# Contracts – Fall 2013 - MacDougall

# Who Can Enforce the Promise?

## Privity

* Who can enforce the contract and against whom can it be enforced?
* If you are not the offeror or the offeree – you are not privy to the contract

### Horizontal Privity

* Where A enters into a contract with B for something that also benefits C, but C cannot bring an action against B for not performing the obligation. A can enforce it but can only be remedied for damages that A suffered, not those of C: ***Tweedle v Atkinson***

### Vertical Privity

* A has a contract with B who has a contract with C. C is not privy to the contract between A and B and vice versa: ***Dunlop Tyer v Selfridge***
  + Chain of contracts (ex: buyers and sellers), can only sue the person above and below you

### Circumventing Privity

* If it’s possible to get specific performance, then it could be used to benefit the third party who is not privy to the contract, however, specific performance must be obtained by a party to the contract, and not by the third party: ***Beswick v Beswick***
* **Agency:**
  + A enters into a contract with B for the purpose of benefitting C, where A is acting as C’s agent, and therefore the contract is actually between B and C
  + A COULD be entering into 2 contracts with B (1 for A and 1 for C, ex: group travel)
  + It MUST be shown that the contract benefits the third party, ideally without benefitting the agent directly
  + There can be no agency relationship without consideration from the other party: ***Dunlop Tyer v Selfridge***
  + Courts are reluctant to find A as an agent for C when A and C have conflicting interests: ***Dunlop Tyer v Selfridge***
* **Exceptions to Privity:**
  + Where two parties enter into a contract that has a defence intended to benefit a third party, the third party is entitled to benefit from the defence, even if they are not privy to the contract, but only as a defence, not as a cause of action!: ***London Drugs v Kuehne &Nagel*** (employment contracts ONLY)
  + Eliminates the constraint of employment contracts: ***Fraser River v Can-Dive Services***

# Intention to Create Legal Relations

* Courts will not enforce promises or recognize them as contracts where there is no intention to create legal relations
* In social, family and domestic situation where there is no mention of intentions to create legal relations, the courts will assume there is none: ***Balfour v Balfour***
  + Courts have since relaxed how strict this rule is in a family context
* ***M v A***: court ruled no intention to create legal relations because it was made within a romantic relationship
* Courts have a strong presumption in business situations that there is an intention to create legal relations, unless it is explicitly stated to the contrary by the parties involved: ***Rose and Frank v JR Crompton Bros***

# Offer

* Offer sets the terms of the contract
* Courts can help formulate a contract
* Terms can be implied on reasonableness and necessity

### Express vs Implied terms

* Contracts may come about from actions instead of negotiation which can make it hard to analyze offer and acceptance

### Was there an offer?

* Factors to distinguish an offer from an invitation to treat:
  + Are the terms of the contract complete? Can the contract be formed by just saying yes? If there is still uncertainty and missing details, it might not be an offer.
    - Are the details of the eventual contract clear or can they be worked out from the communication that has been made?
  + Would treating communication of an offer lead to an absurdity? (ex: creating multiple contracts when multiple contracts is clearly not wanted: ***Carlill v Carbolic Smoke Ball Co***)
  + If a statement can be interpreted as an offer by a reasonable person, then it is an offer: ***Carlill v Carbolic Smoke Ball Co***
  + Intention, illustrated through total context (language, conduct) is the primary factor in determining whether there was an offer or if it was an invitation to treat ***Canadian Dyers Association Ltd v Burton***
    - Look to intention of parties, language between parties, history between parties and conduct after the fact (did the parties act as if there was a contract?)

### Who Makes the Offer?

* Only the offeree can accept the offer, usually the offeror sets the terms of the contract
* Although both parties might be involved in negotiations, legally the offer comes from one of the parties (offeror/offeree): ***Pharmaceutical Society v Boots Cash Chemist*** 
  + Retail Scenario: display of price and placement of goods on shelves is an invitation to treat, customer makes the offer to the cashier at the checkout, which the cashier then accepts: ***Pharmaceutical Society v Boots Cash Chemist***

## Communication of Offer

A valid offer requires 2 things:

1. **Communication:** an offer is not legally effective until it is communicated to the offeree
2. **Knowledge:** an offeree cannot accept an offer unless they have knowledge of the offer

* **Motivation for acceptance is irrelevant**, as long as there was communication of the offer by the offeror, and knowledge of the offer by the offeree: ***Williams v Carwardine*** (not valid authority though as this statement came from the lawyer and not the judge)
* Motivation is irrelevant BUT the offeree can’t accept the offer without intention and to have intention, you need to have knowledge.
  + Ignorance of the offer = lack of knowledge = lack of intention: ***R v Clarke***
  + ***Clarke*** relies on ***Williams*** which doesn’t give valid authority for the statement

# Termination of Offer

## Revocation

* Offer can be terminated by offerer (revoke), offeree (rejection), or a lapse of time
  + Implicit reasonable time frame or offer can be made in such a way that is self-expiring
  + Must communicate revocation (must reach offeree to be effective – postal acceptance rule doesn’t apply), any time before acceptance (will not create a breach, even if it is early revocation): ***Bryne v Vantienhoven***
  + Offeror doesn’t have to provide formal notice of revocation of offer, it may be sufficient enough for the offeree to gain knowledge of offer being revoked (ex: through an action; through a third party): ***Dickinson v Dodds***
* Can you revoke an offer, if the offer itself says it can’t be revoked until a certain time?
  + Yes because there is no contract until the offer has been acceptance, so if no acceptance, the offeror isn’t bound by his promise to keep the promise open: ***Dickinson v Dodds***
  + BUT to prevent early revocation, create an **option contract** – with consideration or else Courts are reluctant to accept these
* Mass offer to a large group/public can be revoked as long as same method of communication for the offer was used: ***Dickinson v Dodds***
* Death revokes the offer: ***Dickinson v Dodds***

## Revocation for Unilateral Contracts

* Unilateral contract: if only one party has any obligations under the contract
  + For the other party to accept the offer, they must have already done something because consideration has to be given at the time of acceptance
  + Acceptance is usually in the form of actions
* If early revocation causes hardship to the offeree (ex: offeree has partially performed preconditions), no early revocation can be allowed
* If the offeror knows that the offeree has begun to do what is necessary to accept the offer, the offeror cannot terminate the offer: ***Errington v Errington*** (equitable doctrine, not part of contract law)
* If ***Carlill*** was a unilateral contract, then the smoke ball company would have been able to terminate its offer while Carlill was doing the actions necessary to accept because they had no knowledge that she had begun to do what was necessary

## Rejection and Counter Offer

* Rejection by the offeree through a counteroffer: rejection vs request for clarification
* Some offers need acceptance to make precise what is imprecise in the offer (ex: I’ll give you up to 1000 X at $y and the acceptance is “I’ll take 400”)
* Three ways of rejection other than outright: inaction, silence, implicit rejection
* ***Livingstone v Evans***
  + The offeree must accept the terms of the offer; proposing any changes is a counteroffer and therefore a rejection
  + A counteroffer will not be a rejection if the counteroffer includes an intention to keep the original offer on hold
  + Once the offer is rejected, only the offeror can revive the original offer by re-offering it
  + An offer can be renewed through ambiguous language (ex: “cannot reduce price” therefore, implying that I am re-offering the original price)

## Termination of Offer through Lapse of Time

* No offer is open for an eternity

***Barrick v Clark***

* If no time is specified in the offer, then the offer lapses after a **reasonable time**
  + Reasonable time: nature and character of negotiations, normal/usual course of business, and circumstances of the offer (including conduct of the parties)
* If no lapse of time state or implied in the offer, look through the perspective of the offeree
* If lapse of time stated or implied, look at time through perspective of the offeror

# Acceptance

* The acceptance must come from the offeree or someone on behalf of the offeree
* An acceptance needs to be an unqualified yes, anything else will terminate the original offer, BUT if the original offer is revived after a counteroffer, it can be accepted: ***Livingstone v Evans***
* All the terms must come from one side (offer) (Denning’s statement of terms being able to come from both sides has been seen as bad law): ***Butler Machine Tool Co v Ex-Cell-O Corp***

## Communication of Acceptance

* Acceptance must be **communicated** in order to be valid
* EXCEPTIONS:
  + Postal Acceptance Rule – post office acts as agent: ***Household Fire***
  + Explicit waiver of communication – offeree still needs to accept through actions: ***Carlill v Carbolic Smokeball Co***
* Cannot state in contract that silence can be viewed as acceptance: ***Felthouse v Bindley***
  + No way to prove offeree accepted and it places the burden on them to get out of the contract (can’t do this!)

### Waiver of Communication

* Communication is for the benefit of the offeror, so offeror can waive need for communication of acceptance – performance of the condition in offer is sufficient (but can’t be silence): ***Carlill v Carbolic Smokeball Co***
* If offer makes clear that specific actions need to be done to accept, then acceptance doesn’t need to be communicated: ***Carlill v Carbolic Smokeball Co*** (didn’t tell them she bought the ball)

### Postal Acceptance Rule

* Communication/acceptance occurs the moment the acceptance is given to the post office: ***Household Fire***
* If offer is sent through mail, and return address is put as place to send acceptance, then it shows that offeror is content to use the mail and accepts the postal acceptance rule: ***Household Fire***
* DOES NOT APPLY IF:
  + Offer explicitly states that it doesn’t exist: ***Holwell Securities***
  + Applying the rule would lead to an absurdity (look at context, ex: marriage, personal service contracts, etc): ***Holwell Securities***

### Where does Acceptance Occur?

* Acceptance occurs where and when it is **communicated**
  + Applies to instantaneous communication (fax, email, telephone): ***Brinkibon v Stahag Stahl***
* Contract comes into existence WHERE acceptance is communicated
  + Important to determine what jurisdiction’s rules apply and where an action occur
* With answering machines OR emails OR fax machine as long as the message of acceptance reaches the machinery or other facilities in the offeror’s control, it will be said to have been communicated, even if the offeror has not actually read the message. It would cause undue hardship to the offeree otherwise.

