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Background to the Law of Contract

# Basic Terminology

Bilateral: both parties have obligations once created

Unilateral: only one party has an obligation when the K is created—that’s also usually offeror.

It is preferable that a contract be construed as bilateral rather than unilateral because the K then comes into existence once the parties start performance (rather than complete performance).

Primary obligations are part of a main contract, which if breached, leads to secondary obligations which are remedies (collateral contract).

Contracts have express terms and implied terms, either implied by the judiciary or through statute.

A mere puff is a statement that was not intended to have legal consequences.

Contract A/contract B scenarios:

1. When I will accept tenders (invitation to tender) based on a set of rules and procedures, that is an offer
2. It is accepted by those who submit tenders, which also creates a new offer (contract B)

All who submit tenders have accepted contract A and only the successful bid will be offered contract B.

Formation of the Contract

|  |  |  |
| --- | --- | --- |
| Offer | Indicates readiness to enter K and sets out the terms of the contract | Is it complete enough to form an offer? Does it indicate readiness to be bound? To whom is the offer made? Has the offer been terminated? |
| Acceptance | It is an agreement to be bound by terms in the offer. The timing is important. | Is it an unqualified “yes”? Has it been communicated? |
| Consensus *ad idem* | Both parties agree at the same time to the K | Is simultaneous subjective agreement even needed at CL? |
| Intention to create legal relations | Show intention of parties to be legally bound by their agreement | Are there any public policy reasons for not allowing an intention to create legal relations in certain contexts (e.g. spouses)? |
| Certainty of terms | Identifies clearly what was agreed | Can terms be implied to help clarify? Can principles of interpretation or rest of K help? Are some terms considered irrelevant? |
| Written record | Sometimes required by statute. Useful for evidentiary purposes. | Is the written record complete? |

# Offer and Acceptance

## Offer and Invitation to Treat

An **invitation to treat** is a statement of readiness to negotiate, it is not an offer (although it can have legal significance if false representation). In a long course of communication, an offer emerges from an invitation to treat when all of the details of the eventual K are made clear and treating the communication as an offer would not lead to an absurdity (e.g. invitations to tenders are invitations for offers—it would result in absurdity if everyone who wanted to do the project could read the invitation to tender as an offer.) Also, catalogues, if read as offers would lead to absurdities if stock ran out.

In Canadian Dryers Assn. Ltd. v Burton, the repetition of the previous price was held to be a renewal of an offer. This finding was based on the language used by the parties and their actions. The defendants decision to hold onto P’s cheque and send a draft of closure strongly suggested that he understood his repetition to be an offer and the reply to be an acceptance.

In Pharmaceutical Society v Boots, the display of goods on a shelf at a pharmacy were held to be invitations to treat. Therefore, when customers select products and bring them to the till, the offer occurs.

InCarlill v Carbolic Smoke Ball Co, an advertisement was an offer of a unilateral contract to the public at large who read the ad.

## Communication of Offer

Motive for accepting an offer is irrelevant. The offeree may be motivated by other factors than the offer (Williams v Carwardine). However, it is crucial that an offeree have knowledge that the offer exists for their acts to constitute acceptance (R v Clarke).

# Termination of Offer

## Revocation

Revocation must be communicated to the offeree. This communication can be done in any way so long as it is communicated. Communication can be direct from the offer or implied from surrounding circmstances. An offer for a bilateral contract may be revoked at any time prior to acceptance (Dickinson v Dodds).

When communications are posted, an offeree may post acceptance (postal acceptance rule—valid upon delivery to postal agent) after a revocation has been posted but prior to receiving the revocation and the offer will have been accepted and the contract binding (Bryne v Van Thienhoven).

Option contracts may prevent early revocation of an offer. The option contract is a preliminary contract which keeps the offer open for a period of time.

Without such an option contract, bilateral contracts create no contractual obligations prior to acceptance so the offeror may revoke at any time, even if revocation is earlier than expected. This is discussed in *Dickinson v Dodds* where the Ct say that an offer will automatically terminate once the offeror dies or parts with his property.

## Unilateral Contracts

If there is no option contract, **unilateral contracts** may also prevent early revocation. In unilateral contracts, acceptance usually occurs through the performance of some actions, which may cause hardship if an offer expected to be left open is revoked. This is considered in Errington v Errington and Woods where an offeror who knows that the offeree has begun acting in order to fulfill obligations of acceptance cannot revoke the offer early.

In the context of a unilateral contract, if the offeror does not know that the offeree has begun taking steps to accept the contract, the offeror may revoke the offer. However, once the offeree accepts the offer, the offeror can no longer revoke (Carlill v Carbolic Smoke Ball Co).

## Rejection and Counter-offer

Acceptance must be a clear, affirmative response. A counter-offer is rejection of an offer. Counter-offers must be distinguished from requests for clarification of the offer (Livingstone v Evans). The latter does not trigger revocation.

## Lapse of Time

Offers are also assumed to be rejected after the lapse of a reasonable time. In Barrick v Clark, a reasonable time was determined by the demand for the land and the language used in the offer, specifically, the request to have the deal closed “immediately” and a reply requested “as soon as possible”.

# Acceptance

The statements of the offeror (i.e. “cannot reduce price”) may be construed as renewals of the offer, which the offeree is open to accept (*Livingstone*).

Acceptance is the final, clear, and affirmative “yes” to the terms proposed by the other. There is some controversy whether the correspondence as a whole should be used to determine the terms of the contract or whether, it is “battle of the forms”, whereby the last party to have his terms accepted prevails. The latter approach was suggested by Denning and is not good law. In *Butler Machine Tool v Ex-cell-o Corp* the offeree who accepts agrees that the terms proposed by the offeror prevail insofar as they conflict with the offeree’s previous terms, even though the previous terms included a supremacy clause.

## Communication of Acceptance

Acceptance of a contract requires some communication or action. Total silence and inaction paired with an intention to accept do not create a binding K (*Felthouse v Bindley*). This is because of the public policy interest in not allowing an offeror to impose a K on the offeree by saying that “non-action” is acceptance.

In most cases, communication will be necessary for acceptance to occur. However the offeror may specify that actions alone are sufficient to accept. In *Carlill v Carbolic Smoke Ball Co*, the offeror complained that treating an ad as an offer to all who read would lead to so many contracts that it would be absurd. It was held that the ad was an offer but that acceptance only occurs when the offeree takes the necessary steps to act on the offer and comes forward to accept the offer based on the conditions of the ad.

Acceptance occurs when and where it is communicated. In the context of instantaneous communication, acceptance occurs in the location of the offeror, upon receiving the notice of acceptance (*Brinkibon v Stahag Stahl*). This is relevant if there is no choice of forum clause. It will determine where a case is heard, but not whose law will determine the K (separate question; can apply law from elsewhere at a local court).

The “when” becomes very important when determining the quantum of damages if a contract is breached.

The postal acceptance rule is an exception: K becomes binding when acceptance is posted due to construction of postal office as an agent of both parties (*Bryne v Van Thienhoven*). The offeror is said to accept the postal office as its agent if the offeror initiates the process by using the post office (it is implied that the p.o. is an accepted agent of the offeror). Even if the letter never reaches the offeror, acceptance occurs and the contract is binding (*Houshold Fire v Grant*). This is so unless the offeror states that actual written notice is required for the contract to become binding (*Holwell Securities v Hughes*). In Holwell, although acceptance had been posted, there was no binding K because the offeror did not receive the written notice, as stipulated in the offer. Holwell identifies that there are some scenarios where permitting the postal acceptance rule to apply would lead to manifest absurdities. Some examples are land contracts and marriage contracts.

## Certainty of Terms

If the bare-bone structure of a K is there, the law may provide assistance in implying terms. If there are meaningless clauses (cut/paste mistakes), they can be severed. Contradictions will be examined in context.

Usually a court can imply terms to clear up uncertainty of terms but the court in *May & Butcher v R* (HL) seemed determined not to do so. They found that a K cannot stand if an essential term, such as price, is left open to future negotiation. They found that there can be no agreement to agree. This is probably bad law and can be cleared up by the *Sales of Goods Act*.

Sale of Goods Act, ss. 12 & 13 - Take away: there are provisions in statutes that seem to be designed to save a contract from failing due to a gap. Also, contracts themselves might have saving devices to fill gaps. But, realize that courts are sometimes determined that a particular result should be reached so nothing shall satisfy the courts in those scenarios.

The courts in *Hillas v Arcos* (HL) went to great lengths to distinguish themselves from the decision in *May & Butcher* and proved far more helpful in implying terms. They feared appearing like an “unfriendly” jurisdiction to commercial parties. They found it was the court’s duty to read documents fairly and liberally to give effect to their intentions. A multitude of ambiguities were overcome in this fashion.

The attitude in *Hillas* informs the judiciary today and their attitude of helpfulness.

The requirement of good faith negotiations

There is no positive obligation to negotiate in good faith at common law. In *Empress v Bank of Nova Scotia* the ct will not help the landlord evict the tenant, seemingly renewing the equitable defence of the imperative that the plaintiff comes to court with clean hands. The promise to negotiate is given a negative meaning in this case (as in failure to do so may limit the availability of equitable defences). This is never explicitly stated. Although, a requirement to negotiate in good faith is implied into the terms as well as the requirement not to withhold agreement. The cts in this case clarify the ambiguity about the price of renewal using the formula provided in the contract, although the parties did not use the machinery specified in the contract (arbitration).

In *Mannpar Enterprises v Canada*, a renewal clause was seen as an agreement to agree. The K did not provide a formula or objective measure to determine price. A bare good faith promise can only be used when seeking an equitable device. The word “renegotiate” is not a promise to act in good faith.

## Intention to Create Legal Relations

**Social and domestic contracts**

Usually courts try not to interfere with domestic contracts because they say there was really no intention that the parties should be sued upon.

However, this can cause problems because the most powerful members of the family will benefit from a system where there is legal immunity of contracts

In *Balfour v Balfour* spouses in amity are not deemed to intend legal relations.

In commercial contracts there is a strong presumption that the parties intend to create legal relations. The party asserting otherwise will have the onus of establishing no intention to create legal relations. The intent can be determined through an analysis of the actions of the parties and what they subjectively demonstrate the parties to have understood. In *Foley v Classique Coaches Ltd*, price was left TBD which was acceptable because the actions (3y of partial performance) of the subsidiary K demonstrated that the parties believed the K to be binding.

*Rose and Frank v JR Crompton Bros* demonstrates an exception to the rule with commercial parties. The language of their contract clearly determined a desire to be engaged in no more than a gentleman’s agreement—they did not intend legal relations and this intention was respected by the courts.

Enforcement of Contracts

# Making Promises Bind – Seals and Consideration

## Seals

A contract under seal is called a deed or a formal contract. It must be in writing. An agent cannot be used for a sealed contract unless statute specifically allows it.

In *Royal Bank v Kiska*, the majority wrongfully applies consideration but Laskin JA identifies a sealed K. He applies good law and dissents, finding that the K was not enforceable. The sophistication of the actual seal is not important but the promisor must acknowledge the seal for it to be binding.

## Consideration

A promise is only enforceable if it is not bare—it must be “in consideration of”. Consideration must have value in the eyes of the law and must be given at the moment of acceptance.

Consideration is what it is when it is given—it does not change. So consideration may be a promise to do x, but it does not become “x”.

Consideration must flow from promisee—doesn’t matter to whom or if absolutely useless. It can also be a practical impossibility (a promise to fly to the moon and back). Consideration cannot be a legal impossibility.

In a bilateral K, consideration is usually the promise in exchange for x. In a unilateral contract, it is usually the acts which are the conditions for acceptance (in *Carlill* consideration was purchasing the device, using it as prescribed by the ad, got sick, claimed). There can be a lot of overlap between acceptance and consideration and it is not always clear what specific acts were the consideration.

Consideration is not concerned with the adequacy of the consideration or the motive behind it, including any moral aspects (*Thomas v Thomas*).

Failure of consideration is not lack of consideration, it is failure to deliver all of what was promised in the contract. It is frequently used in the context of stolen goods. Legally speaking, if you deliver stolen goods, there was a total failure of consideration.

There may be some public policy concerns (re: extortion)—I will sue you if you do not… There are also positive public policy implications because it encourages settlement of disputes outside of the courts.

In *Callisher v Bischoffsheim*, a promise not to sue was binding even though there were no merits to the claim because Callisher genuinely thought he could sue. If you know you cannot sue, it is fraud to use forbearance as consideration. However, if you have little chance of winning but can still sue, it can be valid consideration because of the “annoyances” and costs associated with defending a claim.

## Past Consideration

As a general rule, consideration must be fresh. This is justified in economic, theoretical terms.

*Eastwood v Kenyon* would allow past consideration in the context of someone who lacks capacity when they first give the promise. In such a scenario (i.e. as a child), the promise would not be enforceable. However, if the promise is later repeated when the child is older (and therefore capable), it will become binding on the basis of the past consideration (doctrine of ratification). The doctrine was not helpful in *Eastwood*  because the promise was made by her husband (who was never there when the consideration was originally given).

Courts will refer to *Lampleigh* if they want to use past consideration, although the construction is fairly artificial. It requires that an act done at the promisor’s request which was understood to be renumerated will be consideration for a promise made later in time. In this case, the promise would need to have been legally enforceable if it were made at the same time as the act which the promisor requested. There was an emergency element which explained why the “details” had to be worked out later.

## Consideration as pre-existing legal duties

A pre-existing legal duty to the public (e.g. as a pvt individual—not running a red light; as an immigration official—seeing through an immigration application) causes some unease due to the possibility of bribery. As such, it will only be valid as consideration if the promise is not the basic requirement of law, for example, policing services of a specific kind at a particular time.

A pre-existing duty owed to a third party can be good consideration because it allows the promisee to enforce a promise which was originally only enforceable by the third party (*Pao On*). Although the law seems obsessed with creating new things, this is held to be valid because it allows a person who has a great interest in a matter to enforce it if they were not otherwise privy to the contract. In *Pao On*, the defendants, who were majority shareholders of Fu Chip, had an interest in seeing the K with Fu Chip carried out. So the third K was enforceable because there was fresh consideration.

A duty owed to a third party used to be problematic as consideration because of extortion concerns but now the courts deal with such issues under the doctrine of economic duress so a duty owed to a third party may be good consideration.

In *Greater Fredricton Airport v Nav*, the courts recognize the realities of commercial contracts and say that post-contractual modifications should be enforced short of fresh consideration so long as they are not procured through economic duress. Courts recognized the need to protect the legitimate expectations of parties in the context of a contract.

### Promises to settle for less

The rule from *Foakes v Beer* (where installments were accepted but interest was later sued for) is that a promise to accept less cannot be enforced. The only way to get around it would be:

* A sealed promise to accept less
* Consideration to accept less (*Foot v Rawlings* – post-dated cheques were non-monetary consideration for accepting less)
* Statutes (*Law and Equity Act*)

**Rule in *Cumber v. Wane* abrogated**

1. **43** Part performance of an obligation either before or after a breach of it, when **expressly accepted by the creditor in satisfaction** or rendered under an agreement for that purpose, though **without any new consideration**, must be held to **extinguish the obligation**

The limits on s.43 are construed narrowly:

1. must be present part performance (not no performance) – until the lesser amnt is paid, the creditor may revoke the assurance at any time
2. Parties must agree (although it may be implied) that the payment of the lesser amnt will extinguish the obligation to pay more

# Estoppel

People are held to their words and prevented from denying them. Think of situations where it would “shock” us if the K was not enforced.

