Contracts – MacDougall 2010-2011

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**FORMATION**

# Offer & Acceptance

## **Offer & Invitation to Treat**

Mere puffs 🡪 Invitation to Treat 🡪 Offer

Mere puff: no reasonable person would take it as an offer

**Can the terms of the K (ie offer) only come from one party?**

* Battle of the forms - last shot/first blow? (Denning in *Butler Machine Tool v Ex-Cell-O Corp*)
* Strict offer & acceptance is reaffirmed in *Gibson v Manchester City Council* [1979] - only extreme cases might not fit into offer & acceptance model. Denning is rejected.
  + *NZ Shipping Co v AM Satterthwaite* [1975] - must accept that sometimes the facts of the case don't fit neatly into offer, acceptance, & consideration
* Some Ks require both parties to have input - but the offeror in the end is the one making the offer - so the offeror just incorporates the other party's terms in the offer
* Some terms are implied (in many cases, by statute)
* Sometimes Ks are created through conduct/performance of a term by a party rather than negotiations
  + *Trentham Ltd v Archital Luxfer* [1993] - a K can be concluded by conduct; such a K can impliedly & retrospectively cover pre-contractual performance

**Offer vs Invitation to treat – how to tell the difference**

1. Have all the details of the eventual K been set out? Are there ambiguities remaining?
2. Would treating a communication as an offer lead to an absurdity?
   * Eg. if treated as an offer, might lead to too many acceptances (and thus K's) than the offeror can handle.. But this argument doesn’t always hold… *Carbolic Smoke Ball* [1893]

* Invitation is a stmt of readiness to negotiate
* Invitation can still have some legal significance:
  + May be a source of terms that are included in the offer
  + May be a source of representations or assumptions that can affect the K if they are untrue
  + May be the source of info that becomes the basis of a claim for certain types of damages
* Whether something is a mere puff, ITT, or offer - is a question of intent (*Canadian Dyers Assn)* 
  + Intent is objective, K does not care about subjective intent: *Storer v Manchester City Council*
* Sometimes established categories helps:
  + *Grainger & Son v Gough* [1896] - ads are generally viewed as invitations to treat
  + *Harris v Nickerson* (1873) - auctioneer's words are an ITT, buyers bid is an offer, and auctioneer gives acceptance
  + *Thornton v Shoe Lane Parking* [1971] - driver accepts parkade's offer by taking a ticket

**Communications that are both an Offer and an Invitation to Treat - Contract A/Contract B situations**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Contract A | Offer | Acceptance |  |  |
| Contract B | Invitation to treat |  | Offer | Acceptance |

* Common in an invitation for tenders
* Whether there is a contract A/contract B depends on the dealings btwn the parties (*MJB Enterprises Ltd v Defence Construction* (1951) SCC)
* Obligations in contract A to unsuccessful bidders don't survive the creation of contract B - contract A is complete once the owner has fairly evaluated bidders, and enters contract B (*Double N Earthmovers Ltd v Edmonton* [2007] SCC)

***Canadian Dyers Assn v Burton* (1920) HC**

**There must be offer & 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  
**Held:** P’s quote do not constitute an offer, but his subsequent actions do

***Pharmaceutical Society of Great Britain v Boots Cash Chemists* [1953] CA**

**A display of price/goods in a retail store is an invitation to treat**

**Customer offers to purchase at the cashier, & cashier (agent for store owner) accepts**

**Facts:** Boots is not allowed to sell certain drugs without pharmacist’s supervision

**Held:** Since pharmacist can still choose not to accept offer of purchase, Boots’ self serve is ok

**Note:** But can lead to: *R v Dawood* [1976] Alta CA – 1 pricetag for 2 pieces of clothes. Since the customer is making the offer, she can set the price. SCC leaves K rule intact, but says can’t use K to evade crim

***Carlill v Carbolic Smoke Ball Co* [1893] CA**

**Ad is usually an invitation to treat, unless a reasonable person would think otherwise**

**Mass offers with no knowledge of offerees still constitutes as an offer which could lead to a contract**

**Facts:** Ad offers reward to anyone who gets sick after using smoke ball. Some $ put into bank for this purpose

**Held:** This was a unilateral K. Ad was an offer, not a mere puff.

**Note:** Did the placement of the ad make a difference? When did acceptance occur? (depending on answer, Carbolic’s revocation could eliminate few to many of its K’s)

## **Communication of Offer**

* Only the person to whom an offer is made can accept the K - if a third party accepts, there is no K (*Shogun Finance Ltd v Hudson* [2003] UKHL)

***Williams v Carwardine* (1833) KB**

**Knowledge & performance are required for acceptance. Motive & intent are irrelevant in this case**

**Facts:** Reward offered for info. P gave info to relieve conscience thinking she was dying.

**Held:** P gets reward since she knew of the offer & acted to accept, though that was not her intent

**R v Clarke (1927) Aus HC**

**Knowledge & performance & intent are required for acceptance. Motive still irrelevant.**

**Facts:** Reward offered for info. P gave info while he was being investigated, only to clear his own name, not thinking of the reward.

**Held:** No reward for P. Must intend to accept to be in a K.

## **Acceptance**

* Pivotal role of acceptance - at acceptance,
  + The K comes into existence
  + Consideration for a given promise is tested
  + Knowledge and assumptions can lead to misrepresentations
  + Intention to create legal relations is tested
* Acceptance as a way of saying yes
  + Can be said by the offeree or an agent for the offeree
  + Cannot have acceptance when the offeree is unaware of the offer
  + If offeree is aware of the offer, but has a different motive for doing things to accept the offer, there may still be a K (*Williams v Carwardine*; *R v Clarke*)
  + Can be said through words or actions or both
  + Generally anything more than a yes may constitute a counter-offer, thus rejection
* Acceptance by actions stipulated in the offer
  + If offer contains a prescribed procedure for accepting, then acceptance is generally only effective if it is done by that procedure (*Eliason v Henshaw* (1819))
  + Might be that there is a unilateral K - the offeree does everything he needs to do under the K just to get to the stage of acceptance - then once he is done, the unilateral K is in effect
  + if the offeror has prevented the offeree from doing exactly those stipulated actions, acceptance may be valid if it is close enough (*Carmichael v Bank of Montreal* [1972] - obligation to facilitate acceptance)
    - Criticism: where does this oblig come from? There is no K yet.. offeror is entitled to revoke
* Acceptance by actions not stipulated in the offer
  + Sometimes, acceptance can still take the form of action even if this is not stipulated in the offer (*Saint John Tug Boat Co v Irving Refinery Ltd* [1964] SCC)
    - But we have to be able to infer that the offeree had agreed to the work & terms upon which it was offered, before a binding K is implied
  + If both parties behave as though there were a K - may be enough to have a K (*Brogden v Metropolitan Railway Co* (1877))

***Livingstone v Evans* [1925] Alta SC**

**A counter-offer is a rejection of the original offer; a mere inquiry is not.**

**Once an offer is rejected, it is ended, and can only be renewed by the offeror**

**Facts:** E offers to sell land to L at $1800; L: "send lowest cash price. Will give $1600 cash."; E: "Cannot reduce price"; L accepts offer.

**Held:** L rejected offer with a counter-offer, but E’s “cannot reduce price” was a renewal of the offer.

***Butler Machine Tool v Ex Cell Corp* [1979] UK CA**

**Battle of the forms. First blow, last shot. – Does not apply.**

**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.**

**Facts:** P quoted cost on form, D placed order with different form with own terms. Whose terms prevail?

**Held:** D’s.

## **Communication of Acceptance**

**When does communication occur? (ie when does the K start)**

* Acceptance must be communicated in order to be effective
* Unless:
  + The offeree does the act stipulated in the offer. Then notice is not required. (C*arlill*)
    - Unless it is further stipulated that they must know (*Manchester Diocesan Council for Education*)
    - Offeror may waive stipulated action (*Manchester Diocesan Council*)
    - If offeror has not insisted that only acceptance by the stipulated action is binding, the offeree can accept in any other method that is not disadvantageous to the offeror (*Manchester Diocesan Council*)
* Communication by machine (answering machine, fax, email etc)
  + Generally the acceptance is communicated once it reaches the offeror's machine
  + *Entores Ltd v Miles Far East Corporation* [1955] QB:
    - If communication over phone is indistinct & offeror asks for clarification, then acceptance is communicated once second acceptance is communicated
    - If offeror doesn't ask for clarification, then acceptance is communicated
    - Unless offer has a stipulation otherwise - then must follow that stipulation
* Communication by post - the "postal acceptance rule"
  + Acceptance is effected as soon as the post takes it
  + *Household Fire & Carriage Accident Insurance Co v Grant* (1879) CA
    - Post is an agent for both parties - that is how there is consensus btwn 2 parties
    - If we don't have this rule, could have greater unfairness & potential fraud
    - Dissent: too unfair for offeror
  + Is this rule still appropriate now, when post is slowest form of communication? Maybe not..
    - But rule was still applied in *Romanow v Gillis* [2004] BCSC
  + Rule doesn’t apply(*Holwell Securities Ltd v Hughes* [1974] ER CA):
    - If express term specifies that the acceptance must reach the offeror
    - If it would produce manifest inconvenience & absurdity

**Where does communication occur? (ie where is the K)**

* + K is made where the acceptance is received *(Brinkibon Ltd v Stahag Stahl* [1982])
  + Increasingly a difficult issue with technology & travel.. What if my regular office is in A but I'm in B when I receive the email? Probably will go with regular place of business..

**Waiving notice of acceptance**

* + *Carlill:* since communication of acceptance is for the offeror’s benefit, he is allowed to waive it
  + *Felthouse v Bindley*: But in some cases this may impose a K on the offeree ("if I don't hear from you, then K") - can't do this - court held there was no K in this situation

***Felthouse v Bindley* (1862) UK**

**Communication of the acceptance must be by words, conduct, or both. Can’t be neither.**

**Silence may amount to acceptance, depending on past dealings**

**Facts:** Uncle offers to buy horse from nephew: if I don’t hear back, I’ll consider the horse mine.

**Held:** Can’t require action from someone to reject offer. K void.

***Carlill v Carbolic Smoke Ball Co* [1893]**

**Silence can constitute acceptance if offeror makes it clear that conduct = acceptance, & that notice is not required**

***Brinkibon v Stahag Stahl* [1982] UK HL**

**Generally, K is made where acceptance is received**

**Facts:** Acceptance in telex sent from London to Vienna

**Held:** Location of K is in Vienna

***Household Fire v Grant* (1879) UK**

**Postal Acceptance Rule**

**Facts:** Offer to purchase shares was accepted via post, but offeror never received the acceptance.

**Held:** Doesn’t matter. Post office acts as agent for both.

***Holwell Securities v Hughes* [1974] UK**

**Offeror may choose to negate postal acceptance rule. Ie. require notice before K is started**

## **Termination of the Offer**

**Revocation must be communicated - if not communicated, then not effective**

* Revocation where there is no direct communication
  + Offeree’s knowledge that the offer is impossible = revocation (*Dickinson v Dodds*)
  + Sometimes built into the offer ("while quantities last" or "to the first 20 takers")
  + If an offer is made to a large group of ppl/the public, a revocation is sufficient if it is given using the same method as the offer (*Shuey v United States* (1875))
  + Death of offeror is a revocation
* Revoking the offer early
  + Can revoke any time before acceptance, even if the offeror promises to keep it open
  + But can use option K’s to prevent early revocation of an offer
    - Ie. Give consideration for the promise to keep K open.
  + When there is no option K, might be very unfair for the offeror to revoke if the offeree has already taken steps to acceptance
    - Particularly in unilateral Ks (Eg. *Errington v Errington* [1952])
    - Difficult to reconcile this with K law (there's no K to oblige the offeror to keep the offer open)- more of a restitutionary basis..

***Byrne v Van Tienhoven* (1880)**

**Postal rule doesn’t apply to revocation of offer. Revocation must be communicated & received.**

***Dickinson v Dodds* (1876)**

**Offeror is not bound by promise to hold the offer open unless there is consideration for that promise.**

**Indirect/direct knowledge by the offeree that the offer is no longer possible = revocation.**

**Revocation must be communicated before acceptance.**

**Offeree’s counter-offer = rejection = revocation**

* The original offer can only be resurrected by the offeror (*Hyde v Wrench* (1840))
  + But doesn't take much to revive offer (*Livingstone v Evans* [1925] Alta SC)
* Inquiring whether a term could be modified is not a rejection (*Stevenson, Jacque & Co v McLean*)
* Counter offer only revokes the offer for THAT offeree, not other offerees

***Livingstone v Evans* [1925] Alta SC**

**A counter-offer is a rejection of the original offer; a mere inquiry is not.**

**Once an offer is rejected, it is ended, and can only be renewed by the offeror**

**Lapse of Time = an implied rejection/revocation**

* Lapse after a reasonable time (reasonableness is highly fact dependant)
* Lapse viewed as an implied rejection - 2 ways to view (*Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969])
  1. Imply a term into the K that if the offer is not accepted within a reasonable time, it is withdrawn (implied revocation)
  2. If offeree doesn't accept within a reasonable time (based on his conduct), he has rejected the offer (implied rejection)
     + Then different offerees can have different "reasonable times"

***Barrick v Clark* [1950] SCC**

**Acceptance must be communicated within reasonable time.**

**A request from offeree to keep the offer open is not binding.**

**Facts:** Selling farm land. Potential buyer went on 10 day hunting trip. Seller sold to someone else.

**Held:** Facts show that time limit is short (both parties appear eager to buy/sell) – a reasonable lapse

**Keeping an Offer Open**

1. Restitutionary principles in a unilateral contract: applies only when the offeree has started fulfilling the conditions, and the offeror is aware of this
2. Paying to keep the K open: an option K – often “deposits” – revocation = breach of option K

## **Unilateral Ks**

* Unilateral K's: once they start, all outstanding obligs are on one side. In the process of accepting, the other party has already done all of their obligs.
* Sometimes, the offer can’t be revoked while the person is in the process of accepting
  + Can be thought of as a K with an option K - that the offeror must keep offer open while offeree completes his obligs
  + Can see it as the K already starting, but offeree has the option of doing their obligs, and their completion triggers the offeror's obligs
    - Though technically, this isn't really a K since neither party is obliged to do anything until the offeree accepts by doing their obligs
* Is hard to reconcile this with the notion that offeror can revoke offer whenever he wants - courts have imposed a requirement for offerors to keep offer open once he knows that the offeree has begun doing actions
* Courts will interpret unilateral as bilateral whenever possible - ie that the offeree accepts as soon as he starts doing the obligs (*Dawson v Helicopter Exploration Co* [1955] SCC)

***Carlill v Carbolic Smoke Ball***

**Offer may be revoked before acceptance occurs (in this case, acceptance = offeree asking for $)**

***Errington v Errington and Woods* [1952] UK CA**

**Offeree is not bound by any contract to fulfill the conditions, but the offer cannot be revoked while he is fulfilling the conditions. If the offeree fails to fulfill the conditions, then the offer can be revoked.**

**Restitution may create quasi Ks or special orders – here, an injunction to keep offer open**

**Facts:** Father to son: If you continue paying mtg, house is yours. Father dies.

**Held:** Obligation for father’s estate to keep the offer open until mtg is paid off, or son stops paying mtg.

# Certainty of Terms

* Usually treated as a separate formation issue, but could probably view it as part of a problem with offer (if terms aren't certain, can't accept offer to create a K)
* Can either be lacking meaning (eg no term) or too many meanings (eg ambiguous terms)
* Usually is not dealing with equity, just intention of the parties
* Generally courts want to save a K

**Absence of an important matter**

* Important piece of info missing from the K - can be price, quantity, period of employment, etc
* Implied matters?
  + By Statute (eg. Sale of Goods Act) - but still might not be able to save the K (*May v Butcher*)
  + By common law, custom, or usage
* Missing elements might indicate a preliminary agreement – A K to make a K is not a K at all. Agreeing to agree later is not a K. (*Bawitko Investments Ltd v Kernels Popcorn Ltd* [1991] Ont CA)

**Ambiguity or internal contradiction**

* Ambiguity/contradiction btwn terms may affect existence or enforceability of K
* Eg. *Raffles v Wichelhaus* (1864) - 2 ships called Peerless, K didn't specify which. Mistake & uncertainty are very similar
* Statutes? Rarely help in ambiguity/contradiction - maybe for definitions, Interpretation Act
* Interpreting the K
  + High mark where interpretation was used to save a K: *Hillas and Co Ltd v Arcos Ltd* (1932) HL
    - Words should be interpreted to make the K effective rather than perish
  + Compare this with *May v Butcher* where court easily said there was no K
  + Courts currently sway more closely to *Hillas* than *May & Butcher*
    - What did the parties intend at the time they entered the K, judging by the language? (*R v CAE Industries Ltd* [1986] FCA)
    - Should take the interpretation that is most reasonable/sensible/fair: *Consolidated Bathurst Export Ltd v Mutual Boiler & Machinery Ins Co* [1979] SCC
  + Canons of construction - (they follow from what reasonable ppl assume in Ks)
    - Eg. Insurance Ks: *contra proferentem* rule - words are interpreted more strongly against those who use them (ie insurers)
* "Subject to" clauses (condition precedents)
  + Either certain obligs, or the whole K is 'subject to' something happening

**Sale of Goods Act**

**Ascertainment of price**

**12**  (1) The price in a contract of sale may be  
(a) set by the contract,  
(b) left to be set as agreed in the contract, or  
(c) determined by the course of dealing between the parties.

(2) If the price is not (“meant to be” according to *May v Butcher*) determined in accordance with subsection (1), the buyer must pay a reasonable price.

(3) What is a reasonable price is a question of fact dependent on the circumstances of each case.

**Agreement to sell at valuation**

**13**  (1) If there is an agreement to sell goods on the terms that the price is to be set by the valuation of a third party, and the third party cannot or does not do so, the agreement is avoided.

(2) If the goods or any part of them have been delivered to and appropriated by the buyer, subsection (1) does not apply and the buyer must pay a reasonable price for the goods.

