# Contracts CAN – Brandon Deans – Professor Bruce MacDougall

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Professor MacDougall’s preconceptions of contract law: 6

History of K Common Law 6

Guiding Principles for K Law 6

Formal Pre-requisites for Enforcement 7

Writing Requirements 7

Law and Equity Act, s 59: 7

Parol Evidence Rule 7

Constraints on the Parole Evidence Rule 7

Gallen v Allstate Grain Co: 8

The Content of the Contract 8

Introduction 8

Where to start: 9

Representations and Terms 10

Heilbut, Symons & Co v Buckleton, 1913 AC 30 (HL): 10

Leaf v International Galleries, 1950 2 KB 86: 11

Classification of Terms 11

Implied terms: 12

Machtinger v HOJ Industries, 1992 12

Three types of terms 12

Conditional Obligations: 13

Termination for Breach 13

Rescission vs. Repudiation: 13

Termination for Anticipatory Breach 14

Hong Kong Fir v Kawasaki Kisen Kaisha, 1962 England CA: 14

Wickman v Schuler, 1973 HL: 15

Entire vs. Severable Obligations 15

Quantum Meruit 16

Fairbanks v Sheppard, 1953 SCC: 16

Sumpter v Hedges, 1898 England C.A.: 16

Machtinger v Hoj, 1992 SCC: 17

Bhasin v Hrynew, 2014 SCC: 17

Excluding and Limiting Liability 19

Notice 20

Notice requirement – unsigned documents 21

Thornton v Shoe Lane Parking, [1971] 2 QB 163 (CA): 21

McCutcheon v David MacBrayne, 1964 SC (HL) 28 21

Notice requirement – signed documents 22

Tilden Rent-a-Car v Clendenning, (1978), 83 DLR (3d) 400 (Ont Ca) 22

Karroll v Silver Star Mountain Resorts, 1988 BCSC 23

Fundamental Breach 23

Karsales v Wallis, [1956] 2 All ER 866 24

Abolition/Reform of Fundamental Breach 24

Photo Production v Securicor, [1980] 1 All ER 556 24

Tercon Contractors v BC, 2010 SCC 4 24

Doctrine of Unconscionability 26

EXCUSES FOR NON-PERFORMANCE OF THE CONTRACT 27

\*\*\*Contesting K (other than breach): 27

EFFECTS OF CONTESTING K 27

Eliminating K: 27

Altering k or its effects: 28

VOID + VOIDABLE Ks: 28

Unenforceability 28

Misrepresentation 29

Operative Misrepresentation 29

Remedies: 30

Rescission 30

Bars to Rescission: 30

The Cases 31

Redgrave v Hurd 31

Smith v Land and House Property Corp 31

Kupchak v Dayson Holdings 31

Rescission versus Termination: 32

Mistake 32

3 types of mistakes: 32

Smith v Hughes, 1871 32

Mistake Upsetting Allocation of Risk: 32

McRae v CDC, 1951 [AUSTRALIA] 33

Miller Paving v B Gottardo Construction, 2007 33

Mistake as the Responsibility of 3rd Party: 33

Mistaken Assumption 33

Elements for Common Mistake (required to make contract void): 33

Great Peace Shipping v Tsavliris Salvage 33

Bell v Lever Bros, 1932 33

Mistaken Assumption re: Quality 34

Mistaken Assumptions re: Existence of Subject Matter 34

Common Mistake in Equity 34

Solle v Butcher, 1949 34

Great Peace Shipping v Tsavliris Salvage, 2002 35

Mistake – Terms 35

Smith v Hughes 35

Mistake and Third-Party Interests 36

Mistaken Identity 36

Shogun Finance v Hudson, 2003 36

Non Est Factum 36

Rectification 37

Bercovici v Palmer, 1966 37

Sylvan Lake Golf v Performance Industries, 2002 38

Protection of Weaker Parties 38

Essay? 38

Duress 38

Remedy: 39

Historically: 39

Economic Duress in Canada 39

Greater Fredericton Airport v NAV Canada, 2008 39

Undue Influence 39

Geffen v Goodman Estate, 1991 40

Unconscionability 41

Morrison v Coast Finance Ltd, 1965 [BCCA] 41

**Bad Law…** Lloyd’s Bank v Bundy, 1975 [ENGLAND] 42

Harry v Kreutziger, 1978 [BCCA] 42

Illegality 43

COMMON LAW ILLEGALITY 43

Contracts Contrary to Public Policy 43

KRG Insurance Brokers v Shafron, 2009 44

EFFECTS OF ILLEGALITY 45

Still v Minister of National Revenue, 1998 45

Remedies 45

Damages = Interests Protected 47

Fuller and Purdue, “The Reliance Interest in Contract Damages” (p. 783) 47

Expectation Interest 47

Reliance Interest 48

McRae v CDC, 1951 48

Sunshine Vacation Villas v The Bay, 1984 48

Restitution Interest 49

Attorney-General v Blake, 2001 49

Damages – Quantification 49

Speculations & Chances 50

Chaplin v Hicks, 1911 50

McRae v CDC, 1951 50

Injured Feelings, Disappointment, Mental Distress 50

Jarvis v Swans Tours, 1973 50

Minimal Performance 51

More than 1 Quantum of Damages 51

Groves v John Wunder, 1939 51

Damages – Remoteness 52

Hadley v Baxendale, 1854 52

[BROAD] Victoria Laundry v Newman, 1949 52

[NARROW] Koufos v Czarnikow (The Heron II), 1967 53

Damages – Mitigation 53

Asamera Oil Corp v Sea Oil and General Corp, 1978 54

**Southcott Estates Inc v Toronto Catholic District School Board**,2012 SCC 51, [2012] 2 SCR 675, 54

Background 54

Majority opinion 54

Time Measurement of Damages 55

Semelhago v Paramadevan, 1996 55

Liquidated Damages, Deposits, and Forfeitures 55

Liquidated vs. Penalty 56

Shatila v Feinstein, 1923 56

JG Collins Insurance v Elsley, 1978 56

Formula for Liquidated Damages 57

HF Clarke Ltd v Thermidaire Corp, 1974 57

Deposits & Forfeitures of Deposits 57

Law and Equity Act, s. 24 58

Stockloser v Johnson, 1954 58

Debt 58

Equitable Remedies 59

John Dodge Holdings v 805062, 2003 59

Warner Bros v Nelson, 1937 60

Waiver and Promissory Estoppel 61

Central London Property Trust v High Trees House Ltd.: 61

John Burrows v Subsurface Surveys, [1968] SCR 607, 68 DLR (2d) 354: 62

(i) Undue pressure/duress 62

D&C Builders Ltd v Rees, [1966] 2 QB 617, [1965] 3 All ER 837 (CA): 62

(ii) Inequitable circumstances and reliance 62

WJ Alan & Co v El Nasr Export and Import Co, [1972] 2 QB 189, [1972] 2 All ER 127 (CA): 62

The Post Chaser Case – [1982] 1 All ER 19 (QB): 63

Petridis v Shabinsky, (1982 Ont. HC): 63

Waltons Stores (Interstate) Pty Ltd v Maher, (1988), 62 ALJR 110 (HC) – Australia: 64

(iii) Cause of Action vs. Sword vs. Shield. 64

Robichaud v Caisse Populaire de Pokemouche Ltee (1990 N.B. C.A.): 64

Combe v Combe, [1951] 2 K.B. 215 (C.A.): 64

(iv) Doctrine of unconscionability – PE as a sword? 65

Waltons Stores (Interstate) Pty Ltd v Maher, (1988), 62 ALJR 110 (HC) – Australia: 65

M(N) v A(AT), (2003), 13 BCLR (4th) 73 (BCCA): 65

How to write an exam (Bakan): 66

# Professor MacDougall’s preconceptions of contract law:

* Part of the bigger law of obligations – parties voluntarily take on obligations
* There is a voluntary side, and an imposed side – these are obligations existing between two individuals (one has a right, and one has a duty/obligation)
  + This right is what is called property
* The law can impose obligations, and it does that through the law of delict/tort (tort is really the remedies that protect the right through property law)
* Voluntary obligations are taken by two people coming together and agreeing on the obligations existing between them – the coming together is the contracting/covenant
  + So contract falls under voluntary obligations
  + Quasi-contracts are considered restitution (these are not the same as contracts or voluntary obligations)
* When obligations are created through contract, one party has a right and thus owns a piece of property (the obligation of the other party). A contract is a source of created property – the substance of the right is the obligation.
* Once the contract is created, it must be created legally/properly. It must work and mean something legally. Some obligations may work, and some may not.
* The next step of the contract is to perform the obligation, but a major part of contract law is when someone has not performed his or her obligation
* The primary obligations are the obligations that exist if all goes smoothly in the contract
* The secondary obligations are the remedies should the primary obligations not be performed.
* The offer and acceptance is the process of creating the contract
  + Once the contract is formed, it no longer matters who was the offeror and offeree
  + In the contract we have two parties, A and B
  + In the contract between A and B, contracts are owed between each other
  + If a contract is unenforceable, then the court will not do anything about it
* Contracts under seal can be a deed where A promises to B but B does not give anything in exchange, thus B cannot enforce anything since there is no consideration
  + Example of a unilateral contract
  + Unilateral contracts can be enforceable, if there is consideration
  + Also contracts under seal can be enforceable
* A bilateral contract would involve promises/obligations in both directions. Only one party has an obligation in a unilateral contract, but the person without an obligation can make it enforceable if they provide consideration (which is not the same as an obligation).

# History of K Common Law

**Sources of K Law:** Judge made common law // statutes (i.e. *Law and Equity Act*)

**Common Law:** law is pre-existing; court there as a referee to decide if did or did not do something

**Equity System:** based on idea certain equity or fairness should be involved w/ decision-making (Chancery Court)

* Not good at creating, good at modifying
* Equity can order someone to do something they haven’t agreed to do b/c it’s good for their conscience
* Equity always prevails → follows common law, but it is superior if reaches diff. conclusion

# Guiding Principles for K Law

* **Who** is involved? (Capacity & quantum)
* **Voluntary** involvement? (Desired → consent)
* Importance of **individual** (assumption of quality of power – ex. institutional element injected)
* Change balanced w/ consistency
* **Predictability** → trying to fix the future, need element of change in case something unforeseen arises
* Overarching value of **fairness**
* **When** did the K come into existence? When does it expire?
* **Where** did K come into existence?
* **Interventionist vs. Voluntarism** (law there to help people = 20thc. idea)

# Formal Pre-requisites for Enforcement

* In **informal** contract, the writing is **evidence** of k.
* In **formal** contracts (under seal), the writing **is** the k.

## Writing Requirements

#### Law and Equity Act, s 59:

* Land transfer must be in writing.
* Guarantee or indemnity must be in writing.
* Exact words need not be used.
* If gift is unenforceable: Court may grant restitution of benefit or compensation for money spent in reliance on the gift or contract.

## Parol Evidence Rule

* What if you don’t need to have writing, but you do have writing/written evidence?
* Court will say that written evidence is conclusive

**Parol Evidence Rule:** When parties intend that written evidence of their K contain the entire K, court will not accept in evidence terms of that K which are oral & have not been reduced to writing

* If a k has been reduced to **writing** and the writing appears to be **complete**, then the court will **not** hear oral evidence outside the written k (argue either another contract or not applicable at all): (Gallen elaborates on this). Essentially, the writing occupies the field.
* Applied in situations like:
  + One party arguing some terms in K are written but others are oral
  + Party arguing that there were 2 Ks: 1 in writing & 1 oral (“collateral” or side K)
* In either of above instances, other party raises rule to argue oral terms can’t be accepted so as to vary what appears to be complete agreement in writing

Application of this rule may be **unfair** in some cases. Thus, courts tend to take the rule with a **grain of salt**. Parol evidence can work injustice where strong corporation makes contract, agent gives promises not in writing, and consumer suffers.

* “Inoperative” – ***recitals***: relevant for misrepresentation, mistake, damages. These do not contain promises that are binding. Surrounding information.
* “Operative” – ***terms***: obligations, breach of k. This is where parol evidence rule applies. Must be express.

### Constraints on the Parole Evidence Rule

* It does not apply to misrepresentations
* It does not apply where terms are implied
* Oral evidence is admissible so as to determine whether such terms should be implied or not.
* Oral evidence can be adduced in the context of arguments on doctrines such as rectification and mistake that can affect the existence or enforceability or form of the agreement.
* P.E.R. can be excluded by statute, especially in the context of consumer transactions.

#### Gallen v Allstate Grain Co:

* Lambert said when oral terms are permitted that vary written contract**, doesn’t matter** whether seen as **collateral** agreement or part of **main** contract.
  + 1. Two contracts dealing with same subject matter, time, and parties **cannot contradict**. Since written rule was clearly and demonstrably made, reason requires one to conclude that the **oral** one, **contradicting** it, was **never** **made**.
  + 2. The ***principle*** **cannot** be an **absolute** one.
  + 3. The first principle is supported in case law.
  + 4. If the contract is induced by an **oral misrepresentation** that is inconsistent with the written contract, the **written contract cannot stand**.
  + 5. **Less force** where oral representation **adds** to, **subtracts** from, or **varies** the recorded document than where it ***contradicts***.
  + 6. PER is always **strong**.
  + 7. **Stronger** in **individually negotiated** document than a **standard** printed form, though strong in both.
  + 8. **Less strong** for contradiction between **specific** **oral** representation and **general exemption** clause, as opposed to specific oral representation and equally specific clause in document.
* **Lambert emphasized that the rule is a rule of evidence based on the unreasonableness of a situation whereby the same parties would enter into two agreements at the same time, one written and one oral, that would contradict each other. The rule is not absolute, and there may be cases where an oral assurance prevails over a contradictory written promise.**
* **Facts:** Contrary to oral assurances, buckwheat sold to P by D did not act as a blanket and smother weeds
* **Issue(s):** Is the oral evidence admissible, and if so can it vary or contradict the signed contract?
* **Holding:** For P (farmer). There was oral warranty as part of the contract.

# The Content of the Contract

## Introduction

* A contract is a meeting of the minds about what their obligations are
* An obligation must be a promise. Saying what you want or hope for in the contract is not an obligation or a promise. Thus random statements without promises are not technically part of the contract. The contract only includes the aspects of the document that involve OBLIGATIONS.
  + These obligations are the terms (operative terms) of the contract
  + IF the obligation is broken, you have a remedy
  + The non-obligations are called non-operative terms or, preferably, referred to as RECITALS
  + Recitals include statements, opinion, hope, facts
* An entire obligation is not LITERAL – it means SUBSTANTIAL completion, not necessarily 100%
  + If you hit 90% let’s say, then you are obligated to receive payment and the other person can trigger damages
  + But if it is like 50% then you are not obligated to receive payment and the other person can keep what you completed thus far
* What we are trying to work out what is and is not an operative term in the contract! What is a representation, and what is a term?
* Some statements that are made can affect the contract in terms of how the obligations are enforced
* If the obligations are not performed, there is a breach of contract which gives an access to certain remedies
  + You will never be able to make a contract disappear due to breach of the contract.
  + Nor can you make the contract inoperative due to the breach of the contract.
  + However, there are remedies such as money, injunction, specific performance, etc…
* If you want a contract to be inoperative or disappear, it can’t be due to a breach of the contract but must be due to something outside of the contract – OPERATIVE REPRESENTATIONS which are statements made in the contract but are not actual obligations in the contract
  + Sometimes you don’t want damages for the contract or the person won’t specifically perform, so you need to enforce a REPRESENTATION outside of the contract (so something that is not an obligation)
  + But if you can make the contract disappear or reverse it then anything the other person got from the contract cannot be theirs anymore and thus you can get your goods back or whatever
* There is no *right* to rescission/termination, or a *duty* on the other party. There is a *power* of rescission/termination.
* Right is property, and only rights are property. A power is not property. You can sell rights, but not powers.
* Once we have decided what is in the contract, then we will categorize and label the terms in certain terms.
* In order to get the money or what you were promised, you have to PRESERVE the contract. You have to show BREACH of contract and that what you were complaining about is a BREACH of contract. Thus you must point to a TERM in the contract.
* If you are trying to get rid of the contract, you can’t look at a reason inside the contract. You need a reason outside of the contract – contract was created in a CONTEXT where you were mislead by the surrounding circumstances, and thus you can reverse the contract.

## Where to start:

First, decide whether the thing is a term (*Heilbut*). Second, decide whether it is a primary or secondary obligation. Third, categorize terms as either going “to the heart” of k or not.

* **Repudiatory breach:** the party who has wrongfully broken obligation at the heart of the k (condition) has repudiated k.
* When repudiation occurs, the “innocent” party is given an election.
  + You can *affirm* k and reject the repudiation.
  + Alternatively, accept the repudiation and *terminate* (both parties’ primary obligations disappear from that point forward).
* You elect 1) expressly or 2) by action or inaction such that court deems you to have affirmed k (status quo).

**Terms**: Part of the offer.

🡪 Operative: Gives the obligations (and remedies if breached).

🡪 Usually has a future aspect to it—i.e. a promise—a promise that is untrue gives you an instant remedy because K is strict liability → statement made AFTER K CAME INTO EXISTENCE & INSIDE K = **obligations**

**Non-operative terms:** Statements made in negotiations that do not give rise to obligations.

* “I intend to develop into condos” = “recital” or perhaps a “preamble”. More strictly, called non-operative terms. They don’t impose obligations.
* Remember things in k are not always promises—often representations.
* **Mere Puff:** statement that has no legal consequences at all – by its very nature no reasonable person would rely on it
* **Representation:** Usually a statement of fact (i.e. about the quality of something)—can be from the contracting party or a 3rd party → statement made BEFORE ACCEPTANCE/OUTSIDE K = representation (or misrepresentation)

**Termination:** Primary Obligations End. Ends the duties of both parties from that point in time onwards

**Breach of Condition:** Repudiation of Primary Obligations. If there is condition precedent, it must occur before obligations are enforceable (can be an obligation or event), but **cannot be undecided or too discretionary** (b/c the court may say that you do not have a K to begin with)

**If K is silent, conditions are concurrent:** Ability to claim damages subject to ability to show his ability to perform

# Representations and Terms

**Term** = a statement made for which that party intended to give an absolute guarantee. Only terms are *contractually* binding and breach leads to remedies.

* **SEE** *Machtinger*
* The terms in a k can be *express,* but all ks must necessarily have *implied* terms.
* 1. Express: written or oral (or both).
* 2. Implied:
  + By **law** (CL or statute, not equity) (parties’ intention is *not* relevant to matters of *law*) or
  + By parties
    - 1) **necessary** [NOT REASONABLENESS TEST]: If you didn’t expressly put it in, and law did not put it in, it must *necessarily* follow from what was agreed in order to make rest of k work (e.g., Canadian dollars is a term by necessary implication). Or,
    - 2) **custom/usage** (particular or general). Particular is that the parties have done this before. General is industry practice.

Event analysis:

1) In which period did the event occur (said or did something)?

2) Is it within the k or outside the k? (This predicts remedy: misrep/mistake must occur *before* acceptance. If after, perhaps try estoppel)

**TEST OF INTENTION** = term was intended to be guaranteed strictly & have legal effect (***Heilbut, Symons & Co v Buckleton***).

