**Contracts – 2010/2011 – MacDougall**

**FORMATION OF THE CONTRACT**

A. **OFFER & ACCEPTANCE** – Ch. 1 3

1. **Offer 3**

**a. Offer and Invitation to Treat 3**

* *Canadian Dyers Assn Ltd v Burton 3*
* *Pharmaceutical Society v Boots 3*
* *Carlill v Carbolic Smoke Ball Co 3*

**b. Communication of Offer 4**

* *Williams v Carwardine 4*
* *R v Clarke 4*

2. **Acceptance 4**

**a. Acceptance 4**

* *Livingstone v Evans 4*
* *Butler Machine Tool v Ex-cell-o Corp 5*

**b. Communication of Acceptance 5**

* *Felthouse v Bindley 6*
* *Carlill v Carbolic Smoke Ball Co 6*
* *Brinkibon v Stahag Stahl 6*
* *Household Fire v Grant 6*
* *Holwell Securities v Hughes 6*

3**. Termination of Offer 7**

**a. Revocation 7**

* *Byrne v Van Tienhoven 7*
* *Dickinson v Dodds 7*

**b. Unilateral Contracts 7**

* *Carlill v Carbolic Smoke Ball Co 8*
* *Errington v Errington and Woods 8*

**c. Rejection and Counter-Offer 8**

* *Livingstone v Evans 9*

**d. Lapse of Time 9**

* *Barrick v Clark 9*

B. **CERTAINTY OF TERMS** – Ch. 4 9

* *Sales of Goods Act, ss. 12 & 13 10*
* *May & Butcher v R 10*
* *Hillas v Arcos (HL) 11*
* *Foley v Classique Coaches Ltd 11*
* *Empress v Bank of Nova Scotia 11*
* *Mannpar Enterprises v Canada 11*

C. **INTENTION TO CREATE LEGAL RELATIONS** – Ch. 3 12

* *Balfour v Balfour 12*
* *Rose and Frank v JR Crompton Bros 12*

D. **CONSIDERATION** – Ch. 7 12

1**. Nature of Consideration and Seals 13**

* *Royal Bank v Kiska 13*
* *Thomas v Thomas 13*

2**. Adequacy of Consideration 13**

* *Mountford v Scott 13*

3. **Past Consideration 13**

* *Eastwood v Kenyon 14*
* *Lampleigh v Brathwait 14*

4. **Forbearance 14**

* *Callisher v Bischoffsheim 14*

5. **Pre-existing Legal Duty 14**

**a. Duty Owed to a Third Party 15**

* *Pao On v Lau Yiu Long 15*

**b. Duty Owed to the Promisor 15**

* *Gilbert Steel v University Constr 15*
* *Greater Fredericton Airport v NAV Canada 16*
* *Foakes v Beer 16*
* *Foot v Rawlings 16*
* *Law and Equity Act, s.43 16*

6. **Waiver and Promissory Estoppel 17**

* *Central London Property v High Trees House 17*
* *John Burrows v Subsurface Surveys 17*
* *D & C Builders v Rees 17*
* *Combe v Combe 18*
* *Waltons Stores v Maher 18*
* *M(N) v A(AT) 18*

**PRIVITY**

A. **THIRD-PARTY BENEFICIARIES 19**

* *Tweddle v Atkinson 19*
* *Dunlop Pneumatic Tyre v Selfridge’s 19*

B. **CIRCUMVENTING PRIVITY 19**

1.**Specific Performance 20**

* *Beswick v Beswick (CA) 20*
* *Beswick v Beswick (HL) 20*

2.**Trust 20**

**3.Agency 20**

**4.Employment 20**

* *London Drugs v Kuehne & Nagel 20*

5.**General Principle for Circumvention 20**

* *Fraser River Pile & Dredge v Can-Dive Services 20*

***CONTRACTS FOR SPRING 2011 ALSO INCLUDED BUT NO TABLE OF CONTENTS***

**FORMATION OF THE CONTRACT**

CONTRACT = a legal creation in which promises about the future can be made enforceable.

To form a contract, you need an offer, acceptance, and certainty of terms. You may also require intention to create legal relations and consideration.

A. **OFFER & ACCEPTANCE** – Ch. 1

To conclude an agreement, you need offer and acceptance. These can be explicit (e.g. words, written) or inferred by conduct or inactivity.

1. **Offer**

**Offer: =** an intimation, by words or conduct, of a willingness to enter into a legally binding contract, and which expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an

act, forbearance, or return promise on the part of the person to whom it is addressed**.**

**→ All terms of the contract are in the offer.**

**a. Offer and Invitation to Treat**

An offer is intended to be legally binding, while an invitation to treat is not.

Look at *certainty of terms* and *intention* when trying to distinguish the two – only an offer has them.

**Invitation to Treat:** expression of a willingness to negotiate.

* Has to leave something to be negotiated – if it is just a “yes or no” then intent is that of an offer
* Implies part of the offer

**Puff**: an offer that no reasonable person would take seriously. Legally irrelevant. (*Carlill*)

In the case of **advertisements**, they are invitations to treat, not offers – otherwise they would have to sell even if they ran out of stock. Includes catalogues, window displays, price lists, etc.

***Canadian Dyers Association Ltd. v. Burton*** (1920), 47 O.L.R. 259 (H.C.)

**Must be offer and acceptance for a k**

**Price quotation is usually an invitation to treat**

**Facts**: P offers to sell house. D. asks for lower price. P replies “lowest prepared to accept.” D. accepts, sends chq. P keeps chq., sends draft of deed & date of closure - later returns chq. & claims no K.

**Ratio:** mere quotation of price does not constitute an offer but here P’s subsequent actions show him to have understood a K to have been made. “Whether a proposal is to be construed as an invitation to treat or as an offer depends on language used and circumstances of particular case”

***Pharmaceutical Society of Great Britain v. Boots Cash Chemists Ltd.*** *[1953] 1 All E.R. 482 (C.A.)*

**Must have offer and acceptance for a k**

**A display of price or goods is an invitation to treat**

**Facts**: Boots is a self-service store, smaller scale. Self-service pharmacy where customers picks out items.

**Ratio**: Display of price is only an invitation to treat.

Offer = customer placing item on counter.

Acceptance by owner or cashier, as agent. Owner has final say, power to refuse*.*

***Carlill v Carbolic Smoke Ball Co.*** *[1893] 1 Q.B. 256 (C.A.)*

**Ads are generally an invitation to treat, unless language interpreted as offer by reasonable person**

***Facts:*** Unilateral offer of 100₤ to anyone who contracts flu after using smoke ball as prescribed

***Ratio:*** Offer to all world but K only w/those who accept and perform conditions.

Acceptance is conveyed by performance

Extravagance no defence.

“Reasonable person test.”

D. waived notice of acceptance since unilateral K binding when performance complete.

Ads generally invitation to treat, unless language interpreted as offer by reasonable person – **mere puff definition**

**b. Communication of Offer**

→ An offer is not effective until it is communicated to the offeree.

→ There can be no acceptance in ignorance of the offer

→ There does not have to be an intention to accept the offer, just knowledge of the offer at the time of acceptance.

***Williams v. Carwardine*** (1833), 110 E.R. 590 (K.B.)

**Knowledge of the offer is required in order to accept (only *some* interpret it this way)**

**Motive is not relevant in acceptance**

**You do not need to intend to accept an offer to accept it**

**Facts**: D. made offer for info leading to discovery of murderer of her brother. P., because she was scared, gave info. P then tries to claim award from D, even though her motive in giving info wasn’t to get the award.

**Ratio**: In order to accept an offer:

- don’t have to have the intention of accepting, just have to fill the conditions required to accept

- BUT must know about the offer – does it really say this? Discuss that it really doesn’t but that Clarke says it does

***R. v. Clarke*** (1927), 40 C.L.R. 227 (Aust.H.C.)

**Both knowledge of offer and intention to accept are required (intention – contrary to Williams)**

**Facts**: D. gives evidence for a murder case without knowledge of a reward for the information.

**Ratio**: Both knowledge of offer and intent to accept the offer must be present when the conditions of the

offer are performed (in acceptance by conduct) – i.e. you should be acting in reliance upon the proclamation.

Interprets Williams to mean that motive is irrelevant and knowledge is needed - but Williams doesn’t really say that

Ignorance of the offer at the time of acceptance does not constitute knowledge of the offer.

2. **Acceptance**

**a. Acceptance**

**Acceptance** = an expression by words or conduct of assent to the terms of the offer in the manner prescribed or indicated by the offeror.

→ Acceptance must be communicated, absolute and correspond to all the terms of the offer.

→ If the acceptance changes the offer in any way then it is a COUNTER-OFFER not an acceptance.

In determining whether an acceptance is conclusive, it must be distinguished from:

1. **A rejection and counter-offer** (a counter offer is a rejection of the original offer – once a counter offer is made, the original offer is revoked)

2. An **acceptance with some variation or addition of terms** = a counter-offer.

3. **An acceptance which is equivocal, or which is qualified by reference to the subsequent arrangement of terms** – the acceptance must not qualify the terms of the offer and must be a clear acceptance.

The terms of the k exist in the offer. If the acceptance contains new terms – it is up to the offeror to communicate satisfaction of the new terms verbally or through conduct (ie: fulfilling his requirements within the offer). If he does not, then the terms are not accepted and the k does not exist.

***Livingstone v. Evans*** [1925] 4 D.L.R. 769 (Alta.S.C.)

**Counter-offer kills original offer (which can only be revived by original offeror)**

**An inquiry about the offer does not kill it**

**Facts**: D. offer land for 1800. P. counteroffer 1600. D. said “cannot reduce price.” P. sends 1800. D.

refuses to sell.

**Ratio**: Counter-offer kills the original offer

A statement that the offer cannot be reduced resurrects the original offer.

**Obit**: an inquiry about the offer does not kill it.

**EXCEPTION TO THE ABOVE RULE:**

**\*\*\*THIS HAS BEEN OVERTURNED AS BAD LAW\*\*\***

***Butler Machine Tool Co. v. Ex-Cell-O-Corp*** [1979] 1 All E.R. 965 (C.A.)

**Battle of the Forms – terms should be taken as a whole and reconciled when possible**

**If they cannot be reconciled then the k is concluded**

**Facts**: ‘Battle of the forms’ – P. quoted cost of machinery on a form that contained the term that the P.

could charge the cost of the machinery at the time of delivery. D. accepted the offer on paper with

different terms. P. wants higher price to be paid.

**Ratio**: “last blow” rule: usually in battle of forms, terms on the last form win. However, this is an exception - the terms of the k consist of the terms in the offer subject to modifications contained in the acceptance.

**Implications:** after a counter-offer, the original offer may still have impact

The terms of the agreement are not necessarily in the offer

**b. Communication of Acceptance**

**Exceptions**: waiver of communication, the performance is the acceptance, postal acceptance rule

**Requirements for acceptance to be valid**:

a. Must have **conscious knowledge that you are accepting** the offer.(ex: R. v. Clarke)

b. Acceptor must have **conscious knowledge of the offer** (ex: Williams v Carwardine)

c. Acceptance **must be communicated** to the offeree

**EXCEPTIONS**:

- **waiver of communication** will occur when: (ex: Carbolic Smoke Ball )

→ there is an express or implied intimation from the offeror that a particular mode of acceptance will suffice.

→ There must be some overt act or conduct on the part of the offeree which is evidence of an intention to accept and which conforms to the mode of acceptance indicated by the offeror.

- **Promise for an act** – performance is the acceptance

- **Postal Acceptance Rule** (ex: Household Fire & Carriage Accident Insurance Co. v. Grant)

→ If the offer requires that there must be notice = actual communication of the acceptance must be received by the offeror, then postal acceptance rule does not apply. (ex: Holwell Securities)

- **Acceptance by silence** – the offeror can not stipulate that silence is an appropriate acceptance of the offer. (ex: Felthouse)

**Postal Acceptance Rule**:

(ex: Household Fire & Carriage Accident Insurance Co. v. Grant)

- applies to government post office and telegrams only

- post office is treated as a agent of the offeror

- offer is accepted when the acceptance is handed to the postal office

- offeror is bound at the time it is handed to the post office although the acceptance has not yet been delivered and may never be delivered.

- the contract is formed where the letter is posted

- where there is silence and no stipulation that the postal acceptance rule does not apply

– the rule can be applied.

PROBLEMS WITH THE RULE:

- post office is treated as an agent of the offeror but the post office is clearly not an agent to whom acceptance is or could be communicated.

- Post office is acting as an agent for both parties – conflict of interest

- With respect to the offeror, there is a period when you are unaware that you are party to a contract – though you are bound by it.

- Posting the acceptance puts it irretrievably out of the offeree’s control. One may not know if the acceptance is ever conveyed to the offeror.

- Mail may be delayed – so how does the offeror know how long to wait for the acceptance?

- This rule gets very complicated with technology – e-mail,

WAYS TO GET AROUND THE RULE:

→ state in the offer that the offer cannot be accepted through the post office

→ show that the application of the rule would be absurd. (ex: Holwell Securities v. Hughes)

→ do not use government post office

**Jurisdiction of Law that applied to the Contract:**

- the contract was made where **acceptance** took place (ex: Brinkibon)

- can state in the contract which jurisdictional laws apply to the k.

***Felthouse v. Bindley*** (1862), 142 E.R. 1037 (Ex. Ch.)

**Silence does not constitute acceptance (even if it ok in the offer)**

**Facts**: P offered to buy horse w/statement that “If I hear no more about him, I consider the horse mine.”

Nephew intended to sell, sent no reply. Auctioneer (D) accidentally sold horse. P sues him for conversion.

**Ratio**: Acceptance of offer *must* be communicated to offeror, though offeror may waive that right. If the offeror dispenses of the need to communicate, it cannot result in a burden being placed on the offeree. You can’t impose contracts on people without their consent or knowledge (distinguish from Carlill, where you had to perform an action to enter the contract).

***Carlill v. Carbolic Smoke Ball Co.*** [1893] 1 Q.B. 256 (C.A.)

**Silence can constitute acceptance if offerer makes it clear than performance is acceptance and that notice is not required (i.e. offeror waives need for communication) – i.e. action as acceptance is ok**

**Ratio**: Offeror can waive right to notice of acceptance. Performance of terms can constitute acceptance.

***Brinkibon Ltd. v. Stahag Stahl Und*** [1982] 1 All E.R. 293 (H.L.)

**K is made where acceptance was received = Brinkibon Rule**

**Facts**: Series of negotiations. Telex sent from London to Vienna accepting seller’s offer.

**Ratio**: With instantaneous methods of communication, k is made where and when the acceptance was received.

**= BRINKIBON RULE**

***Household Fire & Carriage Accident Insurance Co. v. Grant*** (1879), 4 Ex. D. 216 (C.A.)

**Postal acceptance rule**

**Facts**: D. offered to buy shares. Company’s acceptance by post. Notice never reached D. Company bankrupt, liquidator (P) sues f/cost of shares not paid for.