## Acceptance of a Unilateral Contract

* Potential problem: offeror revokes offer while offeree is in the process of performing necessary actions to accept
* ***Carlill v Carbolic Smokeball Co:*** if it was a unilateral, no reason why Carbolic couldn’t revoke offer while Carlill was performing actions 🡪 if it had been interpreted as bilateral, then the company couldn’t just revoke the offer because contract would’ve been created when Carlill bought the smokeball
* Courts should interpret contractual situations as being bilateral rather than unilateral whenever possible: both parties are protected from time before performance begins on either side

# Certainty of Terms

* For contract to legally exist, must be certainty of terms – otherwise, contract hasn’t come into existence even if both parties want a contract
* General principle that contracts will be saved whenever possible: ***Hillas v Arcos***
  + Contract **must** contain at least essential/material terms (if missing, contract will be invalid: ***May & Butcher v R***) and will depend on the type of contract
    - An agreement to set a critical term later is not valid: ***May & Butcher v R***
    - Possible for the essential term to be implied by statute (ex: *Sale of Goods Act*)
  + With all issues of certainty (missing, ambiguous, contradictory) courts will look to the rest of the contract and the context to try to resolve the issue (interpret broadly), so long as it is clear that the parties intended to enter into the contract: ***Hillas v Arcos***
    - Interpret the contract and imply what the parties are wanting – look at the intentions of the parties when the contract was created: ***Foley v Classique Coaches Ltd*** – affirmed ***Hillas***
    - If there are differences between the parties, the court can imply what is reasonable – **what can be made certain IS certain**
    - Even if material terms are missing, a court may find, through context, that these have been implicitly addressed

## Promises to Negotiate in Good Faith

* Unclear because who knows where they lead to?
* Can be an implied duty to negotiate in good faith where there is a clear, but still ambiguous reference/measuring stick (market value, rent): ***Empress Towers Ltd v Bank of Nova Scotia***
* Courts will try to give meaning to an ambiguous clause for future agreement where there is an ascertainable meaning that is unclear: ***Empress Towers Ltd v Bank of Nova Scotia***
* Courts can NOT find a new contract, BUT can enforce obligation to negotiate in good faith: ***Empress Towers Ltd v Bank of Nova Scotia***
* Where there is no benchmark, promise to negotiate in good faith can’t be binding: ***Manpar Enterprises v Canada***
* Can’t get anything positive by arguing breach of promise to negotiate in good faith, but can use it to prevent the other party from getting what they want: ***Manpar Enterprises v Canada***
  + Court won’t give other party what they want if they haven’t attempted to fulfill obligation to negotiate in good faith
* Possible to use as a defence: ***Empress Towers Ltd v Bank of Nova Scotia***. Can’t use this as a claim, only as a defence: ***Manpar Enterprises v Canada***

# Enforceability Issues

* For each promise/obligation XYZ in a contract, the other party has a corresponding right XYZ
* There are primary rights/obligations (XYZ) as well as secondary rights/obligations (xyz) that are the damages that arise if the primary obligations are breached
  + When obligations are enforceable the secondary obligations will back up the primary obligations
  + If obligations are unenforceable there is no remedy available for a breach of obligations
* **3 ways to make a contract enforceable:**
  + **Seal**
  + **Consideration**
  + **Estoppel** – equitable remedy available when there is no seal or consideration

## Promise Under Seal

* **Promisor** must be the one to seal the contract
  + To be valid under seal, promisor must affix the seal to the contract making the promise AND be aware of the significance of attaching a seal
* The seal changes it from a gift (gratuitous promise) into a valid contract
* Any representation of a seal is sufficient (gum wafer, written) IF the seal is created by the promisor AND the promisor is aware of the significance of the seal: ***Royal Bank v Kiska***
  + Writing the words “seal” does not qualify as a valid seal if not created by the promisor

## Consideration for the Promise

* Price of the promise – what is given by the promisee in exchange for the promise of the promisor.
  + This makes it not gratuitous and something legally enforceable
* Rules of Consideration:
  + Consideration must be given by the **promisee**
  + Consideration must be given at the time of acceptance
  + Has to be “fresh” (usually) – must be something that makes the promise NOT a gift, something that would NOT happen in any event if a gift was given: ***Thomas v Thomas***
  + Consideration is given to the promisor or third party
  + Consideration must have some value in the eye of the law, moving from the promisee: ***Thomas v Thomas*** (motive isn’t consideration)
  + Consideration must be a **benefit** to the promisor OR a **detriment** to the promise OR both
  + Consideration can be expressly agreed b/w the parties, or it can be implied
  + Consideration where anything that is to be given depends on the whim of the promisee (“if I feel like it” or “if I think circumstances are appropriate”) is valueless consideration
* If there is no seal AND no consideration, then the promise IS NOT enforceable, but there is a valid contract in existence

## Distinguishing Consideration

* **Failure of consideration:** DOESN’T mean there is no consideration and therefore, isn’t enforceable, it has to do with a breach of contract
* **Adequacy:** law DOESN’T assess quality of consideration, all that matters is that there is SOMETHING – you can give a peppercorn for a Rolls Royce if you want and it will make the contract enforceable, can be anything of physical value no matter how nominal: ***Thomas v Thomas***
* **Motive:** not consideration, consideration is the benefit/burden that is expected from the contract

## Forbearance

* Generally unproblematic as it’s usually to the detriment of the promisee
  + A promise not to do something (likely not to sue) can be equally as valuable as promising to do or give something
* If the promisee offers by way of consideration a promise not to do something, where the promisee has no business doing what s/he promised not to do in the first place 🡪 **valueless consideration**
* A promise not to bring about a lawsuit where the promisee **knows** that such a promise is worthless becacuse the lawsuit or legal claim is groundless CANNOT count as valid consideration because the promise is worthless and of no value (no benefit and no detriment)
  + BUT if promisee can show that they reasonably thought the lawsuit had merit, even if it didn’t, can still be valid consideration: ***Callisher v Bischoffsheim***
    - Onus on the promisee to show that the belief was reasonable – ignorance of the law is not a defence: ***Callisher v Bischoffsheim***

# Problematic Consideration

## Past Consideration

* Past consideration not valid because consideration must be given at time of promise AND must be “fresh”/new: ***Eastwood v Kenyon***
* HOWEVER, if past act done at promisor’s request and later promised to compensate, courts will overlook past consideration and make it a binding promise: ***Lampleigh v Braithwait***
  + Affirmed by ***Pao On v Lau Yiu Long*** 
    - “An act done before the giving of a promise to make a payment or to confer some other benefit can *sometimes* be consideration for the promise. The act must (1) have been done at the promisors request, (2) the parties must have understood that the act was to be remunerated either by payment or the conferment of some other benefit, (3) payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.”

### Exceptions to Past Consideration

1. X does a favor for Y in exchange for a promise by Y to pay X $10, but Y **does not have the capacity** to pay while making this promise. Y’s promise would be currently unenforceable, but once Y **gains capacity** and he confirms his promise to X, then this is an enforceable promise. While X has done the act already, making it past consideration, the courts will excuse this and make it enforceable: ***Eastwood v Kenyon***
2. **During an emergency**, X does/gives something to Y at Y’s request without giving Y any consideration in return, BUT it is reasonable for X to assume that there might be compensation for what he does/gives. After the emergency, Y makes a promise to compensate X after the act is complete. The court will excuse past consideration and make this valid: ***Lampleigh v Braithwait***
3. X is doing or giving something to Y out of **necessity**. If Y makes a promise after X already did the act, then this too would be an exception to past consideration.

## Pre-Existing Legal Duty Owed to the Public

* Not valid consideration UNLESS something new is added beyond bare public duty, such as promise to perform the public duty in a certain way
  + Creates something new since a new person can enforce the duty/promise

## Pre-Existing Legal Duty Owed to a Third Party

* This type of consideration is now **acceptable**
* Creates something legally new and valuable because the promisor can also enforce the duty. Promisee gets a detriment as they have another party to be accountable to: ***Pao On v Lau Yiu Long***

## Pre-Existing Legal Duty Owed to the Promisor – PROBLEMATIC

### Promise to Do More

* Five ways to enforce a promise to do more in an existing contract:
  + Agree that the existing contract is being scrapped/rescinded and then enter into a new contract where an obligation may be enhance (needs to be VERY clear that old contract is scrapped)
  + Use a seal
  + Create new consideration
  + Argue that you don’t need consideration: ***Greater Fredricton***, but is this really good law?
  + If none of these work, use promissory estoppel: ***Greater Fredricton*** and ***Gilbert Steel*** say you CAN’T use this, BUT ***Walton Stores*** says you can (Australian though)
* A promise to pay more is not enforceable because there is no new consideration given in return and consideration given for a promise to pay more must be certain: ***Gilbert Steel***
* **BUT**, perhaps a promise to do more can be enforceable if conditions are met: ***Greater Fredricton***
  + If the promise to pay more is a variation of the existing contract
  + If there is no economic duress
    - Consideration may not matter if both parties agree to enhance an existing obligation – Courts should just see if the promise was freely made
      * Greater Fredricton is from the NBCA, not affirmed or overturned