#### Heilbut, Symons & Co v Buckleton, 1913 AC 30 (HL):

* **The test for determining whether something is a term (as opposed to a mere representation) is based on WHETHER THE PARTIES INTENDED IT TO BE A PART OF THE CONTRACT**
  + **A term is a statement made for which the party INTENDED to give an absolute guarantee**
  + **Intention is key to differentiating representation from a term – term must be intended to guarantee strictly and to have legal effect**
  + **It would appear that (a) the more central what was communicated is to the transaction, the more likely it is a term and (b) if what was said was near in proximity to acceptance, the more likely it is a term**
* **A person is NOT liable in damages for an innocent misrepresentation, UNLESS the innocent misrepresentation can be shown to be a collateral K (a material issue that fundamentally changes the contract)**
* **Facts:** *Agent of B bought shares from agent of H 2 times based on what B claims was a* ***representation*** *that H was bringing out a “rubber company”. Shares fell in value, B got pissed and sued for misrepresentation or breach of warranty that company was a rubber company whose main object was to produce rubber (which they were not – they were not solely a rubber company).*
* **Analysis:** Collateral contracts (vary or add to terms of principal contract) must be proved strictly – they are viewed with suspicion by the law. Absence of evidence in case at hand to show existence of a collateral contract. What Johnston said was merely a representation of fact in response to a question. This sort of thing used to be recognized as legal fraud but for policy reasons this was changed as it would result in making a man liable for honest mistake or forgetfulness. There is no warranty here, just an innocent misrepresentation.
* **Side note:** If the agreement for shares were going to be a term, it would have had to be in a collateral K (“warranty”) because the main K for shares was in writing 🡪 P would have to establish evidence that such a K existed
* **Holding:** Statement was a representation.
* **Strategic considerations:**
  + What might you want in relief?
    - The thing you thought you were getting
    - Your money back
    - The amount of money worth what you thought you were getting
  + You can’t get all forms of relief at once…
  + You can’t undo the contract, because then your obligation would not exist anymore. You have to REVERSE the contract.
  + In order to get the money or what you were promised, you have to PRESERVE the contract. You have to show BREACH of contract and that what you were complaining about is a BREACH of contract. Thus you must point to a TERM in the contract.
  + If you are trying to get rid of the contract, you can’t look at a reason inside the contract. You need a reason outside of the contract – contract was created in a CONTEXT where you were mislead by the surrounding circumstances, and thus you can reverse the contract.
  + To get rid of the contract, we have to look at something outside of the contract – the surrounding circumstances
  + If you got shares in a company that you do not think is a good company, then you may not want to argue breach of contract – since a claim to damages may not get you much if the person on the other side can’t pay you

#### Leaf v International Galleries, 1950 2 KB 86:

* **Doctrine of Merger: Cannot argue that one statement is both a term and representation—nature of a term swallows up the nature of a representation—if it can be categorized as a term, it cannot be a representation for the purpose of a remedy.**
* **If a warranty is breached then there is action in damages.**
* **If a condition is breached then there is action in repudiation and in damages. BUT – right to reject for breach of condition is limited by the rule that once a buyer has accepted, or is deemed to have accepted, the goods in performance of the K, he can’t reject, and must claim for damages.**
  + (In this case it’s been 5 years, way too long to be considered “reasonable time”) also can’t argue innocent misrep to get rescission b/c condition would trump and govern what remedy you’re allowed.
* **Silence preserves the status quo – if you are faced with an election and don’t say anything to the contrary, you preserve the world as it is** 
  + **So if you say nothing, you elect to preserve the contract**
  + **If they had acted right away, they could have rejected the painting**
* **An executed contract cannot be rescinded in cases of innocent representation.**
* **Difference is in quality and not substance of thing itself – only rescission if different in substance.**
* **Facts:** Painting bought from sellers. Represented as a painting by Constable. This representation was incorporated in some terms of the contract. 5 years later buyer was advised it was not by Constable. Brought an action saying that the painting was represented as a Constable and he bought it on reliance of the representation. This was an innocent misrepresentation.
* **Issue:** Is buyer entitled to rescind the contract in equity even though it is executed? (Note: only claim to rescind, not for damages).
* **Analysis:** This was a contract for the sale of goods with a mistake about the quality of the subject matter, because both parties believed the picture to be a Constable. There was however no mistake about the subject matter of the sale – a painting of a specific Cathedral. The painter was neither a condition or a warranty. If it were a condition, the buyer could reject the picture for breach of the condition at any time before he accepted it or was deemed to have accepted it, whereas if it were only a warranty, he could not reject it but was confined to a claim for damages. It is right here to assume that this term was a condition. However once you accept the goods in performance of the contract you cannot reject. Five years between is far too long. Action can only be made for damages. Keep in mind that an innocent misrepresentation is much less potent than a breach of condition.
* **Holding:** For D

# Classification of Terms

**Primary Obligations:** those promises which parties will perform if everything goes according to plan; if not performed = breach of K → breach triggers secondary obligation enforceable by other party

**Secondary Obligation:** provide remedies for breach of primary obligations

|  |  |  |
| --- | --- | --- |
| Classification | Why | How |
| Express, implied terms | To know all contractual obligations | Terms implied by   * Custom * Necessity * Operation of law |
| Primary, secondary obligations | To know main obligations and remedial obligations and liabilities | What obligations become enforceable or arise upon failure to perform others? |
| Conditions, intermediate terms, warranties | Only breaches of conditions or breaches of intermediate terms with serious consequences can lead to remedy of termination | How important is term?  Classification notionally done on formation |
| Contingent conditions (conditions precedent or subsequent) or not | To know whether something must occur before a contractual obligation (or even a whole contract) becomes enforceable, or (for conditions subsequent) ends | Interpret k |
| Entire, severable obligation | If entire, one party must complete performance of obligation before other’s obligation becomes enforceable | Interpret k |

## Implied terms:

#### Machtinger v HOJ Industries, 1992

***→* Terms can be implied into K on 3 bases:**

1. **Custom**
   1. Practice between 2 parties has developed to imply such a term into K; if there hasn’t been consistent practice in past between 2 parties then can’t establish custom
   2. Can also imply terms by virtue of type of K it is (ex. shipping Ks)
   3. Parties can prevent custom by expressly excluding its operation as a term in the K, or its exclusion can be implied from rest of K (if it contradicts/doesn’t fit w/K)
2. **Necessity**
   1. **Officious Bystander Test:** is it a term that it can confidently be said that if at the time K negotiated some one had said to the parties, ‘what will happen in such a case?’ they would both reply ‘of course this will happen, too clear so no need to state it explicitly)
   2. **Biz efficacy** → ***Machtinger***stands against using reasonableness as basis for implying terms
      1. Can look beyond K at circumstances in which parties are contracting & at purpose of K
3. **Operation of Law**
   1. Law includes implied term in that type of K (or all Ks) – can be by virtue of CL or statute
   2. CL not common; would likely be b/c of **type** of K entered; more common for statutes to imply terms (ex. *Sale of Goods Act*s) → can contract out of statute implied terms

## Three types of terms

**Terms in a k are characterized at the time of acceptance and can be subdivided into 3 types of terms,** which determine what the consequences of breach of the term will be:

1. **Condition** = statement of fact which forms an essential term in the k/heart of the k
   * *Remedy* = damages and the innocent party can treat the k as **repudiated** = the k comes to an end, the primary obligations are terminated, but the secondary obligations remain
2. **Intermediate Term** (Innominate)
   * *Remedy* = determined after the breach occurs based on the seriousness of the consequences of the breach, not the breach itself, and uses either of the remedies for condition or warranty (***Hong Kong Fir Shipping***)
   * If *consequences* are serious, result is same as a condition (can terminate). If not serious, it is same result as warranty (cannot terminate).
     1. We assess seriousness of *consequences*, not seriousness of *breach*.
   * Remember that the term is always intermediate—doesn’t “become” condition. It is only that the remedy mirrors that situation.
3. **Warranty** = a term which is not essential to the k and is collateral to the main purpose of the k
   * *Remedy* = unless stipulated otherwise in k, only remedy is damages (therefore must prove harm was done). Primary obligations continue to exist.

**NOTE**: These labels are put on the terms at the time the k comes into existence and CANNOT be changed.

\*\*\*Putting labels on the terms in a k is not absolute (the court makes the decision), thus it is better to specify the secondary obligations in the k to illustrate the types of terms (*Wickman v Schuler*). **\*\*\***

## Conditional Obligations:

Provision in agreement that must be satisfied as prerequisite to enforceability of an obligation or ending of an obligation

1. **Condition Precedent** = prerequisite to enforceability
   1. **Ex.** A has no enforceable obligation under K to deliver goods to B until C provides requisite permit (provision of permit by C = condition precedent to enforceability of A’s obligation)
   2. Can trigger not just particular obligation, but can be the prerequisite for the entire contract
   3. Precondition argument: if A finishes building a house after agreed-upon June 1st, the B says “I don’t have to pay because precondition was not met”.
2. **Condition Subsequent** = event that ends obligation
   1. **Ex.** A has contractual obligation to deliver gravel to B until C states enough gravel has been delivered to meet regulations. (C giving notice = condition subsequent – ends A’s obligation to B)
   2. CS often ends primary obligations in K entirely
3. **Concurrent Conditions** = mutually dependent conditions precedent
   1. **Ex.** 1 party to deliver goods & other to pay for them @ same time
   2. You can win in a *concurrent* obligation if you can show that you *would have* performed your part had the other party performed his/her obligation.

## Termination for Breach

**Termination** = remedy that depends on there being a **breach** **of a term in a K that is a condition (**or **intermediate term** where consequences of breach are serious)

### Rescission vs. Repudiation:

* **Rescission** = remedy available to representee *inter alia* when other party has made false or misleading representation
* **Repudiation** = occurs by words/conduct evincing an intention not to be bound by the K; depends on **election made by non-repudiating party**
  + The one who breaks the contract is the repudiating party
  + If non-repudiating party treats K as still being in full force & effect, K remains in being for future on both sides – each party can sue for past or future breaches
  + If non-repudiating party accepts repudiation, K is **terminated** & parties discharged from future obligations
* Simply informing non-repudiating party by **words or actions** = sufficient to exercise termination
* **Acceptance of repudiation (express or constructive):** simply informing the other by words or actions is sufficient. Could be effected by failing to perform one’s own obligations. This is constructive termination. Be careful to make sure it is not failure of performance by innocent party after affirmed k following breach.
* Can lose termination by passage of time (**constructive affirmation of k**).
* **Constructive termination of K** = acceptance of repudiation & termination of K can possibly be effected by failing to perform one’s own obligations as they become due
* **Primary obligations cease** to be enforceable from moment of termination, but secondary obligations survive → allows for combo of termination + damages (if K were rescinded, no possibility for damages)

|  |  |  |
| --- | --- | --- |
|  | **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. |

\*\***Bar to rescission** when argument for **termination** is **rejected** (***Leaf v International Galleries***)\*\*

Try to argue termination where there is a **conditional sale**/**payment by instalments**. If the instalments are not complete, argue the other party can terminate and no property passes. K was perfectly valid up to that point so the person terminating can **keep the money** paid up until termination.

**Losing the Remedy:** termination is tenuous, can be fairly easily lost

* If buyer has accepted part of the good, or if property has passed in specific goods, K can’t be terminated
* Can also lose by election to affirm K – can be done expressly or constructively
* Electing to affirm K not the same as estoppel → not necessary for other party to have changed their conduct as a result of reliance on affirmation
  + Elections operate via knowledge & communication by 1 party, don’t require detrimental reliance on affirmation
* Can also lose through passage of time = **constructive affirmation**

### Termination for Anticipatory Breach

K can be breached in “**anticipatory**” way – party who is supposed to perform **can inform other party they’re not going to perform when time comes,** or it becomes **clear in advance that it will be impossible** for one party to perform as promised & there’s no “excuse” (ex. frustration) to relieve that party from liability

* Innocent party can accept the breach & proceed to remedies immediately, or can affirm (not accept early breach & proceed to remedies only when other party still fails to perform at time when K calls for performance)
  + Must be clear evidence that anticipatory breach has been accepted before K terminated
    - Subsequent acts of innocent party (failing to perform contractual obligations) can be taken as evidence of acceptance of repudiation

#### Hong Kong Fir v Kawasaki Kisen Kaisha, 1962 England CA:

* **Introduced the intermediate term**
* **Test for what effect an intermediate term has: whether the event resulting from the breach has deprived the party who has further undertakings still to perform of SUBSTANTIALLY THE WHOLE BENEFIT INTENDED TO BE OBTAINED**
  + **In other simpler terms: does the occurrence of the event deprive the party with further undertakings to performance of substantial benefits** (what was given as consideration in the K for performing the undertakings)?
  + Where event occurs as result of default of 1 party, party in default can’t rely on this test as relieving him of performance of any further undertakings on his part & innocent party, although entitled to, need not treat the event as relieving him of performance of his own undertakings.
  + Where event occurs as result of default of neither party, each is relieved of further performance of undertakings & rights in respect of undertakings previously performed regulated by *Frustrated Contracts Act*
* **Remedy for intermediate term: determined after the breach occurs based on the seriousness of the consequences of the breach, NOT the breach itself, and uses either of the remedies for condition or warranty.**
  + **If the consequences are serious, the result is the same as a condition breach (can terminate).**
  + **If not serious, the result is the same as a warranty (cannot terminate).**
* **Facts:** P hired ship from D. Ship not equipped w/competent engine room employees so significant time lost during voyage for repairs & damages caused by employees. P repudiated K; D sued for wrongful repudiation
* **Decision:** “Tender a seaworthy ship” is an intermediate term. Here, no termination is available for the charterers. The charterers were not deprived of substantially the whole benefit intended to be obtained from further use of the vessel under the charter.
* **Notes**
  + Time is sometimes crucial, and sometimes not.
  + Note that seriousness of consequences can never be determined before going to court. Courts need to limit how many intermediate terms are identified since businesspeople do not like it. Need predictability. Best to specify what consequence would be in case of breach.

#### Wickman v Schuler, 1973 HL:

* **Placing labels on terms in a K does not definitively attach the legal definition of the label onto the term**
  + The fact that an unreasonable result would occur must be a relevant consideration. The more unreasonable the result, the more unlikely it is that parties intended it (unreasonable if one missed visit would lead other party to be able to terminate).
  + Using word ‘condition’ in K doesn’t imply legal definition of condition into K. Surrounding clauses will be examined to determine what definition of ‘condition’ was implied. Be clear if you want it to be one.
* When there’s a breach of one clause in a K, breach must be read in context w/entire K to decide if rescission is in order.
* Fact that a particular construction leads to a very unreasonable result must be relevant consideration
* Other definitions of **condition**:
  + Synonym for “term”
  + “Precondition” – triggering event for something else
  + “Quality” or “state” of something
* **Facts:** Schuler were manufacturers of certain tools and Wickman were a sales company granted the sole right to sell certain tools manufactured by Schuler. A term of the contract between the parties was described in the contract as being a condition and provided that Wickman would send a sales person to each named company once a week to solicit sales. This imposed an obligation to make 1,400 visits in total. Wickman failed to make some of the visits and Schuler terminated the contract for breach of condition.
* **Decision:** “Condition” was not the legal definition. Cannot terminate.

## Entire vs. Severable Obligations

**Severable K or Obligation** = can be cut up into smaller obligations or Ks

* If obligation severable, part performance can trigger contingent condition

**Entire Obligations** = can’t be broken down; obligation of first party must be performed entirely (***Cutter v Powell, 1795*** → work must be completed before party has to pay)

* Presumption that obligations are immediate, concurrent & entire
* Courts are reluctant to sever contracts (Blue Pencil Test = if the judge cannot draw a line through obligations in the k, then the k cannot be severed)

**Questions:** 1) Is it severable? 2) If down to an entire obligation, how much do you need to do? 3) If it is entire, and did not reach substantial completion, what happens next?

**Qualifications on concept:**

1. **Substantial Performance Doctrine =** to say obligation is performed, simply needs to be substantially performed (***Fairbanks v Sheppard***)
2. Restitution may allow a party to receive value for the goods or services performed even if the obligations of the k have not been fulfilled (***Sumpter v Hedges***) - party may try to get paid on ***quantum meruit***basis.

Strategically, may want to first argue it is entire and then argue severable if that would not work.

If person ***substantially completes*** entire obligation, the other party *cannot* apportion payment. Substantial completion triggers the ***entire***obligation to pay.

* If party sustained a loss, he must claim that in damages or debt. You can’t only pay 90% for 90% of the work; you must give 100% of money for 90% of work. Worker can claim “debts” later for 10% if other party only pays 90%. Payer can claim “damages” for breach of k.
* If there is no actual loss to Payer for Worker not having that last bit performed, Worker may be able to argue that Payer lost nothing and therefore cannot make a damages claim.
* If Worker doesn’t make it to substantial completion, Payer need not pay anything and in fact has a claim in damages for the lack of completion.
* Worker will then argue that Payer does have an obligation to pay. Go to law of obligations: k, tort, restitution (quasi-k—all equity). Unlikely there is a tort. Historically, law tried to invent k (highly artificial—Sumpter). Court looks at how Payer is behaving to see if Payer thinks he has an obligation to pay. ***Quantum meruit***. There is only **one obligation**, and it is **uncertain**, and there is **no consideration**. There is **no offer/acceptance/certainty**. Payer will probably have to pay “compensation” decided on quantum meruit basis. QM is not a k term, it is simply how much you must give the other person.

## Quantum Meruit

*In the law of contracts, a doctrine by which the law infers a promise to pay a reasonable amount for labor and materials furnished, even in the absence of a specific legally enforceable agreement between the parties. By allowing the recovery of the value of labor and materials, this doctrine prevents the unjust enrichment of the other party.*

#### Fairbanks v Sheppard, 1953 SCC:

* **Substantial performance doctrine = an obligation is performed when it is substantially completed**
  + **Can also claim completion if it was the other party’s fault that you couldn’t complete obligation**
  + **Where there is substantial completion but also defects, substantial performance doctrine applies, enabling supplier to enforce agreement subject to customer’s counterclaim for damages arising from defects.**
* **Late performance is conceptually no different from other types of defective performance. Delay is not usually sufficiently serious to discharge the other party unless time is “of the essence”. Usually either by agreement or subject-matter.**
* **To find quantum meruit applicable, the owner must have a decision to either take or not take the benefit of the work done.**
* **Facts:** D contracted to build machine for P for a price. P paid small amount of account but when machine was nearly complete, D refused to finish it until he received further payment
* **Holding:** Appeal allowed, K cancelled, and money paid was returned. Here D did not substantially complete. What was left to be done required engineering skill + knowledge.

#### Sumpter v Hedges, 1898 England C.A.:

* **Quantum meruit = if the innocent party of an abandoned K takes benefit of work done, he can be liable for cost of that work on a quantum meruit basis**
  + **For this to apply, the innocent party must derive an ACTUAL BENEFIT and must have the option not to take the benefit (thus, doesn’t apply when innocent party has no choice but to take benefit of the work done).**
* **When a k is not completed, it is treated as abandoned. The innocent party has the option to treat the k as repudiated (which would end the k). BUT if the party takes the benefit of the work done, then he is creating a new k in which he is liable for the cost of that previously completed work.**
  + **In this case, just because it is left on the party’s property, it doesn’t mean that he’s benefitting – he must use it for ACTUAL benefit.**
* **Facts:** P contracted w/ D to construct buildings for lump sum. When work was partly done, P said he couldn’t continue & abandoned K. D finished buildings himself.
* **Analysis:** Can only use quantum meruit if circumstances are such as to give D option to take or not take benefit of work done (no option when work done on land, as in this case) → look to other facts other than mere taking the benefit of work in order to ground inference of new K
  + In this case, court finds no other facts → mere fact that D is in possession of what he can’t help keeping, or even has done work upon it, affords no grounds for such an inference – not bound to keep unfinished a building which in an incomplete state = nuisance on his land
  + The court said that payment obligations come from contract, and the parties may have been entered into an IMPLIED contract that there was severable obligation and thus the builder should be paid through the second IMPLIED contract
    - Therefore, the amount of PAYMENT that is deserved under that implied contract is invented by the court (“quantum meruit contract” – the amount that is warranted)
* **Holding:** Find for the D – P is not entitled to recover for the work done (because P abandoned work and buildings remained on D’s property as a nuisance – no benefit taken by D). No quantum meruit.