* Promissory estoppel enforces promises made within a contractual relationship.
* Estoppel by representation is used when one party relies on a representation of fact (not belief, intention, opinion, etc.) by another.
  + Can only get something suspensory (temporary)
* Proprietary estoppels said that promises about interests in land could be enforce and could constitute a COA absent a contract.
  + You usually get something terminate, not suspensory

In *John Burrows*, there must be an actual promise. D must show that P led D to believe that P intended to alter their legal relations and would not enforce strict contractual rights. Passive conduct does not demonstrate the necessary, clear, and unequivocal decision to waive contractual rights.

*Central London Property v High Trees* paved the way for the doctrine of promissory estoppels. If a promise is made which was intended to create legal relations and which, to the knowledge of the promisor, was going to be acted on by the promisee and was in fact acted on—that promise must be honoured. Therefore, a promise to accept less, despite absence of consideration, if acted upon, is binding.

Promissory estoppels is on suspensory—if you give the promisee notice that the promise will no longer be binding moving forward, that is valid (*Central London* – think increase in rent).

In *Combe v Combe*, promissory estoppel could not be used as an independent COA, it is a “sword, not a shield”. It cannot be used outside of a contract.

In *Waltons*, the cts thought that the application of promissory estoppels actually upheld contract law by enforcing a K. It should be noted that estoppels was the only COA for this case and directly contradicts *Combe*.

Canadian Courts have considered *Waltons* favourably(*M(N) v A(AT)*) but did not apply b/c there was an absence of intention to create legal relations.

# Privity

## Joint & Several Liability

Several liability: 2 parties are each to pay/receive a specified amount

Joint liability: single amount for which 2 parties must pay/receive.

## Horizontal Privity

When one party contracts on behalf of other (and possibly also themselves) for the benefit of all but cannot get a remedy for the others.

In *Tweddle v Atkinson*, although the K was made for the benefit of P and the K said that P could sue for a breach, P was not privy to the K and could not enforce D’s promise. Even if P could enforce, it would be damages to his father’s estate (who contracted for his benefit with D). The damages would be negligible.

## Vertical privity

You can only enforce against the persons with whom you directly contracted. If one link along the chain goes bankrupt, responsibility will not pass along to manufacturer. This is important because of implications for seeking the “deep pockets”.

In *Dunlop Pneumatic Tyre*, the tire manufacturer sold to a wholesaler who sold to a department store. The manufacturer tried to sue the department store (Selfridge). Tried to claim that wholesaler acted as agent but this was not possible because there was no consideration flowing from Dunlop (manufacturer) and therefore, Dunlop could not enforce. Also, an agent cannot contract in their personal capacity and as an agent “in one breath”—would need 2 contracts (think of car dealership with warranty and sale contracts, both separate).

## Circumventing Privity

Agency and Trust relationships can get around horizontal privity.

To get around vertical privity, you may use statute or the promise may be passed down the line. The latter will not be used in a large retail scenario where Walmart passing on a promise made by Mr Christie’s to a consumer would not be good because Walmart might still need that promise for all of the other Mr Christie things purchased in that contract.

The limited exceptions to privity include:

1. When the parties in the contract intended to confer the benefit of a contractual defence on a third party; and
2. The third party is performing those acts contemplated in the contract

### Specific Performance

*Beswick* at CA was an example of a “bad Denning decision” where he said that a third party who has a legitimate interest in the contract can enforce the contract a) by third party in the name of contracting party b) jointly with contracting party; c) sue them both. This is not true. He tried to say that privity was only procedural, not substantive.

At HL, privity was held to be substantive and you cannot sue in the name of a contracting party or against both contracting parties as a 3rd party. The result remained the same because of the happy coincidence that the P was executrix of the estate.

### Statute

Privity may be abolished in some contexts through statute (e.g. the *Personal Property Security Act*). In the context of vertical privity, there is frequently statutes which allow the consumer to sue the manufacturer (with the deep pockets). *Dunlop* was strange because the manufacturer was trying to sue “down the chain”.

In BC, some include

* Debtor-creditor law
* Business Practices and Consumer Protection act

### Common Law

The SCC carved out exceptions in the employer/employee scenario in *London Drugs* and then widened it again in *Fraser*.

# Formal Pre-Reqs for Enforcement

**Formal** contract (sealed) must be in writing. An **informal** contract (“simple”) may be either written or oral; however, writing is evidence of the K and will be required by statute in some transactions (e.g. transfers of interests in land – s. 59, Law and Equity Act).

When **writing is req’d**, Cts give a **generous interpretation** of what constitutes writing, including email evidence. However, if there is no writing at all, the CL courts will not come to the aid of parties to effect performance so the agreement will be **unenforceable** but **not void**, *per se*—the parties may continue to carry it out. **Equity** will enforce entire performance if there is **unequivocal part performance**.

## Writing Requirements

### *Law and Equity Act,* s. 59

Provides situations where writing is required—we don’t’ need to know these but that for deeds, which are formal K, they must be written and under seal.

These are always required by the legislature, not by the CL.

## Parol Evidence Rule

**Doctrine of rectification**: extent to which the written can be altered. It can be rectified to contain terms or words left out.

**Parole Evidence Rule**: Extent to which the written record is determinative of disputes about the K. The rule is raised to exclude oral terms that attempt to vary what appears to be a complete written K. It can be used by a stronger party in a standard form K where the agent of the stronger party gives oral promises or assurances which are not put into writing.

Policy: The PER favours written evidence, allowing it to “occupy the field” if it seems definitive. The problem is that most Ks are dictated entirely by one party and many parties will not read the whole writing. In Canada, the PER has received favourable treatment although some cases, like *Gallen* has attempted to soften the blow. There is a peculiar way in which it works to ignore oral terms but allow implied terms—is it better to say nothing?

How to use: Go for rectification of the written K so that it represents the true agreement, then the PER will be on your side. **Or imply terms—PER does not apply to implied terms**

In ***Gallen***, the rule is **recharacterized as a principle**. It is a **strong presumption** rather than an absolute rule. It is strongest when: (1) oral representation is contrary to the document; and (2) the K is a unique document and not a standard form K. The presumption is weaker when: (1) oral representation adds to the document; and (2) the K is a standard form document. The **parole evidence rule/presumption** does **not apply** to (1) misrepresentations, (2) terms implied into a K (where oral evidence can determine which terms should be implied), and (3) when it is excluded by statute.

### *Gallen v Allstate Grain Co – 1984 BCCA*

**F**: D’s agent made oral assurances that buckwheat would blanket and smother weeds. P (farmers) entered a K for purchase in a standard form K with a clause negating any warranty as to productiveness. P’s crop was later smothered by weeds, contrary to D’s assurance.

**I**: How should the parole evidence principle be applied? Does it uphold the written K at the expense of oral assurances?

**D**: Appeal dismissed, decision for P

**A**: Majority finds no contradiction b/w the two and reads them harmoniously based on the intent of the parties and in light of how the parties would have interpreted clause 23 (exclusion cl.) in light of the oral representation given by D’s agent.

**R**: The Parole Evidence Principle (PEP) is not an absolute rule but a strong presumption which favours written contracts over oral agreements. The presumption is stronger when the agreements contradict one another; however, when the oral agreement and written agreement supplement one another, they should be read harmoniously taking into account the intention of the parties so as not to allow an unscrupulous party to take advantage of an unwary party through the application of PEP.

**R**: The presumption is stronger with standard form Ks. It is also stronger when the exclusion clause is equally as specific as the oral representation (whereas a general exclusion cl. and a specific oral representation will trigger a weaker presumption). Presumption is strongest when the records contradict one another, a bit less strong when one subtracts from the other but does not entirely contradict, and weakest when there is no contradiction.

The Content of the K

# Representations and Terms

### *Heilbut, Symons & Co v Buckleton* – 1913 H.L.

**F**: D (appellant) is a rubber merchant. He underwrote a large # of shares in Filisola (F). D’s agent was instructed to get applications for shares but the agent had no copy of the prospectus. The P (respondent)’s broker called D asking questions and D’s agent said that F was a rubber company. P’s broken bought a large number of shares. It was later discovered that a large deficiency in the rubber trees at F existed and the shares fell in value.

**COA**: P sued for fraudulent representation or alternatively, breach of warranty

**I**: Is a statement of fact made at the time of sale a warranty?

**D**: overturned, decision for the appellant (D)

**A**: That a statement is made at the time of a sale is not decisive evidence that the statement was a warranty. In this case, the misrepresentation was innocent (not fraudulent or reckless) and there was no evidence showing intention of either party that the statement bear contractual liability in respect to its accuracy.

**R1**: A statement of fact made at the time of sale should only be construed as a warranty if it was so intended by the parties.

### *Leaf v International Galleries* – 1950 C.A. (UK)

**F**: P (buyer) bought oil-painting from D (seller). D innocently represented that the work was that of Constable (but did not note so in the K for sale). Five years after the transaction, P tried to sell the painting and was advised that it wasn’t a Constable. P tried to get its money back from D, D refused.

**COA**: P sued for rescission of the K on the basis of innocent misrepresentation

**I:** Is P entitled to rescind the K five years after the K was performed?

**A**: A K being executed doesn’t necessarily mean that a claim for rescission due to innocent misrepresentation is barred but where the buyer accepts the goods, the claim is barred. Otherwise, there would be too much uncertainty. P would likely be able to sue for breach of warranty and receive damages, however.

**R**: Once a K has been executed and the goods have been accepted, the contract can no longer be rescinded although, if there was an innocent misrepresentation which amounted to a breach of warranty, damages are available.

# Classification of Terms

Terms are included in the offer. They are determined through **a party’s intention** in that they are something to which a man **must be taken to bind himself**. This intent is determined **objectively** through an analysis of a party’s words and behaviour. They are **not mere statements or representations**. If a party is expected to verify their veracity, they are not terms. However, if the maker of a statement has **special skill and knowledge**, the statement may become a term.

Implied terms are **just as efficacious as express terms**. There are 3 categories of implied terms (***Machtinger***): (1) implied as a matter of custom if the evidence suggests that the parties would have understood the custom to be applicable—**presumed intent**; (2) Necessary for business efficacy of the K—**presumed intent**; or (3) Legal incident of a particular class or kind of K.

1. Easiest to determine if the parties show **consistent inclusion**; however, custom may also operate by virtue of the **industry or local practice** where it can be said that “everybody knows”. Custom can be **expressly excluded** in its operation by the contracting parties.
2. The terms must be necessary for the rest of the K to work.
3. This is through operation of the CL or through a statute.

Primary and Secondary obligations: both arise in a K and when a breach occurs, the party in breach has their primary obligation replaced with an enforceable secondary obligation. Parties can **modify secondary obligations** from those that are implied by law but they **cannot exclude them altogether** (***Photo Production v Securicor***). Although the **CL usually implies secondary obligations**, some K’s will purport to set the out expressly ahead of time—these are **liquidated damages**, however they are often **supplemented with other obligations by the CL**.

Conditions, Warranties & Indeterminate Terms: Conditions are the most important terms, warranties are less important. Traditionally, if they were labelled as such, that was accepted by the courts, increasing the predictability of the remedy. The *Sale of Goods Act* also classified some obligations in this bifold manner. **Intermediate/Innominate terms** were made to overcome this bifold division and were first introduced in ***Hong Kong Fir Shopping Co***. They involve ***ex-post* determination of the remedy** (whether it be like that of a condition or of a warranty) based upon the **seriousness of the consequence of the breach**. If the consequence was so serious that it could be said to have **deprived the other party of substantially the whole benefit of the K**, the innocent party may **terminate** the K (which is the **similar remedy to breach of a condition**). This occurs because **the other party** is said to have **repudiated the K through their breach**.

**Intermediate terms are always such—they do not become conditions or warranties**, rather they share the same remedies depending upon the seriousness of the consequences of breach. The **problem** is that they **increase predictability** and lead to **increased litigation**.

## Contingent conditions

**Concurrent conditions** are mutually dependent cps. A **condition subsequent** is an **event** that ends an obligation and possibly **all of the primary obligations** in the K.

**Condition precedents (cps)** may be pre-requisites to the **enforceability of an obligation**; they may also **trigger the existence of a unilateral K**. If the latter is the case, **no enforceable K** can be said to **exist** before that condition precedent occurs so parties may **unilaterally back out**. However, in the context of an **existing K**, a condition precedent **cannot be cancelled unilaterally**. **Subjective/objective cps** are those which require someone **to take steps to satisfy the cp** and a **term may be implied** saying **who** must take the steps but that must be **certain**, not simply written in by the Ct.

Within an **existing K**, a cp may **require a party to facilitate the cp** and therefore, that party has a **duty** to **do so reasonably** (e.g. applying for a licence).

A cp **can only be waived** in a scenario where the cp was put into the K **solely for the benefit of the waiving party** only if:

1. The cp was a promise made by the other party to do something for the benefit of the party that seeks to waive the cp. The waiving party can do so unilaterally.
2. The cp was a promise by a third party to one party for their benefit only. If that party seeks to waive it, they cannot do so unilaterally.

## Entire or severable obligations

If p1 partially performs an obligation which is an **entire obligation**, they will **not be able** to **enforce** p2’s obligation. If p1 has an entire (non-severable) obligation, they may go **outside of K** to seek payment, possibly through **restitution**. Even if an obligation is **entire**, 100% performance is not necessary—**substantial performance** based on the facts is sufficient (***Fairbanks Soap***).

Part-performance by p1 will only trigger some enforceable performance by p2 if p1’s obligation is a **severable obligation**.

## Termination for Breach

Requires the breach of a **condition** (or a **sufficiently serious consequence** flowing from the breach of an **intermediate** term). The party which breaches—through their words or acts—is said to **repudiate the K**, making the result of the K essentially different from that contemplated by the parties when they made the bargain. The **non-repudiating party** (“innocent party”) then gets the **power to terminate** the K, following which: (1) the parties are **discharged from future obligations**, (2) those rights or obligations which have **already matured** are **not extinguished**, (3) the K is **not rescinded**, and (4) the **secondary obligations remain “alive”** (**only** in the case of **frustration** will all obligations cease to exist).

Upon repudiation, the innocent party has an **election**: they may **accept repudiation** and exercise their power to terminate or they may **affirm the K** despite the repudiation of the other party. **Communication of repudiation and acceptance of repudiation** may be through **words or act**. Failing to do one’s own obligation is constructive termination.

If the repudiating party advises the innocent party before their obligation is due that they won’t be performing their obligation that is an **anticipatory breach**, in which case the innocent party can accept the breach immediately or affirm and wait until the actual breach occurs.

**The remedy is tenuous** and can be lost through:

* Provisions of the ***Sale of Goods Act***, including **accepting** part of the goods or keeping them for an **unreasonable time without rejecting**.
* Through **electing to affirm—**either **expressly or constructively—**the innocent party will lose the remedy. The election must be made on the basis of an **informed choice** and after that, it **cannot be changed** unless there are **different, subsequent breaches**.
* The **passage of time** can be constructive affirmation—election must be prompt.