**Ratio**: postal acceptance rule: k is made as soon as acceptance posted (post-office as common agent), regardless of whether the letter is ever received or not. Communication through agents counts as acceptance.

***Holwell Securities v. Hughes****,* [1974] 1 All E.R. 161 (C.A.)

**Postal acceptance does not apply if terms of offer stipulate otherwise**

**Facts**: D. said that “*notice* in writing” must be given. P’s posted letter of acceptance to D but it was never received.

**Ratio**: postal rule does *not* apply if: (a) terms of offer stipulate otherwise, and (b) its application would produce absurdity and inconvenience. Actual communication of the acceptance must be communicated by the offeror.

3**. Termination of Offer**

**a. Revocation**

3 ways an offer can be terminated:

1. **Revocation** – offeror cancelling offer

2. **Rejection** – offeree rejects offer (can do with a counter-offer)

3**. Lapse of Time**

a. **Revocation**:

= *offeror communicates that the offer is no longer open*.

- Can be done by any means

- Offers open to the world should be revoked by the same means that the offers were made.

- Revocation not effective unless it is communicated (does not have to be direct) (ex: Dickinson v. Dodds)

- If offeree has knowledge of revocation before acceptance, then he has no remedy (ex: Dickinson v Dodds)

- Postal Rule does NOT apply- revocation of an offer is effective upon receipt of the revocation. (ex: Byrne v. Van Tienhoven)

- you can revoke offer early, even w/a set deadline (except for unilateral where person has begun actions)

There are **2 main rules** with respect to revocation:

a. an offer may be revoked at any time before acceptance

b. an offer is made irrevocable by acceptance.

***Byrne v. Van Tienhoven*** (1880), 5 C.P.D. 344

**Postal rule does not apply to revocation – revocation is effective upon *receipt***

**Facts**: P. accepted offer on Oct.11. D mailed revocation Oct.8 but doesn’t reach P until Oct.20.

**Ratio**: Revocation of offer is effective upon *receipt*, even if mailed.

Postal Rule does not apply to revocation of offers

***Dickinson v. Dodds*** (1876), 2 Ch.D. 463 (C.A.)

**Revocation must be communicated before acceptance**

**If there is knowledge of revocation then the offeree has no remedy (including indirect knowledge)**

**Offeree is not legally bound by a promise to keep an offer open unless there is consideration for that promise.**

**Facts**: P gives open offer to buy property within time limit. D sells to 3rd party before time up. P indirectly learns of this and sends formal acceptance.

**Ratio**: In order to revoke an offer, you must communicate it to the offeree (does not have to be communicated directly – agent is sufficient)

If the offeree is notified of the revocation of the offer prior to acceptance of the offer, then offeree has no remedy.

An offeror who has promised a certain time period in which to accept the offer is not legally bound by this promise.

Offer can be terminated w/o formal notice. (P can sue for damages but not specific performance)

**b. Unilateral Contracts**

**Unilateral Contracts**: offeree accepts by completing the obligation and offeror still has obligations to fulfill (consideration = the act in uni k)

= an *act is done in return for a promise*

- Only 1 party is required to do something

- Typically occurs in reward or competition type situations. (ex: Carhill v Carbolic Smoke Ball Co)

- Acceptance requires fulfilling a requirement for an action

- The k comes into existence after the requirements have been fulfilled

- The offeror CAN **revoke** the offer before the act has been completed

→ But there is a way that the unilateral k can be kept open for the offeree to accept after the offeree has started to accept but has not quite finished. = **LAW OF RESTITUTION**

**3 ways you can address revocation of offer after actions for acceptance have started in a unilateral contract:**

**a. Law of Restitution**

= until acceptance occurs, you accept the offer staying open by starting to perform the conditions of the unilateral k.

- Where the offeree starts performing the actions required in a unilateral k – the offer cannot be revoked

- This is a DUTY

- The offeree can sue in the *law of restitution/unjust enrichment/quasi-k*

→ This covers situations where a formal k has not yet been entered but it is like a k situation

→ If a person has promised or agreed to pay for some benefit, his liability is contractual, but if he has not done so and has still been enriched by the benefit, his liability is restitutionary

- HAVE TO SHOW THAT THE OFFEROR WAS UNJUSTLY ENRICHED

b. **Preliminary Contract**

= Can argue that when the offeree starts to perform the conditions for the k, a preliminary k comes into existence which governs the performance required for acceptance.

- If the offeror breaches the preliminary k you can file an action.

- EXAMPLE: an invitation to treat could be seen as the offer for the preliminary k, the acceptance of the preliminary k offer occurs when the offeree starts to perform the actions.

c. **Make the unilateral k bilateral**

(ex: Errington v Errington & Woods)

- This is much easier than a. and b.

***Carlill v. Carbolic Smoke Ball Co.*,** [1893] 1 Q.B. 256 (C.A.)

**Generally can revoke offer prior to completion in a unilateral k, sometimes not once performance has begun**

**Com**: Courts always endeavour to make K bilateral b/c of the revocation provision.

Problem: if unilateral offeror revokes K, may interrupt work already completed by offeree.

**Bilateral**: at moment of creation of K, both parties have future obligations (**fully executory**)

**Unilateral**: only 1 party has remaining obligations, other party done all requested. (**partially executory)**

***Errington v. Errington & Woods*** [1952] 1 All E.R. 149 (C.A.)

**Generally can revoke offer prior to completion in a unilateral k, sometimes not once performance has begun**

**Facts**: Father put down payment on house for son & daughter-in-law, mortgage to be paid by couple.

Promise if couple paid off mortgage they would get title to house. Made some but not all payments.

**Ratio**: Unilateral K binding once performance of conditions begins depending on circumstances, not revocable upon commencement. The cause of action is in restitution because it would be unjust for offeror to revoke if they know offeree has started conditions. HOWEVER try to make it bilateral first probably.

- This could be a unilateral k: offer = promise to transfer property

acceptance = making mortgage payments

Therefore acceptance only occurs when payments are finished.

- This could be a bilateral k: offer = promise to transfer property

acceptance = yes

Acceptor would be in breach of k if payments not made and therefore

the offeror could sue for damages

**\*\* Can avoid above situations by making an option-k: keeps offer open while actions are being performed \*\***

**c. Rejection and Counter-Offer**

**Rejection and Counter-Offer**:

- can only be done by the offeree and it need not be express, provided that the offeror is justified in inferring that the offerree does not intend to accept the offer.

- can be accomplished by counter-offer and can be done in any form

***Livingstone v. Evans* [1925] 3 W.W.R. 453 (Alta S.C.)**

**Counter offer = rejection of original offer**

**Facts**: D. offer land for 1800. P. counteroffer 1600. D. said “cannot reduce price.” P. sends 1800. D. refuses to sell.

**Ratio**: Counteroffer is rejection of orig. offer.

Once rejected, only offeror can revive original offer (P renewed)

**d. Lapse of Time**

**Lapse of Time:**

(i) **Offer for a fixed time**:

- the parties may expressly fix a time within which an offer is to remain open

- A promise to keep an offer open is **not binding unless there is consideration** for the promise

(ii) **No fixed time**:

- time may end the offer

- the time depends of the surrounding circumstances (e.g. is it an urgent matter?)

- There are 2 options of how you can consider reasonable lapse of time

a. Look at the offer – what is a reasonable period of time to expect the offer to remain open?

b. Look at the purported time of acceptance – Would a reasonable person say that too much time had passed?

\*\* Have to determine which point to use to determine what evidence is admissible\*\*

Lapse of time is an implied revocation or rejection (usually rejection).

***Barrick v. Clarke*** [1950] S.C.R. 177

**Acceptance must be communicated within time limit or if no time limit, within reasonable time**

**Look at time of offer**

**Facts**: P sent offer to sell to D by letter. D absent hunting, wife asks P to keep offer open. P sells land to 3rd party. D returns and accepts offer too late. Sues for specific performance. Held for P.

**Ratio**: Offeree must respond in reasonable time according to circumstances of business.

**Com**: #1 ®note time at which offer was made and determine what is reasonable ®if it passes, offer lapses.

**Note**: **Can you use evidence after the fact to prove a k earlier?**

U.K.. ®no, too easy to manufacture evidence. **Cdn.** - **admissible, but doesn’t carry much weight**

B. **CERTAINTY OF TERMS** – Ch. 4

**MUST EXIST AT TIME OF ACCEPTANCE**

There can be **2 sources of uncertainty of terms**:

1. the offer does not contain an important element that would be required for a k

- k will fail

2. an aspect of the offer is unclear (e.g. vague or too many possible meanings)

- strike-out clause

- interpret clause

- can cause the k to fail

\*\* This would be straight forward if it was not for May & Butcher\*\*

**Cannons of Constructions** = clarify what parties are taken legally to mean in a k.

**RULES**:

* Whenever possible a contract will be upheld (ex: Foley v Classique Coaches Ltd.)
* Meaningless clauses will be eliminated from the agreement without effect to rest of the agreement
* There is no contract if there is an absent agreement on price (unless there is a statute (Sales of Goods Act) but this still may not apply) (ex: May & Butcher v R)
* BUT in Foley v Classique Coaches Ltd. it was found that that the absence of a price would not cause the k to be avoided.
* Uncertain terms may be determined by reference to the original agreements or normal practice (ex: Hillas and Co. v Arcos Ltd.)
* Parties must agree on the terms – if not the agreement is an “agreement to agree” and this fails on lack of certainty – the k is VOID (Empress)
* → A clause for an agreement to renew is void for lack of certainty (ex: Mannpar
* Enterprises v Canada)
* BUT in Empress Towers Ltd. v Bank of Nova Scotia it was found that an agreement to renew implies that: one must negotiate in good faith and that one must not withhold the agreement unreasonably

\*\***Common Law will not allow a mechanism to decide the price after the k is made. However statutes might**\*\*

**SALE OF GOODS ACT**:

**Ascertainment of Price**

12(1) - The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between parties.

The **price can be set by**:

**a. the contract**

**b. parties agree on a method**

- This could be:

i. agree later

ii. reference to market price

iii. 3rd party sets the price

iv. reference to price in another k

c. s. 12(2) (below)

**Reasonable Price**

12(2) - Where the price is not determined in accordance with the foregoing provisions the **buyer shall pay a reasonable price**. What is a reasonable price is a question of fact dependant on the circumstances of each particular case.

**Agreement to sell at Valuation**

13 - Where there is an agreement to sell good on the terms that the price is to be fixed by the valuation of a third party, and **the third party cannot or does not make the valuation, the agreement is avoided**: provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he shall pay a reasonable price therefore.

**VERY IMPORTANT – COMPLICATES SIGNIFICANTLY**

***May and Butcher Ltd. v R*** [1934] 2 K.B. 17 (H.L.) (COMPLICATES)

**If crucial term is undetermined = no k at all (note: should probably use Hillas instead!)**

**Facts:** The P. and the D. entered into an arrangement for the D. to purchase surplus tentage. The parties did not agree on a price, they agreed that if they could not agree they would go to arbitration.

**Ratio:** If s.12(1)b of Sales of Goods Act does not apply, the k is avoided.

An agreement in which some critical part in the k is left undetermined is not a k at all.

**Why didn’t they go to arbitration to figure out the price?**

→ The arbitration clause could not be used because it is only effective when the k is effective and since the k did not come into existence, it would not go to arbitration.

**Why didn’t the court use s.12(1), 12(2) of the *Sale of Goods Act*?**

→ The Court understood s. 12(1) to mean that you only are able to get the reasonable price if the parties did not use any option from s. 12(1) in the k to determine price: ie: **did not set a price at all.**

→ Court felt this was followed the idea of s.13 (ie: s.13 says that if one of the options in 12(1)b fails then the agreement is avoided – court felt that this presumable extended to all the option of s12(1)b.)

→ **Problem = the statute specifically mentioned only one option – so they did not mean it to apply to all the options – the presumption should be the agreement wasn’t avoided.**

The logical thought is that: if one of the methods in 12(1)b fails then you resort to 12(2).

***Hillas and Co. Ltd. v Arcos Ltd.*** (1932), 147 L.T. 503 (H.L.)

**Business k are often not complete/precise – courts must look at intention and uphold where possible**

**Uphold existence of a contract as much as possible**

**Facts:** The D. agreed to sell an entire production of wood to the P. The D. later agreed to sell the wood to someone else.

**Ratio:** The principles of construction laid down by *May and Butcher* are not laid down, each case must be decided on the construction of the particular document.

***Foley v Classique Coaches Ltd.*** [1934] 2 K.B. 1 (C.A.)

**Look to intention – strong presumption in business k’s that courts will fill in details**

**Facts:** The D. purchased land and entered into agreement with the P. to buy all petrol required for business

from the P. After 3 years, D. tried to renounce the agreement.

**Ratio:** Contracts will be upheld whenever possible

Contracts will not be avoided simply due to an ambiguity in price

***Empress Towers Ltd. v Bank of Nova Scotia*** [1991] 1 W.W.R. 537, 50 B.C.L.R. (2d) 126, 48 B.L.R. 212,

14 R.P.R. (2d) 115, 73 D.L.R. (4th) 400 (C.A.) leave to appeal to S.C.C. refused 79 D.L.R. (4th) vii

**Can’t enforce an agreement to agree, but there is an obligation to negotiate in good faith**

**Agreement to agree = no k**

**Facts:** The D. was the tenant of the P., there was an agreement to renew the lease with a mutually agreeable rent based on market value. They failed to agree before the lease expired and then the P. offered non market value price. Case with bank and Empress trying to get back the money that was stolen from them.

**Ratio:** Can’t enforce an agreement to agree – has some meaning but not full contract – can be used as shield/defence

An agreement to renew has 2 contractual obligations:

1. to negotiate in good faith

2. to not withhold agreement unreasonably

A party is being unreasonable if they won’t consider a fair market price.

***Mannpar Enterprises v Canada*** (1999) 173 D.L.R. (4th) 243

**There is no obligation to negotiate in good faith in an agreement to agree**

**An agreement to agree = no k**

**Distinguished from Empress b/c a mechanism for determining price is not expressed**

**Facts:** The P. was granted a permit with a renewal clause by the D. for extraction of gravel. The D. was not prepared to renew the permit.

**Ratio:** A renewal clause if void for uncertainty

→ Empress and Mannpar are 2 extremes: they send conflicting arguments

* Mannpar does not distinguish from Empress –there is no explanation for difference between the outcomes.
* But can be distinguished on the basis that a mechanism for determining the price is expressed in Empress k but not in Mannpar, also Empress involved continuing existing contract while Mannpar was a new k
* Therefore in some cases, the courts will impose a duty to negotiate in good faith on parties.

