**CONTRACTS CAN**

Sarah Hannigan – April 2016 (MacDougall)

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| FORMATION OF THE K |

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| **INGREDIENT** | **IMPORTANCE** | **ISSUES** |
| **OFFER** | Indicates readiness to enter K  Sets the terms of the K | Complete enough to form K? / Indicates readiness to be bound?  To whom is offer made? / Has offer been terminated? |
| **ACCEPTANCE** | Agreement to be bound by terms | Unqualified "yes"? / Has it been communicated? |
| **CONSENSUS** | All parties agree at same time to same K | Is simultaneous, subjective agreement even needed? |
| **ICLR** | Shows intention of parties to have a *legally binding* agreement | Public policy reasons for allowing/not allowing ICLR in the context? |
| **CERTAINTY OF TERMS** | IDs clearly what was agreed upon | Can terms be implied to help clarify? / Can principles of interpretation or rest of K help? / Are some "terms" irrelevant? |
| **WRITTEN RECORD** | Sometimes req'd by statute  Useful for evidentiary purposes | Is the written record complete? |

**Bilateral K** 🡪 Both parties have obligations at *existence*; the offer determines the obligations of both parties

**Unilateral K** 🡪 Only one party has obligations at *existence*; offer usually made by that party

## OFFER

### Offer & Invitation to Treat

**(1)** *Are all the details of the eventual K clear or can be worked out from the communication that has been made?* (*Can Dyers*)

**(2)** *Will treating the communication as an offer lead to absurdity?* (*Carlil v Carbolic Smoke Ball*)

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| ***Canadian Dyers Associat’n Ltd v Burton***(1920), HC. LAST PRICE IS LOWEST I’M PREPARED TO ACCEPT | |
| **Facts:** | Δ: "the last price I gave you is the lowest I am prepared to accept" / π interprets this as an offer → sends cheque / Δ sends draft deed / Δ then denies the existence of a K → returns cheque |
| **Issue** | Did the words and actions of Δ constitute an offer? **YES** |
| **Reasons:**  (Middleton J) | - Test: *Was communication intended to be an offer?*  - π's letter was a statement of readiness which, plainly read, constituted an offer  - Δ's actions were also consistent w/his making of an offer |
| **Ratio:** | - Mere quotation of price = **invitation to treat** (expression of willingness to negotiate)  - Statement of price at which one is ready to sell = **offer** (esp. if accompanied w/support’g actions) |
| ***Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd***, [1953] QB. PHARM | |
| **Facts:** | Δ operated a self-serve pharmacy / Pharmacist supervised transaction at cash desk |
| **Statute:** | *Pharmacy and Poisons Act, 1933* s 17(1) 🡪 Pharmacist must supervise the sale of drugs |
| **Issue:** | Did acceptance occur at sale? **YES**—appeal dismissed. |
| **Reasons:**  (Somervell LJ) | - Customers are not committed to buying an item just b/c they have taken it off the shelf  - Analogy: browsing a bookstore 🡪 no acceptance until offer completed at checkout |
| **Ratio:** | **Goods on display** = invitation to treat (not offer) |
| ***Carlill v Carbolic Smoke Ball Co***, [1893] QB. SMOKE BALL – INFLUENZA – REWARD – OFFER vs PUFF | |
| **Facts:** | Δ advertised reward if you contract influenza after using ball / π uses ball 🡪 contracts influenza / Δ argues that K was too vague & intended to be a "mere puff": no timeline, absurd consequences if ALL accepted |
| **Issue:** | Is this a valid offer (not a “mere puff”)? **YES** |
| **Reasons:**  (Bowen LJ) | - Intended audience (the public) would interpret the ad as an offer to be acted upon  - It's a wide offer, but isn't to the whole world—only those who accept & use the product  - If offeror implies that notification of acceptance isn’t req'd, then performance = acceptance |
| **Ratio:** | Ask: *Would the intended audience interpret this as an offer?* |

### Communication of Offer

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| ***Williams v Carwardine*** (1833), KB. MURDER – REWARD – ULTERIOR MOTIVE | |
| **Facts:** | Δ's brother murdered / victim was with π on night of murder / Δ offered reward for info / suspect beats π / π makes statement "to ease her conscience" → info leads to apprehension of murderer |
| **Issue:** | Did π enter a K w/Δ despite having ulterior motives? **YES** |
| **Reasons:** | - K was open to ANY person who performed its req'd condition 🡪 K existed therefore reward is owed  - π provided information ∴ fulfilled condition 🡪 no need to evaluate π's motives |
| **Ratio:** | Motive is not relevant to the creation of a K. |
| ***R v Clarke*** (1927), Aust HC. MURDER – REWARD – FORGOT ABOUT REWARD | |
| **Facts:** | Crown offered reward for info leading to the arrest & conviction of murderer / Δ provided sufficient info but wasn’t thinking about reward when he gave it (was previously aware of offer, but forgot) |
| **Issue:** | Can a party unknowingly accept an offer by fulfilling its obligations? **NO**—appeal allowed. |
| **Reasons:**  (Higgins J) | - Offer = meeting of the minds  - *Williams v Carwardine* says the motive inducing consent is irrelevant, but the consent itself is vital ∴ there can’t be assent w/o knowledge of offer |
| **Ratio:** | Must have knowledge of an offer to accept it. |

## TERMINATION OF OFFER

### Revocation

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| ***Byrne v Van Tienhoven*** (1880), CPD. POSTAL ACCEPTANCE RULE – REVOCATION | |
| **Facts:** | Δ mailed an offer to sell product to π THEN mailed revocation / π received & accepted offer, then sold product 3rd party before receiving revocation / π sues for breach of K / Δ claims there was never a K |
| **Issue:** | Does the postal acceptance rule apply to revocations? **NO** |
| **Reasons:**  (Lindley J) | - Would be unjust & inconvenient if you had to wait for potential revocation before accepting offer  - Offeror’s intention continued until the offeree received notice of revocation  - Offeror could’ve avoided problems by specifying date and means of communication  - Post office is agent for the purpose of communicating acceptance, but not revocation |
| **Ratio:** | The postal acceptance rule does not apply to revocation. |
| ***Dickinson v Dodds*** (1876), CA. OFFER W/TIME LIMIT – REVOCATION – SOLD TO 3RD PARTY | |
| **Facts:** | Δ made an offer to π w/time limit / 3rd party told π that Δ sold to someone else / π tried to accept the offer within the time limit by communicating to Δ's MIL / MIL didn’t communicate π's acceptance to Δ  π then tried to accept in person--Δ declined, saying "You are too late. I have sold the property" |
| **Issue:** | - Was the offeror bound to leave offer open for time limit? **NO**  - Can it be revoked once communicated to the offeree? **YES** |
| **Reasons:**  (Mellish LJ) | - Communication doesn't necessarily have to be direct--can come from a presumably reliable source  - Even if within time period, hearing that an offer is no longer open means that it has expired  - If you revoke an offer and it's communicated, the offer is closed regardless of a given time period |
| **Ratio:** | - **An offer is closed once revocation is communicated** to the offeree—either directly or indirectly  - Even if an offer is open for a specified amount of time, the offeror is permitted to revoke early. |

Unilateral Contracts 🡪 The outstanding obligations are all on one side—all the other party has to do is accept

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| ***Carlill v Carbolic Smoke Ball Co***, [1893] QB. SMOKE BALL – INFLUENZA – REWARD – REVOCATION | |
| **Facts:** | Δ advertised reward if you contract influenza after using ball / π uses ball 🡪 contracts influenza / Δ argues that K was too vague & intended to be a "mere puff": no timeline, absurd consequences if ALL accepted |
| **Issue:** | In a unilateral K, can an offer be revoked once offeree has performed requisite condition? **NO** |
| **Ratio:** | In unilateral K, offer can’t be revoked once offeree has performed condition & thereby accepted. |
| ***Errington v Errington & Woods***, [1952] KB. LORD DENNING CAN’T REVOKE ONCE PERF OF ACCEPTANCE STARTS | |
| **Facts:** | Father gifted house to son & DIL (Δ) provided they pay instalments / Instalments paid / Father died / Widow claims house |
| **Issue:** | Can a unilateral K be revoked once the offeree has *begun* action of acceptance? **NO** |
| **Reasons:**  (Denning LJ) | - Offer would only cease to be binding if Δ left their obligations incomplete/unperformed  - Δ weren’t req’d to pay, but as long as they continued to perform condition offer can’t be revoked |
| **Ratio:** | In unilateral K**, offer cannot be revoked** after offeree starts **performance of acceptance** |

### Rejection & Counter-offer

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| ***Livingstone v Evans***, [1925] Alta SC. “CANNOT REDUCE PRICE” – COUNTER-OFFER | |
| **Facts:** | Δ offers to sell land / π requests lower price / Δ replies "cannot reduce price" / π accepts @ original price |
| **Issue:** | Was π's counter-offer a rejection of Δ's offer? **NO** |
| **Reasons:**  (Walsh J) | - "Cannot reduce price" = *renewal of original offer*, not rejection of counter-offer  - When language is ambiguous, look @ context, actions of the parties |
| **Ratio:** | Counter-offer = rejection of original offer (unless expressly stated otherwise). |

### Lapse of Time

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| ***Barrick v Clark***, [1951] SCC. SELL LAND – BUYER AWAY – ELAPSED TIME – TERMINATION | |
| **Facts:** | π offered to buy land / Δ telegrammed acceptance, willing to close immediately, but π was away / Δ sold to 3rd party in meantime / π claims breach of K / Δ claims time elapsed = termination of offer |
| **Issue:** | Did the passage of time constitute a rejection of the offer? **YES** |
| **PH:** | Trial court found offer had elapsed; decision reversed by CoA. |
| **Reasons:**  (Etsey J) | - Look @ *context* 🡪 offeree has to accept within *reasonable* period of time  - Δ expressed urgency: "deal could be closed immediately" & "trusting to hear from you asap” |
| **Ratio:** | Offer can terminate via lapse of time—to determine length, look @ factors like: parties’ conduct/language, nature of the goods, and other reasonable indications. |

## ACCEPTANCE

### Acceptance

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| ***Livingstone v Evans***, [1925] Alta SC. “CANNOT REDUCE PRICE” – COUNTER-OFFER | |
| **Facts:** | Δ offers to sell land / π requests lower price / Δ: "cannot reduce price" / π accepts @ original price |
| **Ratio:** | Tradit’l model of acceptance 🡪 one party sets terms & makes offer, other party accepts (can’t add) |
| ***Butler Machine Tool Co v Ex-cell-O Corp***, [1979] CA. **NOT AUTHORITATIVE** LORD DENNING T&C | |
| **Facts:** | π & ∆ negotiating a sale / π’s offer incl’d price variation clause in t&c that would "prevail over any t&c in the buyer’s (Δ) order" / Δ’s reply stated "on the T&C stated thereon" / Δ said its order prevailed / π sued for damages, claiming price variation clause was intended to prevail |
| **Issue:** | Does a counter-offer constitute a rejection of the original offer? **YES**—appeal allowed. |
| **Reasons:**  (Lord Denning) | - π didn’t just accept offer—added things like cost of installation, delivery date etc 🡪 counter-offer  - *Hyde v Wrench* 🡪 counter-offer kills the original offer |
| **Ratio:** | “Battle of the Forms”: sometimes “first shot”, sometimes “last shot” 🡪 look objectively at forms. |

### Communication of Acceptance

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| ***Felthouse v Bindley*** (1862), NS. HORSE – NEPHEW – AUCTIONEER – CONVERSION | | |
| **Facts:** | π discussed buying horse from nephew / misunderstanding re: price / π wrote nephew offering to split the difference / Nephew didn't reply / Δ (auctioneer) accidentally sold horse / Nephew wrote π: "that horse (meaning the one I sold you) is sold" / π sued Δ for conversion / Δ claims horse wasn't his to begin with | |
| **Issue:** | Can silence constitute acceptance? **NO**—appeal allowed. | |
| **Reasons:**  (Willes J) | - Nothing was done to vest π's property in horse 🡪 Nephew only confirmed acceptance post-sale  - Silence as acceptance places an unfair burden on offeree (must confirm rejection?) | |
| **Ratio:** | Silence ≠ acceptance (acceptance must be communicated via notification/action/implicitly). | |
| ***Carlill v Carbolic Smoke Ball Co***, [1893] QB. SMOKE BALL – INFLUENZA – ACCEPTANCE VIA ACTION | | |
| **Facts:** | Δ advertised reward if you contract influenza after using ball / π uses ball 🡪 contracts influenza / Δ argues that K was too vague & intended to be a "mere puff": no timeline, absurd consequences if ALL accepted | |
| **Issue:** | Can an offer be accepted by *action*? **YES** | |
| **Reasons:**  (Bowen LJ) | Notification of acceptance is generally req’d, but here it was implied that performance of the condition was sufficient acceptance w/o notification. | |
| **Ratio:** | An offer can be accepted *by action*, without express notification of acceptance. | |
| ***Brinkibon Ltd v Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH***, [1982] HL. TELEX – WHERE? | | |
| **Facts:** | | British π bought steel from Austrian ∆ / π wants to sue for breach of K, but acceptance was via telex—whose jurisdiction governs? |
| **Issue:** | | In cases of instantaneous communication, where & when is the K established? |
| **Reasons:**  (Lord Wilberforce) | | - Ask: *When was the last countr-offer made into K via acceptance? When was clear consensus reached?*  - Too much variability to establish a universal rule for instantaneous communication  - Note: acceptance occurs where it would be *expected* (e.g. office in Van but happens to visit NK) |
| **Ratio:** | | K is legally binding *when* acceptance occurs& *where* the offer is received. |
| ***Household Fire & Carriage Accident Insurance Co v Grant*** (1879), CA. SHARES – POSTAL ACCEPTANCE | | |
| **Facts:** | ∆ applied for shares in π / Application approved—π sent letter of allotment to ∆ / Letter never reached ∆ / π went into liquidation / π claims ∆ is shareholder and has to pay / ∆ objects | |
| **Issue:** | When offer is accepted via mail, does acceptance occur when letter is sent or received? | |
| **Reasons:**  (Thesiger LJ) | - Post office must be treated as agent of both parties 🡪 regarded as if π had put letter in ∆’s hands  - Offeror can still circumnavigate PAR if so desired  - If no PAR, offeree couldn’t act upon K until he confirmed that notice of acceptance was received | |
| **Dissent:**  (Bramwell LJ)  \*Adopted in *Holwell*\* | - Something isn’t *communicated* unless it has been *received*  - Unfair: *Why should accepting via post relieve offeree of responsibility & cast all loss on offeror?*  - Absurd result: *What if offeree revokes in person, then letter arrives?* | |
| **Ratio:** | **Postal Acceptance Rule (PAR)** 🡪 Acceptance of an offer is effective as soon as it is posted. | |
| ***Holwell Securities v Hughes***, [1974] CA. PROPERTY – NOTIFICATION OF ACCEPTANCE | | |
| **Facts:** | ∆ granted π 6mo option to purchase property, but had to be exercised “by notice in writing” / written notice never received | |
| **Issue:** | Does PAR apply when offeror requests notification of acceptance? **NO** | |
| **Reasons:**  (Willes J) | - Latin origin of “notice” = “making something known”  - PAR is negated when offeror specifies that acceptance must reach him/her  - Court agrees w/Bramwell LJ’s dissent in *Household Fire*; potential absurdities of universal PAR | |
| **Ratio:** | **PAR** doesn’t *always* apply (e.g. when offeror requests notification of acceptance). | |