(3) If the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

***May & Butcher v R* [1934] UK KB**

**Critical part of K is missing/undetermined = no K at all.**

**Only apply this case when using s. 12 of the SOGA. Otherwise, use *Hillas*.**

**Facts:** K states price will be determined from time to time.

**Held:** Too uncertain. S. 12(2) of SOGA only applies when the parties haven’t contemplated any of the sections in s. 12(1). Ie. s. 12(2) can only save K when the parties have said NOTHING about the price in K

***Hillas v Arcos* (1932) HL**

**Business ppl will write K’s unclearly. Interpret terms fairly & broadly to try to save the K**

**Generally K to make a K won’t be enforceable, but here – the term was already within an existing K.**

**Facts:** buyers of timber had “the option of entering into a K with the sellers” for more timber

**Held:** Clause creates an instant oblig for D, & if accepted by P, would be enforceable within that same K.

***Foley v Classique Coaches Ltd* [1934] KB**

**Look to intention – strong presumption in business K’s that courts will fill in gaps**

**Facts:** D’s K to buy petrol from P “at a price to be agreed on… from time to time”

**Held:** Parties acted like there was a contract for 3 yrs, so can see parties believed they had a contract

**Meaningless or irrelevant clauses**

* Can sever meaningless clauses - sometimes the K survives such severance, sometimes not
* Promises to negotiate “in good faith” or to “use best efforts”: these words have no legal meaning… may possibly destroy the K
* Recently, courts more willing to attach meaning (*R v CAE Industries*)
* But then Denning held that if the law doesn't recognize a K to enter a K, why should it recognize a K to negotiate? - this is too ambiguous to be binding (*Courtney and Fairbairn v Tolaini Brothers Ltd* [1975] ER, aff'd by *Walford v Miles* [1992] HL)
* And yet.. Landlord was found not to have negotiated in good faith for continuing lease in *Empress Towers Ltd v Bank of Nova Scotia* [1990] BCCA
  + BUT THEN *Mannpar Enterprises v Canada* [1999] BCCA - no requirement to negotiate in good faith
  + Court said the difference was that in *Empress*, there was a benchmark ("market value") whereas in *Mannpar*, there wasn't
* High point of giving meaning: *Gateway Realty Ltd v Arton Holdings* [1991] NSSC
  + Parties must exercise K rights fairly, honestly, and reasonably

***Empress v Bank of Nova Scotia* [1991]**

**Try to give legal effect to whatever the parties understood & intended to have legal effect**

**Facts:** Renewal clause in K: "market rental prevailing at the commencement of that renewal term as mutually agreed”

**Held:** “mutually agreed” implies 2 terms: good faith negotiation & agreement will not be unreasonably withheld.

***Mannpar Enterprises v Canada* (1999) BCSC**

**“renegotiation” does not give rise to obligation to negotiate in good faith.**

**“Renegotiation” = “to be agreed” 🡪 not enforceable**

**Facts:** Renewal clause: “subject to satisfactory performance and renegotiation of the royalty rate…"

**Held:** Basically saying "to be agreed" - therefore, not enforceable

**Note:** distinguishing btwn *Empress* & *Mannpar*?

-*Empress* had a standard by which to measure (“market prices”) whereas *Mannpar* didn’t.

-Crown in *Mannpar* was acting on behalf of aboriginal group, owed them a fiduciary duty

-*Mannpar* had more terms to renegotiate (bad argument)

# Intention to create Legal Relations

**Commercial context**

* Even if K is supported by consideration, a K is invalid unless there was intention to create legal relations
* Sometimes parties want to have legal relations in the future, but their communications haven't reached offer & acceptance yet (*Blair v Western Mutual Benefit Ass'n* [1972] BCCA)
* Usually commercial arrangements still give rise to a K even if one party is surprised by it (*Upton-on-Severn Rural District Council v Powell* [1942] ER CA)
* But sometimes if no K is found - transfer can be thought of as a gift (*Esso Petroleum Co. Ltd v Commissioners of Customs and Excise* [1976] HL)

***Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] ER CA**

**In commercial context, there is an assumption that there was intent to create legal intentions - onus of proof is on the person asserting that there were no intentions to create legal relations**

**Objective test for intent, taking into acct the importance of the agreement to the parties, & whether one party has acted in reliance on it**

**When searching for agreed terms, business ppl will try to avoid unpleasant truths**

**Held:** letters of comfort from a 3rd party to a lender only create moral obligations to pay borrower's debt, but not K obligs- neither party intends it to be binding

***Rose and Frank v JR Crompton Bros* [1923] HL**

**Commercial agreements usually imply legal obligation.**

**However, if the parties agree not to enter legal relations, then the courts will uphold that**

**Social & Domestic Contexts**

* Generally no binding legal relations - family arrangements usually depend on good faith of family members (*Balfour v Balfour* [1919] & *Jones v Padavatton* [1969])
* Exception may be when the family members are not living together in amity - then there is a presumption of intention to create legal relations (*Merritt v Merritt* [1970])
* Tread carefully - tide may be changing in this area - acknowledged that this unfettered attitude may lead to oppression of family members & benefit powerful family members

***Balfour v Balfour* [1919] UK CA**

**Family agreements not enforceable in court since parties don’t intend to create legal relations.**

**Facts:** Husband fails to continue giving wife monthly allowances

**Held:** No intent to create legal relations. Also courts can’t deal with every argument in family setting.

**Note:** might not represent court’s view now. This rule can be detrimental to weaker parties.

# Consideration

## **Nature of Consideration & Seals**

**Sealed Promises**

* Called a formal K - came before the doctrine of consideration
* Promisor must affix (or at least acknowledge) a seal (can be drawn) to the K containing the promise & understand the significance of the seal
  + Ie. Seal is not just a formality - serves a purpose of showing that the promisor understands (*Royal Bank of Canada v Kiska* [1967] Ont CA - doc just had the word "seal")
  + But doesn't take much for a court to find that there is a seal (*Re/Max Garden City Realty v 828294 Ontario Inc* [1992] Ont - doc had the words "in witness whereof I have hereunto set my hand and seal")

***Royal Bank v Kiska* [1967] Ont CA**

**The word “seal” next to the promisor’s signature is not enough.**

**Seal requires action & acknowledgement by the promisor that he understands he is legally bound by doc**

**Consideration – basic principles**

* Assessed on a promise to promise basis - not the whole K
* It makes the promise not gratuitous, and thus enforceable in K law
* Value must move from the promisee, can be a benefit to the promisor, or a detriment to the promisee (*Thomas v Thomas* (1842) QB)
  + Doesn’t have to be physical - can be a future right, or forbearance, etc (*Currie v Misa* (1875))
* Considerations must move from the promise, can't come from a third party to the promise (*Dalhousie College v Boutilier Estate* [1934] SCC
  + But benefit can go to a third party (usually can think of this as a detriment to the promisee)
* Consideration must be given at the time of the promise (ie. in exchange for the promise)
* Consideration can be implied - doesn’t have to be expressed (*Thoresen Car Ferries Ltd v WeymouthPortland Borough Council* [1977])
* Action as consideration - typical in a unilateral K - when the K begins, party A has already done the actions (the consideration) for party B's promise to be enforceable

**Distinguishing Consideration**

* Motive ≠ consideration (sometimes some overlap)
* Failure of consideration ≠ non existence of consideration
  + Failure of consideration refers to breach of K - if a party fails to deliver all promises, then there is a total failure of consideration
* Pre-Condition ≠ consideration (sometimes some overlap) – precondition deals with WHEN the promise becomes enforceable & consideration deals with IF the promise is enforceable

***Thomas v Thomas* (1842)**

**Consideration must have value in the eyes of the law, moving from promisee to promisor**

**Motive ≠ consideration**

**Facts:** Husband’s dying wish to leave house to wife, with £1/yr rent

**Held:** This is adequate consideration. Regard for wishes of the testator is not consideration, just motive.

## **Adequacy of Consideration**

* Something valueless cannot be consideration (eg. I'll give you X if I feel like it)
* Forbearance to do something where a person has no business doing that in the first place - is valueless (*White v Bluett* (1853) Exch)
* Forbearance to not start or discontinue a lawsuit which the promisee knows/ought to know is groundless - is valueless (*B (DC) v Arkin* [1996] Man CA)
  + But otherwise, forbearance regarding a lawsuit is consideration (*Callisher v Bischoffsheim* (1870)QB)
  + Possible for forbearance here to be implied (*Stott v Merit Investment Corp* [1988] Ont CA)
* Doesn't matter how much value it has, ie adequacy is irrelevant (*Mountford v Scott* [1975] ER CA)
  + But adequacy might be relevant in other (equitable) aspects: unconscionability, undue influence, illegality, or availability of remedies

***Mountford v Scott* [1975] UK**

**Adequacy is irrelevant in consideration.**

**Facts:** D promised to sell house for £X in 6 months. P gave him £1 for this promise

**Held:** that is sufficient consideration. D held to specific performance.

***Callisher v Bischoffsheim* (1870) UK**

**Forbearance to start/discontinue a lawsuit is consideration unless the promisee knows/ought to know that the lawsuit is groundless.**

**Otherwise forbearance is good consideration.**

## **Past Consideration**

* Past consideration is not valid - it must be given in exchange for the promise
* Doctrine of *ratihibitio* – A promises B X, and B gives A consideration Y, but A can’t fulfill his promise yet. If A subsequently ratifies the promise after gaining capacity, Y is sufficient consideration though it was in the past. (*Eastwood)*
* Series of events leading up to the promise isn’t considered “past” (eg. *Carlill*)
* *Pao On*: A past act can be consideration in a pre-existing duty situation if…
  1. the act was done at the promisor's request, and
  2. the parties understood the act would be remunerated in pmt or benefit, and
  3. The pmt or benefit would have been legally enforceable had it been promised in advance

***Eastwood v Kenyon* (1840) UK**

**Past consideration is not consideration. (though nowadays, equity probably decides)**

**Facts:** P borrows money to raise ward. Ward, & later, her husband, promises to pay loan back.

**Held:** Promise is not binding because there was no consideration.

***Lampleigh v Braithwait* (1615) UK**

**In an emergency (no time to discuss things), if A asks B to do X, and then afterwards A promises B Y, then X is sufficient consideration for the promise Y.**

**An exception to the rule from *Eastwood***

**Facts:** P goes to King to get pardon for D, who then promises to pay P.

**Held:** Promise is binding. P went to King at D’s request, with the expectation of remuneration

## **Pre-existing Legal Duty**

**Pre-existing duty owed to the public - no consideration**

* Unless, you are promising to do it in a particular way or to do something beyond the bare public duty (*Glasbrook brothers Ltd v Glamorgan County Council* [1925] HL)
* Denning would deem the promise as consideration (*Ward v Byham* [1956])

**Pre-existing duty owed to a third party (In K, tort, by statute etc) - yes consideration**

* Could we apply to public duty too? *Pao On* suggested that if the concern is that such consideration is nothing new, or that it could derive from illegitimate threats not to perform the pre-existing legal duty, then these concerns may be better dealt with through duress, unconscionability, etc..
* But in duty owed to a third party, something new is created- the promisor is given the ability to enforce the promise (whereas before the consideration, only the third party could)
  + - * *New Zealand Shipping Co Ltd v AM Satterthwaite & Co* [1975] AC

***Pao On v Lau Ying Long* [1980] PC**

**A promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration, as long as the promise has not been fulfilled yet**

**Pre-existing duty owed to the promisor - no consideration**

* Promise to pay more - A promises B to pay more for X - B reiterates he will perform X
  + No consideration: *Gilbert Steel Ltd v University Construction Ltd* [1976] Ont CA
* Promise to accept less - B promises to accept less from A & A promises to pay less
  + A's promise to pay less is not consideration (*Foakes v Beer* (1884) HL), so B’s promise to accept less is not enforceable
  + Argued in *Re Selectmove Ltd* [1995] ER CA that the flexible approach of *Williams v Roffey Bros* should be adopted, but Court found that *Foakes v Beer* was still good law
  + But.. If third party gives pmt to a creditor, the creditor is held to his promise to accept less.. Even though no consideration flowed from the debtor (*Hirachand Punamchand v Temple*)
  + Accord & Satisfaction
    - B promises to accept less from A, & A promises to pay less &/or something new, then A has given consideration & B's promise to accept less is binding (*Foot v Rawlings*)
    - Accord = agreement to compromise on debt; satisfaction = consideration (the new thing)
    - Statutory change
* Some jurisdictions have statutory provisions that make the promise to accept less enforceable, even in the absence of consideration
* But also some courts have said that it is only binding when all of the part performance has been performed (*Rommerill v Gardner* [1962] BCCA)

***Gilbert Steel v University Construction* (1976) Ont CA**

**Promise to pay more is not enforceable without new consideration**

**If parties clearly intended to abandon old agreement, could have used forbearance as new consideration**

**Estoppel may be used as a shield but not a sword**

**Note:** *Williams v Roffey Bros & Nicholls (Contractors) Ltd* says consideration = additional security of pmt, so a promise to pay more IS enforceable. BUT.. Gilbert Steel is probably better law.

***Greater Fredericton Airport v NAV Canada* (2008) NBCA**

**Post contractual modifications ARE enforceable without consideration, as long as they are not procured under economic distress**

***Foakes v Beer* (1884) HL**

**A promise to give less is not enforceable without consideration**

**\* overruled by BC statute: Law & Equity Act s. 43 – see below**

***Foot v Rawlings* [1963] SCC**

**Consideration may be a slight change in the agreement**

**Facts:** P agreed to pmt plan from D for debt. D was following through with postdated cqs, but P sues for full amt 2 yrs later

**Held:** Accord (compromise on pmt of debt) & satisfaction (postdated cqs) exists

**Law & Equity Act s. 43**

**Rule in Cumber v. Wane abrogated**

****43****  Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.

## **Waiver & Promissory Estoppel**

* There are other ways to make promises enforceable besides seals & consideration- most significant is a trust - but these are hard to create
* One other way to enforce… estoppel
  + Only developed within last 50 yrs & Canada probably least accepting of estoppel

**Estoppel Definition:** "where A has by his words or conduct justified B in believing that a certain state of facts exists and B has acted upon such a belief to his prejudice, A is not permitted to affirm against B that a different stat of facts existed at the time"

* Statement made by A must be a statement of fact, can't be belief, opinion, prediction, statement of intention or promise
* Equitable remedy – so result must be fair, parties must come with clean hands

**Promissory estoppel - History**

* Antecedents - *Hughes v Metropolitan Railway* - not equitable for someone to consent to not enforcing some rights under a contract, and then going back and trying to enforce those rights that they have given up
* Antecedents - Proprietary Estoppel – the stmt is about false interest in land; estoppel by representation – the stmt is a stmt of fact
* *Central London Property v High Trees House*: key case in creating estoppel
  + A promise is enforceable if there is intent to create legal relations + knowledge by the promisor that the promisee will act on the promise

|  |  |
| --- | --- |
| **Promissory estoppel** | **Proprietary estoppel** |
| Clear promise | No requirement for a clear promise |
| Time limitation of estoppel | Permanent effect |
| Normal equitable considerations (clean hands) | Same equitable considerations |
| Extent of promise is enforced to full force | Courts enforce the promise just enough to relieve the inequity |
| No cause of action | Can be a cause of action |

**Limiting Promissory Estoppel - Use as a defence, not as a cause of action**

* shield, not a sword- ie someone can be estopped from taking action against you
* Can be used as "part" of a cause of action… can facilitate a cause of action
  + eg *The "Henrik Sif"* - estoppel was used to allow the plaintiffs to claim cause of action against defendants - but they had a separate cause of action aside from estoppel
* Can be a sword only in the sense that an existing obligation has been altered by the PE
* In practice, these constraints make PE only applicable where the party has agreed to accept less (never more – in Canada. Maybe more in UK if there is a pre-existing relationship)

Currently…

|  |  |  |
| --- | --- | --- |
| **Canada** | **UK** | **Australia** |
| PE may only be used as a shield against someone’s actions against you. It may not be used as a cause of action, only part of a separate cause of action. Legal right (K promise) 🡪 cause of action 🡪 PE can be used. No legal right, no PE.  *Gilbert Steel* | PE can create a cause of action on its own . Denning on estoppel generally: when parties have an underlying assumption (fact or law) either due to misrepresentation or mistake, and have conducted the dealings between them accordingly, neither one of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.  *Amalgamated Investment & Property Co. (In Liquidation) v. TexasCommerce International Bank Ltd* [1982] | PE may be a sword – used to create a legally binding relationship in *Walton Stores v Maher*. Court said this was special because parties were about to finalize a K anyway. But in other cases, PE has been used to enforce promises outside a K. PE can create a cause of action on its own. 1 mishmash of all estoppels? |

**Requirements:**

* A clear & unambiguous promise that is intended to have a binding effect
  + With no express promise, can't use promissory estoppel
* Limited Duration - promissory estoppel only estops the P's claim while it is inequitable for him to do so. The claim can be reinstated.
  + Note: in proprietary estoppel, the claim to the property interest is estopped forever
* Reliance - the promisee must have relied on the promisor's promise.
  + Not necessarily to his detriment. "the detriment will be caused if the original obligation is enforced"

**Relationship with Waiver.. Different types of waiver.**

* Waiver as an election between rights – party A makes a choice between
  1. terminating (due to breach) or rescinding (due to misrepresentation), or
  2. waiving his right to sue.
  + Generally party A has to be aware of surrounding circumstances leading to the election
  + No reliance by party B necessary (on the election or acted on the belief induced by the waiver)
  + *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] UK
* Waiver as promissory estoppel - not choosing between alternatives, but choosing to give up the ability to take a particular action
  + Requirements: person waiving had full knowledge of rights, and an unequivocal and conscious intention to abandon them.
  + Waiver can be retracted as long as reasonable notice is given. If the other party hasn't relied on the waiver, then no notice is required (this is why it looks like PE - reliance matters, & can be revoked)
  + *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co* [1994]
* Waiver by election becoming waiver by promissory estoppel -if a party waives by election in a series of waivers, does it become waived by promissory estoppel if the other party has relied on the series as indicating a future intent to waive?
  + No - *John Burrows Ltd v Subsurface Surveys Ltd* [1968] - unless the party waiving by election led the other party to think that the right was waived forever.