### Promise to Accept Less

* Four ways to enforce a promise to accept less:
  + Put promise under seal
  + S43 of *Law and Equity Act*: **Actual** part performance, not just promise of part performance, expressly accepted in satisfaction of the greater obligation will be enforced as a promise to accept less – would overrule ***Foakes v Beer***
    - Person promising to accept less can actually revoke that promise but the action of accepting less will extinguish the full obligation
    - **USE THIS BEFORE ACCORD AND SATISFACTION**
  + Consideration (accord and satisfaction): ***Foot v Rawlings***
    - Courts will be generous in finding consideration
    - A new method of payment (ex: new place, new instrument of payment) will count as new consideration
    - Post-dated cheques is enough detriment to the promisee to count as good consideration for a promise to accept less
  + Promissory estoppel (narrow doctrine: ***High Trees***)
* Promise to accept less is not enforceable if promisee is not giving any new consideration – payment of a lesser sum than what is owed is NOT consideration for a promise to accept less: ***Foakes v Beer***
  + A change of payment dates isn’t enough consideration

# Making Promises Bind Through Equity

## Estoppel

### Promissory Estoppel

* A promise or assurance made to someone who relies on it (behaves as if it was intended to be binding) and would suffer a detriment if the promise was not binding, then the promise may be binding (equity would consider it). Lots of constraints on how equity would make it binding:
  + Equity will make it binding as a defence to a claim: ***Combe v Combe***, but ***Walton Stores*** has tried to change that view
  + Could be time/situation limited in that the person making the promise could end its effect by giving notice: ***High Trees*** (sometimes not possible and a one-time payment is unlikely to do this)
    - Promissory estoppel is not permanent and can be terminated
  + Because it is equity, the court will look at all surrounding circumstances, and if it doesn’t think it’s fair to hold somebody to the promise, then they won’t (ex: clean hands): ***D&C Builders v Rees***

### Promissory Estoppel to Enforce a Promise to Accept Less (Shield)

* Promisor must intend for the promise to be binding AND the promisee must rely on that promise
* **BIG DOCTRINE:** where a person makes a promise intending it to be relied upon and the promisee relies on it, the promise is binding: ***High Trees***
  + Revived by: ***Walton Stores***
* **SMALL DOCTRINE:** a promise to accept a smaller sum in exchange of a larger sum, that was intended to be binding, if acted/relied upon, is binding regardless of no consideration: ***High Trees***
* A person is held to a promise through estoppel as long as the promise is fair: ***High Trees***

### Restrictions on the (Big) Estoppel Doctrine from High Trees

1. Need to have an **explicit** promise or statement for promissory estoppel to apply: ***John Burrows v Subsurface Surveys***
   * “indulgences in the past do not mean that indulgences will occur in the future” (not using the acceleration clause in the past doesn’t estop party from using it in the future)
   * If a party ***waives*** their right to do something, then they are estopped from going back on it (unless expressly reserved right to change their mind)
2. Promissory estoppel is unavailable where inequitable (duress, undue pressure, deceit, something unconscionable): ***D&C Builders v Rees***
3. **BIG CONSTRAINT**: Promissory estoppel can be used as a *shield* and not a *sword*: ***Combe v Combe***
   * Estoppel can be used to reduce a current obligation, but not increase
   * Can't go to court and say you want something from the other party through estoppel

### Promissory Estoppel to Enforce a Promise to Pay More (Sword)

**What is needed:**

1. Promisor makes promise with expectation that it will induce action or forbearance on promisee
2. It DOES induce action or forbearance on the promisee (reliance)
3. Would be **unconscionable** to the promisee if promise is revoked (extreme detriment required)

* Even if parties don’t have a contract, a promise that one party made can still be made enforceable – promissory estoppel can be a cause of action: ***Walton Stores***
  + If the promisor makes a promise with the reasonable expectation that it will induce action or forbearance and does in fact do so, and will cause a detriment on the promisee if that promise is not kept, then the promisor is held to that promise 🡪 cause of action – **only** possible where necessary to avoid unconscionability
  + Authority in Canada: no court has accepted or rejected it
    - *Greater Fredriction* seemed to reject it, but *M v A* spoke warmly of *Walton Stores*, but didn’t apply it
* Does NOT reject that if there has been intentions to create legal relations, then you could use ***Walton Stores*** and say estoppel can be a cause of action: ***M (N) v A (AT)***

### Test for Promissory Estoppel as a Sword

* Is there a promise?
* Was it relied on to P’s detriment?
* Was it revoked? If so, was it unconscionable?
* The promise can be a reduction, enhancement, or creation of existing obligation
* Expectation of legal agreement – intention to create legal relations: ***M (N) v A (AT)***

# The Content of the Contract

## Differentiate Terms from Representations

* Term: a statement that relates to one of the obligations of the contract
* Promise of the way the world is going to look in the future
* Only a failure to perform one of the terms of the contract will lead to a breach of the contract which eliminates the primary obligation, but shifts to the secondary obligation
* Representation: significant statement of fact made in the context of the lead up to the contract
* A statement of fact about how it exists now or in the past
* A misrepresentation is an untrue statement and can rescind the contract or offer tort damages (not liable for innocent misrepresentations)

## What is a Term in the Contract?

* The test is one of intention: ***Hielbut, Symons & Co v Buckleton***
  + Look to the conduct of the parties, their words and behaviour – the “totality of evidence”
  + Would the reasonable parties intend the statement to be a term and therefore, contractually binding?: ***Hielbut, Symons & Co v Buckleton***
    - Based on the contract, is the statement something that we would expect people to be promising? Or is it unusual?
* GENERAL RULE: the more important the statement is to the contractual aim, the more likely that it’s going to be considered a term: ***Leaf International Galleries***
  + Statute may also be used to resolve the issue of determining if something is a term, a promise or a statement of fact/representation (ex: *Sale of Goods Act* in ***Leaf International Galleries***)
* The closer, in time, the statement is to the actual offer and acceptance, the more likely it’s a term: ***Hielbut, Symons & Co v Buckleton***
* Collateral Contract: ***Hielbut, Symons & Co v Buckleton***
  + If you determine that a statement is a representation and not a term of the contract, then it’s possible that the representation is a term in a collateral contract, but you must strictly show a clear intention of the parties for there to have been a collateral contract
* There can be no termination if all obligations have been performed: ***Leaf International Galleries***
  + After a certain period of time, it will be seen that the good has been accepted/constructive affirmation of the contract – if this is so, and there are no more obligations to perform, then termination is not possible!

## Doctrine of Merger

* If the law characterizes something as a term, then the party has to go down the path that the term provides (breach or termination or nothing): ***Leaf International Galleries***
  + Once characterized as a term, then it cannot be characterized as a representation – cannot use misrepresentation
  + For practical purposes, a term in the contract cannot also be a representation: ***Leaf International Galleries***

## Classification of Terms

* Examined at the time of contract formation to decide how the reasonable person would categorize them in light of all the evidence as a whole and the relationship between the parties: ***Wickman***
* Condition: a highly important and critical term that goes to the heart of the contract: ***Hong Kong Fir***
  + A breach of a condition will lead to a result that is fundamentally different from that intended under the contract
    - Remedy: TERMINATION
      * If this happens, the party who breached the condition is repudiating the contract and the innocent party has an election: either accept the repudiate and terminate the contract, or affirm the contract: ***Hong Kong Fir***
        + This can be done through words, action or inaction (electing the status quo)
* Warranty: a term which is not essential to the contract and is collateral to the main purpose of the contract (less important than conditions)
  + - Remedy: Damages only: ***Hong Kong Fir***
* Intermediate term/innominate term: the effect of the breach is unclear until it is actually breached –it will always remain an intermediate term, but can take on the remedies of either condition or warranty, depending on the effect of the breach
  + - Remedy: Dependent on the consequences of the breach
    - After the breach occurs, determine the seriousness of the consequences of the breach (NOT the breach itself)
      * Did the consequences of the breach deprive the party attempting to rescind of substantially the whole benefit which was intended under the contract?: ***Hong Kong Fir***
        + If yes: termination
        + If no: JUST damages
  + Limits were set in commercial setting because it was used too often/too much litigation
* Even if a contract labels something as a condition or a warranty, the court may choose not to read it that way – have to look at the consequences of the breach to properly characterize it
  + Drafter should specify the remedies for a breach instead of the type of term if they want to be clear: ***Wickman***
* LAPSE OF TIME CAN CANCEL ABILITY TO TERMINATE (for condition or intermediate term): ***Leaf International Galleries***

## Does the Parole Evidence Rule Apply?

* General rule: if contract reduced to writing and appears to be complete, Court will not hear evidence outside of the written contract
  + Doesn’t apply to implied terms or when the contract is induced by an oral misrepresentation that is inconsistent with the written record
* The principles of its application: ***Gallen v Allstate Grain***
  + A hierarchy of terms (written over oral) – not an absolute principle
  + Presumption that the written contract is the whole contract is stronger where the contract is unique (more likely to reflect the parties intent), as opposed to a standard form contract
  + When the oral “terms” are in total contradiction of what is written also strengthens the presumption (as opposed to adding/subtracting/varying the agreement)
  + The presumption is weaker where the contradiction is between a SPECIFIC oral representation and a GENERAL exemption clause that excludes liability for ANY oral representation, than if the contradiction is between a SPECIFIC oral representation and a SPECIFIC clause in the document
* Potential absurdity: terms can be implied, but these terms are obviously spoken about, and under this presumption/rule, they may no longer be allowed to be part of the contract

**How do you get around this?**

* Argue that the oral terms are part of a collateral contract so this rule doesn’t apply
* Argue that the exemption clause is severable (hard to argue why)
* Argue the oral term as an implied term since it doesn’t apply to misrepresentations or implied terms
* You can argue indirectly by arguing that you are rectifying the written record because it is incorrect – then once you amend it to say what you want it to say, you are happy to have the rule apply.