## CERTAINTY OF TERMS

*Verba chartarum forties accipiuntur contra proferentem* rule 🡪 “words are interpreted more strongly against the

person who uses them”

No “assumption of reasonability” 🡪 parties are assumed to be adversarial

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| ***May & Butcher Ltd v******R***, [1934] KB (HL). **OVERRULED BY *Hillas & Co v Arcos Ltd*** TENTAGE - ARBITRATION | |
| **Facts:** | M&B agreed to purchase old tentage from Disposals Board w/price to “be agreed upon from time to time… all disputes arising out of this agreement will be submitted to arbitration” / M&B made deposit / Parties couldn’t settle on price 🡪 agreement fell apart |
| **Issue:** | Were the terms of the agreement sufficiently defined to constitute a K? **NO**—appeal dismissed. |
| **Reasons:**  (Lord Buckmaster) | - Price—a critical part of K—was left undetermined 🡪 K w/o critical part = no K  - Arbitration clause only applies to completed agreement 🡪 no K therefore doesn’t apply  - *Sale of Goods Act* s 9: If price can’t be fixed by 3rd party, no K is formed 🡪 hence, same result |
| **Ratio:** | A K can’t be formed when a crucial aspect (e.g. price) is undetermined. Agreement to agree ≠ K. |
| ***Hillas & Co v Arcos Ltd*** (1932), HL. TIMBER – OPTION TO RENEW – PRICE REDUCTION – K TO ENTER K | |
| **Facts:** | H&C agrees to purchase timber from A under condition that they also have option of entering a K to purchase more the next yr w/price reduction / Next yr, A refuses to sell the timber w/price reduction |
| **Issue:** | Can you make a K to enter a K? **YES**—appeal allowed. |
| **Reasons:**  (Lord Wright) | - *Verba ita sunt intelligenda ut res magis valeat quam pereat* = “words should be interpreted so as to make the thing they relate to effective rather than perish” 🡪 let’s not be so quick to destroy K  - *Id certum est quod certum reddi potest* = “what can be made certain, is certain”  - Apply **standard of reasonableness** 🡪 *Uncertain about terms?* Look at parties’ intentions  - Parties have relevant trade experience ∴ would’ve known each other’s intentions @ the time |
| **Ratio:** | Agreement to enter K is enforceable—look @ words & *intentions* (overrules *May & Butcher*) |
| ***Foley v Classique Coaches Ltd***, [1934] KB (CA). GAS STATION – PROPERTY – ARBITRATION CLAUSE | |
| **Facts:** | π owned gas station / π sold ∆ property, subject to ∆ buying gas from π / K contained arbitration clause / After 3yrs ∆ wants to purchase gas from other source / π claims agreement was binding |
| **Issue:** | Can a K be binding w/o a stipulated price? **YES**—appeal dismissed. |
| **Reasons:**  (Lord Wright) | - Both parties acted as if there was a K for 3yrs 🡪 ∆ can’t suddenly decide not to adhere to the terms  - Issues re: price should be settled via arbitration as specified in agreement (unlike *May & Butcher*, K is established so arbitration clause applies) |
| **Ratio:** | - Agreement to agree not binding, but *adherence* to agreement makes it binding (*Hillas*: look @ parties’ *intentions*)  - K = binding if crucial element is taken out of party’s control: either specified or delegated to a 3rd party |
| ***Sale of Goods Act***, RSBC 1996, ss 12, 13 PRICE CAN BE SET/LEFT/DETERMINED – REASONABLE PRICE – 3RD PARTY | |
| **Ascertainment of price**  **12** (1) The price in a contract of sale may be  (a) set by the contract,  (b) left to be set as agreed in the contract, or  (c) determined by the course of dealing between the parties.  (2) If the price is not determined in accordance with subsection (1), the buyer must pay a reasonable price.  (3) What is a reasonable price is a question of fact dependent on the circumstances of each case.  **Agreement to sell at valuation**  **13** (1) If there is an agreement to sell goods on the terms that the price is to be set by the valuation of a third  party, and the third party cannot or does not do so, the agreement is avoided.  (2) If the goods or any part of them have been delivered to and appropriated by the buyer, subsection (1) does  not apply and the buyer must pay a reasonable price for the goods.  (3) If the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in  fault may maintain an action for damages against the party in fault. | |
| ***Empress Towers Ltd v Bank of Nova Scotia***, [1991] BCCA. LEASE – MARKET RATE – EVICT | |
| **Facts:** | ∆ entered lease w/renewal clause @ market rate / ∆ exercised option to renew lease: proposed rate of X / π said ∆ could stay if they paid (X + Y) / ∆ objected / π now trying to evict ∆ |
| **Issue:** | Was π req’d to uphold a renewal clause *in good faith*? **YES**—appeal dismissed. |
| **Reasons:**  (Lambert JA) | - If parties say there’s a renewal option at rate to be agreed upon, there’s no enforceable *lease* obligation, but still an implied obligation to *negotiate in good faith*  - π had an obligation to negotiate in good faith 🡪 hence, ∆ can’t be evicted  - Objective benchmark = market rate |
| **Ratio:** | - A renewal option w/objective benchmark = duty to negotiate.  - Agreement to negotiate *in good faith* can be used as shield. |

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| ***Mannpar Enterprises Ltd v Canada*** (1999), BCCA. ABORIGINAL – GOV’T – REMOVE GRAVEL | |
| **Facts:** | π had K w/gov’t to remove gravel from Indian reserve w/renewal clause subject to satisfactory performance & renegotiation / π wanted renewal / gov’t refused / π sued for damages |
| **Issue:** | Did gov’t have a duty to exercise renewal clause *in good faith*? **NO**—appeal dismissed. |
| **Reasons:**  (Hall JA) | - Unlike *Empress Towers*, no benchmark was set (e.g. market rate)  - Bystander Test: Look @ facts & parties’ language 🡪 *Would both likely agree term was implied?*  - Court can’t imply a term only b/c it “seems reasonable”  - “Renegotiation” = broad term 🡪 gov’t reserved itself a broad scope to refuse renewal  - Absence of an arbitration clause = agreement was less binding |
| **Ratio:** | - No objective benchmark (e.g. set price) = no duty to negotiate.  - Agreement to negotiate *in good faith* cannot be used as sword. |

## INENTION TO CREATE LEGAL RELATIONS

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| ***Balfour v Balfour***, [1919] KB (Eng CA). COUPLE – VACATION – ILLNESS – BREAK-UP – MONTLY STIPEND | |
| **Facts:** | π & ∆ went to UK for vacation / π became ill & had to stay in UK as per Dr’s advice / π had to return to his job in Ceylon / ∆ agreed to pay monthly stipend until π returned / broke up / ∆ withdrew support |
| **Issue:** | Can an inter-spousal agreement constitute a K? **NO**—appeal allowed. |
| **Reasons:**  (Atkin LJ) | - Spouses commonly make arrangements, but don’t intend legal consequences  - To say otherwise would overwhelm the court system |
| **Ratio:** | Family/social arrangements are not recognized as legally binding Ks. |
| ***Rose & Frank Co v JR Crompton & Bros Ltd***, [1923] KB (CA). “THIS ARRANGEMENT ISN’T FORMAL/LEGAL” | |
| **Facts:** | π = distributor of ∆’s products / π signed doc saying “this arrangement isn’t formal/legal” / ∆ terminated agreement / π sued for breach |
| **Issue:** | Can a document asserting no legal relation be considered a K? **NO** |
| **Reasons:**  (Scrutton LJ) | Doc expressly shows parties’ clear intention to avoid legal relations |
| **Ratio:** | Presume commercial parties have ICLR *unless explicitly stated otherwise*. |

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| ENFORCEABILITY ISSUES |

## MAKING PROMISES BIND – SEALS & CONSIDERATION

### Seals

**Requirements: (1)** Promisor must affix the seal **(2)** Promisor aware of its significance **(3)** Actual seal (*Royal Bank*)

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| ***Royal Bank v Kiska***, [1967] ONCA. “GIVEN UNDER SEAL…” – NO ACTUAL SEAL – FORMALITY | |
| **Facts:** | ∆ signed doc saying “given under seal…” & “signed, sealed, & delivered in presence of…” but no actual seal |
| **Issue:** | Does a K w/o consideration require an actual seal? **YES** (maj found consideration, ∴ binding K) |
| **Dissent:**  (Laskin JA) | - Actual wax seal may no longer be req’d, but at least a representation of one is  - Words are anticipatory of an actual seal, not a replacement of one  - Formality serves a purpose in law & should hence be preserved  - ∆’s intention to execute sealed doc cannot be binding w/o actual seal |
| **Ratio:** | K without consideration or valid seal = not binding. |
| ***Thomas v Thomas***(1842), QB. DYING HUSBAND – CONSIDERATION – MOTIVE | |
| **Facts:** | Dying husband orally declared house to go to wife (π) / Executors (∆) agreed that π would get prop at 100*l*/mth rent “in consideration of [deceased’s] desire”/ π paid / ∆ eventually tried to evict π b/c no consid |
| **Issue:** | Was there valid consideration? **YES** |
| **Reasons:**  (Patteson J) | - Respect for deceased’s wishes = motive 🡪 motive ≠ consideration  - However, 100*l*/mth rent was sufficient consideration in the eyes of the law 🡪 π keeps property |
| **Ratio:** | Motive ≠ sufficient consideration. |

### Consideration

**(1)** Originate from promisee **(2)** Given at time of promise **(3)** Explicit/implied **(4)** Action/promise of action/no action

### Forbearance

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| ***B (DC) v Arkin***, [1996] Man QB. ZELLERS – ALLEGED THEFT – FORBEARANCE – NO INTENTION TO SUE | |
| **Facts:** | π's son allegedly robbed Z / Δ said they were willing to settle out of court / π paid $225 for damages, then sought to recover b/c ∆ never had a claim against her personally / ∆ argues that payment was binding: π —$225🡪 ∆ ∆—forbearance🡪 π  π argues forbearance wasn’t valid consideration b/c ∆ knew the lawsuit wouldn’t succeed anyways |
| **Issue:** | Can a promise not to sue be consid when no action is seriously intended? **NO**—appeal allowed. |
| **Reasons:**  (Jewers J) | - Forbearance can usually constitute consideration, but here π was misled by ∆’s lawyers  - ∆ knew claim against π wouldn’t work 🡪 π wouldn’t have paid if she had known this |
| **Ratio:** | Forbearance can be consideration UNLESS claims are doubtful or not known to be valid. |

### Past Consideration

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| ***Eastwood v Kenyon***(1840), QB. **MODIFIED BY *Lampleigh v Brathwait*** DOCTRINE OF PAST CONSID. | |
| **Facts:** | π paid for his ward’s education / Ward’s husband (Δ) promised to pay back π / ∆ failed to pay |
| **Issue:** | Can past consideration make a binding K? **NO** |
| **Reasons:**  (Lord Denman CJ) | - Benefit was *voluntary* (not requested by Δ) and “past and executed long *before*” ∆’s promise  - ∆ was “in no way connected w/the property or w/π when the money was expended” |
| **Ratio:** | Consideration isn’t valid if it was given before the promise was made (and to another party). |
| ***Lampleigh v Brathwait***(1615), KB. PARDON FROM THE KING – EXCEPTION TO DOCTRINE OF PAST CONSID | |
| **Facts:** | ∆ asked π to get him a pardon for murder from King / π succeeded to do so / After, ∆ promised π 100£ for his efforts / ∆ failed to pay / π sued / ∆ argued there was no consid for his promise |
| **Issue:** | Can past consideration make a binding K? **YES** |
| **Reasons:** | Past consid can be valid if **(1)** Given as per the promisor’s request;  **(2)** Parties understood the act was to be remunerated; **AND**  **(3)** Payment would’ve been enforceable had it been promised in advnce |
| **Ratio:** | Past consideration can be valid if given as per promisor’s request; exception to *Eastwood v Kenyon*. |

### Pre-existing Legal Duty—Duty Owed to *3rd Party*

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| ***Pao on v Lau Yiu Long***, [1980] PC. SHARE SWAP – DUTY OWED TO 3RD PARTY – COMPLICATED | |
| **Facts:** | π owned shares in SO / FC wanted to acquire SO’s building / Decide to swap shares:  - π promised to retain 2.5M shares for 1yr  - ∆ promised to buy back 2.5M shares @ $2.50ea after 1yr  π realized this was dumb (must sell shares if they rise) / Insisted on *guarantee agreement* instead:  - ∆ to compensate π if shares fell within 1yr  Shares fall / ∆ refuses to compensate for π’s loss / ∆ claims *guarantee agreement* not valid: π merely provided pre-existing duty to 3rd party (π opted for new K w/o giving fresh consid in return) |
| **Diagram:** |  |
| **Issue:** | Can a pre-existing obligation constitute valid consideration when it’s given to a 3rd party? **YES** |
| **Reasons:**  (Lord Scarman) | - A pre-existing obligation to 3rd party does add value: π’s obligation now enforceable by 2 parties  - Same duty owed to 2 people = 2 people have the ability to enforce it |
| **Ratio:** | A pre-existing obligation to a 3rd party can constitute fresh consideration (broadens *Lampleigh*). |