***Central London Property v High Trees House* [1947] KB**

**A promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding even in the absence of consideration**

**More generally: if a promise was made with the intent to create legal relations, and the promisor knew the promise would be acted on – it is enforceable even without consideration**

**Facts:** Landlord agreed to accept less, but after war wanted to charge full rent and claim for last 6mths

**Held:** (Denning) Despite lack of consideration, landlord's promise is binding

**Note:** promissory estoppel mostly limited to more specific stmt above

***John Burrows v Subsurface Surveys* [1968] SCC**

**Waiving rights in a series doesn’t = future rights are waived, unless waiving party leads other party to believe so.**

**Facts:** D owes P $, pays in installments. P has right to demand full pmt if D is over 10 days late. D consistently over 10 days late for 18 months. Finally, P demands full pmt after an argument.

**Held:** For P. Estoppel requires P to have led D to believe that the rights under their K would not be enforced. Friendly indulgences ≠ evidence of losing this right. Otherwise, business parties would always have to enforce everything for fear of losing future right.

***D & C Builders v Rees* [1966] QB**

**When relying on PE, must have true accord & satisfaction. Accord (promise to accept less) cannot be coerced**

**Facts:** P’s took lesser sum for work done from D b/c she said ‘take it or leave it’, knowing that P’s were in financial straits. *Central Trees* appears to say promise to take less is binding…

**Held:** Promise to take less must have been given voluntarily. Here, promise was given under intimidation

***Combe v Combe* [1951] KB**

**PE cannot stand alone as a cause of action – can’t use PE without a pre-existing legal relationship**

**But court doesn’t say what you can do if there IS a pre-existing legal relationship**

**Facts:** Husband promises wife allowance £100. After 6 yrs, wife sues for £600.

**Held:** Husband’s promise is not binding – can’t use estoppel to create an action – it only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so.

***Waltons Stores v Maher* (1988) Aus HC**

**Estoppel can be used as a cause of action, without a pre-existing legal relationship (sword)**

**Facts:** P starts building prior to formalization of agreement that D would be leasing new building. D says no intention to proceed.

**Held:** D bound by agreement. Can use PE as a sword.

**Note:** might be able to see this as a case of unconscionability instead. Also, this is from AUS.

***M(N) v A(AT)* (2003) BCCA**

**A non-K promise can give rise to an equitable estoppel only when:**

1. **A induces B to assume or expect that the promise is intended to affect their legal relations, &**
2. **A knows or intends that B will act or not act in reliance on the promise, &**
3. **B does so act or abstain, &**
4. **Because B has acted/not acted in reliance, B will suffer detriment if the promise is not kept**

**Note:** Courts seemed positive about *Waltons Stores* but didn’t apply it here

# Privity

**Doctrine of Privity**

* Only the parties who have created the K can enforce it
* Others who are influenced or benefited from the K can't enforce it either
* Privity & Consideration – need both to enforce a promise - they work independently of each other

**Horizontal vs Vertical privity**

* Horizontal privity: A enters into K with B and both A & C benefit, or only C benefits
  + If B breaks the K, only A can claim damages, but sometimes A doesn't suffer much in damages but C does
  + *Lyons v Consumers Glass Co. Ltd* - mother buys glass baby bottle & while feeding baby, the bottle explodes & impairs his vision. Baby can't bring action in breach of K because he wasn’t privy to the K of sale. Mother can bring action under breach of K but her damages are minimal. Baby can sue under tort of negligence, but that requires proof of negligence
* Vertical privity: A enters into sale K with B, B enters into sale K with C, C enters into sale K with D … all for the same product
  + Each buyer/seller only has a K with the party above or below him - can't bring action under breach of K on anyone else
  + Sometimes the consumer will sue D, who sues C, who sues B, who sues A… but what if B goes out of business? A might be ultimately liable but can't get to them…
* In light of Horizontal & Vertical privity issues, lots of criticisms of privity… Canada has not been open to change, but other common law jurisdictions have allowed some more flexibility

***Tweddle v Atkinson* (1861) UK – Horizontal privity**

**No stranger to the consideration can enforce the K, though made for his benefit.**

**Facts:** A promised C £200. B promised C £100 as consideration for A’s promise. Both A & B are dead.

**Held:** C gets nothing. He gave no consideration.

***Dunlop Pneumatic Tyre v Selfridge’s* [1915] UK HL – Vertical privity**

**Only parties to the K can bring action. A term in the K allowing 3rd party to sue is not enforceable.**

**Facts:** A sells tires to B. B promises not to sell below price. B sells to C, who sells below price. A sues C.

**Held:** No action. No K btwn A & C, and B couldn’t be considered an agent for A since he would have had to enter K of sale with C for himself, and K for A. IF B was an agent for A, consideration would be needed

**Exceptions to privity**

* Abolition by statute: US & UK allow third parties who benefit from the K to enforce it
  + New Brunswick has enacted statute like the English one
* Limited Exception in Canada:
  + SCC has allowed a third party to use a defence set out in the K if that provision in the K was intended for the third party to use, and the third party was doing the thing set out in the K

**Parties to a contract**

* Usually 2 sides - one party on each side… but not always:
  + Multilateral K - multiple parties, each party has an agreement with each of the other parties & in the same terms (eg in a club or society)
  + Joint or Several Liability - one party in the K consists of 2+ persons. Usually in debtor-creditor K's. A question of whether the 2 persons are to each pay a specified amount (several liability), or whether they are jointly responsible for one amount

## **Circumventing Privity**

* Mostly only Agency, Trust, and Employment

**Suit by the party entering the K (not really circumventing privity then)**

* The party privy to the K can sue for breach of K & ask for specific performance
* In England, the party privy to the K can also sue for damages sustained to the other beneficiaries of the K
  + Might need to specify in K though that the third party is going to benefit from the K

***Beswick v Beswick* [1966] CA & [1968] HL**

**Denning: 3rd party beneficiary of the K with a legitimate interest to enforce it can sue – OVERRULED**

**HL: Privity still applies. 3rd party beneficiary cannot sue even with legitimate interest.**

**Facts:** D receives business from uncle, but required to pay aunt (P) annuity. D stops paying.

**Held:** P cannot sue personally, but can sue in role of administratrix. Remedy of specific performance ordered (normally difficult to get) – to do otherwise would give P nothing since the estate didn’t suffer.

**Agency**

* Can argue that A entered into the K with B as an agent for C, or that A entered into 2 K's - one between A & B and one between B & C with A as an agent for C - but there are some problems with this:
  + Hard to show agency though - Ideally, A doesn't directly benefit and only C benefits
  + Sometimes conflict of interest when viewing A as an agent for C (eg *Dunlop*)
  + C may benefit too much without the burdens of a K

**Trust**

* Can say that when A & B enter into a K to benefit C, they are creating a trust benefiting C
* But hard for courts to accept this because to establish a trust, usually need to explicitly say so, because the duties of the trust are onerous and courts do not want to impose such a duty when none was intended

**Collateral Contract**

* A & B enter a K that affects C - A & C might have a collateral K
* Sometimes is hard if A & C have never met nor negotiated & hard to find consideration
* Successfully used in *Shanklin Pier v Detel Products*:
  + A & C discuss A's quality of paint
  + C gets B to paint their tier with A's brand of paint
    - Sale K is between A & B, but because A & C had met, and C gave consideration by having B buy A's paint, then C could bring action against A

**Assignment and Subrogation**

* A & B enter into K. Sometimes, A can assign the K to C, and C takes over the contractual position of A - C takes on both obligations & benefits
* Subrogation is assignment in an insurance claim - A is insured by C, so C takes A's rights & remedies against B.

**Transfer of the Obligation**

* To solve vertical privity - the "promise" of quality and condition is passed on along with the product
* Has only been accepted in Quebec, not at common law yet

**Employment**

***London Drugs v Kuehne & Nagel* [1992] SCC**

**Narrow exception in privity for employees seeking to use a limitation of liability clause in employer’s K**

**Facts:** P & A have K with clause that limits liability to $40. A’s employees (D) cause damage.

**Held:** D is allowed to use limitation of liability clause. 2 requirements: i) parties must have intended for the clause to extend to the benefit of employees (will be presumed, unless parties expressly state otherwise), & ii) D’s must have been acting in the course of their employment & performing the very service provided for in the K when the loss occurred.

***Fraser River Pile & Dredge v Can-Dive Services* [1999] SCC**

***London Drugs* extended beyond employer-employee relationships.**

**If the intention of the parties A&B to the K was to benefit C, & C’s right to the benefit has “crystallized”, then A&B can’t modify the K to affect C’s interest. (C’s right crystallizes when the need to rely on the clause arises during the performance of the thing contemplated in A&B’s K)**

**Facts:** A is B’s insurer, clause for A not to subrogate against charterers. C is B’s charterer. Barge sinks.

**Held:** C’s interest in the K crystallized when barge sank. C can enforce K term.

**CONTENT**

* Statements made by a party can be categorized into:
  + Mere puff (no legal consequences because no reasonable person would rely on it)
  + Terms (terms of the K, contains or relates to an obligation in the K)
  + Representations (a significant statement of fact that a reasonable person would rely on)
* Misrepresentation can lead to rescission of the K and/or give rise to tort actions (negligence or fraud)
* For rescission to be possible, must be an "Operative Misrepresentation"

# Misrepresentation & Rescission

**Operative misrepresentation – elements**

1. Statement of fact
2. Stmt is untrue
3. Stmt is material
4. Reliance on stmt in entering the K

**Statement of fact**

* Must be fact, not opinion or prediction
  + - Cannot be a stmt of law (*Rule v Pals* [1928])
    - Mixed fact and opinion/belief = fact, as long has it has an important component that is present or past fact (*Smith v Land and House Property Corporation* (1884))
    - Stmt of intention can be a misrepresentation if the person's intention can be ascertained (*Edgington v Fitzmaurice* (1885))
  + There must be a statement
    - Silence where no duty to speak = no statement (*Keates v The Earl of Cadogan* (1851))
    - Duty to speak - consumer situations
      * Misrepresentation if the purchaser can prove that the "vendor is guilty of concealment or a reckless disregard of the truth, or falsity" of stmts (*McGrath v MacLean et al* [1979])
    - Duty to speak - good faith & fiduciary situations
      * Recent developments → more situations where there is a duty to reveal info
      * Duty to reveal if: one party relies on info from other to make decision and the other party can bring about a certain decision by withholding/concealing info (*978011 Ontario Ltd v Cornell Engineering Co* [2001])
    - Misleading silence
      * Silence in response to a q can be a statement if a reasonable person would interpret the silence to be an answer
      * Answering a q but omitting certain parts can also be a stmt (*Dimmock v Hallett* (1866))
    - Conduct as a statement
      * Conduct to make the vendor believe a non-existing fact was held to be a misrepresentation (*Walters v Morgan* (1861))

**Statement is untrue**

* + Rescission available even for "innocent" misrepresentations, from equity (*Redgrave v Hurd*)
  + Ambiguous statements: usually benefit of the doubt given to stmt maker
    - But also can't give a general impression & just add fine print to the effect of the opposite (*New Brunswick & Canada Railway v Muggeridge* (1860))
  + True stmts becoming false before K starts - duty to inform in equity (*With v O'Flanagan* [1936])

**It is material**

* + Objective test: is it "substantial" and going "to the root of" the K? (*Guarantee Co of North America v Gordon Capital Corp* [1999])
  + Can't be a collateral matter.. not a “mere” representation

**Is relied on by the other party as a reason to enter into a K**

* + Misrepresentation doesn't need to be the only reason, but must be A reason for entering into the K (*Edgington v Fitzmaurice* (1885))
  + Very related to "material" requirement
  + Evidence of reliance depends on the facts: the subject of the K, who the parties are, who is making the statement, etc
  + No duty to check representations (no due diligence requirement (*Redgrave v Hurd*))
  + Objective test

***Redgrave v Hurd* (1881) UK**

**Failure to exercise due diligence is irrelevant if a person is induced to enter K due to a material false representation. Honest belief is not a defence.**

**Facts:** P told D his business made $X/yr. P gave D receipts adding up to less than X. D didn’t check. D finds out after K is made and refuses to complete. P sues for specific performance.

**Held:** for D. K rescinded

***Smith v Land and House Property Corp* (1884) UK**

**If facts are equally known to both parties, opinion is opinion**

**If facts not equally known, an opinion from the party that knows more may be stmt of fact since it is implied that his opinion is based on known facts.**

**Facts:** P sells hotel to D, tells D the it is let to a “most desirable tenant” (tenant is in arrears)

**Held:** This is a stmt of fact – misrepresentation.

**Misrepresentations by non-contracting parties**

* + Effect on K depends on closeness btwn statement maker and contracting party
    - If no connection, then K party can't be held at fault, so not responsible. Some connection, likely held responsible
    - If false info attributable to K party, then party is responsible regardless of whether they authorized the passing on of the false info (*Pilmore v Hood* (1838))
    - Stmt made by agent = stmt made by party (*Weibelzahl v Symbaluk* (1963))
* Actions against statement makers
  + - Stmt maker may be held liable in tort
    - If no tort action, then unlikely that the misrepresentation will give rise to a claim
      * In *Peek v Gurney* (1873), directors of co. could be liable to purchasers of original shares, but not subsequent purchasers buying from the first purchaser

**Rescission**

* Available for fraudulent, negligent, & innocent misrepresentations
* Equitable response (not quite a remedy since it doesn’t usually result from a breach)
* Effecting Rescission
  + The other party must have notice - if they can't be located, then notifying the relevant authorities is enough (*Car and Universal Finance Co Ltd v Caldwell* [1965])
* Bars to Rescission
  1. Impossibility of restitution *in integrum*
     + If the return of property (real, shares, etc) is impossible because it has been tsfed to a third party, or changed in some way, then rescission may not be possible
     + Possible to account for use of the property (eg. rescind the K but make the P pay for deterioration for the car - *Wiebe v Buchart's Motors Ltd* [1949])
     + Sometimes, can use money to substitute for return of property but money is usually to do with damages (*Kupchak v Dayson Holdings Co Ltd et al* (1965))
  2. Execution of the K
     + If the K has been executed, rescission might only work for fraudulent, not innocent misrepresentations (*Shortt v MacLennan* [1958]) – otherwise might not be equitable
  3. Affirmation
     + If the P knows about the misrepresentation but goes ahead with the K, the P has affirmed the K and waived the right to rescind
  4. Delay (like affirmation by passage of time)
     + P is guilty of laches if an unreasonable amount of time passes before seeking rescission - (time starts when you ought to have known of the misrep)
* Once rescinded, cannot claim damages in K because the K has disappeared
* But, may be able to claim damages in tort of deceit or negligence

***Kupchak v Dayson Holdings* (1965) BCCA**

**Sometimes complete rescission is impossible – then compensation may be awarded**

**Facts:** P bought motel in exchange for 2 properties. Found out about misrepresentations, but 1 property had been sold by then.

**Held:** Can still ‘rescind’ the K, but part of the rescission must be satisfied by compensation.

# Representations & Terms

**Misrepresentation that becomes a term of the K**

* England: no rescission available (*Pennsylvania Shipping Co v Compagnie Nationale de Navigation*)
* SCC: rescission should remain available (*Guarantee Co of North America v Gordon Capital Corp*)
  + Then the party can either claim rescission or termination of the K plus damages
  + Logically speaking, rescission means that the party can't then claim damages - but this was left open in *Guarantee*

***Heilbut, Symons & Co v Buckleton* [1913] HL**

**Innocent misrepresentations can’t lead to damages. But can lead to rescission**

**Facts:** P’s shares of co. fell. P was led to believe by D that the co. was a rubber co, but it wasn’t. P sought rescission for the misrepresentation, or damages for breach of warranty.

**Held:** No warranty here – it was a misrepresentation, but because it was innocent, no damages.

# Classification of Terms

**Deciding whether something is a term**

1. Usually the terms are set out in the offer, but sometimes ambiguous (term or representation?)
2. Test is intention - did the person mean to legally bind himself to the term? Would an intelligent bystander reasonably infer intention? (*Oscar Chess Ltd v Williams* [1957])
   * Intent depends on conduct and words rather than thoughts
   * Lord Goddard in *Ecay v Godfrey* (1947) used more of a subjective intent
3. Skill & knowledge of the stmt maker can be taken into account (*Esso Petroleum Co Ltd v Mardon*)
4. May depend on the importance of the stmt to the K, or how close it is to the moment of acceptance

**Express & Implied Terms**

1. Implied terms are just as efficacious as express terms
2. In 3 categories of implied terms:
   1. Terms implied as a matter of custom or usage
      * Can be based on customs between 2 parties, customs within an industry, customs within the type of K
      * Won’t be implied if the customary term contradicts/doesn’t fit in with the rest of the K because it is implied on the basis of presumed intention
   2. Terms necessary to a K
      1. Business efficacy
      * Refers to terms that the parties clearly assumed in order to allow the K to work
      * Aka the "officious bystander test" (*Reigate v Union Manufacturing Co* [1918])
      * Implied on the basis of presumed intention (“as a matter of fact”)
      1. Implied as a legal incident of the particular kind of K
         * Implied because it is necessary to make the K fair.
         * Implied NOT on the basis of presumed intention (“as a matter of law”)
         * Possibly can put this under (c) too – implied by common law
      * Not a reasonableness test (would the term be reasonably implied in the K?)
      * A stricter necessity test looking at the K, the parties, environment, purposes of the K
        + Then, the term may be implied if it is necessary in a practical sense to the fair functioning of the agreement, given the relationship btwn the parties
   3. Terms implied by Operation of Law (eg. SOGA)
      * Terms that are implied because the law includes it in that type of K or all Ks (Usually statute, but can be common law)
      * Can usually expressly or impliedly reject implying the term - but in certain situations, such exclusion is prohibited

* Implied terms may still apply for K’s where the parol evidence rule is in effect.
  + Purpose of rule is to exclude express oral terms not put in writing
  + Since implied terms are neither written nor oral, it makes sense that they can still apply