Once the K is terminated, there may be recovery of amounts paid if there was a **total failure of consideration**. If the failure was not total, one party that has done work or transferred goods to the other without an enforceable payment obligation before termination may make a **restitutionary claim for compensation**.

### *Hong Kong Fir v Kawasaki Kisen Kaisha* – 1962 CA

**F**: P owns the vessel, Hong Kong Fir. D is a charterer. D is allowed to hire the vessel for 24mo at a rate of 47s/ton; it was to be delivered fit for ordinary cargo service. D had the option of adding lost time (spent on repairs) to the charter time. The vessel was delivered undermanned and with incompetent staff, although P knew that the engine was old, requiring efficient engine-room staff to maintain it. The vessel required 20wks of repairs to make it seaworthy. During that time, freight rates significantly declined. D still had 17 months of use and wrote to P to repudiate the charter twice.

**P/H**: P sued for wrongful repudiation. Trial J found vessel unseaworthy and P in breaches of clauses 1&3 but rejected D’s contention that the K was frustrated and that they were entitled to repudiation for breach.

**D**: appeal dismissed

**I**: Was D entitled to rescind the K? Which events allow the innocent party (no in default) to rescind the K?

**A**: If set out by a specific cancellation clause or statute, otherwise CL analysis. The court rejects the binary of condition/warranty and say that you must examine the events which occurred due to the breach.

**R**: If one party breaches a term of a K, the K may be terminated by the other party if and only if the events which follow the breach deprive the innocent party of substantially the whole benefit which it was intended by both parties that the innocent party should obtain from its performance of further contractual obligations.

**R2:** Warranties do not give rise to such an event and do not entitle the innocent party to rescind the K—only to seek damages for breach of warranty.

### *Wickman v Schuler* – 1974 CA

**F:** D was a manufacturer. P was granted the sole right to sell D’s products. P failed to comply with a clause. D tried to terminate on the basis of repudiation. There was a cl. in the agreement which allowed a party to terminate the agreement forthwith if the other committed a material breach which they failed to remedy in sixty days of being so required (in writing) to do.

**P/H**: At trial, decision for D: the K was lawfully terminated; this case allowed an appeal which was later affirmed by the House of Lords

**I**: Will the use of the word “condition” indicate a term of K any breach of which by one party gives the other party an immediate right to rescind the whole K pursuant to the *Sale of Goods Act*?

**D**: No

**A**: Although D tried to argue strict legal meaning of “condition”, Lord Reid finds it so unreasonable that he looks for another meaning by reading clause 7 with clause 11 and decides that a breach of cl 7 would be a material breach which would entitle D to give notice to P (60 days written), allowing P to remedy the situation or else D would be entitled to terminate.

**R**: To classify a term, one must discover the intention of the parties as based upon a reading of the whole K. While usage of specific words like “condition” will be indicative of intention, they are not conclusive especially when the lead to a particular construction which is very unreasonable.

### *Fairbanks Soap v Sheppard* – 1953 SCC

**F**: D contracted to build P a machine for $9,800. P paid $1,000 on account. When machine was nearly finished, D refused to do anymore until paid another $3,000. P sued to recover $1,000 (+ other losses) and D counter-claimed for K price ($9,800).

**P/H**: At trial & CA, found for D?

**I:** Was the machine sufficiently complete to allow D to demand payment?

**D**: No, appeal allowed, decision for P

**A**: If there is a K to do work (x) for a lump sum, that $ cannot be recovered until x is complete or substantially complete. The K was not found to be substantially complete. The builder being done the work was a condition precedent for P’s obligation to arise. Only if D abandoned the K could they try to make some claim for unjust enrichment. D abandoned when he refused to finish without a payment. However, it is possible that a second K could have arisen but P would need to choose to get some benefit out of the partial work and P did no such thing, P offered D access to remove the machine.

**\*R:** For an obligation to be met, the law does not require 100% performance but only “substantial performance”.

**R:** An omission to do every K obligation perfectly does not put an end to a K or bar a party for making a claim upon in—but abandoning a K will do so.

**R**: For a party to be compensated for incomplete, abandoned work, they need to show that a second contract was made in which the person for whom the work was being done chose to benefit from the partial-work.

### *Sumpter v Hedges* – 1898 CA (UK)

**F**: P contracted to erect a building for a lump sum. P was partially finished but couldn’t go on and abandoned the K. D finished the building, which was on his property.

**COA**: P tries to establish a new K so that he can recover on a quantum merit.

**I**: Is D’s benefitting from partially-completed works carried out by P (who abandoned the K) evidence of a new K on which P may sue?

**D**: No

**A**: P argued that by finishing the work and benefiting from P’s work, D had entered a new K. But there was an exception in this case because the buildings were on D’s land, P didn’t remove, and them remaining in an unfinished state was a nuisance to D.

**R**: When P abandons a K and D benefits from the previous work, D must be given an option whether or not to take the benefit of the work done before a new K can be inferred onto D. However, if an innocent party does take the benefit of the work, they may be liable for the cost of that work.

### *Machtinger v Hoj* – 1992 SCC

**F**: Employment K terminated without notice. The employment K did not explicitly state that reasonable notice was required.

**I**: Can the obligation to provide reasonable notice of termination be implied into an employment K?

**D**: Yes, such an obligation is implied in law as a necessary incident of this class (i.e. employment) of contracts.

**A:** The term may be implied (i) through custom or usage—terms which parties are presumed to have intended based on evidence that the parties would have understood such a custom to be applicable; (ii) as a matter of fact—something which the parties are presumed to have intended but which was overlooked, although obviously assumed (necessary (cf reasonable) for business efficacy); (iii) by law—terms which the parties did not intend but which are necessary legal incidents to the class of K (usually by statute).

**R**: An obligation may be implied even if it was not the intent of either party. It will be implied if it is a legal incident to a particular kind (or class) of K and is necessary to the fair functioning of the parties’ agreement given the nature of their relationship. Such a term may only be displaced by an express contrary agreement.

# Excluding and Limiting Liability

Controls on ECs/LCs: At CL: (i) notice, (ii) construction; in equity (iii) unconscionability, or (iv) unfairness, or (v) public policy. Fundamental breach is no more.

Terms in a SFK (standard form K) attract more scrutiny from courts b/c they are not truly negotiated by both parties and the stronger party usually imposes its terms on the weaker on a take-it-or-leave-it basis where the weaker party has no real choice. The weaker party may be seen to **consenting to the essence of the K but not the details**. They also run afoul the CL idea that primary obligations should roughly equal secondary obligations.

Limitation clauses (LC) were historically seen to be needing fewer controls than the more serious exclusion clause (EC) but in reality, there is no meaningful difference (Wilson in *Hunter*). LCs can impose onerous procedural requirements on the other party or limit liability to a certain $ amount.

**Does the EC/LC form part of the K?**

Was there **notice**? Historically, this was met if the party knew or ought to have known that the SFK contained terms which were sufficient to convey in the mind of P that the SFK contained conditions. That **bare bones req’t** is no longer sufficient: the party seeking to rely on the term must show that it was **fairly brought to the attn of the other party**. This was the case only if the term was particularly onerous or unusual (*Tilden*). What constitutes reasonable notice may depend on the sophistication of the P. What is clear is that reasonable notice **must be before** the agreement is made (*Thornton*).

The L’Estrange Rule dictated that a **signature** would bind the party whose remedies were affected whether or not they read the written K (absent fraud or misrepresentation). The operation of the rule was limited in *Tilden* so that signature alone does not represent an acquiescence to unusual and onerous terms which are inconsistent with the true object of the K. If such terms are to be relied upon, the party seeking to rely on them must take **reasonable measures** to **draw them to the other party’s attention**. *Karoll* introduced a 3rd exception to the rule. The L’Estrange rule doesn’t operate if there is (i) *non est factum*, (ii) inducement to agree by fraud or misrepresentation, and (iii) the **party seeking to enforce the K knew or ought to have known the of the other party’s mistake**.

The notice requirement may also be met by a **constructive signature**. If there were previous dealings between the parties which were evidence of knowledge of a condition even if there was not a signature on that occasion, the party would be bound—but the past practice must show knowledge of the condition (*McCutcheon*).

Construction of the K must be undertaken after notice has been established. It will determine **whether the EC/LC applied in that context**. *Contra proferentem* operates so that EC/LCs are construed strictly against the party who wishes to rely on them such that any ambiguity is interpreted against the person who wants to rely on them (*Tercon*). If there are conflicting terms, courts will favour the clause which retains liability.

## Notice Requirement – Unsigned Documents

### *Thornton v Shoe Lane Parking* – 1971 CA (UK)

**F**: Freelance trumpeter playing for BBC (P) visits car-park for the first time, drives up, receives a ticket (t) which says that it is “issued subject to the conditions of issues as displayed on the premises”; those conditions were only visible inside the paying office and another place inside the garage. They were lengthy conditions including an exclusion of liability for personal injuries arising from D’s negligence. Upon leaving the car-park the accident occurred and P was seriously injured.

**I**: Did P have notice of the exemption condition?

**D**: No, appeal dismissed.

**A**: Denning—at the time a customer receives a ticket from a machine, they can’t return it and get their money back (although facts suggest he paid while leaving…can’t figure out why this discrepancy). Only those terms which he was given notice of before printing the ticket were binding. By placing terms on a printed ticket, it was imposing the terms on him after the K was formed. Customers are only bound by the terms of a ticket if (i) they know there is writing on a ticket which contains conditions; (ii) they know of writing and receive reasonable notice that the writing constitutes conditions. D did not establish notice.

**R**: For an exclusion clause to be enforceable, the party who is bound by it must receive notice of its existence prior to entering into the K.

### *McCutcheon v David MacBrayne* – 1964 HL (UK)

**F**: P got his brother-in-law, MS, to ship his car by ferry. MS had shipping things via D’s ferries on several occasions—each time requiring his signature on a risk notice which was really long and complicated and he never read. On this occasion, there was an oral agreement as to price, payment, and the issuance of a ticket. The ticket was issued after the K was entered into. There was no signing of a risk note. Due to D’s staffs’ negligence, the ferry sunk and P’s car was a total loss. P sued for its value.

**I**: May a term be implied into a K so as to exclude liability if the parties to that K have a history of dealings with such a term included?

**D**: Not in these circumstances; appeal allowed (for P).

**A**: A term can be implied on the basis of a course of dealings if, upon asking an officious bystander, both parties would have said “of course the term should not be left out”. In this case, MS had never read the conditions and he entered the K on good faith based on an oral K so such a term cannot be implied. MS was not estopped from denying the clause because he had no knowledge of it in prior dealings (and previous dealings can only be relevant if they prove actual knowledge and assent to terms).

**A**: Lord Devlin discussed the artificially with which exclusion clauses are forced upon consumers who didn’t read or understand/negotiate the K (and weren’t expected to). This is the same scenario but in reverse.

**R**: To imply a term based on previous dealings between the parties, it must be established that the parties had actual knowledge of those prior terms and assented. It is not sufficient that the parties had signed a K in prior dealings which they neither read nor understood to imply such terms into subsequent dealings.

## Notice Requirement – Signed Documents

### *Tilden Rent-a-Car v Clendenning* – 1978 BCCA

**F**: C had regularly rented from T. He visited T at YVR, provided basic information, and bought additional coverage. He was given a K to sign which he did without reading, which was evident to T’s staff. He was handed a copy, keys, and left. He got in an accident and pled guilty to impaired driving based on the advice of his counsel although he claims that he wasn’t impaired and could drive. His additional coverage was complete with an exclusion clause which operated in the event of impaired driving. The print was small and hardly legible on C’s copy.

**I**: What must a party do in order to rely on the exclusion clause in a standard form contract?

**D**: Appeal dismissed, decision for C (i.e. defendant)

**Law**: L’Estrange rule: if a K is on an unsigned document, it must be proven that the party allegedly bound by it was aware or should have been aware of th terms and conditions. If the K is signed—without fraud or misrepresentation—the signing party is bound regardless of whether they actually read the document.

**A**: To have *consensus ad idem*, you may demonstrate assent through a signature, but that’s not conclusive. The real test is whether the party trying to rely on the terms actually believed that the other party was assenting to them—in this case it was known by T that C did not read them therefore clearly T held no such belief. T would have needed to reasonably expect that C attached his signature, intending to acknowledge his acquiescence. In this case, the clause was onerous and inconsistent with the true object of the K and the small type discouraged C from reading and understanding its nature.

**\*R**: When a party is seeking to rely on unusual provisions in a standard form K, they must first take reasonable steps to make sure the other party is aware of the provisions. If the first party does not take such reasonable measures, the unusual terms are unenforceable.

**R2:** Where the party seeking to enforce a document knew or had reason to know that the other party was mistaken as to its terms, those terms should not be enforced.

**R3**: Signature alone will not represent assent to “unusual and onerous terms” of a K which are inconsistent with the true object of the K.

### *Karroll v Silver Star Mountain Resorts* – 1988 BCSC

**F**: P was competing in a downhill ski competition when she was injured by D’s negligence. Prior to competing, she indicated that she knew the K would affect her legal rights. There was a large heading which said: “release and indemnity” and told the reader to read closely. She had signed similar Ks in the past. The Release included an exclusion clause waiving liability for D’s negligence and P’s injury.

**I**: Is P bound by the exclusion clause? Did she have adequate notice?

**D**; Yes, decision for D

**A**: To assess whether a party intended to be bound by the terms of a K, look at (i) the effect of the exclusion clause in relation to the nature of the K, (ii) the length and formatting of the K, and (iii) the time available for the signor to read and understand the K. In this case, the clause was consistent with the purpose of the K (allowing P to engage in a hazardous activity while limiting the liability of organizers). It was also relevant that it was easy to red, short, and had an alarming title. Because of these factors, no reasonable D would think that P was not agreeing and therefore, did not need to take reasonable steps to bring the exclusion clause to P’s attention. Regardless, the capitalized heading met that requirement.

**R**: The party hoping to rely on the terms of an agreement need only draw a signor’s attention to the terms of the agreement if a reasonable person would know that the signing party was not consenting to the terms in question and did not understand them.

**R1**: The L’Estrange rule doesn’t operate if there is (i) *non est factum*, (ii) inducement to agree by fraud or misrepresentation, and (iii) the **party seeking to enforce the K knew or ought to have known the of the other party’s mistake**.

## Fundamental Breach

Even if the EC/LC passed the notice and construction stages, the **courts may refuse to give it effect**. The **doctrine of fundamental breach** would not enforce an EC in the context of a breach of an important term or a breach with serious consequences that would substantially deprive the other party of the whole benefit of the K. Cons: undermined Ks of sophisticated parties, disregarded intent, operated even without a breach linked to unfairness. Denning tried to bring it back twice but it was **finally shut down in *Photo Production* in the UK** as a not an automatically-operating doctrine of law. Canada treated it more favourably.