### Pre-existing Legal Duty—Duty Owed to *Promisor*

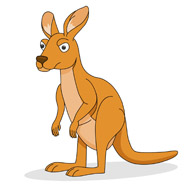
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| ***Gilbert Steel v Univ Constr***(1976), CA. **PROMISE TO PAY MORE MODIFIED BY *Greater Fredericton*** | |
| **Facts:** | π & ∆ in K: π delivers steel for X price / Parties agree to price X+Y for next delivery / π delivers steel, but ∆ only pays X / ∆ claims agreement wasn’t binding: only “consideration” given was pre-existing duty (π was already obliged to deliver steel at X price) |
| **Issue:** | Can a pre-existing duty to promisor constitute fresh consideration? **NO**—appeal dismissed. |
| **Reasons:**  (Wilson JA) | - No mutual agreement to abandon the original K  - π also can’t succeed via estoppel—would have to be used as a sword here |
| **Ratio:** | Pre-existing duty owed to promisor ≠ fresh consideration. |
| ***Greater Fredericton Airport Authority Inc v NAV Canada***, [2008] NBCA. **PROMISE TO PAY MORE** NAV | |
| **Facts:** | As per gov’t agreement, ∆ was supposed to pay for equipment upgrade, but didn’t / π eventually agreed to pay for it under protest / π claims agreement was unenforceable b/c no fresh consid |
| **Issue:** | Can a pre-existing duty to promisor constitute fresh consid? **YES** (but not if K made under duress) |
| **Reasons:**  (JT Robertson JA) | - No need to add more consideration when parties are modifying an agreement—it already exists  - Not valid under *econ duress*—notable evolution from *Thomas* where we said motive is irrelevant |
| **Ratio:** | **Post-K modification** doesn’t req fresh consid *unless made under econ duress* (exception to *Gilbert*) |
| ***Foakes v Beer***(1884), HL. **PROMISE TO ACCEPT LESS MODIFIED BY *Foot v Rawlings*** NO INTEREST | |
| **Facts:** | A owed R $ after prev court judgment / A requested time to pay debt / R agreed not to take action & waived interest / A paid $ but not interest / R claims interest: argues A gave no consid in the agreement not to pay interest (already bound by pre-existing debt) 🡪 R promised to accept less |
| **Diagram:** |  |
| **Issue:** | Can a pre-existing duty to promisor constitute fresh consid? **NO**—appeal dismissed. |
| **Reasons:**  (Earl of Selborne LC) | - Doctrine from *Pinnel’s Case*: “payment of a lesser sum on the day, in satisfaction of a greater, cannot be any satisfaction for the whole”  - *Fresh* consideration req’d 🡪 a change in payment dates ≠ fresh consideration |
| **Ratio:** | Promise to accept less requires fresh consideration. |

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| ***Foot v Rawlings***, [1963] SCC. **PROMISE TO ACCEPT LESS** CHANGE IN FORM | |
| **Facts:** | A to pay off debt to R via promissory notes / Aging R agreed to accept less *via cheque* / A pays accord’g to terms / R sues for entire debt, claiming there was no consid in agreement to accept less |
| **Diagram:** |  |
| **Issue:** | Can a pre-existing duty to promisor constitute fresh consid? **YES**—appeal allowed. |
| **Reasons:**  (Cartwright J) | - Accord & satisfaction (agreement to accept less + new consideration)  - Consideration = A agreeing to pay debt according to R’s terms  - Agreement to accept less *in a particular form* qualifies as fresh consid (convenient to creditor) |
| **Ratio:** | *Foakes* work-around: agreement to accept less binding if beneficial to promisor (eg change in form) |
| ***Law and Equity Act***, RSBC 1996, c 253 s 43 | |
| **Rule in *Cumber v. Wane* abrogated**  **43** Part performance of an obligation either before or after a breach of it, when expressly accepted by the  creditor in satisfaction or rendered under an agreement for that purpose, though without any new  consideration, must be held to extinguish the obligation. | |

## MAKING PROMISES BIND – ESTOPPEL

**Doctrine of promissory estoppel** 🡪 If promise is intended to be binding, intended to be acted upon, & actually acted upon, it is binding so far as the terms actually imply (*Central London*): Requires

**(1)** **Clear promise/assurance:** unambiguous & precise

**(2)** **Detrimental reliance:** Reliance🡪 Indication that promisee has taken up promisor on his promise (eg pays ½ rent) Detriment 🡪 Burden on promisee will sustain if promisor isn’t held to promise/assurance (what estoppel prevents)

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| ***Central London Prop’ty v High Trees House***, [1947] KB. **PROMISE TO ACCEPT LESS** SNEAKY LORD DENNING | |
| **Facts:** | π leased property to ∆ / ∆ agreed to accept less due to war-time conditions / ∆ paid reduced rent / War ended, but ∆ continued paying reduced rate / π increased to original rent & sought the diff. for mnths owed / ∆ claims promise to accept less was binding for entire lease term (99yrs) |
| **Issue:** | Despite no consid, can promise to accept less be binding? **YES**—but ceases when conditions end. |
| **Reasons:**  (Denning J) | - Case law has evolved to support promissory estoppel—law & equity have been joined for awhile  - Despite lack of consideration, equity says this promise should be enforced  - Both parties understood the promise would apply under prevailing conditions  **Big Estoppel** 🡪 Promise is binding when: **Small Estoppel** 🡪 Promise to accept less w/o consid  **(1)** Intended to be binding is binding if acted upon (can only be  **(2)** Intended to be acted upon as shield, not sword)  **(3)** Actually acted upon  \**Denning insists that he’s not establishing estoppel… but he obvs is\** |
| **Ratio:** | Established the **Doctrine of Promissory Estoppel**—both big/small versions (narrowed in *Combe*). |
| ***John Burrows Ltd v Subsurface Surveys Ltd***, [1968] SCC. **PROMISE TO ACCEPT LESS** GRATUITOUS INDULGENCES | |
| **Facts:** | ∆ bought business from π / Payment to be made via mnthly instalments w/acceleration clause: π could claim entire amount if instalments were late / ∆ repeatedly made late payments w/o consequence / Parties become estranged 🡪 π invokes clause & claims full amount / ∆ makes claim for equitable defence |
| **Issue:** | Can promissory estoppel be applied w/o an explicit promise (to accept less)? **NO**—appeal allowed. |
| **Reasons:**  (Ritchie J) | - Promissory estoppel req’s *clear evidence of promise* (π granting indulgences ≠ sufficient evidence)  - π’s conduct suggests he granted *friendly indulgences* while retaining his right to insist on K terms  - Avoid absurdity: no one would grant indulgences if they could waive your right to enforce a K |
| **Ratio:** | Promissory estoppel can only be invoked where there’s *clear evidence* of a promise (to accept less). |
| ***D & C Builders Ltd v Rees***, [1966] QB. **PROMISE TO ACCEPT LESS** LORD DENNING ESTOPPEL | |
| **Facts:** | ∆ hired π to do work / ∆ paid π, but not all (owed £480) / ∆ offered £300 as long as accepted “in completion of the account” / ∆ knew π was in financial straits & would be forced to accept £300 to avoid bankruptcy / π sought rest of amount owed / ∆ claimed π was estopped from claiming it |
| **Issue:** | Can promissory estoppel be used to enforce a promise that’s inherently unfair? **NO** |
| **Reasons:**  (Lord Denning MR) | - No consid here, so turn to equity:  - ∆ placed pressure on π 🡪 forced π to accept an unsatisfactory agreement |
| **Ratio:** | Promissory estoppel is an *equitable* doctrine—only applies when it’s *fair* to enforce the promise. |
| ***Combe v Combe***, [1951] CA. LORD DENNING DIVORCE – HUSBAND to PAY WIFE – BUT DIDN’T – ESTOPPEL | |
| **Facts:** | Couple divorces / Husband agrees to pay wife 100*l*/yr via 3mth installments / Husband did not make any payments / 6yrs later wife brings action claiming 6yrs worth of payments |
| **Issue:** | Can promissory estoppel be used as a cause of action? **NO**—appeal allowed. |
| **Reasons:**  (Denning LJ) | - Narrows scope of estoppel in *Central London v High Trees* to “Small Estoppel” (shield, not sword)  *-* Promissory estoppel can *change* legal relations, but can’t *create* them  - Estoppel would lead to an unjust (i.e. inequitable) result anyways… |
| **Ratio:** | Promisry estoppl can be part of cause of action, but not as cause of action itself (shield not sword). |
| ***Walton Stores (Interstate) Pty Ltd v Maher*** (1988), Aus HC. LEASE – DEMOLISH BUILDING – OOPS | |
| **Facts:** | R was waiting for A to sign lease, but needed to demolish building asap / A’s lawyer says “we shall let you know if any amendments are not agreed to / R wasn’t notified of objections 🡪 demolished building / A then returned unsigned lease / R suing for declaration that a binding K existed |
| **Issue:** | Can promissory estoppel be used as a cause of action? **YES** (in Australia)—appeal dismissed. |
| **Reasons:**  (Mason CJ & Wilson J) | - Promis’y estoppl should apply when departure from voluntary promises would be *unconscionable*  - A *knew* that R was proceeding in reliance on the agreement, yet stood by in silence  - R proceeded on the assumption of an agreement 🡪 completion of exchange was just a formality |
| (Brennan J) | Elements to establish an equitable estoppel:  **(1)** π assumes/expects the existence of legal relationship that ∆ isn’t free to withdraw from  **(2)** ∆ induced π to adopt that assumption/expectation  **(3)** π acted/didn’t act in reliance on the assumption/expectation  **(4)** ∆ either knew or intended for π to do so  **(5)** π’s action/inaction will be detrimental if assumption/expectation is not fulfilled  **(6)** ∆ failed to act to avoid that detriment |
| **Ratio:** | Australia allows promissory estoppel to be used as a cause of action for cases of *unconscionability*. |
| ***M (N) v A (AT)***, [2003] BCCA. MORTGAGE – MOVED TO CANADA – BREAK-UP – ESTOPPEL IN CANADA | |
| **Facts:** | R promised to pay A’s mortgage if she moved to Canada w/him / Broke up / R didn’t pay |
| **Issue:** | Can promissory estoppel be used as a cause of action? **NO**—but not a *definite* no… |
| **Reasons:**  (Huddart JA) | - *Walton Stores*: necessary element of estoppel is *the assumption/expectation of a legal relat’nshp*  - Characterizes “equitable estoppel… as a flexible doctrine requiring a broad approach to preclude  unconscionable conduct/injustice” 🡪 suggests could be used in CAN for cases of *unconscionability*  - In this case, no evidence that parties expected a legal relationship, so can’t be applied |
| **Ratio:** | Canadian courts have *considered* using promissory estoppel as a sword, but have yet to do so. |

## PRIVITY

### 3rd Party Beneficiaries

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| ***Tweddle v Atkinson*** (1861)*,* QB. MARRIAGE – FATHERS AGREE TO PAY – HORIZONTAL PRIVITY | |
| **Facts:** | Couple gets married / Both fathers agree to pay π (groom) 200*l* / K contained clause granting π’s father the power to sue for enforcement / Bride’s father died before his payment was made / π’s father died before he could sue / π makes claim against executor of the will |
| **Issue:** | Can π—3rd party beneficiary to the K—make a claim for enforcement? **NO** |
| **Reasons:**  (Wightman J) | π didn’t give consideration, so can’t take advantage of K even though it was made for his benefit |
| (Crompton J) | Didn’t give consideration 🡪 not a party to the K 🡪 no entitlement to sue for enforcement |
| (Blackburn J) | Natural love & affection (father-son relationship) = insufficient consideration |
| **Ratio:** | Illustration of **horizontal privity**—parties not privy to K can’t enforce K nor are they subject to its obligations |
| ***Dunlop Pneumatic Tyre v Selfridge****,* [1915] HL. TIRES – SOLD BELOW LIST PRICE – VERTICAL PRIVITY | |
| **Facts:** | D (distributor) bought tires from π (manufacturer) / D promised not to resell the tires below list price unless buyer also agreed not to sell tires below list price (or else £5 fee) / D entered K w/∆ / ∆ sold below list price / π brings action against ∆ for breach of K, claiming ∆’s K is w/π—D = π’s agent |
| **Issue:** | Can π make a claim against ∆ despite no express K between them? **NO**—appeal dismissed |
| **Reasons:**  (Viscount Haldane LC) | -A person in a K not under seal can only enforce the K if consideration was given by him to the promisor (or to someone else as per promisor’s request  -Must give consideration either personally or via agent to be entitled to sue  -**Agency** doesn’t apply—no consid moved between π to ∆ (would’ve meant that D was entering  K in 2 capacities: on its own behalf & on behalf of π |
| (Lord Dunedin) | -π can’t sue D for breach of K b/c D fulfilled its obligations in the K  -π can’t sue ∆ for breach of K b/c *there was never a K with ∆* |
| **Ratio:** | Illustration of **vertical privity** (& failure of **agency**) |

Circumventing Privity – Specific Performance (order by the court to perform the unfulfilled obligation)

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| ***Beswick v Beswick****,* [1966] CA. SNEAKY LORD DENNING UNCLE – NEPHEW – WIDOW | |
| **Facts:** | ∆’s dying uncle agreed to transfer business to ∆, provided that ∆ gave his widow (π) £5/wk / ∆ paid first £5, but no more / π sued ∆ / π had 2 roles: beneficiary & administrator |
| **Issue:** | Does π have cause of action despite not being a party in the K? **YES**—can sue both as widow AND admin |
| **PH:** | Dismissed @ trial—Vice-Chancellor held that π had no right to enforce the agreement |
| **Reasons:**  (Lord Denning MR) | -“If the decision of the Vice-Chancellor truly represents the law of England, it would be deplorable”  -General rule: “no third person can sue, or be sued, on a K to which he is not a party  -Where a K is made for the benefit of a 3rd person who has a legitimate interest to enforce it, it can be enforced by him in the name of the contracting party or jointly or by adding him as a defendant |
| **Ratio:** | A 3rd party (beneficiary) can enforce K when it has a legitimate interest to enforce it |

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| ***Beswick v Beswick****,* [1968] HL. UNCLE – NEPHEW – WIDOW – DENNING WAS WRONG | |
| **Reasons:** | -Denning was wrong, but can’t overturn the result so they use a more orthodox approach  -π can enforce K in her role as *administrator*, not as *beneficiary* (can sue ONLY as admin) |
| **Ratio:** | Executor of will can enforce K for specific promises made by deceased person |

Circumventing Privity – Trust 🡪 **A** enters K with **B** (trustee), **B** to hold property for **C** (beneficiary). If **B** violates trust terms, **C** can bring claim against **B** for *breach of trust* (circumvents privity).

Circumventing Privity – Agency 🡪 **A** (agent) enters K with **B** that would benefit **C** (beneficiary). Hence, **C** can bring claim against **B** for *breach of contract* (circumvents privity). Tried in *Dunlop*, but failed—can’t enter K in two different capacities.