C. **INTENTION TO CREATE LEGAL RELATIONS** – Ch. 3

**Determining Intention**:

- this is an objective test: if the reasonable person would consider there was an intention to make a legally binding k, then the promisor is bound

**Situations where there is no intention to create legal relations**:

- Arrangements might fall into a class where **legal contracts are not normally made** – ex: Social engagements and family arrangements cannot be k’s because there is no intention to create legal relations (ex: Balfour v. Balfour)

- Business transactions where the parties **explicitly state** that they do not intend to enter into legal obligations (ex: Rose & Frank v. JR Crompton & Bros)

***Balfour v. Balfour*** [1919] 2 K.B. 571 (C.A.)

**Family agreements are not legally enforceable – this hurts the weaker party**

**Facts**: Husband, D, promised wife, P, allowance. Couple divorced. Husband failed to continue payments.

**Ratio**: Overburdened courts shouldn’t consider family obligations as k’s as they did not intend legal consequences.

**Com:** This was a public policy decision

Criticism - this hurts weaker party. Can sue for non-performance of support though.

***Rose & Frank v. JR Crompton & Bros*** [1923] 2 K.B. 261 (affirmed in H.L.)

**If parties explicitly state that they have no intention to create legal relations, then the k is not bound by the court**

**Facts**: Prior legal relations between D and P. Parties then make written agreement w/ “good faith” clause excluding legal relations. D refused orders and terminated relations.

**Ratio**:Parties’ express intentions should stand without interference by courts.

If parties make it clear in the k, they may include a clause that does not make the k legally binding in the Court of Law.

**Com**: This decision is so old as not to be relevant.

This clause not likely to be effective today, however arbitrations could be used if parties so desire.

D. **CONSIDERATION** – Ch. 7

**\*\*\* CANNOT HAVE CONSIDERATION FOR K’S – CONSIDERATION ONLY**

**EXISTS FOR EACH OF THE PROMISES WITHIN A K \*\*\***

**Consideration** = a benefit moving from the promisee to the promisor or to a 3rd party OR it is a detriment incurred by the promisee.

- in either case, it is the agreed price of the promisor’s promise.

**RULES**:

- Consideration is only required for informal k’s (a seal acts as considerationin formal k’s)

- {For formal k’s – the promise is binding if the promisor seals the promise}

- If consideration for one of the promises is missing, then only that promise is not enforceable

- There must be consideration for each promise within a k

- Consideration must be present at the time of acceptance

- consideration must move from promise to promisor (or 3rd party) or be a detriment to them

**What can be consideration?**

1. An act other than a promise (ex: swimming the English Channel)

2. A forbearance = not doing something (i.e. “I’ll stop doing A if you promise B”)

3. The creation, modification, or destruction of a legal relationship

4. A promise

The existence of **consideration must be distinguished** from:

1. **Motive** (ex: Thomas v Thomas) –reason why someone enters into the k is not consideration

2. **Adequacy** **of consideration**

3. **Failure of Consideration** (one of the parties failed to perform any of what he promised to do – ie: breach of the k)

**Seal**: can be used to make an agreement enforceable in which there is no consideration.

- the promisor must apply the seal

1**. Nature of Consideration and Seals**

***Royal Bank v. Kiska*** [1967] 2 O.R. 379 (C.A.)

**When sealed with awareness of what a seal means = sufficient consideration**

**Promisor must affix the seal**

**Facts**: P bank brought action on guarantee signed by D. D used no wafer seal but “seal” printed in place of.

**Ratio**:A formal seal can make a guarantee absolutely binding even without consideration.

A pre-printed seal on a document by the promisee is not sufficient for consideration of the promise (promisor MUST affix the seal)

The person affixing the seal must be aware that what they are doing is making the agreement legally binding.

***Thomas v. Thomas*** (1842), 114 E.R. 330

**Consideration must be something of value in the eyes of the law moving from the promisee to the promisor**

**Motive (love & affection) is not the same as consideration**

**Facts**: P‘s husband dies verbally wishing her to have house. P makes agreement w/executors to pay ₤1/year rent and keep in good repair. D executor later evicts P contrary to agreement.

**Ratio**:Any consideration, as long as it’s not incidental to the gift, can be construed as consideration, no matter how small.

Motive is not the same thing as consideration.

**Com**: 3 arguments were brought up in this case:

1. pious regards for wishes – D argued that it was motive and not in writing

2. P promised to make repairs – D argued this was incidental to getting the house

3. P promised to pay rent – D argued it is incidental aspect of getting the land – the rent would have to be paid anyway by anyone who had the land

2**. Adequacy of Consideration**

Size of consideration does not matter in Common Law – as long as some consideration exists, that is all you need.

***Mountford v Scott*** [1975] 1 All E.R. 198

**The size of the consideration does not matter – anything of value is sufficient.**

**Facts:** An option to purchase land was given in exchange for $1.

**Ratio:** Anything of value, however small the value, is sufficient consideration to support a contract at law. If the parties agreed on it then it’s good.

3. **Past Consideration**

**Past consideration = make a promise for an action that is already completed.**

*- not acceptable consideration*

- exception: Lampleigh, some statutes allow for it in certain contexts, underage (i.e. those who make the contract when they’re underaged can repeat the promise when of age and it’ll count)

***Eastwood v. Kenyon*** (1840) 113 All E.R. 482 (Q.B.)

**Past consideration is no consideration**

**Facts**: P borrowed and spent $ on ward. Ward promised to repay amount when she came of age, and in fact paid 1yrs. interest. Married D who also promised to repay, but did not. (The P offered the fact that he incurred expenses earlier as consideration, this is past consideration and is not valid)

**Ratio**:Past consideration is not good consideration.

***Lampleigh v. Brathwait*** (1615) 80 E.R. 255 (K.B.)

**Past consideration may be consideration if one party agrees to give the other party something in exchange for an action. The action is completed. Then the reward is made explicit. The k is binding.**

**Facts**: D requested P to get pardon for murder from King. P laboured to get D a pardon. Afterwards, in consideration of such, D promised to give P ₤100. The pardon was obtained before the promise was made.

**Ratio**:When a promise is made, if it is a mere voluntary courtesy, then it is not binding. But if it is coupled with an expectation – then it is valid.

An act done before a promise to pay can sometimes be consideration for the promise. The act must have been done at promisor’s request and there was an understanding that it will be ultimately paid for.

**Lampleigh v Brathwait explained**: If parties enter into an agreement and one party promises to do something (unexplicit) in exchange for the action, the action is then done and the thing given in exchange then becomes explicit, then it is not past consideration.

- usually occurs in emergency situations (where there wasn’t time to discuss compensation)

BUT – the terms must become explicit to ensure certainty of terms – otherwise the k will fail.

4. **Forbearance**

**Forbearance: = a promise not to do something**

- not acceptable consideration in some circumstances

- **almost always acceptable consideration**

**EXCEPTION:**

1. Promise to forbear from suing is **not acceptable** consideration when**: the person threatening to sue knows that there is no merit to their legal claim** (ie: they know that an action would not be successful)

- if you think you have good action, forbearance from suing is good consideration

***Callisher v Bischoffsheim***(1870), L.R. 5 Q.B. 449 (eng. Q.B.)

**Forbearance is good consideration if the person believes their claim is good.**

**It is not good consideration if the person knows their claim is false.**

**Facts:** Pf said Honduras govt owed him money, then agreed not to start proceedings against govt for an agreed time in return for df giving him some bonds. Pf did not take proceedings but df didn’t give the bonds. It turned out that pf was not owed money by the govt.

**Ratio:** For the pf. Forbearance to sue is good consideration and whether proceedings to enforce the claim have begun or not doesn’t make a difference. He must bona fide believe he has a fair chance of success in his claim. The other party’s advantage is avoiding annoyance and vexation with an action. However, it is not good consideration if the person making the claim knew it was false.

5. **Pre-existing Legal Duty**

**Pre-existing legal duty = promising to do what you are already bound to do for the:**

1. **Public** – promise to do what you are already bound to do by public duty

2. **3rd Party** – promise to do what you are already bound to do for a 3rd party (eliminated by Pao On v Lou Yiu Long)

3. **Promisor** – promise to do what you already promised to the promisor

**\*\*\*THESE ARE NOT GOOD CONSIDERATION EXCEPT FOR THE FOLLOWING EXCEPTIONS\*\*\***

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

Historically not good consideration in common law for a promise, but *Pao On* says that a promise to perform a pre-existing legal duty to a 3rd party can be valid consideration – e.g. B can now also enforce A’s duty to C

***Pao On v. Lau Yiu Long*** [1980] A.C. 64 (P.C.)

**Promise to perform, or performance of a pre-existing k obligation to a 3rd party can be valid consideration as long as the promise has not been fulfilled (past consideration) – makes it enforceable in another way**

**Economic duress: if you are forced to do something, it invalidates the contract**

**Facts**: *Main K* = F.C. & P - F.C. buying majority of Shingon (owned by P) shares w/F.C. shares*. Subsid. K* = P & D - P not to sell shares f/1yr. after which D would buy back at $2.50 regardless of market value. Ps wanted benefit if value rose - *New subsid. K* = Ds to indemnify Ps if shares lost value and P affirms main K. Shares drop, P brings action to enforce new subsid. K.

**Ratio**: Performance of a pre-existing legal duty to a third party can be valid consideration.

If the new promise was foreseen at time of main K, there is no issue of new promise being past consideration. If new K *replaces* old K, and old K o.k. w/past consideration., then new K alright too.

**Note**: F.C. could have argued economic duress - forced to make new sub. K - unconscionable.

**b. Duty Owed to the Promisor**

2 Situations:

1. The same promise for more

2. The same promise for less

**This may occur in two situations**:

a. Replacing the k with a new one

b. Replacing a term in the k – but this can only be accomplished by creating a new k

**Accord in Satisfaction** = an agreement in which there is consideration that replaces an old prior agreement – the law says this is enforceable as long as there are new promises that change the existing promises.

**1.** The Same Promise for More:

- a promise to do more is not enforceable if what is being received in return does not change.

2. The Same Promise for Less:

- a promise to accept less in exchange for the same promise is not enforceable

***Gilbert Steel v. University Construction*** (1976), 12 O.R. (2d) 19 (C.A.)

**Promise to do more than original promise made in pre-existing k cannot be sufficient consideration unless what is being received is changed.**

**Mutual abandonment of agreements ≠ consideration**

**CANNOT USE EQUITY STATUTE**

**Facts**: P & D had existing K. Then P supplier increased the price of steel bars. D orally agreed to the increase. Written K drawn up but never executed. P sues for breach of oral K.

**Ratio**: Promise or performance of pre-existing duty to promisor is not new consideration, nor is forbearance from breaking the K.

Consideration is *not* found in mutual abandonment of old obligations.

**A promise to do more is not enforceable if what is being received in return does not change.**

**Obit**: Cannot use estoppel as cause of action ® eg. shield not sword.

***Greater Fredericton Airport v Nav******Canada*** [2008] N.B.J. No. 108

**Post-contractual modifications without fresh consideration can be enforceable if the variation was not procured under economic duress.**

**Facts:** Nav was contracted to move an equipment system for the Airport but decided it would be smarter to replace part of it instead. There was a dispute about who should pay for the new equipment. Nav’s obligation was to pay for the DME since it insisted on buying new equipment instead of relocating. Airport eventually agreed to pay by way of a letter signed under protect, but then refused to make the promised payment. Issue is whether there was consideration for the Airport’s promise to pay, i.e. did Nav do more than originally promised in exchange?

**Ratio:** Performance of a pre-existing obligation does not qualify as fresh or valid consideration. Nav promised nothing in return for the Airport’s promise. Commercial reality is that efficiency sometimes requires existing contractual obligations to be adjusted, law must protect their expectations that these modifications be enforced. It would be an injustice not to, if the promise has acted in good faith and to their detriment in relying on the enforcement of those changes. So a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress.

***Foakes v. Beer*** (1884), 9 App. Cas. 605 (H.L.)

**A promise to do less in exchange for the same promise is not good consideration = OVERRIDDEN BY STATUTE IN BC**

**Facts**: D owed P money. P agreed to accept less. No mention of interest. P claims interest after debt paid.

**Ratio**: Payment of smaller sum cannot satisfy larger debt (*Pinnel’s* case).

**A promise to do less for the same promise in exchange is not good consideration.**

Both parties must do something different.

Partial payment to creditor is not consideration for creditor’s promise to accept less.

The promise must be serious and not made under economic duress.

*Accord in Satisfaction:*

***Foot v. Rawlings*** [1963] S.C.R. 197

**A difference in the agreement in addition to a change in what is promised is good consideration for a k**

**Facts**: Agreed that P would charge less interest on debt if regular payments made on paid cheques. Agreement kept for 2 years. P sues for balance.

**Ratio**: Modification of payment (form, place or time) exempts K from the rule that a smaller sum can’t satisfy a larger debt.

**A difference in the agreement in addition to a change in what is promised is good consideration for a k**.

**4 ways around Foakes v Beer**:

A. Put the agreement under seal

B. Statute – some statutes outline situations in which Foakes v Beer is eliminated (ex: Law and Equity Act)

C. Structure the new arrangement so that not only are the parties paying less but something else is different (ex: different time/place/payment method, anything additional) – then new arrangement is binding (eg Foot v Rawlings)

**ACCORD IN SATISFACTION** = replacing the earlier duties with new duties (accord is the agreement to settle for less, the satisfaction is something new given in exchange) – e.g. pay in a different way, on a different date, etc.

D. Estoppel – in certain circumstances you cannot go back on your word

- even if the k is binding, estoppel can enforce a promise

**LAW AND EQUITY ACT:**

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.

* The statute does not make the 2nd k binding, it simply extinguished the first obligation (thereby possibly not making it a pre-existing legal duty)
* Foot v Rawlings – this wouldn’t work because parties did not extinguish their first obligation.
* Foakes v Beer – could use in that case because statute applies to ‘same for less’ situation.
* Gilbert v Steel – could not use in that case because statute does not apply to ‘same for more’ situation.

6. **Waiver and Promissory Estoppel**

These are parts of equity – not contract law.

**Promissory estoppel:** = where someone says something, and another person relies on that statement, the person making the statement cannot go back on it.

- suspends the rights between parties, makes it so you can’t revert on a promise

The promise should be clear and unambiguous. Any ambiguity should be resolved in favour of the promisor.

**Estoppel requires**:

1. Must be a **statement** – can be a statement about the past or the future, BUT must be a **fact**

2. There must be **reliance** on the statement

3. (There had to be some **detriment** suffered by the person relying on the statement)

- NOT ALWAYS REQUIRED

**Promissory Estoppel Restrictions**:

1. Waiving rights in the past does not constitute a promise to wave rights in the future (ex; John Burrows Ltd. v Subsurface Surveys Ltd.)

