# The Content of the Contract

## Differentiate Terms from Representations

* Term: a statement that relates to one of the obligations of the K
	+ Promise of the way the world is going to look in the future
	+ Only a failure to perform one of the terms of the K will lead to a breach of the K 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 K
	+ A statement of fact about how it exists now or in the past
	+ A misrepresentation is an untrue statement and can rescind the K 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”
	+ a term is something to which a man must be taken to bind himself – ***Oscar Chess Ltd v Williams (intelligent bystander test)***
	+ Would the reasonable parties intend the statement to be a term and therefore, contractually binding?: ***Hielbut, Symons & Co v Buckleton***
		- Based on the K, 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 K:** ***Hielbut, Symons & Co v Buckleton***
	+ If you determine that a statement is a representation and not a term of the K, then it’s possible that the representation is a term in a collateral K but you must strictly show a clear intention of the parties for there to have been a collateral K
* 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 K– 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
	+ Denning: if you are denied a particular result from one option, you CANNOT use the other option to reach that particular result
	+ Characterization of a term precludes useful characterization as a misrepresentation is accepted by some BC rulings (ie agrees with Denning) 🡪 not necessarily the case all over Canada
	+ For practical purposes, a term in the K cannot also be a representation: ***Leaf International Galleries***

## Classification of Terms

* Examined at the time of K 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 K: ***Hong Kong Fir***
	+ A breach of a condition will lead to a result that is fundamentally different from that intended under the K

🡪 Remedy: TERMINATION

* + - * If this happens, the party who breached the condition is repudiating the K and the innocent party has an election: either accept the repudiate and terminate the K, or affirm the K: ***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 K and is collateral to the main purpose of the K (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 K?: ***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 K 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; cannot just simply call something a condition: ***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 K reduced to writing and appears to be complete, Court will not hear evidence outside of the written K
	+ Doesn’t apply to implied terms or when the K 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 K is the whole K is stronger where the K is unique (more likely to reflect the parties intent), as opposed to a standard form K
	+ 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 K

**How do you get around this?**

* Argue that the oral terms are part of a collateral K 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 1st 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 1st 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 K 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 K takes benefit from the work done, they can be liable to pay for what has been completed
	+ When a K is abandoned after part performance, the party who abandoned the K 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 K: ***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 K 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 K 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
		- In deciding whether a particular term is necessary for the business efficacy of the K, one can look not just at the rest of the K but also to the parties, the envt in which they are constructing and their purposes in entering the K
	+ Operation of law
		- Can be implied because either CL or statute includes terms in those types of Ks – 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 K (event must occur before obligation is enforceable – I will shovel your driveway if it snows), or as 3) a trigger to the K (either party can revoke the K until the condition precedent is completed; no K without the CP)
	+ If it is w/in an existing K, and not just the acceptance of a unilateral K, then no one can unilaterally cancel the deal
	+ Unilateral abandonment can only occur in cases where the CP is put into the K for the benefit of the party who wants to get rid of it
	+ a court will try where possible to find a K – preference for concluding that a CP is to an obligation, not to a K
* **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

## Good Faith and Honest Performance

* Duty of honest performance
* Made post-formation dishonesty that does not otherwise amount to breach of the K an actionable wrong
* Must be honest when answering questions ***Bhasin Hrynew and Heritage Education Funds Inc***

## 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:**
	+ 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**”
	+ “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***