### Exception to Privity

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| ***London Drugs Ltd v Kuehne & Nagel International Ltd****,* [1992] SCC. EMPLOYEES – DAMAGE | |
| **Facts:** | LD had storage K w/K&N, which included limitation of liability clause (liability limited to $40) / K&N employees caused $30K in damage to products / LD sues for full damages / Employees claim they’re covered by their employer’s K, so limited liability clause applies |
| **Issue:** | Can a K extend to the employees of a party? **YES**—appeal dismissed |
| **Reasons:**  (Iacobucci J) | -Rationale: relax doctrine of privity so as not to frustrate commercial practices  -No valid reason to deny the clause’s benefit to employees who perform employer’s Kual oblig’ns  -LD *knew* employees would perform oblig’ns before entering K—no reason to let LD circumvent |
| **Ratio:** | Narrow exception to privity for **employment Ks only**: employees can use employer’s K as a shield IF   1. K either expressly or implicitly extended benefit to employee(s) seeking to rely on it 2. Employees acting in the course of their emplymnt **&** performing the very services outlined in K |
| ***Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd****,* [1999] SCC. CHARTERED SHIP – SANK | |
| **Facts:** | FR had K w/insurance co: IC couldn’t bring action against charterers (waiver of subrogation) / FR’s ship sank due to negligence while under charter by CD / FR recovered from insurance co. / FR agreed to waive subrogation clause / IC sues CD for negligence / CD relies on waiver of subrogation |
| **Issue:** | Can a K extend to a 3rd party (not an employee)? **YES**--appeal dismissed |
| **Reasons:**  (Iacobucci J) | -*London Drugs* test doesn’t just apply to employees, but any 3rd party that meets the requirements:  **(1)** K expressly mentioned CD  **(2)** CD was doing the activity anticipated in the K  -Plain reading of K clearly shows that subrogation clause should apply  -FR was acting as CD’s agent when it excluded CD from liability |
| **Ratio:** | **Relaxes** the doctrine of privity 🡪 *London Drugs* test isn’t restricted to employment Ks |

## FORMAL PRE-REQS FOR ENFORCEMENT

### Writing Requirements

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| ***Law and Equity Act***, RSBC 1996, c 253 s 59 |
| **Enforceability of contracts**  **59** (1) In this section, **“disposition”** does not include  (a) the creation, assignment or renunciation of an interest under a trust, or  (b) a testamentary disposition.  (2) This section does not apply to  (a) a contract to grant a lease of land for a term of 3 years or less,  (b) a grant of a lease of land for a term of 3 years or less, or  (c) a guarantee or indemnity arising by operation of law or imposed by statute.  (3) A contract respecting land or a disposition of land is not enforceable unless  (a) there is, in a writing signed by the party to be charged or by that party’s agent, both an indication that it has been made and a reasonable indication of the subject matter,  (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or  (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person’s position that an inequitable result, having regard to both parties’ interests, can be avoided only by enforcing the contract or disposition.  (4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party’s behalf of a deposit or part payment of a purchase price.  (5) If a court decides that an alleged gift or contract cannot be enforced, it may order either or both of  (a) restitution of a benefit received, and  (b) compensation for money spent in reliance on the gift or contract.  (6) A guarantee or indemnity is not enforceable unless  (a) it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor, or  (b) the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made.  (7) A writing can be sufficient for the purpose of this section even though a term is left out/wrongly stated. |

Parol Evidence Rule → If K is in writing & writing is appears to be *complete*, then court will look solely to those terms to settle dispute—oral evidence = inadmissable (only applies to *express* terms, not *implied*)

**Work-around:** Circumvent the PER by claiming multiple Ks \*doesn’t apply to consumer transactions\*

***Why have PER?*****(1)** If you had writings yrs ago, probably a *momentous* event (carefully thought through) **(2)** Writing is both *evidence* & *judgment* **(3)** Idea of writing being *sacrosanct* (but we’ve moved on from this)

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| ***Gallen v Allstate Grain Co*** (1984)*,* BCCA. BUCKWHEAT SEEDS – PAROLE EVIDENCE RULE | |
| **Facts:** | ∆ orally assured π (farmers) that its product (buckwheat seeds) would smother weeds / π entered K for purchase of product / Contrary to assurances, weeds smothered & destroyed crop / Written clause: “will not in any way be responsible for the crop” / π wins @ trial, ∆ argues that oral assurances shouldn’t have been admitted as evidence via PER |
| **Issue:** | Can oral evidence be admissible despite PER? **YES**—appeal dismissed (π prevail) |
| **Reasons:**  (Lambert JA) | - PER = principle, not absolute rule → establishes a presumption which can be rebutted:  If oral evidence contradicts the document = presumption is *more strong*  If oral evidence adds/subtracts/varies the document = presumption is *less strong*  If parties signed an individually negotiated document = presumption is *more strong*  If parties signed a printed form = presumption is *less strong*  - **Harmonious construction rule** → Parties cannot have intended to agree to inconsistent obligtions |
| **Ratio:** | The **PER is a *principle***, not an absolute rule—look at degree of conflict & form |
| **Dissent:**  (Seaton JA) | π had ample time to look at K & dissect the document |

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| THE CONTENT OF THE CONTRACT |

## REPRESENTATIONS & TERMS

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| ***Heilbut, Symons & Co v Buckleton****,* [1913] HL. TERM vs. REPRESENTATION – LOOK AT INTENTION | |
| **Facts:** | π bought shares in rubber company from ∆ / Later discovered there was a large deficiency in rubber trees which were said to exist / Shares fell in value / π brings action against ∆ for breach of warranty / In alternative, claims statement was misrepresentation |
| **Issue:** | Was the statement a term? **NO**—appeal dismissed |
| **Reasons:**  (Lord Moulton) | - Parties didn’t *intend* statement to be contractually binding—casual conversation, not negotiation  - Innocent misrepresentation by ∆, so no breach & no liability for damages  - Closer in proximity to acceptance = more likely to be a term (green book) |
| **Ratio:** | **Test** for determining **term vs. representation:** look at the parties’ **intention** |
| ***Leaf v International Galleries****,* [1950] KB. LORD DENNING STATEMENT RE: QUALITY PROBS A REP, NOT A TERM | |
| **Facts:** | π bought Constable painting from ∆ / π tries to sell painting 5yrs later / Turns out painting wasn’t a Constable (∆ thought it was) / π isn’t suing for damages—just rescission of the K |
| **Issue:** | Was the statement a (mis)representation? **NO**—appeal dismissed |
| **Reasons:**  (Lord Denning) | - **Doctrine of merger:** statement can’t be both term & representation  - Painting being a Constable was condition of subject-matter’s *quality*, not *material character*  - 5yrs is too long to recover → **passage of time** constitutes an election to go w/the *status quo* |
| (Sir Raymond Evershed MR) | - Alternate result would cause business dealings to become hazardous (innocent misrepresentation could lead to rescindment many yrs later |
| **Ratio:** | Statement that refers to *quality* is likely a (mis)representation; *material character* is likely a term |

## CLASSIFICATION OF TERMS

**Implied Terms** → Neither oral nor written; summarized by McLachlin J in *Machtinger*:

1. Custom/usage
   * Custom **b/w the parties** → *Has there been consistent inclusion by the parties of the term in the past?*
   * Custom of **industry** → *Were both parties to the K aware of the term at the time they entered the K?*
   * Custom of **contract type** → *Does the use of certain words make it clear that certain consequences are intended by the K?*
   * **Other** → *Does it contradict or fit uncomfortably with the rest of what the parties have agreed?*
2. Implication Because of Necessity*Is the term necessary to make the rest of the K work?*
   * + NOT a test of “reasonableness” 🡪 Consider: parties, environment in which they’re K-ing, their purposes
3. **(3)** By Operation of Law

* **Common law implication** (rare) → *Not parties' intentions w/respect to the term, but rather their*

*intention w/respect to that* type *of K*

* **Implication by statute** → BC *Sale of Goods Act*: terms as to title, description, quality, & fitness are

implied into all sales Ks—they cannot be contracted out of in a "retail sale"

**Primary obligations** → Promises which the parties will perform if everything goes according to plan (according to their good faith expectations when entering the K)

**Secondary obligations** → Provide the remedies for the breach of the primary obligation

**Condition** 🡪 Breach of which would go the the root of the K (repudiation); gives rise to termination

**Warranty** 🡪 Breach of which could never deprive the party of the substantial benefit of the K (no repudiation)

**Intermediate** 🡪 Treat as condition/warrantly based on the seriousness of the consequences of the breach

**Condition precedent** 🡪 Prereq to the enforceability of an obligation; triggers either an obligation or the whole K

**Condition subsequent** 🡪 Deals with an event that ends an obligations

**Entire obligation** 🡪 Part performance is insufficient to trigger the other party’s performance of an obligation

**Severable obligation**  🡪 Part performance is sufficeint to trigger some enforceable performance of an obligation by the other party

**Termination** 🡪 Remedy dependent on either a breach of **condition** or **immediate term w/serious consequences**

**Repudiation** 🡪 Party in breach is said to have *repudiated* the K, giving the other the election to terminate or affirm

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| ***Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd***, [1962] 2 QB 26 (CA). INTERMEDIATE TERMS | |
| **Facts:** | π agreed to rent a ship to ∆ that was fit for ordinary cargo use / Incompetent engine staff, so held up for 5wks + 15wks for repairs / ∆ wants to terminate K / π sues for wrongful termination |
| **Issue:** | Does the breach of this term constitute repudiation? **NO**—appeal dismissed |
| **Reasons:**  (Diplock LJ) | - Condition → breach of which relives party of further performance of obligations  - Warranty → breach of which does not give rise to such an event  - Some contractual undertakings can’t be described as either: depends on nature of the event  - **Test**: look @ results of breach; ask: *Did it deprive the party of its substantial benefit?* Here, no |
| **Ratio:** | Invented (but didn’t name) concept of **innominate/intermediate terms**—wait until breach occurs then evaluate seriousness of consequences (serious = treat as condition; not serious = warranty) |
| ***Wickman Machine Tool Sales Ltd v L Schuler AG***, [1974] HL. “CONDITION” MAY NOT BE A CONDITION | |
| **Facts:** | ∆ granted π sole right to sell ∆’s products in UK / K had “condition” that π was to visit 6 clients/wk / π failed to do so on a few occasions / ∆ tried to terminate K / π sued |
| **Issue:** | Does the breach of a “condition” always lead to right of termination? **NO**—appeal dismissed |
| **Reasons:**  (Lord Reid) | - Naming something “condition” in K doesn’t necessarily result right of rescission—look @ context  - Multiple meanings: “condition” could refer to quality or a term, hard to know which one  - Labelling isn’t a particularly reliable way of categorizing terms → court can override parties’ labels |
| **Ratio:** | Calling something “condition” ≠ automatic right of termination for breach—must look @ context |
| ***Fairbanks Soap Co v Sheppard***, [1953] SCC. DOCTRINE OF SUBSTANTIAL PERFORMANCE – ENTIRE OBLIGATIONS | |
| **Facts:** | ∆ contracted to build machine for $$$ / π paid $ / ∆ refused to finish machine unless more $ was paid / π sued to recover the $ / ∆ counterclaimed for K price |
| **Issue:** | Does an *entire* obligation have to be 100% completed to say it has been met? **NO** |
| **Reasons:**  (Cartwright J) | - No substantial completion of K: pieces of machine missing, operating improperly (intentional),  incapable of producing desired product in current state (∆’s obligation ≠ substantially complete)  - Not enough work done by ∆ to trigger π’s obligation to pay → cancel K, return deposit to π |
| **Ratio:** | If obligation is *entire*, then it isn’t necessary that it’s 100% completed to say it has been met—law requires “substantial performance” based on facts/context (**doctrine of substantial performance**) |
| ***Sumpter v Hedges***, [1898] QB. *QUANTUM MERUIT* BASIS – ENTIRE OBLIGATIONS | |
| **Facts:** | π contracted to erect buildings for lump sum / π abandoned K when work was partly done / ∆ found his land w/unfinished buildings upon it, so completed work / π wants payment for his work |
| **Issue:** | Can partial performance of an entire obligation be compensated? **NO**—must look outside K |
| **Reasons:**  (Chitty LJ) | - No evidence of fresh K to pay for work done by π  - Here, ∆ didn’t benefit from π’s work—it was a nuisance |
| (Collins LJ) | - π *abandoned* the K, therefore abandoned performance  - Only option for compensation on a *quantum meruit* (“what one has earned”) basis would be to  raise the inference of a 2nd K b/w the parties |
| **Ratio:** | *Entire* obligations can’t be compensated on a ***quantum meruit*** basis unless actual benefit |
| ***Machtinger v Hoj Industries Ltd****,* [1992] SCC. IMPLIED TERMS | |
| **Facts:** | Employment K clause allowed for dismissal w/o notice contrary to *Employment Standards Act* / π dismissed w/o notice & sued for wrongful termination |
| **Issue:** | Was the requirement to give notice an implied term in the K? **YES**—appeal allowed |
| **Reasons:**  (McLachlin J) | - Term can be implied as: \*only displaced by an **express** contrary agreement\*  **(1)** a matter of custom/usage→ *has there been consistent usage by the parties in the past?*  **(2)** necessary to give business efficacy to a K → *is it needed to make the rest-of-the-K work?*  **(3)** req’d by law → *does a statute/common law imply it in this particular type of K?*  - Here, it was implied by law that employer was legally obligated to provide reasonable notice |
| **Ratio:** | Court can find **implied terms** based on custom/usage, necessity for bus. efficacy, or as req’d by law |

## GOOD FAITH & HONEST PERFORMANCE

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| ***Bhasin v Hrynew & Heritage Education Funds****,* [2014] SCC. DUTY of HONEST PERFORMANCE – CONTROVERSIAL | |
| **Facts:** | π (director) hired by CanAm w/auto renew’l clause unless 6mo notice / ∆ = other director, schemed w/CanAm to take over π’s business / π suspicious; asked CanAm whether merger was “done deal” / CanAm evasive, then gave π 6mo notice on last possible day to do so / π lost his business to H |
| **Issue:** | Is there a duty not to mislead another party? **YES**—appeal allowed |
| **Reasons:**  (Cromwell J) | - DHP requires that parties be honest when answering Qs or offering info… & beyond? (unclear)  - Not a duty of *disclosure* → “does not impose a duty of loyalty or of disclosure or require a party to  forego advantages flowing from the K”  - Consequences: could leave parties unable to say anything to avoid the risk of misleading someone |
| **Ratio:** | Established the (vague) **duty of honest performance** applicable to *all* Ks → “simple requirement not to lie or mislead the other party about one’s Kual performance” |