#### Machtinger v Hoj, 1992 SCC:

* **Terms can be implied into a K based on custom or usage, being necessary for business efficiency, presumed intention of the parties, and terms implied by law**
* **“Reasonableness” is NOT the test for implying terms – the test is TRUE NECESSITY.**
* **The intention of the parties is relevant to terms implied as a matter of FACT, where question is what parties would have stipulated had their attention been drawn at the time of K to the matter. Intention is NOT relevant to matters of law. The three types are terms implied in fact, in law, and as a matter of custom or usage.**
* **Requirements for reasonable notice in employment contracts fall into terms implied by law.**
* **Facts:** Contract of employment was missing a term providing for notice on termination. How does court imply one?
* **Analysis:** Is it a NECESSARY condition of the relation of employer and employee that there be a K duty imposed on employer to provide reasonable notice of termination? Answer has been YES.
* **Holding:** Court implied a reasonable term of notice as a term implied by law since it was a necessary condition. Employee basically wins!
* **Note:** Difference between imposing a legal duty and implying a term!

#### Bhasin v Hrynew, 2014 SCC:

* **There is a duty in contracts and it is the duty of honest performance – what it means is that when you perform the contract you have to carry out the performance in an aboveboard (straightforward and non-deceptive) way so as to not frustrate the purpose of the contract so as to not frustrate the other party**
  + **A duty to act honestly, not capriciously and arbitrarily**
  + **A contracting party must have “appropriate regard” for the other party’s legitimate interests**
  + **This means simply that the parties must not lie or otherwise knowingly mislead each other about matters directly relating to matters of the contract**
  + **If you want it to be a tort, must be a deliberate lie**
  + **If you want to rescind a contract, need not be a deliberate lie**
* **Two duties: duty of good faith and duty of honest performance**
  + **Duty of good faith – the presumption that the parties to a contract will deal with each other honestly, fairly, and in good faith, so as to not destroy the right of the other party or parties to receive the benefits of the contract. Implied into every contract.**
    - **Duty of honest performance is a sub-category of the general organizing principle of good faith**
  + **Duty of honest performance – there is a duty to tell the truth, and this does manifest itself in other ways.** 
    - **Estoppel is another example – if you don’t tell the truth, then you might estopped from going back on the promise.**
    - **Another example is honest representation**
    - **There are different sorts of duties**
* **Why did the court frame duty of honest performance in the way it is?**
  + **They specifically said it is a duty but not a term in the contract**
  + **Because it is not a term, it is a duty, and you cannot contract out of it (it is impossible to contract out of)**
  + **But you can circumscribe the duty and build around it so as to narrow it**
* **Facts:** Bhasin has contract with CanAm to sell investment assets. There were others who also sold these investments for CanAm. This includes Hrynew, who had the same contract. They were in competition with each other because they were selling the same products. CanAm was trying to get Bhasin and Hrynew to merge their business. Hrynew was actually an agent of CanAm and was working closely with CanAm. Bhasin was unaware that CanAm wanted this. Things deteriorated, and Bhasin’s business was ruined by virtue of this. There was not much left to it at the end. Bhasin is suing CanAm.
* **Issue:** Is there an obligation in contracts to act in good faith? Is there a duty to perform in good faith within the contract? If there is, then what does it mean?
* **Analysis:** Bad faith and lack of good faith is a shield that you can use (defence to something), but not a term that you can use offensively to get anything. So the question is when can you convert bad faith into a sword?
  + To bring a claim in contract, you must show an obligation in the contract
  + The complaint was that in performing the obligation, there was an additional obligation on CanAm to act in good faith so as not to frustrate the business venture that Bhasin had
  + And this obligation if it was in the contract must have been implied in the contract
  + Judge said that there is no implied term in contracts to the effect that you have to act in good faith
  + It is however, and it can be said of the law of contracts that there is what Cromwell calls a general organizing principle of good faith in contracts
    - There are numerous doctrines based on good faith (i.e., duress, undue influence, stopple, etc.)
    - It is not itself a separate duty, but it is always tied in with something else
  + But what the judge did invent is that there is however a duty in contracts that is new (he invented it), and it is the duty of honest performance – what it means is that when you perform the contract you have to carry out the performance in an aboveboard way so as to not frustrate the purpose of the contract so as to not frustrate the other party
* **Holding:** Appeal allowed against Can-Am, but not Mr. Hrynew.
* **Notes:**
  + SCC is trying to sort this out – Is there such an implied term in contracts that can be used as a sword?
    - Judge said that there is no implied term in contracts to the effect that you have to act in good faith
    - It is however, and it can be said of the law of contracts that there is what Cromwell calls a general organizing principle of good faith in contracts
      * There are numerous doctrines based on good faith (i.e., duress, undue influence, stopple, etc.)
      * It is not itself a separate duty, but it is always tied in with something else
    - But what the judge did invent is that there is however a duty in contracts that is new (he invented it), and it is the duty of honest performance – what it means is that when you perform the contract you have to carry out the performance in an above board way so as to not frustrate the purpose of the contract so as to not frustrate the other party
      * This duty was broken in the case
    - Why did the court frame duty of honest performance in the way it is?
      * They specifically said it is a duty but not a term in the contract
      * Because it is not a term, it is a duty, and you cannot contract out of it (it is impossible to contract out of)
      * But you can circumscribe the duty and build around it so as to narrow it
  + If it is a duty we are talking about as a shield, then the other party does not get compensated because of the duty – in order for there to be a sword to get damages for it must be a term in the contract or a separate tort
    - For these duties all you get is a shield
    - One of the problems with duty of honest performance is they have merged a shield and a sword together for the duty
      * In this case, something that is not a term in the contract leads to damages – a secondary obligation which relates to a primary obligation in the contract
  + The principle should be consistent with the weight the common law places on freedom of contracting parties to pursue self-interest: motives of contracting parties should not be scrutinised. However, good faith (like [good conscience](http://en.wikipedia.org/wiki/Good_conscience) in equity) operates irrespective of the intentions of the parties and limits [freedom of contract](http://en.wikipedia.org/wiki/Freedom_of_contract), albeit that in some contexts parties should be free to relax the requirements.

There is general agreement on several points arising from the case:[[8]](http://en.wikipedia.org/wiki/Bhasin_v_Hrynew#cite_note-8)

1. It applies only in the context of the performance of contractual obligations, and not to the negotiation of the contracts themselves.
2. The general organizing principle of good faith must be applied according to the context of the contract in question.
3. The duty of honest performance does not equate to a duty of fiduciary loyalty.
4. The duty of honest performance does not equate to a duty of disclosure.
5. While the court did not rule out the ability of contracting parties to influence the scope of honest performance in a particular context, it did state that a generically worded [entire agreement](http://en.wikipedia.org/wiki/Entire_agreement) clause would not constitute an indication of the parties' intentions in that regard.

# Excluding and Limiting Liability

**Terms in standard form Ks** have attracted greater scrutiny & law has been willing to disregard some parts of the K or make them unenforceable, b/c often one party has overwhelming bargaining strength

* Excluding and limiting liability clauses involve secondary obligations – they are a circumscription of the damages you will get
* In reality, contracts are not carefully entered into. There is generally not a level playing field and the more powerful party can impose imbalances through exclusion and limitation of liability while the weaker party has an enormous liability.
* Limitation clauses can quantify (say, to a specific dollar amount) or be procedural in nature (“I am liable to you, but here is what you must do”) – the latter often does not explicitly say “limited liability”
* Are an exclusion clause and a limitation clause any different?
  + Limitation is favoured in law over exclusion
  + Essentially they are the same, however.
* If you do have exclusion and limitation clauses, are they part of the primary or the secondary obligations?
  + Exclusion clauses are arguably part of the primary obligations – Court says that if you have an exclusion clause is that you do not have a primary obligation, and thus exclusion clauses are simply defining the primary obligation – i.e., what excluding liability means is that you never promised that thing in the first place! Thus it is a primary obligation
    - Thus, there is a problem with merging exclusion and limitation – they are distinct in some way – limitation relates to remedies and exclusion relates to whether obligation exists in first place
* You have to show that the liability limiting clauses or exclusion clauses were actually a part of the contract
  + In order for this to have been part of the offer and the acceptance, you have to show that the person who bears the burden of this limiting clause was AWARE and KNEW that this clause was present – NOTICE REQUIREMENT

Determining whether **exclusion, limitation & indemnification** **clauses** are part of K → fall into **2 categories**:

1. Whether there was **notice** by **both parties** (effectively the weaker party) as to existence of these clauses
2. Construe the clause to see whether in a given situation it was actually meant to apply at all = **“construction”** of the clause

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| **Controls on Use of Exemption Clauses – TEST**:   1. Did other party have **notice**?   - Can signature of other party serve as conclusive evidence of notice?   1. Does the **clause apply** to given situation?   - Interpret clause (and rest of K)  - Does statute prohibit application? (N/A)   1. Is it **unconscionable** to apply the clause? 2. (According to Wilson J., but now doubtful authority) – Does the clause operate **unfairly** in context of actual breach? 3. Is clause contrary to **public policy**? |

**Techniques used to control & reduce use of exclusion clauses** (b/c courts don’t like limiting liability):

1. **Notice Requirement**
   1. In order to be bound by a clause, must be awareness of clause (***Thornton; Tilden***)
   2. Simply signing the doc doesn’t = notice (***Tilden***)
   3. If notice requirement met, then exclusion/limitation clause is part of K
2. **Construction**
3. **~~Doctrine of Fundamental Breach~~**
   1. If there’s fundamental breach then exclusion/limitation can’t apply (***Karsales***)
   2. **Problem:** England has legislation that governs these clauses, no comparable legislation in Canada, but English jurisprudence still applicable
   3. **Doctrine no longer exists (*Tercon; Photo Production***)
4. **Doctrine of Unconscionability** (***Morrison***)
   1. If there’s inequality in bargaining power at time of acceptance, limitation/exclusion clause doesn’t apply
   2. Developed in response to Canada’s lack of legislation on doctrine of FB
5. **Public Policy (*Tercon***)
   1. Perhaps another form of illegality – usually refers to time of formation of K (ex. charging 90% interest)

If there has been notice, terms still might not apply. Must construe to see if it was meant to apply in context. Interpreted strictly against person trying to enforce. This is “***contra proferentem***” principle. (Tercon is example—narrow interpretation of provision).

If notice and construction are cleared, the exclusion applies, but it is still possible that court will not enforce. Could be unconscionability, unfairness or unreasonableness. Also, fundamental breach, which in theory no longer exists.

## Notice

In order for clause to be part of K, both parties should know that clause is actually there → more than just basic

What constitutes sufficient notice?

* Notice must come **at or before time of agreement**; if details provided later, can’t be included as contractually binding (***Thornton v Shoe Lane Parking Ltd, 1971)***

### Notice requirement – unsigned documents

A statement can be imported into a K if previous dealings show that a party knew or agreed to the term in previous dealings (***McCutcheon v David MacBrayne, 1964***)

**Constructive Signature:** past practice can be used as notice on subsequent occasions where attention is not specifically drawn to existence of certain terms → must show that by virtue of earlier transactions there **must have been knowledge** of particular provisions

**Construction**: courts tend to construe exclusion & limitation clauses **strictly against party who wishes to rely on them** → if there’s ambiguity, clause will be interpreted against person relying on it

* Early cases in notice made it easy to satisfy notice.
  + Presumption 1) notice is satisfied as long as other person knew there were such terms. Didn’t have to read or understand. Could wave fine print in front of you and that suffices. Fine print is harder to satisfy (*Karroll*). Other cases (*Thornton*) require there be opportunity to actually read. Denning said must have (a) chance to read and (b) chance to say no. There is also a requirement that other person bring to one’s attention any onerous or unusual terms (*Tilden*)
  + Presumption 2) party you are dealing with can read and understand English.
* Bare bones: Requirement is generally that you know the fine print is there. Only some courts do not follow the presumptions that you know and understand English (*Thornton* says you need chance to read it, understand it, and to do so when it makes a difference—can’t have notice inside parkade. *Thornton* is a generous case).

#### Thornton v Shoe Lane Parking, [1971] 2 QB 163 (CA):

* \*Limitation of liability clause only binding if customer had **reasonable notice** of clause **before** entering into agreement
  + Must do what is reasonable to make P aware of the conditions/bring to his or her attention
* Reasonable notice requires that the person must have a chance to read and understand the conditions, and to do so at a meaningful time.
* Notice must come **at or before time of agreement**; if details or clauses provided later, can’t be included as contractually binding
* Notice must come at a point where you have a choice to enter or not enter the contract – thus can’t occur afterwards
* **Facts:** Thornton parks car in lot and got in an accident in the lot. Receives ticket from automatic machine. Ticket has statement that it is subject to conditions posted in parking lot. These conditions were posted in the office where you had to pay upon departure, and on the wall opposite the ticket machine. Poster was not prominent. The conditions exempted the lot from any liability for injury caused to the customer while their car was in the parking building. Thornton was injured.
* **Issues:** Is P subject to the exemption clause? Does the fact that the ticket was dispensed automatically matter?
* **Analysis:** The greater the limited liability, the greater the effort must be taken to bring it to one’s attention – there is a higher standard of reasonableness – **PROPORTIONAL NOTICE.** Ticket is simply a receipt showing the contract has been formed – writing on the ticket was not visible until after contract had been formed – so contract is not subject to the conditions.
* **Holding:** Exemption clause did not form part of the contract – P wins – Ds cannot escape liability.
* **The one seeking to rely on limitation will argue**: earlier cases had a less strict requirement, assuming that one merely had to know of the existence of the limitation/exclusion clause in order for it to be effective. Thornton is rather generous.

#### McCutcheon v David MacBrayne, 1964 SC (HL) 28

* A statement can be imported into a K if previous dealings show that a party knew or agreed to the term in previous dealings
  + Previous dealings are relevant if they prove knowledge of terms, actual and not constructive, and assent to them
  + If previous dealings show that a party knew or agreed to a term, there is a basis for arguing that it can be imported into K without an express statement, but it depends on the circumstances
  + No implication can be made against a party that was unknown
* Knowledge of terms is tested subjectively, thus prior relations are therefore not enough unless there was actual subjective knowledge of the condition
* **Facts:** Brother-in-Law arranges to ship P’s car to mainland. Usually ferry company would have customers sign risk note but in this instance P was not asked to do so. The ship sank due to negligent navigation. P signed a risk note on 4 occasions before but not every time arrangements were made. P says he knew that notes contained conditions but that he didn’t know what conditions were.
* **Issues:** Is a plaintiff bound by an unsigned contract considering that he had past dealings with the D? What constitutes a signature – can it be actual or constructed?
* **Analysis:** Ferry company argues that the history of dealings indicates acceptance of the terms. This is rejected – previous dealings are only relevant if they demonstrate subjective knowledge of conditions, not simply demonstrating that there were previous dealings.
* **Holding:** Found for P – no exclusion of liability.
* **Relatively strict interpretation here of signature**

### Notice requirement – signed documents

**Signature as Notice:** when a doc containing contractual terms is signed, then, in **absence of fraud or misrepresentation**, party signing it is bound – doesn’t matter whether he read the doc or not (***L’Estrange v Graucob, 1934***)

* **ON EXAM**: Traditional view, expressed in *L’Estrange*, was that one party’s signature established that party assented to those terms, in the absence of fraud or misrepresentation (even if party didn’t read or understand). The following qualifies that position.
* **ON EXAM:** In *Karroll*, reiterated *L’Estrange* exceptions: 1) *non est factum*, and 2) inducement to agree by fraud or misrepresentation (all variations on mistake).
  + Tilden holds that unless reasonable measures are taken to draw the signing party’s attention to unusual and onerous terms in a standard form k, those terms are not enforceable (*Tilden*). *[Was the term inconsistent with the true object of the k?]*.
  + *Karroll* takes a more limited approach: one must draw attention to terms only if the party seeking to enforce knew or ought to have known of the other party’s mistake (*Karroll*).
    - The factors in making this determination include whether the clause runs contrary to the signing party’s normal expectations, the length and format of the k, and the time available to read the k. In such a case, the signing party cannot reasonably be taken to have consented to the term, and thus the signature is not a consensual act and is not binding. This is a unilateral mistake and is a “sharp practice” knowing full well the other party is making a mistake. Any one of these situations may get the signing party out of signature. The other party’s involvement depends on the mistake type you assert.
* Signature still means notice in many situations.

#### Tilden Rent-a-Car v Clendenning, (1978), 83 DLR (3d) 400 (Ont Ca)

* Unless reasonable measures are taken to draw a party’s attention to unusual (or ONEROUS) terms in a standard form document, terms are not enforceable (even with the signature)
  + Signature is not enough for unsophisticated parties
  + Absent such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove fraud, misrepresentation, or non est factum
  + Generally, signed K binds unless not their act, fraud was involved, or if other party knew that they didn’t understand the terms
* **Facts:** When D rented a car from P, he signed the agreement without reading it, which was obvious to the clerk helping him. The D alleges that if he knew about the terms of the k he would not have entered into it. **Limiting a Contractual liability—more possible that Limitation Clause got lost in other terms**
* **Issues:** Was he bound by the terms of the exclusion clause?
* **Analysis:**
  + Exclusion clause was **inconsistent w/overall purpose** of the K (insurance) so something more than a signature was required to constitute sufficient notice
  + **Party who seeks to enforce K knows or ought to know of other party’s mistake**
* **Holding:** Appeal dismissed with costs – contract not binding.
* **Note:** What differentiates this from Karroll is that the contract in that case was simple to understand whereas in this Tilden case it was a relatively complex insurance contract with multiple parties.

#### Karroll v Silver Star Mountain Resorts, 1988 BCSC

* **Only must draw attention to terms if a reasonable person would know that the signing party was not consenting to the terms in question or did not understand them (Limits** *Tilden***)**
  + **Requirement to draw attention to terms only applies** 
    - **(1) Where party seeking to enforce to the document knew or had reason to know of the other’s mistake as to its terms (because there is lack of consent)**
    - **(2) Where someone signs a document where one has reason to believe he is mistaken as to its contents (Fraud or Misrepresentation)**
    - **(3) Non est factum (not my signature)**
  + **General rule:** Must only draw attention if a reasonable person would know that the party was not consenting to the terms in question, because this is basically equivalent to misrepresentation by omission
  + **Factors**: if clause runs contrary to party’s normal expectations, length and format of k, time available to read k.
* **Tilden** = **3rd exception to L’Estrange rule → Karroll** limits this exception – says requirement to draw attention only applicable in certain circumstances
  + **2 exceptions to L’Estrange** rule:
    - Non est factum
    - Inducement to agree by fraud or misrepresentation
* **Facts:** P signed doc releasing D from liability for injuries in ski race. P claims wasn’t given adequate notice, only would have taken 1-2min to read, doesn’t recall if opp. to read provided
* **Issues:** Is the indemnity agreement binding, and if so, on whom?
* **Analysis:** Karroll signed the release knowing it was a legal document affecting her rights. The release was short, easy to read, and headed in capital letters. In the circumstances, a reasonable person would not conclude that Karroll was not agreeing to terms of the release. In any event, Silver Star took reasonable steps to discharge any obligation to bring the contents of the release to Karroll’s attention.
* **Holding:** Action dismissed.