In Canada, it took longer to die. In *Hunter*, it was decided to no longer be a doctrine of law but that the applicability of the EC/LC would depend on the construction of the K. Dickson CJ suggested that courts only interfere with agreements in the context of unconscionability, as determined at the time the K is entered into. Wilson J rejected the doctrine but tried to create a doctrine of unfairness which examined the operation of the EC/LC at the time of the breach in order to supplement unconscionability which only applies to situations surrounding the creation of a K (like inequality of bargaining power). She described it as an exceptional remedy only available if there was (i) a fundamental breach affecting the very thing bargained for (i.e. fundamental breach) (ii) which in the circumstances the cts would not uphold despite clear intent if the court should not aid the party seeking to enforce the EC (b/c unfair, unjust or policy).

The dissent in *Tercon* seemed to favour Dickson’s approach. Binnie endorsed a three step process (i) interpretation of the EC to determine if it applies to the breach, considering the intention of the parties (“does it apply”); (ii) was the EC unconscionable at the time the K was made as might arise from unequal bargaining power (“valid”); and (iii) despite being applicable and valid, should the Ct refuse to enforce the EC because of overriding public policy which overrides the public interest in the enforcement of Ks?

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

**F**: Stinton offered to sell D a Buick for £600. D inspected; it was in excellent condition. D agreed to buy through a hire-purchase company. S sold to P who sold to Mutual Finance. The Buick was delivered to D in a deplorable state and it wouldn’t run. MF demanded payment and D refused so MF assigned all of its rights to P. The hire-purchase terms included an exclusion clause noting “no condition or warranty… re: fitness, roadworthy, condition…”

**I**: Does the exclusion clause prevent D from rejecting the Buick?

**D**: Decision for D

**R**: An exclusion clause may only avail a party that is carrying out the K in its essential respects. They do not cover misconduct by a party that is guilty of a breach that goes to the root of the K. (the doctrine of fundamental breach)

### *Photo Production v Securicor* – 1980 House of Lords

**F**: PP employed S (appellant) to provide security services. One of S’s employees deliberately starts a fire, causing damage. S is not negligent in employing him and it was not established that the burning down of the factory was intentional. The K had an exclusion clause so that S was not liable for the injurious acts of its employees. *Unfair Contract Terms Act* was passed dealing with consumer K’s using standard terms and eliminated the need for “fundamental breach” but the Act did not apply to parties of equal bargaining power, such as commercial parties.

**I**; Does the doctrine of fundamental breach exist?

**D:** No

**A**: Secondary obligations may be implied by law or by statute and modifications to those implications may be made between the parties; however, secondary obligations cannot be entirely excluded. There is a presumption in favour of primary and secondary obligations but if the parties are businesses, the courts must not overlook the clear construction of an exclusion clause given that these parties are capable of looking after their own interests.

**A**: Fundamental breach was said to occur when the failure of one party to perform a primary obligation robbed the other of substantially the whole benefit of the K which the parties intended for the first party to obtain in the K.

**R**: Parties are allowed to exclude or modify obligations as they please, within limits—the agreement must retain the legal characteristics of a K and must not offend against the equitable rule against penalties.

**R**; There is no doctrine of fundamental breach, operating automatically on exclusion clauses in the presence of such a breach; however, a fundamental breach may still occur, causing courts to scrutinize the exclusion clause more thoroughly.

### *Tercon Contractors v BC (Transportation)* – 2010 SCC

**F**: BC put out a call for bidder. P submitted a bid, which was a tendering K which included an exclusion of liability clause that read, “no proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP”. BC accepted a bid from a contractor who was not eligible to participate in the tender; BC tried to cover it up. P sues as the other final bidder.

**P/H**: Decision for P at trial; overturned at CA; SCC narrow majority 5-4

**A** (trial): Found EC to be ambiguous and applied *contra proferentem* principle in Tercon’s favour. She also found that BC’s breach was fundamental so it was not fair or reasonable to enforce the EC.

**R**: All justices rejected the doctrine of FB.

**Majority (Cromwell) - 5:**

**I**: Did the Province breach the tendering contract? (*yes*) Does the EC bar P’s claim for damages? (*no*)

**D**: Appeal allowed. Agreed with trial J’s decision (minus FB)

**A**: The analysis of the majority centred on construction of the EC. The EC applied to participation in the RFP not in claims arising from the participating of other, ineligible parties, as was the case here. It also didn’t apply to the province’s breach of the duty to fairness, which was an affront to integrity and business efficacy of tendering process. They arrived at that result by looking at the EC in harmony with the rest of the contract, including its purpose and the commercial context. That context was public procurement which required transparency and fairness.

**A**: In this case, the EC (and how it operated) stood to “gut a key aspect of the approved process” which is unlikely what the parties intended. The Province tried to argue that P accepted (given its sophistication as a commercial party) the EC which the Ct didn’t like given its ambiguity. “Participating in the RFP” was also read to mean participating in a contest among eligible participants, not with ineligible participants. As such, the EC and purpose of the RFP were compatible, the former applying to only approved participants and the latter setting out a system for selecting between approved participants. Also read in conjunction with a reservation clause which allowed BC to cancel the RFP and allow additional bidders; but there was no reservation to allow the province to consider ineligible bidders or unilaterally change the rules of eligibility. Even if this weren’t the case, the court still would have refused to enforce the EC on the basis of *contra proferentem* in favour of P because the EC was ambiguous.

**R**: The doctrine of fundamental breach should be put to rest

**Dissent (Binnie J) – 4:**

**I**: In what circumstances will the court deny a D the benefit of an EC to which an innocent party, not being under any sort of disability, has agreed?

**A**: Traditionally answered through fundamental breach but that doctrine should be put to rest—unhelpful. The Ct has no discretion to refuse to enforce a valid and applicable contractual EC unless P can point to some paramount consideration of public policy sufficient to override the public interest in freedom of K. P is a sophisticated commercial party and the EC should apply and would apply to BC’s breach. The Ct must give effect to the intent of the actual parties, not determine intentions of reasonable parties.

**A**: The doctrine of fundamental breach, as created by Denning, operated independently of the intention of the parties if, in the circumstances, D had so egregiously breached the K as to deny P substantially the whole of its benefit. The P could be excused from further performance but D could be held liable for the consequences of its “fundamental” breach even with an EC that was clear and unambiguous. **Dickson CJ’s response in *Hunter*** was that FB as a doctrine spawned huge difficulties in characterization and distracted parties from the real question of what agreement was actually intended. Better would be to use unconscionability to assess issues at the time the K was made, allowing courts to interfere with an agreement in situations such as unequal bargaining power. Such a technique would protect weaker parties from contracts which are contrary to public policy without relying on an artificial and problematic doctrine of FB. **Wilson J in *Hunter*** thought the court should retain discretion to refuse to enforce EC when pre-breach unconscionability didn’t apply but that as a general rule, courts should give effect to EC despite a FB. She tried to revamp FB for post-breach analysis of (i) whether there was a fundamental breach and (ii) ct should assess the circumstances to see if the EC should be given effect, not necessarily stopping at a determination of their intent (through construction) but possibly interfering with clear intent if the court should not aid the party seeking to enforce the EC (on policy grounds).

**A**: Subsequent courts thought that fundamental breach is a matter of construction, not a matter of law and that courts should give effect to the intention of the parties unless it would be unconscionable (Dickson) or unfair, unreasonable or otherwise contrary to public policy (Wilson). Later courts nixed the “unfair, unreasonable” and focused on public policy (which would have to be substantially harmful misconduct approaching criminality or fraud).

**R**: The dissent endorsed a three step process (i) interpretation of the EC to determine if it applies to the breach, considering the intention of the parties (“does it apply”); (ii) was the EC unconscionable at the time the K was made as might arise from unequal bargaining power (“valid”); and (iii) despite being applicable and valid, should the Ct refuse to enforce the EC because of overriding public policy which overrides the public interest in the enforcement of Ks?

**D**: They would have dismissed the appeal

Note: For commercial parties, this “public policy” seems dire and has a few examples but is very uncertainty!

Excuses for Non-performance of the K

# Contesting the K

These involve challenges which do not arise because of a breach

1. circumstances that affect enforceability which occurred **at or before the K formation** (misrepresentation, mistake, duress, undue influence, unconscionability)
2. circumstances which arose after the K was formed (limitation period, possibly “unfairness”)
3. circumstances in either time period: illegality

**True unenforceability** arises when a K legally exists but Cts will not facilitate it.

A **void K** occurs when there is a flaw in formation such that the K does not exist and **law does not recognize results under the K**.

**Voidable K**: A K exists but it is flawed such that the badly treated party can undo the K (by option).

# Consequences of successfully contesting a K

## Eliminate the K

The result is that **no obligations will remain** and everything transferred **must be returned**. This is granted when the K can be shown to have **never existed legally** or can be **undone**.

### Void at CL

This was a black/white assessment which could be **sought by either party**. It usually involved some issue at the formative stage (e.g. offer, uncertainty of terms) or some **illegality** in the K’s creation, purpose or impact.

### Voidable in equity

This means that the K will be voidable but **only at the behest of the party** who equity is operating to protect—that party may choose not to have the K voided even though it is voidable. If it is voided, nothing remains to be rescinded, terminated, sued under, etc. However, anything transferred under the K can be reclaimed based on restitutionary principles, even if it has gone to a third party (though not always).

It can be thought of as an unenforceable agreement which equity will not enforce and will allow the weaker party to get out of through voiding the K. This is advantageous if the K is severed so that only one point is voided.

## Rescinding, Setting Aside, or Avoiding the K

These are all remedies which may operate despite the CL finding that the contract exists. They operate to **return the parties to the position they were in before the K came into existence**. They have different names but they all do pretty much the same thing. They all recognize that the **K was flawed from formation** because of some less-than-honest treatment by one party which was largely to blame, entitling the disadvantaged party to **undo the K** so long as there is no undue hardship or delay.

Misrepresentation🡪 **Rescission** (equity) – CL operation as well if fraudulent misrep.

Unconscionability🡪 **Setting aside** (equity)

Undue Influence, Duress, Mistake🡪 **Avoiding** (equity) – duress has some CL operation

The **CL** will require **possibility of complete restitution** but **equity is more flexible** and can account for loss in value and profits from use. Equity also **considers fairness to other contracting party and third parties** when ordering the remedy.

Effect

Damages in K will not be available (but maybe in torts). Might be better to **sever off** an offending part of the K so that it might be unenforceable while the rest remains in tact.

## Altering the K: Severance

Either hive off offending parts of a K or break it into two.

Hiving off: taking out a **peripheral** term because it offends a legal principle. **Cannot** hive off a term that goes to the **heart of the K** or create a **substantially different K.** The removed part may either be:

1. void—as if it was never part of the K (if it’s nonsense or there was no notice)
2. unenforceable—protects one party, which has the choice whether to sever it or not

**Blue pencil test** Must be technically able to remove the words or clauses and for the remaining K to make sense

**Judicial adjustment of terms:** This is more generous than the blue-pencil test—courts are allowed to add some text to make the K consistent with the original intent of the parties (“notional severance”). Courts may refuse to sever if parties are abusing the process, allowing increasingly more narrow alternatives to make the Cts arbitrate.

### Dividing the K

This involves splitting the K into 2 Ks and is not as mechanistic as hiving off. It can be used to keep part of the agreement alive while getting rid of another part.

With the **Parole Evidence Rule**, you could have 1 oral agreement and 1 written agreement—1 main and 1 collateral.

If there are more than two parties to a K, you can also use this technique to provide a remedy when only one of them breaches.

## Altering the K: Judicial Adjustment of Terms

This involves “positive” intervention—adding to a K what the parties did not expressly or implicitly put in. This is not a recognized doctrine but it’s not uncommon.

**Creation of K**: Denning’s battle of the forms supplied terms to offer/acceptance—this is not really allowed but is seen sometimes with implied terms.

**Setting aside on terms**: this was what happened in *Solle v Butcher* and involved a remedy for mistake where one set of obligations was substituted for another, as set out by the Cts (rather than the parties)

**Severance**: This involves “notional severance” which can involve adding reasonably substantial terms to a K, such as “reading down” a term through judicial rewording. This is a way of curing a defect so that the K can be valid and enforceable.

## Altering the K: Unenforceability

The **court won’t assist in the K’s objectives**. But **anything transferred is legally transferred if performed** but any **non-performance will not be enforced**. For instance, if there is **no consideration, K is not enforceable** but if someone still transfers under the K, that is legally effective.

May arise due to **illegality**, **EC/LC that is unconscionable**, **statutory limitations**, etc.

# Misrepresentation and Rescission

It is unreasonable to act in reliance of a mere puff, which have no legal significance. Terms relate to one of the obligations in the K and may be implied or explicitly stated. Representations are not terms but are significant statements of fact which a reasonable person might rely on in the lead-up to a K—they may also become incorporated into a K as terms, at which point they would be called terms, not representations.

**How to establish an operative misrep.**

**Operative misrepresentations** lead to the possibility of rescission and require (i) a statement of fact, (ii) that is untrue, (iii) and material, (iv) and was relied upon by the other contracting party as a reason to enter the K.

(1) Statement of fact: present/past and is not an opinion, belief, or expectation of future outcomes or law (all statements about the future should be in Ks). A mixed statement of fact/law may be sufficient but requires an examination of the relationship of the parties. Some statements of opinion may involve implied statements of fact (*Smith*), in that the past justifies such an opinion.

The statement (i) is not silence if there is no duty to speak, (ii) there may be a duty to speak in rare situations, usually required by consumer legislation (re: latent defects), (iii) the duty to speak in good faith and fiduciary situations is called a duty *uberrimae fides* (“utmost good faith”) where the law requires more than self-interest, (iv) misleading entire or partial silence, (v) conduct including nodding may be a statement if it communicates a fact. The statement may also emanate from a third party if they are closely connected with one contracting party (e.g. business associate, agent, family member). If the 3rd party isn’t closely connected, can still be sued in torts for deceit or negligent misrepresentation.

(2) untrue: if it is known to be untrue, that’s fraud (=tort of deceit). If it’s not known, it’s an innocent misrepresentation and can lead to possible rescission nevertheless. There may be a need to inform the recipient of a change if a true statement later becomes untrue. (may be a duty to inform of changes, when a truth🡪 false; courts are reluctant)

(3) Material: It has to be substantial and go to the root of the K, not simply a mere puff.

(4) Relied Upon: it need not be the main or sole reason for entering a K. This is a contextual fact-based examination. There is no duty for the recipient to verify the veracity of the utterer’s statements even if they are given the opportunity to do so (*Redgrave*).

**Effects of Misrep.**

A misrepresentation can have a two-fold effect (i) possibility of rescission, and (ii) tort claim for damages due to negligence or deceit.

**Remedy**: A K is **voidable** because of a misrepresentation which led to its creation, making the remedy of **rescission** available. Rescission will **undo the K**, taking parties **back to their position prior to the K**. This involves a **strong restitutionary element**.

**Secondary obligations disappear after rescission**

Misrepresentation did originally operate in CL so that if the misrep. was fraudulent, there would be a void K.

**Bars to rescission:**

(1) Impossibility of restitution *in integram*: if the property is not returnable in the same condition (not fungible), the remedy is not available; although courts may allow with some compensation for interim use and deterioration. Money may be substituted if property cannot be returned (*Kupchak*).