***Machtinger v HOJ Industries Ltd* [1992] SCC**

**Sets out implied terms (a) & (b) above. Also sets out necessity test.**

**Conditions, Warranties and Intermediate Terms**

* Distinction is only important if you want termination as a remedy
* Traditionally, only conditions and warranties:
  + Condition: very important. Any breach of this term is serious and repudiates the K
  + Warranty: less important. A breach does not allow for termination of the K.
* What if importance depends on the seriousness of the breach? *Hong Kong Fir* created Intermediate (aka innominate) terms: can lead to termination being available if there is a serious breach, or not available if it is a small breach
* Intermediate terms stay intermediate terms (ie don’t turn into conditions/warranties after breach)
* Different breaches of an intermediate term can lead to diff consequences (ex. K to deliver newspaper. Fail to deliver once, maybe termination is not available. Fail to deliver 10xs.. Maybe on the tenth time termination is available)
* But due to unpredictability of intermediate terms, courts have said some terms will always be conditions or warranties
* Warning! Conditions & Warranties have other meanings:
  + Condition can also mean "term" or "precondition" or "quality"
  + Warranty can also mean "term" or can be a type of K

**Hong Kong Fir v Kawasaki Kisen Kaisha (1962) UK**

**Intermediate terms exist – availability of termination depends on seriousness of breach.**

**Test for whether termination is available: Will the injured party be deprived of the benefit which he entered the K for?**

***Wickman Machine Tool Sale v Schuler* (1974) HL**

**Labels don’t matter. Calling something a condition doesn’t make it a condition in the legal sense.**

**3 meanings of condition: i) proper meaning – a prerequisite, ii) common meaning – a provision, term, iii) term of art – the legal meaning (ie. breach of condition 🡪 availability of repudiation)**

**Contingent Conditions - Conditions precedent and conditions subsequent**

* Conditional obligations:
  + Condition precedent (aka precondition) – X must happen before an obligation is enforceable
  + Condition subsequent – X ends the enforceability of an obligation (usually ends all primary obligs in a K)
* Conditions precedent to a K
  + In *Wiebe v Bobsien* (1984) Bouck J says there are 2 types of conditions precedent:
  1. Conditions precedent which are part of the K, and trigger enforceability of the all the other obligs (ie, condition just suspends performance of an otherwise complete K)
* Eg. subject to… Bank approving the mtg (objective)
  1. Conditions precedent that are triggers for the existence of the K
     + Here, one party can unilaterally cancel the K before the condition happens since no K exists yet. Can call this kind of condition "illusory"
     + Eg. subject to… the purchaser liking the house (subjective)
     + Courts will try to find a K where possible - so generally try to find type (a) conditions
     + Lambert dissented in *Wiebe* and added a third type of condition precedent with both objective & subjective elements – subject to… dept’s approval of subdivision (someone has to go solicit the approval & persuade the dept)
       - Sometimes terms on who must do what may be implied to save the K – but sometimes courts can’t create the K & so agreement fails for uncertainty
* If a condition precedent requires one of the parties of the K to facilitate it, they have a duty to do what is reasonable to facilitate (*Dynamic Transport Ltd v OK Detailing Ltd*)
  + If the party does not facilitate, then the other party may be able to get an order of specific performance or damages
* Unilateral waiver of a condition precedent
  + A party can unilaterally waive a condition precedent ONLY IF the other party promised to do the condition precedent for the benefit of the waiving party (*Turney v Zhilka*)
  + If the condition precedent depends on a 3rd party, then no waiver is possible, even by the benefitted party \*\*BC’s Law & Equity Act overrules this. Benefitted party can waive.\*\*

**Entire and Severable Obligations**

* Important distinction in Ks where enforcement of A's obligation depends on B completing his obligs
* A has an entire oblig: B must (substantially) complete his oblig before A’s is enforceable
* A has a severable oblig: B can partly complete his oblig before A’s is enforceable
* Eg. *Cutter v Powell* (1795) Cutter was working on a ship, and died part way in the trip - K was for his labour - 30 guineas for the trip. Court decided Cutter's was an entire obligation. Ie no part pmt to his estate
* An entire obligation doesn’t have to be 100% complete before the other party's obligs are enforceable.. Must be substantially complete - what this means is very fact dependent (*Fairbanks Soap Co v Sheppard* [1953])
* Can keep dividing severable obligs until you find an entire oblig. At some point must be entire
* Sometimes not important to characterize as entire or severable – Ks with concurrent obligs

***Fairbanks v Sheppard* [1953] SCC**

**Substantial completion of an entire obligation = other party’s obligs are enforceable**

**Facts:** P contracted with D to create soap machine. P would pay most of it after completion. Before completion, D demanded money first.

**Held:** for P. D didn’t substantially complete his oblig. Also D had abandoned the K .

***Sumpter v Hedges* [1898] UK QB**

**For entire obligs, party A abandoning a K (ie not completing obligs) = no pmt from party B.**

**But A can still recover on *quantum meruit* if there is evidence of a new K with B, OR if B has *opted* to retain the benefit of A’s work (must have option).**

**Facts:** P partially built buildings on D’s land. P stopped midway. D finished building. P seeks to recover on a *quantum meruit*

**Held:** If P abandoned K, and D CHOSE to take the benefit of P’s work, then P could recover on *quantum meruit*. Here, D had no choice – buildings were on his land. Also, P could recover if there was evidence of a new K.

**Termination**

1. If one party breaches such an important term that it actually has changed the K, then they have repudiated the K
   * The other party then has access to the remedy of termination (ie can accept repudiation)
2. Repudiation ≠ rescission
   * Rescission - available to the representee for misrepresentation
   * Repudiation - occurs when one party breaches a serious term, and the other party can choose to terminate the K (future obligs disappear)
3. Acceptance of repudiation can happen via words or conduct – effective as soon as it’s communicated
   * The party accepting the repudiation can just stop performing their obligations (*Vitol SA v Norelf Ltd, The Santa Clara* [1996])
4. Primary obligations not yet performed cease to exist from the moment of termination, but secondary obligs still exist (ie can claim for damages)
5. Anticipatory breach: one party says they cannot perform an oblig, or it is obvious that it will be impossible to perform the oblig
   * The other party can accept the breach and proceed to remedies, or affirm the K and proceed to remedies when there is an actual breach (*Hochster v De La Tour* (1853))
   * The innocent's party may accept the breach by not performing their obligs (*American National Red Cross v Geddes Bros.* [1920])

**Losing the Remedy of Termination**

1. Sale of Goods Act sets out how remedy may be lost (mostly accepting goods that have been delivered)
2. Electing to affirm the K = giving up remedy of termination
   * Injured party must make an informed choice + clearly elect to affirm – cries of protest ≠ election (*Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1996])
   * Once elected to affirm K, decision is final - in fairness to the repudiation party
3. Passage of time - amount of time depends on the circumstances of the case (*Winnipeg Fish Co v Whitman Fish Co* (1909))

***Leaf v International Galleries* [1950] UKCA**

**If you cannot claim rescission through breach of condition, then you cannot claim it through innocent misrepresentation. Can lose remedy of rescission through passage of time.**

**Facts:** P bought painting from D – receipt said it was by X. 5 yrs later, P finds out it is not by X. P seeks rescission.

**Held:** Since P has accepted the good & affirmed the K, cannot claim breach of condition. Also cannot claim rescission on misrepresentation because P is already barred from rescinding on breach.

# Excluding & Limiting Liability

## **Standard Form Ks & Clauses Limiting Liability**

* Industrialization → large companies → K's with a "stronger" party and a "weaker" party
* Strong party can create standard form K & say "take it or leave it"
  + Often the std form K has an exclusion/limitation of liability clause
  + Courts prefer limitation of liability rather than exclusion clauses *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983]
* Courts concerned with stronger parties benefiting & whether weaker party understood the clauses/K
* In deciding whether such clauses are part of the K, courts look at notice & construction of the clause

**Notice – unsigned docs**

* + For a clause to be part of the K, both parties must be aware of its existence
  + Basic notice - eg *Parker v South Eastern Railway* (1877)
    - If both parties know where to find conditions (eg. on the back of a coatcheck ticket), then each can assume the other has notice. (ie can assume that customers understand English & pay attention to conditions)
  + Above basic notice requirement for unusual/onerous clauses
    - If clause is particularly unusual/onerous, party who would enforce the clause must show that this clause was brought to the attention to the other party (*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB CA)
    - What constitutes sufficient notice may depend on sophistication of parties (*Promech Sorting Systems BV v Bronco Rentals and Leasing Ltd* [1995] Man CA)
  + Notice before the K is concluded
    - Eg. *Olley v Marlborough Court Ltd* [1949] KB CA - notice of exclusion set out in hotel room not part of the K because the K is made at the reception desk
    - Eg *Thornton v Shoe Lane Parking* [1971] CA

***Thornton v Shoe Lane Parking* [1971] UK CA**

**K is concluded upon the driver taking & accepting the ticket, thus terms posted inside parkade have no effect.**

**Also the term completely excludes liability 🡪 no one is bound by it unless sufficient notice is given.**

**Notice – with signature**

* *L'Estrange v F Graucob Ltd* [1934] KB Div Ct
  + - Signature of the form means acceptance of the clauses set out in the doc, regardless of whether you had notice of them (unless there is fraud or misrepresentation)
* Innocent/fraudulent misrepresentation vitiates the signature
  + - *Curtis v Chemical Cleaning & Dyeing Co* [1951] KB CA - false impression of clause in doc given, though innocent misrepresentation, vitiates the signature
* Limiting L'Estrange
  + - Signature as an easy method of ensuring notice has been questioned in recent decades
    - Eg. *Tilden Rent-A-Car Co v Clendenning* [1978] Ont CA
    - But sometimes signature still enough - *Fraser Jewellers (1982) Ltd v Dominion Electric Protection Co* [1997] Ont CA - clause very clearly marked in a one page K signed by a businessman on behalf of his company.. Can't claim that because he didn't read it, doesn't need to abide by it
* Constructive Signature
  + - Sometimes a constructive signature satisfies the L'Estrange doctrine if earlier transactions btwn 2 parties have shown that there is knowledge of particular provisions, then can be said that there is notice of these on later occasions (*Henry Kendall Ltd v William Lillico Ltd* [1969])
    - But sometimes this argument fails… eg *McCutcheon v David MacBrayne Ltd* [1964]

***McCutcheon v David MacBrayne* [1964] UK HL**

**Signed is binding, and unsigned is not binding – follow *L’Estrange* strictly**

**Previous dealings are relevant only if they prove knowledge of the terms → then there may be constructive signature. (ie. previously signed ≠ this time it’s signed)**

**Facts:** D destroys P’s car while shipping it for P. P usually signs doc which excludes liability, but not this time. D argues that previous signatures = knowledge of exclusion clause = binding.

**Held:** previous signatures ≠ binding.

***Tilden Rent-a-Car v Clendenning* (1978) UK CA**

**Limitation of L’Estrange: Signature alone isn’t enough to enforce onerous/unusual terms.**

**Still have to draw party’s attn to term.**

**Facts:** car rental K had a limiting clause regarding ins if renter was intoxicated. Renter hastily signed

**Held:** clause was so inconsistent with the overall purpose of the K that more notice was required

***Karroll v Silver Star Mountain Resorts* [1988] BCSC**

**No general requirement to ensure that the other party reads and understands onerous clauses.**

**Oblig arises only if, in the circumstances, a reasonable person should have known that the party signing was not consenting to the terms in question. (then staying silent essentially = misrepresentation by omission)**

**BC more apt to follow L’Estrange.**

**Facts:** P injured in a downhill skiing competition. D asserts exclusion clause in waiver, signed by P.

**Held:** P is bound by L’Estrange unless she can prove i) D ought to have known that she did not intend to agree to the waiver & ii) with this knowledge, D failed to bring the clause to her attn. Neither is satisfied.

**Construction**

* + "*contra proferentem*" principle of interpretation - words of written docs are construed more harshly against the party using them
  + If there is a conflict btwn clause & other term stating liability, courts will try to retain liability
  + Exclusion/limitation clauses must be constructed very carefully - eg. Does it cover negligence? Assumed not to unless expressly stated

**Fundamental Breach & Unreasonableness/unconscionability**

* Even after requirements of notice & construction are met, and the clause is found to apply, courts might still reject it. How?

1. Fundamental breach - created by Denning (not used anymore)
   * When there is a fundamental breach (breach of an important term or one with such serious consequences), exclusion clauses could not apply (*Karsales (Harrow) Ltd v Wallis* [1956])
   * Criticisms?
     + Fundamental breach can be used even for exclusion clauses drafted by both parties, where both are sophisticated and not in need of protection. In this case, the doctrine is not preventing the undermining of the K but actually undermining it itself.
     + Also can view an exclusion clause as really saying that there is no primary oblig in the first place (if my promise to deliver you wheels with the bike is not enforceable, then is it even a oblig to include wheels?) - so then there is no breach.
2. Abolition/reform of the doctrine of Fundamental breach
   * HL disapproved Denning's doctrine once (*Suisse Atlantique v Rotterdamsche Kolen Centrale* [1967]) - he tried to resurrect it, but then HL put it to rest again, relying on Unfair Contract Terms Act 1977
   * In Canada – *Karsales*, *Hunter*, then *Tercon –* currently, fundamental breach is abolished.
   * No Unfair Contract Terms Act in Canada
3. *Hunter Engineering v Syncrude Canada* [1989] SCC- modify the doctrine
   * Wilson J: Test of unreasonableness
     + Fundamental breach can affect exclusion/limitation clauses ONLY in cases where the foundation of the K has been undermined
     + Test: is it fair & reasonable for the clause to apply in these circumstances? – ie. look at the breach that occurred, not at the formation of the clause.
   * Dickson CJ: Control by interpretation & unconscionability alone
     + Test: Does the clause apply to this breach? If so, was the K entered into unconscionably? (ie. was there unequal bargaining power?)
4. **Tercon Contractors v British Columbia [2010] SCC**

SCC rejected fundamental breach doctrine. Adopted Dickson’s CJ approach + policy.

Enforceability of an exclusion clause depends on:

1. Does the exclusion clause apply to the circumstances? (interpret the clause & assess parties’ intentions)
2. If it applies, was the formation of the clause unconscionable due to unequal bargaining power?
3. Public policy considerations – are there interests that outweigh the interest of enforcement of Ks? (burden of proof on party wanting invalidation of the clause)

**Facts:** P submitted tendering bid to D, D gave K to other, ineligible bid. Exclusion clause in tendering K.

**Held:** for P – exclusion clause didn’t pass first stage.

***Karsales v Wallis* (1956) UK CA**

**Denning creates Fundamental Breach– OVERRULED by *Photo Production* & *Tercon***

**When there is a fundamental breach (breach of an important term or one with serious consequences), exclusion clauses could not apply**

***Photo Production v Securicor* [1980] UK HL**

**HL rejects Fundamental Breach (again). Whether exclusion clause applies depends on construction of the K.**

# Requirement of Writing, Parol Evidence & Rectification

* Formal/sealed vs informal/simple
* Informal can be written or oral
* Formal Ks usually used for land interest
  + Governed by English Statute of Frauds 1677 in some jurisdictions (others have repealed or replaced it)
  + Statute says that sale of land interest, sales above x amt, and K's of guarantee have to be in writing
    - Writing = "some memorandum or note thereof", interpreted generously
  + Written record makes the K enforceable - even if no record, agreement isn't void, but courts can't order performance
    - * Though.. even without writing, if there has been part performance, equity enforce entire agreement, but part performance must be in relation to the K (*Deglman v Brunet Estate* [1954] SCC)

## **Parol Evidence Rule**

* Rule: if the parties intend that the written evidence of their K contain the entire K, then oral promises are not enforceable unless they have been reduced to writing
* Only applies to express terms, implied terms are not affected by parole evidence rule
* Issues? Stronger parties promise client assurances, but don't include them in the standard form K
  + Difficult for little guy to prove that the parties didn't intend the writing to represent the K
  + If rule applies, then stmts are at best misrepresentations
  + So courts typically only apply parol evidence rule to equal parties carefully drafting K
* *Hawrish v Bank of Montreal* [1969] SCC - Hawrish was a guarantor for existing & future debt, but was assured that he would be released when directors of company gave a joint guarantee - this wasn't in the K, & SCC held in favour of bank calling upon Hawrish for repayment
  + Court applied parol evidence rule, stating that any collateral agreement cannot stand as it contradicts the terms of the K

**More flexible approaches?**

* Some courts more willing to find that parties did not intend for written K to contain all terms
* Ie. Court may find that K consists of written, oral, & conducted terms (*J Evans & Son (Portsmouth) Ltd v Anrea Merzario Ltd* [1976] (CA))
* ***Gallen v Butterley* [1984] BCCA**
  + Lambert J held: if oral terms are going to be permitted, then it doesn’t matter whether they form part of the K, or whether the terms form a separate collateral K - effect is the same
  + The **parol evidence rule is a presumption that** **can be rebutted**, the presumption being that 2 parties would rather enter 1 written agreement than 1 written & 1 oral agreement
  + Use this with caution: SCC has said that it IS a RULE, not a presumption. Treat this as obiter

|  |  |
| --- | --- |
| **Presumption strengthened if…** | **Presumption weakened if…** |
| Oral agreement contradicts written terms | Oral agreement adds to written terms |
| Parties have individually negotiated the K | Standard form K’s created by 1 party |
|  | Oral agreement contradicts a general exclusion/exemption clause |

**Constraints on the rule**

* Does not apply to misrepresentations & does not apply to implied terms
* Statute can exclude the rule
* Oral evidence can still be adduced in the context of rectification & mistake that can affect the existence/enforceability/form of the agreement
* To get around the rule? Argue there is a collateral K, that the K is severable, or that the term is implied

## **Rectification**

* A mistake was made in writing down the K - the court corrects this mistake → rectification
  + Usually both parties agree that there was a K & that all terms were supposed to be in writing (ie. parol evidence rule may apply)
* Operates wholly in equity, & is part of the law on mistake (a remedy when mistake is found)
* Denning in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] CA:
  + Look at **conduct** of the parties , not thoughts, & compare this to what the K says
  + If you can predicate with certainty what their K was, and it was, by common mistake, wrongly expressed in the doc, then you can rectify - nothing less will suffice

**3 Contexts (types of mistakes) for Rectification**

Parties A/B think X, Y, or Z.