## Fundamental Breach

**Doctrine of FB:** exclusion clause can’t be used in context of a breach of an important term or a breach w/ serious consequences (***Karsales v Wallis, 1956)*** [adopted in CANADA, now not used]

* **Fundamental Breach** = one that substantially deprives the other party of the whole benefit of the K

**FB Criticized for following reasons:**

* Available for use even in Ks w/clauses that were carefully drafted by both parties
* Not directly linked to unfairness – theoretically could operate when there isn’t any, or may not operate when there is unfairness.
* Based on control of secondary obligations; sometimes an exclusion clause can have nothing to do w/a breach
* Used even with sophisticated parties who accepted clause. Since they accepted clause, fundamental breach actually **undermined the k**.
* Also, an exclusion clause may have **nothing to do with secondary obligations**. It may mean there is such a limited secondary obligation that there is really no primary obligation at all. E.g., if I exclude my liability to deliver a bicycle, I really have no primary obligation. Hence, the failure to deliver bike might be no breach at all, let alone fundamental breach.

#### Karsales v Wallis, [1956] 2 All ER 866

* **Doctrine of fundamental breach applies to all fundamental breaches. Exclusion clauses can’t be used to avoid liability for fundamental breaches (adopted in Canada, but now not used).**
* **Doctrine of Fundamental Breach: A BREACH WHICH GOES TO THE VERY ROOT OF THE K DISENTITLES THE PARTY FROM RELYING ON THE EXEMPTING CLAUSE**
  + **PROBLEM: REMOVES FREEDOM OF K AND APPLIED TO PARTIES THAT DIDN’T NEED IT**
  + **This doctrine no longer used**
* **If a breach goes to the root of the contract (FB), the exempting clause takes no effect.**
* **Facts:** D inspected car. P then bought car and leased it to D for financing. Upon receiving the car, it was not in the same condition as when D inspected it. D told P he would not accept the car.
* **Issues:** Does an exemption clause excuse a fundamental breach?
* **Analysis:** Even with an exemption clause, there is always an implied term under the *Sale of Goods Act* that goods will be fit for their purpose and will correspond with the description, and the seller cannot rely on the exemption. As this breach goes to the root of the contract (a fundamental breach), the exemption clause does not apply.
* **Holding:** For D. Exclusion clause cannot be relied on.

### Abolition/Reform of Fundamental Breach

**Problems w/ doctrine**: The doctrine is a very blunt instrument and is applied to parties that didn’t need it. The idea is that when a fundamental breach occurs, there is a legal reaction that is automatic. FB is a *doctrine*. Tension: does law say A) parties wanted that result, or B) law wanted that result?

**Peculiarities of doctrine**: First, Denning seemed to only apply to exclusion clauses. Second, although created in context of *Karsales*, the parties who were intended to benefit (relatively “weaker” parties) were not the ones who used (big corps using the doctrine instead). Third, theoretical problem in that the automatic reaction upsets the balance of risk allocation. Sophisticated parties probably thought through their allocation, and the court should not upset that. The effect of FB is to add a primary obligation that was not actually agreed upon. Fourth, you cannot predict it. You can’t enter into k knowing whether the exclusion will apply or not.

#### Photo Production v Securicor, [1980] 1 All ER 556

* Overrules Karsales (**IN ENGLAND** not CANADA) – doctrine of Fundamental Breach no longer exists, but fundamental breaches do 🡪 simply a matter of whether parties intended exclusion clause to apply
  + Courts can’t reject clause when meaning is clear
* Replaces FB with **Rule of construction:** True construction of the contract is the proper approach – must interpret what the clause says and the intention of the parties
* **Facts:** D in k with P to patrol P’s business. D’s employee purposely set fire to P’s business. D has limitation clause saying won’t be liable for acts of employees unless it could have been foreseen.
* **Issues:** Can exclusion or limiting clause be invoked here?
* **Analysis:** Look at clause and if it was intended to apply to this breach. Apply according to intention. If the breach is important enough, they have a right to treat the contract at an end and sue for damages.
  + In this case, the parties were equal, and the risk assumed by Securicor should be a modest one
  + It did not know of value of P’s factory, nor efficacy of their fire protection system
  + Exemption must be read *contra proferentem.* Must be clear words, and these are clear words.
* **Holding:** The words are clear. Securicor can rely on the clause.

#### Tercon Contractors v BC, 2010 SCC 4

* No doctrine of FB in Canada. Exclusion clauses must be interpreted in light of the whole K – in light of its purposes and commercial context as well as the overall terms.
* When assessing enforceability of exclusion clauses, the courts must apply a three-part test:
  1. As a matter of interpretation, does the clause apply to the circumstances established?
  2. If so, was it unconscionable at the time the K was made? 🡪 focuses on the time of creation, not the execution after the fact
  3. If not, should the court nonetheless refuse enforcement on the grounds of public policy? (The onus of proof lays with the party seeking to avoid enforcement).
* **Clear language** necessary to exclude liability for breach of basic requirement of a K → tendering has implied duty of **fairness** – language would need to be clear about excluding liability
* Must consider exclusion clauses in light of purpose & commercial context + overall terms
* The words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract.
* **Facts:** Province enters tendering k with 6 companies specifying that only those companies are eligible. One of the 6 companies combines with an ineligible company and enters a co-bid. P and the co-bid are the 2 finalists but P loses. P sues, saying they would have won if rules in k had been followed. Exclusion clause in k specifies no damages “as a result of participating” in the tendering process.
  + BC put out a call (a request for expressions of interest - RFEI). Six teams responded (including Tercon and Brentwood). A request for proposals (RFP) followed, stating that only the participants to the RFEI could submit bids. Tercon responded; Brentwood responded but had partnered with EAC for part of the work. BC accepted the bid from Brentwood/EAC. Tercon sued BC for damages on the basis that by accepting an ineligible bid BC was in breach of contract, causing Tercon to lose the project.
* **Issues:** 
  + Did BC breach the tender contract by accepting the bid from the ineligible bidder? YES.
  + Did the exclusion clause successfully prevent a claim for damages for breach of the tendering contract? NO, the clause did not apply to the breach in question.
* **Analysis:**
  + Province’s liability is not from Tercon’s participation but is from province’s unfair dealings with an ineligible party
  + Clear language is necessary to excluside liability for breach of a basic requirement of a K. Here, tendering has an implied duty of fairness, so language would need to be clear about excluding liability.
  + This tendering K was made with 6 parties in mind, so the exclusion clause could not have been contemplated to do away with liability for including other parties. There was also a clause allowing the province to cancel this K and make a new one allowing new bidders. This wouldn’t have been included if exclusion clause included adding new parties.
* **Holding:** Appeal allowed. Exclusion clause does not apply to the breach in question.
* **ON EXAM**: We first ask whether the clause is part of the secondary obligations or primary obligations. Second, we assess the matter of notice. Then, we reach what Binnie described (dissenting, but the following being good law) in *Tercon*:
* **ON EXAM**: Summary: first, whether as a matter of interpretation the exclusion clause applies to the circumstance—that is, look at **construction**. This depends on intention of parties as expressed in k. Exclusion clauses must be read ***contra proferentem****.* If it does not apply, we stop here. If exclusion clause applies, the second issue is whether clause was **unconscionable** at the time k was made, “as might arise from unequal bargaining power” (*Hunter*). This relates to k formation, not breach. If clause is valid and applicable, court looks to third inquiry: whether court should refuse to enforce valid exclusion due to overriding ***public policy***, proof rests on party seeking to avoid clause, that outweighs very strong public interest in freedom of contract (this presumably rejects Wilson’s test of “unfairness” put forth in *Hunter*).
* **ON EXAM**: Binnie added this test of public policy. We don’t know why Binnie picked this doctrine. Binnie does not define it, and it is unclear whether it must be against public policy at the *formation* of the k or whether it can *become* contrary to public policy. Binnie does seem to suggest it must be egregious.

**Test for determining if exclusion/limitation clause applies** (***Hunter via Tercon***):

1. Is the clause part of the secondary obligations or is it characterizing the primary obligations?
2. Is there a statute that prohibits or regulates this clause?
3. Was there notice of the clause?
4. Construe it – what does it mean?
5. If having construed, you can still say that it was intended to apply then consider unconscionability (inequality of bargaining power at time of acceptance) and unfairness (what occurred subsequent to K and, in context of exclusion clause, if it would be unfair to apply it to the particular situation)
6. Also consider whether court should refuse to enforce the valid exclusion due to overriding PUBLIC POLICY – proof rests on party seeking to avoid clause, that outweighs very strong public interest in freedom of K

### Doctrine of Unconscionability

* If there is inequality in the bargaining power at the time of acceptance, then the limitation/exclusion clause does not apply
* Developed in response to Canada’s lack of legislation on doctrine of fundamental breach

# EXCUSES FOR NON-PERFORMANCE OF THE CONTRACT

* **Issues arising at or before “contract” is formed**: capacity, misrepresentation, mistake, protection of weaker parties (duress, undue influence, unconscionability)
* **Issues arising before or after formation**: illegality
* **Issues arising after formation**: limitation of actions
* Also, first four relate to parties themselves. Illegality relates to outside standards or circumstances that affect k, though parties can have some impact.

## \*\*\*Contesting K (other than breach):

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **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 rescinded  Sometimes tort damages |
| **Mistake** | (one or) both parties mistaken about assumptions (or terms) | Mistaken party | Usually common mistaken assumption before k  Sometimes 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 |

## EFFECTS OF CONTESTING K

### Eliminating K:

|  |  |  |  |
| --- | --- | --- | --- |
| **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) |

### Altering k or its effects:

|  |  |  |
| --- | --- | --- |
| Method | How | Why/when |
| **Severance** | Removing part of contract | Illegality  Unconscionability |
|  | Treating as two contracts | * to meet form requirements * to treat one k as terminated for breach or frustration * to resolve privity problems |
| **Judicial adjustment of terms** | Assist in creating terms | Difficult to tell what was in offer |
|  | Set k aside “on terms” | Mistake in equity (if still good law)  Unconscionability |
|  | Severance | Reconstituting agreement after removing part |
| **Unenforceability of all or part of contract** | Court refuses to order performance or give remedy for non-performance | * illegality (practical effect) * lack of consideration or seal * Expired limitation period * Incapacity (sometimes) * Exclusion or limitation clause * Penalty clause |

## VOID + VOIDABLE Ks:

* **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”
* May be a flaw in formative stage (e.g., no offer, too uncertain, type of illegality or incapacity that makes void). There is no discretionary aspect. It is void or not. Does not depend on volition of parties.
* No basis for CL damages or termination.
* If anything has been transferred, it might be possible to reclaim under restitution, even if it has gone into hands of third party.
* Might sever into two contracts, making part void, part not void. Usually, though, we think of the severed part as unenforceable.

## Unenforceability

* *Unenforceability:* Legally the contract or promise exists, but the machinery of the law (particularly the courts) cannot be used to facilitate it
  + On application by one of the parties, a court can declare all or part of the contract to be unenforceable. This means that the machinery of the court will not be used to assist in the objective of the K, including providing of a remedy.
  + Unenforceable obligations that are performed are in fact effective as intended in the contract. But unenforceable obligations that are not performed will not be the subject of a court order that would necessitate their performance or would provide a remedy in the event of non-performance.
  + True unenforceability should be distinguished from both voidness and voidability. A void contract does not exist and therefore the question of enforceability does not arise. A voidable contract is either perfectly valid or voided and thus again enforceability does not arise.
  + Unenforceability is commonly the result of the following contexts:
    - A. Consideration
      * If there is no consideration for a promise, then it is said to be unenforceable. This means that the court will not assist in effecting performance of the promise or in providing a remedy instead.
    - B. Exclusion and limitation clauses
      * If it is found that these clauses work unfairness or are unconscionable in the context of the given contract and breach, then it is possible that they are unenforceable
    - C. Illegality
      * While it is often said that illegality makes a contract “void”, the result of the illegality is usually better described as unenforceability.
    - D. Capacity
      * In some contexts relating to an incapacity of a party to the contract, the contract is in a sense held in abeyance to see if the person with the incapacity ratifies the contract when the inequality is removed. In this sense, there can be seen to be a contract, just one that is not enforceable until such ratification.
    - E. Limitation periods
      * A contract promise will not be enforced or a remedy given if the claim is brought beyond the statutory limitation period

# Misrepresentation

**Misrepresentation =** representations that aren’t true

* Those that have legal significance are called **operative misrepresentations**
* **Options:**
  + **Estoppel by Representation:** holding party to the lie as though it was the truth = one way to affirm K
  + **Misrepresentation:** operate as if the lie were not given, getting rid of the effects of the lie
    - If misrep was by a 3rd party, generally out of luck

**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)

## Operative Misrepresentation

**In order for there to be an operative misrep, must be:** (1) A statement of fact,(2) That is untrue,(3) That is material, and(4) That is relied on by the other contracting party as a reason to enter into a K

1. A **statement** of **fact**,
   1. Statements about the future, the law, opinion, promise, prediction are **not** statements of fact
   2. Statement can have elements of opinion, belief or even promise as long as it has important component that is existing or past fact
      1. Statement of opinion (where facts not known to both parties) can involve statement of material fact → impliedly states he knows facts to justify opinion (*Smith v Land and House Property, 1884*)
   3. Ignorance of law is no excuse, thus statements about the law can’t be basis for misrep.
   4. Conduct (such as a nod or wink) can form a statement of misrepresentation (*Walters v Morgan*)
   5. **Absolute silence** usually can’t form basis of misrep b/c at CL no duty to supply factual info to other party, even if that party has info they know would be considered vital to other party.
      1. **Silence** can constitute a misrep when:
         1. There is a fiduciary duty
         2. When a Q is asked but there is whole or partial silence in response
         3. When statutes state that there is a duty to disclose info
   6. Misstatement by non-contracting party – to have effect would have to be connected to parties somehow
2. That is **untrue**,
   1. Knowingly false = deceit
   2. Unwitting falsehood = innocent misrepresentation – still sufficient to lead to possible rescission (*Redgrave v Hurd*)
   3. Ambiguous statements = usually benefit of doubt given to maker of the statement
   4. True statements becoming false = some authority that maker of a statement (true at the time) is under a duty to inform the recipient if it subsequently becomes false before K is entered into
3. That is **material,** AND
   1. Must be one of the reasons why the person entered into K
   2. Ways around this:
      1. Look at who parties are (ex. car dealers should know more about cars than you)
4. That is **relied** on by the other contracting party as **a reason to enter into K**
   1. Must be statement about something significant

### Remedies:

There are 3 types of operative misreps:

1. **Innocent =** operative misrep but not negligent or fraudulent (didn’t know it was false)
2. **Negligent =** should have known
3. **Fraudulent =** knew but didn’t tell

|  |  |  |
| --- | --- | --- |
|  | **Common Law (Damages)** | **Equity (Rescission)** |
| **Innocent** | **N** | **Y** |
| **Negligent** | **Y** | **Y** |
| **Fraudulent** | **Y** | **Y** |

## Rescission

Misrepresentation makes K **voidable** → can **rescind** K

**Rescission = undoing of the K**

* Both parties will be put back to position they were in before K existed
* If you can’t obtain conditions that occurred before K existed, then rescission not an option (***Kupchak*** says something contrary)
  + No remedy for innocent misrep unless you can acquire conditions before K came into existence

### Bars to Rescission:

(Nothing in equity absolute – courts may ignore bars to rescission b/c it’s fair to do so)

1. **Rescission would adversely affect a 3rd party’s rights**
   1. Would upset 3rd party entitlements
2. **Impossibility of complete restitution**
   1. Some things are fungible (ex. $$ - can give back diff. notes but add up to same amount)
   2. If subject matter of K is completely gone (ex. sold to 3rd party) restitution usually impossible
   3. *Kupchak v Dayson Holdings Co, 1965* → substituted $$ for property, **rescission** **still possible even when complete restitution can’t be reached**
3. **Affirmation = the innocent party may lose an equitable remedy b/c they are taken to have affirmed K**
   1. When a person discovers misrep, must choose to use equitable remedy or continue w/K – when they decide not to pursue an equitable remedy, they are seen to have affirmed K and no longer eligible for an equitable remedy
   2. **Laches** = delay in seeking remedy, taken to be affirmation
4. **Execution of K** 
   1. Highly arguable – may not be law
   2. If both parties have completed obligations in the K, then K is finished & no K left to rescind
   3. Very weak argument

## The Cases

#### Redgrave v Hurd

(1881), England C.A. – p.355

**It is not a defence to say the P should have tried harder to learn the truth—there is no due diligence burden**

**Innocent misrepresentations can form the basis for a remedy of rescission—in equity, you don’t have to establish knowledge of falsehood (but recklessness or knowledge of falsehood is required at common law)**

**Facts**: P enters into k with D for house and law practice share. D said it brought in 300-400 pounds/year. 200 were in receipts and D said the rest was made up in other ways. P said finances were in bundle of papers D could inspect. Had D inspected, would have found it was utterly worthless, but D did not examine. D finds out situation and attempts rescission.

**Ratio**: Providing someone with the opportunity to investigate does not necessarily mean there is no operative misrep – they might not be able to understand or accurately investigate with the means given.

Court of Equity: In order to set aside a k due to misrep, it is not necessary to prove that the D knew at the time that the representation was false.

Common Law: A k may be set aside even if the person did not know the statement to be false but only if the statement was made recklessly and not with the belief that it was true.

**Dec:** Find for the D. Contract rescinded—there was operative misrep.

*Redgrave* made rescission more significant as a remedy. Equity has more discretion than CL—seems to do justice.

#### Smith v Land and House Property Corp

(1884) England C.A. – p.359

**A statement of opinion often involves a statement of material fact when the facts are *not* *equally known* by both parties, for it implies there are facts which justify the opinion**

**A statement of opinion, from a knowledgeable party to one who is not, is a representation – if false, it is actionable**

**Facts**: P sold hotel to D, stated there was a “most desirable tenant.” D buys hotel, then the tenant goes bankrupt.

**Ratio**: Here, the opinion was a statement that nothing had happened in past to make him undesirable tenant.

#### Kupchak v Dayson Holdings

(1884) England C.A., p.363

**Monetary compensation may be granted under rescission where it is impossible or inequitable to restore the original property. (Rescission for what can be restored, and compensation for what cannot).**

**Being unable to immediately abandon operations given by a k does not necessarily preclude rescission**

**Facts**: P bought share of a motel from D. Later it was discovered hotel’s earnings were falsely misrepped by agent of D. P in exchange gave two pieces of real estate, among other things. By time Ps found out, some real estate had been sold and other parts redeveloped.

**Ratio**: Rescission is an option even when complete restitution cannot be reached – when compensation can be awarded to make up the difference (only for very bad cases of misrepresentation, e.g., fraud).