2. it must be fair to enforce the promise (ex: D. & C. Builders Ltd. v Rees)

3. it can only be used as a defence – not as a cause of action (ie: can only be used to modify an existing relation – cannot be used to create a relation (shield not a sword) (ex: Combe v Combe) CONTRARY TO (ex: Walton Stores Pty Ltd. v Maher)

***Central London Property Trust Ltd. v High Trees House Ltd.*** [1947] (King’s Bench) –

**Beginning of Equitable Estoppel**

**Facts:**The P gave the D a break on their rent while occupancy of the building was down during wartime, but when it increased post-war the D wanted to enforce the lower rent even though the contract was for more.

**Ratio:**A promise to accept a smaller amount in discharge of a larger, if acted upon, is binding despite the absence of consideration.

A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply (ie: the conditions that caused the promise to be made still exist).

It can only be binding if it would be inequitable otherwise.

**Dec:** *Denning* – Find for the P. Found that the court of equity would recognize promises.

***John Burrows Ltd. v Subsurface Surveys Ltd.*** [1968] (SCC)

**Waving rights in the past does not constitute a promise to wave rights in the future – cannot use promissory estoppel**

**Facts:** D was consistently late with his payments and finally P decided to sue based on a k that they had saying that if D was ever more than 10 days late with payments he could sue for entire amount. The D claims that because the P has not taken action with regard to late payments in the past – that he can use promissory estoppel as a defence.

**Ratio:**Waving the rights in the past does not constitute a promise to wave rights in the future (choosing to wave rights and promising to wave rights are different) **Dec:** Find for the P.

***D. & C. Builders Ltd. v Rees*** [1966] (Queen’s Bench)

**promissory estoppel – it must be fair to enforce the promise**

**Facts:** The P reluctantly accepted a smaller amount for his work than was owed because he needed to money and the D knew this and used it against him (crazy wife who was like “take this money or take nothing!” and he was poor so he took the lesser amount)

**Ratio:** Qualification on *Central London Property Trust* = the creditor is barred from his legal rights only when it would be **inequitable** for him to insist to them but he is not bound unless there is a true **accord** between them.

**Dec:** Find for the P. *Denning* – promissory estoppel is equitable – therefore depends on fairness.

***Combe v Combe*** [1951] (CA)

**Estoppel is a shield not a sword – can’t base an action fully on estoppel**

**Definition of Estoppel**

**Facts:** The D and P were divorced – the husband agreed to pay the wife 100*l* per year, he never did. The wife wants the money (there was no pre-existing relationship involving payments)

**Ratio:** Estoppel can never stand alone as the cause of action (can be used as a shield not a sword)

Estoppel can be used to modify an existing legal relation but not to create a relationship

**Dec:** Find for the husband. *Denning-* “Estoppel = “where one party has, by his words or conduct, made to the other a promise which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise cannot afterwards be allowed to revert to the previous legal relations as it no such promise has been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only his word.”

***Walton Stores Pty Ltd. v Maher*** (1988) (H.C. of Australia)

**ONLY PERSUASIVE IN CANADA – NOT BINDING**

**Estoppel is a sword and a shield**

**Allows *Gibert Steel* situation to use promissory estoppel but does not mean outcome would have been different**

**Facts:** There was a verbal agreement to amend the lease but they were awaiting formalization. Demolition of the building started and there was no objection by Waltons. Waltons now claims there was no intention to proceed.

**Ratio:** Equitable estoppel can be used as both a cause of action and where there is no pre-existing legal relationship

**Dec:** Find for the Mahers.

**Note:** The court merges promissory and proprietary estoppel together – used estoppels to make a contract.

This type of estoppel will only work on grounds of unconscionability (therefore cannot be said to undermine the *Gilbert Steel* situation very often)

***M(N) v A(AT)*** (2003), 13 B.C.L.R. (4th) 73 (B.C. C.A.)

**Promissory estoppel requires the intention to create a legal relationship with a binding promise**

**Facts:** Mr. A promised to pay the outstanding balance on Ms. A’s mortgage if Ms. A moved to Canada to live with him and get married. Mr. A did loan her $100,000 on a promissory note, which she used for her mortgage. He then dumper her and kicked her out of his house. Ms. A claims that through promissory estoppel she is entitled, as minimum equity, to not have to pay back the loan.

**Ratio:** Test for the enforcement of a promise: did the parties intend to affect their legal relations? A necessary element of promissory estoppels is the promisee’s expectation or assumption of a legal relationship. Here, the answer is no, the mortgage promise was not intended to be binding. These types of promises made in the context of a relationship are at the parties’ own risk. If Mr. A had to pay her mortgage by law then she would be legally obligated to stay with him.

**PRIVITY**

→ Contractual obligations can only be imposed on those that were party to the k

→ The only parties that can enforce the k are those that are party to the k

**2 FORMS OF PRIVITY:**

1. **Horizontal** = (k made by A & B for the benefit of C)

2. **Vertical** = (A & B have a k, B & C have a k, but A & C do not have a k)

A. **THIRD-PARTY BENEFICIARIES**

***Tweddle v. Atkinson*** (1861) (QB) (**Horizontal Privity)**

**Third party cannot enforce k since provided no consideration, even if k is for his benefit**

**Facts**: P was son of John Tweddle, who made agreement with son’s wife’s father (Guy) that both would give to P some $. Guy died without giving P money. Clause in contract says P “has full power to sue the said parties”. P and wife ratified and assented to the agreement. Brought suit against Guy’s estate (D).

**Ratio:** Consideration must more from the party entitled to sue upon the contract: therefore third party beneficiary who did not provide consideration cannot enforce the contract. Natural love and affection is not consideration.

**Dec:** P cannot enforce the k (Find for D)

***Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*** (1915) (HL) **– (Vertical Privity)**

**Only parties to the k can sue on the k.**

**Facts:** P sold tires to Dew, wholesalers, on terms that Dew would not sell that tires below P’s list prices except to customers legitimately engaged in the motor trade, to whom they were allowed to sell at 10% below list price. Condition was that the customers would then have to sell at P’s list prices. Dew hasn’t broken any promises because all they did was promise to put clause in contract with buyers that they would not sell below certain price and if they did, the buyer would have to pay damages to Dunlop. D (department store) obtained tires from Dew and signed agreement to sell at list price, then agreed to sell tires to two customers at below list price. P claim injunction and damages in respect of D’s breach of their agreement with Dew.

**Ratio:** (i) Only a person who is party to a contract can sue on it: even if the contract explicitly says that the third party has rights under the contract, those rights are not enforceable.

(ii) Consideration must have been given by promisee to promisor or to some other person at promisor’s request (agent)

(iii) Principal not named in the contract can sue on it if the promisee was contracted as his agent; he must have given consideration through agent.

B. **CIRCUMVENTING PRIVITY**

**Ways of Dealing with Privity Doctrine so a non-Party can Benefit from the k:**

1. Abolish the situation by statute (ie: say that in \_\_\_ situation, a party can sue even if they weren’t party to k)
2. Use Civil Law Vertical Privity Rule: when A sells to B, A sells a guarantee. When B sells to C, B sells the guarantee as well. Therefore, C can bring an action for breach of k with A

→ Ie: turns personal obligations into real obligations

→ Persuasive only in common law

1. Constructive **Trust** (Horizontal Privity): When A requires B to act for the benefit of C – the k can be converted into a trust. Thus there would be a fiduciary duty between B and C (this is a very strong duty – much stronger than a k)
2. **Agency** (vertical privity): A is the principal. A enters into an agency k with B. B acts as the agent for A. When B makes a k with C, the k is effectively between C and A and there is no k between B and C.

→ The interests of A and B must NOT conflict (ex: Dunlop)

1. **Specific Performance**: parties to the k can go to court to require specific performance (cannot be damages because the parties to the k have no incurred any harm). But C cannot bring this action (ex: Beswick)

**London Drugs Exception to Privity**:

- this exception can only be used as a **defence**

1. London Drugs Ltd. v Khuehne & Nagel International Ltd. [1992] (SCC)

= in an employment k between A and B, if the employee is acting on behalf of one of the employer (one of the parties), then the k can be extended to the employee if:

1. the limitation of liability clause explicitly or impliedly extends to the employees

2. employee was acting in the course of employment and undertaking to requirements of the k.

1.**Specific Performance**

***Beswick v Beswick*** [1966] (CA) **(Horizontal Privity) OVERRULED BELOW**

**A third party who has a legitimate interest in enforcing the k may do so in the name of the contracting party.**

**Facts:** In a k with his uncle, D promised to pay the P ₤5/week. The D paid until the uncle died, then refused to pay.

**Ratio:** Denning: Where a k is made for the benefit of a third party ,who has a legitimate interest to enforce it, it can be enforced by that third party in the name of the contracting party.

The general rule is: no third person can sue, or be sued, on a k to which he is not party.

**Dec:** Find for the P. HOWEVER OVERRULED BY HL

***Beswick v Beswick*** [1968] (HL)

**A third party CANNOT enforce a k**

**Ratio:** Where a k by its express terms purports to confer a benefit directly on a third party, it shall NOT be

enforceable by the third party.

2.**Trust**

**3.Agency**

**4.Employment**

***London Drugs Ltd. v Khuehne & Nagel International Ltd.*** [1992] (SCC)

**Employees can sometimes benefit from contracts in which they are a 3rd party in the case of *defences***

**Facts**: LD kired K&N to store a machine for them. K&N was only liable for $40 under a limitation of liability clause. Workers at K&N damaged the machine. The workers claimed to be covered by the liability clause of K&N.

**Ratio:** In employment, employees can benefit from a defence in a contract they are a 3rd party to if:

1. the limitation of liability clause explicitly or impliedly extends to the employees

2. employee was acting in the course of employment and undertaking to requirements of the k.

Look to the intentions of the parties to see if the 3rd party can benefit.

5.**General Principle for Circumvention**

***Fraser River Pile & Dredge v Can-Dive Services*** (SCC)

**London Drugs Exception does not only apply to employment k’s.**

**Facts:** Fraser owned a barge that was under charter to Can-Dive and got damaged. Fraser and its insurer had a clause in their contract where insurer waived its right of subrogation against charters and extended coverage to affiliated companies and charterers. The insurer paid Fraser for the loss of the barge. Then Fraser waived its right to that waiver so the insurer could bring a negligence claim against Can-Dive.

**Ratio:** The *London Drugs* exception does not only apply to employments ks – can be applied here.

If a 3rd party benefits from a provision – the provision must exist at the point the 3rd party can utilize it – in order to guarantee entitlement (ie: cancellation of waiver after the incident does not affect the situation).

**Assignment**: The transferring of rights and duties in a contract to another party. Usually forbidden

**Subrogation:** You can take over another party’s claim and sue. Usually in insurance. A subtype of assignment.

**THE CONTENT OF THE CONTRACT**

**Terms**: Part of the offer.

🡪 Operative: Gives the obligations.

**Representations:** Statements made in negotiations that are not part of the offer.

B. **MISREPRESENTATION AND RESCISSION**

Ideally – try to argue breach of k before misrepresentation.

**Misrepresentation** = representations that are not true.

🡪 Those that have legal significance are called **operative misrepresentations**

🡪 Not in law of k, in law of torts

**In order to be an Operative Misrepresentation:**

1. Have to be a misrepresentation of **fact:**
   * Statements about the future, the law or opinion are not statements of fact
   * Ignorance of law is no excuse, thus statements about the law cannot be basis for misrep.
2. There has to be something said that is false
   * **Silence** can constitute a misrepresentation when:
     1. If there is a fiduciary duty
     2. When a question is asked but there is whole or partial silence in response
     3. When statutes state that there is a duty to disclose information
3. The statement must be addressed to the party misled
   * Must be one of the reasons why the person entered into the k
   * Ways around this:
     1. Look at who parties are (e.g. car dealers should know more about cars than you)
     2. If a person has done investigations to verify the statement, then they did not rely on your statement (*Redgrave v Hurd*)
4. The representation must induce the k
   * Must be a statement about something significant

**REMEDIES:**

There are 3 types of operative misrepresentations:

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

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

**Rescission** = undoing of the k

* Both parties will be put back to the position which they were in before the k existed
* If you cannot obtain the conditions that occurred before the k existed, then rescission is not an option (though Kupchak says something contrary)
* **Therefore, there is no remedy for an innocent misrep unless you can acquire the conditions before the k came into existence**

**Bars to rescission:**

(but nothing in equity is absolute – courts may ignore the bars to rescission because it’s fair to do so)

1. **Rescission would adversely affect a 3rd party’s rights**
   * Would upset 3rd party entitlements
2. **The impossibility of complete restitution**
   * Some things are fungible (i.e. money – can give back different notes but add up to same amount)
3. **Affirmation = the innocent part may lose an equitable remedy because they are taken to have affirmed the k.**
   * When a person discovers the misrepresentation, they must chose to use the equitable remedy or to continue with the k – when they decide not to pursue an equitable remedy, they are seen to have affirmed the k and are no longer eligible for an equitable remedy
   * **LACHES** = a delay in seeking remedy that caused affirmation
4. **Execution of the k**
   * Highly arguable – may not be law
   * If both parties have completed the obligations in the k – then the k is finished and there is no k – therefore there is nothing to rescind.
   * Very weak argument

1. **Misrepresentation and Rescission**

***Redgrave v Hurd*** (1881), England C.A. – p.355

**It is not a defence to say the P should have tried harder to learn the truth**

**Innocent misrepresentations can form the basis for a remedy of rescission**

**Facts**: P enters into k with D to start a practice with a specified income. P finds out income not correct while researched but D assures him the difference would be made up. P later finds out the business is worthless.

**Ratio**: It is not a defence to say P should have tried harder to learn the truth – i.e. there is no due diligence burden.

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

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

Common Law: a k may be set aside even if the person did not know the statement to be false but only if the statement was made recklessly and without care.

**Dec:** Find for the D.

***Smith v Land and House Property Corp*** (1884) England C.A. – p.359

**A statement of opinion is a statement of fact when the facts are not equally known by both parties.**

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

**Ratio**: When the facts are not known equally on both sides, a statement of opinion that implies the statement is based on fact is usually a material fact.

***Kupchak v Dayson Holdings*** (1884) England C.A., p.363

**Rescission of a k is an option even when complete restitution cannot be reached.**

**Facts**: P bought share of a motel from D. Later it was discovered hotel’s earnings were falsely misrepped by agent of D. D had sold interest in properties given by P in exchange for the motel shares.

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

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

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

2. **Representation and Terms**

**Term** = a statement made for which that party intended to give an absolute guarantee.

**TEST OF INTENTION** = term was intended to be guaranteed strictly (*Hielbut, Symons v Buckleton*).

***Hielbut, Symons & Co v Buckleton*** (1913) H.L., p.371

**The term is a statement made for which the party intended to give an absolute guarantee.**

**Facts**: D bought shares in P’s company with understanding that it was a rubber company. Company was not properly described because it was not solely a rubber company.