X is in the K.

|  |  |
| --- | --- |
| Unilateral – A may or may not be aware of B’s mistake | X/Y |
| Mutual (sometimes called common) | Y/Z |
| Common – neither is correct, but A likes X better than Y | Y/Y |

**Unilateral mistake**

* + A is content with the record, B wants rectification - B admits he was the only mistaken party
  + UK position – unilateral mistake has no effect on K in most situations.
  + ***Sylvan Lake Golf & Tennis Club v Performance Industries* [2002] SCC**

**Confirmed that law of mistake may be applicable to unilateral mistakes.**

1. Existence of a prior oral K whose terms are definite & ascertainable
2. Error may be fraudulent or innocent, but D knew or ought to have known of the error
3. D relying on the error must amount to fraud or the equivalent of fraud
4. Rectification won’t be too onerous – if too much change required, court may dismiss
   * + - Rectification should be used to restore parties to their original bargain
       - Negligence of P does not preclude him from taking action but conduct of P still matters
       - Proof may be somewhere between a BoP and BARD standard
   * *Fraser v Houston* [2006] BCCA- "ought to have known" is insufficent, D must have actually known

**Mutual Mistake**

* + Both parties agree there is a mistake, but have diff ideas of what it should be
  + P must prove: what was executed was not the agreement made & what the outwardly expressed continuing mistake actually was
* But sometimes, court has no other choice but to rectify since both parties want rectification

**Common Mistake**

* + The written record is in error – the parties know the correct term – but one party might prefer the incorrect term because it benefits him
  + P trying to get mistake rectified must prove that what was executed was not the agreement made, & prove what the outwardly expressed continuing common mistake actually was: *Fraser v Houston* [2006] BCCA

***Bercovici v Palmer* (1966) UK CA**

**Mutual mistake: actions after the K is made may be used in determining intent of the K.**

**Facts:** P sold business to D. In tsf K, “Lot 6 of 33A” was included – discovered yrs later. P owns “Lot 6 in 33”, but claims this was never in the negotiations. D claims 33A should be changed to 33.

**Held:** for P. D’s actions completely inconsistent with having obtained interest in Lot 6 – they never paid taxes, bought insurance, charged rent for P living there, etc.

**When can we use rectification?**

* Sealed Ks? The deed IS the K, so you shouldn’t be able to rectify… but it has happened.
* May be absolutely important that the written record reflects the exact K (eg when parol evidence rule applies)

**EXCUSES FOR NON-PERFORMANCE**

**Contesting the K**

* Parties contest a K in order to not have to fulfill their obligations
* Unenforceability can mean:

1. "True" unenforceability
   * Legally, the K or promise exists, but the courts cannot enforce it
2. Void K (non-existence of the K)
   * Happens when something in the formation is missing, or if the K is fundamentally flawed
   * Actions that have already been done have no effect (eg. Transfer of title was performed under a void K - then law won't recognize that transfer)
3. Voidable K (K that can be undone)
   * If the K is flawed in some way - usually because one party has been treated unfairly - then the K can be rescinded, or avoided, or set aside
   * Party who has been treated unfairly can affirm the K- then the K is valid & enforceable
4. Discharge by frustration (K where the primary & secondary obligs are terminated beyond a particular point
   * Both primary & secondary obligs are ended upon frustration
   * But up until frustration, K is valid

* Is possible for just one part of the K to be unenforceable - then it is severed

# Mistake

## **Mistake – Intro**

Recall:

Parties A/B think X, Y, or Z.

|  |  |
| --- | --- |
| Unilateral – A may or may not be aware of B’s mistake  X is correct state of affairs. | X/Y |
| Mutual (sometimes called common) | Y/Z |
| Common | Y/Y |

**Why Legally-Operative Mistake is Rare**

* Law of K centers around the idea that parties are responsible for what they promise to another party - to allow one party to excuse himself from obligations due to his own mistake seems odd

1. Mistake upsets allocation of risk
   * Can be said that the purpose of Ks is make a party responsible for bringing about a certain state of affairs - then that party takes on the risk of being able to bring about that state
   * Allowing mistake to excuse one's responsibility disregards this allocation
   * *McRae v Commonwealth Disposals Commission* (1951) considers this
2. Mistake, frustration, & risk
   * Mistake deals with things before formation of the K
   * Frustration deals with things that happen after K
   * Both doctrines relieve parties of risks that they did not contemplate & did not provide for in their agreement
   * Mistake is the rarer of the 2 (*Great Peace Shipping Ltd*)
3. Mistake does not affect the K when created by a 3rd party & the 3rd party can be held liable (perhaps in negligent misrepresentation)
   * Eg. *Yawney v Jehring* [2000] BCSC:
     + K for child support pmts was entered into based on father's lawyer's erroneous advice
     + Court refused to rescind the K - the equitable remedy of rescission is not meant to shield a 3rd party who is clearly at fault
4. Mistake and *Caveat Emptor*
   * Another reason why mistake might not affect a K: Unless there is a pre-existing special relationship, parties are not responsible for looking out for the other party
     + Unless to not correct his misapprehension would amount to fraud (*McMaster University v Wilchar Construction Ltd et al* [1971])
   * If the non-mistaken party is responsible for creating the error, then they could be liable through misrepresentation

## Common Mistaken Assumptions (common law)

* Happens when both parties contracting about X make an assumption as to title of the X, existence of X, or quality of X - and the assumption is not put into the K as a term
* Effect: Makes the K void (ie never came into existence b/c there was no consent)
* Mistaken Assumption as to Title
  + Seller attempts to sell X to buyer - but it turns out buyer already owns X
  + Eg. *Cooper v Phibbs* (1867) - sale of fishery
* Mistaken Assumptions as to the Existence of the Subject Matter
  + Usually dealt with by statute
  + Parties contract about X - X has been destroyed or never existed
  + This mistake assumes that the K doesn't make one of the parties responsible for X's existence (*McRae v Commonwealth* - eg where one party has assumed the risk of X existing)
  + Sometimes, X exists, but is so different from what the parties thought X was, that it is thought to really be Y (ie a BIG mistake as to quality = mistake as to existence)
    - Eg. *Sherwood v Walker* (1887) - cow sold turned out not to be barren & was pregnant
      * K was rescinded because what they were selling (barren cow) didn't exist
* Mistaken Assumptions as to Quality
  + For mistaken assumption as to quality to affect K: Must be a common mistake, & there is a quality missing from a thing that makes the thing essentially different from what the parties agreed on (*Bell v Lever Bros*)
  + Difficult to differentiate from Mistaken assumptions as to existence
    - Eg *Diamond v BC Thoroughbred Breeders' Society* (1966) - common mistake as to which horse was being sold
      * Court decided this was quality (lineage was slightly different) that didn't destroy the identity of the subject matter

**Equitable common mistake?? Yes.. and no.. maybe yes in Canada**

* Denning creates an equitable version of Mistake as to Quality in *Solle v Butcher* [1949], by saying that previous case law is mistake in common law
  + Denning asserted that *Bell v Lever Bros* showed that mistake could nullify assent (ie K is void) - but unconscientiousness could set aside a K too if there is a common fundamental misapprehension as to facts or their rights, and the party seeking avoid the K is not at fault
  + CL: title, existence, & quality; + equity: "fundamental" facts or rights
* Canada accepts *Solle v Butcher* in *TD Bank v Fortin* (1978) BCSC – P paid $10k to settle claims arising out of repudiation of a K – but finds out K never could have happened anyway, and applied to have $10k returned on the basis of mistake (
  + - Court held for P, K was void *ab initio* in equity due to fundamental mistake
* Still applicable? *Great Peace Shipping* [2002] England CA appears to go back to *Bell v Lever Bros* (pre-*Solle v Butcher*) and limited common mistake to title, existence & quality
  + - Said that quality covered Denning's view of common mistake in equity
    - Restrict common mistake even further than *Lever Bros*
    - But Canada has still applied *Solle*

***Bell v Lever Bros* [1932] UK HL**

**Can have: mistake as to identity of parties, existence & quality of the subject matter of the K – which will void the K.**

**Mistake as to quality must be by BOTH parties, & the mistaken quality must make the thing essentially different.**

**Facts:** P was employer of D. Gave them severance when P let them go. P found out they had taken advantage of co. & took action to void severance agreement based on mistake.

**Held:** for D. Mistake didn’t change the quality of the K

***McRae v Commonwealth Disposals Commission* (1951) Aus HC**

**If claiming any kind of mistake, must show that there was reasonable basis for mistaken belief. Can’t be negligent, wilfully blind, reckless.**

**Party cannot rely on common mistake where the mistake consists of a belief which is (1) unreasonably entertained by him, and (2) deliberately induced by him in mind of other party.**

**Facts:** P found no tanker & wants damages. D argues common mistaken belief as to existence of tanker, which should void the K.

**Held:** cannot rely on common mistake since D created the belief.

***Great Peace Shipping v Tsavliris Salvage* [2002] UK CA**

**Throw out Solle v Butcher. No such thing as a separate equitable mistake.**

**For common mistake to avoid a K:**

**1. Common assumption as to existence of a state of affairs**

**2. No warranty by either party that this state of affairs exists**

**3. Non-existence of the state of affairs is not attributable to either party**

**4. Non-existence of state of affairs renders performance of the K impossible (ie substantially deprives a party of the benefit of the K)**

**5. State of affairs may be vital to the consideration for the K, or required for the K to be possible**

**Facts:** D hired P’s ship. Cancelled K because ship was farther from a wreck than both parties expected. P suing D to pay cancellation fee. D arguing common mistake voided the agreement.

**Held:** Ship was only 22 hrs farther, this did change the essence of what they had contracted to do.

***Miller Paving v B Gottardo Construction* [2007] Ont CA**

**If a K provides that 1 party bear the risk of the state of affairs, then that party can’t rely on mistake to have the K set aside.**

**Facts:** P billed D for paving supplies. Signed mutual release that everything was paid for. Later, P realized it hadn’t billed for 500k worth. Invoked common mistake to void release.

**Held:** for D. D wasn’t aware of mistake & K didn’t become something essentially different from what it was believed to be.

## Mutual Mistake (common law)

* Relating to terms rather than assumptions: one party interprets a term as X and the other interprets a term as Y - both X & Y are reasonable interpretations of the term
* Eg *Raffles v Wichelhaus* (1864) ER:
  + Seller & buyer agree to have goods sent on the "Peerless" but there were 2 ships named Peerless sailing 2 months apart - buyer rejected the goods when they arrived because to him, they were 2 months late
  + Court held for buyer - since there was no consensus *ad idem*, there was no binding K
* Could also view some of these situations as certainty of terms problems, OR court can interpret term & decide one is more reasonable than the other → unilateral mistake
* Courts want to find a K when possible, will only allow mutual mistake to set aside the K when a reasonable bystander could not infer a common intention from the K either (*Staiman Steel Ltd v Commercial & Home Builders Ltd* [1976] Ont HCJ)
* Buyer must take reasonable care to ascertain what he is buying - can't get out of the K just by saying that he meant something diff from the seller (*Tamplin v James* (1880) CA)

## **Unilateral Mistaken Assumptions (not Terms)**

* + Generally this has no effect on the K unless there is fraud or something that amounts to fraud
  + *Smith v Hughes* (1871) QB - old oats were actually new - seminal case
  + Cockburn: was it a term? If not, then can't affect the K
  + Blackburn: did the D believe that they were old? (can't affect K) Or did the D believe that the P contracted that they were old? (affects K) Ie. Mistaken assumption vs mistake about what the terms were
  + *Imperial Glass Ltd v Consolidated Supplies Ltd.* (1960) BCCA
  + Bid to supply window glass - miscalculation & Imperial contracted to supply at 10xs less
  + Consolidated Supplies knew of the offeror's mistake.. but it was not caused by Consol.
  + CA: Not voidable for mistake because there was consensus, thus an offer - Imperial Glass intended to offer the goods at the price named
    - * Could only void on unilateral mistake if there is fraud - here, there is no fraud

## **Unilateral Mistake: Mistake as to Terms**

* Mistake as to Terms - "Snapping up" an offer
  + One party "snaps up" the offer because it is so advantageous, knowing that the other party had made a miscalculation - affects offer
  + Knowing = knows or ought to have known (*Hartog v Colin & Shields* [1939] KB)
* Mistake as to Terms - the Tendering Context
  + Contract A governs the tendering process, K B is the K for the performance of the service
  + *R v Ron Engineering & Construction Ltd* [1981] SCC
    - Contract A stipulates a 150k deposit which is kept by X if party Y withdraws the tender
    - Y gives the bid, but realizes that there was a mistake in the K - withdraws K B. X keeps the deposit but Y argues that the unilateral mistake affected the whole K process
    - Court holds that X can keep the deposit - mistake was known after K A - so had no effect on K A - ie a unilateral mistake could not affect contract A where it was not known to either party at the time A was formed. Maybe if X had known of the mistake when entering into A then mistake could affect A.
  + *Calgary v Northern Construction Co* [1985] Alta CA
    - Seems to say that despite mistake, after contract A is entered into, party X is allowed to proceed to accept an enforceable contract B
* Mistake as to Terms - Unavailability of Equitable Remedies
  + Unilateral mistake as to terms usually doesn’t affect the K
  + But the court can refuse to give a remedy of specific performance to the party trying to enforce the K
    - Eg. *Glasner v Royal Lepage Real Estate Services* [1992] BCSC
      * Seller knew that buyer had a mistaken belief about the property - when buyer found out, refused to complete
      * Seller sought specific performance - court refused such remedy because seller knew or ought to have known about buyer's mistake of a material term

***Smith v Hughes* (1871) QB**

**First case on mistake – lays out three different types of mistake**

**Facts: P agreed to buy old oats from the D, the oats weren’t old.**

**Held: 3 different opinions:**

**a. Cockburn: Assumptions outside the k are irrelevant. It does not matter what the parties thought, it is a matter of what the k was. It didn’t matter whether the P believed that the D knew they were old oats. This is a simple offer and acceptance. Mistake does not exist.**

**b. Blackburn: No ad idem where 1 party intends to make a K on 1 set of terms & the other party intends to make a K on a separate set of terms 🡪 void. Must be about terms, not assumptions. May be unilateral mistake, and doesn’t matter whether or not the other party knew of the mistake.**

**c. Hannen: Mistake can be about terms or a belief. Can be a unilateral mistake – P must believe X, and think that D also believes X. (doesn’t matter whether D actually believes X)**

## **Mistaken Identity (common law)**

* Mistaken identity is sort of a unilateral mistake…
* If not fraudulent, then K is void.
  + *Cundy v Lindsay* (1878) HL
    - X wrote letter addressed to A, but B received it
    - Court found X had no K with B
* If fraudulent, can see it as a fraudulent misrepresentation (K voidable)
  + Denning thinks no difference btwn face to face or not: *Lewis v Averay* [1972] QB CA
    - If 1 party is mistaken as to the identity of the other party, it doesn’t mean the K is void from the beginning - only means that the K is voidable by the 1 party - but only before a third party has, in good faith, acquired rights under the K
  + Preserves differential approach: ***Shogun Finance v Hudson* [2003] UKHL**
    - Rogue, face to face with dealer, purchased car using someone else's (X) identity - credit agreement was through faxes btwn Shogun & the dealer
    - Rogue sold car to Hudson & disappeared
    - Does Hudson own the car, or does Shogun?
    - **If there is personal contact, strong presumption that the K is btwn the physical parties present - if dealings are exclusively through writing, then no such presumption (ie the K is btwn the parties listed in the doc)**
    - Since Shogun only dealt through faxes & phone, Shogun had K with X, not Rogue.
    - Then since Rogue never had ownership of the car (voided K), Hudson doesn't either - then the car belongs to Shogun
    - Dissent favours *Lewis v Averay*: where 2 individuals deal with each other, they have a K - regardless of medium and what 1 party thought of the identity of the other - the K is voidable but not void

Note: *Phillips v Brooks Ltd.* [1919] KB

* + - B sold ring to A, believing A to be X, and accepts cheque. A sells ring to C. A runs off.
    - Cheque to B bounces - does B’s mistake affect the K? No
    - Since B tsfed ownership to A, who tsfed ownership to C - C owns the ring

***Non Est Factum* "That is not my deed"**

* Common law doctrine - dissolves a party's responsibility for anything under the K even though his name & signature are on the K
* Effect: Voids the K
* 2 ways to plea:
  + Can be used when identity & signature are forged
  + Or when someone actually signs the K himself but argues that he didn't know and could not have been expected to know that the doc was a K or that it was the kind of K it turned out to be – rules in *Gallie v Lee*
* *Gallie v Lee* [1971] HL affirmed by *Marvco Color Research Ltd v Harris* [1982] SCC
  + - P must establish that what he thought the doc was and what the actual doc was - was fundamentally/radically/totally different
    - Can't rely on *non est factum* if the signing of the doc was due to carelessness
    - Historically could only be used by blind, illiterate ppl
    - After *Gallie v Lee*, could be used for anyone, who, through no fault of their own, could not understand the doc (eg. defective education, illness, or innate incapacity)

***Marvco Color v Harris* [1982] SCC**

**If D was careless in signing the document, then D is estopped from claiming *non est factum*, especially when third parties in good faith have relied on it.**

**Application of this principle will depend on circumstances of each case.**

***Saunders v Anglia Building Society* [1971] UK HL**

**If someone doesn’t read an agreement before signing it, he cannot rely on *non est factum* to void it.**

**If the person did not act negligently, and was deceived, then can use *non est factum.***

## **Third Party Interests & Other Remedies**

* K is void: an innocent third party who purchases after the K has no ownership
* K is avoided: an innocent third party who purchases after the K retains ownership
* Even if a plea fails, P can also raise misrepresentation, duress, unconscionability, or illegality
  + - Courts may or may not grant a rescission in these other pleas - might take into account whether an innocent third party is affected

# Protection of Weaker Parties

* Protection of weaker parties occurs when a party is at a legally significant disadvantage against the other party - enough to warrant interfering with freedom of K
  + Or, can also be that the general circumstances surrounding the creation/performance of the K are so unfair that the K shouldn't be enforced
* Protection will affect enforceability, and sometimes existence of the K
* Different ways to protect weaker parties - but can result in complexity for parties trying to use these doctrines.. so Denning attempts to unify them in *Lloyd's Bank v Bundy* [1975]
  + But these attempts generally only lead to the creation of yet another doctrine (eg *Bundy*)
  + Sometimes courts say they're simply "doing justice" instead of fitting their decision into a doctrine (eg *Gaertner v Fiesta Dance Studios Ltd* (1972)
* Legislature sometimes tries to adopt a doctrine into statutory form.. But should they clarify?