## Is the Obligation Actually Enforceable Yet? (Contingent, Entire vs Severable)

**Arises in situations where there is a condition precedent and it has only been partially performed**

* Entire obligation: the obligation of the first party must be performed COMPLETELY (substantial performance doctrine) to trigger the other party’s enforceable performance: ***Fairbanks v Sheppard***
* Severable obligation: part performance of the first party’s obligation is enough to trigger enforceable performance of the other party’s obligation
  + Substantial performance doctrine: each severable obligation can be viewed as an entire obligation as it needs to be substantially performed in order to trigger the other party’s obligation
* The law will presume entire obligations, so there must be something in the contract implying it is otherwise in order to argue that
  + Could be easier for the party to argue that it is an entire obligation and establish substantial performance instead: ***Fairbanks v Sheppard***
* For work that is partially done, the law might allow payment on a “quantum meruit” basis
  + If the innocent party of the abandoned contract takes benefit from the work done, they can be liable to pay for what has been completed
  + When a contract is abandoned after part performance, the party who abandoned the contract can only recover on quantum meruit for the work already done if the circumstances give the other party an option to “accept”, thus creating the inference of a new contract: ***Sumpter v Hedges***
  + Now dealt with through law of restitution through unjust enrichment

## Implied Terms: *Machtinger v Hoj*

* Terms can be applied through:
  + Custom or usage (must have evidence to support such an inference):
    - Personalized: terms can be implied into a contract because there is a developed practice between the two parties (consistent inclusion of that term in the past)
    - Industry: terms can be implied by virtue of an industry or local practice in which context the parties are operating
    - Type of contract
  + Implication because of necessity to give business efficacy to the contract:
    - Not a test of reasonableness, but it must be necessary to make the rest of the contract work!
    - Officious bystander test – if asked what would happen in X event, both parties would say “of course such and such will happen”
    - Very commonly litigated
  + Operation of law
    - Can be implied because either common law or statute includes terms in those types of contracts – the intention is not relevant
    - Ex: *Sale of Goods Act, Employment Standards Act*

## Contingent Conditions – Conditions Precedent and Conditions Subsequent

* **Condition precedent:** prerequisite to the enforceability of an obligation or the contract
  + CP as an 1) obligation (A cannot call upon B to perform their obligation until CP is fulfilled), as 2) an event external to the contract (event must occur before obligation is enforceable – I will shovel your driveway if it snows), or as 3) a trigger to the contract (either party can revoke the contract until the condition precedent is completed; no contract without the CP)
  + If it is within an existing contract, and not just the acceptance of a unilateral contract, then no one can unilaterally cancel the deal
  + Unilateral abandonment can only occur in cases where the condition precedent is put into the contract for the benefit of the party who wants to get rid of it: ***Turney v Zhilka***
  + ***Wiebe v Bobsien*** – a court will try where possible to find a contract – preference for concluding that a condition precedent is to an obligation, not to a contract
* **Condition subsequent:** an event that ends an obligation
* **Contingency:** important knowing when obligations have to be completed
  + Ex: foundation must be completed by June 1st – the contingency is June 1st

## Excluding and Limiting Liability

* The problem: exempts one party from liability for failure to perform certain obligations or limits it
* Two steps to control these clauses: 1) scrutinize whether the parties know the term exists and 2) scrutinize and possibly modify/negate the effect of such clauses
* Exclusion clauses don’t have to have a quantum – they can be procedural

**The use of exclusion and limitation clauses are limited by the courts – for it to be enforceable, there must be:**

* NOTICE:
  + ***Parker v South Eastern Railway*** – sets out test to see whether what the railway company had done was “sufficient to convey to the **minds of people in general** that the ticket contains conditions”
  + If clause is particularly onerous or unusual – “the party seeking to enforce it must show that particular condition was **fairly brought to the attention of the other party**” – ***Interfoto Picture Library v Stiletto Visual Programmes***
  + ***Promech Sorting Systems BV v Bronco Rentals and Leasing Ltd*** – “that which is reasonable notice for one class of customers may not be reasonable for another class”
  + Notice must be given before or at the time of agreement for the clause to stick (must have time to accept or reject): ***Thornton v Shoe Lane Parking***
  + The court is very against implying constructive notice here, but a statement can be imported into a contract if previous dealings show that a party knew or agreed to the term before – must show ACTUAL notice of terms in previous dealings and assent to those terms: ***McCutcheon***
  + SIGNATURE AS NOTICE:
    - If you sign a contract with an exclusion or limitation clause, you are generally held to have accepted that clause: ***L’Estrange v Graucob***
      * EXCEPT where there has been misrepresentation from the party seeking to enforce it: ***Curtis v Chemical Cleaning & Dyeing Co***
      * ***Tilden Rent-A-Car Co v Clendenning*** – provisions relied on are inconsistent with overall purpose of contract and in such situations, a signature is not enough – party relying on the exclusion must show they took reasonable steps to make signor aware or show that the signor was actually aware
  + Not a general principle that a party must draw attention to an exclusion of liability clause. To find there is a duty to draw attention, one must look at 1) the effect of the clause in relation to the nature of the contract 2) the length and format of the contract 3) the time available for reading and understanding it: ***Karrol***
  + Party wanting out of an exclusion clause must show one of the following: ***Karrol***
    - *Non est factum*
    - Signature was on the basis of a misrepresentation (leads to rescission)
    - Signing party was mistaken and the other party knew or had reason to know of the mistake (clause would be unenforceable)
  + \*\*\*What is the consideration for the exclusion/limitation clause?: ***Karrol***
    - Pay for a day on the slopes, but then also have to sign a waiver after paying for the mountain. Could argue for implied term or promissory estoppel
* CONSTRUCTION
  + Court must determine whether the clause even applies to the particular situation (especially for standard form contracts) – using cannons of construction
  + Must analyze the terms in light of the purpose of the contract, in the context of the contract and the overall terms: ***Tercon***
  + *Contra Proferentum*: the court will construe the exclusion/limitation clause strictly against the party relying on them: ***Tercon***
  + If the contract lists examples of when exclusion of liability would operate, court may construe it to mean that it will ONLY operate in those circumstances
* FUNDAMENTAL BREACH: no longer available in Canada: ***Hunter v Syncrude, Tercon v BC***
  + If there is a fundamental breach, exclusion clause cannot apply: ***Karsales v Wallis***
    - If you exclude liability for the main part of the contract, that means that wasn’t really a term at all
  + Replaced by doctrine of unconscionability
* UNCONSCIONABILITY (clause must not be unconscionable for the clause to apply)
  + Arises from situations of unequal bargaining power and deals with circumstances surrounding the *creation* of the contract, not the breach: ***Hunter v Syncrude***
  + Equitable doctrine
* UNFAIRNESS
  + To deal with situations after the contract has been entered into – added another control of unfairness/unjustness (seems like fundamental breach now) – probably bad law: ***Tercon***
    - Wilson likes it though as the only one: ***Hunter v Syncrude***
* PUBLIC POLICY
  + Even if the exclusion is held to be valid, court could still refuse because of an overriding public policy
    - Onus on the party seeking to avoid enforcement of clause to identify overriding public policy that outweighs the public interest (freedom of contract) in the enforcement of the contract – but no real definition of public policy: ***Tercon***

# Excuses for Non-Performance of the Contract

## Misrepresentation (fraudulent, negligent, innocent)

**Was the representation an operative misrepresentation?**

* **Statement of fact:** when one party has more info, a statement of opinion or belief can imply a statement of fact that underlies that opinion or belief: ***Smith v Land and House Property Corp***
  + Silence doesn’t usually count as there is no duty to speak (*caveat emptor* – buyer beware), but some circumstances do require a duty to speak (consumer situation, good faith and fiduciary situations)
  + Can be made by a non-contracting party, but is someone so closely connected to the other contracting party that it’s fair to establish a connection (agency)
* **Untrue:** if the statement is ambiguous, the benefit of the doubt will go to the maker of the statement
  + The maker has the duty to inform if the statement becomes false after the statement is made, but before acceptance
  + Even if innocent misrepresentation, still an operative misrepresentation and may be remedies through equity: ***Redgrave v Hurd***
  + If made knowingly, tort of deceit available
* **Material:** representation must be important or relevant – depends on the context of the contractual situation (subjective) – “going to the root of the contract”
* **Reliance:** did the actual representee rely on the statement?
  + It must be at least one of the reasons they entered into the contract
  + There is no duty for the representee to check whether the statement is true or not – failure of the representee to exercise due diligence is not a defence to misrepresentation: ***Redgrave v Hurd***

**Can the party rescind due to misrepresentation?**

* The aggrieved party has to make an election:
  + Can hold the liar to the truth through rescission
  + Can hold the liar to the lie as truth, through promissory estoppel
* An equitable doctrine – discretionary form of relief, not automatic: ***Kupchak v Dayson Holdings***
* Makes the contract VOIDABLE

**Bars to Rescission**

* Impossibility of making complete restitution: if what has been transferred cannot be returned in the condition it was in when transferred
  + Equity can step in and use money compensation to allow for use and deterioration, or if the property is no longer available: ***Kupchak***
    - More likely in fraudulent misrepresentation or where the person who relied on the statement is able to return their property
    - If the innocent party has the goods, it would be harder to claim this because it can be seen as affirming the contract
* Execution of the contract: if both parties have fulfilled all obligations: ***Kupchak***
* Affirmation: rescission is unavailable if P knows about the misrepresentation and proceeds with the contract anyways – waives the remedy of rescission
* Delays (laches): if you wait too long, the law takes care of the election for you
  + Must look at the circumstances and determine when somebody ought to have realized the misrepresentation and what a reasonable time might be for that person to assert the claim
  + One year was not too long in ***Kupchak*** (equitable: will take hardship on both parties into account and be flexible on the time limit)