(2) Execution of the K: Nothing short of fraud will suffice to order restitution once a K has been executed. (i.e. this means that all of the obligations are performed; it’s even difficult when partly executor—easiest if “wholly executory)

(3) affirmation: if the party proceeds despite knowledge of a misrep., they are affirming the K

(4) delay: an unwarranted delay leads to a finding of **laches**.

**Availability of damages**

**After rescission**, damages in K disappear—but **tort damages may still be available**.

However, if the misrepresentation becomes “merged” into the K as a term, there are more options:

1. Termination of K and K damages
2. Rescission (possibly through monetary compensation—Kupchak)—but no K damages

### *Redgrave v Hurd* – 1881 CA (UK)

**F**: P advertised that he would take an efficient lawyer as his partner if they would purchase his suburban residence. D entered into negotiations with P and D told P his practice made £300-400 per year. Business summaries indicated £200/year and D asked about the difference. P showed D a bunch of papers, which D did not examine. D agreed to buy P’s house and a share in the business and paid a deposit. D later discovered that the business was utterly worthless and refused to complete the transaction.

**COA:** P sued for specific performance, D countered, seeking rescission

**P/H**: Trial J found for P, dismissed D’s counter on the basis that D didn’t rely on the statement and if he did, he was negligent in so doing and was deprived of the equitable remedy sought.

**I**: If given an opportunity to verify the veracity of a representation but a party fails to do so, are they barred from seeking rescission on the basis of a failure to rely upon the statement or negligence?

**D**: No, appeal allowed—rescission and deposit returned

**R**: If x makes a material representation to y to induce y into entering a K, it is inferred that y relied on the representation unless there is evidence to the contrary that y knew that the representation was false.

**R**: Rescission may be granted for both innocent as well as fraudulent misrepresentations.

**R2**: The recipient of a misrepresentation has no duty to verify the veracity of the statement of material fact, even if they are given the opportunity to do so.

### *Smith v Land and House Property Corp.* – 1884 CA

**F**: P offered to sell his hotel, which was leased to F, “a most desirable tenant”, D agreed to buy. F had a history of delinquency and distress was threatened. F went into bankruptcy and D refused to complete the transaction.

**COA**: P sued for specific performance, D defended the claim on the basis of misrep.

**I**: Can an opinion be the basis for a claim for misrep.?

**D**: Yes if it demonstrated an implied statement of fact; decision for D

**A**: When both parties have the same knowledge, an opinion is irrelevant. The nature of landlord-tenant relations meant that P had knowledge to which D was not privy. Describing F as a “most desirable tenant” is an assertion that nothing has occurred to make the landlord (P) think otherwise. In this case, that was untrue—a tenant late on payments and threatened with distress is not a “most desirable tenant”

**R**: when knowledge is asymmetrical, x’s (who knows the facts best) statement of opinion to y is often a statement of material fact because it implied that x knows facts which justify the opinion.

### *Kupchak v Dayson Holdings* – 1965 BCCA

**F**: Kupchak (A) purchased shares from Dayson (R) of a motel in return for 2 properties conveyed to R and a mortgage given to R by A on land and chattels owned by the motel company. Upon completion, A took possession of the motel and began to operate the business. Two months later, A learnt that R made false representations about past hotel earnings so A stopped making payments. A’s solicitors notified R of their intention to continue withholding payments until a proposed lawsuit had been determined. R subsequently sold an interest in 1 of the properties conveyed and tore down the existing building and erected an apartment building.

**P/H**: A commenced an action in rescission but failed at court and was awarded damages.

**I**: Is there a power in equity to award the payment of money to adjust the rights of the parties consequent upon rescission?

**D**: Yes, decision for A (appeal allowed)

**A**: R was definitely fraudulent but spent a lot of $ on the property after A advised of impending lawsuit. The effect was that one property was so completely changed that its identity was destroyed. The general rule is that when someone commits frauds, they may not raise as a defence their dealings with a property that they’ve acquired through fraud unless it would be very unjust. But A only asked for the value of the property at the date it was transferred to R.

**A**: R also tried to accused A of laches but there was nothing in A’s actions of sending a letter informing of future repudiation which misled R as to A’s intent.

**R**: When there is an impossibility of perfect restitution, equity may give the remedy of rescission but do so in a way that adjusts the parties’ rights, ordering either party to pay compensation to the other to make good some deficiency in perfect restitution. **Monetary compensation** not damages.

**R2**: Equity will be more likely to order compensation in lieu of restitution to prevent a fraudulent party from enjoying the benefit of their fraud at the expense of an innocent party.

**R3**: Restitution may be unavailable if it causes undue hardship, even if that hardship is to the wrongdoer rather than an innocent 3rd party.

# Mistake

Unlike misrepresentation where misunderstandings are attributable to another party, misunderstandings under mistake are **only attributable to the party with the misapprehension**. It goes to a misunderstanding **at or before** the time of contracting.

**CL- makes the K void** (the K never existed)

**EQ- the K is voidable** (can be avoided, set aside, rescinded) - means that primary/secondary obligations are erased from that point forward OR affirmed by the grieved party and allowed to continue on.

Policy

Legally operative mistakes are very rare b/c contract law requires that parties be responsible for the promises that they make. It can also **upset the risk allocation** determined by the parties in advance. In *McRae v CDC*, the CDC tried to get out of the salvage K on the basis that the tanker never existed; however, that mistake was due to their own recklessness which had no reasonable grounds.

Mistake and Frustration are similar in that they try to **terminate a k** based on an **unforeseen risk**. For mistake, this refers to matters prior to contract formation. Criticism is that they might **relieve a party of the very risk allocation agreed to**, either expressly or implicitly. The doctrines should only operate **for risks not contemplated and not provided for** at the time of the agreement.

When a **third party** is **responsible** for the mistake, the 3rd party should be **sued for damages**, the K should **not be terminated**—to do so would allow the 3rd party to shirk their responsibility.

**Caveat Emptor** requires parties to look out for their own interests. The other party has no duty to protect the interest of the first party in disclosing information to that 1st party when the 1st party is under some misapprehension—even if the 2nd party is aware of the misapprehension (unless doing so would amount to fraud).

### *Smith v Hughes* – 1871 (UK)

**F**: P was to sell D oats. D had a sample of the oats before the bargain was completed. D claimed he wanted old oats and told this to P prior to entering the K. P denies any reference to the age of the oats. The written K did not reference the age of the oats. P delivered new oats and D refused. D claimed that all trainers, as a rule, used old oats and that the price of the K was too high for new oats (despite scarcity).

**A** (Cockburn): Thought that assumptions outside of the K were irrelevant and the real question was one of offer/acceptance and a lack of *consensus ad idem*. What’s in the K actually matters and the law of mistakes does not exist.

**A** (Blackburn): A unilateral mistake as to terms is *maybe* sufficient to avoid a K. The parties agreed to the sale of a specific article. There was no obligation on P to inform D of his mistake nor was there a warranty as to the age in this case. Whatever was D’s private intent (to buy old oats), if he conducts himself in such a way that a reasonable man would believe he was assenting to the terms of the K, he is bound by those terms. (*depends how you read Blackburn—he might be saying unilateral mistake as to terms is sufficient if there is fraud whereas a mistaken assumption which had nothing to do with the other party might not be enough*)

**A** (Hannen): Thought that D would have to show that he was mistaken and that P knew that D was mistaken (in that sense P’s mind matters). (*confusing decision b/c mixes up D/P but doesn’t discuss assumption; may be the case that if a mistake was known or should have been known by the other party who does nothing about it, M may operate (no mention if fraudulent or not))*

**D**: New trial ordered

**R**: The law of mistake is born

Response to case: Mistake was born but it could lead to great injustice given that *either* party could seek that the K be voided at CL because of a unilateral mistake—even the fraudulent party—and it would be an absolute party. Later courts responded by limiting M significantly and the result was that unilateral M was generally only avl. if there was fraud but otherwise, you’d need more than one party to be mistaken.

## Common Mistake – CL approach

These mistakes are **assumptions about the factual matrix**—not the terms themselves. A common mistake is a **shared mistake** which can affect the K if it is an assumption as to **title** of the subject matter (x) of the K, the existence of the K, or its quality.

Title refers to a scenario where a buyer contracts to buy something which he or she already owns—this is a common mistake as to relative and respective rights of the parties.

Existence of the subject matter (x) is relevant if x was destroyed or never existed at all. Dealt with through statute (*Sale of Goods Act*). Mistake will only operate in this circumstance if **one of the parties was not responsible for ensuring** the **existence of the subject matter** (x) (*McRae v CDC)*. Might also not work if the subject matter bargained for is completely different in reality (*Sherwood* with the barren cow—went to the substance of the K, not merely the quality).

A mistaken assumption as to the quality of the subject matter was said to not affect a K in *Sherwood* but in *Bell v Lever Bros*, it was noted otherwise. In *Bell v Lever Bros*, Lord Atkin gave a narrow basis for operative mistake on the basis of a common mistake as to quality. The quality had to be some characteristic of x other than its existence or title, that if absent, would make the thing with that characteristic (“quality”) **essentially different**. However, mistake could not be used where one party had **responsibility in the K** of making sure x had that particular quality. The mistake must be **so** **fundamental as to destroy the identity of the subject matter** (x).

### *Bell v Lever Bros* – 1932 House of Lords

**F**: The defendants (Ds) speculated on the company’s business to their private advantage which was a breach of duty which would have justified termination with compensation. P didn’t know. P amalgamated with another company, leaving no room for Ds and negotiated their termination by paying compensation.

**P/H**: Trial J found D fraudulent. Both at trial and upon appeal, agreements void due to mistake.

**D**: Appeal allowed at HL (3:2)

**A**: M only operates to negative consent—it can be (i) a common mistake as to identity (ii) common mistake as to the existence of the subject matter (e.g. perished before the date of sale), or (iii) common mistake as to quality of the subject-matter which is so fundamental that it destroys the identity of the subject matter (where the quality was not a condition or warranty in the K).

**A**: The identity of the subject matter (“employment contract”) was not destroyed by the common mistake. The agreement (to terminate the employment K) is not void simply because there is a belatedly discovered preferable way to terminate the employment K.

**R:** The CL will render a K void for mistake if (i) unilateral mistake as to identity, or common mistake as to (ii) existence of subject matter, (iii) vital quality going to identity, or (iv) respective rights, so long as no p. had assumed risk of assuring the state of affairs.

**R**: Common mistake operates in CL to negative assent and void the K.

### *McRae v CDC* – 1951 Australian HC

**F**: D advertised the locality of a tanker, based upon a rumour. P contracted the right to salvage the tanker and spent a lot of $ towards the salvage expedition. The tanker never existed. Salvage offers a chance of very large profits but no guaranteed profit.

**I:** Can the existence of the tanker be said to be a common mistake which both parties held, thus leading to a void K?

**D**: For P, breach of K, w/ damages

**A**: Looked at the construction of the K and found that CDC made an implicit promise that the tanker existed, therefore not void *ab initio*. The non-existence of the tanker was a breach.

**A**: In the alternative, mistake would fail because a party cannot succeed relying on common mistake if they’ve held a belief without any reasonable grounds and communicated that belief to the other party to induce their belief. It amounts to gross negligence. Also, P made no assumption; P trusted D’s assertion.

**R**: A K will not be void *ab initio* on the grounds of non-existence of the subject-matter if it is determined (through construction of the K) that one party implicitly promised the existence of the subject matter. In that case, non-existence is a breach, not a common mistake.

**R2**: A party who holds a mistaken assumption on unreasonable grounds through their own culpable conduct, and makes assertion to another party to induce that party’s common mistaken assumption, will not be able to use mistake as a means of rendering the K void.

**R**3: Mistake will not reverse the risk allocation agreed upon by the parties.

## Common Mistake – Equity’s Approach

In *Solle v Butcher*, Denning decided that equity could affect the ongoing existence of a K which the CL has not deemed void through the doctrine of mistake. The court could set aside a K in contexts of **unconscientiousness** where parties had a **common mistake as to facts** or relative and respective **rights** (possibly also a mistake as to law), where the mistake was fundamental and the party seeking to set it aside was not at fault (and there is no injustice to a third party). The court could set aside a K if it would be unconscientious for the other party to avail himself of the legal advantage which he obtained by any mistake as to fundamental fact or right.

*Great Peace Shipping*  rejected *Solle*. *Great Peace* noted that *Bell* was **definitive and exhaustive** as to the law on common mistake. It also narrowed the law, stating that common mistake would only affect the K in instances of “**impossibility**” or where a “**vital attribute**” was at issue.

In Canada, *TD Bank v Fortin (No 2)* accepted Denning’s equitable mistake in *Solle*. After Great Peace, the ONCA (2007) strongly suggested that *Solle* **should be retained as good law in Canada (*Miller Paving***). Solle has done no harm in Canada and allows needed flexibility to correct unjust results in widely diverse circumstances. It’s still unclear whether it stands in Canada today.

### *Great Peace Shipping v Tsavliris Salvage* – 2002 UK CA

**F**: A ship, CP, suffered serious damage and hired D to provide assistance. D contacted a 3rd party, M, to help find the nearest vessel. M advised that P’s ship (GP) was the nearest. D and P made an agreement which allowed D to cancel if D provided a minimum 5-day fee. Later, it was discovered that P was far further than imagined. D told M they’d likely cancel but wanted to first ensure there was a closer vessel. There was a closer ship and D hired them. D cancelled with P but D refused to pay the fee. To get out of the obligation, D said there was a shared fundamental assumption that P was in close proximity to CP.

**I**: Was there a common mistaken assumption that would make K void at CL? in equity?

**D**: For P

**A**: For common mistake to be established at CL, there must be: (i) common assumption as to the existence of a state of affairs; (ii) there is no warranty by either party that the state of affairs exists; (iii) the non-existence of the state of affairs is not attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the K impossible; & (v) the state of affairs may be the existence or vital attribute of consideration which must subsist if performance of the contract is to be possible. Given that D did not cancel with P until the closer ship was found demonstrates that performance was not impossible.

**R**: Lever Bros was the full statement of the law of mistake. Equity has no jurisdiction. Solle v Butcher was wrong.

**R**: The common mistaken assumption as to the state of affairs and their subsequent non-existence must render performance impossible to have an operative mistake. (plus see A, other requirements)

### *Miller Paving v B Gottardo Construction* – 2007 ONCA

**F:** A (Miller) contracted to supply materials to R (Gottardo). A signed an agreement acknowledging that it had been paid in full for all the material supplied. Later, A discovered deliveries for which R had not been billed so it rendered an invoice but R resisted even though R had been paid for most of those materials.

**P/H**; Trial J denied A’s claim

**I**: What is the impact of *Great Peace* in Canada? Did the trial J fail to consider the doctrine of common mistake?

**A**: *GP* was not adopted in Canada but not decided in this case—there was favourable consideration of equity’s role in the doctrine and concern that *GP* would lead to a loss of flexibility which is necessary to correct unjust results. *Solle* gave equitable jurisdiction to set aside a voidable K which is enforceable at CL if a common mistake as to facts or relative/respective rights leads to a misapprehension which is (i) fundamental and (ii) in the circumstances, it would be unconscientious to allow one party to avail itself of the legal advantage obtained ((iib) and the party seeking to have it set aside is not at fault). In this case, A was at fault because it was their responsibility to ensure billing and it was in no way R’s responsibility—it was not unconscientious to allow R to avail itself of the legal advantage.