**Inequality of Bargaining Power**

* ***Lloyd's Bank v Bundy* [1975] QB CA**: Denning tried to amalgamate duress of goods, unconscionable transactions, undue influence, & undue pressure into one general principle of "inequality of bargaining power". Single thread running through all doctrines.
  + "[g]ives relief to one who, without independent advice, enters into a K which is unfair or tsfs 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"
  + Unconscionability must exist at the time the K is created
* Has been rejected in UK - unequal bargaining ≠ unconscionable bargaining (*Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] UK CA)
* Canada has used it to inform other doctrines, particularly unconscionability (*Hunter v Syncrude*)
* Problem with this one doctrine is that it ignores the differences btwn all the other doctrines - they may create complexity, but may be needed..

|  |  |  |
| --- | --- | --- |
| Duress | Undue Influence | Unconscionability |
| Specific circumstances at the time the K is created  Usually K content doesn’t matter  Effect: voidable or void K | Relationship of the parties over time  K content starts to creep in  Effect: Rescission | Moment of unequal bargaining power. K can BECOME unconscionable  Content of the K – is it unfair?  Effect: Rescission |

## **Duress – Common law… moved to equity**

* Effect? Voidable if possible, & sometimes void (eg. *Saxon v Saxon*)
* Deals with circumstances surrounding the making of the K and their impact on the ability of the pressured person to make a real choice
  + ie the weaker party had no real choice but was compelled to enter the K
  + Historically, viewed as "coercion of the will" (*Pao On v Lau Yiu Long*- “coercion of the will is something more than commercial pressure)
* Currently, more concern with "legitimacy" of pressure – can the court accept a K flowing from this pressure? Content may have an impact but not necessarily determinative - May have duress even in what is otherwise a fair K
* Pressure to enter K doesn’t have to be the sole reason why the party entered the K, needs only to be one of the reasons (*Barton v Armstrong*)
* Categories of duress
  1. Duress to the person (CL)
     + Threat to someone's (or third party's, usually family) physical well being from other party to the K(or third party)
     + May include threat of imprisonment or prosecution
  2. Duress to goods or property (CL)
     + Threat to take or damage the other's property
     + Historically a K couldn't be affected by this kind of duress - now courts more willing to accept it (*Knutson v Bourkes Syndicate* [1941])
  3. Economic duress (eq)
     + Traditionally couldn't affect a K - economic pressures & even threats are tolerated in a capitalistic system and our economy is based on pressures & strengths
     + But then courts started seeing some as illegitimate/unacceptable threats
     + Traditional duress test: *Pao On*: have to have more than commercial pressure - the coercion had to essentially vitiate consent. A enters K with B, A under duress. Steps:
       - 1. Did A protest?
         2. What there an alternative course open to A?
         3. Did A have independent advice?
         4. Did A take timely steps to avoid the K?
     + Modern test,"legitimacy": test modified after *Pao On* in *Universe Sentinel* [1983] - look at whether the pressure was "illegitimate", rather than looking at whether there was "coerced will"
       - Usually threat of unlawful action is illegitimate, regardless of the demand
       - If there is a threat of lawful action, then court has to look at legitimacy
     + Economic duress in Canada is accepted, & courts tend to assess legitimacy (*Stott v Merit Investment Corp* [1988] - securities salesman agreed to take responsibility for bad account in duress - no particular legal wrong, but it was still found illegitimate & voidable)
     + *Gordon v Roebuck* [1992] - 4 factors in Pao On is not the end of the issue, must also continue on *Universe Sentinel* legitimacy approach. Found that 4 steps of *Pao On* were met but court gave no remedy because it wasn't shown that the agreement had been executed under unjustifiable economic duress
     + Still rarely successfully argued except in the most extreme situations

***Greater Fredericton Airport v NAV Canada* [2008] NBCA**

**Test for economic duress/lack of consent:**

**1. Was the promise extracted using pressure?**

**2. Was there no alternative choice but to comply?**

**3. Did the coerced party consent?**

**a. Was there consideration?**

**b. Did the party make the promise under protest? (VERY IMPORTANT)**

**c. Reasonable steps taken afterwards to disaffirm promise?**

## **Undue Influence - Equitable**

* One's unconscientious use of power to compel another into entering a K
* Looks at the broader relationship between parties & whether that relationship creates a situation of UI. If so, then any K may not represent true assent by the influenced party
* Effect? Rescission
* Duress falling short of the common law requirements may constitute UI in equity
* Influence vs threat; domination of the will vs coercion of the will
  + But recently, more focus on trust & confidence
* Test:

1. First establish UI
2. Decide whether the specific K is still legally acceptable
   * Ie. Was there a relationship capable of creating influence? And was use of that influence abused? (*National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC)

* Establishing relationship:
  + *Royal Bank of Scotland PLC v Etridge (No 2)* [2001] HL: ordinarily, UI arises in abuse of trusts, but not confined to this - can also include situations of trust & confidence, reliance, dependence, vulnerability
    - 3 classes of relationships:
      1. Irrebuttable presumption of UI in relationships: types of relationships that the law has accepted as needing protection (vulnerability/dependency)
         * Parent/child, guardian/ward, trustee/beneficiary, solicitor/client, etc
         * Proof of the relationship = there was influence
      2. Rebuttable presumption of influence in relationship: weaker party must prove that he placed trust in the other & the transaction was questionable.
         * Doubtful that this would exist in commercial relationships, might be familial/spousal
         * Generally transaction will be "manifestly" disadvantageous to the influenced party (*National Westminster Bank PLC v Morgan* [1985] HL)
         * But *Etridge* rejected this terminology and preferred a wrongful transaction in the sense that it constituted an advantage taken of the weaker party that could only be explained by undue influence
      3. Relationship of actual undue influence: no presumptions - the weaker party must show that the stronger party actually exercised UI
         * No need to show manifest disadvantage (*CIBC Mortgages PLC v Pitt*)
* Rebutting the impact of the presumption of UI on the K:
  + D must prove that P entered into the transaction from his own full, free, & informed thought (*Geffen*) - independent legal advice is important but not determinative

***Geffen v Goodman Estate* [1991] SCC**

**Approved 2 stage test for Undue influence:**

**1. Establish UI – use 3 categories from *Etridge***

**2. Examine K to see whether UI was exploited. (only need to show manifest disadvantage for commercial transactions, not personal ones)**

**Undue Influence from 3rd party**

* For 3rd party influence to be UI - 3rd party must be acting either as agent for the other party or with the notice of that party (*Bank of Credit and Commerce International SA v Aboody* [1990] QB - wife's guarantee given to bank set aside because bank had notice - solicitor for the bank witnessed the actual UI of the husband)
* *Barclays Bank plc v O'Brien* [1994] HL: bank has constructive notice when:
  + - 1. Transaction on its face is not financially advantageous to the wife
      2. There is a risk for the husband to commit a legal/equitable wrong in that kind of a transaction
      * Court will set aside the agreement unless the bank has taken steps to avoid UI (meeting alone with wife to explain the risk that she is taking on)
      * Approved by SCC in *Gold v Rosenberg* [1997]

## **Unconscionability - Equitable**

* Origin: *Slator v Nolan* (1876) - regardless of whether there is a pre-existing relationship btwn parties, if one can & does take undue advantage of the other, then the K should not be allowed to stand
* Assesses the circumstances surrounding the creation of the K and the contents of the K
* Unfair situation creates presumption of "fraud" (unconscientious use of power, not deceit) - and stronger party can rebut by showing the transaction was fair, just, & reasonable
* What if a K becomes unconscionable after the K has come into existence? - Wilson J considered this in *Hunter Engineering Co v Syncrude Canada Ltd* [1989] SCC:
  + Unconscionability may be used to control use of exclusion & limitation clauses (sever them & make them unenforceable if they are unconscionable)
  + Maybe it is a separate doctrine of "unfairness"
  + PC has rejected a separate "unfairness" doctrine (*Hart v O'Connor* [1985])
* Also some statutes deal with unconscionability & they don't always agree with common law principles

***Morrison v Coast Finance* (1965) BCCA**

**Test for Unconscionability:**

**1. Prove inequality in position of parties arising from ignorance, distress, need;**

**2. Prove substantial unfairness of bargain obtained by the stronger 🡪 presumption of fraud**

**3. D can rebut by proving bargain was fair, just and reasonable.**

**Facts:** elderly woman convinced by 2 men to mtg house to finance company in exchange for a valueless promissory note. Finance company knew of valuelessness & even drafted these documents

**Held:** Unconscionability applies. Remedy would normally be rescission but since matter was btwn finance co & woman, court ordered finance co to exchange notes for mtg - ie court can order creative remedies as fit.

***Harry v Kreutziger* (1978) BCCA**

**2nd test for unconscionability: Is the transaction viewed, as a whole, sufficiently divergent from community standards of commercial morality? (focused more on the transaction rather than parties)**

**Don’t have to establish strong/weak or unfair advantage, much broader.**

**Problem: Whose community standard? What is commercial morality?**

# Illegality

* K may be illegal because the law disapproves of its making, purpose, or performance in some way
* Ask: Is the K illegal? If so, what is the effect of the illegality?
* Can have statutory or common law illegality (sometimes these overlap)

## Statutory Illegality

* Older approach differentiates btwn an illegality in the formation of the K & the performance of the K. Effect is to make the K void *ab initio*
  + Formation: *Re Mahmoud & Ispahani* [1921] KB - license was required for sale of linseed oil. Seller had license & was incorrectly informed that the buyer also had one. Buyer refused to accept order when it arrived & court would not enforce the K because it was illegally entered, despite innocence of the seller
    - Sometimes leads to unfair results where the D knew of the illegality but the P did not (*Rogers v Leonard* [1973] Ont HC)
  + Performance: the purpose or manner of execution of the K might be illegal
    - If both parties had an intent to break the law at the formation of the K, then probably not enforceable at all. If only one party had this intent, then that party can't enforce
    - *Maschinenfabrik Seydelmann K-G v Presswood Bros Ltd* [1965] Ont: Can the K be performed lawfully at all? If so, illegality turns on whether the parties intended to break the law - presumption in favour of legality, so need intention to make K illegal
    - *Ashmore, Benson, Pease & Co Ltd v A v Dawson Ltd* [1973] UK CA: even if there was no intent at the outset, but a party formed intent, then K can be void for illegality
* Modern approach focuses on whether making particular K's illegal will further the objective of the statute
  + *St John Shipping Corp v Joseph Rank Ltd* [1957] QB: ship exceeded statutory load limit accidentally, one customer tried to say that that the K was illegally performed, so the shipping co could not rely on K to be paid - Devlin J distinguishes btwn a K which has the purpose of doing a prohibited act, and a K which is performed illegally only incidentally - also purpose of statute was to impose fine, not to deny shipper his pay
  + In Canada, no abolition of the older approach yet - but modern approach has been gradually adopted & developed (*Canada Permanent Trust Co v MacLeod* [1979] NSSC)

***Still v Minister of National Revenue* [1997] FC**

**Rejection of classical focus on strict legality of creation, purpose, & performance of K**

**Adopted *Royal Bank of Canada v Grobman* [1977] Ont - weigh consequences of invalidating K, social utility of consequences, & who the statute is aimed at.**

**Facts:** P had mistakenly thought she had the proper docs to work in Canada, worked, paid EI premiums. P was laid off & denied EI because her employment K was illegal.

**Held:** K not void for illegality

## **Common Law Illegality**

**Restraint of Trade**

* + One party agrees not to use his talents, skills, or knowledge in a given area for a given period of time (might be small part or large part of K)
  + Historically, courts didn't accept these Ks at all (*Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company Ltd* [1894] HL), now recognize that some restraints are justifiable
    - But without a legitimate reason for the restriction, courts will still reject K. (*Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] PC)
  + Must balance freedom of K with society's interests by considering what is reasonable for the parties (is there enough protection for the imposed party?) & for the public (is it injurious to the public?) (*Herbert Morris Limited v Saxelby* [1916] HL)
  + Also a difference btwn mercantile (less protection) & labour K's (*Elsley Estate v JG Collins Insurance Agencies Ltd* [1978] SCC)
  + Factors to consider: geographic & temporal scope of restriction

**K to commit a crime or do a legal wrong**

* + K to commit a crime or K to do another wrong that falls short of a crime (*Beresford v Royal Insurance Co Ltd* [1938] HL)
    - Eg. breaking other K, defrauding/blackmailing 3rd party
  + Also a public wrong to misstate values or revenue with intent to deceive tax authorities (*Alexander v Rayson* [1936] KB CA)

**Ks prejudicial to good public administration**

* + K to corrupt public officials or otherwise undermine good government
  + Eg *Carr-Harris v Canadian General Electric Co* [1921] Ont SC: K for one party to use influence in political arena to get ammunition K's with govt was not enforceable

**Ks prejudicial to the administration of justice**

* + Eg paying to stifle a prosecution (*The People's Bank of Halifax v Johnson* [1892] SCC)
  + Eg paying a witness beyond statutory fees (*Hendry v Zimmerman* [1947] Man KB)

**Ks prejudicial to good foreign relations**

* + Eg. K to raise money to support hostilities against a friendly govt (*De Wutz v Hendricks* (1824))
  + Eg. K that assists a hostile govt - but this doesn't include K with someone who has enemy citizenship, more to do with commercial intercourse which may advantage enemy nation (*Lampel v Berger* [1917] Ont)

**Morals**

* + Eg. K to only marry one person (*Lowe v Peers* (1768))
  + Some argument that morality doesn’t have a role in K

***KRG Insurance Brokers v Shafron* [2009] SCC**

**To hold former employee to a restrictive covenant: K clause must be reasonable and unambiguous.**

**In particular, the clause must have a reasonable geographical scope; a reasonable time limit; and be reasonable in the activities it seeks to restrict.**

**Also:** use of notional severance limited to exceptional circumstances, particularly in restrictive covenants. Don’t want employers to put in unreasonable clauses & wait for courts to amend.

## **Effects of Illegality**

* Basic effect is that a court will not enforce the K (*Holman v Johnson* (1775))
  + May make K void – can sever the K to make one part void and other parts ok
  + May make K unenforceable – can sever K or sever clause using blue pencil or notional severance (though *Shafron* says only use notional severance for interest rate changes)
* Generally, property tsfed under an illegal K cannot be recovered (*Tinsley v Milligan* [1994] HL)
  + If one party has to rely on the illegal K to recover property, the other party can raise the K's illegality as a defence
  + From authorities:
    1. Property can pass under an illegal K
    2. P can enforce property rights acquired under an illegal K provided that he does not need to rely on the illegal K for any purpose other than providing the basis of his claim to a property right
    3. Doesn't matter how the illegality came to light - if the P has acquired legal title under the illegal K, that is enough
* Exception: if parties are not *in pari delicto* - ie equally blameworthy, then court will allow innocent party to recover what was tsfed (particularly when the illegality is meant to protect that party, or if one party would not have known of the illegality)
* Also if party repents they may be able to recover (*Ouston v Zurowski* [1985] BCCA)
  + Repentance = withdrawal from performance before the illegal purpose was carried out in any substantial way
  + Motive is not important (*Tribe v Tribe* [1996] CA)
  + Only the repented party can use doctrine of repentance (*Zimmermann v Letkeman* [1977] SCC)
* What about recovery without relying on the illegal K? - can recover
  + Eg. Illegal K to lease materials - the lessor can still recover the materials (*Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB CA)
* In restraint of trade, usually would sever a restrictive covenant, or if the covenant is the essence of the K, can make the whole K unenforceable
* Illegality could have NO effect on the K – both for statutory & CL illegalities. (Note this is mostly an equitable response)

***Still v Minister of National Revenue* [1997] FC**

**Modern approach changes the effect of the illegality by: 1. making it easier to hold that there is no illegality, and 2. declaring the K illegal but still providing relief as an ‘exception’.**

**Statutory illegality should be guided by:** 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.

# Frustration

## **Development of Frustration**

* Doctrine began as an implied term that if something unforeseen happened, the parties would be excused from performing their promises (both primary & 2ndary obligs)
* But then *Davis Contractors Ltd v Fareham Urban District Council* [1956] UK reformulated it

***Paradine v Jane* (1647) KB**

**Pre-frustration: nothing can hinder a K promise. If you promised it, you must fulfill it.**

***Taylor v Caldwell* (1863) QB**

**Frustration is based on an implied term that the continued existence of the particular person/chattel is required for the K. If the thing perishes through no fault of the parties, all obligs are extinguished.**

***Davis Contractors v Fareham* UDC [1956] UK**

**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 performance is called for would render it a thing radically different from that which was undertaken by the K"**

## **Application of Frustration – some requirements**

* Don't want parties to use frustration to get out of a bad bargain, so 3 requirements (*J. Lauritzen AS v Wijsmuller BV* [1990] UK)

1. Event must be unforeseen
   * Reasonable person should not have contemplated the event - if able to be contemplated, then parties are taken to have accepted its risk (*Canadian Government Merchant Marine Ltd v Canadian Trading Co* [1922] SCC)
     + If parties "ought to have foreseen" event, then K not frustrated: *Walton Harvey LTd v Walker & Homfrays Ltd* [1931] UK
     + But Denning thinks this is not necessarily true.. If parties didn't provide for it in their K, that is enough: *Ocean Tramp Tankers Cop v V/O Sovfracht* [1964] UK
   * Natural disasters usually are unforeseen, but not always
   * If K is entered into with oblig/expectation that one of the parties will carry insurance for the event, then event wasn’t unforeseen
   * Economic & political events:
     + Eg. *Canadian Government Merchant Marine*: labour difficulties ≠ unforeseen
     + Eg. *Bayer Co Ltd v Farbenfabriken vorm Fried* [1944] Ont CA: war might place one of the parties "on the other side" & might put parties on diff sides of the conflict or make performance extremely onerous or impossible. May be unforeseen.
     + Eg. *Petrogas Processing Ltd v Westcoast Transmission* [1988] Alta CA: law changes or changes in regime may be unforeseen. If they are not, then can’t frustrate the K.
   * "Force Majeure" clauses:
     + Parties can include terms in the K to say that if X happens, K is ended/no more obligs
       - If something other than X happens, K can still be frustrated
     + If the clause kicks in, then it is not because the K is frustrated (since the parties could foresee this event) (*Ottawa Electric Co v City of Ottawa* [1903] Ont CA)
     + Construed strictly, like an exclusion clause.
   * Eg. *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co* [1975] SCC
2. Event wasn't the fault of the parties
   * Eg. of self induced frustration: *Maritime National Fish Ltd v Ocean Trawlers* [1935] PC
3. Event makes the purpose of the K impossible or drastically more difficult to achieve
   * Can categorize existing cases:
   * Destruction, death, & illness
     + Destruction of the essence of the K- *Taylor v Caldwell* - music hall burnt down
     + Death - usually where individual must perform a service that his estate cannot do
     + Illness - is the illness likely to continue for such a period that further performance of the party's obligation to work would be impossible or radically different? (*Lafreniere v Leduc* [1990] Ont HC)
     + K can also depend on the health of a 3rd party (*Krell v Henry* [1903] KB)
   * Method
     + Where the method that both parties contemplated has become impossible & an alternative method is burdensome
     + Eg. "Suez cases" - shipping K's negotiated on the assumption that Suez canal would be open - Suez crisis→ closed canal. Some K's were frustrated - depended on whether both parties entered into K on the basis that only that method would be used (*Tsakiroglou & Co Ltd v Noblee Thorl GMbH* [1962])
   * Disappearance of purpose
     + Where performing the K is still possible, but the purpose of performing the K has disappeared (rare)
     + Eg. "Coronation cases" - King Edward's Coronation cancelled - K's for ships, property etc for the Coronation day could still be performed - but no purpose anymore
       - Test: was the coronation the only purpose of the parties in entering the K? Is there still some purpose to the agreement despite cancellation?
     + Eg. *Claude Neon General Advertising v Sing* (1941) NSSC - wartime → no lighted signs at night. Court held no frustration - is still possible for parties to perform K, & though D's benefit of the sign is diminished, it is not entirely useless in daylight
   * Change in the law & illegality
     + Depends very much on how the K is framed & what the purpose of the K is
     + Eg. *KBK no. 138 Ventures Ltd v Canada Safeway* [2000] BCCA - zoning changes → allowable building square footage went from 231k to 30k sqft. This was a "change of circumstances so fundamental as to be regarded as striking at the root of the agreement & as entirely beyond what was contemplated the parties when they entered the agreement"

***Can govt Merchant Marine v Can Trading Co* (1922) SCC**

**Labour difficulties not unforeseen since it was their own policies that led to the strike.**

**Reasonable person could have contemplated difficulties.**

***Capital Quality Homes v Colwyn Construction Ltd* [1975] Ont CA**

**Test for frustration is whether the fundamental character of the agreement is so altered as to no longer reflect the original basis of the agreement**

**Facts:** Purchaser buying 26 lots to build houses & resell. Vendor knew of this purpose. Zoning laws changed & purchaser would only get one big lot instead of 26 smaller ones.