# Was there a Mistake?

* **A mistaken understanding (relating to a belief at or before the contract is created) that is not caused by the other party – as opposed to misrepresentation that is a mistaken understanding caused by the other party: *Smith v Hughes***
* Doctrine is rarely invoked – used secondary to misrepresentation – courts are not apt to excuse parties from their obligations because of their own carelessness (allocation of risk is a primary purpose of the contract)
* Mistake as to quality
  + Won’t affect contract unless mistake of both parties and quality makes the thing without the quality essentially different from what it was believed to be (***Bell v Lever Bros***)
  + Depends on how fundamental mistake is to have an effect (***Diamond v BC Thoroughbred***)
* Mistaken assumption as to existence of subject matter
  + Assumes it isn’t part of contract for one party to ensure thing exists
* Mistaken assumption as to title
  + Where buyer is already the owner – liable to be set aside (***Cooper v Phibbs***)

### Rectification: Was there a mistake about the written record?

* Equitable remedy – depends largely on the type of mistake made
* What is in writing is not actually the contract, it is evidence of the contract
* When arguing for rectification, you are asking the court to rectify the written evidence to follow the actual contract: ***Bercovici***
* If the party seeking rectification cannot point to the prior agreement that was departed from when the contract was written down, there can be no rectification: ***Shafron v KRG***

**Common Mistake**

* Both parties think Y, but the contract says X – easily rectified as both parties agree – but in practice, the result is that one party prefers the written contract and will attempt to claim it as a unilateral mistake

**Mutual Mistake**

* Party A think Y, Party B thinks Z and X is in the contract.
* The Court will have to act as neither party is happy with the contract – can either rectify or declare the contract void due to certainty of terms: ***Bercovici***
* If its rectified, the court will likely choose either Y or Z (all or nothing)
* To use rectification, must be no fair and reasonable doubt left (between BoP and BARD standard)
* In rectifying, Court will examine pattern of behaviour after contract formation to figure out how best to rectify – it’s rare to use post contractual evidence: ***Bercovici***

**Unilateral Mistake**

* Occurs when only one party is mistaken – must be mistaken about what the contract contains – not simply a mistaken assumption about the subject matter: ***Smith v Hughes***
* Contract will be “set aside” in equity if one party knows about the mistaken belief of the other and allows them to continue under that belief – “snapping up” an offer: ***Solle v Butcher***

**Test: *Sylvan Lake*** (party B carelessly failed to realize the feet had been changed to yards)

* Must establish there was a prior oral agreement with definite, ascertainable terms
* D knew or ought to have known of the error and P did not
  + Can be fraudulent or innocent; orally agreed terms were not written down properly
* Attempt to rely on the erroneous written document must amount to “fraud or the equivalent of fraud” – the non-mistaken party must be trying to take advantage
* P must show the “precise form” in which the written instrument can be made to express the prior intention – it also cannot be a big % of the contract (this only deals with small errors)
* Must establish everything with convincing proof (rigorous civil standard)

**Due Diligence:** rectification isn’t to be used as a belated substitute for due diligence, however, it isn’t a requirement for unilateral mistake rectification because P seeks no more than enforcement of the prior oral agreement – just a factor that will be taken into account.

### Was there a Mistake about the Nature of the Document?

***Non-Est Factum***

* Can be used in two situations:
  + Your name is used by a rogue to enter into documentary contracts: ***Shogun***
  + You enter into a contract but don’t realize it is a contract or the nature of the contract
    - Can only be used if there is a fundamental difference between the contract that P signed and the contract that P thought he was signing: ***Saunders v Anglia Building***
    - P cannot use *non est factum* if his signing of the document was due to his own negligence: ***Saunders v Anglia***
    - If it could have been avoided by due diligence and no guilty party to bear liability, the person who could have avoided the issue is liable: ***Marvco Colour Research Ltd v Harris***
* Consequence of successfully using *non est factum* – VOID

### Was there a Mistake about who the Other Party is (Identity)?

* Almost always a unilateral mistaken assumption about the person’s very identity not just characteristic
* ***Shogun Finance*** sets out the law for this:
  + Face to face contracts: doesn’t mean willful and deliberate dishonesty, but rather in a more restrictive sense accepted by the rules of equity (equitable or constructive fraud): ***Smith v Hughes***
    - The contract is between the mistaken party and whoever physically entered into the contract with them – not who they are pretending to be
    - REMEDY: mistaken party needs to show fraud or tantamount to fraud – VOIDABLE
  + Written contracts:
    - The contract is between those named in the contract
    - REMEDY: third party can claim *non est factum* – VOID
* If you can’t tell if it’s face to face, probably need to argue both, but ***Shogun*** seems to say it’s probably considered a written contract

### Was it a Mistake about Terms?

* Common or mutual mistake? Dealt with as an offer and acceptance issue: VOID
* Unilateral mistake? Only has an effect if there is fraud or tantamount to fraud: VOID/VOIDABLE

### Was it a Mistake about Assumptions Accepted by Common Law?

***Bell v Leaver Bros***

* Establishes that mistakes operate in the following scenarios:
* Identity of the parties: CONTRACT VOID
* Existence of the subject matter/mistake as to title: CONTRACT VOID
* Quality of the subject matter: CONTRACT VOID
  + 3 only applies to common mistakes (not unilateral)
  + 3 only applies when the mistake must be about the existence of some quality which makes the thing without the quality essentially different from the thing it was believed to be

EXCEPTION: ***McRae***

* If it can be said that we entered into the contract on the basis that I’ve assumed the risk of some element, I can’t use mistake in regards to that element to get off the hook
* So the biggest way you can prevent someone from arguing MISTAKE is to say there is an IMPLIED TERM in the contract that says you’ve assumed the risk of this element

### Was it a Mistake in Equity?

***Solle v Butcher***:Denning says *Bell* is not the end of the story on mistake – we can still go to equity if CL says no

* Common mistake can make the contract voidable even if you don’t fit in *Bell* byway of equity finding it serious enough to allow one of the parties to say the contract should be rescinded (fundamental difference)
* Where there is a unilateral mistake: if there is some wrongdoing by the other party, equity may allow the mistaken party to set aside the contract
* Whether it is unilateral or common, if it is unconscionable to hold the parties to the contract, then equity will let you out of it
* The nature of the mistake can be well beyond what the mistake can be as defined in *Bell* (identity, existence, or quality) which are all about facts or the way the world is, but what isn’t covered is a mistake about the law. Denning says it can be a mistake about the law as well!
* Result of the mistake isn’t simply that the contract can be rescinded, but that the court, in its discretion, can set aside the contract on terms – partly rescind the contract/adjust it in a certain way. It isn’t all or nothing – it’s doing right in the circumstances.

***Great Peace Shipping***: English case that says *Solle v Butcher* is not good law

* + If you can’t fit into one of the scenarios from *Bell*, then mistake doesn’t apply
  + Makes *Bell* even stricter – “impossibility of performance”, “vital attribute”
  + The mistake must “make the thing … essentially different from the thing it was believed to be”

***Miller Paving***: Canadian Case!!

* + Doesn’t say anything definitively, but strongly suggests *Solle* should apply in Canada and doesn’t like *Great Peace Shipping*

# Is the Contract Illegal (Against Public Policy)?: VOID

## Statutory illegality:

* Contract can be illegal due to 1) FORMATION or 2) PERFORMANCE
* If the statute prohibited a type of contract, historically, almost automatically found it to be void and this hasn’t been expressly overruled
* **Modern approach** considers the statutory purpose before deeming it void or unenforceable, considering the surrounding circumstances of the particular contract and whether it will further the object of the statute (***Canada Permanent Trust Co v MacLeod***) – ex: ***Still v Minister***

## Common law illegality: heads of public policy aren’t closed

* RESTRAINT OF TRADE:
  + A bare covenant not to compete is void: ***Nordenfelt v Maxim***, but some restraints are justifiable if there is a legitimate reason for then, but the presumption is that restrictive covenants are *prima facie* unenforceable: ***Shafron v KRG Insurance Brokers***
  + Court will balance freedom of contract w/ society’s interests: must be reasonably in the interest of the parties (afford adequate protection to the party it was meant to benefit) and must be in no way injurious to the interests of the public: ***Herbert Morris v Saxelby***
  + Different attitudes between employment contracts and sale of business contracts – person buying a business might have a legit reason for a restraint: ***Elsley Estate***
    - Assumed power imbalance between employee and employer – covenant in employment contract subject to more rigorous scrutiny – onus on party seeking to enforce it to show that it is reasonable: ***Shafron***
  + Ambiguous restriction is *prima facie* unenforceable unless ambiguity can be resolved: ***Shafron***
* CONTRACT TO COMMIT A CRIME:
  + Can also involve a contract to do another wrong that falls short of a crime – contrary to public policy = unenforceable: ***Beresford v Royal Insurance Co***
* CONTRACTS PREJUDICIAL TO GOOD PUBLIC ADMINISTRATION:
  + Where individuals have a contract to corrupt public officials or otherwise undermine good government: ***Carr-Harris v Canadian General Electric Co***
* CONTRACTS PREJUDICIAL TO ADMINISTRATION OF JUSTICE:
  + An agreement to pay to stifle a prosecution (***The Peoples’ Bank of Halifax v Johnson***) or pay a witness remuneration beyond statutory fees (***Hendry v Zimmerman***) is illegal
* CONTRACTS PREJUDICIAL TO GOOF FOREIGN RELATIONS:
  + Illegal to have a contract to raise money to support hostilities against a friendly government or to assist a hostile government: ***De Wutz v Hendricks***
  + Doesn’t mean a person can’t contract w/ person of enemy citizenship: ***Lampel v Berber***
* MORAL CONTRACTS:
  + Contract against morals is illegal: ***Pearce v Brooks***
  + Contracts “prejudicial to family life and the status of marriage” are illegal: ***Lowe v Peers***
    - Careful using old authority as morals are always in a state of flux