**LLC presented *after* K formed not term of K**, **unenforceable**

* + The court is very against implying constructive notice here, but a statement can be imported into a K 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***
	+ If the party you want to enforce the exclusion clause against is not signing anything to confirm that they agree to it, you MUST at least make a token effort to bring the exclusion clause to their attention BEFORE they enter the K
		- there must be notice of all the ECs before the time of K-ing; if the details are provided later, they cannot be included as contractually binding
	+ SIGNATURE AS NOTICE:
		- the general rule: is that if Party A signs a K w/Party B, Party B is entitled to rely on the sig as evidence of Party A's assent to all of the terms of the K, whether Party A has read them or not
		- there are 2 exceptions: NEF (applies when the signatory was not capable of reading/understanding the agreement (ie blind, illiterate) ; fraud or misrep (if consent has procured through either of these the innocent party can rescind the K)
		- If you sign a K with an **exclusion or limitation clause**, you are generally held to have accepted that clause: ***L’Estrange v Graucob***
			* When a document containing Kual terms is signed, in absence of fraud or misrepresentation, the party singing it is bound, and it is wholly immaterial whether he has read the document or not; such signature entails the notice and acceptance by the weaker party of all the terms that were written in the K
			* ***Tilden Rent-A-Car Co v Clendenning*** – provisions relied on are inconsistent with overall purpose of K 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
				+ To successfully invoke the Tilden exception, the party seeking to avoid must: a reasonable person in the circs would have known the party signing did not intend to agree to the terms included (b/c the terms in ? were inconsistent with the overall purpose of the agreement and b/c a reasonable person could not reasonably conclude that the signing party knew of the particular terms), AND that the party asking to rely on the term did not take reasonable steps, in the circs, to bring the term to the attention of the signing party ***Karrol***
				+ If the party you want to enforce the EC against is not signing anything to confirm that they agree to it, you MUST at least make a token effort to bring the EC to their attention BEFORE they enter the K ***McCutcheon***
			* ***L’Estrange*** expection: The exception applies when the term in question is inconsistent with the overall purpose of the K or the relevant party does not have much time or opportunity to read the full terms (including relevant terms) before signing; and the party seeking to rely on the term has not taken reasonable measure to bring the term to the other party's attention
	+ 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 K 2) the length and format of the K 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 K, in the context of the K 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 K 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: ***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 K, 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 K 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***
		- Everybody agrees about unconscionability; the question left is unfairness
* 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 K) in the enforcement of the K – but no real definition of public policy: ***Tercon***

# Excuses for Non-Performance of the Contract

|  |  |  |  |
| --- | --- | --- | --- |
| **How** | **Effect** | **Who uses** | **For what reason** |
| **Contract void** | No contract | Both parties (operation of law) | * missing ingredient for formation
* common mistake
* *non est factum*
* some mistaken identities
* illegality (often)
* duress (historically)
* incapacity (sometimes)
 |
| **Contract voidable** | Contract undone | Protected party | * misrepresentation
* duress
* undue influence
* unconscionability (sometimes)
* mistake (scope uncertain)
* incapacity (sometimes)
 |

* **Void** contract does not exist.
* A **voidable** contract is a perfectly good contract that does whatever it is supposed to do, but it can be all undone (until it is undone, it is perfectly valid).
	+ A voidable contract, once undone, is “avoided”

## Misrepresentation (fraudulent, negligent, innocent)

**Effect of Misrepresentation:**

1. Possibility that party to whom the misrepresentation was made can rescind the K

2. Ability to be the basis for a tort action (negligence or deceit)

**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, insurance Ks, 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 the maker does not know of its falsity, then it is an innocent misrep, but still sufficient for it to lead to a possible recission of the K, even though no claim for damages
	+ 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 K”
* **Reliance:** did the actual representee rely on the statement?
	+ It must be at least one of the reasons they entered into the K
	+ 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?**

* For operative misrep, you can rescind the K, but you do not have to
* 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 K 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 $ 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 b/c it can be seen as affirming the
* 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 K 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 K 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 K 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
* 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

### 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 (NEED TO SHOW THERE WAS A K FIRST; SOLVE CONSTRUCTION PROBLEM FIRST)
* 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

**Common Mistake**

* Both parties think Y, but the K says X – easily rectified as both parties agree – but in practice, the result is that one party prefers the written K and will attempt to claim it as a unilateral mistake
* one of the parties (the D) is arguing against the existence of the mistake; the other party (the P) bears a heavy onus of showing that there was such a mistake
* that party must prove that what was executed was not the agreement made and must also prove what the outwardly expressed continuing common mistake actually was

**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 K – can either rectify or declare the K void due to certainty of terms:
* 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 K formation to figure out how best to rectify – it’s rare to use post contractual evidence

**Unilateral Mistake**

* Occurs when only 1 party is mistaken – must be mistaken about what the K contains – not simply a mistaken assumption about the subject matter: ***Smith v Hughes***
* The law is if one of us has made a mistake with respect to the terms of the K then there if something unequitable about that set of facts then that K has not come into existence
* ARGUE WHICH EVER ONE OF THE JUDGES SUITS YOUR FACTS THE BEST; SAY THAT THE COURT MIGHT NOT PREFER THAT
	+ **COCKBURN:** *caveat emptor*, buyer beware, stuck w/ K, D omitted to make age **term** of K, no breach, must pay; **look to term of K**
	+ **BLACKBURN:** even if parties’ intentions differ, P estopped from denying D’s views if P acted as if they were correct (K on D’s terms)
		- Look to the minds of the parties ; a UM as to terms prevents the K from coming into existence 🡪 it does not matter that you did not make the same mistake or you did not know I made a particular mistake ; **mistake about the term**
	+ **HANNEN:** 1 party’s mistake could affect K but that party’s mistake has to be mistake re: *terms* of K, **AND known** to other party – then K void/no K;
		- UM as to terms only operates if other party aware of mistake and by insisting on continuing w/ K, party acting unconscionably 🡪 remedy = ? (K change, unenforceable, void/never existed…)
* K will be “set aside” in equity if 1 party knows about the mistaken belief of the other and allows them to continue under that belief – “snapping up” an offer: ***Solle v Butcher***
	+ one party knows that the other's offer contains a miscalculation or an erroneous figure and "snaps up" the offer b/c the error makes it such a good deal
	+ the non-mistaken party does not have to be shown to have subjective knowledge of the mistake; it may be enough that they ought to have known