**Held:** K frustrated. Vendor knew of this purpose. Zoning change not within contemplation of parties.

***Victoria Wood Development Corp v Ondrey* [1977] Ont HC**

**Foundation of the K must be affected to find frustration**

**Facts:** Purchaser meant to subdivide 1 large lot. Zoning bylaws changed. Couldn’t subdivide. Vendor knew of this purpose

**Held:** not frustrated. Risk lies with purchaser. Should have inserted condition into K if he didn’t want the risk. Subdividing was part of the buyer’s motive, but not part of the K

***Maritime National Fish v Ocean Trawlers* (1935) PC**

**Self induced frustration: party who causes the problem cannot claim frustration**

**Facts:** D could only obtain 3 fishing licenses, but hired 5 trawlers. Didn't allocate a license to P - claimed frustration.

**Held:** "Essence of frustration is that it should not be due to the act or election of the party"

## **Effects of Frustration**

* Common law:
  + K comes to total halt. No obligs after the frustrating event are to be performed.
  + Anything done before the frustrating event is held to be valid
  + If oblig is partly performed by party A, & pmt not required until after the frustrating event happened, party B doesn’t have to pay unless the performance can be severed (*Appleby v Myers* (1867))
    - Pmt due before frustrating event - still required (*St Catharines v Ont Hydro-Electric Power Commission*)
  + If pmt by party B, then frustrating event, & nothing done by party A - B can recover for total failure of consideration (*Fibrosa Spolka Akcyjna v Fairbairn Lawso Combe Barbour Ltd)*
    - What if A does a little something? Not sure. Doesn’t matter - statute
* Statutory changes:
  + BC, Yukon, Sask: Allows for severance of parts that are wholly performed & right to restitution

**Breach**

* Also excused from doing primary obligations when the other party has breached their obligations (Relates directly to terms that have not been performed. Not mistake/misrep)
  + Could have a concurrent oblig that you cannot do until the other party completes theirs
  + Could have a breach of a condition 🡪repudiation 🡪 termination
* Sometimes by the time you get to mistake, you’ve already breached the K. So really, mistake could be an excuse for not performing secondary obligs

**REMEDIES**

**Non-contractual Remedies**

* K remedies arise only when there is a breach of a K obligation
* But other remedies may arise out of a K - ie tort remedies for misrepresentation, restitution

**Statutory remedies**

* Statutes may set out specific remedies for specific K situations
* Vary from jurisdiction to jurisdiction
* Some just restate existing common law & equitable remedies

# Eliminating the K

* Must either show that the K never existed legally, or that the K can/should be undone
* No contractual obligations for anybody

1. Void at common law
   * Law doesn’t recognize the K as ever having existed
   * Since K never existed, parties can't do anything about it (other than try to create a new K)
   * Voidness isn't due to the volition of party, it is an assessment of the law itself
   * Common law remedy → not discretionary - a K is either void, or not void
   * When might a K be void? Usually a problem during formation
     + No offer or no acceptance
     + Uncertainty of terms
     + No intention to create legal relations
     + One party had no capacity to enter into a K
     + Illegality in K's creation, purpose, or impact such that it can be said to be illegal for such a K to exist
     + Mistake
     + Traditionally, duress usually → void; now, duress usually → voidable
   * Consequences of voidness:
     + If K is void, other K remedies are generally not available since the K never existed (thus should consider voidness before considering other remedies)
     + Generally, whole K is void or not void - might be able to sever a K into different K's and say that one is void and one is not - sometimes can think of one severed part of the K as being void, normally due to illegality (but usually just thought of as being unenforceable)
     + Property may be able to be reclaimed under a property or restitutionary principle
       - Illegality: some situations where the tsf of property is effective even under the illegal K - better to think of K as unenforceable rather than void
2. Setting aside/rescinding/avoiding the K
   * When do we rescind the K?
     + Misrepresentation
     + Undue influence
     + Duress
     + Mistake
     + Unconscionability
   * Can see that the theme: during formation, one party is treated unfairly and other party is largely to blame (ie the problem is not within the K itself)
   * Acknowledges that the K exists but flawed from the moment of formation to disadvantage one party - then this party is given the option of undoing the K (if it can be done without undue hardship or delay)
   * Sometimes money is used as a substitute for property that can't be returned
   * For duress or fraudulent misrepresentation: operates at common law or in equity
   * For others, is purely an equitable device
   * When equitable, is a discretionary remedy
   * Under common law, can't avoid a K unless complete restitution can be made - in equity, more flexibility for money substitute, account for profits, and allowance for loss (also will consider fairness or hardship to the other party)
   * Availability of damages?
     + Claims for secondary obligs or contractual damages should not be allowed since the K is rescinded (but SCC has left this open: *Guarantee Co of North America v Gordon Capital Corp* [1999])
     + But claims to tort damages are not affected by rescission
   * Severability?
     + Generally, whole K is avoided - might be able to sever a K into different K's and say that one should be avoided and the other is not (but usually just thought of as being unenforceable)

# Altering the K or its Effects

1. Severance – hiving/dividing
   * Hiving off part of a K
     + Term(s) of a K can be taken out of the K - usually treated as unenforceable, or sometimes seen as void
     + Reasons: non-sense terms that were mistakenly included in the K; too uncertain to have meaning; term is illegal; exclusion/limitation clause that the other party was unaware of; term is unconscionable
     + Whether term is seen as unenforceable or void depends on why it is being severed
       - If severed due to voidness (eg. No notice, non-sense, uncertainty) - then neither party has a choice in the matter
       - If severed to protect a party then that party can seek to have the term deemed unenforceable, or leave it as is
     + Peripheral terms only
       - Can only hive off a peripheral term, can't remove something that is the heart of the K
       - What is peripheral and what is the heart of the K depends on interpretation of the term in the context of the entire K
       - Eg. *William E Thomson Associates Inc v Carpenter* [1989] Ont CA
     + Blue Pencil Test (generally only used for illegality)
       - Can you erase the offending term and still have the K make sense without adding words/clauses? If not, then can't sever
       - Based on notion that courts can't create K's for parties
       - *Transport North American Express Inc v New Solutions Financial Corp* [2004] SCC
     + A New Approach – notional severance
       - Blue Pencil test is given more flexibility - courts are allowed to severe & rewrite part of the K to make the K consistent with the original intent of the parties
       - *Transport North American Express Inc*
     + Abuse of Process
       - Cannot sever term if court thinks it is an abuse of process
       - *Canadian American Financial Corp v King* [1989] BCCA: courts are not de facto arbitrators over clauses that are drawn as alternatives
         * Not going to use severance to make the choice btwn alternatives for the parties
         * The entire clause will be void for uncertainty instead
   * Dividing the K
     + Might want to view K as 2 separate K's - why?
     + Where the parol evidence rule applies or where statute requires that the K be in writing - then something that was orally promised might not be enforceable unless the court views it as a separate K all together
     + For privity - courts may interpret as separate K's when more than 2 parties involved (but can present tricky consideration issues)
     + Then once divided, a breach leading to termination of one K doesn't affect the other K and there are still binding obligations
       - Or, can divide to prevent the K from being frustrated
     + Dividing the K doesn't bring the blue-pencil rule into effect - ie the courts have to make both K's make sense- can't do this by just dividing the words of the K - so have to add/repeat
2. Judicial Adjustment of terms
   * Not the same as resolution of uncertainty, rectification, or implication of terms
   * No recognized doctrine/principle of Judicial intervention/adjustment - but some authority for it
   1. Creation of the K - battle of the forms
      * *Butler Machine Tool v Ex-Cell-O Corp* [1979] - some terms are necessarily within the K during offer & acceptance - these terms are supplied by the courts, and not always reflective of the intention of the parties
   2. Setting aside on terms
      * *Solle v Butcher* [1949] ER CA - a remedy for mistake may be to substitute one set of obligations with another set decided by the court. Continued authority on *Solle* is doubtful, but has never been overruled on this particular point
   3. Severance
      * *Transport North American Express Inc v New Solutions Financial Corp* [2004] SCC - doesn't make sense to follow blue-pencil rule; vest the greatest possible amount of remedial discretion in judges
   4. Unconscionability
      * *Morrison v Coast Finance* (1965) BCCA - can alter K based on unconscionability (protection of weaker parties)
      * Some recent developments in promissory estoppel look like this - eg *Waltons Stores*
3. Unenforceability
   * Even if courts declare a tern unenforceable, the parties can still complete it. Anything tsfed under an unenforceable K is still legally tsfed (*Monnickendam v Leanse* (1923) KB)
   * True unenforceability ≠ void or voidable
   * Usually the result of:
     + No consideration = no enforceability
     + Exclusion or limitation clauses - unfair clause may lead to unenforceability
     + Illegality - sometimes ppl say a K is void for illegality, but better to think of it as unenforceable
     + Capacity - may not be enforceable by the party with capacity on the party without capacity - until the incapacitated party ratifies the K
     + Limitation periods
4. Discharge by Frustration
   * At common law, both primary & secondary obligs are discharged (also dealt with largely in statute)

# Damages

## **Interests Protected – why do we have damages?**

* Primary obligations of K have legal meaning because the law provides for consequences if they are not carried out (secondary obligations)
  + Secondary obligs are tied to primary obligs - so if there has been no breach of a primary oblig (term of the K), then there are no K damages
* Can categorize these by reasons for awarding damages (expectation, reliance, & restitution)
* Can see compensatory vs restitutionary, or compensatory vs punitive damages
* True K damages – looks at where the party would have been had the term been carried out

**Expectation interest - forward looking**

* + - Usual reason for damages
    - Parties expect that the other party in a K will fulfill their obligs. When they don't, damages put the injured party in the position that they were going to be in (*Robinson v Harman* (1848))
    - Clearest example is when profits are lost - but sometimes amount of profits may be difficult to determine
    - Some set formulas for profits:
      * Usually net profit rather than gross profit
      * If goods are not delivered, or delivered but rejected, the damages are the difference btwn K price & the market price
      * If goods are delivered & accepted but defective, damages are the difference in market value of what was delivered & market value of what should have been delivered
    - "no more, no less" rule - P can't be overcompensated (ie can't profit from the breach) (*Sally Wertheim v Chicoutimi Pulp Co.* [1911])
    - When injury is not profits, and more intangible (eg pleasure, relaxation, etc) - difficult to quantify

**Reliance interest – backward looking**

* + - Parties rely on the K being fulfilled & might lose money as a result of this reliance
    - Compensation for wasted expenditure or undoing the loss that the P would have avoided if not for the K
    - Might be important where calculating an expectation interest is difficult (*McRae v Commonwealth Disposals Commission* (1951) HCA)
    - Expenditure must be truly wasted/lost - if it would have been incurred anyway, can't claim. If P still can use it, can't claim. If it still has market value, can't claim the amt that it's worth.
    - If a P can claim reliance & expectation interest, court must ensure there is not over-compensation
      * Some courts believe that one cannot get both damages - that one has to make expenditures in order to make a profit, so the other shouldn't have to pay for both (*Cullinane v British "Rema" Mfg Co Ltd* [1953] CA)
      * Usually P can choose to claim either reliance or expectation or both interests.. But can't claim speculative costs (*Sunshine Vacation Villas Ltd v Governor and Company of Adventurers of England Trading into Hudson's Bay* [1984] BCCA)
* Also, if D can show that P would have lost even more money had the K been carried out, (ie he saved the P money by breaching K) then no damages for reliance will be awarded - difficult for D to establish but not impossible (*Bowlay Logging Ltd v Domtar Ltd* [1982] BCCA) - aka damages can't get P out of a bad bargain
  + - * + Exception to bad bargain rule: if P had entered the K because of a misrepresentation made by the D (*Rainbow Industrial Caterers Ltd v Canadian National Railway Co* [1991] SCC)

***McRae v Commonwealth Disposals Commission* [1951] Aus HC**

**When expectation damages can’t be determined, award reliance damages.**

**Facts:** D promised P there was a tanker to salvage. In reliance, P spent $ to go to tanker. No tanker.

**Held:** Purpose of damages is to put the innocent party in the position they would have been in had the K been performed. Can’t determine expectation damages, so awarded reliance damages.

***Sunshine Vacation Villas v The Bay* (1984) BCCA**

**Cannot claim both expectation & reliance damages 🡪 double recovery. They are ALTERNATIVES.**

**Since P’s couldn’t establish that loss of profits would be greater than loss of capital (aka wasted expenditure), P’s were only awarded for loss of capital.**

**Restitution interest – forward & backward looking**

* + - Rare, but sometimes the D is made to disgorge his profits from the breach in the way of damages - probably better to deal with this outside of K law
    - Interest may be a form of restitutionary damages - where the D doesn't give P money on time, and in the interim gains interest on those funds - P should be able to recover D's gain (D's gain is exactly P's detriment) (*Bank of America Canada v Mutual Trust Co* [2002] SCC)
    - But generally not awarded on this basis - might discourage economic activity (*Surrey County Council v Bredero Homes Ltd* [1993] UK CA)
    - Now that law of restitution is much more developed, can probably just think of them as restitutionary damages rather than contract damages

***Attorney General v Blake* [2001] UK HL**

**If reliance & expectation remedies are inadequate, can turn to restitutionary damages.**

**In a suitable case, damages for breach may be measured by the benefit gained by the wrongdoer.**

**Facts:** D, secret spy, traitor. Wrote autobiography. AG claiming restitution based on D profiting from breach of contract (telling secrets)

**Held:** Crown had a legitimate interest in ensuring D didn’t continue to benefit from revealing info.

**Fuller and Purdue: The Reliance Interest in Contract Damages**

* Restitution interest presents strongest case for relief – one has taken an unjust gain & the other an unjust loss
* Reliance interest presents also a solid case for relief – reliance on the broken promise has caused one a detriment
* But what about expectation interest? Is it right to award damages for the value of the expectancy that the promise created? – no proof of reliance is required
* Some possible explanations:
  + Psychological: promisee feels he has been “deprived” of something which was “his”
  + “Will Theory” of K law: parties have “legislated” a set of laws btwn them, and legal enforcement of the K only implements these laws
  + Economic or Institutional: in a credit economy, future values (for the purposes of trade) become present values
    - But then have to think about this: a promise has present value because the law enforces it. So the law doesn’t protect the value, but rather creates it
  + Juristic:
    - As a cure against the loss of other potential K’s (mitigation supports this)
    - As a prevention against losses of expectancy by penalizing the breaching party
    - To promote & facilitate reliance on business agreements by dispensing with proof of it
* Are the juristic & economic/institutional explanations just 2 sides of the same coin?
  + Law & society have interacted
  + The law measures damages by expected value in part because society view the expectancy as a present value; and society views the expectancy as a present value because the law gives protection to the expectancy

## Quantification Issues

* P must show what he has lost
* Some legal doctrines help D - eg. D has to show the market price of goods delivered some cases - can keep damages he pays to a minimum (*Ford Motor Co of Canada Ltd v Haley* [1967] SCC)
* Sometimes hard to determine market value (no market), & lost profit (depends on many factors)
* Speculations & chances complicate things - what if the breach creates the loss of a 1/4 chance of winning a beauty contest? (*Chaplin v Hicks*) - jury will have to do the best in estimating… but difficulty of quantifying damages shouldn't relieve the wrong-doer of paying damages
* Increasingly common for court to award damages for injured feelings & other emotions
  + Used to be called aggravated damages, now called mental distress damages (*Fidler v Sun Life Assurance Co of Canada* [2006] SCC)
  + *Fidler* also relates these damages back to *Hadley v Baxendale* & sets out test for P:
    1. One of the objects of the K was to secure psychological benefit 🡪 parties can reasonably contemplate that breach will bring mental distress
    2. Degree of mental suffering caused by the breach is sufficient to warrant compensation
  + Will be unusual for commercial Ks & employment Ks
  + Eg *Vorvis v Insurance Corporation of BC* [1989] SCC - no aggravated damages for abrupt & wrongful dismissal - McIntyre J said no damages traditionally, but won't completely preclude them. Wilson J (in dissent) said H&B test should be applied
* Sometimes Ks provide for a range of performance - then damages will be based on minimal performance by the party in breach, not the most likely performance (*Hamilton v Open Window Bakery Ltd* [2003] SCC)
* Sometimes more than 1 figure- eg. *Groves v John Wunder* (1939) US - lessee breached K by leaving property in bad condition - could award lessor high figure (cost of repairing) or low figure (difference in value of property)
  + Some argument to be made that lower sum ought to be chosen on a mitigation principle
    - But this might encourage ppl to breach Ks if cost of breach < cost of non-breach
* If cost of cure of breach is much higher than the benefit obtained by the cure, then courts will go with lower figure (*Ruxley Electronics & Construction Ltd v Forsyth* [1996] HL)
  + But courts shouldn’t question too much about the wishes of the aggrieved party
* Usually the date of the breach is used for calculating damages, but not if it would give rise to an injustice (*Johnson v Agnew* [1980] HL
  + Eg if the market price fluctuates wildly, might be calculated using the date that the P will find a substitute (*Radford v De Froberville* [1977] UK)
  + Usually won’t use the date of the breach if it would not be reasonable for the P to discover the breach right away
  + For anticipatory breach, will be date that the breach was accepted (*Hochster v De La Tour* (1853))
  + Date of pmt is used where there is currency conversion (*Miliangos v George Frank* [1976] HL)

***Chaplin v Hicks* [1911] KB CA**

**Wrongdoer shouldn’t be absolved of liability just because damages cannot be assessed with certainty**

**Facts:** P lost chance to win beauty pageant due to D’s breach

**Held:** Jury can decide what the value of the lost chance was.

**Compare to:** *McRae v Commonwealth Disposals Commission* (1951) - no loss of profits damages because the chance to gain was too speculative. Maybe can distinguish them .. *Chaplin* - K was for chance to win; *McRae* - K was for a chance for profit

***Groves v John Wunder* (1939) Minn CA**

**Lack of value in land does not allow a contractor who has breached his K to escape from ordinary damages**

**Facts:** D breached K deliberately be leaving land in bad condition b/c land is worth very little. Would have cost $60k to repair land. Land would only be worth $12k if repaired.