## Effects of Illegality

**Historically, illegality rendered contract void, potentially causing as many problems for P as D. Now, contract is unenforceable, allowed judges to have discretion as to the consequences.**

* Determine the quantum of illegality:
  + Possible that the whole contract will be illegal, but courts often just find one aspect illegal
  + Three ways to deal with just one part:
    - Sever contract into multiple contracts and argue the illegality of only one
    - Blue pencil test: line drawn through the illegal clause to see if the remainder still makes sense – usually what the weaker party wants
    - Notional severance: courts decided they can ADD by way of severance (doesn’t reflect parties’ agreement)
      * Reflects idea of Denning in *Solle* that says it’s appropriate at times to read into a contract
      * Restriction to avoid floodgates: only available when there is a bright line between what is legal and illegal (ex: interest rates), and when clause is clearly severable, trivial and not the main purpuse: ***Shafron v KRG***
* Actual relief for the illegality:
  + If the illegality is serious/egregious, it will be void
  + Could be unenforceable by both parties, or if only one party knew of the illegality or the illegality was designed to only protect one of the parties, then it is possible that the contract was enforceable for that party only
  + Property (including $) that has been transferred under an illegal contract is not recoverable – no restitution remedy available: ***Still v MNR***
    - Courts may allow a party to recover what was transferred when:
      * Parties are not equally blameworth
      * P repented (reputed contract) before the contract was fully executed
      * Claim to property does not depend on relying on the illegal contract, such as through another area of law (ex: tort – ownership interest of lessor doesn’t depend on illegal lease)

# Is There a Reason for the Court to Step in to Protect the Weaker Party?

## Was one Party under Duress?

* Duress to person (includes 3rd parties)
* Duress to goods – not applicable to intangibles, pure economic loss or mental heath
* ***Pao On*** was the first case to establish Economic Duress and applied the traditional duress test
  + Economic duress: has to be more than commercial pressure – there had to be coercion which vitiated consent so that the contract was not voluntary
* Test for economic duress before a contract (not a contractual change): ***Pao On***
* Was there a threat?
* The party agreed under protest because of this threat/pressure
* No alternative course was open to him such that it led to the contract
* The party wasn’t independently advised
* The party took timely steps to avoid the contract after the contract was formed
* As it developed, became clear how easy it was too meet this test – any negotiation could be a threat, so added another requirement
* Illegitimacy of the pressure: two examinations:
  + Nature of the pressure (what they threatened to do)
    - If illegal, the pressure is usually said to be illegitimate regardless of the demand
  + Examination of bargain that resulted (nature of the demand)
    - Even if not illegal, the pressure can still be illegitimate
* ***Greater Fredericton*** questioned #5. The logic was that the duress should be less about the pressure and more about the bargain itself. Sets out a new test for economic duress, which is to be used for alterations to the contract after it has formed (can also apply to formation of contract if you accept the logic that duress should be about the bargain)
* Test for economic duress after the contract is formed (if *Greater Fredericton* is good law):
  + Two threshold requirements that are absolute conditions precedent:
    - 1. Promise must be extracted as a result of pressure
    - 2. Exercise of pressure made it so that the party had no practical alternative
  + If met, then there are 3 considerations (not requirements):
    - Whether the promise was supported by consideration (less likely it was given under economic duress, but not necessary)
    - Whether the coerced party made the promise under protest
    - Whether the coerced party took reasonable steps to disaffirm the promise as soon as practicably possible
* **TEST:** if economic duress comes up in situations of contract formation, go with ***Pao On***, but you can argue the logic of ***Greater Fredericton*** if you need

## Did the Stronger Party Exert Undue Influence on the Weaker Party?

* Contract can be suspect because one party has undue power over the other – the doctrine is rooted in influence, not threats and relates to the ongoing pressure due to the relationship of that party
  + Relationship is such that the weaker party is likely to do whatever the stronger party tells them to
* Generally makes the entire contract void, but some authority that parties can pick and choose which parts become unenforceable
* Equity has come up with two steps:
  + 1) P has to establish a suspect relationship capable of giving rise to undue influence
    - ESTABLISHED CATEGORIES OF RELATIONSHIPS:
      * Presumption of undue influence is automatically met
      * Established: lawyer-client, physician-patient, priest-advisee, parent-child, trustee-beneficiary
      * NOT established: dentist-patient, spouses
    - UNESTABLISHED RELATIONSHIP:
      * P needs to work harder here to create a presumption of undue influence
      * P needs to prove that he placed his trust/confidence in D, such that the nature of the relationship is that P IS unduly influenced by D
    - ANOTHER STEP? ***Geffen*** (status not clear in Canada – question by La Forest)
      * Commercial context:
        + Establish “manifest disadvantage” in contract – show unfairness due to undue benefit to D or disadvantage to P in the agreement
      * Non-commercial (gifts, trust, etc): don’t need to establish anything else
  + 2) once the relationship is established, D has to rebut the presumption in this specific contract
    - Need to show that the contract was entered into as an exercise of independent will
    - Typically the best (maybe only) way to do this is to show P got independent advice (not determinative in itself either though)
  + If both established, burden shifts to D to rebut that the contract is voidable/unenforceable
* Undue influence by a third party:
  + Common situations of husband and wife whereby one guarantees the other’s financials

## Would it be Unconscionable to let the Contract Stand?

* Consider both the circumstances present at the time of contract creation and the content of the contract
  + Circumstances: courts are looking that one party unduly influenced another, but not through an ongoing relationship in undue influence, just at the time the contract was created.
  + Looks for situations that are tantamount to fraud, whereas undue influence is more concerned with abuse of trust/confidence
* An unfair advantage gained by an unconscientious use of power by a stronger party against a weaker party: ***Morrison***
* Test for Unconscionability:
  + 1) proof of inequality in the position of the parties arising out of ignorance, need, or distress of the weaker, which left him in the power of the strong (weaker party has to admit one of the three)
  + 2) proof of substantial unfairness of the bargain obtained by the stronger
    - *Upon proof of this, it creates a presumption of fraud, which the stronger party must repel by proving that the bargain was fair, just and reasonable*
* The doctrine was created not only to capture situations that don’t fall into undue influence or duress, but also to allow for a corresponding remedy that is more discretionary to deal with situations that call for it – usually part or all of the contract is unenforceable, but other options are available: ***Morrison***
* Lambert J in ***Harry v Kreutziger*** (influenced by Denning in ***Lloyds Bank v Bundy***) creates a new formulation for explaining the test: “whether the transaction seen as a whole is sufficiently divergent from community values of commercial morality” – look to Canadian cases to set values
* Denning suggested merging all the doctrines together into inequality of bargaining power: ***Lloyds Bank v Bundy***, rejected in ***Tercon***, but referenced in ***Hunter v Syncrude***
  + “…law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”

### Outstanding Questions

* Is this a separate doctrine?
* Does it have to be unconscionable at the outset, or can it become unconscionable through subsequent events?
  + ***Hunter Engineering:*** considered a separate doctrine of unfairness to encompass later events – applied in the context of exemption clauses – might be severed from the contract (unenforceable)
    - ***Tercon*** doesn’t like this!
  + Court has accepted that unconscionability is available due to the imbalance of weaker parties entering into the contract, but because it doesn’t go with Wilson’s unfairness doctrine, which is the only way you can get at the unconscionability after formation, for now, it appears that unconscionability only looks at the situation of contract formation
    - BUT ***Harry v Kreutziger*** doesn’t explicitly say its only about contract formation

# Frustration

**Termination of a contract consequent upon an unforeseen catastrophic event that makes the contract impossible, or prevents the contract from being performed in a manner at all similar to what was contemplated by the parties when they entered the contract**

## Development of the Doctrine

* ***Paradine v Jane*** – “not my fault” doesn’t work in contracts – strict liability – the contract sets out the allocation of risk definitively
* ***Taylor v Caldwell*** – frustration potentially arising by virtue of an implied term – Blackburn “where foundation of contract ceased to continue to exist, without fault of parties, then parties are excused”
* ***Davis Contractors Ltd v Fareham Urban District Council*** – can’t be an implied term because frustrating events are unforeseen
  + Frustration: when, without fault of either party, a contractual obligation has become incapable of being performed because the circumstances would render it a thing radically different from what was undertaken by the contract (*non haec in foedera veni* – it was not this that I promised to do)

## Is the Contract Frustrated?

***J Lauritzen AS v Wijsmuller BV, “The Super Servant Two”*** – factors to consider:

1. That it be unforeseen
2. That it not be the fault of either party
3. That it make the purpose of the contract impossible or drastically more difficult to achieve

### 1. Unforeseen

* Consider the situation and what the reasonable person in their position would have contemplated when entering the contract: ***Canadian Government Merchant Marine Ltd***
  + Not intended to relived business people from a bad bargain – they assume the risk and are expected to take into account various economic possibilities (ex: inflation, strikes)
* A court should consider “dictates of justice” to see whether frustration ought to be allowed (not defined beyond being a reality check factor though): ***Edwinton Commercial Corp***
* FORCE MAJEURE/ACT OF GOD CLAUSES:
  + States what is to occur under certain circumstances – if it ends a contract, it isn’t because the contract is frustration, just that the contract provides for a chain of events: ***Ottawa Electric Co***
  + Similar to exclusion clauses, to excuse non-performance – courts will construe these strictly: ***Atlantic Paper Stock v St Anne Nackawic Pulp & Paper Co***
* Courts might say the parties should have reasonably foreseen the events even if they did not: ***Walton Harvey Ltd***
* Denning says that the only essential thing is that the parties didn’t provide for the event: ***Ocean Tramp Tankers Corp***, but it is unclear if there should be frustration where the parties could foresee the event and might have provided for it, but didn’t