**Ratio**: The test for whether a statement is a term or a mere representation is the intention. A term in a k is a statement made where the party intended the statement to be an absolute guarantee and to have legal effect.

There are no damages possible for innocent misrepresentation.

**Dec:** The statement was a representation.

C. **CLASSIFICATION OF TERMS**

**Conditions, Warranties and Intermediate Terms:**

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

1. **Condition** = statement of fact which forms an essential term in the k
   * *Remedy* = damages and the innocent party can treat the k as **repudiated** = the k comes to an end, the primary obligations are terminated, but the secondary obligations remain
2. **Intermediate Term** (Innominate)
   * *Remedy* = determined after the breach occurs based on the seriousness of the consequences of the breach, not the breach itself, and uses either of the remedies for condition or warranty (*Hong Kong Fir Shipping*)
3. **Warranty** = a term which is not essential to the k and is collateral to the main purpose of the k
   * *Remedy* = unless stipulated otherwise in k, only remedy is damages (therefore must prove harm was done)

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

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

***Hong Kong Fir v Kawasaki Kisen Kaisha*** (1962) England CA, p.436

**Introduced the Intermediate Term (and test to determine if something is a condition or intermediate term)**

**Facts**: P hired ship from D. Ship not equipped w/competent engine room employees so significant time lost during the voyage for repairs and damages caused by the employees.

**Ratio**: *Breach of a Condition* = gives rise to an event which relieves the party not in default of further performance of primary obligations

*Breach of Intermediate Term* = remedies determined after the breach occurs based on the seriousness of the consequences, not the breach, and uses either of the remedies for a condition or warranty.

*Breach of a Warranty* = party cannot treat himself as discharged from the k.

Test for whether it is intermediate term or condition: Does the occurrence of the event deprive the party with further undertakings to perform of substantial benefits?

**Dec:** Reaffirms trial judge’s decision.

***Wickman v Schuler*** (1973) H.L., p.443

**Placing labels on terms in a k does not imply the legal definition of the label onto the term**

**Facts**: P entered k with D to be sole seller of D’s products. To ensure aggressive sales tactics, k had provisions that P would use very specific sales tactics. P failed to comply strictly.

**Ratio**: Using the word ‘condition’ in a k does not imply the legal definition of a condition into the k. Surrounding clauses will be examined to determine what definition of ‘condition’ was implied. Be clear if you want it to be one.

**Dec:** ‘Condition’ was not the legal definition.

**Rescission versus Repudiation:**

|  |  |  |
| --- | --- | --- |
|  | **Rescission** | **Repudiation** |
| **Remedy for:** | Misrepresentation | Breach of k |
| **Type of remedy:** | *Equitable* – therefore no right to the remedy | *Common Law* – therefore there is a right to the remedy |
| **Action:** | Ends the k, restores situation to conditions before the k | Ends the k – the innocent party has the right to terminate the primary obligations |
| **Comments:** |  | This remedy is easily lost if it is not acted on right away (in some cases it is lost as soon as the k is entered into) – therefore would only be able to claim damages. |

***Leaf v International Galleries*** (1950), England CA, p.378

**There is a bar to rescission when an argument for repudiation is rejected**

**Facts**: P bought painting from D advertised as a ‘Constable.’ 5 years later, P told it was not a ‘Constable’ and tried to take it back to D to get a refund.

**Ratio**: If the k cannot be ended through breach of k, then it cannot be argued that a term is misrepresentation and should be ended in rescission (there is a bar to rescission when an argument for repudiation is rejected).

Misrepresentation can’t be used for rescission after a really long time.

**Dec**: For D.

**Entire versus Severable Contracts:**

**Severable K or Obligation** = can be cut up into smaller obligations or k’s.

**Entire Obligations** = cannot be broken down.

🡪 Courts are reluctant to sever contracts (Blue Pen Test = if the judge cannot draw a blue line through obligations in the k, then the k cannot be severed)

**Qualifications on concept:**

1. To say obligation is performed, simply needs to be substantially performed (*Fairbanks v Sheppard*)
2. Restitution may allow a party to receive value for the goods or services performed even if the obligations of the k have not been fulfilled (*Sumpter v Hedges*)

***Fairbanks v Sheppard*** (1953) SCC, p.450

**Substantial Performance Doctrine = an obligation is completed when it is substantially completed**

**Facts**: D contracted to build machine for P for a price. P paid a small amount on the account but when the machine was nearly complete, D refused to finish it until he received further payment.

**Ratio**: **Substantial Performance Doctrine**: an obligation is completed when it is substantially completed (for entire or severable contracts).

You can also claim completion if it was the other party’s fault that you could not complete it.

**Dec:** Appeal allowed, k cancelled.

***Sumpter v Hedges*** (1898) England C.A., p454

**Quantum Meruit = If the innocent party of an abandoned k takes the benefit of the work done, he can be liable for the cost of that work.**

**Facts**: P contracted with D to construct buildings for lump sum. When work was partly done, P said he couldn’t continue and abandoned the k. D then finished the buildings himself.

**Ratio**: When a k is not completed, it is treated as abandoned. The innocent party has the option to treat the k as repudiated (which would end the k). BUT if the party takes the benefit of the work done, then he is creating a new k in which he is liable for the cost of that work.

If it is left on the party’s property, it doesn’t mean that he’s benefitting – he must use it for actual benefit.

**Dec:** Find for the D – P is not entitled to recover for the work done (because D didn’t finish the buildings and they remained on his property as a nuisance – no benefit taken by D).

D. **EXCLUDING AND LIMITING LIABILITY**

1. **Contractual Interpretations**

***Machtinger v Hoj*** (1992) SCC, p.463

**Terms can be implied into a k based on custom or usage, business efficiency or presumed intention and terms implied by law.**

**Facts**: Contract of employment was missing a term providing for notice on termination. How does court imply one?

**Ratio**: Look at custom, usage, presumed intention, business efficacy, and terms necessarily implied by law.

2. **Standard Form Contracts and Clauses Limiting Liability**

**Clauses Limiting Liability**:

**CL Provisions used to limit liability:**

1. Exclusion = excludes liability
2. Limitation = limits liability
3. Procedural = imposes a procedure that the law does not impose on someone seeking compensation.

**Techniques used to control and reduce the use of the above provisions (because Courts do not like limiting liability):**

1. **Notice Requirement**
   * In order to be bound by a clause, there needs to be an awareness of the clause – do not need to know exactly what it says, just know that it is there (*Thornton v Shoe Land; Tilden v Clendenning*)
   * Simply signing the document does not constitute notice
   * If notice requirement is met, then the exclusion/limitation clause is part of the k
2. **Doctrine of Fundamental Breach**

* If there is a fundamental breach then an exclusion/limitation clause cannot apply (*Karsales v Wallis*)
* There’s now legis in England governing certain types of exclusion/limitation clauses
  + However, problem is that jurisprudence in England applies, but not the legislation and there is no comparable legislation in Canada
* Doctrine no longer exists in Canada (*Tercon v BC; Photo Production v Securicor*)

1. **Doctrine of Unconscionability**

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

**a. Notice Requirement – Unsigned Documents**

***Thornton v Shoe Lane Parking*** (1961) England C.A., p.478

**A limitation of liability clause is only binding if the customer had reasonable notice of the clause before entering into the agreement.**

**Facts**: P parked in D’s parking lot and was involved in an accident that was partially D’s fault. D stated that ticket should exempt D from liability since it stated that the ticket was issued subject to the conditions posted in the lot.

**Ratio**: The customer is only bound by the terms on a ticket if the terms were sufficiently brought to his notice beforehand, but not otherwise (i.e. as long as the customer can get his money back if he does not agree with terms).

Reasonable notice requires that the person must have a chance to read the conditions.

**Dec:** Find for P.

***McCutcheon v David MacBrayne*** (1964) HL, p.488

**A statement can be imported into a k if previous dealings show that a party knew or agreed to the term in previous dealings.**

**Facts**: P took car on D’s ferry, ferry sinks.

**Ratio**: Previous dealings relevant if they prove knowledge of terms, actual and not constructive, and assent to them.

If previous dealings show that a party knew or agreed to a term, here is a basis for arguing that it can be imported into the k without an express statement, but it depends on the circumstances.

If a term is not expressed in a k, then it can only be put into the k by implication. No implication can be made against a party that was unknown.

**Dec:** Find for P.

**b. Notice Requirement – Signed Documents**

***Tilden Rent-a-Car v Clendenning*** (1978) England CA, p.492

**Unless reasonable measures are taken to draw a party’s attention to unusual terms in a standard form document, the terms are not enforceable.**

**Facts**: When D rented a car from P, he signed the agreement without reading it, which was obvious to the clerk helping him. The D alleges that if he knew about the terms of the k he would not have entered into it.

**Ratio**: A party seeking to rely on standard form documents cannot do so unless they have taken reasonable measures to draw the party’s attention to the terms. A signature will not suffice.

Absent of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove fraud, misrepresentation or non est factum.

**Dec**: Find for D.

***Karroll v Silver Star Mountain Resorts*** (1988) BCSC, p.496

**Only must draw attention to terms if a reasonable person would know that the signing party was not consenting to the terms in question or did not understand them.**

**Facts**: P signed document releasing D from liability for injuries in a ski race. P claims she wasn’t given adequate notice or opportunity to read it but admits it would have only taken 1-2 minutes and doesn’t recall if they gave her an opportunity to read it.

**Ratio**: Limits *Tilden*: Requirement to draw attention to terms is only applicable in certain circumstances. It only applies (1) where party seeking to enforce the document knew or had reason to know of the other’s mistake as to its terms (because there is lack of consent) and (2) where someone signs a document where one has reason to believe he is mistaken as to its contents.

General rule: Must only draw attention if a reasonable person would know that the party was not consenting to the terms in question, because this is basically equivalent to misrepresentation by omission.

Factors: if clause runs contrary to party’s normal expectations, length and format of k, time available to read k.

**Dec**: For D. Term consistent w/purpose of k, short & easy to read, clearly labeled in bold font that she should read it.

**c. Fundamental Breach**

***Karsales v Wallis*** (1956) England CA, p.506 🡪 ADOPTED IN CANADA (though now not used)

**Doctrine of Fundamental Breach applies to all fundamental breaches. Excluding/limitation clauses can’t be used to avoid liability for fundamental breaches.**

**Facts**: D inspected car. P then bought car and leased it to D for financing. Upon receiving the car, it was not in the same condition as when D inspected it. D told P he would not accept the car.

**Ratio**: **Doctrine of Fundamental Breach**: A breach which goes to the very root of the k disentitles the party from relying on the exempting clause.

Exempting clauses cannot be relied on if there is a breach of the obligations imposed on a party.

**Dec:** For D.

**Problem:** The doctrine is a very blunt instrument and is applied to parties that didn’t need it.

***Photo Production v Securicor*** (1980) HL, p.508 – OVERRULES KARSALES (in England)

**Doctrine of Fundamental Breach no longer exists, but fundamental breaches do**

**Facts**: D in k with P to patrol P’s business. D’s employee purposely set fire to P’s business.

**Ratio**: Doctrine of Fundamental breach no longer exists.

It is simply a matter of whether the parties intended the exclusion clause to apply.

***Tercon Contractors v BC (Transportation)* (**2010)SCC [online] – OVERRULES KARSALES (in Canada)

**No doctrine of fundamental breach in Canada. Exclusion clauses must be interpreted in light of whole k.**

**Facts**: Province enters tendering k with 6 companies specifying that only those companies are eligible. One of the 6 companies combines with an ineligible company and enters a co-bid. P and the co-bid are the 2 finalists but P loses. P sues, saying they would have won if rules in k had been followed. Exclusion clause in k specifies no damages “as a result of participating” in the tendering process.

**Ratio**: Confirms that there is no doctrine of fundamental breach in Canada.

Province’s liability is not from Tercon’s participation but is from province’s unfair dealings with an ineligible party.

Must consider exclusion clauses in light of its purposes and the commercial context, as well as its overall terms.

Clear language is necessary to exclude liability for breach of a basic requirement of a k. Here, tendering has an implied duty of fairness, so language would need to be clear about excluding liability.

This tendering k was made with 6 parties in mind so exclusion clause could not have been contemplated to include liability for including other parties. There was also a clause allowing province to cancel this k and make a new one allowing new bidders. This wouldn’t have been included if exclusion clause included adding new parties.

**Dec:** For Tercon.

**Test for determining if an exclusion or limitation clause applies** (*Hunter v Syncrude via Tercon*):

1. Is the clause part of the secondary obligations or is it characterizing the primary obligations?
2. Is there a statute that prohibits or regulates this clause?
3. Was there notice of it?
4. Construe it – what does it mean?
5. If having construed, you can still say that it was intended to apply then consider unconscionability (inequality of bargaining power at time of acceptance) and unfairness (what occurred subsequent to the k and, in the context of the exclusion clause, if it would be unfair to apply it to the particular situation).

**d. Legislative Treatment**

**Sales of Goods Act, ss. 15-20**

* For retail sale of new goods, cannot contract out of protection.

E. **PAROL EVIDENCE AND RECTIFICATION**

1. **Parol Evidence Rule**

RULE OF PAROL EVIDENCE:

**If a k has been reduced to writing and the writing appears to be complete, then the court will not hear parol evidence outside the written k.**

* Application of this rule may be unfair in some cases
* Thus, lower courts tend to ignore the rule but upper courts tend to affirm the rule

***Gallen v Allstate Grain Co*** (1984) BCCA, p.422

**Parol Evidence Rule**

**Facts**: Contrary to oral assurances, buckwheat sold to P by D did not act as a blanket and smother weeds.

**Ratio**: **Parol Evidence Rule** – there are 7 principles:

1) Rule of evidence – evidence can be introduced to establish an oral agreement separate from written agreement. But in case of 2 agreements made at same time contradicting each other, written one is stronger evidence.

2) This is not an absolute principle.

3) There are exceptions.

4) The rationale of the principle does not apply with equal force where the oral representation adds to, subtracts from, or varies the agreement recorded in the document, as it does when oral agreement contradicts the document.

5) There is a presumption in law that a document that looks like a k is treated like a whole k. Therefore, it is very difficult to get around this presumption when what is oral is in total contradiction with what is written.

6) A unique document forms a stronger presumption than a standard form, though both have a strong presumption.

7) The presumption would be less strong where the contradiction was between a specific oral representation and a general exemption clause that excludes liability for any oral representation than it would in a case where a specific oral representation was contradictory to an equally specific clause in the document.