## EXCLUDING & LIMITING LIABILITY

### Notice Requirement – Unsigned Documents

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| ***Thornton v Shoe Lane Parking Ltd****,* [1971] QB (CA). LORD DENNING PARKADE – TICKET – EXCLUSION CLAUSE | |
| **Facts:** | Parkade sign: cars “parked at owner’s risk” / π entered parkade, machine issued ticket that said in fine print: “issued subject to conditions displayed on the premises” / Sign inside said that parkade wasn’t liable for injuries sustained within (ex. clause) / π injured in parkade, brought action in neg. |
| **Issue:** | Sufficient notice of terms? **NO**—judgment for π |
| **Reasons:**  (Lord Denning) | - π had no opportunity to study conditions on ticket before deciding whether to continue w/K  - No chance to *withdraw*—committed beyond recall bc machine can’t be reasoned with  - Parkade essentially trying to introduce conditions *after* π had already entered a K w/them |
| **Ratio:** | Notice of terms must come either before or at the time of agreement—need oppor’ty to withdraw |
| ***McCutcheon v David MacBrayne****,* [1964] HL. CAR ON FERRY – FERRY SANK – EXCLUSION CLAUSE DIDN’T APPLY | |
| **Facts:** | π put car on ∆’s ferry / Ship sank due to ferry operators’ neg. / Doc listed “conditions” which excluded liability for any loss sustained / π had signed doc in the past, but not this time |
| **Issue:** | Can past practice constitute notice of an exclusion clause? **NO**—w/narrow exception |
| **Reasons:**  (Lord Devlin) | - Signatures given on previous occasions don’t apply → previous dealings ≠ evidence of knowledge  UNLESS you can show that π had knowledge of ALL terms & (exclusion) clauses  - No signature this time, so “law must give the same answer: they must abide by the K which they  made. What is sauce for the goose is sauce for the gander” |
| **Ratio:** | If there hasn’t been **consistent practice in the past** b/w parties, then custom can’t be established |

### Notice Requirement – Signed Documents

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| ***L’Estrange v F Graucob Ltd****,* [1934] 2 KB 394 (Div Ct). SIGNATURE = ASSENT, EVEN IF DOC NOT READ | |
| **Reasons:**  (Scrutton LJ) | *When a doc containing Kual terms is signed, then, in the absence of fraud, or I will add, misrep, the party signing it is bound, & it is wholly immaterial whether he has read the doc or not.* |
| **Ratio:** | Signature = evidence of other party’s assent to all the terms of the K, whether read or not |
| Exceptions to the ***L’Estrange* Doctrine** (see *Karroll v Silver Star*) EXCEPTIONS TO THE ABOVE | |
| 1. ***Non-est factum***(“it is not my deed”) → applies when signatory was incapable of reading/understanding the agremeent (e.g. blindness, illiteracy; sales receipt turned out to be mortgage…) 2. **Fraud/misrepresentation** → if consent to the agreement was procured through either of these, innocent party can rescind the K 3. ***Tilden Rent-A-Car*** → can’t turn blind eye to a party’s obvious ignorance or particularly onerous/unusual terms   Applies when: **(a)** Term in question is inconsistent w/overall purpose of the K;  **(b)** Party doesn’t have time/opportunity to read full terms (incl. relevant term) b4 signing; **&**  **(c)** Haven’t taken reasonable measures to bring the term to other party’s attn. (e.g. needs to be bolded, capital letters, at top, specifically pointed out) | |
| ***Tilden Rent-A-Car Co v Clendenning****,* [1964] HL. EXCLUSION CLAUSE INVALID IF INCONSISTENT W/OVERALL K, ETC | |
| **Facts:** | ∆ rented car from π, opted for extra insurance coverage for $2/day / Didn’t read full K before signing / Exclusion clause voided coverage for damage caused after the insured had consumed any amount of alcohol / ∆ had a drink, then crashed car into pole while trying to avoid a collision |
| **Issue:** | Does the exclusion clause apply? **NO** |
| **Reasons:**  (Dubin JA) | - *L’Estrange Doctrine* says that clause would apply bc ∆ signed a K containing it… BUT:  - Rule only protects **reasonable reliance** on a signature, and here the reliance was not reasonable  - No real opportunity to read the terms (& no one ever did)  - Exclusion clause = clearly inconsistent w/overall purpose of K (to insure against damage) |
| **Ratio:** | Must take **reasonable measures** to draw a particularly onerous/unusual term to other party’s att’n |
| **Dissent:**  (Lacourcière JA) | - Court must give effect to the clear intent of a commercial document  - Clause is strict, but terms aren’t unusual/oppressive/unreasonable |
| ***Karroll v Silver Star Mountain Resorts Ltd*** (1988)*,* BCSC. EXCLUSION CLAUSE VALID IF REASONABLE + NOTICEABLE | |
| **Facts:** | π went to ∆ to compete in ski race / At registration π signed a simple 1pg doc titled “RELEASE & INDEMNITY: PLEASE READ CAREFULLY”/ π may have read release, but not sure / π collided w/another skier on downhill course; claims ∆ was negligent in failing to ensure course was clear |
| **Issue:** | Does the exclusion clause apply? **YES** |
| **Reasons:**  (McLachlin CJ) | Exceptions to the L’Estrange Doctrine   1. ***Non-est factum***→ Not an issue here 2. **Fraud/misrepresentation** → No evidence of either 3. ***Tilden Rent-A-Car*** → Not a particularly onerous/unusual term (π had signed similar releases before races); consistent w/purpose of K; reasonable measures: short, easy to read; cap letters |
| **Ratio:** | Illustration of the **correct use of exclusion clause** |

### Fundamental Breach & Its Aftermath

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| ***Karsales v Wallis****,* [1956] Eng CA. LORD DENNING DOCTRINE OF FUNDAMENTAL BREACH, BUT BAD LAW IN CAN. | |
| **Facts:** | ∆ inspected car / π bought car & leased it to ∆ for financing / ∆ received car 1wk later in “deplorable state” & refused to accept it / exclusion clause: “no condition/warranty that the vehicle is roadworthy or as to its age/condition/fitness for any purpose is given by the owner” |
| **Issue:** | Can an exclusion clause cover a fundamental breach of K? **NO** |
| **Reasons:**  (Lord Denning) | *[I]t is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects* |
| **Ratio:** | Invented **doctrine of fundamental breach** → party can’t rely upon an exclusion clause where it has committed a fundamental breach of K (goes to the root of the K) **\*NOT** good law inCANADA**\*** |
| ***Photo Production Ltd v Securicor Transport Ltd****,* [1980] HL. EXCLUSION CLAUSE COVERS FUNDAMENTAL BREACH | |
| **Facts:** | π employed security co. (∆) / ∆ employee negligent → factory destroyed by fire / Clause: “under no circumstances shall the co. be responsible for any injurious act or default by any employee…” |
| **Issue:** | Can an exclusion clause cover a fundamental breach of K? **YES** |
| **Reasons:**  (Lord Wilberforce) | - “under no circumstance” + “any injurious act or default by employee”  - Exemption must be read *contra proferentem*—words must be clear, & here they are |
| **Ratio:** | The doctrine of fundamental breach can be overcome w/the use of **clear wording** (overrules *Karsales* in England); read exclusion clauses *contra proferentem* (against the offeror) |
| ***Tercon Contractors Ltd v British Columbia****,* 2010 SCC. EXCLUSION CLAUSE MIGHT BE INVALID IF IT’S UNFAIR | |
| **Facts:** | BC entered tendering K w/6 cos. specifying that only they’d be eligible / One company combines w/ineligible co. & enters co-bid / 2 finalists / π loses, claims π would’ve won if the rules in K had been followed / Clause: excludes damages “as a result of participating” in tendering process |
| **Issue:** | Can an exclusion clause apply in cases of perceived “unfairness”? **YES** (but strong dissent says no) |
| **Reasons:**  (Cromwell J) | - Interpret exclusion clause in light of the whole K: tendering has an implied duty of fairness, so  language would have to be clear about excluding liability  - Barring compensation for this kind of breach would render the process virtually meaningless  - Interpret clause *narrowly*: “participating” in process ≠ submitting a proposal |
| **Ratio:** | Exclusion clauses are inoperative if unconscionable, and *may* be inoperative if “unfair” |
| **Dissent:**  (Binnie J) | **Good law:** To allow a party to escape an exclusion clause, ask…   1. Does the clause **apply** to the circumstances established in evidence? 2. Was the exclusion clause **unconscionable** at the time K was made “as might arise from situations of unequal bargaining power between the parties” 3. Should the court nevertheless refuse to enforce it due to overriding **public policy** concern? |

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| EXCUSES FOR NON-PERFORMANCE |
| **VOID** → Flaw in the formation of the K prevents it from coming into existence at all  **VOIDABLE** → Law acknowledges that K exists, but is flawed in some way   |  |  |  |  |  | | --- | --- | --- | --- | --- | | **Device** | **Reason** | **Who uses?** | **Prerequisites** | **Effect** | | **Capacity** | Some persons not capable of contracting | Party w/o capacity (mental incapacity, infants) | Status of incapacity | Depending on nature of incapacity   * K = void * K = voidable * K = unenforceable | | **Misrepresentation** | One party misled other party | Party who was misled | Erroneous factual statement inducing K | K rescinded; sometimes tort damages | | **Mistake** | (One or) both parties mistaken about assumptions/terms | Mistaken party | Usually common mistaken assumption before K  Sometimes mistake about other’s identity | K = void (usually)  Some law says voidable | | **Duress** | One party coerced by other to contract | Coerced party | Illegitimate threat | K = voidable (historically, void) | | **Undue influence** | One party dominated by other | Dominated party | Relationship of undue influence leading to questionable contract | K = voidable | | **Unconscionability** | Contracting circumstances unfair & tantamount to fraud | Weaker party | Party took unfair advantage of other’s position | K = voidable or subject to judicial adjustment | | **Illegality** | Public policy disapproves of some contractual situations | One or both parties, depending on type of illegality | Formation/performance of K is prohibited by statute/common law | K = void/unenforceable | | **Frustration** | K’s purpose becomes impossible | Both parties | Unforeseen catastrophic event | K = wholly discharged from point of frustration; statutory consequences | | **Limitations of actions** | Must bring claim within statutory period | Either party, as a defence | Limitation period has expired | Obligations unenforceable in court | |

## MISREPRESENTATION & RESCISSION

1. **Statement of fact** → Opinion = *mere puff* (not meant to be relied upon); usually about future (but *Smith*); duty to correct statement that has become false; can be silence (*would a reasonable person interpret this as a statement?*); can be partial truth; BUT in most cases it’s *caveat emptor*
2. **Untrue** → Statement must be false; law: ∆ had to know that statement was false; equity: ∆ didn’t have to know, but statement had to be made *recklessly* (*Redgrave*)
3. **Material** → *Substantial*, goes to *the heart of the K*; depends on context (e.g. colour of car)
4. **Relied on by other party** → Statement must have *induced* the K; context must show *reliance* (*Redgrave*)

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|  | **COMMON LAW**  (Damages) | **EQUITY**  (Rescission) |
| **INNOCENT** (∆ didn’t know statement was false) | N | Y |
| **NEGLIGENT** (∆ should’ve known statement was false) | Y | Y |
| **FRAUDULENT** (∆ knew statement was false) | Y | Y |

**Rescission** 🡪 Undoing/avoiding the K; putting parties back into their pre-K positions

**Bars to rescission:**

1. Rescission would adversely affect 3rd party rights (**undue hardship**)
2. The **impossibility** of complete restitution (restitution *in integrum*)
3. **Affirmation** 🡪 The innocent party loses any equitable remedy because he is taken to have affirmed the K
4. **Laches** 🡪 A delay in seeking a remedy is taken to be a form of affirmation of the K
5. **Execution** of the K 🡪 If both parties have completed their obligations, then K is done—nothing to rescind

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|  | **RESCISSION** | **TERMINATION** |
| **Remedy for:** | Misrepresentation | Breach of K (condition or serious consequence of an immediate term) |
| **Type of remedy:** | *Equitable*—it is discretionary | *Common law* |
| **Action:** | Undoes the K; restores the situation to conditions before the K | *Ends* the K; innocent party has the right to terminate primary obligations |

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| ***Redgrave v Hurd*** (1881), Eng CA. NO DUTY TO CHECK REPRESENTATIONS, WHETHER INNOCENT OR FRAUDULENT | |
| **Facts:** | π sold ∆ his law practice, claiming it brought in £3–400/yr / π offered financial records to ∆ for inspection / Papers showed practice brought in £200/yr, but ∆ chose not to examine them / delta later discovered truth & refused to complete the K |
| **Issue:** | Is there a duty to check representations? **NO** |
| **Reasons:**  (Jessel MR) | - If you induce someone into a K via false representation, it’s not sufficient to say “If you had used  due diligence you would’ve found out that the statement was untrue”  - Equity: To set aside K due to misrep, not necessary to prove that ∆ knew representation was false  - Common law: K may be set aside even if ∆ didn’t know statement was false, but only if it was  made recklessly & not w/the belief that it was true |
| **Ratio:** | - There is **no duty to check representations**—both innocent & fraudulent  - If π conducted investigations to verify the statement, then he likely didn’t **rely** on it |
| ***Smith v Land & House Property Corp*** (1884), Eng CA. IF FACTS EQUALLY KNOWN = PROBS AN OPINION | |
| **Facts:** | π advertised hotel for sale as being let to Mr Federick Fleck, “a most desirable tenant” / Fleck went into bankruptcy shortly after / ∆ refused to complete K / π claims opinion, not statement of fact |
| **Issue:** | Did this statement constitute a misrepresentation? **YES** |
| **Reasons:**  (Bowen LJ) | - If **facts are equally known** to both parties = probably expression of **opinion**  - If **facts aren’t equally known** = probably a **statement of fact**  - Here, facts weren’t equally known → statement was an opinion, but it suggested that nothing had  happened in the past to make Fleck an undesirable tenant = untrue = misrepresentation |
| **Ratio:** | If facts aren’t equally known, then an opinion by the knowing party may be interpreted as a factual statement (& therefore a potential misrepresentation) |
| ***Kupchak v Dayson Holdings Co***, [1965] BCCA. MISREPRESENTATION – NO RESTITUTION? TAKE SOME $$$ | |
| **Facts:** | ∆ fraudulently induced π to purchase shares in motel / π gave 2 pieces of real estate in exchange / π learned about fraud & sought to rescind K, but real estate had already been sold & developed |
| **Issue:** | Can a K be rescinded when restitution is not available? **YES** |
| **Reasons:**  (Davey JA) | Being unable to immediately abandon operations given by a K doesn’t necess’ly preclude rescission |
| **Ratio:** | Rescission of a K + monetary compensation is an option when complete restitution is impossible (for *fraudulent* misreps, but unclear whether it covers *innocent* misreps as well) |

