 K says what you want, other party as misconstruing what’s already there (don’t have to add/undo anything in K)
* **Add** s/t to K (implied term) 🡪 Not expressly there, but *put* it there (parties didn’t talk about it, concede it’s not there), argue for court to put it in
* **Rectification** (if there is written K) 🡪 Should be term, was discussed, but was mistakenly left out when K written down (note: std high, but achieves same goal as implied T – get’s what you want in K in K!)

*If you can’t get what you want, get rid of K*

* **Misrepresentation** 🡪 Blame other party for your entering K **(🡪 rescission**, 1° and 2° oblgs end)
* ***Non Est Factum*** 🡪Not my doing (e.g. Patel in *Shogun*), fraudulent, **K void**/nullity, can’t be own neg
* **Mistake** (of terms or mistaken assumption) 🡪 Last resort, ask court to get rid of K (usually in conjunction w/ another argument!) 🡪 see charts

*If breach is proven, breaching party liable for damages to innocent party*

* **Protected Interests** (Expectation, Reliance, Restitution)
* **Remoteness** (*Hadley v Baxendale* test)
* **Mitigation** (Duty on P to take reasonable steps to mitigate, not perfect)
* **Equitable Remedies** 🡪 If dmgs insufficient (subj matter *unique*, $ ≠ sub, usually ltd to transfers of property/poss that is special/unique, or achievement of result that ≠ pers service); Eq dmgs if SP/inj imposs

**Does a K exist? How many?**

* O&A (consideration? privity?); Acceptance? (not silence; action/Yes; communicated? method)
* Characterize communications (ItT, offer, rejection, counter offer, request for clarification, acceptance
* Intention of parties (language, circumstances/context, conduct, timeline) 🡪 ITCLR?
* Communication (silence, knowledge, motive vs. intent)
* Revocation? (Lapse; any method as long as communicated); Rejection? (Lapse)
* Certainty of terms?

**Is K enforceable?**

* Seal? Consideration (including forbearance)? Probs w/ consideration? (Fresh, duty owed to 3rd party, to promisor, variation)
* Can promise be made enforceable through promissory estoppel?
* Privity?
* Written evidence? (PER)

**Content of K**

* Rep or term?
* If term:
	+ Condition, warranty or intermediate term?
	+ Primary or secondary obligation?
	+ Entire or severable?
	+ Express or implied?
* E/LLCs 🡪 Notice? (sig/no sig); construe K
* Unconscionability? Public policy/illegality? Fundamental breach (E/LLC)?
* Rectification? (Mistake in written K?)
* Mistake? Common, mutual or unilateral?

**Excuses for non-performance of K**

* Misrepresentation 🡪 rescission (equitable; discretionary), makes K voidable
	+ Bars to rescission? (Restitution impossible, execution of K, affirmation of K, 3rd party has acquired rights)
* Mistake 🡪 as to term? Law? Assumption? (See charts)
* NEF? 🡪 K void
* Duress 🡪 usually voidable (historically void)
* Undue Influence 🡪 K voidable (rescission)
* Unconscionability 🡪 K voidable
* Illegality/public policy (RoT)

**E/LLCs**

* Did other party have notice? Sig = evidence of notice?
* Does clause apply to situation? Construction; Does statute prohibit application?
* Is it unconscionable to apply clause?
* (Wilson J, doubtful authority: Does clause operate unfairly in context of actual breach?)
* Is clause contrary to public policy?

**Remedies**

* Damages 🡪 breach of term (enforceable right); expectation/reliance/restitution
	+ Quantum = ?, P to establish on Bal/P
	+ Remoteness (*Hadley v Baxendale*)
	+ Duty to mitigate
	+ LDs? = Penalty?
* Equitable remedies 🡪 operate where unfair for innocent party to suffer conseq’s of breach; alt to CL remedies at discretion of court; when “$ no sub”; ≠ $ for breach of 1°, rather seeks to have 1° *performed*; does not terminate, actually *affirms* K; often uniqueness is property (unless as investment/resale)
	+ SP
	+ Injunction
	+ Equitable damages ($) if SP/injunction impossible due to 3rd party involvement

\**Is there a K?* 🡪 Formation (O&A, consideration, certainty, ITCLR)

\**How to enforce promises in K?* 🡪 (*Who* is involved: privity; *How*: Seal, consideration, promissory estoppel)

\**How are terms in K significant?* 🡪 Classifying terms (terms v reps; entire/sev; 1°/2°; cond/war); E/LLCs; term’n

\**How can party context K?* 🡪 Capacity, misrep, mistake, duress, UI, Unconsc, illegality, frustr: elim/alter K

\**What remedies?* 🡪 Termination, damages, equitable remedies

**\*\***K based on idea that people entering arrangements have chance in advance to **assess risks** involved (think about subj matter, credit-worthiness of other party, investigate econ/political forecast) before agreeing to be bound 🡪 that is why there are **few excuses for non-performance (strict liability**: difficulty or costliness not excuse**)**, one is thought to have weighed/accepted risk, vs. fault based torts (no chance to assess whether to enter into legal relationship, take victim as is); test for **remoteness in K** takes into account obligation to reveal special circumstances (like thin skull)

\*K = consensual agreement; allows parties to rearrange rights, powers, responsibilities, liabilities as b/t themselves; plan for future (certainty); plus set of rules to remedy disappointment/damage causes if rearrangement doesn’t work out as promised b/c 1 or both parties doesn’t live up to what was agreed to 🡪 response to rectify detrimental reliance? Or method to allow people to plan for future? Both.

\*Essence of K = agreement, writing just evidence; obligation-based relationship

\*Risk allocation key; mistake as upsetting that (accept burden, shouldn’t get out of responsibility just if mistaken)

\***Mistake** and **Frustration**🡪 M (pre/@ K’ing), F (after K): neither can operate where K deals expressly/implicitly with risk that such things/facts occur (allocation of risk as heart of K, can’t have M or F relieving party of essence, only when they relate to risks parties did not contemplate/provide for in K)

\*Court will try to find K where possible; can’t ‘get out’ of K by saying meant s/t diff that what other person mean

\*Benefit of NEF: if successful, makes K void, so if 3rd party is involved, detrimental impact on them or D no barrier (vs doctrines that don’t void K like duress, illegality; if resc would neg’ly affect 3rd P, won’t be granted)

\*It is consideration given by promisee that makes promisor’s prom not gratuitous, s/t K law interested in enforcing