**Dec:** For P.

2. **Rectification**

**Rectification** = written k is changed by order of the court.

* What is in writing is not the k, it is evidence of the k.
* When arguing for rectification, you are asking the court to rectify the written evidence to follow the actual contract (*Bercovici v Palmer*)
* Burden of proof is higher than BoP but below BARD (*Bercovici v Palmer; Sylvan Lake*)
* Usually only applies to common mistake
* However, can apply to unilateral mistake in some circumstances (*Sylvan Lake*)

***Bercovici v Palmer*** (1966) Sask. CA, p.601

**Subsequent actions can be considered when determining the intention of the k.**

**Facts**: D agreed to buy P’s store. A misunderstanding took place and another piece of property was transferred as well. D claims the transfer was the intention of the k. At trial, P won since the property was never mentioned in negotiations and D never behaved as if he owned it. It was ruled to be a common mistake.

**Ratio**: After k entered, subsequent actions of parties can be considered to determine what the intention of the k was.

You can only use rectification if no fair and reasonable doubt is left (higher than BoP).

It is necessary to show that the parties were in complete agreement and just wrote down the terms incorrectly.

**Dec:** For P.

***Sylvan Lake Golf v Performance Industries*** (2002) SCC, p.604

**In some cases, it is possible to use rectification for a unilateral mistake.**

**Facts**: P wanted to build 2 rows of houses requiring 180 yards but k said 180ft (only 1 row of houses). All other measurements in the k were in yards.

**Ratio**: There are 4 preconditions to allow rectification to be used for unilateral mistake:

1) You must establish there was a prior oral contract with definite, ascertainable terms.

2) The other party knew or ought to have known of the error and the P did not.

🡪Attempt to rely on the erroneous written document must amount to “fraud or the equivalent of fraud.”

3) P must show “the precise form” in which the written instrument can be made to express the prior intention.

4) All of the above must be established with “convincing proof” (between civil BoP and criminal BARD).

Mere unilateral mistake is not enough – the non-mistaken party must be trying to take advantage.

The error can be fraudulent or innocent – orally agreed terms were not written down properly.

Due diligence: Rectification isn’t to be used as a belated substitute for due diligence. However, it can’t be a full requirement for unilateral mistake because P seeks no more than enforcement of the prior oral agreement. It is just a factor that will be taken into account (as rectification is equitable and therefore judges have discretion).

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

A. **MISTAKE**

**Mistake** = one of the parties argues that he did not think that the k did what the other party says it did.

🡪 Consequences = k is void (never came into existence) or voidable (k is brought to an end)

* There is no absolute law on mistake.
* Mistake is almost always used as an alternative to misrepresentation. The difference is that misrepresentation requires fault to be proven.
* An argument cannot just be made under mistake, some other doctrine must be introduced.

***Smith v Hughes*** (1871) England Div. Court, p.546

**First case on mistake – lays out three different opinions on what is needed for mistake.**

**Facts**: P agreed to buy old oats from D. The oats tendered by P were from the last crop.

**Ratio**: 3 different opinions:

Cockburn: Assumptions outside the k are irrelevant. It does not matter what the parties thought, it is a matter of what the k was. This is a simple offer and acceptance. Mistake does not exist.

Blackburn: In an action for mistake, P must show that he was mistaken about what D was promising. What is important is the mind of P. Did P think that D thought that P thought he was selling old oats? D’s mind unimportant.

Hannen: P must show he was mistaken, D knew about the mistake and knew P was mistaken (D’s mind matters).

**Dec:** New trial ordered.

2. **Mistaken Assumption**

***Bell v Lever Bros*** (1932) HL, p.560

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

**One party or all parties can be mistaken.**

**There are three areas in which mistake may occur.**

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

**Ratio**: A mistake made about something that is a term of the k can affect the k.

A mistake can be made by 1 party, or by both.

Areas where parties can be mistaken:

a) The ID of contracting parties

b) The existence of subject-matter of the k at the date of the k (i.e. purchasing a perished good)

c) The quality of the subject-matter of the k 🡪 Must be mutual & quality must fundamentally change the good

**Dec**: Agreement void due to mistake.

***McRae v CDC*** (1951) Australian HC, p.565

**Party can’t rely on its own mistake as a defence if mistake was made negligently or recklessly.**

**Facts**: P buys oil tanker from D that is allegedly wrecked on a reef but the oil tanker doesn’t actually exist.

**Ratio**: A party cannot rely on a mutual mistake where the mistake consists of a belief which is entertained by him without any reasonable ground and is used to induce the same belief in the other party’s mind.

Parties can’t rely on a mistake as a defence if they made it due to negligence, recklessness, willful blindness, etc.

**Dec**: For P.

***Great Peace Shipping v Tsavliris Salvage*** (2002) England CA, p.574

**Elements of common mistake. The mistake must make the matter “essentially different” from expected.**

**Facts**: D hires P to fix D’s boat but P is farther away than they both thought so D hires someone else, doesn’t pay P.

**Ratio**: Elements of common mistake required to avoid a contract:

1) Common assumption as to the existence of a state of affairs

2) No warranty by either party that the particular state of affairs exists and the non-existence is neither party’s fault

3) The non-existence of the state of affairs must render performance of the k impossible

4) The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

The mistake must “make the thing contracted for essentially different from the thing that it was believed.”

Here, further distance does not mean service provided would be essentially different – doesn’t make it impossible.

**Dec**: For P.

***Miller Paving v B Gottardo Constr*** (2007) ONCA, p.579

**Before allowing mistake, you must look to the contract to see if bearing of risk has been provided for in k.**

**Facts**: Parties sign agreement saying P has been paid for all materials. P later tries to charge for something it forgot.

**Ratio**: Common mistake – both thought all materials have been paid for.

Look to the contract first to see if parties have provided for who bears the risk of a mistake.

Here, it was the responsibility of P to determine what was owed and to charge the D.

Common mistake requires that the subject matter of the k become essentially different due to the mistake. Here, it was about paying for things and this doesn’t change that.

It was not D’s fault at all here and it is not unjust for D to avail itself of the legal advantage it obtained.

\*\*\* Says that *Great Peace* is NOT the last word on mistake in Canada.

**Dec:** For D.

3. **Mistake as to Terms**

* Usually resolved under certainty of terms
* Unilateral mistakes tend to seek equitable remedy (but must come to court with clean hands)
* See *Smith v. Hughes* under part A, but note *Bell v. Lever* says this doesn’t exist in section 2.

4. **Mistake and Third-Party Interests**

**a. Mistaken Identity**

***Shogun Finance v Hudson*** (2003) HL, p.583

**K is with the rogue if face-to-face (voidable) but with the name in k if done through indirect contact (void).**

**Facts**: Rogue buys car using financing from P and sells it to D. Both P and D claim title to the car.

**Ratio**: Mistaken ID can affect k (via common law and equity) but what it does depends on how k was entered.

Basic rule: If you enter k with a person face-to-face with mistake about their ID, the k is not affected.

🡪 However, you can argue this in equity if person commits fraud in a situation where ID is crucial.

When dealing through paper, email, etc, the k is with the person IDed in the papers, not with the rogue.

Here, P dealt with dealership face-to-face but not with rogue, so P’s contract is with person IDed in the papers.

Face-to-face is VOIDABLE if innocent 3rd party didn’t get rights from rogue in good faith.

**Dec:** For P. It was through paper so Patel had title, not the rogue. Patel can claim non est factum 🡪 K is void.

**b. Non Est Factum**

**Non Est Factum** = it is not my deed.

* Occurs if someone deliberately misled another into entering a k
* The innocent party cannot be negligent
* Remedy = void k

***Saunders v Anglia Bldg. Society*** (1971) HL, p.591

**Non Est Factum – Not applicable if you signed due to carelessness or negligence**

**Ratio**: A person who signs a document differing fundamentally from what he believed it to be is disentitled from successfully pleading non est factum if his signing of the document is due to his own negligence/carelessness.

The test for determining this is the reasonable person test: would a reasonable person have taken the same actions as the party pleading non est factum took?

***Marvco Color v Harris*** (1982) SCC, p.593

**Non Est Factum – Carelessness is the standard**

**Facts**: D thought they were signing an amendment to their mortgage. However, their daughter’s boyfriend got them to sign a new mortgage to another party. D did not know what they were signing.

**Ratio**: Carelessness is the standard for non est factum, not negligence (as in *Saunders*).

You can’t claim non est factum because you didn’t read the k.

**Dec**: For P.

B. **FRUSTRATION**

\*\*\* Always argue both frustration and non-frustration in an exam \*\*\*

**Frustration** = Frustration occurs when the law recognizes that **without** default of either party a contractual obligation has become **incapable of being performed** because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the k (*Davis v Fareham*).

* Event must be unforeseen
* Cannot be self-induced
* K can contain a specific clause which allocated the risk in the event of frustration, if no clause exists…
* Brings the k to an end.
  + Both primary and secondary obligations are ended at the time of the frustrating act
  + Therefore, if the k is ended before one party has performed any obligations, then the other party shoulders the entire burden of the frustration.
* If a k is frustrated, it is likely that k’s that depend on the frustrated k will also be frustrated (though there is no guarantee)

***Frustration vs. Mistake***

* Frustration is essentially a mistake that occurred AFTER the K came into existence 🡪 whereas mistakes deals only w/ what happens BEFORE a K comes into existence
* DIFFERENCE:
  + *Mistake*: connected to the mind of one/both of the parties
  + *Frustration*: has nothing to do w/ actions/thoughts of parties themselves 🡪 has to do with an event that occurs outside the control of the parties

1. **Development of the Doctrine**

***Paradine v Jane*** (1647) England KB, p.620

**Common law historically did not allow frustration**

**Facts**: D leased land from P but was forced off the land during the civil war. P suing for unpaid rent.

**Ratio**: There is no such thing as frustration – if you make a promise then you must fulfill it.

**Dec** For P.

***Taylor v Caldwell*** (1863) England QB, p.621

**Frustration occurs when an item perishes and makes performance of k impossible, at no fault of the parties, as long as they did not provide for the circumstances in the k. Frustration = implied term in k (NOT LAW!!!)**

**Facts**: D entered into k with P to supply a concert hall but then the hall burnt down.

**Ratio**: When an item perishes and makes the performance of the k impossible, at no fault of the parties, then the parties are excused from the performance, unless they have expressly provided for the circumstances in the k.

Frustration is based on an implied term in the k.

**Dec:** Parties are excused from the k.

***Davis Contractors v Fareham UDC*** (1956) HL, p.628

**Doctrine of Frustration**

**Facts**: P agreed to build houses for D. Due to post war market there wasn’t enough labour and construction took longer than anticipated in the k (22 months instead of 8). P sues D for more money.

**Ratio**: Frustration occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the k 🡪 It was not this that I promised to do.

Frustration cannot occur if the thing that prevents the k from being fulfilled could reasonably have been foreseen.

The reason for seeking frustration of k should be of equal significance to both parties.

Frustration is NOT based on an implied term – that implies it could have been foreseen. It is a doctrine.

**Dec:** For P. State of post-war labour was foreseeable, simply not getting done on time is not enough for frustration.

2. **The Application of the Doctrine**

* Factors considered re: is a K frustrated? => to make the K Practically/legally impossible OR very difficult
  + 1) Unforeseen (Can Gov’t**)**
    - Economic and Political events 🡪 expected to take into account various economic possibilities
    - “Force Majuere” Clauses – NOT frustration –if it IS listed, hard to say it was unforeseen)
    - Unavailability of insurance = frustration less likely; too likely to happen so won’t insure=foreseeable
  + 2) Not be the fault of the parties (Maritime Nat’l Fish )
  + 3) Makes the purpose of K impossible or drastically more difficult
* Can a change in legislation cause frustration? \*\*CAN (Capital) BUT: dependant on the nature of the agreement (Victoria) 🡪 These cases illustrate a common source of frustration in Canada (zoning laws)
* **Very unpredictable => can have 2 cases with seemingly the same K/facts & one frustrated and other not!**
  + Background for lots of cases; parties just trying to get out of a bad deal 🡪 courts aware/suspicious of this!
* LESSON: NEVER give advice a K is frustrated unless statute says so 🡪 b/c it is unsure

***Canadian Government Merchant Marine v Canada Trading Co*** (1922) SCC, p.623

**Events must be unforeseeable to qualify for frustration. Normal economic/labour issues don’t quality.**

**Facts**: CGM contracts to transport things by boat for CTC but, because of dispute between CGM and shipbuilders, the boats are not ready in time.

**Ratio**: An event must be unforeseen to count as frustration. If it could have been anticipated and guarded against in contract, the party in default cannot claim relief because it has happened.

You cannot imply a term where a reasonable man would not have.

**Dec:** Respondent wins. The delay was not an extraordinary occurrence; issues in shipyard could have been foreseen.

***Capital Quality Homes v Colwyn Const. Ltd.*** (1975) ONCA, p.632

**Legislation changes can cause frustration.**

**Facts**: P agreed to buy 26 lots from P with intention of splitting them up. New legislation was then passed restricting the ability to convey lots. P wants his deposit money back.

**Ratio**: Change in law can cause frustration.

Frustration not allowed if the Act was the fault of one of the parties OR the possibility of such an event was contemplated by the parties or provided for in the k.

**Dec:** D has to give the deposit back. It was known that P wanted to subdivide.

***Victoria Wood v Ondrey*** (1977) ONHC, p.635

**Change in legislation won’t always cause frustration. The change must go to the foundation of the agreement.**

**Facts**: P agreed to buy land from D to subdivide. Before completion of k, new legislation was introduced that precluded subdivision.

**Ratio**: Distinguished from *Capital* on basis that this contract was only for a parcel of land, not for 26 deeds as in *Capital*. As such, the change in legislation did not go to the “very foundation of the agreement,” which was merely for the sale of the parcel of land (despite fact that both parties knew that P intended to subdivide).

Subdivision wasn’t provided for in the k and k wasn’t conditional on ability of purchaser to carry out his intention.

If you want to guard against risk of zoning/law changes, you should provide for it in your k.

**Dec:** For D.

\*\* Self-induced frustration: one party is at fault for the event that occurred. Courts are unlikely to find the k frustrated unless the innocent party brings the action for frustration.

***Maritime National Fish v Ocean Trawlers*** (1935) PC, p.648

**Self-induced frustration does not lead to a frustrated k.**

**Facts**: P chartered a trawler from D knowing that there was legislation limiting the number of licenses granted for the trawler type. P had 5 trawlers but was granted only 3 licenses, which they used for their other boats instead.

**Ratio**: If the k cannot be performed due to an act or election of one party, then the k cannot be frustrated.

**Dec:** For D.

3. **Effects of Frustration**

**Problems with frustration:**

All or nothing approach – if K is frustrated, the WHOLE K is frustrated.