D argued P affirmed k by retaining shares, continuing to manage motel, keeping up payments for first two payments. This is not persuasive. Appellants could not abandon operation since they were responsible for operations

**Dec:** Rescission of what can be restored and compensation (not damages b/c remedy is in equity) for the rest.

**Problem**: Calculation of compensation is not addressed.

## Rescission versus Termination:

|  |  |  |
| --- | --- | --- |
|  | **Rescission** | **Termination** |
| **Remedy for:** | Misrepresentation | Breach of k (must be condition or serious consequence of intermediate term) |
| **Type of remedy:** | *Equitable* – it is discretionary | *Common Law* |
| **Action:** | Undoes the k, restores situation to conditions before the k | Ends the k – the innocent party has the right to terminate the primary obligations |
| **Comments:** |  | 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. |

# Mistake

**Mistake =** one of the parties argues that he didn’t think that the K did what the other party says it did; related to something **believed at or before time of contracting**, not a belief that arises after K is formed

**Consequence:** K is **void** (never came into existence) or **voidable** (K is brought to an end)

* NO absolute law on mistake
* Almost always used as alternative to misrep. Difference is **misrepresentation requires fault** to be proven
* Argument can’t be made just under mistake, some other doctrine must be introduced

## 3 types of mistakes:

1. **Unilateral mistake =** where one party is mistaken (thinking X) and the other is not mistaken (thinking Y)
2. **Mutual mistake** = one thinks X & other thinks Y, neither is clearly wrong (or right)
3. **Common mistake** = both parties think X about their K, but X doesn’t exist, is impossible, or is otherwise erroneous
   1. **Result = void**

#### Smith v Hughes, 1871

(*P agreed to buy old oats from D, oats not actually old, P pissed)* → lays out 3 diff. opinions on what’s required for mistake

* Cockburn: stressed difference between party’s **motives** for entering K & **term** of K – if it’s not a term then it’s irrelevant. Assumptions outside the K are irrelevant; doesn’t matter what parties thought, it’s a matter of what K was – this was simple offer & acceptance, mistake not here
* Blackburn: **Must be mistake about what K contains** – mistaken assumption not enough. In an action for mistake, **P must show that he was mistaken about what D was promising**. What is important is **mind of P**. Did P think that D thought that P thought he was selling old oats? D’s mind unimportant.
* Happen: **P** must show he was mistaken, **that D knew about the mistake and knew P was mistaken** (D’s mind matters)

What Blackburn says is the most valuable takeaway – it must be a mistake as to TERMS in a contract (i.e., a mistake about the offer 🡪 and thus no acceptance), not assumptions

### Mistake Upsetting Allocation of Risk:

Party on whom burden of risk is placed is expected to have considered this burden before agreeing to K, shouldn’t be able to get out of K responsibility by claiming mistake later

#### McRae v CDC, 1951 [AUSTRALIA]

*P buys oil tanker from D that is allegedly wrecked on a reef but tanker doesn’t exist; D tries to get out of responsibility*)

* **Party (D in this case) can’t rely on mutual mistake where mistake consists of belief that’s entertained by him w/o any reasonable ground and is used to induce same belief in other party’s mind**
* Can’t rely on mistake as defence if they made it due to **negligence, recklessness, willful blindness** etc.

#### Miller Paving v B Gottardo Construction, 2007

(*Parties sign agreement saying P has been paid for all materials, P later tries to charge for something he forgot)* → **before allowing mistake, must look to K to see if bearing of risk has been provided for in K**

* In this case, responsibility of P to determine what was owed and to charge D; not D’s fault that P missed something
* Mistake doesn’t make subject matter (paying for materials) “essentially different”
* Common mistake – both thought all materials had been paid for. Here, it was the responsibility of P to determine what was owed and to charge the D. It was not D’s fault at all here and it is not unjust for D to avail itself of the legal advantage it obtained.
* **Decision:** for D.

### Mistake as the Responsibility of 3rd Party:

May not affect K if it can be shown party’s mistake is attributable not to one of the contracting parties, but to a 3rd party where that party can and should be held liable for damage he/she caused by engendering the mistake (ex. negligent misrepresentation)

## Mistaken Assumption

**Common mistakes** that affect K can be about assumptions as to title of the subject matter of the K, existence of that subject matter, or its quality → **Mistake** not to term of K but to an **assumption**

|  |
| --- |
| Elements for Common Mistake (required to make contract void):Great Peace Shipping v Tsavliris Salvage **Elements of common mistake required to make the contract void:**   1. **Must be common assumption as to existence of a state of affairs** 2. **Must be no warranty by either party that that state of affairs exists** 3. **Non-existence of the state of affairs must not be attributable to the fault of either party** 4. **Non-existence of the state of affairs must render performance of the K impossible** 5. **State of affairs may be existence, or vital attribute, of consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible**   **Facts**: D hires P to fix D’s boat but P is farther away than they both thought (common mistake) so D hires someone else, doesn’t pay P.  **Ratio**: Here, further distance does not mean service provided would be essentially different – doesn’t make it impossible.  **Dec**: For P. No fundamental mistake or impossibility. Service was same regardless of distance. |

#### Bell v Lever Bros, 1932

(1932) HL, p.560

**A mistake about the subject matter of the k may affect the k.**

**There are four areas in which mistaken assumption may occur:**

**1) The identity of contracting parties**

**2) The existence of subject-matter of the k at the date of the k (e.g., purchasing a perished good)**

**3) Subset of impossibility: transferring something to you that you already have**

**4) The quality of the subject-matter of the k 🡪 must be common mistake and quality must make the subject-matter essentially different from the thing it was believed to be.**

**Atkin says each can make the k void, as it demonstrates absence of consensus (though Denning later argues voidability is an option for 3)**

**Facts**: P pays severance to D then finds out D did things he could have been fired for anyways.

**Dec**: mistake was not so fundamental as to affect the k. In favour of the company officers.

* “Quality” is broad: it is the nature of a thing, not “high or low”. Must be the essence of the k.
* Atkin distinguished between mistaken assumption about quality and mistake where quality is a **term** in k (a party bears responsibility for quality). Latter could be a breach.
* Atkin takes it upon himself to clarify law. We are not clear whether his catalogue is the beginning or the end of the law on mistake. *Solle* says it is the beginning (in fact, Denning says “my rule is better”). In *Great Peace*, says *Bell* is the end of mistake. Atkin doesn’t really use the law on mistake that he set out—he just construed k. Other judges did not talk about mistake.
* Atkin says nothing about mistake as to terms. Also nothing about misrepresentation.

### Mistaken Assumption re: Quality

**Mistake re: quality can affect K → to extent that mistake operates, it nullifies assent** (***Bell v Lever Bros, 1932*** – *P pays severance to D then finds out D did things that he could have been fired for anyways*)

* **Quality** = some characteristic of the subject matter **other than its existence or title to it**
* Mistake won’t affect K unless it was a **mistake by both parties (common mistake)** & is as to a quality that the thing w/o it is essentially different from the thing as it was believed to be
* Distinguished from situation where parties have put quality of the thing in K as a **term** so that one party bears risk & responsibility of subject matter not having that quality

### Mistaken Assumptions re: Existence of Subject Matter

Impact of this mistake assumes that it is **not a part of K that one of the parties is responsible for ensuring thing exists** (***McRae v CDC*** → one of the parties assumed risk that subject matter doesn’t exist & will be contractually liable for failure to perform in event of non-existence)

* Can also be mistake re: object that does exist but is completely different from what parties thought it was

### Common Mistake in Equity

#### Solle v Butcher, 1949

→ characterized ***Bell*** as dealing w/ mistake at **just** CL – opened possibility of equitable effects of mistake that would operate in diff. way from CL

* **Test:** is the mistake sufficiently fundamental so as to make K voidable?
  + Could relieve a party from consequence of his own mistake, so long as it didn’t do injustice to 3rd parties
  + K will be set aside if mistake of 1 party has been induced by a material misrepresentation of the other, even though not fraudulent or fundamental
* **2 types of mistake: mistakes which render K void (CL) and mistakes which render K voidable (equity).**
* **Suggests mistaken assumption should involve a three-stage analysis:**
  + **(1) Would mistake render K void at CL?**
  + **(2) Was it voidable in equitable mistake?**
  + **(3) If so, on what terms?**
* **Three situations where equity steps in:**
  + **1) Equity can set aside—that is, rescind—the contract in contexts of unconscientiousness (Denning seems to contemplate unilateral mistaken assumption that could lead to equitable response. Other party must know or ought to know of mistake)**
  + **2) Voidable in equity if mistake of one party has been induced by a material misrep of other, even though not fraudulent or fundamental, or if one party, knowing the other is mistaken about terms of an offer, or identity of person, lets him remain under delusion and conclude k.**
  + **3) Voidable in equity if common mistake as to facts or to relative rights, provided the misapprehension was fundamental and the party seeking to set aside was not at fault. (Looks like *Bell* test in that it has to be common mistake. Perhaps something here about negligence, not clear. What seems to differentiate from *Bell* is the “relative and respective rights”. It extends beyond quality and can incorporate mistake of law, whereas *Bell* might not.)**
* **Summary:** 
  + **Broad interpretation (#1) = unilateral, fault is ok (must simply be unconscientious).**
  + **Narrow interpretation (#3) = common mistake, provided misapprehension was fundamental, and cannot be at fault.**
* **Equity can set aside on terms it sees fit**

**Facts**: Butcher owned house containing flats. Set about repairing with business partner Solle. Solle wanted to rent. Parties discussed whether repairs would exclude flat from governing rent control legislation. Solle advised Butcher flat would not be subject to rent control (mistake of law), and assuming this to be correct, entered into agreement for 250. Control was actually at 140. After discovering mistake, Solle sought to recover overpayment and declaration for lower rent. Butcher counterclaimed for rescission on grounds of mistake.

So it is a common mistake.

**Ratio**: court characterised previous case law (*Bell*) as dealing with CL

**Dec**: By reason of common misapprehension, court can set aside lease on such terms as it sees fit. Denning gives landlord an election given to the tenant: tenant decides what landlord gets. 1) tenant can continue with k as it exists, but with the new lower rents or 2) tenant can terminate k at that point..

* If void, landlord would have to give back all rent. Much of k had already been performed. Denning is not happy with CL occupying the field.
* Not clear why there is even anything for equity to modify, since CL would make void.
* If the case is right, tough to know when mistake operates. Also unclear when narrow view operates when *Bell* wouldn’t.

#### Great Peace Shipping v Tsavliris Salvage, 2002

– says ***Solle*** bad law in ENGLAND → sets out elements of common mistake – mistake must make the matter **“essentially different”** from expected (*D hires P to fix D’s boat but P is farther away than they both thought so D hires someone else, doesn’t pay P*)

* Further distance doesn’t mean service provided would be essentially different – doesn’t make it impossible as required
* May have rolled back law to pre-*Solle*. It adopts *Bell* as exhaustive. Equity cannot have a different effect for mistake. Could argue that the unilateral part of Solle is still alive.
* Found no difference between *Solle*’s “fundamental” mistake and Atkins’ mistake as to “quality” that makes thing “essentially different” from what it was believed to be.
* Phillips felt common mistake would only have impact where “impossibility” or “vital attribute” was at issue.
* *Great Peace* has yet to be adopted in Canada, and there might be good reason not to. There is no reason why we cannot move on to equity, and it might work injustice if we cannot.

## Mistake – Terms

\*\*Usually resolved under **certainty of terms\*\***

#### Smith v Hughes

→ mistake as to terms is relevant since there’s no “meeting of the minds” → no K & no obligation

**Unilateral mistake can have an impact, but it must be about TERMS**

**Mutual Mistake re: Terms:**

* True mutual mistake = no consensus ad idum
* One party’s assumption is more reasonable than the other – turns it into a unilateral mistake as to terms
* Construction issue = certainty of terms

**“Snapping Up” an Offer**: one party knows that the other’s offer contains a miscalculation and “snaps up” the offer b/c error makes it such a good deal

* Non-mistaken party doesn’t have to be shown to have subjective knowledge of mistake; enough if that party “ought to have known” of the mistake
* ***Solle v Butcher*** → Denning said K will be ‘set aside’ in **equity** if “one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it’s made, lets him remain under his delusion and conclude a K on mistaken terms instead of pointing out the mistake”

**Tendering Context**: In Contract A/B situation, where mistake was not known until after Contract A was formed, unilateral mistake had no effect on Contract A

* Mistake on face of the tender that would have been obvious to owner might have prevented Contract A from being formed, but if that’s not the case then mistake can’t affect first K

**Unavailability of Equitable Remedies**: unilateral mistake re: terms can mean there’s no K at all; otherwise mistake usually has no effect (unless ***Solle*** & doctrine of unconscionability [still] apply to unilateral mistakes)

## Mistake and Third-Party Interests

### Mistaken Identity

#### Shogun Finance v Hudson, 2003

(*Rogue buys car using financing from P & sells it to D, both P & D claim title to car****)*** → mistaken ID can affect K (via CL and equity), but depends on how K was entered

* **Rule: (2 options, face-to-face or in writing)**
  + **If face to face:** K is voidable, but only if identity is “OF THE ESSENCE”, the rogue caused you to enter through fraud or something tantamount to fraud, and there is no hardship on 3rd parties.
  + **If K is written from distance:** void due to non-est-factum
  + **Face-to-face:**
    - Strong presumption that each party intends to contract w/the other w/whom he’s dealing (despite ID party may claim to be)
  + **Written system:**
    - No scope or need for such a presumption – concluded that the person who set up that system intended to and could rely on ID of person named in doc
* **Dissent:** where 2 individuals *deal w/each other*, by whatever medium, and agree to terms of a K, then K will be concluded between them, notwithstanding that one has deceived the other into thinking that he has the identity of a 3rd party
  + K = voidable, not void
* Shogun is trying to get the car back
* They need to find that the K is void, not voidable
  + Could argue misrepresentation, perhaps – but the problem with misrepresentation is you get rescission, which you can’t do when you can’t find an individual (or it has been transferred to an innocent third party)
  + Void means that it can’t pass to third parties. So you can get it back. (Similar to nemo dat).

### Non Est Factum

*Non est factum* = “that is not my doing” [not my deed]

* CL doctrine → arises in context of a written K where one party disputes that they ought NOT be held responsible at all for anything under the K, though it names them as a party & the doc contains their signature

**Forgery:** Can argue NEF as defence b/c defendant was not, in fact, a party to the agreement at all, may never have heard of it before – someone else may have fraudulently named them as party or forged signature (***Shogun***)

* More common context: where right person is named in written K (may have even signed it), but that person claims they didn’t know & couldn’t have been expected to have known that the doc was a K or that it was the type of K it turned out to be
  + Rare to use this defence successfully in this context b/c often raised in context where party was simply careless as to what doc was
  + Doctrine not to be used to get someone “off the hook” if they were negligent or careless (***Saunders v Anglia Bldg Society, 1971*** – **NEF not applicable if signed due to carelessness or negligence**)
    - **Test:** Would a reasonable person have taken the same actions as the party pleading NEF took?
    - **Fundamentally Different Test:** there has been a mistake as to nature of docs that renders them fundamentally different between doc as it is & doc believed to be

**Absence of Carelessness:** P must establish that there was a difference between the doc as it is & the doc as they believed it to be – affirms fundamentally different test (***Marvco Colour Research Ltd v Harris, 1982*** – *D re-signed mortgage b/c told there was mistake w/dates; D did this w/J present, told he didn’t have to read it; really signed a new mortgage –* ***HELD FOR P***)

* **NEF can only be used when**:

1. There is NOT carelessness; AND
2. There has been a mistake as to nature of docs that renders them “fundamentally different”

* Idea of **fairness**: “Party, who by the application of reasonable care was in a position to avoid a loss to any of the parties, should bear any loss that results when the only alternative available to the courts would be to place the loss upon the innocent appellant”

**Impact on 3rd Parties:** If plea is successful, **K = void;** no title can pass to a buyer or other person under the K – so 3rd party buyer from original buyer is also screwed

* Subsequent buyer from original buyer cannot take title, even though he was not involved in first k.
  + Compare this to where k is voidable: if third party buys before original k is avoided, new buyer has good title (at least until the first k is rescinded).

## Rectification

**Rectification (EQUITABLE DOCTRINE) =** written K is changed by order of the court → asking for court to rectify the written evidence to follow the actual K (***Bercovici v Palmer***)

* The k exists, but there is a question regarding the written record of evidence.
* What is in writing is not the k; the writing is evidence of the k. Often used as preliminary step in parol evidence rule argument.
* When arguing for rectification, you are asking the court to rectify the written evidence to follow the actual contract (*Bercovici*). The question is not what the parties intended, but merely a matter of correcting the record.
* Mistake in written record of the K → both parties usually agree a K exists; Q = whether written record contains a mistake that should be amended by court
* **Not** about intention; it’s about **documentation of K** – if can’t point to prior agreement that written K has departed from, can’t be rectification
* Mistake operates wholly in **equity**
* **Burden of Proof:** higher than BOP but below BARD (***Bercovici; Sylvan Lake***)
* Usually only applies to **common mistake**; can apply to unilateral mistake in some circumstances (***Sylvan Lake***)

**Three Contexts for Rectification:**

* **Common Mistake –** one party (D) arguing against existence of mistake; other party (P) bears onus of showing that there was such a mistake
  + P must also prove what the outwardly expressed continuing common mistake actually was
* **Mutual Mistake** – both parties agree there is a mistake, but argue for diff. mistakes
  + Burden of convincing court no diff. from common mistake → court may practically have no choice but to rectify the K as both parties agree it needs rectification (***Bercovici v Palmer, 1966***)
* **Unilateral Mistake** – one party is content w/the record as it stands & other party is not → other party acknowledges that they’re the only mistake party and that written record reflects agreement as wanted by other party
  + Claim for rectification for unilateral mistake is very difficult to achieve

#### Bercovici v Palmer, 1966

(*D agreed to buy P’s store, a misunderstanding took place and another piece of property was transferred as well. D claims transfer was intention of the K. AT trial, P won since the other piece of property was never mentioned in negotiations and D never behaved as if he owned it – ruled to be a common mistake*)

→ **Subsequent actions can be considered when determining intention of the K**

* After K entered, subsequent actions of parties can be considered to determine what intention of K was
* Can only use rectification if no fair & reasonable doubt is left (higher than BOP)
  + Necessary to show that the parties were in complete agreement & just wrote down terms incorrectly

#### Sylvan Lake Golf v Performance Industries, 2002

(*P wanted to build 2 rows of houses requiring 180 yards but K said 180ft; all other measurements in K were yards*)

* **4 preconditions to allow rectification to be used for unilateral mistake:**
  1. Must establish there was a prior oral K w/definite, ascertainable terms
  2. Other party knew or ought to have known of the error and P did not
     1. Attempt to rely on erroneous written doc must amount to “fraud or equivalent of fraud”
  3. P must show “the precise form” in which the written instrument can be made to express the prior intention
  4. All of the above must be established w/ “convincing proof” (between civil BOP & crim BARD)
* **Rectification is discretionary**
* Mere unilateral mistake not enough – non-mistaken party must be trying to take advantage
* Error can be fraudulent or innocent → just that orally agreed terms were not written down properly
* **Due diligence**: rectification not a substitute for due diligence; however, can’t be full requirement for unilateral mistake b/c P seeks no more than enforcement of prior oral agreement → just a factor that will be taken into account (b/c rectification is equitable & judges have discretion)
  + Although a lack of due diligence does not necessarily bar rectification, rectification should not be seen as a substitute for due diligence.

# Protection of Weaker Parties

No single protective doctrine – attempts to unify (***Lloyd’s Bank v Bundy, 1975*** – arguably created new doctrine of “**inequality of bargaining power**”)

* Doctrines are **equitable**, although **duress** has possible consequences in CL
* In the following three doctrines – we see a progression with greater concerns with regards to the contract itself
  + Duress has nothing to do with the bargain itself (whether or not it is a good bargain), but unconscionability looks more at what was in the contract itself
* We begin to see a new form of relief/remedy – the contract is said to be “unenforceable”
  + Can make PARTS of the contract unenforceable
* These doctrines are about consent during offer and acceptance – where you may not have consented if not for violation of this doctrine

### Essay?

Perhaps both UI and duress are shifting towards the requirements of unconscionability. Both now suddenly seem to include considerations of the content of the k, which is a distinct feature of unconscionability. Perhaps it is not Denning’s “inequality of bargaining power” that we are converging on, but rather “inequality in the bargain”. Is this a desirable development?

## Duress

Duress operates w/respect to circumstances that surround the **making of the K** and their impact on ability of a pressured person to make a real choice – duress must exist **at the time K was entered**

* Basically says that one of the parties was in no position to accept or make an offer, didn’t have a legally operative mind
* Threat can be from a 3rd party outside of the K

Are you talking about duress under creation of a contract (old standard – illegitimate, Pao), or a change of a contract (possibly old standard or NavCan test…)?