### 2. Not Caused by the Parties

* Parties can't rely on their own default to excuse them from liability under the contract: ***Maritime National Fish Ltd v Ocean Trawlers Ltd***

### 3. Purpose of the Contract Impossible or Greatly More Difficult

* Destruction of the essence of the contract after it comes into existence can frustrate the contract: ***Taylor v Caldwell***
  + Natural disaster, death, illnesses
  + TEST: whether party’s illness or incapacity was of such a nature that their obligation would be either impossible or radically different from that envisaged by the agreement: ***Lafreniere v Leduc***
    - Could also depend on life or health of 3rd party: ***Krell v Henry***
* IMPOSSIBILITY AND DIFFICULTY – METHOD
  + Whether there is frustration depends on whether it can be said that BOTH parties entered into the contract on the basis that that particular method of performance would be the only method used: ***Tsakiroglou & Co v Noblee Thorl GmbH***
* IMPOSSIBILITY AND DIFFICULTY – DISAPPEARANCE OF PURPOSE
  + Sometimes performance is pointless because purpose for which performance is agreed no longer exists or has disappear through no fault of the parties
    - Both parties contemplated an event must take place in order for their agreement to have a purpose and the event was cancelled: ***Krell v Henry***
    - The disappearance of the event was the purpose of one party, but couldn’t have been said to be the purpose of both parties: ***Herne Bay Steam Boat Co v Hutton***
    - No impossibility – D gets much less benefit, but not entirely useless: ***Claude Neon General Advertising Ltd v Sing***
* CHANGES IN THE LAW AND ILLEGALITY
  + How changes in the law affects contracts depends on how contract is framed, and what the purpose of the contract is, as per the contract itself
  + EXAMPLES:
    - ***Capital Quality Homes Ltd*** – clear frustration of the common venture
    - ***Victoria Wood Development Corp*** – no frustration because the agreement was not made conditional on a continuing ability to subdivide
      * High standard of proof for a change in legislation to cause frustration
    - BCCA distinguishes ***KBK No 138 Ventures Ltd v Canada Safeway*** from ***Victoria Wood*** – striking at root of the agreement – didn’t amount to mere inconvenience, but transformed the contract into something totally different than what was intended

## Consequences of Frustration at Common Law

* Once frustrated, no further enforceable primary and secondary obligations, but doesn’t undo the contract – goods transferred already are validly transferred
* If one party performed something before the frustrating event, but still hadn’t been paid, they went without payment – UNLESS it could be said that performance was part of a severable obligation: ***Appleby v Myers***
  + Payments due before the frustrating event are still payable: ***St Catharines v Ontario Hydro***
  + If payment was made before the event and the other party has not done anything by the time the frustrating event occurs – can recover it as on failure of consideration: ***Fibrosa Spolka Akcyjna***

## Statutory Changes to the Consequences of Frustration

* To relieve potentially drastic consequences
* English and BC Model: allow for severance where possible of part of the contract that are wholly performed or wholly performed but for payment – separate contracts that haven’t been frustrated
* English Model: allows for monies paid
* BC Model: builds on English model and gives right to restitution for any benefit conferred prior to frustration

## Frustrated Contract Act, BC

* KEY PROVISION: Section 5(2) – every party to a contract to which this Act applies can have restitution for benefits created by the party’s performance or part performance of the contract
  + Establish that you are one of the parties and what you performed was actually part of the contract
* Which contracts is this Act applicable to?
  + Section 1 – every contract that has been discharged due to doctrine of frustration (doesn’t apply to a contract entered into before May 3, 1974, or insurance contracts)
  + Section 2 – so long as there was no provision in the contract for the event of frustration
  + Section 3 – the government is also bound by this statute
* Section 4 – will unfrustrate a part of the contract by severing parts of the contract that are wholly performed a) before discharge or b) except for payment for a sum that can be ascertained
  + - Don’t need to get into the statute if it could be severable from common law
* Section 5(1) – **benefit** means something done in the fulfillment of the contractual obligation, regardless of whether the person who was supposed to benefit from it actually received the benefit – EXHAUSTIVE DEFINITION, not just an inclusive one
* Section 5(3) – primary obligations disappear (everyone is relieved from part of the contract that should have been performed before the frustrating act but were not done) – but **still governed by contract law** – can still be entitled to damages, but no specific performance
* Section 5(4) – **if the circumstances giving rise to the frustration cause a total or partial loss to the value of the benefit to the party required to make restitution under (2)**, then the loss must be apportioned between the parties (usually 50/50)
* Section 7(1) – **if restitution is claimed for expenditures** incurred in performing the contract, the amount recoverable must include only reasonable expenditures
  + Only reasonable expenditures will be compensated on fair market value
* Section 7(2) – **if the claim is based on delivery of property** – if the person returns the property within a reasonable time, then the value of restitution will be reduced by the value of that property (discretionary – depends on the person returning the goods)
* Section 8 – when calculating amount of restitution, don’t take into account a) loss of profits, or b) insurance money that becomes payable because if the frustration
  + Restitutions awards for gains (compensation for unjust enrichment)
  + Value of the benefits is assessed at the time of frustration
* Section 9 – must be a claim for breach of contract arising at time of frustration or avoidance and limitation period applicable to that contract applies

# Damages

P bears burden of establishing:

* Right to damages (that other party has breached primary obligation)
* Quantum of damages (how much was lost as a result of the breach)
* The loss was not too remote to hold D liable: ***Hadley***

## Which Theory is the Claim for Damages based in? (Fuller/Purdue article)

**Too broad to serve as “heads of damages”, but useful when trying to understand purpose of damages.**

* P has choice between expectation and reliance damages so long as there is no overcompensation: ***Anglia Television Ltd v Reed***
  + One shouldn’t be able to be compensated both for lost profits and for the costs needed to get those profits: ***Cullinane v British “Rema” Mfg Co***
  + P can choose the greater amount: ***Sunshine Vacation Villas***
* If one of the obligations is purely speculative, court will choose interest that is more certain: ***Sunshine***

EXPECTATION INTEREST:

* Forward looking, tries to put wronged party in the position they would have been in had the obligations been completed: ***Robinson v Harman***
* Essentially the difference between the value of what you received and what you should have received
* If there has been partial completion, it doesn’t matter whether you want/don’t want what has been delivered – expectation damages will be the same because you can sell what has been delivered in the market
* Compensation is given for either lost profits or the cost of substitute performance
* Profit recoverable should be net profit, but some cases where gross profit may be an appropriate measure: ***Western Web Offset Printers Ltd***
* FORMULAS:
  + Goods not delivered or rightly rejected: market price – contract price = damages
  + Wrong/defective goods delivered but buyer keeps it: market value of what was supposed to be delivered – market value of what was delivered = damages
    - Where it would result in overcompensation for P, shouldn’t use the formulas: ***Sally Wertheim v Chicoutimi Pulp Co***
* Most common basis for awarding damages: ***Sunshine Vacation Villas***

RELIANCE INTEREST:

* Compensation for wasted expenditure – using money to undo the loss that P would’ve avoided if he hadn’t entered into the contract in the first place
* P has to show that expenditure is actually wasted:  ***McRae v CDC***
  + Can sell things that are purchased, but there is a presumption that unwanted materials have a market value of zero – D needs to establish that they have market value: ***Ford Motor Co v Haley***
* Useful when the expectation interest is difficult to calculate: ***McRae***, or speculative: ***Sunshine Vacation***
* May not be useful if D can show that P would have incurred these losses regardless or if D’s breach saved P from potentially greater loss than if the contract was carried out: ***Bowlay Logging Ltd v Domtar Ltd***

RESTITUTIONARY INTEREST:

* From the perspective of D – forces them to disgorge benefits gained from breaching their contractual obligation (not meant to compensate P, but deprive D of unjust enrichment): ***AG v Blake***
  + Separate from law of restitution or fiduciary obligations
* To prevent D from exploiting time-value of money, courts must be able to award damages which include an interest component that returns the value acquired by D between breach and payment to P: ***Bank of American Canada v Mutual Trust Co***
* Only available in exception circumstances – can be used where P is wronged, D benefits, but P hasn’t actually lost anything: ***AG v Blake***

## How to Estimate the Quantum of Damages?

**P bears the burden of establishing a figure on the balance of probabilities, which can be difficult to quantify (ex: loss of profit from salvaging a ship – *McRae*), but D isn’t relieved of burden of damages due to difficulties in quantification: *Chaplin v Hicks***

### Remoteness

* Sometimes certain claims are too remote, so even if D caused it, can be not liable
* Test for Foreseeability, governing remoteness: ***Hadley v Baxendale***
  + 1. GENERAL DAMAGES: “what may fairly and reasonably be considered arising naturally, according to the usual course of things” – damages applicable to any breach of a similar contract to any P – assuming it would be within the reasonable contemplation of the parties
    - One need simply to reference the terms of the contract itself
    - Purpose of contract, nature or intentions of party are irrelevant
    - Knowledge can be imputed based on what the party in breach “ought to have known”
  + 2. SPECIAL DAMAGES: “such as may reasonably be supposed to have been in the contemplation of both parties at the time of contract as the probable result of a breach”
    - General nature of special circumstances need to be known at the time the contract was entered into – don’t need all the details – D only responsible for what he knew about
    - Ex: don’t need to know what subcontracts will happen, just that P would subcontract
    - Conflicting authority on what is a “probable result”:
      * ***Victoria Laundry:*** if loss was a “serious possibility” or “real danger” – suggests any foreseeable loss would pass the remoteness test (objective)
      * ***Koufos v Czarnikow:*** criticized ***Victoria Laundry*** by Lord Reid as being too easy to meet
        + Whether on the information available to D, it was reasonable to have realized such a loss was sufficiently likely to result
        + Says that ***Victoria Laundry*** is too much like torts and foreseeability should be harder to meet in contracts because in torts you have to show fault and in contracts, you just have to show that the thing happened
    - EXAM: cite ***Hadley***, then state it isn’t clear whether ***Victoria Laundry*** or ***Koufos*** is to be used, and make an argument in favour of the client