Can have drastic consequences and provide profound injustices

E.g. 1 party did everything pre-frustration and other party did nothing – 2nd party gets full benefit for free

Exception: Payment due prior to the frustrating event is still recoverable

**Force Majeure Clauses**: “Act of God” clause – prevents frustration because k provides for those events.

**Response**: **Frustrated Contract Act - RSBC 1996, c. 166 – Supplement 2**

* Does not define frustration – only covers what happens when a K is frustrated
* Intention is to divide loss of frustration equally between the parties
* Based on law of restitution, prevents unjust enrichment
* Makes contracts severable 🡪 separate frustrated parts from non-frustrated parts
* Insurance is irrelevant to the calculation of restitution (as is loss of profits)
* “Benefit” = anything done, regardless of whether other party received the benefit
* Parties can get restitution for full or partial fulfillment of obligations
* Relieves parties of all remaining obligations except for pre-frustration claims for damages
* Only reasonable expenditures can be claimed (versus actual expenditures)

C. **PROTECTION OF WEAKER PARTIES**

The following doctrines are equitable, although duress has possible consequences in common law.

1. **Duress**

Duress looks at a particular event – the duress must exist at the time the k was entered.

**Remedy**: Equity makes the k voidable or finds that certain obligations are not enforceable.

🡪 If found under common law, the k is void

***Greater Fredericton Airport v Nav Canada*** (2008) NBCA, p.666

**Test for economic duress.**

**Facts**: Nav contracted to move equipment for GFA but decided to just replace it instead. There was a dispute about who should pay for new equipment. Nav’s obligation was to pay since it insisted on buying new equipment. Airport eventually agreed to pay by way of letter signed under protect then refused to make promised payment.

**Ratio**: The true cornerstone of the doctrine of duress is lack of consent.

“Illegitimate” pressure is not a condition precedent to finding economic duress.

The onus is on the pressuring party to prove the modification to the k wasn’t procured under duress.

**Two conditions precedent to a finding of economic duress**:

1) Promise must be extracted as a result of the exercise of “pressure” (i.e. a demand or threat)

2) Exercise of that pressure must have been such that the coerced party had no practical alternative but to agree

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

1) Was there consideration? (Court will be more sympathetic if not – this includes peppercorns)

2) Was it made “under protest” or “without prejudice”? (Failure to voice objection may be fatal to your claim)

3) Did the coerced party take reasonable steps to disaffirm the promise as soon as practicable? (Can’t sit on it)

🡪 The last 2 factors are more important.

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

🡪 It is not the legitimacy of the pressure that is important, but rather its impact on the victim.

**Dec:** For GFA. Nav exerted economic duress. Remedy: k voidable.

2. **Undue Influence**

**Undue influence** = the influence which disables a person influenced from acting spontaneously from exercising an independent will.

* Related to duress – but considers the nature of the relationship over time rather than the particular event at the time the k was entered.
* Makes the k voidable

***Geffen v Goodman Estate*** (1991) SCC, p.680

**Presumption of undue influence. Test to determine undue influence. Burden of proof.**

**Facts**: Trust set up by woman with mental health issues. Her son argues her brothers unduly influenced her to do it.

**Ratio**: For undue influence, burden is on the claimant to show that they were incapable of acting spontaneously or had no independent will.

However, presumption arises in certain relationships (essentially those with a presumption of a fiduciary obligation).

🡪 Parent-child, guardian-ward, solicitor-client, trustee-beneficiary, physician-patient, religious advisor-advisee, etc.

**Test to establish undue influence:**

A) Establish undue influence b/w parties – is potential for “dominating influence” inherent in nature of relationship?

B) Examine the actual k to see whether the influence led to an unfair k – What was the nature of the transaction?

🡪 Was P unduly harmed or D unduly benefitted? Mere imbalance/bad bargain not sufficient.

🡪 Only applies in context of commercial transaction – different standard for gifts.

Once this presumption is established, it must be rebutted by D with evidence that the transaction was entered into “as a result of claimant’s own free will and informed thought.”

**Dec:** The trust was allowed to stand. Brothers were acting for her care and woman had independent legal advice.

3. **Unconscionability**

= invokes relief against unfair advantage gained by an inconscientious use of power by a stronger party against a weaker one.

🡪 Determines whether k is unconscionable – does not focus on parties, just the transaction

🡪 Result is: courts are more apt to tinkering with k and finding part of k unconscionable

***Morrison v Coast Finance*** (1965) BCCA, p.697

**Created doctrine of unconscionability. Test for unconscionability.**

**Facts**: Old widow induced into mortgaging her home to allow two men to buy cars.

**Ratio**: Created the doctrine of unconscionability.

**Test for determining unconscionability**:

1) Proof of inequality rising from weaker party’s ignorance, distress or need that left him in power of stronger party.

2) Proof of substantial unfairness obtained by the stronger party.

3) The stronger party can repel this by proving the bargain was fair, just and reasonable.

Here, bargain was unequal, D had scheme to cheat P, no rational fully-informed person would have agreed, B had no independent legal advice.

Remedy: Unusual remedy given. Equity not bound by traditional responses of rescission and unenforceability. Court can tinker with what they do and adjust agreements to make them fair.

**Dec**: Find for P –k unconscionable. Court restructures k in P’s favour – D gets the promissory notes from 2 men.

***Lloyds Bank v Bundy*** (1974) England CA, p.704

**Denning groups all mechanisms of protecting weaker parties together**

**Shows that one cannot pigeonhole anything into one category of protection – they all overlap**

**Facts**: D mortgages his farm to help son’s debt and bank forecloses on it.

**Ratio**: Four categories for inequality between parties:

1) Duress of goods = in equality in bargaining power (voidable transaction)

2) Unconscionable transactions = unfair advantage gained by unconscientious use of power by stronger party.

3) Undue influence

4) Undue pressure = a k should be based on free and voluntary agency of the individual who enters it

These all rest on “inequality of bargaining power.”

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

Independent legal advice cannot save every transaction but the absence of it may be fatal.

This view has not been generally accepted but is sometimes used to “inform” decisions (e.g. Lambert in *Harry*).

**Dec:** For P.

\*\*\* You can use both tests in *Harry* as SCC hasn’t ruled on which one should win.

***Harry v Kreutziger*** (1978) BCCA, p.709

**There are two tests for unconscionability.**

**Facts**: P sold fishing boat to D for low price. D told P he could get a new license after but he knew that was a lie.

**Ratio**: McIntyre: Basically gives *Morrison* test (inequality + fraud).

Lambert: Sets out a new test that takes focus away from the individual and puts it on the k.

Test: Did the transaction, seen as a while, diverge significantly enough from community standards of morality so that it should be rescinded?

Problem: What is the community? What is morality? What is immoral?

Benefits: Much more open-ended and less structured by an intricate list of pre-requisites.

**Dec:** For P.

D. **ILLEGALITY**

**Illegality** = parties are trying to accomplish something in the k that they ought not to do according to law.

2 categories of illegality:

1. **Statutory Illegality**
   1. The making of the k is expressly or impliedly prohibited by statute.
   2. The question is always one of legislative intent
   3. 2 types:
      1. Direct = the formulation of the k is illegal – the k becomes void
      2. Indirect = the formulation of the k itself is not illegal, but the direct consequences of the k are – the k is not void but it can be argued that the k is not enforceable
2. **Common Law Illegality**
   1. The k can be rendered unenforceable on grounds that it is contrary to public policy
   2. The contracts that would fall into this category are:
      1. A k to commit a legal wrong
      2. The k is injurious to public life or foreign relations
      3. A k purporting to oust the jurisdiction of the court (e.g. an agreement not to go to court – therefore must always have a statutory basis for arbitration, mediation, etc.)
      4. If it is prejudicial to the administration of justice (e.g. a k to stifle a prosecution)
      5. Restraint of trade contracts = a k between parties to restrict free trade
      6. Immoral ks and ks prejudicial to the status of marriage (typically ks about sex)

1. **Contracts Contrary to Public Policy**

***KRG Insurance Brokers v Shafron*** (2009) SCC, p.730

**Illegality for Ks against public policy. Blue pencil severance.**

**Facts**: D signed covenant saying he can’t work in insurance in the “Metropolitan City of Vancouver” but the area was not specifically defined.

**Ratio**: Restraints of trade are contrary to public policy at CL because they interfere with individual liberty and the exercise of trade should be encouraged and free. There is a prima facie presumption that these are unenforceable.

Exception: where the restraint of trade is found to be reasonable.

How to determine reasonableness: geographic coverage, period of time it is in effect, extent of activity prohibited.

🡪 Terms must be unambiguous to be reasonable. Ambiguous covenants are prima facie unenforceable.

Blue Pencil Severance: Effected when the part can be severed by running a pencil through it.

Blue pencil: part removed must be clearly severable, trivial, and not part of the main purport of restrictive covenant.

🡪 **TEST**: Only used if the obligations are sensible and reasonable in itself that the parties would have unquestionably agreed to them without varying other terms.

Application of severance is restrained 🡪 parties have right to contract freely and determine their rights/obligations.

🡪 Also invites employers to draft overly broad restrictive covenants and leaving it to the courts to chop it down.

Notional severance: Reading down an illegal provision in a k to make it legal and enforceable.

🡪 Court says this has no place in restrictive employment covenants – b/c there is no solid test for reasonableness.

**Dec:** Covenant unenforceable for ambiguity.

2. **Effects of Illegality**

Illegality can make a k void (traditional), voidable, unenforceable, or they can be adjusted or severed.

Generally, courts make them voidable or unenforceable (at choice of party law is supposed to protect).

**Purposive approach** (*Still*): Fashion a remedy that keeps with the purpose of the statute.

***Still v Minister of National Revenue*** (1998) FC Appeal, p.762 – Statutory illegality but CL approach is similar

**Purposive approach for determining if the illegality defence is available**

**Facts**: Woman moves to Canada, marries a Cdn, and applies for citizenship. She gets papers from govt that imply she can now legally work in Canada so she gets a job. Later applies for EI but is denied as an illegal worker.

**Ratio**: The law has developed a complex method of dealing with illegality.

OLD APPROACH: If formulation or making of the k is illegal then the k is void. However, if the consequences of the k are illegal then the k is not void, but it can be argued that the k is not enforceable (intention/policy considered).

Unenforceable means the k will not be enforced by the courts – however, courts may find a way around an unenforceable k through restitution or:

1. Where the party claiming for return of property is less at fault

2. Where the claimant ‘repents’ before the illegal k is performed

3. Where the claimant has an independent right to recover (e.g. recovery through tort)

NEW APPROACH: Whether the illegality is direct or indirect, one can argue that the k is not void.

**The purpose of the law is considered and how it is best served in a specific purpose (therefore very unpredictable)** (must go to court for this).

If the statutory prohibition goes to performance of the k, and not its formation, case falls outside illegality doctrine.

The choices for remedy are: void, voidable, unenforceable or a combination of those.

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

Relief is not available if it would have the effect of undermining the purpose or object of a federal statute.

Here, public policy is in favour of legal immigrants who have acted in good faith. Public interest requires relief.

**Dec:** For P.

**REMEDIES**

* Depend on the nature of the primary obligations that have been broken
* Sometimes the secondary obligations will be explicit within the k, but if they are not, the following cases will help determine the remedies for breaking the primary obligations
* There is a right to CL remedies (*damages*), but must argue for equitable (*specific performance, injunction*) remedies (there is no right to them)

A. **DAMAGES**

* As soon as an obligation is breached, there is a right to damages
* Common law remedy
* Damages in **torts**: the court looks backwards and awards money that is meant to restore the party to the position he was in
* Damages in **contracts**: the court looks to the future and awards money that puts the party in the position that it would have been in had the promises been fulfilled

**Characterizations of Damages:**

1. **Interest Protected**
   1. Expectation = the money expected to get or save from the k (e.g. profits)
   2. Reliance = the expense incurred because the innocent party relied on the k (e.g. expenses)
   3. Restitution = tend to be a debt owed by the innocent party

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

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

**🡪** Loss of profit, wasted expenditure, interest, etc

1. **The Interests Protected**

***Fuller and Purdue*, “The Reliance Interest in Contract Damages”** – page 783

* 3 types of damages and their purposes:

1. Expectation
   * Aims to put innocent 3rd party in position she would have been in had the k been filled
   * This is the ruling principle for breach of k
   * Promotes market activity
   * Value of the expectancy = position you would have been in if k finished
     + i.e. these are profits – sometimes hard to quantify
   * This is the weakest argument – it’s just disappointment in not getting what was promise
   * However, it does arouse a sense of injury
   * Enforcement of promises is important – discourage breaches of contract
   * Purpose can therefore be seen as penalizing a breach (not compensating the P)
2. Reliance
   * Aims to put innocent party in position she would have been in had she not entered into the k
   * This is good for when P has not suffered loss measurable by expectation level or has been unable to prove or establish expectation losses with the requisite degree of certainty
   * P can also seek this if they will get more than they would through expectation measures or if expectation measures are difficult to value monetarily
3. Restitition

* Aims to give back what the innocent party transferred to the breaker of the k
* Prevent gain by a promisor defaulting at the expense of the promise (i.e. D-based)
* Can involve both losses occurred and gains prevented (disgorgement damages)
* 2 elements:
  1. Reliance by the promise
  2. A resultant gain by the promisor
* In assessment of damages you *measure the extent of the injury*, determine whether it was *caused* by the D’s act, and ascertain whether the P has included the *same item* of damage twice in his complaint.

2. **The Expectation Interest**

(see Fuller and Purdue stuff)

3. **The Reliance Interest**

***McRae v CDC*** (1951) Aust. HC, p.793

**When expectation interests cannot be determined, reliance interests should be awarded**

**Facts**: P buys oil tanker from D that is allegedly wrecked on a reef. P goes to salvage the wreck but there is no boat.

**Ratio**: Purpose of awarding damages is to put P in position they’d be in if k had been performed (expectation).

When expectation cannot be quantified, the court will look to award reliance damages.

If a party has lost expenses b/c of other partying failing to do k (i.e. costs incurred in reliance of the other party’s obligation), the innocent party may be able to claim damages for those wasted expenditures.

🡪 However, they must be truly wasted – Can’t claim capital expenditures you can use elsewhere (e.g. boat upgrade)

**Dec:** No way to know what the tanker would have been worth, so reliance costs awarded (+ lost expenditures).

***Sunshine Vacation Villas v The Bay*** (1984) BCCA, p.801

**Both reliance and expectation damages cannot be awarded unless it will not overcompensate.**

**Facts**: Bay reneged on a deal to allow P to become the exclusive travel agency in several of its stores.

**Ratio**: Damages can’t be awarded for both reliance and expectation because it would result in double compensation.

Therefore, one can only receive both reliance and expectation damages if it would not overcompensate the party.

If profits are too difficult to quantify, reliance damages will be awarded instead.