**R**: The court did not decide whether *GP* would be adopted into Canada but treated it unfavourably, seemingly preferring to retain the equitable doctrine of mistake.

**R**: If the party seeking to set aside a K due to mistake was at fault for their mistake, there will be no remedy.

## Mutual Mistake

This is where the parties **reasonably meant different things** in the context of offer and acceptance. It relates to **terms, not assumptions**. This could be seen as an issue with certainty of terms or consensus *ad idem*. Some courts **may choose the best** of the 2 different meanings and construe as a unilateral mistake. This arises in circumstances where a **reasonable bystander** could not infer a common intent due to ambiguity.

In *Bercovici* the court was confronted with a mutual mistake and rather than finding no agreement, they found that one was correct, the other wrong.

## Unilateral Mistake

Not legally effect unless it involves **snapping up** or mistakes about **identity**.

Mistaken assumptions are irrelevant unless the misapprehension amounts to fraud on the part of the non-mistaken party.

### Mistake as to terms: snapping up

This is an area where a unilateral mistake will affect the K. If p1 knows that the offeror’s offer contains a miscalculation or an erroneous figure and snaps it up because it’s a great deal. It’s sufficient if p1 ought to have known of the offeror’s mistake. (*Solle* – sets aside K in equity on this basis)

This is one of the only areas where mistaken terms are operative at CL. However, this can usually be dealt with through offer/acceptance. BCCA thought actual knowledge req’d; SCC actual or constructive knowledge.

### Mistake as to terms: tendering

This is a Contract A (tender) and Contract B (construction contract) scenario. A (tender w/ deposit) is the offer in B. The mistake must be obvious to the owner. Some suggestion that the parties rights crystallize in Contract A so that Contract B can be enforced by the owner even if they knew of the mistake (*Calgary (city) v Northern construction*).

### Mistake as to terms: unavailability of equity

It usually has no effect except that it **may prohibit** the use of **specific performance** against the mistaken party.

### Mistake as to identity

Distinction between a person dealing face-to-face with the wrong person and at-a-distance communication, where the former dealings will result in the mistaken party contracting with the party present and therefore the mistake is not operative.

In ***Shogun Finance v Hudson***, the distinction was upheld and it was noted that there is a **strong presumption** that each **intends** to **K with the person present**, a presumption which does not carry over to written dealings.

### *Shogun Finance v Hudson* – 2003 UK

**F**: A rogue dishonestly acquired Mr Patel’s driver’s licence. The R went to a car dealer and agreed to buy a car with financing (hire-purchase K). The Financer buys the car from the dealer under the agreement and the “buyer” pays installments to the finance company. The dealer met R in person and faxed info about Patel (including a copy of the driver’s licence) to S (finance company). S researches Patel and agrees; dealer allows R to take possession. R sells to the innocent defendant, H.

**I**: Was there a valid K b/w S and R which permitted R to transfer title to H?

**D**: No, decision for Shogun

**A**: A K will not be concluded unless the parties have *consensus ad idem*. Whether they agree to material terms is determined through an objective appraisal of their exchange.

**A**: When parties interact face-to-face there is a strong presumption that each intends to contract with the individual right before them. When parties exclusively deal with another in writing, no such presumption exists. S had a formal system involving a standard form K in writing, so there was no such presumption and the identification of the parties depends on a construction of that agreement. S only intended to K with Patel. Patel could not be bound because *non est factum*. So R took no title and therefore had no title to convey to H. The K was void.

**\*R**: Replaced the strict rules of mistake as to identity with an approach which looks at intention of the parties. There is a strong presumption that when parties contract face-to-face they **intend** to contract with the individual before them; but when they interact solely in writing, there is no such presumption and the **intent** of the parties is revealed through construction of the agreement. If the parties intended to be the parties were not so, the K is void.

**R2**: If a K is made and one party to the K does not consent to its formation on their behalf by a third party, the K is a nullity.

## Rectification

This is sought if the aggrieved party agrees that the **K exists** but argues that the **written record contains a mistake** which needs to be rectified. This requires an **examination of the parties outwards acts** to see how the **parties conversations** in coming to the agreement **compare** with the **written** K which was signed (this has nothing to do with intent).

**Common mistake** requires P to show that what was executed was not the agreement and prove outwardly expressed agreement. **Mutual mistake** might require rectification since both parties agree that an error exists—although a different error. **Unilateral mistake** is when only one party is mistaken and the other says that the written record reflects the agreement that they want.

*Sylvan Lake Golf v Performance Industries* (2002 SCC), rectification was corrective, restoring the original bargain not correcting belatedly recognized error in judgment. A lack of due diligence was not fatal. The remedy prevents a written document being used as an engine of fraud or misconduct similar to fraud. It means that the prior oral contract had definite and ascertainable terms which were not properly written down—either innocently or fraudulent—and at the time of execution, D knew or ought to have known) of P’s mistake. P must show the precise form that the written document was meant to take, with a standard above the civil standard but below the criminal standard. A later BCCA case (*Fraser v Housten*) contradicted the SCC saying that constructive knowledge was not sufficient.

### *Bercovici v Palmer – 1966 SASK QB*

**F**: P’s husband died. They ran a business together. After his death, she sold the business property. P and D went to P’s solicitor who put it in writing and prepared a brief memo. P and D’s lawyers corresponded with one another and the final agreement was signed noting 2 properties (store and pavilion) and also “Lot 6 in Block 33A”—P had a cottage (RR) in which she lived at Lot 6, Block 33. Both parties wanted a rectification—P to remove the property altogether, D to have it as “33A” so as to include RR.

**I**: What evidence is used in assessing a claim for rectification?

**A**: Trial J looked at (1) no relationship between the cabin and business and D wanted latter, (2) RR not mentioned in any dealings or in the memo, (3) purchase prince didn’t reflect RR, (4) D claimed P threatened to not include RR and D never checked with solicitor if it was—not accepted by J, (5) D never looked at RR after transaction, (6) D never paid tax or sought to insure RR, (8) D’s solicitor referred to “both properties”, indicating 2 not 3, and (9) agreement listed contents of all buildings but not RR. The J also found P credible and looked at her behaviour before and after the agreement, which was consistent with her present-day position.

**R**: To determine the true agreement, the trial J admitted external evidence relating to the conduct of the parties, before and after the agreement was made.

### *Bercovici v Palmer – 1966 Sask CA*

**I**: Is the only admissible evidence pertaining to rectification evidence predating the execution of the K?

**D**: No, appeal dismissed, for P (respondent)

**A:** Rectification is not a question of construction—the parties completely agreed as to the terms but wrote them out incorrectly.

**R:** Rectification may only be used if the court is satisfied by the evidence and is left with no fair or reasonable doubt that the written document doesn’t embody the final intention of the parties.

**R**: P must lead evidence making it clear that both parties had the same, concurring alleged intent and P must show the precise form in which the instrument will express the intention.

**R**: To determine an action for rectification, the courts may rely on the parties’ conduct, including their subsequent conduct.

### *Sylvan Lake Golf v Performance Industries* – 2002 SCC

**F**: S operated a golf-course and had right of 1st refusal if owner sold. S agreed to purchase as a joint venture with PI. The parties entered verbal agreements regarding the terms of the joint venture whereby S would operate for 5 years and after, PI would buy and S would have an option to buy a specific parcel for residential development—that option was necessary for S to agree. S showed PI a picture of a double-row housing development. PI’s lawyer reduced the verbal K into writing and provided the land dimensions as 480 yards by 110 feet, which was only enough for one row of houses—S told PI specifically of desire for two rows and noted that one row would be a waste. S read over the K but not clause 18 which included the dimensions. S sent PI sketches for development and PI waited until near the expiry of the option to reject and point out 110 ft, not yards.

**COA:** S sought rectification

**P/H**; At trial, decision for S—J found PI to be fraudulent

**A**: Rectification is an equitable remedy which is corrective, not speculative in that it restores the original bargain and doesn’t correct a belatedly recognized error in judgment. The purpose of rectification is to prevent a written document from being used as an engine of fraud or misconduct “equivalent to fraud”

**\*A**: There are four condition precedents for rectification: (1) existence of a prior oral agreement which differs in content from the written doc., (2) the other party must be shown to have known or ought to have known of the mistake in reducing the oral terms to writing so that their advantage from the error amounts to “fraud or equivalent to fraud” (so that it would be unconscientious for a party to avail himself of the advantage obtained—this is “equitable fraud” meaning profoundly unfair), (3) P must show the precise form of the agreement that can be altered in the written record, (4) it must be proven with convincing proof (beyond the civil standard but below criminal).

**A**: D wanted a fifth condition precedent—due diligence.

**\*R**; Due diligence is not a condition precedent to rectification, however, P’s conduct will be relevant and rectification, as an equitable remedy, may be denied if it would be unjust to impose on D liability which is more properly attributed to P’s negligence.

**R2**: The court weighs carelessness with fraudulent behaviour and finds that when the latter occurs (step 2) as it does in rectification, the first party’s carelessness should not act as a bar (equitable doctrine—not as stern and automatic as NEF.

## Non est Factum (NEF)

**CL doctrine** (can be argued by either party) which arises due to fraud (party named didn’t sign) or because of justifiable mistake (the right person signed but they didn’t know and couldn’t have been expected to know that the document was a K or a K of that type). The latter category does not help those that are negligent or careless—it was originally only open to those that were blind or illiterate. It was liberalized to include those that were temporarily or permanently unable to understand the document they were signing without an explanation because of a defective education, illness, or innate incapacity which was no fault of their own.

**Remedy**: K is **void** rather than voidable. A **detrimental impact on D or on a 3rd party** is theoretically **not a barrier.** That means that if “x” goes to a third party, it will be returned even if that party was innocent (whereas with a voidable K, the involvement of a 3rd party usually means that the 3rd party gets to retain the good and P is out of luck).

### *Saunders v Anglia Bldg. Society* – 1971 HL

**A**: Traditionally, if there was a difference in character or class of the document, it would be sufficient for *non est factum*. Whereas, if the difference was only in the contents, that was not sufficient. This case rejects the rigid rule.

**R**: a person who has signed a document fundamentally/totally/radically different from the one that they thought they were signing will only be able to rely on *non est factum* if their signing of the document was not careless.

### *Marvco Color v Harris* – 1982 SCC

**F**: R executed a charged at the request of a third party, J. J acted dishonestly and made a last minute change and R did not re-read. A was not fraudulent and the charge was executed in their favour. R pled *non est factum*.

**I**: is the defence of *non est factum* available to a party who, knowing that a document has legal effect, carelessly fails to read the document, thereby permitted a third party to perpetrate a fraud on another innocent party?

**A**: In not reading the document, R was careless. Even though R’s carelessness was motivated by good intentions, it exposed an innocent party (A) to risk.

**R**: A party that by their own carelessness, signs a document which affects their legal rights, is precluded from claiming *non est factum*.

# Protection of Weaker Parties

|  |  |  |
| --- | --- | --- |
| Duress | At the moment K is entered | Content is irrelevant (re: coercion of will, not illegitimacy of pressure *Greater F*) |
| Undue influence | Long-standing relationship | Content is irrelevant |
| Unconscionability | No relationship over time, untoward at the time of K | Content is relevant |

## Duress

Question of the circumstances surrounding the K creation and the impact of those circumstances on the ability of the pressured party to assent. If the weaker party was forced or compelled to agree or had no real choice—no assent. The “coercion of the will” was said to vitiate consent. **Must be one reason for entering K, not sole or main**.

Effects of Duress

Historically, duress (to the person, to goods) was a **CL doctrine which would render a K void *ab initio***. **Today**, the doctrine usually makes the K **voidable** at the **option of the weaker party**. If a K is deemed voidable and has been performed and restitution is not possible, the weaker party may have no relief. A K may not be voidable if third parties would be adversely affected. The threatening party might “get away with it”.

Traditional (CL) duress: to the person or to goods or property

Involved a threat to the physical well-being of one of the contracting parties or a similar threat to a person closely connected to the weaker party. The threat could come from the other contracting party or some other person associated with him or her.

Economic duress

Traditionally, a plea could not be based on commercial or economic pressure alone. The reluctance was grounded in the idea that economic threats are to be tolerated in a capitalistic system. In the 20th C, limits were imposed on the legal acceptability of such pressures in forming Ks.

### Pao On

**F:** share swap for a building with a side-agreement relating to price variance with the shares; where one p liked it at the time of entering into the K but later realized it sucked so said they would go no further with the K unless the side-agreement was altered and the 2nd p renegotiated but didn’t want to—felt forced into the situation.

**A:** Originally the argument was consideration (but PC found this to be superficial); the reason the PC didn’t like it was b/c of the threat involved

**Traditional Test**: (1) a threat, (2) K was entered into as a result of the threat, (3) the person took action quickly afterward to counteract the consequence of the threat, (5) was the person legally advised

**R**: The PC found that economic duress could make a K voidable so long as the duress was more than “commercial pressure” and that there was coercion which vitiated consent (“coercion of the will”).

### Reaction to Pao On: Illegitimacy of Pressure

*Pao On* left the test at that but the subsequent problem was that it was far too easy to pass that test (threats being the very “stuff” of economic life; everyone is reluctant to pay anything for anything). Plus the question of legal advice is quite insignificant (it can be meaningless if you’re advised that if you want the K, give into the demand for payment). Built into previous ideas of duress was something unpleasant that nobody would want (to be maimed, have your property destroyed) – law would not accept that you could want such a result. However injuring economic interests is something quite common—it’s how the world works (liberal economics, looking out for your own interests). What else must be established for economic duress to be established?

Later cases added in the condition that the threat be illegitimate rather than on the coercion of will. As such, **content became relevant in duress.** Previously, the legitimacy of the pressure was irrelevant. The legitimacy of the threat would depend on the **nature of the pressure and the nature of the demand**. The threatened action, if unlawful, would be illegitimate but even a lawful act may be legitimate, depending upon the nature of the demand. **Canada has accepted this UK development requiring an assessment of legitimacy.** This is considered after traditional Pao On (last con.prec).

The **NB CA rejected** the assessment of **“illegitimate pressure”** in the **context of the modification of an existing K in *Greater Fredericton Airport Authority v NAV***. The consideration of independent legal advice was also questioned. The incorporation of “factors to consider”, including consideration might have been a way of simply replacing the legitimacy of the pressure. The **Newfoundland and Labrador CA** adopted the *Greater Fredericton* test.

### *Greater Fredericton Airport v NAV –* 2008 NBCA

**F**: P and D entered an ASF agreement under which D was responsible for certain capital expenditures. P asked D to relocate the ILS. D suggested it was less expensive to install a DME instead. P gave in but maintained it was not responsible to pay for equipment but, under protest, signed a letter agreeing to pay. P then refused to pay after the DME was installed. NAV had a monopoly of-sorts over this sort of equipment supply to airports.

**P/H**: The Arbitrator found that D was not entitled to claim reimbursement but due to the correspondence, there was a new and separate binding K. The CT of QB overturned the arbitrator. CA (this case) found errors in Ct of QB analysis and decided again on arbitrator’s decision.