## MISTAKE

**Mistake 🡪** At least one of the parties has a misunderstanding about the K

**Consequences** 🡪 Either **(1)** K is void (never came into existence) or, **(2)** K is voidable (can be brought to an end)

* Essentially, misrepresentation is a mistake that is *attributable to one party*
* Mistake is almost always used as an alternative to misrepresentation
* ***Caveat emptor***—even if you know the other party is under a misapprehension, there is no duty to disclose circumstances (unless a failure to do so would amount to fraud); parties must act in their own self-interest

**Unilateral** 🡪 A is mistaken, B is not

* Probably won’t prevent creation of K; rarely has an effect unless a party is “snapping up” an offer that he knows contains a mistake or where there is a mistake as to identity (*Solle v Butcher*)

**Common** 🡪 A and B are both mistaken about the same thing

* The K is void (it never came into being)

**Mutual** 🡪 A is mistaken about X, B is mistaken about Y = neither is right/wrong (likely matter of offer/acceptance)

* If the parties meant different things, there might be no K (no MooM); if both are reasonable, there may be a mutual mistake and therefore no K; tends to relate to *terms*, not *assumptions*

### Mistake as to Terms

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| ***Smith v Hughes*** (1871), QB. OATS OATS OATS – DIFFERING VIEWS RE: WHEN MISTAKE MAKES THE K VOID | |
| **Facts:** | Sale K for the purchase of oats / Buyer thought they were old oats (which racehorses could eat) & refused to take & pay for the new oats / Seller only ever had new oats |
| **Issue:** | Can a unilateral mistake relieve a party of its obligations? **YES** (but law seems to agree w/Hannen J) |
| **Reasons:**  (Cockburn CJ) | - ***Caveat emptor***—if not to term, then no mistake (case of offer & acceptance—**no law of mistake**)  - Here, age of the oats wasn’t a *term*, so mistaken belief is irrelevant |
| (Blackburn J) | - Look @ π’s mind: π must show that he was mistaken about what ∆ was promising  - A **unilateral** mistake as to *terms* is sufficient (perhaps also applicable to *assumptions*?) |
| (Hannen J) | - Look @ ∆’s mind: π must show that ∆ is **blameworthy** (aff’d by Lord Denning in *Solle*)  - ∆ **knew** or **ought to have known** about the mistake (e.g. “snapping up”) |

### Mistaken Assumption

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| ***Bell v Lever Brothers Ltd***, [1932] HL. COMMON MISTAKE – K ONLY VOID IF IT GOES TO “ESSENCE” OF THE K | |
| **Facts:** | ∆ paid severance to πs / ∆ then learned that πs had committed breaches of their duties which would’ve allowed them to be terminated w/o compensation |
| **Issue:** | Can a **common mistake** render the K *void*? **NO** |
| **Reasons:**  (Dixon & Fullagar JJ) | - **Essential quality test:** mistake must be to the “essence” of the K, whether to ID, existence, or title  - Mistake won’t affect assentunless mistake of both parties **&** goes *to the existence of some quality*  *which makes the thing w/o the quality essentially diff from the thing as it was believed to be*  - Here, no mistake: parties wanted to end employment, and *still achieved that same result* |
| **Ratio:** | Mistake can make K void if the mistake is to the **essential quality** of the K (difficult test to meet) |
| ***Solle v Butcher*** (1949), KB. LORD DENNING COMMON FUND’L MISTAKE + FAULTLESS = EQUITY MIGHT SET K ASIDE | |
| **Facts:** | π & ∆ discussed whether flat was excluded from rent control legislation / π advised ∆ that the flat would be excluded / Both assumed this to be correct / In fact, legislation did apply that capped rent @ £140 / π “discovered” the mistake & sought to recover overpayment / ∆ counterclaimed for rescission due to mistake—wanted to make the K void to prevent π from staying on at lower rent & from getting overpayment back |
| **Issue:** | Can a **common mistake** render the K *voidable*? **YES** |
| **Reasons:**  (Denning LJ) | - 2 types of mistake: **(1)** Mistake that renders K void at *CL* (*Bell*) **(2)** Mistake which renders K  voidable via *equity*, where the K “can be set aside on such terms **as the court thinks fit**”  - Here, no mistake to essence of the K (so can’t be void), but mistake is still fundamental  - Equity can step in & alter rights b/w the parties; has power to set K aside when *unconscientious*  - Here, landlord wants K rescinded, but equity gives π (tenant) the **option** of either  **(1)** staying on & paying the “proper rent” ($ agreed upon) or  **(2)** leaving, but can’t recover prior overpayment (true rescission (*Great Peace* calls this heresy) |
| **Ratio:** | *Bell* deals w/mistakes at CL, but **equity** **can render K *voidable*** when unconscientous |
| **Note:** | Here, equity favoured the landlord (∆) because there was evidence that π wasn’t faultless |
| ***McRae v Commonwealth Disposals*** (1851), Aus HC. COMMON MISTAKE THAT’S 1 PARTY’S FAULT = BREACH OF K | |
| **Facts:** | π bought wrecked oil tanker from ∆ / π facilitated a costly salvage expedition / tanker didn’t exist |
| **Issue:** | Can a common mistake constitute a breach of K? **YES** |
| **Reasons:**  (Dixon & Fullagar JJ) | - Situation where there’s a common mistake, but one party is mistaken due to other’s misrep  - You can’t rely on your own mistake—the party responsible for the mistake assumes burden/risk  - π relied & acted upon ∆’s assertion that there was a tanker in existence |
| **Ratio:** | If a **party is responsible for a common mistake**, then that party assumes the burden/risk |
| ***Great Peace Shipping v Tsavliris Salvage***,[2002] CA. OVERRULES DENNING – HARD FOR MISTAKE TO VOID A K | |
| **Facts:** | ∆ hired π to fix boat, but π was farther away than both thought / ∆ hires another & doesn’t pay π |
| **Issue:** | Can a **common mistake** render the K *void*? **YES** (but not in this case; judgment for π) |
| **Reasons:**  (Lord Phillips) | - Here, the parties were sufficiently proximate for π to carry out service  - K included an express right for π to cancel subject to cancellation fee—no injustice in this result |
| **Ratio:** | Overruled *Solle*; adopts *Bell* as exhaustive in ENGLAND aka **no equity in law of mistake**  **Elements of common mistake req’d to make K void at CL:**  **(1)** Common assumption as to the existence of a state of affairs  **(2)** No warranty by either party that the SoA exists  **(3)** Non-existence of SoA is neither party’s fault  **(4)** Non-existence of SoA must render performance of K impossible  **(5)** SoA may be the existence, or a vital attribute of the consideration to be provided **OR**  circumstances which must exist if the performance of the contractual venture is to be possible  **Result:** mistaken assumptions are unlikely to be successful (as per *Bell*) |
| ***Miller Paving Ltd v B Gottardo Construction Ltd*** (2007), ONCA. ABORIGINAL | |
| **Facts:** | Parties signed agreement saying π has been paid for all materials / π later discovered something that hadn’t been invoiced / TJ said the agreement barred π from receiving further payment |
| **Issue:** | Is there an equitable doctrine of common mistake in Canada? **YES** (but not applicable here) |
| **Reasons:**  (Goudge JA) | - Both parties thought all materials had been paid for = common mistake  - For equity to step in, must show π wasn’t at fault (here, no clean hands due to π’s admin error)  - Rationale: need flexibility to correct unjust results in widely diverse circumstances |
| **Ratio:** | Upholds *Solle*: there is an **equitable doctrine of common mistake** in CAN. (*Great Peace* ≠ adopted) |

### Mistaken Identity

* Usually **unilateral mistake** involving misrepresentation/fraud; results in K being void/voidable (*Shogun*)
* Even though ID is likely a term, this may be the **superior argument**. If you prove a breach, you might not be able to get damages—the other party is probably unable to pay since it is breaching the term of being the person who is creditworthy. Also, if the term goes to the heart of the K, there may be nothing to terminate—you have already performed you obligations (e.g. given $). *Leaf* says you need to argue either **term** or **representation**. Here, you might prefer the consequence of having no K, and therefore want to argue mistake first to get back whatever you gave.

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| ***Shogun Finance Ltd v*** Hudson, [2003] UKHL. ROGUE BUYING CAR – FACE-2-FACE DISTINCTION | |
| **Facts:** | Rogue bought car using someone else’s licence (“Patel”) / Rogue gets financing from π & sells car to ∆ / Both π & ∆ claim title to the car / K was not made face2face |
| **Issue:** | Can mistaken ID render a K void? **YES** (judgement for π) |
| **Reasons:**  (Lord Phillips) | - K was made via paper (not face2face) so was w/the actual Patel 🡪 void due to *non est factum*)  - Hence, title never passed from π (*nemo dat* = no legal title passes = breach of K) |
| **Ratio:** | If K made face2face 🡪 voidable if ID is *of the essence*, rogue involved, no hardship to 3rd party  If K not made face2face 🡪 K exists, but void due to *non est factum* (i.e. K w/the actual Patel)  **Note:** Contrasts *Great Peace*, which says equity can’t speak on mistake once CL has spoken  **Note:** Current state of law in Eng, & appears to be law in Can (altho no case has engaged w/issue) |

### *Non Est Factum*

Only applicable to **written Ks**: π must be **faultless** (*Saunders*; *Marvo*); “it is not my deed”; common law doctrine

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| ***Saunders v Anglia Building Society***,[1971] HL. *NON EST FACTUM* – WRITTEN Ks ONLY PLS | |
| **Issue:** | Can *non est factum* make a K void? **YES** |
| **Ratio:**  (Lord Pearson) | **Before:** *NEF* only applied if mistake was as to the very nature/character of the transaction  **Now:** To invoke *NEF*: **(1)** Must be a **written** K **(2)** π must be **faultless** (not blameworthy/careless) **(3)** Mistake must make the K **fundamentally different** from what the signing party believed it to be |
| ***Marvco Color Research Ltd v Harris***,[1982] SCC. THOUGHT THEY WERE AMENDING, BUT ACTUALLY NEW MTGE | |
| **Facts:** | ∆s thought they were signing an amendment to their mortgage, but daughter’s bf got them to sign a new mortgage to another party / Essentially, ∆s didn’t know what they were signing (i.e. careless) |
| **Issue:** | Can a careless/negligent party rely on *non est factum* to make K void? **NO** |
| **Reasons:**  (Estey J) | *The party, who by the applic’n of rsnble care was in a posit’n to avoid a loss.. shld bear any loss that results when the only altrntve avlble to the cts would be to place the loss upon the inncnt [party].*  - Here, ∆s’ negligence precludes them from disowning the document due to policy considerations |
| **Ratio:** | Affirms *Saunders*—π must be faultless (not blameworthy/careless/negligent) to qualify for *NEF* |

### Rectification

* **Mistake as to written record** → Court changes the WR to reflect what parties *thought* they agreed to
* **Equitable doctrine** → Courts are skeptical to acknowledge that you wrote something down incorrectly
* When making this argument, you’re asking the court to rectify the written evidence to reconcile it with the actual K—not a question of what the parties *intended*, but merely a matter of *correcting* the record
* The standard of *convicing proof* functions to close the floodgate & improve the utility of written documents

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| ***Sylvan Lake Golf v Performance Industries Ltd***. MISTAKE IN RECORD – FEET NOT YARDS – UNILATERAL MISTAKE? | |
| **Facts:** | π wanted to build 2 rows of houses / Mistake in written record: 110 feet not yards / K’s other msrmnts were in yards / unilateral mistake / ∆: fraud was so obvious that π should’ve detected it |
| **Issue:** | Is there a requirement to exercise due diligence in cases of fraud to receive rectification? **NO** |
| **Reasons:**  (Binnie J) | - **Rectification** = *an equitable remedy whose purpose is to prevent a written doc from being used as*  *an engine of fraud/misconduct*; awarded at court’s discretion (might be denied if unjust)  - Used to only be available for mutual mistakes, but now extended to unilateral (if criteria is met)  - Rectification is now available if π can show:  **(1)** The existence & content of the prior oral agreement  **(2)** That ∆ knew/ought to have known of the error & π did not (“fraud or the equivalent of fraud”)  **(3)** The precise form in which the instrmnt can be made to express the prior intention, e.g. ft 🡪 yds  **(4)** All of the above can be established w/”convincing proof” (higher than BoP, lower than BARD)  - Even though π didn’t read doc, there’s **no req’ment to exercise due diligence** to get rectification |
| **Ratio:** | Establishes elements needed to receive rectification, but no requirement to exercise due diligence |

## PROTECTION OF WEAKER PARTIES

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|  | **Timing** | **Label placed** | **Can 3rd parties be involved?** | **Remedy** | **Are we looking at content?** |
| **Duress** | Looks at moment of K | On the process (though *GF* says we look to content too) | Yes | Equity makes the K voidable; CL (historically) makes it void | *GF* says “yes” (look at consid), but this is a significant shift |
| **Undue influence** | Ongoing concern (look to relationship); later unfolding of K doesn’t matter | On the process | Yes | Equity makes the K voidable or may make obligations unenforceable if some have been performed | *Geffen* says content is relevant for commercial transactions |
| **Unconscionability** | *Harry*: May unfold to become unconscionable | On the K—often, on part of the K | No | Equity isn’t bound by typical voidable or unenforceable remedies | Yes—*is there “substantial unfairness”?* (*Morrison*) |

### Duress

* Historically: K = **void**; now the doctrine of duress usually makes the K **voidable**
* Duress looks at a particular event—duress must exist **at the time the K was entered**

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| ***Pao on v Lau Yiu Long***, [1980] PC. MOVED DURESS INTO EQUITY – NOW K BECOMES *VOIDABLE* | |
| **Ratio:**  (Lord Scarman) | **Factors indicative of duress** (but not a checklist *per se*…)**: \***moved duress into **equity\***  **(1)** Did he protest? **(2)** Was there an alternative course available? **(3)** Was he independently advised? **(4)** After entering K, did he take steps to avoid it (i.e. complain)?  **Also:** Was the pressure **legitimate**? Consider: **(1)** Nature of the pressure **(2)** Nature of the demand |
| ***Greater Fredericton Airport Authority Inc v NAV Canada***, [2008] NBCA. AIRPORT – DURESS – LAYS OUT TEST | |
| **Facts:** | K said ∆ was supposed to pay for equipment upgrade / π eventually agreed to pay under protest |
| **Issue:** | Was the agreement made under economic duress? **YES** |
| **Reasons:**  (Robertson JA) | **Test for economic duress** in context of K *variation* (but possibly *creation* as well…)  2 Conditions Precedent (all must be present):  **(1)** K variation must have been extracted by **pressure**  **(2)** Exercise of that pressure must have been such that coerced party had **no practical alternative**  **Q:** *Did the coerced party consent to the variation?* Consider 3 factors:  **(1)** *Was the promise supported by* ***consideration****?* (no consid = court more sympathetic)  **(2)** *Was the promise made* ***under protest*** *or* ***w/o prejudice****?*  **(3)** *If not, did the coerced party take* ***reasonable steps to disaffirm*** *the promise ASAP?*  Note: not essential whether party sought indpndnt legal advice or whether pressure was illegitimate—focus on the *impact on the victim*; **onus on pressuring party** to prove no duress |
| **Ratio:** | Reformulates **test for economic duress**, w/greater emphasis on *context* (limited to K variations…?) |