**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
* 1st need to establish what the K is, and then see what the mistake was in the written record
* 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 K (this only deals with small errors)
* **3 condition precedent (high hurdles) for Rectification in context of UM**: **1)** Previous oral inconsistencies w/ written **2)** Other party knew/ought to have known of mistake (constructive knowledge) **3)** Able to show document can be rewritten to express parties’ intent
* 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 (never argue for oral K) 🡪 usually unilateral mistake***

* Doesn’t need to be a mistake about the heart of the K; cannot argue if you are careless
* Can be used in two situations:
	+ Your name is used by a rogue to enter into documentary contracts: ***Shogun***
	+ You enter into a K but don’t realize it is a K or the nature of the K
		- Can only be used if there is a fundamental difference between the K that P signed and the K that P thought he was signing: ***Saunders v Anglia Building***
		- P cannot use *NEF* 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 K: 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 K is btwn the mistaken party and whoever physically entered into the K with them – not who they are pretending to be
		- The old CL rule with respect to oral Ks (i.e. unwritten, face to face Ks) is that mistake as to identity has no effect and does NOT cause the K to be void, UNLESS the IDs of the parties is a term of the K.  🡪 as you can ID the person (i.e. point them out if you saw them), the CL does not care what you thought their name was when the K is a face to face oral K
		- REMEDY: mistaken party needs to show fraud or tantamount to fraud – VOIDABLE
	+ Written Ks:
		- The K is between those named in the K
		- Any mistake as to ID renders the K VOID, and a court will basically have to grant recision.  This is a CL rule, which is why it's all or nothing.  If the rule applies, the K is void automatically
		- 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 Accepted by Common Law?

* Look at Bell and Leaver to make the K void

***Bell v Leaver Bros***

* Establishes that mistakes operate in the following scenarios:

1. Identity of the parties: CONTRACT VOID

2. Existence of the subject matter/mistake as to title: CONTRACT VOID

3. Quality of the subject matter: CONTRACT VOID (has to go to the heart of the K, Solle said no 🡪 wrong)

* + 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 K 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 K that says you’ve assumed the risk of this element
* YOU CANNOT ARGUE YOUR OWN MISREP TO RESCIND THE K
* mistake only operates regarding risks parties did not contemplate/provide for in K

### 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 K 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 K 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 K
* Whether it is unilateral or common, if it is unconscionable to hold the parties to the K, 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 K can be rescinded, but that the court, in its discretion, can set aside the K on terms – partly rescind the K/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*
	+ Mistake must show subject has fundamentally changed or its not their own fault

# 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 K 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 K
	+ 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*** 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 K after it has formed (can also apply to formation of K 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 K 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?

* K can be suspect because 1 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 K void, but some authority that parties can pick and choose which parts become unenforceable
* D has rebut presumption usually by establishing in that particular K that there was independent advice
* don’t look at the context of the K
* defined as the unconscientious use of one person of power possessed by him over another in order to induce the other to enter a K
* **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 – questioned by La Forest if *content* should be considered; Wilson’s view is probably more authoritative)
			* Commercial context:
				+ Establish “manifest disadvantage” in Kt – 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
			* Why the difference?? perhaps b/c in a K there is consideration and the lopsidedness can be measured. By contrast, gifts or wills involve no consideration and hence lopsidedness cannot be quantified.
	+ 2) once the relationship is established, D has to rebut the presumption in this specific K
		- Need to show that the K was entered into as an exercise of independent wil, despite relationship of UI, P entered the particular k on his own “full, free and informed thought”
		- 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 K is voidable/unenforceable
	+ Law should not interfere with reasonable bargains, and UI should only be used where abuse of trust results in manifest disadvantage. ***Geffen***
* 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 K creation and the content of the K
	+ Circumstances: courts are looking that 1 party unduly influenced another, but not through an ongoing relationship in undue influence, just at the time the K was created.
	+ Looks for situations that are tantamount to fraud, (ABOUT UNFAIR ADVANTAGE) whereas IU is more concerned with abuse of trust/confidence (ABOUT CONSENT)
* 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 K 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 \*\*ONLY BC HAS ACCEPTED THIS (COULD BE TAKEN CARE OF TODAY BY ECONOMIC DURESS)
	+ 2 test for uncon: McIntyre reiterates Morrison test; Lambert makes new test (Problem: What is the community? What is morality? What is immoral? Benefits: Much more open-ended and less structured by an intricate list of pre-requisites.\_
* 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 K 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 K (unenforceable)
		- ***Tercon*** doesn’t like this!
	+ Court has accepted that unconscionability is available due to the imbalance of weaker parties entering into the K, but b.c 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 K formation
	+ Says we ask for unconscionability during formation stage in order to make the exclusion clause unenforceable
	+ Everyone agrees about unconscionability, the question lingering is on unfairness
		- BUT ***Harry v Kreutziger*** doesn’t explicitly say its only about contract formation