If P would have made a loss, reliance damages awarded (they will be more) – onus on P to show profits>reliance.

**Dec:** P gets reliance damages.

4. **Restitution**

***Attorney-General v Blake*** (2001) HL, p.805

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

**Facts**: British spy becomes agent for the USSR then gets sent to jail for leaking secrets. He busts out of jail and writes book about it. AG sues because his spy contract had a term saying he could not divulge info in books or press.

**Ratio**: Damages are usually compensatory (expectation).

However, they aren’t always for recouping financial loss – can also be measured by benefit of the wrongdoer.

This is only for exceptional circumstances however – usually damages, specific performance and injunction do it.

General guide: Did P have legitimate interest in preventing D’s profit-making activity and depriving him of profit?

🡪 i.e. Did the D profit by doing exactly what he contracted not to do?

**Dec:** For P. AG has legitimate interest in D not profiting off spilling secrets.

B. **QUANTIFICATION**

**General damages** :

= (market value of what was supposed to be delivered) – (market value of what was delivered) **OR**

= (market price that innocent party paid) – (contract price that innocent party was supposed to pay)

When k is broken, P is an innocent party, court will assist P when possible – but burden of proof is on P.

***Chaplin v Hicks*** (1911) England KBCA, p.814

**If there is a breach of k, the P has a right to damages even if they are impossible to calculate.**

**Facts**: Contestant in beauty contest whines that the final decision process was given on too short of notice so she missed it and couldn’t win. Defence: chances of the P to win are impossible to assess.

**Ratio**: Fact that expectation damages are nearly impossible to calculate does not relieve the wrongdoer of the requirement of paying damages for breach of k.

Jury must do the best they can, even if it involves guesswork.

**Dec:** For P. If the right had been transferable, it would have had value in that a good price could be obtained for it.

***Groves v John Wunder*** (1939) Minnesota CA, p.816

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

**Facts**: P owns a crappy lot, leases it to D for gravel extraction on condition D leaves it in its original state. D intentionally breaks this. Value of property assessed at $12K but cost of returning it to that state would be $60K.

**Ratio**: Law aims to give promisee what he was promised (expectation).

Damages should be awarded to do what k required, not for market value.

“Economic waste” is not a claim – owner is entitled to what he has lost (i.e. the work/structure he was promised).

**Dec:** For P.

***Jarvis v Swans Tours*** (1973) England QBCA, p.825

**Damages for non-quantifiable harm – mental distress**

**Facts**: P buys holiday from D based on a brochure but the holiday was a piece of crap unlike the brochure.

**Ratio**: Damages can be awarded for mental/emotional distress and loss of enjoyment if they are not too remote and the subject matter of the K was intended to bring about some emotion or enjoyment.

🡪 Contract must have been intended to generate a certain emotion but the breach results in the opposite emotion.

The K must have been for some kind of enjoyment and there must have been an actual breach of K (not just disappointment) – e.g. here, the contents of the brochure were warranties that were breached.

**Dec:** For P. Distress damages added on top of the cost of the vacation.

C. **REMOTENESS**

Any claims for damages must first go to *Hadley v Baxendale*, then look at the other cases.

You MUST cite *Hadley* but where you use *Victoria Laundry* or *Koufos* is up to you.

***Hadley v Baxendale*** (1854) England Exchequer Court, p.858 **\*\*IMPORTANT – THE TEST FOR DAMAGES\*\***

**Test for awarding damages**

**Facts**: Broken shaft given by P to D to bring to a repair shop. D was not told that the absence of the shaft meant that work would stop completely at P’s mill. Carrier breached k by delivering several days late. P sued for loss of profits but D argued that this loss was too remote.

**Ratio**: Damages will be awarded for losses that:

**A**) **General Damages** = occurred naturally from the breach (anyone else that would have suffered the breach would suffer the same losses) – “may fairly and reasonably be considered arising naturally, according to the usual course of things, from the breach itself” 🡪 Only the terms of the K are relevant (not purpose, intentions, etc)

**B) Special Damages** = were contemplated by the parties as a probable result of the breach of k (i.e. will flow from a breach of k from what the parties know but not what is in the k) – “anything that may reasonably be supposed to have been in the contemplation of both parties at the time they made the k, as the probable result of the breach”

🡪 The special circumstances needed to be known at the time the K was entered into

🡪 Just need to know general nature, not details/specifics

**Dec:** For D. P didn’t let him know about the necessity of the shaft so can’t claim profit losses.

***Victoria Laundry v Newman*** (1949) England KBCA, p.861

**Made the test for remoteness very broad**

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

**Ratio**: 6 points on the law of remoteness for damages:

1) Governing purpose of damages is to put the party whose rights were violated in same position, as money can do, as if his rights had been observed. This would include improbable losses (too harsh) so there are qualifications (2-6).

2) Aggrieved party is only entitled to recover such part of the resulting loss that was foreseeable at time of k.

3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or at all events, by the party who later commits the breach.

4) Knowledge possessed is of 2 kinds – imputed and actual. Imputed is knowledge that is ordinary/normal/expected (first branch of *Hadley*). Actual is the special circumstances and relates to the 2nd branch of *Hadley*.

5) For the breacher of the k to be liable, it is not necessary that he should actually have asked himself what loss is liable to result from a breach. It suffices that, if he HAD considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (i.e. objective test, not subjective).

6) Nor, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the D could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough he could foresee it was likely to result 🡪 A serious possibility or a real danger that is likely to occur.

**Dec:** P gets some damages (reasonably foreseeable) but not others.

***Koufos v Czarnikow (The Heron II)*** (1967) HL, p.868

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

**Facts**: A ship delivering sugar breached its k to deliver the sugar on time. The sugar arrived 9 days late and the price for sugar had dramatically decreased in this time. Ship captain ought to have known this was “not unlikely.”

**Ratio**: The test for remoteness in contracts should be more difficult than the test for remoteness in torts.

In *Hadley*, not every type of reasonable foreseeable damage could have been intended to be included.

🡪 Because then what about if the price of sugar had risen? Loss of profit wasn’t a sure thing.

The crucial question is whether, on the info available to the df when the k was made, he should, or the reasonable man in his position would, have realized that such a loss was sufficiently likely to result from the breach of k to make it proper to hold that the loss flowed naturally from the breach or should have been in his contemplation.

**Dec:** The loss of profit was too remote.

D. **MITIGATION**

***Asamera Oil Corp v Sea Oil & General Corp*** (1979) SCC, p.871

**Mitigation principle**

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

**Ratio**: P has an obligation to mitigate and keep the damages within reason.

You are required to stem your losses as early as reasonable and to bring your damages to claim in a timely way.

Damages will be recoverable in an amount representing what the purchaser would have had to pay for the goods in the market, less the contract price, at the time of the breach.

Impecuniosity is not a defence (you can’t say you were too broke to mitigate).

Damages will only be awarded for a reasonable amount of time.

**Dec:** Use price when P should have started their claim (after all steps to save K failed).

E. **TIME OF MEASUREMENT OF DAMAGES**

***Semelhago v Paramadevan*** (1996) SCC, p.879

**Damages at common law are to be calculated at the time of breach.**

**Damages in lieu of specific performance are to be calculated at the time of judgment.**

**Facts**: P buys house from D, D breaks K. P wants SP or damages. Market value of house rose from $205K or $325K in between breach and trial. Which price should be used?

**Ratio**: General rule: use value at time of breach so P can buy goods in the market.

However, if P asks for specific performance, the K is ‘saved’ as D can deliver at any point before judgment.

🡪 In this case, damages should be valued at the time of judgment (as this when the K is really broken).

🡪 Trial date is used for this.

**Dec**: For P.

F. **LIQUIDATED DAMAGES, DEPOSITS AND FORFEITURES**

***Shatilla v Feinstein*** (1923) Sask. CA, p.885

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

**Facts**: P buys wholesale business from D. K said D can’t work in that business in that city for 5 years and that if this is breached, D must pay $10,000 in liquidated damages. D buys shares in another company, becomes their direction.

**Ratio**: The law allows parties to say beforehand what the amount to be paid is if there is a breach for which the damages will be of an uncertain quantity – to be determined upon the circumstances of the case.

If the sum is larger than any actual damage which could possibly arise, it is not considered to be a bona fide pre-estimate of damages and will be found to be a penalty.

If there is a fixed sum for the breach of a number of stipulations of various degrees of importance, a presumption is raised against the sum being treated as liquidated damages.

Presumption can be rebutted if it is shown on the face of the agreement, or on evidence, the parties have taken into consideration the different amounts of damages that might occur and arrived at an amount they felt proper.

🡪 It must be a genuine pre-estimate of damages 🡪 cannot be extravagant or unreasonable

Terminology: calling it liquidated damages doesn’t mean anything – it may still be a penalty.

**Dec:** This is a penalty – set sum of $10K is way too big for minor breaches.

***HF Clarke Ltd v Thermidaire*** (1976) SCC, p.889

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

**Facts**: Breach of covenant against competition clause. Remedy stipulated as “gross trading profits.”

**Ratio**: If parties intend to be bound by a liquidated damages clause, they must take into account notions of fairness and reasonable (to be judged by the court).

Even if a formula is used, you must be able to defend its results as being reasonable.

It the formula is dependent on time, it is important that the P bring the claim within reasonable time.

**Dec:** Formula altered to be for net profits and extent of damages limited within a reasonable time.

***JG Collins Insurance v Elsley*** (1978) SCC, p.896

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

**Facts**: D breaks K with liquidated damages clause but P sues because the actual damages were much higher.

**Ratio**: The power to strike down a penalty clause interferes with freedom of k and should only be used for the purpose of preventing oppression of the party that has to pay.

If actual loss is greater than the penalty, P only has to pay the penalty.

🡪 If one party can use the penalty to intimidate, they can’t ignore it when it turns on them.

A penalty is a cap on damages, not a way to increase them.

An agreed upon sum is thus the cap regardless of whether it is damages or a penalty.

**Dec:** For D. D only has to pay the penalty.

***Stockloser v Johnson*** (1954) England QBCA, p.898

**Forfeiture clauses have no remedy at common law (but possibly in equity)**

**Facts**: P buys stuff from D by installments. Clause in K says D is owner until all payments are made. P failed to pay once near the end of the K and then sued to recover previous payments, saying the clause was a penalty.

**Ratio**: Judge says no. This is not a penalty. D just seeks to keep the money which already belongs to him.

IF there is no forfeiture clause: As long as seller says buyer can still finish the k, then buyer can’t get his money back. But if seller rescinds, buyer can get his money back.

However, if there is a forfeiture clause or the money is expressly paid as a deposit, then the buyer who is in default cannot recover the money at law.

🡪 He may have a remedy in equity by ordering seller to pay back the money.

Required circumstances for court to use an equitable remedy:

1) Forfeiture clause must be of a penal nature (i.e. sum forfeited out of proportion to the damage)

2) It must be unconscionable for the seller to retain the money.

🡪 E.g. Ridiculous 50% deposit, seller trying to take advantage for profit, buyer has made most payments but is incapable of finishing the last few payments 🡪 must be unconscionable, this relates to restitution.

**Dec:** For D. P was dumb with his money, not unjust for D to keep it.

**Law and Equity Act, s. 24 - RSBC 1996, c. 253 – Supplement 6**

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

G. **EQUITABLE REMEDIES**

* Two types:

1. **Injunction** = order of court to someone to do or not do something (with respect to a particular term in k)
   * Mandatory (to do something), prohibitory (not do something)
   * Specific performance is a type of injunction
   * Can be pre-breach (prohibit from breaching) or post (mandatory injunction to perform)
2. **Specific Performance** = order by court to a party to perform the k obligations (injunction to do whole k)
   * Must be mutuality of performance – both parties must fill their primary obligations

* Neither of these will be ordered for labour contracts (*Warner Bros*).
* NOTE: Can’t get these if k is terminated! SP postpones date of breach (*Semelhago*)
* These are discretionary – courts will consider these factors:
  + Are CL remedies adequate? Would damages be inadequate? Does P have clean hands? What was P’s conduct w/respect to k obligations? Hardship on 3rd parties and D? Will it require obligations extending over a period of time (a negative, but may be awarded if not complex [*Beswick*])? Is it an obligation to perform a personal service (*Warner*)? Difficult for court to evaluate compliance?

***John Dodge Holdings v 805062 Ontario*** (2003) ONCA, p.904

**Specific Performance – Test for uniqueness of property**

**Facts**: P agreed to buy land from D for development. D did not complete sale so P sued for specific performance.

**Ratio**: For real property, specific performance can be granted if the person seeking it can show that the property in question was unique at the date of the actionable wrong.

Look to *Semelhago*: “The property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended.”

You are only obliged to mitigate damage by seeking alternatives if you are not entitled to specific performance.

**Dec:** For P. At the time D broke the k, the land had a unique proximity to shopping malls.

***Warner Bros v Nelson***(1937) England KB, p.910

**Injunction for personal services**

**Facts**: D had k with P saying she’d only act in their movies but wants more $ so she breaks k. P wants injunction.

**Ratio**: Courts will not enforce a positive covenant of personal service, even if it is expressed in the negative.

Court won’t enforce an injunction to enforce a negative covenant if the effect of doing so would be to drive the D either to starvation or to specific performance of the positive covenants.

Court won’t enforce an agreement by which one person undertakes to be the servant of another.

Here, D can do something else during the length of the k if she doesn’t want to make movies for P. She is only barred from being in the movies of other companies.

Here, damages aren’t good enough – the thing is of a particular value “the loss of which cannot be reasonably or adequately compensated in damages” 🡪 injunction is appropriate.

Court should make the period of the injunction such as to give reasonable protection and no more to the P against the ill effects of them to D’s breach of contract.

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

***Zipper Transportation v Korstrom*** (1997) Manitoba QB, p.916, (1998) Manitoba CA, p.917

**Interlocutory Injunction**

**Facts**: D was an independent contractor for P and then stole a customer from P so P asks for an injunction to stop D from practicing that area of business.

**Ratio**: Trial judge: It is not contrary to public interest to enforce the covenant and doing so would be reasonable.

Appeal judge: Look at a test of a balance of convenience.

🡪 Look for irreparable harm to either P or D 🡪 refers to nature of the harm suffered, not its magnitude

Here, there is no evidence that P would get the client back as a customer, but D would lose a customer and therefore suffer economic loss.

3 stage test for courts to apply when considering an application for either a stay or interlocutory injunction:

1) Preliminary assessment must be made on the merits of the case

2) Must be determined whether the applicant would suffer irreparable harm

3) Assessment must be made as to which of the parties would suffer greater harm from an injunction

🡪 You can also look at public interest in balancing process

Here, no irreparable harm to P if no injunction, but D would be effectively prohibited from making a living.

**Dec:** For D. Balance of convenience favours refusal to grant an interlocutory injunction.