Remember that economic duress rarely works particularly because something else may be argued beforehand such as mistake or illegality

### Remedy:

Equity makes K **voidable** or finds that certain obligations are not enforceable at option of weaker party

* Problem w/ voidability is that it might not be possible to avoid K if it’s been performed & restitution isn’t possible
* May also not be voidable if 3rd party would be adversely affected

If found under CL, K is **void** (neither party can control whether duress makes K void)

### Historically:

Treated as “coercion of the will” (***Pao On v Lau Yiu Long, 1980***) – looks at following factors to determine if there was coercion of the will: (this test adopted for “economic” context in ***Pao On***)

1. Whether the person alleged to have been coerced **did or did not protest**?
2. Whether, at the time he was allegedly coerced into making the K, he had an **alternative course open to him** (i.e. legal remedy)?
3. Whether he was **independently advised**?
4. Whether after entering K **he took steps to avoid it**?

**Now:** also an assessment of whether the pressure is such that a court can tolerate the K that results from it

* Problem with defining it as illegitimate is that it begs the question and makes it more complicated

### Economic Duress in Canada

#### Greater Fredericton Airport v NAV Canada, 2008

→ Established test for **economic duress** in Canada

(*GFA agreed “under protest” to pay NAV for needed equipment; NAV had existing obligation to provide that equipment. Absence of fresh consideration not important provided there was no economic duress*)

* True cornerstone of duress = **lack of consent**
* Court rejected relevance of “illegitimate pressure” as a consideration in economic duress, at least in context of modification of an existing K; also doubted relevance of “independent legal advice” as a consideration
* **Onus** on the **pressuring party** to prove modification to K wasn’t procured under duress
* Pre-existing legal duty, so no consideration here. Nav Can had a pre-existing duty and did more than they had to.

**Two conditions precedent to finding of Economic Duress:**

1. Promise must be extracted as a result of the exercise of “pressure” (i.e. demand or threat)
2. Exercise of that pressure must be such that coerced party has no practical alternative but to comply

**Ultimate Q: Did the coerced party consent to K variation? 3 FACTORS:**

1. Was there **consideration**? (Court will be more sympathetic if NO)
2. Was it made “**under protest**” or “**without prejudice**”? (Failure to voice objection may be fatal to claim)
3. Did the coerced party take reasonable steps to disaffirm the variation as soon as practicable? (Can’t sit on it)

Last 2 factors more important.

NOT important: whether they sought independent legal advice or whether there was good faith conduct by coercer

## Undue Influence

**Undue Influence =** unconscientious use by one person of power possessed by him over another in order to induce the other to enter a K

* Has strong linkages to duress.
* UI concerns the **context** in which k was created. There is a question as to whether the **content** should also be a factor.
* The **later unfolding** of the k is of **no concern**.
* Makes the k voidable (rescission). If some obligations have been performed, court may look to unenforceability.
  + Equity may find unenforceability. For unenforceability, may be that only certain obligations are unenforceable or only the strong party cannot enforce. The law can pick and choose. This can be highly advantageous for the weaker party: he can avoid performing any obligations and can call upon the other to perform his obligations. The k is left in place as valid.
  + If no obligations have been performed in k, equity will rescind.
  + If some obligations have been performed, we look to unenforceability.
* Equitable doctrine in origin & scope
* Considers **nature of relationship** between parties to see whether that relationship creates a situation of UI rather than particular event at the time K was entered (duress)
* Looks at the contract, not just the relationship – there must be a disadvantageous contract created from it.
* **Be prepared to argue that there is not just a relationship that creates this imbalance, but also a bad contract emanating from it.**
  + **But some argue the K should have nothing to do with it and that this area is akin to duress**
  + **Be prepared to argue both**

**Irrebuttable Presumption of UI in Relationship:**

* Parent – child
* Guardian – ward
* Trustee – beneficiary
* Solicitor – client
* Medical advisor – patient
* Religious advisor – advisee

In these cases law presumes, irrebuttably, that 1 party had influence over the other; complainant doesn’t have to prove they actually placed trust & confidence in other party

Teacher and student doesn’t qualify, nor spouses.

#### Geffen v Goodman Estate, 1991

(*Trust set up by woman w/mental health issues, son argues her brothers unduly influence her to do it*) → **presumption of undue influence** – establishes **test** & **burden of proof**:

* **Rebuttable Presumption of UI in Relationship**: claimant must show they placed their trust/confidence in the other along w/the proof of the questionable nature of the transaction
* **Influence =** ability of 1 person to dominate will of another, whether through manipulation, coercion, or outright but subtle abuse of power

**Two-step process (*Geffen*):**

* 1) First, there must be a **relationship** capable of giving rise to the necessary influence. This relationship can be proved or presumed. The burden rests on the plaintiff. “Is potential for ‘dominating influence’ inherent in the nature of the relationship?”
  + Not entirely clear if P has one or two steps to satisfy. The first is accepted.
  + 1) Establish that the relationship itself is one of UI, which can be done in two ways:
    - a) **Established relationships** of undue influence lead to an irrebuttable presumption of UI *in the relationship*, OR
    - b) Establish an **actual relationship** of UI based on the evidence.
  + 2) Look to the contents of the transaction? (The law is not clear on whether this second consideration is relevant).
    - Was P unduly harmed or D unduly benefitted? Mere imbalance/bad bargain not sufficient.
    - Wilson in *Geffen* says sometimes the content is relevant. She distinguishes between 1) **commercial** transactions (i.e., contracts) and 2) **non-commercial** transactions (e.g., wills).
      * For non-commercial, establishing the relationship of UI is sufficient.
      * For commercial, the P must *also* establish the k itself is **lopsided** or had a **“manifest disadvantage”**. The “manifest disadvantage” requirement looks somewhat odd, as UI typically concerns the *context*, not *content* of the k.
        + Disagreement as to whether “manifest disadvantage” requirement should exist for commercial transactions → stemmed from differing views on what UI designed to protect

One view: protect against abuses of trust, confidence or power – focus on process of UI rather than result → MD not a requirement, merely evidence that goes to show whether abuse took place

Opposing view: law should only address abuses of trust/confidence resulting in significant and demonstrable disadvantage to person under influence (doesn’t want to interfere w/reasonable bargains)

* + - * Wilson also does not explain why there is this commercial/non-commercial distinction. It is perhaps because in a contract there is consideration and the lopsidedness can be measured. By contrast, gifts or wills involve no consideration and hence lopsidedness cannot be quantified.
    - **Ambiguities**: 1) is **content** to be considered? 2) what exactly does the “commercial/non-commercial” **distinction** entail? 3) **how lopsided** does the bargain have to be? La Forest questions whether content should be considered. The better view is probably Wilson’s.
* Then 2) **rebut presumption** of undue influence (burden on D).
  + Must prove that, despite relationship of UI, P entered the particular k on his own “**full, free and informed thought**” (usually **independent advice**).
  + Also, magnitude of disadvantage is evidence going to whether influence was exercised.
  + May entail showing:
    - No actual influence was deployed in particular transaction
    - P had independent advice

## Unconscionability

**Unconscionability** = invokes relief against unfair advantage gained by an unconscientious use of power by a stronger party

* Clear descendent of UI – involves examination of parties’ relationship, but focuses more on circumstances of creation of **particular agreement**; often involves relationships that last no longer than creation of particular K in Q
* Concerned w/ situations that are “tantamount to fraud” (vs. UI, which is more concerned w/abuses of trust/confidence)
* Court more apt to tinker w/K and find **part** of K unconscionable
* Doesn’t necessarily have the illegitimacy of duress, or the ongoing quality of UI

#### Morrison v Coast Finance Ltd, 1965 [BCCA]

(*Old widow induced into mortgaging her home to allow 2 men to buy cars*)

Elderly woman was taken advantage of by Lowe and Kitely, who persuaded her to mortgage house and lend mortgage money to them so they could pay off their loans and debt. Crawford, the person who controlled the companies to which money was owed, was aware of the facts and ensured monies were paid by L and K to companies. In return, L and K gave promissory note (IOU) and valueless assignment of conditional k (already paid off) to woman. Crawford drew it up and was aware of valuelessness. Woman wanted but did not get advice. Woman sought to have court set mortgage aside.

→ Created **doctrine of unconscionability**

**Test for determining unconscionability:**

1. Proof of inequality in position of the parties arising out of ignorance, need or distress of the weaker that left him in power of the stronger party
2. Proof of substantial unfairness obtained by the stronger party
3. After the weaker party creates the presumption of fraud, the stronger party can rebut this by proving the bargain was fair, just, and reasonable

For remedy, equity is not bound to traditional responses of rescission or unenforceability

* For instance in this case, court tinkered with the arrangement and adjusted the agreements to make them fair (they re-structured the contract in P’s favour)

#### **Bad Law…** Lloyd’s Bank v Bundy, 1975 [ENGLAND]

(*D mortgages his farm to help son’s debt, bank forecloses on it*) → DENNING – groups all mechanisms of protecting weaker parties together into simple doctrine of **inequality of bargaining power**

**4 categories for inequality between parties:**

1. Duress of goods = inequality in bargaining power (voidable transaction)
2. Unconscionable transactions = unfair advantage gained by unconscientious use of power by stronger party
3. Undue influence
4. Undue pressure = a K should be based on free & voluntary agency of the individual who enters it

These all rest on “inequality of bargaining power”

\*\*Gives relief to one who, w/o independent advice, enters into a K upon terms that are very unfair or transfers property for a consideration that is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs/desires, or by his own ignorance/infirmity, coupled w/undue influences/pressures brought to bear on him by or for the benefit of the other\*\*

* Subsequently rejected in England, but **influential in Canada** → Wilson J**. treated unconscionability as equivalent to inequality of bargaining power** in ***Hunter v Syncrude***; equivalency accepted by SCC in ***Tercon***
* Problem w/Dennings’ approach: doesn’t take into account all the differences in existing doctrines → lessens the flexibility provided to the courts by various doctrines
* Denning’s view has not been generally accepted but is sometimes used to “inform” decisions (e.g. Lambert in *Harry*).
* Ignores differences. Lessens flexibility by having so many doctrines.
* The paradox is that the people these doctrines are designed to help are not able to utilize the doctrines due to their complexity.
* **BAD LAW**

#### Harry v Kreutziger, 1978 [BCCA]

\*\*can use both tests b/c SCC hasn’t ruled on which one should win\*\* *(P sold fishing boat/license to D for low price. D was not very worldly or experienced in business, whereas P was very experienced. P exerted great pressure. D told P he could get a new license after but he knew that was a lie)*

**Two tests for unconscionability:**

* McIntyre: basically sets out ***Morrison* test**(**inequality + fraud**)
* Lambert: Sets out a new test that takes focus away from individual, puts it back on K
  + **Test:** **Did the transaction, seen as whole, diverge significantly enough from community standards of morality so that it should be rescinded?**
    - **Problem:** What is “community standards”? What is “morality”?
    - **Benefits:** Much more open-ended and less structured by an intricate list of pre-reqs

# Illegality

The state has certain interests in parties’ contracts, and thus an illegal ones will not be allowed to be in existence. This might be used to deal with before or after the contract is in existence.

**Illegality =** parties are trying to accomplish something in the K that they ought not to do according to law. The k (or part of the k) is illegal because law disapproves of its making, purpose or performance.

* Various policy concerns law has about particular type of K, its setting, or its purpose/effect

**Two-stage process:** 1) is the k illegal? 2) if it is, what are the effects of the illegality?

No airtight compartments – K can also be both illegal and economic duress, etc… Void under two doctrines.

**2 Categories of Illegaility:**

1. **Statutory Illegality**
   1. The making of the K is expressly or impliedly prohibited by statute
   2. Q is always one of legislative intent → will making given K illegal, considering the surrounding circumstances of that particular K, further the objects of the statute? (***Still v Minister of National Revenue, 1997*)**
   3. Traditionally, law looked to whether k’s creation or execution is prohibited by statute.
      1. If the **creation** of the K is prohibited, then it was generally **void** (*Still* seeks to change this).
      2. If the **execution** of the K is prohibited, then equity may step in to make it **unenforceable** or **voidable** based on the facts and policy (*Still* adopts a new approach)
   4. 2 types:
      1. Direct: the formulation of the K is illegal = K is void
      2. Indirect: formulation of K itself not illegal, but direct consequences of it are = K not void but can be **argued** that K is not enforceable
2. **Common Law Illegality**
   1. K can be rendered unenforceable on grounds that it’s **contrary to public policy**
   2. Contracts that would fall into this category are:
      1. A K to commit a legal wrong
      2. K is injurious to public life or foreign relations
      3. K purporting to oust the jurisdiction of the court (ex. an agreement **not** to go to court – therefore **must** always have a statutory basis for arbitration, mediation, etc.)
      4. If it is prejudicial to the administration of justice (ex. K to stifle prosecution)
      5. Restraint of trade Ks = a K between parties to restrict free trade
      6. Immoral Ks and Ks prejudicial to the status of marriage (typically Ks re: sex)

## COMMON LAW ILLEGALITY

CL has developed various categories of public policy that can make a K illegal – not closed, but relatively difficult to get a court to accept new heads of public policy

### Contracts Contrary to Public Policy

Categories:

* Restraint of trade
* K to commit a crime/do a legal wrong (commit a tort, for example)
* K prejudicial to good public administration (bribery, for example)
* K prejudicial to administration of justice (again, could be bribery)
* A champerty contract – a contract where a non-party individual gets a % payment from the contract – contingency fee contract is illegal at common law
  + In order to have a contingency fee agreement then the jurisdiction must allow it and you must follow the proper rules for it…
* A maintenance contract – a contract to sustain or get into litigation when you don’t have a stake in the outcome – e.g., paying someone else to litigate
* A contract prejudicial to family life and the status of marriage – e.g., something that predicts a breakup such as a pre-nup would need to be permitted by legislation/statute (since it is illegal at common law)
* K prejudicial to good foreign relations
* Morals

**Restrictive covenant:** promise not to do something. Promise may intrude on public policy (e.g., encouraging as much competition as possible, freedom to work as people wish, etc.). Law says that *restraints on trade* are illegal (not all RCs). There is a tension between freedom of contract and the public interest (*Elsley*).

*Elsley*: Courts usually give effect to covenants in the context of a **sale of business**, since Ks would be valueless otherwise. For employment, general blanket restraints on freedom to compete are unenforceable but recognize that protection to trade secrets, confidential info, and trade connections are enforceable. There are often imbalances in bargaining power, leading to results against public interest.

* **Other arguments**:
  + Where there is a **lower level employee**, tends to be more reluctant to uphold restrictive covenants. Where the k is not truly negotiated (thrust upon employee), less likely to uphold restriction (the covenant).
  + Where there are **other service providers** nearby, court is more likely to uphold restriction – the covenant (since public interest is not harmed).

**Restraint of Trade**: one party agrees to a restrictive covenant not to work in or use their talents, skills or knowledge in a given area (possibly everywhere) for a given period of time (possibly forever) → CL is not jazzed on this type of agreement

* Your promise to tie your own hands and not do something is costing the public. Manifests itself in employment contracts or businesses being sold to another business.
* If the restraint of trade occurs between two equals, it is often presumed as okay. Usually comes about in a situation where there is a power imbalance.
* Another example would be “I am not going to sell any product but yours” – if in a small town then this would restrain trade.

#### KRG Insurance Brokers v Shafron, 2009

(*D signed covenant saying he can’t work in insurance in the “Metropolitan City of Vancouver” but area not specifically defined – that term doesn’t mean anything*)

* **Restraints of trade contrary to public policy at CL b/c they interfere w/individual liberty and exercise of trade should be encouraged & free**
* ***Prima facie* presumption that restraints** **are** **unenforceable**
  + Exception: where the restraint of trade is found to be reasonable – **onus on party seeking to enforce covenant to show reasonableness**; absent a reason for the restriction, covenant not to compete will be illegal
  + How to determine **reasonableness:** geographic coverage, period of time it’s in effect, extent of activity prohibited
    - Terms must be unambiguous to be reasonable. Ambiguous = *prima facie* unenforceable.

**Blue Pencil Severance:** effected when the offending party can be severed by literally crossing it out w/a pencil. Part removed must be **clearly severable, trivial, and not part of the main purport** of restrictive covenant

**Test:** Only used if obligations are sensible and reasonable **in itself** that the parties would have unquestionably agreed to them w/o varying other terms. Can only be used if the judge can draw a line through the portion they want to remove without affecting the meaning of the remainder.

* Application of severance is restrained → parties have right to contract freely and determine their rights/obligations
* Also invites employers to draft overly broad restrictive covenants, leaving it to the courts to chop it down

**Notional severance:** re-writing or reading down an illegal provision in a K to make it legal & enforceable while preserving the intentions of the parties as much as possible

→ Court says this has no place in restrictive employment covenants b/c no solid test for reasonableness, and it invites employers to write overly broad restrictions and have the court do the work in making it legal

*Shafron* is odd, since blue-pencil would work quite well. Could just draw a line through “Metropolitan”. If we are seeking to uphold the intentions of the parties as much as possible, blue pencil is less of an intrusion compared to striking out the RC in its entirety.

Instead, they decided that the covenant was unenforceable for ambiguity.

## EFFECTS OF ILLEGALITY

**Historically:** illegality meant that K was void, or at least unenforceable

**Basic Effect**: court won’t enforce K; better to think of consequence as unenforceability rather than K being void b/c in some cases of illegality, 1 party can enforce the K but other can’t

* Can make a K:
  + Void (traditional)
  + Voidable
  + Unenforceable
  + They can be adjusted or severed.

**Purposive Approach** (***Still***): Fashion a remedy that keeps w/ purpose of the statute

#### Still v Minister of National Revenue, 1998

(*S genuinely & mistakenly thought she had proper papers to work in Canada. Worked & paid unemployment insurance premiums. Laid off, applied for unemployment benefits – denied as illegal worker*) → affirms **modern approach** to dealing w/illegality

**Old Approach:** If formulation or making of K is illegal, K = void; if consequences of K are illegal K not void, but can be argued it’s unenforceable – courts can find a way around unenforceable K through restitution or:

1. Where the party claiming for return of property is less at fault
2. Where the claimant ‘repents’ before the illegal K is performed
3. Where the claimant has an independent right to recover (ex. recovery through tort)

**Modern Approach:** Whether the illegality is direct or indirect, can argue K is not void

→ **Purpose of the law (legislative purpose) is considered & how it is best served in a specific purpose (therefore very predictable)** [must go to court for this]

* Relief is not available if it would have the effect of undermining the purpose or object of a statute
* If statutory prohibition goes to **performance** of K, not its formation, case falls outside illegality doctrine
* Choices for remedy = void, voidable, unenforceable or a combo

“Where a K is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so”

# Remedies

* Consideration is always on an obligation-by-obligation basis (consideration is not for an entire contract but for an obligation)
* There is a limit to the amount/type of damages you can get
* For the primary obligations, liability is strict – you must perform it
  + But the damages you get by way of remedial obligation is by a certain extent based on fault
* Damages from breach of contract are presumptively to compensate from a loss that comes from the result of a breach of rights
* Damages are therefore compensatory – they compensate for the value of the primary obligations
  + You are not supposed to be better off with the damages than you would have been otherwise
  + The damages are compensatory
  + They are compensatory for YOUR LOSS, not for GAIN
* What do we mean by loss?
  + If you had a contract for $35 that gives you $53 worth of goods, but you have shoddy goods that are worth $17, then you would need to compensate $36
  + K Price = $35
  + Value of goods expected = $53
  + Value of goods received = $17
  + Damages should be the difference $36
  + But let’s say you also incurred capital costs due to this issue
    - Let’s say the person was planning on building a shed with these goods
    - Let’s say the shed costs $1200 but that is now wasted because of the deliverance of the shoddy goods
  + Generally the onus is on the plaintiff to prove what their losses are
* There are forms of damages that do not compensate, but punish – punitive damages. No cases on this in the casebook.
* Damages are not calculated, they are assessed. Not an exact accounting process. Just looking at fairness mostly.

|  |  |  |  |
| --- | --- | --- | --- |
| **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 remedy  Order to perform k  Keeps 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 remedy  Money substitute for specific performance or injunction |

* There is a right to CL remedies (*damages*), but must argue for equitable (*specific performance, injunction*) remedies (there is no right to them as they are discretionary)
* CL tends to build things; equity tends to destroy or modify things.
* Because most of the excuses doctrines destroy obligations, they are better thought of as forms of relief rather than remedies. A remedy is typically an alternative obligation that is imposed on the other party. True remedies concern what is in the k. It is not truly a remedy to say that one is relieved from one’s obligation.
* Excuses concern the context of the k that gives rise to relief. Occasionally, we got into the content of the k (unconscionability and to a certain extent frustration and undue influence). But, must be content in association with surrounding circumstances. To compare with termination, the obligations are ended because of what is in the k. Termination focuses on the content.
* Termination also is not a remedy, as it ends obligations.
* For remedies, we focus on the specific obligation. REMEMBER TIMING when assessing remedies.