# Damages

|  |  |  |  |
| --- | --- | --- | --- |
| **Remedy** | **When Available** | **Who can claim** | **Nature and effect** |
| **Termination** | For breach of condition (or sometimes intermediate terms) | Party not in breach | Ends primary obligation of both parties from termination |
| **Damages** | Upon breach of any primary obligation in the k | Party not in breach upon showing:* Breach of other
* Amount of loss (quantum)
* Reasonableness of claim (not too remote and claimant mitigated)
 | Money substitute for obligation broken, quantified by reference to:1. Pre-agreed amount (“liquidated damages”)
2. CL rules and principles
3. Combination of a and b
 |
| **Debt** | Upon failure to pay contractually specified sum | Party not in breach. Need not mitigate. | Order to pay sum stipulated in contract |
| **Specific Performance or injunction** | One party is about to breach or has breached k | Other party who:* Has “clean hands”
* Is not tardy (laches)
* Is not seeking labour
* Can show above (CL) remedies not adequate
* Can show that k not terminated or avoided
 | Equitable remedyOrder to perform kKeeps primary obligations alive |
| **Equitable damages** | When specific performance or injunction is appropriate but unavailable (or P opts for money substitute) | Party who might have got specific performance or injunction  | Equitable remedyMoney substitute for specific performance or injunction |

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***
	+ certain kind of K cases, such a strong and legitimate interest in performance, that justify the court going above and beyond the ordinary measures in K and justify awarding restitution remedy

## How to Estimate the Quantum of Damages?

**P bears the burden of establishing a figure on BoP, 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 K 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 K was entered into – don’t need all the details – D only responsible for what he knew about
		- Ex: don’t need to know what subKs will happen, just that P would subK
		- 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 info 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 K b/c in torts you have to show fault and in Ks, 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 b/c 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” Ks – ***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)? ***Groves***
* Figure out what main point of the K 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 Ks 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 K 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

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 K was the opposite emotion to that caused by its breach
	+ 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 K 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 k 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: and what constitutes mitigation depends on the type of K and the obligations (fact dependent)
* P is expected to take steps to stem ongoing losses:
* 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
* claims in debt, claims liquidated damages, and claims for restitution are NOT claims for damages, and mitigation DOES NOT apply to them
* the duty to mitigate may not apply when the P has a legitimate interest in performance
* the question of **legitimate interest** arises when Party A commits an anticipatory breach( ie tells the other party they won’t perform before the time when performances is due) and Party B refuses to accept the breach and insists on performance, even though this will likely lead to greater losses for Party B
* just $$ is not a legitimate interest, if good or interest is not special or part of what obtained, then probably not a legitimate interest
* Need to show not that you just asked for a specific performance, need to show you have justification (not just an empty claim or a tactical move to get around a mitigation problem) ***Southcott Estates***
* a single-purpose corporation cannot avoid the duty to mitigate simply by asserting that by its very nature it lacks funds to pursue alternative transactions or that its corporate mandate was confined to pursuing only the opportunity that was denied to it by the D's breach ***Southcott Estates***
* specific performance will be available only where $$ cannot compensate fully for the loss, b/c of some peculiar and special value of the land to the P ***Southcott Estates***
	+ The duty to mitigate will apply regardless of whether specific performance is pursued (except in limited circumstances), and will continue to apply even if the purchaser is a single purpose corporation with no assets
* a P deprived of an investment property does not have a fair, real, and substantial justification or a s substantial and legitimate interest in specific performance unless he can show that $$ is not a complete remedy b/c the land has a “peculiar and special value to him ***Semelhago***