**D**: Appeal dismissed, decision for *GFA*

**A**: Variation under a pre-existing K unsupported by consideration is enforceable provided it was not procured under economic duress. An agreement may be enforceable despite economic duress the other party subsequently affirms. While duress to the person or to goods makes a K void, economic duress only makes a K *voidable*. *Pao On* established economic duress and made a test which req’d that the pressure exerted was illegitimate; if the demand was lawful, not voidable because of economic duress.

**A:** NAV app’d pressure, had a monopoly giving GFA no practicable alternative, and GFA protested, refused to pay from the outset and supplied no consideration.

**\*R (test):**

(1) A promise to vary a K which resulted from explicit or implied pressure of either a demand or a threat;

(2) Because of that pressure, the coerced party had no practical alternative but to agree (e.g. get a 3rd party to perform and sue the coercer for damages); and

(3) Did the coerced party consent? Depends on consideration of three factors (i) was the promise supported by consideration; (ii) was the promise “under protest” or “w/o prejudice”; and (iii) if not, did the coerced party take reasonable steps to disaffirm the promise as soon as practicable.

**R2**: The focus of an economic duress inquiry is on the impact of the coercion on the “victim”. The legitimacy of the pressure or the good faith of the coercer are irrelevant.

Note: perhaps simply replaces legitimacy with consideration—but in GF it’s not *automatic* like legitimacy was.

### Is it usable?

**Economic duress is rarely successful because the pressures must be very stron**g. It is **usually easier to argue illegality** or access some statute which addresses the issue, particularly in the consumer context. Many monopolistic situations which are req’d for the argument to succeed are already subject to regulation.

## Undue Influence

Looks to the broader rel’nship b/w the parties and whether that rel’nship creates a situation of undue influence. The Q is whether it’s unconscientious for one party to use its power to induce another to enter a K? It may be established when duress fails. The remedy is **rescission**. When the **relationship** creates a **situation of undue influence**, **any contract** that comes into existence will be **tainted** by concerns of a lack of **true assent by the influenced party**.

Originally, the doctrine focused on the domination of the will, but more recent authority looks to ideas of “**trust and confidence**”.

Two-step process: (1) assess the relationship—has a relationship of undue influence been established? (2) Contextual examination: despite the relationship is the K legally acceptable?

The **relationship** can be **proved** **or presumed as one of undue influence** but equity will not intervene unless the influence has been abused. English Law has recognized **three categories of relationships affected by undue influence**:

Irrebuttable presumption of undue influence in the relationship

These are established relationships where substantial gifts by the vulnerable person are not normally expected, including: parent-child (unless parent is “potentially vulnerable”), guardian-ward, trustee-beneficiary, solicitor-client, medical advisor-patient, and spiritual advisor-spiritual advisee. **It is sufficient to prove the existence of the type of relationship for the presumption to operate**.

Spouses and dentist-patient are not such relationships.

The **presumption** is that **one party has influence** over the other**, not that the stronger party exploited** the influence. **Once established, the stronger p. must explain how the K wasn’t in fact unfair exploitation of the other p.**

Rebuttable presumption

In such relationships, one **person must place his or her trust or confident in the other along** with **proof of the questionable nature of the transaction** (latter is not required for irrebutable presumptions).

Originally “manifest disadvantage” was needed, but there has been suggestion that a better question is whether the **transaction was wrongful in that it constituted an advantage taken of the person subjected to the influence** which, **failing proof to the contrary**, was **explicable only on the basis that undue influence** had been exercised to procure it.

In *Geffen*, the SCC thought that “confidence” and “reliance” did not properly capture the essence of the rel’nship and that one should look to the **domination of the will** of the another through manipulation, coercion, or outright but subtle abuse of power. The **court split on the relevancy of “manifest disadvantage”**. Wilson thought it should be the next phase of inquiry in commercial transactions only (not gifts). La Forest pointed to disagreement about whether manifest disadvantage should exist or not for commercial transactions but he did not resolve the question since it was not before the court. He pointed to the division on whether one should focus on the process of undue influence itself and not its results or whether the law should not interfere with reasonable bargains therefore only granting relief for UI when the abuse of trust resulted in a manifest disadvantage.

This remains unsettled in Canadian law but seems to be leaning towards the English law which finds “manifest disadvantage” irrelevant.

Rel’nship of actual undue influence

Where actual UI is shown. This might be better dealt with in economic duress. Likely no need to show manifest disadvantage in these relationships.

Rebutting the impact of the presumption of UI in the particular context

The **D must establish that the K was a result of the plaintiff’s full, free, and informed thought (*Geffen*)**. Relevant factors may include **independent advice** and the **magnitude of the disadvantage or benefit** (*Geffen*).

UI exercised by a third party

It may be exercised by **a 3rd party** if that party is either **agent** of one of the contracting parties or has (**actual** **or construction) notice from that party**.

A UK case (*Barclays Bank*) has suggested that the **stronger party, if it is put on inquiry, it must take reasonable steps to satisfy itself that the agreement was properly obtained**, including a possible separate meeting with the potentially pressured party.

### *Geffen v Goodman Estate* – 1991 SCC

**F**: Grandmother (AS) had 4 kids, 3 were high functioning and one had bi-polar disorder (TG). AS had supported TG and wanted to make provisions in her will to continue to care for TG. AS originally left TG a life estate in her 1968 will. A 2nd will was made which changed the interest to an outright EIFS with no provisions for the grandchildren from her 3 sons. The 3 brothers were concerned that TG might divest herself of her assets due to her disability so that they would need to support her. They all met with a lawyer who advised a life estate for TG but the meeting broke-up and TG and the brothers communicated less frequently. TG then sought (independently) advice from the same lawyer. Eventually TG and a nephew set up a trust with TG having a life estate and could only sell with trustee’s approval who would consider her best interest; also upon TG’s death, the property would be divided equally among the surviving children (and all other grandchildren of AS). TG didn’t seem aware of what was done and tried to leave her entire estate to her kids.

**I**: What is req’d to establish a presumption of undue influence?

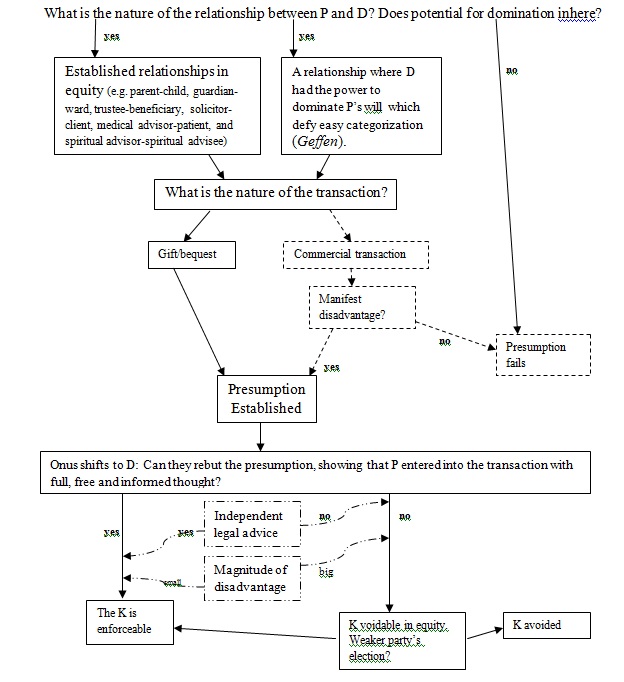
**D**: appeal allowed

**A**: (1) To trigger the presumption, P must establish that D and P had relationship where the potential for domination inhered. It could be an established relationship in equity or another. (2) Examine the nature of the transaction to see whether P was unduly disadvantaged or D unduly benefited (this is not necessary when the transaction involves a gift). (2.5) If it’s not a commercial transaction, move onto 3. If it’s a commercial transaction, was there manifest disadvantage? 2 SCC justices thought that in commercial transactions manifest disadvantage was necessary (Wilson), 2 SCC Justices (La Forest) thought no but some evidence of undue advantage before the burden shifts, and 1 SCC justice (Sopinka) refused to decide since it was purely *obiter*. (3) The presumption is established and the onus shifts to D to rebut the presumption, showing that P entered into the transaction with “full, free, and informed thought. For #3, the (rebutting by D), the presence of independent legal advice is helpful. Also magnitude of disadvantage/benefit is cogent evidence going to whether influence was exercise.

**R**: P must establish a relationship where D has the ability to dominate P’s will

**R**: It remains unclear whether manifest disadvantage is necessary to trigger the presumption of undue influence in the commercial context.

**R3:** Undue influence goes to the process



## Unconscionability

The **relative position** of the parties raises a *prima facie* presumption of fraud, which allows the K to be **set asid**e. **Fraud** = unconscientious use of power arising **out of the circumstances and conditions, not deceit**. The result is that the **transaction could not stand unless the person claiming its benefit can repel the presumption** by showing contrary evidence to show that the K was **fair, just, and reasonable**.

Difference from UI

Unconscionability focuses on **short relationships** in which the **circumstances of the creation of the particular K were tantamount to fraud**. (cf undue influence= long-term relationship, concerning longer abuses of trust and confidence)

Test + Remedy

In *Morrison v Coast Finance*, there must be **proof of inequality in the position of the parties** arising out of ignorance, need or distress of the weaker, which left **him in the power of the stronger**. In addition, there must be **proof of substantial unfairness in the bargain obtained by the stronger**. Upon those two conditions being established, there is a **presumption of fraud** which the **stronger party must repel** by proving that the bargain was fair, just and reasonable.

The **remedy** in *Morrison* was significant because it indicated that the **court would attempt to do justice in the context of unconscionability** and in doing so, would **not be bound by traditional responses** such as rescission and unenforceability. Even where rescission and unenforceability are employed to remedy unconscionability, they may be applied to only part of the K (*Hunter Engineering v Syncrude*).

Reformulation?

Lord Denning in *Lloyds’ Bank v Bundy* tried to unify and simplify these doctrines. He may have simply created a new doctrine of inequality of bargaining power. That was largely rejected in the UK but in Canada, it has received greater acceptance.

In *Harry v Kreutziger*, two judges applied the *Morrison* test for unconscionability but Lambert **reformulated** the test to focus on a single question, greatly influenced by Denning’s idea. The question was **whether the transaction as a whole is sufficiently divergent from community standards of commercial morality such that it should be rescinded.**

Lambert, J.A. question would make the **doctrine of unconscionability more open-ended and less structured with intricate prerequisites**. This could possibly address the inaccessibility and incomprehensibility of these doctrines to weaker parties. However, the **term** community standards of commercial morality is so **vague** that it would **invite litigation** and require massive amounts of social science evidence.

Subsequent Events: Doctrine of “Unfairness”

Unconscionability addresses circumstances in existence at the time of formation or before (as do duress and UI). Wilson J in *Hunter Engineering* ruled out the ability of unconscionability to deal with subsequent events (particularly in the context of exclusion or limitation clauses). However, she considered a separate **doctrine of unfairness to encompass such subsequent events**, which may have simply been a **replacement for the doctrine of fundamental breach**. The doctrine applied only to **exemption clauses** and how they operate in the **context of an actual breach**. In *Tercon*, the SCC rejected the ability of a ct to interfere with the terms of a valid K on vague notions of equity or reasonableness.

Statutory Unconscionability

Some statutes deal with unconscionability or unfairness but do not always agree with common law.

### *Morrison v Coast Finance* – 1965 BCCA

**F**: A 79yo women (M) of meager means had only one substantial asset, her home. Two men, L & K, convinced her to take out a mortgage and give them the $ to repay a finance company and get 2 cars & they would repay her. The interest rate was high, she was not supposed to profit at all from the arrangement, she hardly knew L & K, she had no legal advice, and she had no independent means to repay the loan. The finance company was attached to the car dealership and run by the same manager. L & K submitted the application for financing to the manager, C. C didn’t meet M until she came in to sign the mortgage. At signing, she was w/o a friend, lawyer, and expressed that the amnt was too high and that she wanted legal advice—she was given no legal advice. After signing, C took M, L & K into his office for M to transfer $ to L & K, repay their debt to the finance co. and buy 2 cars. All of the $ from the loan went back into the car company.

**I**: Was the K unconscionable? Was this transaction so unfair as to create presumption of overreaching by the respondent companies?

**P/H**: Trial J found no relationship which creates presumption of UI and nothing about the mortgage which made the transaction unconscionable.

**\*D**: Yes, appeal allowed; (remedy—**set aside on terms,** worthless promissory note instead of restitution *in integram*) would have wanted the whole transaction set aside but the cars couldn’t be returned wholly. The mortgage instead was set aside without M having to repay so long as she transferred L’s promissory note and conditional sales agreement to R.

**A** (unconscionability): This was not a simple loan, it went directly to the respondent cos. R/C took advantage of M’s obvious ignorance. This was a gross abuse of overwhelming inequality. Given the facts, R had a duty to see that M got independent advice prior to signing the mortgage. R couldn’t show that the transaction was fair just and reasonable.

**\*R** (test): P must establish (i) proof of inequality which left the weaker party (due to ignorance, need or distress) in the power of the stronger party and (ii) proof of substantial unfairness in the bargain obtained by the stronger. After that, the (iii) D must rebut, showing the bargain was fair, just, and reasonable.

**R2**: In order to do justice, equity, in the context of unconscionability at least, will not necessarily be bound to the traditional responses of rescission and unenforceability. It may render only part of a K unenforceable (cf duress and UI which should only rescind the whole K, not part). It may also set aside **on terms**.

### *Lloyds Bank v Bundy* – 1978 CA (UK)

**F**: D (farmer/father) owned a house that had been in his family for 300 years, worth £10,000; it was his only asset. D mortgaged his house to borrow $$ for his son’s business which was already in dire straits. The Bank manager (H) knew that the son’s company was doing very poorly and was not happy with the security on the loan up until then; the son took H to see his father which is when the mortgage was signed. D did not receive legal advice before signing, D trusted H and his son and didn’t understand how deep-seated the son’s business issues were. Eventually the bank insisted on sale of D’s house w/ vacant possession. D was still in possession at trial.

**COA**: The bank sought to evict D

**I**: Is there a broader principle of unfairness under which this K (mortgage) would fall and therefore be voidable in equity?

**I2:** Were the circumstances of this case so exceptional that D should not be bound?

**P/H**: Trial J found nothing to take it out of the realms of a commercial transaction.

**D**: Denning: yes, appeal allowed for D

**R**: Denning looks to several categories, short of fraud, where the inequality of bargaining powers merits the intervention of the courts—he tries to draw them into one larger, broad category (incl. duress, UI, etc.) He finds that the single thread is the inequality of bargaining power. By virtue of that inequality, he suggests that the law will give relief to those who, without independent advice, enter into a K upon terms that are very unfair or transfers property for consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs, desires, ignorance, or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

**R**: Looks to individuals who, without independent advice, enter a K with unfair terms when their bargaining power is “grievously impaired” due to their own needs or desires or ignorance, coupled with undue influences or pressure.

Note: In Canada, Wilson J *Hunter* equated unconscionability to inequality of bargaining power, a characterization which was accepted by the entire SCC in *Tercon*. Denning’s idea has been far more influential here than in England where it has been specifically rejected.