As soon as a primary obligation is breached = **right to damages**

* Damages in Ks: court looks to the future and awards $$ that puts party in position that it would have been in had the promises been fulfilled (vs. torts, which is backwards looking – meant to restore party to position they were in before tort occurred)
* Parties can oust CL remedies by agreeing expressly on damages provisions = **liquidated damages**

**Overarching Principle of Damages:** COMPENSATION – no more, no less → point is to compensate party to point where the K would have got them if it had been fulfilled

**Normal Rule of K Recovery:** measures damages by value of promised performance

**Characterizations of Damages:**

1. **Interests Protected**
   1. Expectation interest = $$ expected to get or save from K (profits)
   2. Reliance interest = expense incurred b/c innocent party relied on K (expenses)
   3. Restitution = tend to be a debt owed by innocent party

\*\*Expectation & reliance damages tend not to be both awarded – 1 or the other (***Sunshine v The Bay***)

1. **Overarching** 
   1. General
   2. Specific
2. **Heads of Damage**

**→** Loss of profit, wasted expenditure, interest, etc.

## Damages = Interests Protected

#### Fuller and Purdue, “The Reliance Interest in Contract Damages” (p. 783)

**3 Types of Damages:**

* **Expectation**
* **Reliance**
* **Restitution**

**They argue:** goal of K remedies is to promote market activity. To further this goal K law should protect reliance *interests* of non-breaching parties. To protect reliance interests K law should award the expectation *measure* of damages.

### Expectation Interest

Aims to **put innocent party in as good a position as they would have been in had K been fulfilled** = ruling principle for breach of K

* Aspect of **distributive justice** – no longer merely seeking to heal disturbed status quo, looking to bring it into a new situation
* Promotes market activity
* **Value of expectancy** = position you would have been in if K finished
  + Ex. lost profits – sometimes hard to quantify
* Weakest argument = disappointment in not getting what was promised
  + Arouses sense of injury
  + Enforcement of promises is important – discourages breach of K
  + Purpose = penalizing breach (not compensating P)
* Rule of “avoidable harms” = P is protected only to extent that he has in reliance on the K forgone other equally advantageous opportunities for accomplishing the same end
  + Qualification on the protection accorded the expectancy
* B/c it’s an easier measure of recovery vs. reliance interest = more effective sanction against K breach
* Also important to promote & facilitate reliance on biz agreements

**Reasons why law protects Expectation interest:**

* Psychological: breach of promise arouse in the promisee a sense of injury → whether reliance has actually occurred or not is irrelevant – promisee has formed an attitude of expectancy such that a breach of the promise causes him to feel that he has been “deprived” of something which was “his”
  + Says the sentiment is a uniform one so law has no occasion to go back on it, but criticism is that the law does go back on
* “Will Theory”: views contracting parties as exercising, so to speak, a legislative power, so that the legal enforcement of a K becomes merely an implementing by the state of a kind of private law already established by the parties
* Economic/Institutional Approach: essence of a credit economy lies in the fact that it tends to eliminate the distinction between present & future (promised) goods
  + Credit significant institution – inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property & breach of promise is injury to that property
  + Criticism: promise has present value b/c law enforces it. “Expectancy” is not the cause of legal intervention it’s the consequence of it

**Summary –** juristic explanation rests protection accorded the expectancy on

1. The need for curing & preventing the harms occasioned by reliance, AND
2. On the need for facilitating reliance on biz agreements

### Reliance Interest

Aims to **put innocent party in position they would have been in had they not entered into K (**position pre-K)

* Good for when P hasn’t suffered loss measureable by expectation interest or has been unable to prove/establish expectation losses w/requisite degree of certainty
* P can also seek these damages if they will get more $$ this way than through expectation or if expectation measures difficult to value monetarily
* Can’t claim reliance to get out of a bad bargain

2 Ways of Looking at Reliance:

1. Compensation for wasted expenditure – P may have incurred expenses b/c they were relying on other party to perform their obligations – where that party fails to perform, some or all of P’s expenditure is wasted
2. Way of using $$ to undo the loss P would have avoided if they’d not entered into K in the first place

**When expectation interests can’t be determined, reliance interests should be awarded**

#### McRae v CDC, 1951

* **Key Q: has there been any assessable loss resulting from breach of K complained of?**
  + This case there is something which can’t be assessed (potential profits from salvage tanker)
* Purpose of awarding damages is to put P in position they’d be in if K had been performed (expectation) – when it can’t be quantified, court will look to reliance damages
* Claim for wasted expenditure must convince court that $$ was **truly wasted** – can’t claim if you would have incurred costs anyway, or if you can use it elsewhere
  + In this case fact that expense was wasted flowed *prima facie* from fact that there was no tanker (first fact = damage; 2nd fact = breach of K) → **Burden of proof** shifts to CDC to establish that, had there been a tanker, expense incurred would equally have been wasted

**Both reliance and expectation damages can’t be awarded unless it won’t overcompensate**

#### Sunshine Vacation Villas v The Bay, 1984

*Bay reneged on deal to allow P to become exclusive travel agency in several of its stores*

* Can’t get both if = double compensation
* If profits are too difficult to quantify, reliance damages awarded instead
  + In this case SV didn’t establish that loss of profits award would have exceeded expenditures, so expenditures = appropriate amount to award as damages for breach
* Onus on P to show profits > reliance
* Onus on D to show P’s expenditures to date of breach less than net loss which would have been incurred had the K been completed

### Restitution Interest

Aims to **give back what the innocent party transferred to the breaker of the K (disgorge D of value he received from P)**

* **Object:** Prevent gain by a promisor defaulting at the expense of the promisee (i.e. D-based)
* Can involve both losses occurred & gains prevented (**disgorgement damages**)
* Strongest case for judicial intervention

**2 elements;**

1. **Reliance by the promisee**
2. **Resultant gain by the promisor**

In assessment of damages you **measure the extent of the injury**, determine whether it was **caused** by D’s act, and ascertain whether P has included the **same item** of damage twice in his complaint

This form of damages is common for fiduciaries since they are not meant to have any gain (breach of fiduciary duty)

**Restitutionary damages can be awarded where P has a legitimate interest in preventing D from profiting**

#### Attorney-General v Blake, 2001

*British spy becomes agent for USSR then gets sent to jail for leaking secrets. Busts out of jail & writes book about it. AG sues b/c spy K had a term saying he couldn’t divulge info in books or press*

* Restitutionary damages looks at what D has (unfairly) gained or retained as profit as a result of their own breach
* Guide for Restitutionary Damages:
  + Did P have legit interest in preventing D’s profit-making activity and depriving him of profit?
    - **Did D profit by doing exactly what he contracted not to do?**
* **Account of profits (disgorgement of D) only appropriate in exceptional circumstances,** where other remedies insufficient
* **Held:** For P – AG has legitimate interest in D not profiting by spilling secrets. Publisher now pays P, not D.
* *The main argument against availability of restitutionary damages, advanced by Lord Hobhouse here, will be uncertainty. This will have unsettling effect on commercial ks where certainty is important. This is not well founded. It is only available in exceptional circumstances. Perhaps we could argue that restitutionary interest damages would be larger (in certain cases), and hence would deter breaches more effectively. Agreements should be protected by the courts.*
* **Criticism:** Lord Nicholls does not ID any general principles to allow claims in other contexts. Restitutionary interest discourages efficient breach. Efficient breaches are good and should be encouraged—both parties benefit, as does the overall economy. Moreover, nearly every P will claim they has a “legitimate interest” in preventing D’s profit-making activity.

## Damages – Quantification

* There is no certainty about the types of loss – who is to say what the figure is? It is difficult to come up with a figure because it is so ambiguous.

**General Damages:**

* = (market value of what was supposed to be delivered) – (market value of what was delivered) OR
* = (market price that innocent party paid) – (K price that innocent party was supposed to pay)

When K is broken, P is an innocent party, court will assist P when possible BUT **burden of proof is on P to satisfy court as to amount lost by virtue of D’s breach**

* Assumed that incorrect goods delivered have no value – up to D to establish that they have some market value

**If information is brought into the court to show the loss sustained, then the court will take that into account**

### Speculations & Chances

* Depends on how speculative chances of gain were had K not been broken as to whether damages will be awarded

#### Chaplin v Hicks, 1911

(*B/c of breach of K by organizer of acting/beauty contest, P (1 of 50 finalists) was unable to attend a meeting where she would have had a chance to be one of the 12 winners chosen)* → **If there is a breach of K, P has right to damages even if they are impossible to calculate**

* Court accepted it was impossible to say P would have been one of the winners (had ¼ chance) & that she couldn’t have sold her chance b/c it was personal to her BUT jury might say that if her spot could have been transferred it would have been valuable
* **Fact that damages can’t be assessed w/certainty doesn’t relieve wrong-doer of necessity of paying damages for breach →** jury must do it’s best, even if it’s guesswork

#### McRae v CDC, 1951

→ court refused to award any damages for loss of profit b/c chance of gain was too speculative – distinguished from ***Chaplin*** by saying:

* “Broken promise in ***Chaplin*** was, in effect, ‘to give P a chance’; here the **element of chance lay in the** **nature of the thing contracted for itself**”
  + ***Chaplin***: very subject of K was giving P chance to win contest
  + ***McRae***: subject of K was provision of wrecked tanker that only indirectly led to chance of profit
    - This distinction can be criticized – only point of bidding on tanker was potential profit from its salvage & P deprived of that chance in same way ***Chaplin*** was deprived of chance to win

### Injured Feelings, Disappointment, Mental Distress

* Difficult to quantify damages where what results from breach are injured feelings or other emotions
* **Traditional** CL approach: these types of losses couldn’t be compensated for in damages claim
* **Now:** increasingly common for courts to award compensation = **mental distress damages**
  + **Important = purpose** (or at least 1 of the purposes) **of K was opposite emotion to that caused by breach**
* Mental distress damages should be situated w/in general *Hadley* principle that such a loss have been in the **reasonable contemplation** of the parties (***Fidler v Sun Life Assurance Co of Canada, 2006***)
  + Test to prove Mental Distress Damages:
    - That an object of the K was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties
    - That the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation

***\*\**Bruce’s Fave Case\*\***

#### Jarvis v Swans Tours, 1973

(*J bought 2 week holiday package from ST, ST had a brochure in which various assurances were provided. Holiday didn’t live up to brochure by a long stretch, on return J sued ST for damages, including failure of holiday to meet expectations generated by tour company through its brochure & mental distress/aggravation he experienced on holiday & after*)

* **Denning:** statements in brochure were representations or warranties → breaches gave J right to damages, Q is what is the amount of damages?
  + **Special damages for mental distress can be recovered in K if they are (1) not too remote and (2) the subject matter of the K was intended to bring about some emotion or enjoyment** (just as damage for shock can be recovered in tort)
    - **Ex.** K for a holiday, or any other K to provide entertainment and enjoyment
      * If other contracting party breaches K, damages can be given for disappointment, distress, upset & frustration caused by breach
      * Purpose of K was not for the food & bed he received, he went to enjoy himself w/all the facilities which ST said he would have
  + **Held:** entitled to damages for lack of those promised facilities & for loss of enjoyment
    - **Still have to conform to normal rules for remoteness of damage in K**

### Minimal Performance

* Issue = where it’s not clear from K exactly what performance the other, breaching party, was to provide (K may have provided for possible range of performance)
* **Principle:** assessment of damages only requires determination of minimum performance P is entitled to under the K

### More than 1 Quantum of Damages

**Cost of Completion**: cost of buying substitute performance from another including undoing any defective performance

**Difference in Value**: market value of the performance the K breakers undertook minus that actually given

#### Groves v John Wunder, 1939

**Facts:** Plaintiff owned a tract of land. Both Plaintiff Defendant operated plants for excavating and screening gravel. The contract at issue here was essentially a lease from Plaintiff to Defendant for a term of seven years. Defendant agreed to remove sand and gravel from Plaintiff’s property and leave the land at a uniform grade, using the stripped overburden for the purpose of creating the grade. Defendant received the Groves screening plant and paid $105,000. Thereafter, Defendant intentionally breached the contract by removing the “richest and best of the gravel” and leaving the premises not substantially at the grade required by the contract. Rather, it was “broken, rugged and uneven.” The cost of bringing the land into compliance with the contract would be upwards of $60,000. However, if Defendant had fully performed by leaving the land at a uniform grade, it would have only been worth $12,160.

**Analysis:** Yes. In certain cases, there is a measure of inequity in forcing a breaching party to tear down a nearly completed structure to remedy a breach. See e.g. Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429 (1921). Recall that Jacob & Youngs v. Kent is the case where the homebuilder inadvertently failed to install only Reading pipe in the house. The homeowner demanded that the pipe be replaced with the Reading pipe he asked for, but the Court of Appeals of New York refused to impose such a harsh and oppressive result on the homebuilder. One rationale for this result is that tearing down a completed structure would create unnecessary waste. However, absent such “economic waste,” the damages awarded must equal the cost of remedying the defect. Otherwise, a breaching party could strategically breach a contract to save money without having to pay out significant damages. This strategy seems to be what Defendant has done here. Hence, Defendant is not permitted to escap  
e his obligations and is therefore liable to Plaintiff for the cost of leaving the property at a uniform grade.

→ **Damages should be for the work to be provided, not difference in value of property being worked on**

Must argue: what was the point of the K? Was it to give the property value, or was it to get work done?

* “Economic waste” is not a claim – owner entitled to what he has lost (i.e. the work/structure he was promised)
* D’s breach of K was willful – allowing him to just pay damages for diff. in value is rewarding bad faith & deliberate breach of K
* In reckoning damages for breach of a building or construction K, law aims to give disappointed promisee, so far as $$ will do it, what he was promised
* No unconscionable enrichment when result is to give one party to the K only what the other has promised

## Damages – Remoteness

* D is legally not responsible for anything past a line of remoteness
* Remoteness probably plays a bigger role in contracts than in tort

Any claims for damages must first go to ***Hadley v Baxendale***, then look at other cases (can cite *Victoria* or *Koufos* after that)

#### Hadley v Baxendale, 1854

(*P had component of steam engine broke causing them to shut down their mill, D was supposed to take component to shop for new part. Delivery of component was delayed due to D’s neglect, callusing P’s mill to remain closed longer than expected. P sued to recover those damages)*

**TEST FOR DAMAGES** →

1. **General Damages** = damages will be awarded for losses that occurred naturally from the breach (anyone else that would have suffered the breach would suffer the same losses) – “may fairly and reasonably be considered arising naturally, according to the usual course of things, from the breach itself” → only terms of K are relevant (not purpose, intention, etc.)
   1. **Comes from the breach of the terms of the K itself**
2. **Special Damages** = damages will be awarded for losses that were contemplated by the parties as a probable result of the breach of K (i.e. will flow from a breach of K from **what the parties know**, not what is in the K) – “anything that may reasonably be supposed to have been in the contemplation of both parties at the time they made the K, as the probable result of the breach”
   1. Special circumstances needed to be **known at the time the K was entered into → P must communicate them to D**
   2. Just need to know general nature, not details/specifics
   3. If I know I should be aware that if I don’t perform an obligation, that you will sustain losses of a certain type, and because I knew that when I entered the K I took on that risk and thus when that risk comes about I must pay for your special damages
   4. What is meant by “probable result”? What is the threshold?

In this case damages were held to be too remote b/c P did not communicate consequence of delay of delivery would mean the entire mill would stay closed (could have had a spare shaft etc.)

* The idea is that the k is about the **conscious allocation of risk** between parties. One is aware of and willing to take on the risks attendant with the special consequences. The parties must have the opportunity to provide for the breach knowing fully of the circumstances. We can contrast this with the thin skull principle in tort law. There, you take the victim as you find him/her.
* Tort is wider: that which is reasonably foreseeable, unless risk is so small that reasonable man would brush it off as far-fetched. The rationale is that, in a k, you can protect yourself against unusual risks by bringing them to the attention of the other. By contrast, there is no such opportunity in tort—tortfeasor cannot complain if he has to pay for some unlikely but foreseeable damage.
* **The special circumstances must be known at the time of acceptance.**
* **The loss cannot just be foreseeable, it must be a *probable* result of the breach.**
* We often see special damages information in recitals.
* ^Hadley is the most important contract case and thus you will have to cite it on your exam
* Special damages are on top of general.
* A claim for damages MUST fit into one of the two branches, and they are cumulative so you can sometimes get them together.
* Just has to fit with at least one of the rules.

#### [BROAD] Victoria Laundry v Newman, 1949

(*P bought a boiler from D, D agreed to deliver by certain day. Boiler was broken during the dismantling process on D’s property & had to be fixed, ended up being delivered late*)

→ Made the **remoteness test very broad** – introduced 6 points on law of remoteness for damages:

1. Governing purpose of damages is to put the party whose rights were violated in same position, as $$ can do, as if his rights had been observed. This would included improbable losses (too harsh) so there are qualifications (2-6)
2. Aggrieved party is only entitled to recover such part of the resulting loss that was **foreseeable at time of K**
3. What was at the time reasonably foreseeable depends on the **knowledge then possessed by the parties**, or at all events, by the party who later commits the breach
4. Knowledge possessed is of 2 kinds – **imputed** & **actual**
   1. Imputed = knowledge that is ordinary/normal/expected (first branch of ***Hadley***)
   2. Actual = special circumstances (2nd branch of ***Hadley***)
5. For the breacher of K to be liable, NOT necessary that he should actually have asked himself what loss might result from a breach. Suffices that, if he HAD considered the Q, he would, as a reasonable man, have concluded that the loss in Q was liable to result (**objective test**)
6. Nor, to make a particular loss recoverable, need it be proved t hat upon a given state of knowledge the D could, as a reasonable man, foresee that a breach must necessarily result in that loss. It’s enough he could foresee it was **likely** to result = **serious possibility or real danger that’s likely to occur**

#### [NARROW] Koufos v Czarnikow (The Heron II), 1967

(*Ship delivering sugar breached K; delivered sugar 9 days late & price for sugar had dramatically decreased in this time. Ship captain ought to have known this was “not unlikely”*)

→ Overrules broad definition of remoteness in ***Victoria*** for a much **narrower definition**

* Test for remoteness in Ks should be more difficult than test in torts – in ***Hadley*** not every type of foreseeable damage could have been intended to be included as either arising naturally or be w/in contemplation of the parties at time of entering into K
* **Crucial Q:** whether, on the info available to D when K was made, he should, or the reasonable man in his position would, have realized that such loss was **sufficiently likely to result** from breach of K to make it proper to hold that loss flowed naturally from breach or that loss of that kind should have been w/in his contemplation

## Damages – Mitigation

P has obligation to keep damages w/in reason → not really a “duty” to mitigate losses, more a factor to be taken into account in assessing whether P’s claim for damages is reasonable

With mitigation you are making an argument – what is **reasonable.** But don’t say DEFINITIVELY. Just say what you think and why.