### Undue Influence

* Unconscientious use by one person of power possessed by him over another to induce the other to enter K
* **Remedy** = rescission (K *voidable*); if some obligations have been performed, court may look to unenforceability

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| ***Geffen v Goodman Estate***, [1991] SCC. UNDUE INFLUENCE – WOMAN WITH MENTAL ILLNESS – BAD BROS. | |
| **Facts:** | Woman w/mental illness set up a trust / Son argues that her brothers unduly influenced her |
| **Issue:** | Is the K voidable as it was procured under duress? **YES** |
| **Reasons:**  (Wilson J) | **Test for undue influence:**  **(1)** π must establish a relationship capable of giving rise to the necessary influence  **a.** Either the relationship itself is one of UI…  **i)** Established relationship of UI = irrebuttable presumption of UI in rltnshp; e.g. solicitor-client, not employer-employee, arguably teacher-student, not spouses  **ii)** Establish relationship based on evidence  **b.** …OR look to the contents of the transaction for “manifest disadvantage”  **i)** Commercial transaction (e.g. will)  **ii)** Non-commercial transaction = establishing the relationship of UI is sufficient  **(2)** Burden on ∆ to rebut the presumption of undue influence for the specific K   * Must prove that—despite relationship of UI—party entered K on his own “full, free & informed thought” (usually via independent advice) * The magnitude of the disadvantage = evidence of whether there was UI   - As an equitable doctrine, court may render certain obligations unenforceable (“pick & choose”)  - If no obligations performed, then **rescission**; if some performed, then **unenforceability** of others |
| **Ratio:** | Outlines **test for undue influence** (equitable doctrine) |
| **Dissent:**  (La Forest J) | Disagrees as to whether there should be the additional “manifest disadvantage” requirement for commercial transactions (these thoughts are more consistent w/current law in England…) |

### Unconscionability

* Invokes relief against unfair advantage gained by an unconscientious use of power by a stronger party against a weaker one (*Morrison*)
* Looking at the **transaction**—doesn’t attach labels to the parties 🡪 hence, courts are more apt to tinkering with the K and finding part(s) of it unconscionable
* Combination of **status** + **action**
* Unconscionability requires you to go to court, since you can’t know yoru remedy until you seek the court’s assistance (e.g. court must determine the minimum intervention req’d to obviate the unconscionability)
* K may start out as conscionable & become unconscionable though how the world unfolds (Lambert J in *Harry*)

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| ***Morrison v Coast Finance***. ROGUES SCAMMING OLD WOMAN - ~UNUSUAL~ REMEDY | |
| **Facts:** | Rogues took advantage of elderly women by persuading her to mortgage her house & lend them the $ / ∆ drew up rogues’ promissory notes despite knowing they were valueless / π wanted, but did not receive legal advise / π sought to have mortgage set aside |
| **Issue:** | Is there a doctrine of unconscionability? **YES** |
| **Reasons:**  (Davey JA) | **Test for unconscionability** (looks like UI, but doesn’t req an ongoing relationship)**:**  **(1)** Proof of **inequality** arising from weaker party’s ignorance/distress/need  **(2)** Proof of **substantial unfairness** of bargain obtained by stronger party (presumption of fraud)  **(3)** Stronger party can **rebut presumption of fraud** by proving bargain was **fair, just & reasonable**  - This bargain was unequal, no indepndnt legal advice, & no rational, informed person would agree  - **Unusual** **remedy**: court sets aside mortgage on the condition that π returns (valueless)  promissory notes to bank (court shows a *Denningish* willingness to “tinker” to create a fair result) |
| **Ratio:** | Outlines **unconscionability** as a doctrine separate from undue influence w/*unusual remedy* |
| ***Lloyds Bank v Bundy***, [1975] QB. LORD DENNING MORTGAGE – UNCONSCIONABILITY – BAD LAW NOW | |
| **Facts:** | ∆ mortgages his farm to help repay son’s debt / Bank forecloses on it |
| **Issue:** | Was the K unconscionable? **YES** |
| **Reasons:**  (Lord Denning) | 4 categories of inequality b/w parties:  **(1)** Duress of goods = inequality in bargaining power (*voidable* transaction)  **(2)** Unconscionable transaction = unfair advantage gained by unconscientous use of power  **(3)** Undue influence  **(4)** Undue pressure = K should be based on the free & voluntary agency of individual who enters it |
| **Ratio:** | This case is now decidedly **BAD LAW**, but may be used to *inform* other decisions… (*Harry*?) |

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| ***Harry v Kreutziger***, [1978] BCCA. BOAT SOLD FOR CHEAP – V UNCONSCIONABLE THOUGH – TEST FOR BC ONLY | |
| **Facts:** | π sold boat to ∆ for low price, when it was actually worth more due to attached fishing licence / π wasn’t very worldly or experienced in business, whereas ∆ was / π exerted great pressure |
| **Issue:** | Was the K unconscionable? **YES**—K **rescinded** |
| **Reasons:**  (McIntyre JA) | **Test for unconscionability:** Essentially, reformulation of *Morrison* (inequality + substantial unfairness in the bargain + opportunity for rebuttal) |
| (Lambert JA) | - **Test for unconscionability:** *Was the transaction, seen as a whole, sufficiently divergent from*  *community standards of commercial morality that it should be rescinded?*  - Benefits: more open-ended; less structured by intricate list of pre-reqs  - Potential probs: *What are the “community standards”? What is “immoral”?* |
| **Ratio:** | Lambert JA established a new **test for unconscionability** that has \**only ever been applied in BC\** |
| **Note:** | Both tests are viable—the SCC hasn’t ruled on which test prevails |

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| REMEDIES |

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| **REMEDY** | **WHEN AVAILABLE** | **WHO CAN CLAIM** | **NATURE & EFFECT** |
| **TERMINATION** | For breach of condition (or maybe an immediate term) | Party not in breach | Ends primary obligations 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 * Reasonableness of claim (not too remote & π-mitigated) | Monetary substitute for obligation proken, quantified by reference to:   * Pre-agreed amount (LD) * CL rules & principles * Combination of the above |
| **DEBT** | Upon failure to pay contractually specified sum | Party not in breach; need not mitigate | Order to pay the sum stipulated in the K |
| **SPECIFIC PERFORMANCE or INJUNCTION** | One party is about to breach or has breached the K | Other party who:   * Has “clean hands” * Is not tardy (laches) * Is not seeking labour * Can show above (CL) remedies are inadequate * Can show that K wasn’t terminated or avoided | * Equitable remedy * Order to perform the K * Keeps primary obligations alive |
| **EQUITABLE DAMAGES** | When specific performance or injunction is appropriate, but unavailable (or π opts for monetary substitute) | Party who might have got specific performance or injunction | * Equitable remedy * Monetary substitute for specific performance or injunction |

**Right to damages** 🡪 Liability is strict: as soon as an obligation is breached, there’s a right to damages

**Quantum of damages** 🡪 Liability isn’t strict: must consider *remoteness*; fault-based

## DAMAGES – RATIONALE

### The Interests Protected

Fuller & Purdue, “The Reliance Interest in Contract Damages” (1936)

1. **Expectation** 🡪 Aims to put (innocent) π in the position he would’ve been in had the K been completed

* Looking *forwards*; often achieved via formula (difference b/w K & market price); profit = net difference)

1. **Reliance** 🡪 Undo loss that π would’ve avoided if he hadn’t entered into K; compensate for wasted expenditure

* Looking *backwards*; useful where expectation interest is too difficult to determine; $ must have been *wasted*

1. **Restitution** 🡪 Disgorge what ∆ has (unfairly) gained/retained as profit as a result of his breach

* Unusual: looking at ∆ instead of π

### The Reliance Interest

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| ***McRae v Commonwealth Disposals Comm*** (1951), Aus HC. OIL TANKER – BUT ACTUALLY THERE IS NONE – LOL | |
| **Facts:** | π bought wrecked oil tanker from ∆ / π facilitated a costly salvage expedition / tanker didn’t exist |
| **Issue:** | Will damages be awarded for speculative reliance interests? **NO** |
| **Reasons:**  (Dixon & Fullagar JJ) | - Here, no way to know what the tanker would’ve been worth so expectation is too hard to assess  - Measure damages by reference to expenditure incurred + wasted in reliance on ∆’s assurance  - Claim for “equipment” = denied 🡪 equipment was necessary for the ship to operate anyways  - Claim for “reconditioning” (work done on ship) = denied 🡪 some work done before K was made  - Claim for “loss of revenue” (profit ship would’ve made if not used for salvaging mission) = allowed  - Claim for crews’ wages, travel expenses, office expenses = allowed  - K is **inherently unpredictable** bc salvaging itself is unpredictable |
| **Ratio:** | If expectation interest can’t be determined, award reliance damages instead (but not too spec’ve) |
| ***Sunshine Vacation Villas v The Bay***, [1984] BCCA. *EXCLUSIVE* TRAVEL AGENCY – NO DOUBLE RECOVERLY PLS | |
| **Facts:** | ∆ reneged on a deal to allow π to become the *exclusive* travel agency in its stores |
| **Issue:** | Can both reliance & expectation damages be awarded? **NO** (i.e. it’s super unlikely…) |
| **Reasons:** | - Can’t allow double recovery; π can’t recover expenses incurred in preparation or part  performance—those are part of the price paid to secure the gain  - Here, profits are too difficult to quantify, so award reliance damages instead |
| **Ratio:** | Both **reliance & expectation** damages won’t be awarded unless π can prove that it won’t overcompensate—otherwise, π can **choose b/w them** to claim whatever damages are greater |

### Restitution

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| ***Attorney-General v Blake***. SPY GOT CAUGHT – PROFITABLE BOOK – STATE GETS SUPER JEAL | |
| **Facts:** | British spy (∆) became USSR agent / Imprisoned for leaking secrets / ∆ busts out of jail, writes book about it / AG sues ∆ bc his spy K had a term saying he couldn’t divulge info in books/press / AG didn’t suffer loss or expect any profit / Info was no longer confidential / No fiduciary obligation |
| **Issue:** | Can damages be awarded when there’s no quantifiable loss of profit? **YES** |
| **Reasons:**  (Lord Nicholls) | - *the law does not adhere slavishly to the concept of compensation for financially msrble loss. When*  *the circumstances req, damages are measured by ref’ce to the benefit obtained by the wrongdoer*  - Crown has legit interest in preventing ∆ from profiting from the disclosure of official info, whether  classified/not—shouldn’t be a $ incentive to break this undertak’g (**exceptional circumstance**) |
| **Ratio:** | Restitutionary damages may be awarded where π has **legitimate interest** in depriving ∆ of profit |
| **Dissent:**  (Lord Hobhouse) | - Policy concern: making restitutionary damages available will lead to uncertainty  - In context of commercial Ks, certainty is important |

## DAMAGES – QUANTIFICATION PROBLEMS

**Something delivered =** [market value of what was supposed to be delivered] **–** [market value of what was delivered]

**Nothing delivered** **=** [market price the innocent party paid] **–** [K price the innocent party was supposed to pay]

* Burden of proof is on **π** to quantify damages

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| ***Chaplin v Hicks***, [1911] KB. WHINY ACTRESS IN PAGAENT – EXPECTATION INTEREST DOESN’T REQ CERTAINTY | |
| **Facts:** | Newspaper beauty contest / Aspiring actress (π) whines that there was a breach of communications & she was denied opportunity to win (she was a finalist) / K was for a *chance* to win / ∆ argues that the *chance* to win is impossible to assess |
| **Issue:** | Do expectation damages require certainty? **NO** (π awarded £100) |
| **Reasons:**  (Vaughan Williams LJ) | - The fact that damages can’t be quantified should not relieve the wrongdoer  - Determined that π had approximately a ¼ chance of winning  - If π’s right had been transferable, it would’ve had value (good price could be obtained for it) |
| **Ratio:** | Damages are not *quantified* via an exact science, they are *assessed*  **Note:** Seems inconsistent w/*McRae*, which we could analogize to a lottery as well… too remote? |
| ***Groves v John Wunder Co*** (1939), Minn CA. LOT VALUE LESS THAN TO RETURN TO ORIGINAL (SHITTY) STATE | |
| **Facts:** | π owned crappy lot / Leased to ∆ for gravel extraction on condition that ∆ left it in its original state / ∆ intent’ly breached condition / lot value = $12K, but cost of returning it to original state = $60K |
| **Issue:** | Can damages be reduced to market value? **NO** (judgment for π) |
| **Reasons:**  (Stone J) | - Breach was wilful 🡪 to diminish damages *handsomely rewards bad faith & deliberate breach of K*  - *The law aims to give the disappointed promisee, so far as money will do it, what he was promised*  - **Cost of performance rule:** ∆ liable to π for the rsnble cost of doing what ∆ promised & failed to do  - Ask:*What was the point of the K? To give property value, or to get work done?* |
| **Ratio:** | Law aims to give the promisee what he was promised (expectation)—not market value |
| **Dissent:**  (Julius J Olson J) | - The cost of performance rule should only apply where property/improvement is *unique*  - Here, the lower (market) value should be awarded |
| ***Jarvis v Swans Tours***, [1973] QB. HORRIBLE HOLIDAY – LOL – JUST THE WORST – EMO DAMAGES – MENTAL STATE | |
| **Facts:** | π bought holiday pckg from ∆ / holiday was awful; didn’t live up to the brochure by a long stretch |
| **Issue:** | Can damages be awarded for the unquantifiable (e.g. disappointment)? **YES**—appeal allowed |
| **Reasons:**  (Lord Denning) | - Brochure’s contents either warranties/representations (Denning doesn’t specify)  - *The right measure of damages is to compensate him for the loss of entertainment & enjoyment*  *which he was promised, & which he did not get* |
| **Ratio:** | To qualify for damages, K must have been intended to produce certain mental state & resulted in an opposite mental state |