## Quantification Issues

**3 main types of quantification problems**

1. No expenditure and potential profit is dependent on chance:

* Just because damages are hard to assess isn’t sufficient for denying damages – jury must do best they can to arrive at appropriate quantum, even if it’s just “guesswork”: ***Chaplin v Hicks***
  + ***Chaplin*** and ***McRae*** were both “chance” contracts – ***Chaplin*** had no expenditure, so couldn’t use the reliance method and was forced to guess, whereas ***McRae*** was able to use the reliance approach
* Can pro-rate the amount with a % as in ***Chaplin***
* The chances in lotteries are seen as too remote, so somewhere between ***Chaplin*** (25%) and lotto chances

2. More than One Quantum of Damages:

* Typically arises where work was supposed to be done that would give a particular result and something different results
* Are the damages for the difference in value of the property (lower) or the cost of bringing the property to the agreed upon state (higher)? Split court on this in ***John Wunder***
* Figure out what main point of the contract was and argue what the actual promise was for – make sure that damages aren’t out of proportion to the benefit that would be obtained
* To argue higher amount:
  + Look at point of contract and frame obligations as being “doing the work”
  + Goal of contract is to give P what they expected, so need damages to bring property to the expected “particular state”
* To argue lower amount:
  + Look at point of contract and frame obligations as increasing property to particular value
  + Canadian courts more likely to go with the smaller value UNLESS there is evidence P would actually use the money to make the changes (ex: pool case, ***Ruxley Electronics***)

3. Injured Feelings, Disappointment, and Mental Distress:

* Special damages that are peculiar to a specific person – started with ***Jarvis v Swan Tours***
* Purpose or at least one of the purposes of the contract was the opposite emotion to that caused by its breach: ***Fidler v Sun Life Assurance***
  + Should still be assessed through ***Hadley*** that such a loss would have been in the reasonable contemplation of the parties – TEST:
    - An object of the contract was to secure psychological benefit that brings mental distress upon breach within the reasonable contemplation
    - That the degree of mental suffering caused by the breach was enough to warrant contemplation
* This would be unusual in a commercial contract
* Traditionally, couldn’t make this claim in the employment context, but it appears to be changing and could maybe recover for the way you were fired (not that you were fired)
  + Whether mental suffering would have been in the reasonable contemplation of the parties at the time the employment contract was entered into as flowing from the unjust dismissal:  ***Hadley v Baxendale***

## Should the Claiming Party have Mitigated the Damages?

**P also bears the burden of proving that the loss was not easily mitigated.**

* P has the duty to mitigate: ***British Westinghouse Electric***, and what constitutes mitigation depends on the type of contract and the obligations (fact dependent): ***Payzu Ltd v Saunders***
* P is expected to take steps to stem ongoing losses: ***O’Grady v Westminster Scaffolding***
* P has to act reasonably (not perfectly) in response to the breach
* P is expected to mitigate when learning of the breach or within a reasonable time thereafter: ***Asamera Oil***

## Impecuniosity (lack of money) is no Excuse

* Generally, P can’t rely on own poorness to avoid mitigation: ***RG McLean Ltd v Canadian Vickers***
* But could incorporate into ***Hadley*** – if P’s poorness is known to D at the time the contract was entered into, it might be damages under those special circumstances

## Anticipatory Breach

* When D breaches, P can choose to either accept the breach and proceed to remedies, or affirm the contract
* As long as P shows an “interest” in affirming the contract, the duty to mitigate doesn’t require acceptance of the anticipatory breach where failure to accept will result in a greater claim: ***White & Carter (Councils) Ltd***
  + De minimis principle applies in determining whether interest was substantial

## When should Damages be Calculated?

* General rule: loss is assessed at the earliest date P can be expected to mitigate (when breach occurs or knowledge of breach): ***Semelhago***
* Exception: equitable damages are assessed at the time of judgment
  + Damages in lieu of specific performance would be assessed at time of trial because that’s when specific performance would be done

## Were there Liquidated Damages in the Contract?

* Where parties agree in the contract, what the damages will be in the event of a breach – not a damages claim, a debt claim
* Equity will not allow liquidated damages to be enforced where it would overcompensate P or used a threat for performance (hold *in terrorem* – penalty clauses): ***Shatilla, Elsley Estate v JG Collins Insurance***
  + Equity making it unenforceable works by right, not discretion: ***Jobson v Johnson***
* Penalty clauses are meant to protect one party and not both, so equity will see who wanted the penalty clause and who is treated unfairly by its not being a genuine pre-estimate of actual damages – if the weaker party wants the penalty clause, they can have it: ***Elsley Estate***
* It must be a genuine pre-estimate based on the position of the parties at the time of acceptance: ***Shatilla***
  + Can develop a formula to address the issue: ***HF Clarke Ltd v Thermidaire***
* Courts are usually generous in treating the parties as having acted in good faith as long as it appears to be a genuine attempt at a pre-estimate of loss: ***Meunier v Clouthier***

## Was there a Deposit Paid?

* Can be both a primary and secondary obligation in that it is both a prepayment or triggering acceptance or obligations, but its forfeiture is also usually in the event of a breach
* Relief from forfeiture:
  + Operates by way of discretion and isn’t often used: ***Jobson v Johnson***
  + Denning states that two things are necessary: ***Stockloser v Johnson***
    - Clause must be penal in nature (sum forfeited is out of proportion to the damage)
    - It must be unconscionable for the seller to retain the money
* Section 24 of the *Law and Equity Act* confirms equity’s ability to do this:
  + “the Court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to cost, expenses, damages, compensations and all other matters that the court thinks fit”

## Are Punitive Damages Available?

* Punitive damages should be resorted to only in exceptional cases, and with restraint: ***Fidler v Sun Life***
* Conduct must depart markedly from ordinary standards of decency, in situations that can be described as malicious, oppressive or highhanded to the Court’s sense of decency: ***Hill v Church of Scientology***
* There must be a finding of a separate actionable wrong which caused the injury complained of by P: ***Vorvis, Honda Canada Inc v Keays***
  + Actionable wrong can be breach of contract itself, likely some term to act in good faith: ***Whiten***

## Money Claims Other than Damages

### Debt

* Common law remedy – one must show that the other party had an obligation under the contract to pay a fixed sum and that that sum wasn’t paid: ***Standard Radio Inc v Sports Centeral Enterprises***
* Debt claims aren’t subject to mitigations
* Usually will be assessed at the date of acceptance

### Compensation for Amounts Paid and Value Transferred

* Restitutionary claim – available when payment has been made and the other party fails to deliver at all what was paid for (total failure of consideration)
* Where the other party is responsible for one party’s inability to complete performance, that party can recover back any money paid even if there is no total failure of consideration: ***Giles v Edwards***
* If the obligation to pay was dependent on the performance of an entire obligation and it wasn’t completed, thereby never triggering the payment obligation:
  + 1) sever the obligation so as to trigger payment obligation for that part of the work performed
  + 2) argue that an amount should be paid under *quantum meruit*
  + 3) make a claim in restitution based on unjust enrichment

# Are Equitable Remedies Available?

* Concerned that the parties get what they were promised in the first place – alternative to common law remedies that operate at the discretion of the court
  + Must be able to demonstrate that common law remedies aren’t adequate
  + Must come to the court with clean hands
  + Must seek specific performance or mitigate your losses in a timely manner
  + Hardship to third parties MAY prevent use of equitable remedies
* Equity will not award remedies where it is very complex because it is hard to measure: ***Warner Bros***
  + Not willing to award specific performance for personal service obligations: ***Warner Bros***
  + Never enforce a positive covenant of personal service: ***Warner Bros***
  + Will not enforce negative covenants (like restrictive covenants) if this would drive D to starve or specific performance of positive covenants: ***Warner Bros***
* INJUNCTION: order to perform an obligation in the contract
  + Interim: lasts for a short period of time
  + Interlocutory: obtained after the notice of claim is filed until the end of litigation – to avoid uncompensable damages
  + Perpetual: granted from judgment and finalizes the adjudication
* SPECIFIC PERFORMANCE: order to perform the whole contract
  + Only available in situations where substitutional relief (damages) does not sufficiently protect P’s interests or doesn’t adequately compensate: ***John Dodge v 805062 Ontario***
  + Where an interest in land, historically assumed that the land is unique, but ***Semelhago*** now requires P to prove that the land is unique to qualify for specific performance (rare that the court would reject a request for this in real estate though – different for commercial context)
  + Evaluation for uniqueness should be made at time of breach: ***John Dodge***
* If one of these is ordered, the contract cannot be terminated – in fact, it’s affirmed. A claim for specific performance can be seen as reviving the contract.
* Common law and equitable remedies don’t mix, but you can get an injunction for a specific obligation and damages for the others
* EQUITABLE DAMAGES: damages in lieu of specific performance/injunction
  + Calculated at time of judgement (or time of trial): ***Semelhago***