**If I break my contract with you, then you can sue for breach of contract through common law. You can actually go for the equitable remedy – specific performance – an order that the K be performed.**

**What constitutes mitigation?** – Depends on the type of K & obligations (dependent on the facts)

* Assessment of damages by reference of market prices most obvious & frequent use of mitigation principle in practice (ex. P may pay more for a replacement item/service but is only able to recover what the market was demanding for that item/service)
* P also expected to take steps to stem ongoing losses where they result from breach (ex. malfunctioning piece of equipment will be expected to be repaired/replaced w/in reasonable period of time so as to stanch the losses that result
* Also expected to find replacement K to put unused labour/facilities to use
* If employee wrongfully dismissed, have a duty to find replacement work

**When to Mitigate:**

* **Mitigation not expected until P learns of breach, or w/in reasonable time thereafter (*Asamera***)
* Question arose in Asamera and Southcott – could it be so that mitigation principle requires a plaintiff to pursue a damages claim instead of an equitable claim for specific performance or injunction?
* Is there a point, in other words, that you have to give up your claim for equitable remedy?
* Court says that mitigation constrains the election to go equitable… Compounding damages by letting them pile up while waiting to elect – not accepted by the court as a condoned practice.
* However, when faced with an **anticipatory breach** you can elect for damages right away or elect to continue with the contract (affirmation)…

#### Asamera Oil Corp v Sea Oil and General Corp, 1978

***(****P had rights to shares from D, D broke K. Share prices changed over long trial – when should $$ be calculated?*)

→ **P has obligation to mitigate & keep damages reasonable**

* Required to stem losses as early as is reasonable and to bring your damages claim in a timely way – what is reasonable is determined by the time of breach
* Damages will be recoverable in an amount representing what the purchaser would have had to pay for the goods in the market, less the K price, **at the time of breach**
* P’s own impecuniosity (having little or no money) not a defense for not taking reasonable steps to mitigate
* Damages only awarded for reasonable amount of time

#### **Southcott Estates Inc v Toronto Catholic District School Board**,[2012 SCC 51](http://www.canlii.org/en/ca/scc/doc/2012/2012scc51/2012scc51.html), [2012] 2 SCR 675,

is a landmark case of the [Supreme Court of Canada](http://en.wikipedia.org/wiki/Supreme_Court_of_Canada) in the area of [commercial law](http://en.wikipedia.org/wiki/Commercial_law), with significant impact in the areas of:

* [specific performance](http://en.wikipedia.org/wiki/Specific_performance) in the context of commercial land transactions (together with the related duty of[mitigation](http://en.wikipedia.org/wiki/Mitigation_(law))), and
* [piercing the corporate veil](http://en.wikipedia.org/wiki/Piercing_the_corporate_veil) for[single purpose](http://en.wikipedia.org/wiki/Special_purpose_entity)subsidiaries

## Background

Southcott Estates Inc sued the [Toronto Catholic District School Board](http://en.wikipedia.org/wiki/Toronto_Catholic_District_School_Board) for [specific enforcement](http://en.wikipedia.org/wiki/Specific_enforcement) of a contract to sell it 4.78 acres (1.93 ha) of [land](http://en.wikipedia.org/wiki/Land_lot). Southcott Estates Inc was a subsidiary of Ballantry Homes Inc, a developer,[[1]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-1) and [special purpose entity](http://en.wikipedia.org/wiki/Special_purpose_entity) created just for purchasing and developing the land. The deal was conditional upon Southcott paying a 10% deposit, and the Toronto School Board getting [severance](http://en.wikipedia.org/wiki/Severance_(land)) permission from [Toronto](http://en.wikipedia.org/wiki/Toronto)'s [Committee of Adjustment](http://en.wikipedia.org/wiki/Committee_of_adjustment) before a certain date. However, the Committee refused without reviewing a [development plan](http://en.wikipedia.org/wiki/Development_plan) for the land, which meant severance was not granted in time. Southcott sued for specific performance or damages.

At trial, Southcott stated it never had any intention to mitigate its loss and had not tried, that it had no assets other than the deposit from Ballantry Inc for the deposit, and it was never going to purchase any other land.

### Majority opinion

[Karakatsanis J](http://en.wikipedia.org/wiki/Andromache_Karakatsanis) began by summarizing the principles for mitigation previously adopted by the Court in *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*[[10]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-11) where [Lord Haldane](http://en.wikipedia.org/wiki/Lord_Haldane)'s observation was endorsed:

|  |  |  |
| --- | --- | --- |
| **“** | The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.[[11]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-12) | **”** |

The principles have since been refined in further cases at the Court, as well as at the Federal Court of Appeal.[[12]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-13)

Southcott had argued that, as a single-purpose company, it was impecunious and unable to mitigate without significant capital investment of the parent company or without the corporate mandate to do so. In addition, it would be reasonably foreseeable to those contracting with a single-purpose corporation that such an entity would have finite resources and a confined corporate mandate.[[13]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-14) This was held to be insufficient:

* The claims relating to specific performance and damages were premised upon resources that were not tied up as a result of the breach alleged, which in this case did not affect Southcott’s ability to obtain capital.[[14]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-15)
* In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations.[[15]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-16)
* As a separate legal entity, Southcott was required to mitigate by making diligent efforts to find a substitute property, because those who choose the benefits of incorporation must bear the corresponding burdens, including the duty to mitigate its losses.[[16]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-17)

*Asamera*, when read together with *Semelhago v. Paramadevan*, holds that it "cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases,"[[17]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-18) and specific performance will be available only where money cannot compensate fully for the loss, because of some “peculiar and special value” of the land to the plaintiff.[[18]](http://en.wikipedia.org/wiki/Southcott_Estates_Inc_v_Toronto_Catholic_District_School_Board#cite_note-19)

## Time Measurement of Damages

At **CL damages** calculated **at the time of breach**

* **Damages in lieu of specific performance** calculated at **time of judgment**

#### Semelhago v Paramadevan, 1996

(*P buys house from D, D breaks K. P wants SP or damages. Market value of house rose from $205K to $325K in between breach & trail. Which price should be used?*)

* **General rule: use value @ time of breach so P can buy goods in the market**
  + **BUT** if P asks for specific performance K is ‘saved’ as D can deliver at any point before judgment – then the judgment becomes when the K is broken if no specific performance delivered

## Liquidated Damages, Deposits, and Forfeitures

Parties can try to avoid above complications by agreeing in advance, at time K is entered into, what the damages will be in event of a breach = **liquidated damages**

* CL principles fill in the blanks where parties haven’t agreed to oust CL assessment completely
* Still subject to overarching principle of damages that damages are meant to compensate for failure to perform primary obligation, and no more
  + Not meant to put P in better position than they would have been had primary obligations been performed, also not meant as a threat to compel other party to perform to avoid more onerous penalty

If liquidated damages clauses are there to hold a party *in terrorem* or to overcompensate = **penalty clauses**

* Liquidated damages is not a damages claim. There is not mitigation, remoteness. It is actually a debt claim.
* LD may deal with only certain claims or may be meant to exhaust any damages claim under k. Interpret. CL principles fill in the blanks.
* Both LD and CL damages are simply meant to substitute for primary obligation. LDs are secondary obligations. Not meant to punish. Penalties are for the state to impose, not individuals to impose on others.
* LD will not be enforced if it puts P in better position than if obligations were performed. Simply go to CL.
* The value of the LD (quantum) has to be justified such that it is worth what the primary obligation was worth.
* Liquidated damages are faster and simpler. However, it is not easy to come up with a figure. It is supposed to be a genuine pre-estimate of damages. Not used much as it is difficult to defend.
* A LD clause assessment is a question of construction decided on terms and circumstances, judged at the time of making k, not time of breach.
* K may call for higher payments in certain events. Includes acceleration clause. This is not part of secondary obligations and so the law on penalties does not apply.

### Liquidated vs. Penalty

#### Shatila v Feinstein, 1923

(*P buys wholesale biz from D. K said D can’t work in that biz in that city for 5 years and that if this is breached, D must pay $10k in liquidated damages for each breach. D buys shares in another company, becomes their director*)

→ **Liquidated damages must be a genuine pre-estimate of damages**

* **Simply calling something “liquidated damages” won’t preclude the court from finding it a penalty**
* **If the sum is larger than any actual damage that could possibly arise, it is not considered to be a bona fide pre-estimate of damages and will be found to be a penalty. Penalties are unenforceable.**
* **If there is a fixed sum for the breach of a number of stipulations of various degrees of importance, a presumption is raised against the sum being treated as liquidated damages.**
* **[Presumption can be rebutted if it is shown on the face of the agreement, or on evidence, the parties have taken into consideration the different amounts of damages that might occur and arrived at an amount they felt proper.]**

**Penalty vs. Liquidated**

**Q of construction** to be decided upon the terms & inherent circumstances of each particular K, judged **at time of making the K, not at time of breach**

**Penalty If:**

* Sum stipulated for is extravagant and unconscionable in amount in comparison w/greatest loss that could conceivably be proved to have followed from the breach
* Breach consists only in not paying a sum of $$ and sum stipulated is a sum greater than sum which ought to have been paid
* **Presumption** (but no more) that it’s a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serous & others minimal damage
  + Can be rebutted if it’s shown on the face of the agreement, or on evidence, that the parties have taken into consideration the diff. amounts of damages that might occur and arrived at an amount they felt proper

Sum can be liquidated **damages** if consequences of breach are such that make precise pre-estimation impossible

**Law re: penalty clauses = equitable → protects one of the contracting parties, not both**

* Equity will look to see who wanted the penalty clause in the K (likely the stronger party) and who is treated unfairly by its not being a genuine pre-estimate of actual damages (usually the weaker party)
  + Weaker party, even though they’ve acted wrongly in breaking K, can ask equity not to enforce penalty clause
  + If weaker party is fine w/the clause, they can affirm the K & clause; party who put clause can’t go to equity and ask them to not enforce it

#### JG Collins Insurance v Elsley, 1978

(*E sold insurance biz & entered into non-compete clause which stipulated that in event of breach, E would pay “as liquidated damages” $1k. There was a breach and insurance company claimed $1k clause not enforceable as it was a penalty clause b/c it was fixed sum for breach of clause that could have varying degrees of seriousness re: consequences of breach. Court refused to intervene*)

→ **Penalty clauses can be upheld if used as a cap to limit damages**

* This is an employment contract with a restrictive covenant in it
* **P probably should have argued this as a limitation clause instead…**
* Power to strike down a penalty clause interferes w/freedom of K and should only be used for the purpose of preventing oppression of the party that has to pay
* If one party can use the penalty to intimidate, can’t ignore it when it turns on them
  + If actual loss greater than penalty, party in breach only has to pay the penalty
* A penalty is a **cap** on damages, NOT a way to increase them → an agreed sum = cap regardless of whether it’s damages or penalty

**Upholding Agreed Damages If Possible:**

Argument **against** the principle that penalty clause ought not to be enforced is principle that says **contracts should provide certainty & predictability to parties**

* Liquidated clauses does that → courts should write it off as a penalty clause too quickly
* Courts usually generous in treating the parties as having acted in good faith in this matter → figure can be significantly out in terms of actual loss occasion by the breach, as long as it appears that it was a genuine attempt at a pre-estimate of loss
  + A figure clearly picked out of the air, a fanciful figure or preposterously high will all fall afoul of this test & will be classified as a penalty clause

### Formula for Liquidated Damages

**Formula Instead of Fixed Sum:**

#### HF Clarke Ltd v Thermidaire Corp, 1974

(*Breach of covenant against competition clause not to sell competitors products, remedy stipulated as “gross trading profits”*)

→ **Formulas for liquidated damages must be reasonable and fair**

* If parties intend to be bound by a liquidated damages clause, they must take into account notions of **fairness and reasonableness** (to be judged by the court)
* Even if a formula is used, must be able to defend its results as reasonable
* If formula is dependent on time, important that P brings the claim w/in reasonable time

**Comparison w/Exclusion/Limitation Clause:**

* Exclusion/limitation clause can be seen as flip side of a penalty clause in some cases – limitation clause will be an attempt to limit amount of damages that will have to be paid in event of a breach; penalty generally attempt to get too much by way of damages
  + Both derogate from basic principle of damages – compensation, no more, no less
* CL ascertains whether parties in fact agreed to the provisions (was there notice, was the provision meant to apply in particular context etc.) – if there was notice & agreement, CL would enforce the provision
  + Equity is different:
    - For liquidated damages that are too greedy, uses penalty doctrine
    - Limitation clause = doctrine of unconscionability (and public policy)
  + In practice much easier to challenge clause for too much in damages than a limitation clause

### Deposits & Forfeitures of Deposits

* **Deposit** = preliminary payment often used to confirm acceptance of a K, to be acceptance itself, or to trigger the other party’s obligations → used as part payment of total purchase price
  + Has characteristic of primary obligation of payment, but also a condition precedent to other party’s obligations becoming enforceable → if party making payment fails to complete payment obligation after having paid deposit, deposit is forfeited by way of remedy to party who has received it
  + Damages claim can be made by that same party but credit would have to be given for amount of the deposit that has been forfeited → in this way deposit forms part of remedies (secondary obligations) of party who has paid it
* Whether there is a deposit and whether it can be forfeited on breach is up to the parties to decide in the K – usually “deposit” implies forfeiture in event of default, but doesn’t have to
* Parties can also express intention to have payment be forfeited w/o using “deposit”
* If an amount of $$ is paid and it’s not a deposit or otherwise to be forfeited on breach, then if K is ended, the party who has paid the $$ might be able to claim it back, subject to a cross claim in damages

#### Law and Equity Act, s. 24

→ Court may relieve against all penalties & forfeitures, & in granting relief may impose any terms as to costs, expenses, damages, compensations & all other matters that the court thinks fit

#### Stockloser v Johnson, 1954

(*P buys stuff from D by installments, clause in K says D = owner until all payments made, P failed to pay once near the end of K & then sued to recover previous payments, saying clause was a penalty*)

→ **Forfeiture clauses have no remedy at CL (but possibly w/equity)**

* Judge rules this is not a penalty, D seeks to keep $$ that already belongs to him
* **If there is no forfeiture clause**: as long as seller says buyer can still finish K, buyer can’t get his $$ back
  + If seller rescinds, buyer can get his $$ back
* May have a remedy in equity by ordering seller to pay back the $$
* **Requirements for court to use equitable remedy:**
  + (1) Forfeiture clause must be of a **penal** nature (i.e. sum forfeited out of proportion to the damage)
  + (2) It must be unconscionable for the seller to retain the $$
* **Decision:** For D. P was irresponsible with his $$$ so it is not unjust for D to keep it. May be able to claim through equity.
* Consider: 1) is the deposit meant to be kept in the event of a breach? 2) is the court able to give any relief.
* Usually, “deposit” implies forfeiture in event of default, but this can be changed by the parties. If money is not meant to be forfeited, payor can sue for it back.
* Denning says buyer cannot recover at CL. But, equity comes along (same as mistake, estoppel, and now deposits). Court can order remedy as it sees fit.
  + First, must be of a penal nature (this is dubious, as it brings in secondary obligation concepts).
  + Second, “unconscionable” in the sense of simply unjust in equity.

### Debt

**CL remedy = claim to have enforced a contractual promise to pay $$ by one K party to the other**

* **CL compels promisor to do the very thing which he has promised (pay the specified amount of money) – different from damages in which CL doesn’t compel the undertaking party to specifically perform his undertaking but compels him to pay a pecuniary substitute for such performance**
* Debt and action for the price are not usually thought to be subject to diminution on basis of a “duty” to mitigate → not a $$ substitute, they directly relate to primary obligation which was a fixed amount of $$
* Might be damages in addition, but debt amount itself is not damages

# Equitable Remedies

Two types:

1. **Injunction:** order of the court to a party of the K to do or not do something (perform an obligation or not break it)
2. **Specific performance**: order by court to a contracting party to perform the K obligations – very much like an injunction to perform the whole K
   1. Common claim in context of contractual disputes

**NOTE**: Neither will be ordered for labour Ks (***Warner Bros v Nelson, 1937***)

**If there’s an order for equitable remedy, K can’t have been terminated, it’s affirmed** (***Semelhago***)

**Factors Governing Availability of Remedies:**

* **Consideration of the CL matrix** 
  + Are CL remedies adequate?
* **Adequacy of damages** 
  + Would damages be inadequate?
  + Historically, real property treated as something unique that $$ could not substitute for – increasingly that is being challenged (condo etc.) → especially the case if the land is to be used as an investment or for early resale (***John Dodge Holdings Ltd v 805062 Ontario Ltd, 2003***)
* **Applicant must come “with clean hands”**
  + Equity looks at P’s behaviour & position re: K
* **P’s own conduct in respect of K obligations**
  + 2 situations where court won’t grant SP:
    - If P is in breach of his own obligations
    - Where agreement is one which involves continuing or future acts to be performed by P, he must fail unless he can show that he’s ready & willing on his part to carry out those obligations
* **Timely request**
  + If P hasn’t acted in timely fashion, P guilty of **laches** (delay)
  + Factors to consider:
    - Length of delay
    - Nature of acts done during the interval
* **Hardship to D or to 3rd parties**
  + Court will protect interests of a 3rd party who has an existing K w/D, which could not be performed if K w/P were ordered performed
    - Even if K w/ 3rd party is later, if that later K has been performed & 3rd party is a *bona fide* (“good faith”) purchaser w/o notice of P’s claim, then SP won’t be ordered so as to upset its position
* **Obligations extending over a period of time** 
  + SP generally won’t work b/c obligations said to need constant supervision (***Beswick*** = **exception** b/c obligations weren’t complicated [just fixed payments])
* **Obligation to perform a personal service** 
  + Generally court won’t order equitable remedy where it would mean ordering D to perform a personal service (disinclined to supervise performance over period of time)
  + Court ought not enforce performance of negative obligations if their enforcement will effectively compel the servant to perform his positive obligations under the K
* **Mutuality** 
  + Court won’t order equitable remedies if both parties can’t get the same remedy

#### John Dodge Holdings v 805062, 2003

(*P agreed to buy land from D for development, D didn’t complete sale so P sued for SP*)

**Decision**: for P. At time K was broken, land had a unique proximity to shopping malls.

→ **SP – test for uniqueness of property**

* For real property, SP can be granted if person seeking it can show that the property in Q was unique **at the date of the actionable wrong**
* Look to ***Semelhago***: “The property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended”
* Only obligated to mitigate damage by seeking alternatives if you’re NOT entitled to SP

#### Warner Bros v Nelson, 1937

(*D had K w/P saying she’d only act in their movies but she wants more $$ so she breaks K. P wants injunction to restrain D from acting in breach, and damages*)

**Decision:** For P. Injunction given for 3 years.

→ **Injunction for personal services**

* Courts won’t enforce a positive covenant of personal service, even if it’s expressed in the negative
* Court won’t enforce an injunction to enforce a negative covenant if the effect of doing so would be to drive the D either to starvation or to specific performance of the positive covenants.
* Court won’t enforce an agreement by which one person undertakes to be the servant of another.
* Here, D can do something else during the length of the k if she doesn’t want to make movies for P. She is only barred from being in the movies of other companies.
* Here, damages aren’t good enough – the thing is of a particular value “the loss of which cannot be reasonably or adequately compensated in damages” 🡪 injunction is appropriate.
* Court should make the period of the injunction such as to give reasonable protection and no more to the P against the ill effects of them to D’s breach of contract