## Impecuniosity (lack of money) is no Excuse

* Generally, P can’t rely on own poorness to avoid mitigation
* But could incorporate into ***Hadley*** – if P’s poorness is known to D at the time the K 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 K
* As long as P shows an “interest” in affirming the K, the duty to mitigate doesn’t require acceptance of the anticipatory breach where failure to accept will result in a greater claim
	+ 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?- for secondary damages

* **Where parties agree in the K, 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
* 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 v JG Collins Insurance***
* 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***
	+ Fixed amount no matter what the breach, will be a difficult argument that it is not a penalty clause and a reasonable estimate ***HF Clarke Ltd v Thermidaire***
	+ if not reasonable preestimate of damages, you were denied the use of the penalty clause; therefore fairly easy to predict the outcome of a PC (**simply not going to apply and not enforceable)**
* 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
* When penalty clause fails, doesn’t deprive P of remedy, just reversion to reg law of damages: ***Shatilla***

## 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
	+ the party who has paid the deposit and who will forfeit it on breach of further payment obligations can seek relief from the forfeiture in certain circumstances
	+ 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
* S24 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
* 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
* There must be a finding of a separate actionable wrong which caused the injury complained of by P:
	+ Actionable wrong can be breach of contract itself, likely some term to act in good faith

## Money Claims Other than Damages

### Debt

* CL remedy – one must show that the other party had an obligation under the K to pay a fixed sum and that that sum wasn’t paid
* Debt claims aren’t subject to mitigations
* Usually will be assessed at the date of acceptance
* reasonable preestimate of the loss (reasonable parties would have agreed on at the time the K was entered into). When the loss does occur, simply claim the debt amount

### 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
* 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 CL remedies that operate at the discretion of the court
	+ Must be able to demonstrate that CL 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
	+ Come in timely fashion (**no undue delay**/laches); depends on circ’s, length, acts done in interval
	+ Show you won’t make court work too hard (Court must monitor compliance; won’t grant if too complicated, or over long time)
* 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 K cannot be terminated – in fact, it’s affirmed. A claim for specific performance can be seen as reviving the K.
* CL 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***

|  |  |
| --- | --- |
| **VOID** | **VOIDABLE**  |
| -Mistake as to identity of the parties 🡪 entered into by writing is void  -mistake of the subject matter/mistake as to title-mistake as to quality of the subject matter-Common mistake-Mutual mistake -non est factum -if EC is made under duress  | -duress (at the option of the weaker party) -undue influence -equity  |

|  |  |  |
| --- | --- | --- |
|  | **Rescission**  | **Termination** |
| **Remedy for:** | Misrepresentation | Breach of condition = repudiation (which triggers option for termination) |
| **Type of remedy:** | *Equitable* – therefore no right to the remedy | *Common Law* – therefore there is a right to the remedy |
| **Action:** | Ends the k, restores situation to conditions before the k (no primary or secondary obligations) | Ends the k – the innocent party has the right to terminate the primary obligations from that point forward; secondary obligations survive |
| **Comments:** | No possibility for damages b/c nothing left in K w/which to make a damage claim  | This remedy is easily lost if it is not acted on right away (in some cases it is lost as soon as the k is entered into) – therefore would only be able to claim damages. |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Device** | **Reason** | **Who uses** | **Prerequisites** | **Effect** |
| **Capacity** | Some persons not capable of contracting | Party without capacity (mental incapacity, infants) | Status of incapacity | Depending on nature of incapacity* Contract void
* Contract voidable
* Contract unenforceable
 |
| **Misrepresentation** | One party misled other party | Party who was misled | Erroneous factual statement inducing contract | Contract rescindedSometimes tort damages |
| **Mistake** | (one or) both parties mistaken about assumptions (or terms) | Mistaken party | Usually common mistaken assumption before kSometimes mistake about other’s identity | Contract void (usually)Some law saying contract is voidable |
| **Duress** | One party coerced by other to contract | Coerced party | Illegitimate threat | Contract voidable (historically, void) |
| **Undue influence** | One party dominated by other | Dominated party | Relationship of undue influence leading to questionable contract | Contract voidable |
| **Unconscionability** | Contracting circumstances unfair and tantamount to fraud | Weaker party | One party taking unfair advantage of position of other | Contract voidable or subject to judicial adjustment |
| **Illegality** | Public policy disapproves of some contractual situations | One or both parties, depending on type of illegality | Formation or performance of contract prohibited by statute or common law | Contract void or unenforceable |
| **Limitations of actions** | Must bring claim within statutory period | Either party, as a defence | Limitation period has expired | Obligations unenforceable in court |