**Held:** D liable for cost to repair land (60k) because 1. Breach was willful, no good faith, & 2. Law aims to give the disappointed promisee, as much as $ damages will allow, what he was promised. A choice to build on valueless land is the owner’s choice, and if he pays another to do it, then they should do it.

**Dissent:** should use difference in property value. They are suing for damages, not specific performance.

***Jarvis v Swan Tours* (1973) QB CA**

**Damages may be recovered for mental distress - here, loss of enjoyment & entertainment which was promised & not delivered**

## Remoteness

* P has to establish an oblig was breached (ie the claim) and the amount of the claim
* Generally, once P has established these, D has strict liability to pay compensation
* Some damages though are too remote for D to be liable for them

**3 issues:**

1. Causation
   * D's breach must have caused the damage
   * Being an effective cause is enough - doesn't need to be the only cause (*County Ltd v Girozentrale Securities* [1996] UK CA)
   * If an intervening cause breaks the chain of causation, then first cause is not liable (*Lambert v Lewis* [1982])
2. Acceptance of risk based on knowledge: thin skull rule for K does not apply - the D must have had notice of the P's thin skull in order to be liable
   * Based on the idea that in K, parties have a chance to assess the risks of entering into Ks, so accept these risks when the agreement is made
3. Test for remoteness of damages in K set out in *Hadley v Baxendale* (1854)
   * Denning in *Parsons (Livestock) v Uttley Ingham & Co* - wants to merge tort & K remoteness - but there are differences (*BG Checo International v BC Hydro* [1993] SCC)

***Hadley v Baxendale* (1854) UK**

**Breach of K can result in 2 sorts of damages – general/special (most litigation will be on #2):**

**1. Knowing the terms of the K, what damages can arise from the breach?**

**2. Taking into account the circumstances (motive, purpose of K, plans) of the injured party that the breaching party knew or ought to have known about at the time the K was entered into, what probable damages might arise from the breach?**

**Facts:** D was late in delivering shaft for P’s mill.

**Held:** Loss of profits was not foreseeable (McD says this was probably wrongly decided)

Damages should be those that "may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such a breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it"

**Victoria Laundry v Newman Indust. Ltd [1949] KB CA**

**Summary of remoteness:**

**1. Remoteness protects D from being liable for all losses, no matter how unpredictable**

**2. Aggrieved party is entitled to recover the part of the loss that was reasonably foreseeable at the formation of the K as liable to result from the breach**

**3. What was reasonably foreseeable depends on the breaching party’s knowledge**

**4. Can have actual & imputed knowledge. (for both types of damages from HB)**

**5. K breaker didn’t need to actually consider the breach leading to losses – but if he had, would he reasonably have foreseen this loss?**

**6. Can say a "probable result" means a loss that is a serious possibility or a real danger, it is liable to result, or on the cards --\*\*rejected by Koufos\*\***

**Koufos v Czarnikow (The Heron II) [1969] HL**

**Rejected *Victoria Laundry*'s #6 - test is whether 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. Do not make it sound like tort.**

**Torts: difficult to establish liability, then must accept thin skull. (oblig’s are imposed)**

**K: easy to establish liability, but must have notice of thin skull. (obligs are voluntarily taken on knowing what one's risks are)**

## Mitigation

* P must mitigate his losses - obliged to do what a reasonable and prudent person would do (*British Westinghouse Electric v Underground Electric Railways* [1912] HL)
  + Reasonable, not perfect person (*Nu-West Homes Ltd v Thunderbird Petroleums Ltd* [1975] Alta CA)
* What is mitigation? Very fact specific - Duty to act reasonably in his (P's) own interests (*Forshaw v Aluminex Extrusions Ltd* [1989] BCCA)
* When to mitigate? When P learns of the breach or within a reasonable time thereafter (*Asamera Oil Corp v Sea Oil and General Corp* [1978] SCC)
* P's own lack of finances is no excuse not to mitigate (*RG McLean Ltd v Cdn Vickers Ltd* [1970])
* Anticipatory breach: does a P have a duty to mitigate his losses by accepting an anticipatory breach earlier on? If the P has a legitimate interest in affirming the K, then he has no duty to accept anticipatory breach. (*White & Carter v McGregor* [1962] HL)
  + What is a legitimate interest? almost any reason - unless it is "wholly unreasonable" (*Stocznia Gdanksa SA v Latvian Shipping Co* [1996] UK)
* Limitation period - in K, usually 6 yrs from breach
* Statutory controls - sometimes damages are capped by statute - usually these statutes help the P - only need to show breach & no need to show quantum of damages

***Asamera Oil Corp v Sea Oil & General Corp* [1979] SCC**

**In an action for shares/market: the injured party has an oblig to purchase like shares in the market on the date of the breach (or once P knows about the breach) or within a reasonable time.**

**If a P wants to rely on a claim to specific performance so he doesn’t have to mitigate by buying alternative property, then he needs to show a fair, real, & substantial justification for his claim to performance (ie. that the property is unique in some way)**

## Time Measurement of Damages

***Semelhago v Paramadevan*[1996] SCC**

**1. Date of breach is normal date for measuring damages. Rationale? P is expected to have gone and purchased equivalent good at the date of breach.**

**2. For something unique, specific performance may be ordered. If P elects to take damages in substitution for sp, damages should give as near as possible what sp would have given on the date of the trial. Specific performance, in essence, postpones the date of the breach to the date of the trial. So assigning damages according to the date of the trial in sp is like assigning them according to date of breach normally.**

**3. Land used to automatically be considered unique. Now, must give evidence to show uniqueness**

## Other Damages

**Punitive Damages**

* Looks at D's behaviour, not P's state- very very rare
* *Fidler v Sun Life Assurance* [2006] SCC
  + Crim law are the vehicles for punishment - so punitive damages will be rare & given with restraint
  + Impugned conduct must be malicious, oppressive, or highhanded and offensive to the court's sense of decency
* *Whiten v Pilot Insurance Co* [2002] SCC: punitive damages address retribution, deterrence, & denunciation

**Money claims other than damages**

* Debt: CL remedy. Not the same as damages. Is more like ordering specific performance of a pmt that was a primary oblig (*Standard Radio Inc v Sports Central Enterprises Ltd* [2002] BCSC)
* Compensation for amts paid : restitutionary
  + Could have total failure of consideration - A gives something. B gives nothing in return. Then P can recover the amount paid
  + No total failure of consideration – might be able to partial recovery if apportionment is possible without too much difficulty (*Goss v Chilcott* [1996] PC)
  + If there is no total failure of consideration & damages not an adequate remedy, may consider restitutionary remedy based on unjust enrichment
* Compensation for work done or goods tsfed:
  + A could have done something/tsfed something, and the K gets terminated before B's oblig to pay arises: then A can try to
    1. Sever the oblig so as to trigger a pmt oblig for what he has done
    2. Contractual *quantum meruit* → pmt
    3. Unjust enrichment → claim in restitution

**Liquidated Damages & Penalties**

* K's can have provisions that deal with what the damages will be in case of a breach - called "liquidated damages" provisions
* Common law will fill in the blanks where the parties haven't ousted the CL completely
* Won't be enforced if they will put a P in a better position - like CL damages
  + If the liquidated damages are there to hold a party *in terrorem* or to overcompensate, they are called "penalty clauses" (penalty clauses are not enforced (*Jobson v Johnson* [1989] CA)
* Law on liquidated damages & penalty clauses set out in *Dunlop Pneumatic Tyre Co v New Garage & Motor* [1915] HL
* Non-enforcement of a penalty clause is based on equity - so only weaker/disadvantaged party can ask equity to declare it unenforceable - similarly, they can affirm the K & clause
  + *JG Collins Insurance Agencies Ltd v Elsley* [1978] SCC
* Courts will try to uphold damages clauses if possible - freedom of K & Ks should provide certainty & predictability. Particularly in commercial context where parties carefully draft their Ks (*Philips Hong Kong Ltd v AG of Hong Kong* (1993) PC)
  + Parties just have genuinely estimate the amount in drafting the clause (doesn't matter if it is actually way off - just can't pick a figure out of thin air (*Meunier v Clouthier* [1984] Ont HC)
* Can't bypass penalty clause unenforceability by using a formula instead of fixed sum - courts will still reject it if it equates to an unfair amount (*HF Clarke Ltd v Thermidaire Corp* [1974] SCC)
* Acceleration clauses (upon some event, A can request B to accelerate pmts - usually pay right away) are upheld - they are not 2ndary obligs - courts' role is not to relieve a party of an imprudent bargain (*Export Credits Guarantee Department v Universal Oil Products Co* [1983] UK)
* Flipside: Exclusion/limitation clause - courts investigate whether the parties actually agreed to the provision. If not, then not enforceable.
  + Penalty clauses: almost a right to have this be unenforceable. Vs Exclusion clauses: still very discretionary - uses unconscionability. Odd imbalance

***Shatilla v Feinstein* (1923) Sask CA**

**Test for liquidated damages: can the sum be seen as “a genuine pre-estimate of damages/losses.”?**

**Disproportionate sum or fixed sum for breaches of varying importance goes against presumption for liquidated damages.**

**Facts:** D breached restrictive covenant in K. Would have to pay $10K for each breach.

**Held:** This is a penalty clause. Fixed, large sum for any degree of breach.

***HF Clarke Ltd v Thermidaire* (1976) SCC**

**If the liquidated damages generated by formula is extravagant and unconscionable in comparison with greatest loss that could conceivably be proved to have followed from breach 🡪 penalty.**

**Test still stands despite difficulty in pre-estimation**

***JG Collins Insurance v Elsley* [1978] SCC**

**Only the party who is burdened by the damages can ask to have the clause declared unenforceable.**

**Equitable remedy of declaring the penalty clause unenforceable is only available to weaker parties.**

**Facts:** K called for $1000 for breach of restrictive covenant. Way lower than actual loss. P wanted it declared a penalty clause (thus unenforceable) b/c it was a fixed sum for a breach with varying severity

**Held:** If actual loss > stipulated damages, injured party only receives stipulated damages.

# Deposits, & Forfeitures

* Deposits are part of both primary & secondary obligs- can be part of the pmt, or part of the damages
* Relief from forfeiture of deposits is available based on the same principle of penalty clauses, but is much more discretionary
* Generous view: Relief given if the forfeiture clause is of a penal nature (out of proportion with the damage) & it is unconscionable for the seller to keep the money (*Stockloser* - Denning)
* Narrower (probably more realistic): court probably can only grant relief by allowing the party to continue with the K (*Stockloser*)
  + Because the deposit has already been paid.. So equity has a harder time stepping in with unenforceability - the deposit-keeper isn't trying to enforce anything! - the payer is just wanting to rescind that part of the K
  + Or, if the deposit hasn't already been paid, then the party will be trying to enforce a debt claim (no damages)

***Stockloser v Johnson* (1954) QB CA**

**Where there is a forfeiture clause or money is expressly paid as a deposit, then buyer who is in default cannot recover the money at law at all.**

**But EQUITY can provide relief: (1) Forfeiture clause must be of penal nature (out of proportion to damages); (2) Must be unconscionable for seller to retain money … probably a generous view.**

**Law & Equity, s. 24**

**Relief against penalties and forfeitures**

**24**  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.

# Equitable Remedies

* Main equitable remedies for breach of K:
  1. Specific performance - to perform the K obligs
  2. Injunction - to perform a term or not break a term
  + Essentially, the K is affirmed. Particularly useful when there is no substitute for the performance of the K
* Equitable → discretionary. But some factors to look at:
  + Common law - CL takes first priority, so if CL says the K is void, or terminated, then equity can't step in with something else
    - Also if equity has allowed the K to be rescinded, or obligs declared unenforceable, then have to follow that & can’t order specific performance or injunction
  + Are the CL remedies adequate?
    - Damages are inadequate sometimes, but especially if the K matter is very unique. If K matter is very ordinary, damages will usually suffice (*Cohen v Roche* [1927] KB)
    - One category of such unique matter? Real property (*Adderley v Dixon* (1824) UK)
      * Particularly unique if land is to be used for investment or early resale (*John E Dodge Holdings Ltd v 805062 Ontario Ltd* [2003] Ont CA)
    - Sometimes, even ordinary, replaceable matters can lead to an equitable remedy - time, place, financial constraint might make damages inadequate (*Sky Petroleum v VIP Petroleum* [1974] UK)
  + Clean hands doctrine
    - But sometimes operates unfairly if the P is guilty of just a small misrepresentation (*Cadman v Horner* (1810) UK)
    - P who obtains K by fraud is not entitled to an equitable remedy (*Shaw v Masson* [1923] SCC)
    - Clean hands must closely relate to that transaction - P's general reputation or other dealings doesn’t affect the current case (*Dering v Earl of Winchelsea* (1787) UK)
  + P's own conduct in respect of K obligs: Equitable remedy won't be granted if (*Australian Hardwoods Pty Ltd v Commissioner of Railways* [1961] PC):
    - the P is asking something to be enforced which consists of interdependent undertakings which the P is breaching
    - the agreement consists of continuing or future acts to be performed by P (consideration for D's actions), and P is unwilling to perform them
  + Timely request: P is guilty of laches if he delays in seeking the remedy
    - What is a delay depends on circumstances (*Orsi v Morning* [1971] Ont CA)
      * Always take into acct length of delay & nature of the acts done during the interval - did the P do something to try and repair the breach? Or did they just try to stall? (*Lindsay Petroleum Co v Hurd* (1874) PC)
  + Hardship to the D or 3rd parties
    - Can be offset by hardship to the P if remedy not given (*Eastes v Russ* [1914])
    - Will protect 3rd parties interests as well (*Thomas v Dering* (1837) UK)- eg. Property already tsfed to a 3rd party (unless there is notice of the P's interest in the property (*Irving Industries v Canadian Long Island Petroleums* [1974] SCC)
  + Continuing obligations extending over a period of time requires court supervision, which court won't agree to - ie repeated actions against D (*Co-operative Insurance Society Ltd v Argyll Stores* [1998] HL)
  + Obligation to perform a personal service: Usually won't grant remedy for this because it is usually a continuing obligation
    - Also court will ask whether granting an injunction would amount to an obligation to perform a personal service (eg. *Warner Bros Pictures Inc v Nelson* [1937]
  + Mutuality - Remedy won't be granted if the D also could not enforce his obligs against the P (*Flight v Bolland* (1828) UK) (of course, not always applicable - eg. If the D doesn't have clean hands)
* Sometimes if specific performance can't be awarded, court may substitute it with damages - called "equitable damages" (*Semelhago v Paramadevan* [1996] SCC)

***John Dodge Holdings v 805062 Ontario* (2003) Ont CA**

**Specific performance will only be granted if P can demonstrate that property is unique: a quality that cannot be readily duplicated elsewhere. Quality should relate to use of property.**

**Time of determination of uniqueness: at date of breach or later.**

***Warner Bros v Nelson* [1937] KB**

**An award of damages not appropriate if cannot reasonably and adequately compensate the D’s “special, unique, extraordinary and intellectual” services.**

**If K of personal service contains negative covenants, courts will enforce it if it will NOT amount to either specific performance of positive covenants, or to forcing D to be idle or perform those positive covenants.. but still, equitable thus discretionary.**

**Held:** Bette Davis not allowed to act for other studios ≠ requirement to act for Warner Bros. She can do other things

***Zipper Transportation v Korstrom* (1998) Man CA**

**In application for an interlocutory injunction, consider: 1. merits of the case (is there a serious q to be tried?), 2. Possibility of irreparable harm if denied, & 3. Balance of harm to each party**

**Facts:** non-competition clause in labour K for 12 mths or pay 30k. P seeks interlocutory injunction pending trial for whether 30k clause is enforceable

**Held:** Not granting the injunction won’t cause irreparable harm to P & would inconvenience D more. No injunction granted.