## DAMAGES – REMOTENESS

* If there is no excuse for non-performance (e.g. duress), then the primary obligations are **strict**
* However, the *quantum* is not strict—after a certain point, ∆ isn’t strictly liable for damages = *remoteness*
* In **theory**: the onus is on π to prove the damages aren’t too remote (**reality**: often argued as a defence)
* Any claims for damages must first go to *Hadley*, then look to other cases (*Victoria Laundry* or *Koufos*)

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| ***Hadley v Baxendale*** (1854), Eng Exchequer Ct. BASED ON THE IDEA OF THE CONSCIOUS ALLOCATION OF RISK | |
| **Facts:** | π gave ∆ broken shaft to bring to repair shop / ∆ wasn’t told that the absence of the shaft meant that work would stop completely at π’s mill / ∆ delivered several days late / π sued for lost profits |
| **Issue:** | Are the damages too remote? **YES** (judgment for ∆) |
| **Reasons:**  (Alderson B) | - π didn’t let ∆ know about necessity of the shaft, hence loss of profit wasn’t contemplated by ∆  - Think about the conscious allocation of risk b/w parties (i.e. opposite of thin skull rule in torts) |
| **Ratio:** | **General damages** 🡪 Losses flowing naturally from the breach of K according to the usual course of things (anyone else that would’ve suffered the breach would’ve suffered the same losses)  **Special damages** 🡪 Losses that may reasonably be supposed to have been in the contemplation of both parties at the time they made the K as a *probable* result of the breach (not just foreseeable) |
| ***Victoria Laundry (Windsor) Ltd v Newman Indust Ltd***, [1949] KB. FOCUS ON FORESEEABILITY & “REAL DANGER” | |
| **Facts:** | π bought a boiler from ∆ / ∆ agreed to deliver by certain day / boiler was broken during the dismantling process on ∆’s property & req’d repairs, so it was delivered late |
| **Issue:** | Are the damages too remote? **NO** (reasonably foreseeable losses eligible for damages) |
| **Reasons:**  (Asquith LJ) | 6 points on the remoteness of damages:  **(1)** Purpose of damages (to put π in same position) would include improbable losses = **too harsh**  **(2)** Aggrieved party is only entitled to recover for losses that were **foreseeable @ time of K**  **(3)** What was reasonably foreseeable depends on the **knowledge** of the party that commits breach  **(4)** 2 kinds of knowledge:  **imputed** = knowledge that is ordinary/normal/expected (1st branch of  *Hadley*); **actual** = special circumstances (2nd branch of *Hadley*)  **(5)** **Obj test** 🡪 *Would* ***rsnble person*** *have concluded that the loss was liable to result from breach?*  **(6)** Don’t have to prove reasonable person would’ve foreseen that the breach must necessarily  result in the loss—rather, *was it foreseeable that the loss was* ***likely*** *to result?* = **a serious**  **possibility or real danger that is *likely* to occur** |
| **Ratio:** | Distinguished b/w *actual* & *imputed* knowledge that can determine whether loss was rsnbly frsble |
| ***Koufos v Czarnikow (The Heron II)***, [1969] HL. NARROWED REMOTENESS TEST – “SUFFICIENTLY LIKELY TO RESULT” | |
| **Facts:** | Ship delivering sugar breached its K to deliver on time / Sugar arrived 9 days late / Price had dramatically decreased during this time / Ship cptn ought to have known that it was “not unlikely” for market prices to fluctuate |
| **Issue:** | Are damages for losses that would have been considered “not unlikely” to occur too remote? **YES** |
| **Reasons:**  (Lord Reid) | - Damages that were foreseeable, but would only occur in small minority of cases = too remote  - What if market price had risen? Loss of profit wasn’t a sure thing |
| **Ratio:** | Damages may be denied if they were foreseeable in a *small minority* of cases |

## DAMAGES – MITIGATION

* What π has to do in order to claim damages—must act *reasonably* (e.g. wrongful dismissal = seek other work)
* Mitigation isn’t a duty; it simply limits the amount that π can claim
* Two aspects: **(1)** Buy another one and pay market price (but can’t overpay) **(2)** *Temporal* aspect 🡪 can’t act too late (or too early)

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| ***Southcott Estates Inc v Toronto Catholic District School Board***, [2012] SCC. SPEC PERF ≠ NO DUTY TO MITIGATE | |
| **Facts:** | π = single-purpose corporation for the sole purpose of purchasing & developing properties / ∆ breached K by refusing to extend the closing date / π sought specific performance, argues it isn’t req’d to mitigate its losses / TJ refused to order specific performance & awarded damages instead |
| **Issue:** | Does pursuit of specific performance relieve a party from its duty to mitigate losses? **NO** |
| **Reasons:**  (Karakatsanis J) | - **Duty to mitigate** 🡪 reqs π to take all *reasonable* steps to mitigate losses flowing from the breach  - Duty may be waived if π has a **fair, real, & substantial justification** in spec perf (or *legit interest*)  - **Specific performance** 🡪 available *only* where $ can’t compensate fully for the loss bc of some  “peculiar & special value” of the property to π  - π = single-purpose corp within larger group of companies 🡪 hence, π could’ve purchased another  property (majority basically ignores that π had *separate legal ID* from sister & parent companies)  - Here, π didn’t have a “fair, real, & substantial justification” to justify its inaction |
| **Ratio:** | Can’t recover losses that you could’ve reasonably avoided—claim for specific performance won’t insulate you from your **duty to mitigate** unless you have a fair, real, & substantial justification |
| **Dissent:**  (McLachlin CJ) | - As a single-purpose corp, π had a “fair, real, & substantial justification” for claiming spec perf  - Spec perf & duty to mitigate ≠ compatible: replacement K might prevent you from complet’g 1st K |

## TIME OF MEASUREMENT OF DAMAGES

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| ***Semelhago v Paramadevan***, [1996] SCC. BOUGHT HOUSE – MARKET VALUE ROSE – CALCULATE AT BREACH | |
| **Facts:** | ∆ bought house from π / ∆ breached K / π sued ∆ for specific performance or damages / market value of house rose from $205K to $325K b/w breach & trial |
| **Issue:** | Are damages always calculated at the time of the breach? **NO**—exception for specific performance |
| **Reasons:**  (Sopinka J) | - Spec perf is only available where $ can’t compensate fully for the loss bc of some “peculiar &  special value” of the property to π (π must show that “substitute would not be readily available”)  - **General rule** 🡪 use value at time of breach so π can buy goods in the market  - **Exception** 🡪 If π claims spec perf, K is “saved” bc ∆ can deliver at any point before judgment (in  this case, damages should be valued at time of judgment, where the K is *actually* broken) |
| **Ratio:** | Damages are to be calculated at time of breach unless π is claiming specific performance |

## LIQUIDATED DAMAGES, DEPOSITS, & FORFEITURES

**Principle:** Equity says LD clauses that hold a party *in terrorem* or to *overcompensate* are penalty clauses (unenfr’ble)

* LD is not a damages claim; it is a **debt** claim
* LDs are secondary obligations and are not meant to punish: penalties are for the state to impose
* LDs won’t be enforced if they put π in a better position than if obligations were performed
* LDs are faster and simpler, but it can be difficult to arrive on a figure—supposed to be a *genuine* pre-estimate
* An LD clause assessment is a question of construction decided on terms and circumstances, judged at the **time of the K**, not the time of the breach
* There is no real downside to limitation clauses—the consumer might not know it is a penalty, and if the consumer does challenge it, common law damages still remain available

**LDs vs. Limitation Clauses**

* Exclusion/limitation clauses can be seen as the flip side of penalty clauses in some cases: **penalty** = attempt to get too much by way of damages, whereas **limitation** = attempt to limit damages
* Both are troubling to the “no more, no less” principle
* For both, CL simply ascertains whether parties agreed to provisions: if both, then CL applies
* Equity steps in in both contexts, albeit in different ways
  + **LD** 🡪 Equity uses the penalty doctrine predictably
  + **Limitation** 🡪 Equity uses the doctrine of unconscionability (and possibly public policy) = unpredictable

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| ***Shatilla v Feinstein***, [1923] Sask CA. FIXED SUM – COMPETITION CLAUSE | |
| **Facts:** | ∆ sold business to π / ∆ agreed not to engage in similar business for 5yrs in any capacity (otherwise must pay π $10K (!) in damages) / ∆ bought shares in another similar company & became director |
| **Issue:** | Can “liquidated damages” be binding if they can lead to extravagant & unconscionable results? **NO** |
| **Reasons:**  (Martin JA) | - LD must be genuine pre-estimate of damages at time of K—can’t be extravagant/unreasonable &  won’t be enforced if they put π in a *better* position that if oblig’ns were performed  - If sum > any actual damage that could possibly arise = penalty, not damages  - **Fixed sum** for a # of stipulations: some important, others trivial = presumption of penalty, not LD  - Presumption can be *rebutted* if there’s evidence that parties took different amounts of damages  that might occur into consideration & arrived at an amount they felt proper  - Parties’ use of term “liquidated damages” is meaningless (could still be a penalty) |
| **Ratio:** | **Fixed sum** that seems “**extravagant & unconscionable**” for trivial breaches = **penalty**, not LD |
| ***HF Clarke Ltd v Thermidaire Corp***, [1976] SCC. FORMULA – DON’T LOOK AT INTENTIONS TO DECIDE IF PENALTY | |
| **Facts:** | Breach of K (competition clause) / Remedy = “gross trading profits” |
| **Issue:** | Are parties’ intentions indicative of whether a clause is LD vs. penalty? **NO** |
| **Reasons:**  (Laskin CJ) | - Court decides in equity whether LD or penalty  - Not giving effect to parties’ *intentions*, but rather the actual *terms* of the K  - Despite parties being commercial & sophisticated, clause appears to be a penalty = unenforceable |
| **Ratio:** | Parties’ intentions do not determine whether LD **formula** is **grossly**/**excessively punitive** |
| ***JG Collins Insurance Agencies v Elsley***, [1978] SCC. ACTUAL LOSS > LD = PAY LD – LIQUIDATED DAMAGES CLAUSE | |
| **Facts:** | ∆ breaks K w/liquidated damages clause / π sues bc the actual damages were even higher |
| **Issue:** | Can the party that benefits from the LD clause challenge it? **NO** |
| **Reasons:**  (Dickson J) | - To order higher damages would be *contrary to principle & productive of injustice*  - Penalty clause = **cap** on damages—party imposing penalty shouldn’t be able to use the clause to  induce performance, then ignore it if it turns out unfavourable (calculated risk)  - **Note:** better way to argue = claim that it’s a *limitation clause* (not a penalty clause) |
| **Ratio:** | If **actual loss > LD**, then π only has to pay the **LD**—an agreed sum = maximum amount recoverable |

**Deposits:** Relate both to primary and secondary obligations

* The preliminary payment often used to confirm acceptance, be acceptance, or trigger other’s obligations
* Deposit is used as part payment of final price, so has the characteristics of primary obligation of payment
* Condition precedent to other’s obligation becoming enforceable
* If party making deposits fails to complete payment obligations (and other party terminates), then deposit is forfeited by way of remedy to the party receiving—hence, also secondary obligation of the party that paid

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| ***Stockloser v Johnson***, [1954] QB. LORD DENNING HARD TO RECOVER DEPOSITS AT CL – INSTALMENTS TOO | |
| **Facts:** | π bought stuff from ∆ via instalments / Forfeiture clause: ∆ = owner until all payments made / π failed to pay final instalments, then sued to recover previous payments (claimed clause = penalty) |
| **Issue:** | Can forfeiture clauses preclude deposits from being recovered? **YES** |
| **Reasons:**  (Lord Denning) | **Q:** *Is there a forfeiture clause (or $ expressly paid as a deposit)?*  **NO** 🡪 If the seller keeps the K open & available for performance, then the buyer cannot recover  **YES** 🡪 The buyer cannot recover the $, but may have a remedy in equity if:   1. The forfeiture clause is of a penal nature (sum forfeited is out of all proportion to the damage) 2. It must be unconscionable for the seller to retain the $ (**ask:** *who broke the K?*) |
| **Ratio:** | Deposits may be eligible for recovery if the forfeiture clause is *penal* & result is *unconscionable* |
| ***Sale of Goods Act***, RSBC 1996, ss 12, 13 | |
| **Relief against penalties and forfeitures**  **24** The court may relieve against all penalties & forfeitures, and in granting the relief may impose any terms as to  costs, expenses, damages, compensations & all other matters that the court thinks fit. | |

## EQUITABLE REMEDIES

**Principle:** Equity only provides relief where the CL has failed you; can’t be obtained once K terminated/rescinded; must come w/clean hands in the context of the particular transaction (not looking at you *as a person*)

**Injunction** 🡪 Order of court to someone not to do something

* Can be pre-breach (prohibit from breaching) or post-breach (mandatory injunction to perform)

**Specific performance** 🡪 Order by court to a party to perform the K obligations

* Must be about *mutuality* of performance (both parties must fulfill their obligations)

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| ***John E Dodge Holdings Ltd v 805062 Ontario Ltd*** (2003), ONCA. SPECIFIC PERF – PROPERTY MUST BE UNIQUE | |
| **Facts:** | π agreed to buy land from ∆ for development / ∆ didn’t complete sale / π sued for spec perf |
| **Issue:** | Is the property *unique* enough to justify a claim for specific performance? **YES** (judgment for π) |
| **Reasons:**  (Weiler JA) | - Look to *Semelhago*: property must have “a quality that cannot be readily duplicated elsewhere.  This quality should relate to the proposed use of the party & be a quality that makes it particularly  suitable for the purpose for which it was intended”  - At the time ∆ broke the K, the land had a unique proximity to shopping malls  - Only obliged to mitigate (i.e. seek alternatives) if you’re not entitled to specific performance |
| **Ratio:** | For real property, **specific performance** can be granted if π can show that the property was unique at the date of the actionable wrong |
| ***Warner Bros Pictures Inc v Nelson***, [1937] KB. GREEDY LIL ACTRESS – INJUNCTION – NEGATIVE COVENANTS ONLY | |
| **Facts:** | ∆ (aspiring actress) entered K w/π, saying she’d only act in their movies / ∆ wanted more $ so broke K / π sought **injunction** to restrain ∆ from acting in breach + damages |
| **Issue:** | Can a negative covenant be ordered via injunction? **YES** |
| **Reasons:**  (Branson J) | - *An injunction is a discretionary remedy, and the Court… may limit it to what the Court considers*  *reasonable in all the circumstances of the case*  - **Injunctions** appropriate when: “cannot be reasonably/adequately compensated in damages”  - Here, dealing w/a **negative** covenant (don’t work for someone else)  - No evidence that ∆ won’t be able to find other employment (though not in her specialty) |
| **Ratio:** | Court won’t enforce a **positive** covenant of personal service, even if expressed in the **negative** |

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| NOTES |