### *Harry v Kreutziger* – 1978 BCCA

**F**: The appellant (H) owned a fishing boat: GM. H was partially deaf and had a grade 5 education; he had no experience in business and was a logger and commercial fisherman, and wished to remain so. GM was of little value but the fishing licence attached to it was highly marketable, worth about $16,000. The respondent (K) knew of its full value. K offered to buy GM for $2,000 and gave H a cheque and told him to think about it overnight. H discussed with his brother and decided not to sell and got his brother to return the cheque because he didn’t want to face K. K kept badgering H and each time H refused. H finally accepted $4,500 and K arbitrarily held back $570.

**A (**McIntyre—stated the law, uncontroversial**)**: To establish that a bargain is unconscionable, P must show (i) inequality in the parties’ positions because of P’s ignorance, need or distress which left him in the power of the stronger, and (ii) proof of substantial unfairness in the bargain. After that, the presumption of fraud is established. D must then rebut by showing that the bargain was fair and reasonable.

**A\* (**Lambert—controversial): K was aggressive and had full knowledge of GM’s value (incl licence) whereas H was uneducated, in poor economic circumstances, and physically infirm. K sought out H, falsely and recklessly assured him and used his power to dominate H. Lambert agreed with McIntyre but introduced something new; he looked to Lloyds Bank as guidance for the common foundation and found a single question: “Whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded?” The larger question is important and should not be obscured by the smaller doctrines.

## Inequality of Bargaining Power?

**No single protective doctrine**

Most legal systems outside the CL world have an **overriding principle** that in making and carrying out contracts, parties should act in good faith. There is a principle of fair and open dealing. The English law has not created an overriding principle, **rather piecemeal solutions** in response to demonstrates problems of unfairness. Equity may strike down unconscionable bargains. Parliament may address specific issues. CL may create certain classes of K which require the utmost good faith. The result is a handful of specific doctrines the law uses to protect weaker parties in contractual circumstances. These doctrines constitute **one of the most complicated areas of the law of contracts**. Although they are designed to protect weaker parties, those parties often have the most difficulty understanding and accessing the law so those who they are intended to benefit often don’t know how they operate. There’s also controversy about the language: “protecting”, “weak”: how protective if they must come to Ct and testify as to their weakness and incapacity?

Attempts to unify the doctrines

Lord Denning in *Lloyd’s Bank v Bundy* attempted to unify an overarching principle. Denning may have created a new doctrine of inequality of bargaining power.

Simply “Doing Justice”

Occasionally courts will worry less about categorizing what they are doing, favouring to simply do justice.

Statutory and remedial complications

When a legislature adopts or adapts one of these doctrines in statutory form, it’s not always easy to tell whether they wanted to mirror the common law doctrine or fix the doctrine.

**Inequality of Bargaining Power**

Based on Denning’s attempt to bring together all of the doctrines that protect weaker parties into one single thread: the inequality of bargaining power. “The English law gives relief to one who, without independent advice, enters into a K upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other”.

**The UK rejected** the uniform principle. **Canada shows greater acceptance**. Wilson J used it to inform the doctrine of unconscionability in *Hunter v Syncrude*. She treated the **inequality of bargaining power** as the **equivalent of unconscionability**, which was **accepted by the SCC in *Tercon***.

Problems? A unified principle might paint over differences in existing doctrines, lessening the flexibility that Cts have to choose from many different doctrines and remedial approaches. Although too many doctrines may be too complex, a contraction to a single principle might be too extreme.

# Illegality

## Statutory Illegality

Statutory illegality traditionally operated automatically to render certain Ks void or unenforceable. The modern approach does not so readily deem a K illegal. **The older approach has not been definitively overruled.**

**Older Approach:** Produces fairly automatic responses. Focuses on (i) whether formation is illegal; (ii) whether performance is illegal; (iii) and knowledge and intent of the parties.

Formation

If a statute prohibited the formation of a K, if it were formed, the innocence of the party seeking the remedy would be irrelevant—K unenforceable. If the statute did not expressly prohibit the K, Cts were reluctant to conclude that it impliedly prohibited a statute. The principle was automatic and led to dubious results.

Performance

Performance refers to statutes which make a particular purpose or object within the K illegal, although formation is not necessarily illegal itself. Whether or not it is unenforceable will depend on the partying seeking to enforce the K and whether or not they had intent to break the law at the time the K was entered into (or when it is being performed). Any (or all) parties with such an intent, would not be able to enforce the K. However, a party who does not have the illegal intent at the outset can acquire it later if they knowingly participate in illegality.

Some courts have distinguished between whether the K is capable or incapable of being lawfully performed. In the former case, there is a presumption in favour of the legality of a K so that if it is performed illegally, it is necessary to show intention to break the law.

**Modern Approach:** The new approach also considers the object of the statute and whether finding a K illegal will further those objects.

### *Still v Minister of National Revenue* – 1997 FCA

**F:** Applicant married a CDN, app’d to be a permanent resident and was given a doc saying that she was eligible to apply for employment. She took that to mean she was entitled to work in Canada and worked as a housekeeper. She didn’t get permanent residency until September 23/93. When she was laid off in Oct/93, she applied for unemployment benefits but was denied on the grounds that her K for service up until Sept 23/93 was illegal and invalid. App’t was found to be acting in good faith; she thought she was lawfully entitled to work in Canada. The statute which she infringed gave no express penalty for breach of the provision unless the person knowingly contravenes the provision.

**I**: What is the effect of statutory illegality on a K?

**A**: This case describes the shift from the classical model of illegality (unfair, rigid—results in the K being void *ab initio* if expressly or impliedly illegal) to the modern approach, which is espoused in this case. The doctrine of illegality rests on the understanding that it is **contrary to public policy** to allow a person **to maintain an action on a K prohibited by statute.** Relief should not be available to the parties if it would undermine the purposes or objects of the statutes.

**R**: If a K is expressly or impliedly prohibited by statute, the Ct may refuse to grant relief to a party if the circumstances of the case (including the object and purpose of the statutory prohibition) are such that granting such a relief would be contrary to public policy. The modern approach to illegality requires courts to weigh the following factors: the serious consequences of invalidating the K (incl the penalty on the party seeking to uphold the K), the social utility of those consequences and a determination of the class of persons for whom the prohibition was enacted.

**R**: Cts will consider whether the penalty imposed by denying relief (and rendering a K unenforceable) is disproportionate to the breach (illegality). Whether someone is flagrantly disregarding the law is not an unreasonable policy consideration; however, those who act in a *bona fide* manner should not be denied relief.

## Common Law Illegality: Contrary to Public Policy

Theoretically not closed heads of public policy but it would be very difficult to have a new head of public policy accepted

### Contract to Commit a Crime or a Legal Wrong

No court will lend its aid to the enforcement of an illegal, fraudulent, or immoral contract (*ex turpe*). Such a legal wrong could involve a necessity that an earlier K be broken to fulfil the K at issue.

### Contracts Prejudicial to Good Public Administration

Contracts to corrupt public officials or undermine the gov’t are no good.

### Contracts Prejudicial to the Administration of Justice

There is public policy concerns as to the administration of justice, particularly the courts. One cannot K to stifle a prosecution, or pay a witness, etc.

### Contracts Prejudicial to Good Foreign Relations

You cannot K to assist a hostile gov’t, this includes those that commit hostilities against friendly foreign gov’ts.

### Morals

Traditionally, a K against morals is illegal (i.e. a K involving driving around a prostitute). This also includes those prejudicial to family life and the status of marriage.

Morality alone is an insufficient basis to affect the existence of a particular K today.

### Restraint of trade

One party agrees to a RC which might be the core of a K or part of a larger agreement. Bare covenants not to compete are void. But some restraints, within contracts, are justifiable despite the presumption that they are *prima facie* unenforceable (*KRG Insurance*). However, justifiable means that there must be some reason why the parties agreed not to compete or else it will be automatic.

One of the reasons for this head of public policy is society’s interest in competition and the use of labour. However, that interest must be balanced with the freedom of K. Only a legitimate interest informing the RC will win out in this balance.

Courts take a different attitude with respect to RCs in employment Ks versus sale of business Ks.

Courts will consider the **geographic and temporal** scope of the covenant and a less burdensome scope will be more likely acceptable to the courts. However, if the geographic scope is ambiguous, the courts won’t uphold the RC on the grounds of unreasonableness (due to ambiguity) (*Shafron*).

### *KRG Insurance Brokers v Shafron* – 2009 SCC

**F**: S sold his insurance company to KRG Western in a 1987 K which contained no RC. He was later employed by KRG Western, signing a K with an RC that he would not work for another insurance brokerage in the “metropolitan City of Vancouver” for 3 years. S left his employment and began to work in another insurance agency in Richmond.

**P/H:** Trial J found “Metropolitan City of Vancouver” to be neither clear, nor certain (and also unreasonable) so dismissed the action. At BCCA, the doctrine of “notional” severance was applied in a way as to construe the phrase as “something more” than Vancouver, rewriting the geographical scope to what it thought was reasonable

**I**: Is a restrictive covenant illegal? What is the remedy for illegality in the context of an RC?

**D**: Appeal allowed, RC was unenforceable due to illegality

**A (Restraint on Trade)**: the CL presumption is that RCs are *prima facie* unenforceable as illegal restraints on trade, although a reasonable restrictive covenant will be upheld. For an RC to be reasonable, its terms must be unambiguous. An ambiguous RC will be *prima facie* unenforceable because the party seeking to enforce the RC will be unable to demonstrate reasonableness in face of an ambiguity.

**A (**policy**)**: RCs are contrary to public policy and interfere with individual liberty and the exercise of free trade. For policy reasons, RCs can be justified in the context of the sale of a business, but less so in an employment K. This is due to equality of bargaining power and the need for freedom of K in a sale of a business in order to increase viability through a non-competition clause. In the latter, there is a great cost to society and to the individual for a worker to not be allowed to work. Therefore there is greater freedom of K in the context of a sale of a business. Tr. J found it to be an employment K.

**A (severance)**: The purpose of severance is to give effect to the intention of the parties when they entered into the K. Cts are restrained b/c of freedom of K. Two types of severance can remove illegal features in a K and render them in conformity with the law: **blue-pencil** and **notional severance**. The blue-pencil test is narrowly applied if it’s possible for the J to strike out a portion of the K, without affecting the meaning of the part remaining. Notional severance involves the reading down of an illegal provision in a K that would be unenforceable due to illegality, making it enforceable.

**A** (policy): The concern w **severance** in the employment context is that it creates uncertainty with courts determining what’ reasonable. Also a concern that it **invites employers to draft overly broad (and unreasonable) RCs** with the prospect that they may either force it upon the employee (who will be disadvantaged in litigation) or have the court read it down to the extent that it is unreasonable, still retaining a reasonable RC to the employer’s benefit.

**R**: Severance should only be applied if the severed parts are independent of one another and can be severed without affecting the meaning of the part remaining. The blue-pencil rule can therefore be used sparingly, only when the part being removed is clearly severable, trivial, and not part of the main purporse of the RC.

**R**: An ambiguous or unreasonable RC in an employment K will be void and unenforceable and is not appropriate for severance due to policy reasons.

**R**: RCs in the employment context receive greater scrutiny by the courts than those within commercial sale contexts.

## Effects of Illegality

The court **will not enforce the K**. It’s not void, *per se*—unenforceable is more accurate. Recalling that a truly void K is said to have absolutely no effect under the K, which doesn’t exist; whereas performance under an illegal K often has some effect.

Recovering property

Property transferred under an illegal K **cannot be recovered**—the transfer is **effective**. Unlike other ways of getting out of a K, there can be no restitutionary remedy associated with a finding of illegality, unless (3 exceptions to illegality which justify granting relief)—*Still*:

1. The parties are not equally blameworthy. If illegality is meant to protect an “innocent” party, that party may be allowed to recover, particularly when they didn’t know of the illegality, couldn’t be expected to know of the illegality, or the illegality was meant to protect the party which would be contrary to using illegality against that party’s interests.
2. One party has repented the illegality prior to complete performance. The doctrine of repentance will only apply where the party attempting to seek recovery transferred under the K is the one who actually repented.
3. One of the parties has a right (likely proprietary) that allows them to get their stuff back without relying on the illegal contract.

Effects of the modern approach to statutory illegality

It makes illegality more difficult to find and can allows the court to choose not to label a K as illegal based on the effect of illegality in that context.

**For CL illegality**: there will be the old law as to unenforceability; probably can’t recover property (but 3 exceptions)

**For statutory illegality**: If trying to recover property🡪go through the old law with the 3 exceptions; if trying to get a statutory benefit🡪modern approach

Severance: particularly useful with RCs where you can sever the RC so long as it wasn’t the essence of the K.

Remedies

# Common Law Remedies

## Damages – Rationale

### Fuller and Purdue (article)

There are three purposes for awarding damages in K law:

*1) Restitution interest* – P has acted in reliance on D’s promise & conferred some value on D. The value involved is the prevention of unjust enrichment. This has the strongest moral/legal justification.

*2) Reliance interest* – P has acted in reliance on D’s promise, changing his/her position. Damages are awarded for undoing the harm which his reliance on D’s promise caused.

*3) Expectation interest* – P can seek the value of the expectancy which D’s promise created either through specific performance or damages equal to the value of performance.

The expectation interest is the basis for most awards. It is distributive justice, rather than corrective justice. It requires the law to engage in a more active role of bringing about a new situation rather than upholding the status quo. The two main juristic reasons are the (1) need to cure and prevent the harms occasioned by reliance and (2) the need to facilitate reliance on business agreements.

(1) Breaches arouse a sense of injury and deprivation in the promise. This is especially so because the parties have set out a system of private law between themselves. The Court will only enforce if the promise is important enough to society to justify the law’s interest with it.

(2) Business agreements stimulate economic activity and it’s good for parties to rely upon such agreements, justifying legal protection of the reliance interest. The law should encourage reliance

Canadian courts have espoused this expectation measure of damages as a normal entitlement with controls on damages recoverable based on the limiting principles of mitigation and remoteness. However, damages based on reliance do continue to surface in jurisprudence particularly where the plaintiff is unable to prove or establish expectation losses.

### The Expectation Interest

The main point of a K is to create a binding relationship with mutual obligations. To ensure performance, secondary obligations provide consequences which ensure dependability. Secondary obligations should compensate a plaintiff—no more, no less. The P will be put in the same position that they were expecting to be in, including lost (net) profit. In the case of delivered goods which are rejected, this is usually the difference between the K price and the market price (i.e. profit expected). In the case of delivered goods which are accepted, this is the difference between the market price of what was delivered and the market price of what ought to have been delivered.

### The Reliance Interest

This involves compensation for wasted expenditure and the costs which P incurred in reliance on the other party. These are only those expenses which are wasted. Those which aren’t wasted (in that they have some market value or would have been incurred anyways) will not be compensated.

Damages are ascertained using the reliance interest if the expectation interest is nearly impossible to determine with any confidence because the K involved some sort of gamble. In *McRae*, the claim for lost profit was rejected as it was too speculative.

### Which interest?

Some courts may award on both bases, resulting in overcompensation. This is less likely where the reliance interest is for actual wasted expenditure. Some courts take the absolute view that one cannot get both because had the K panned out, they would have had expenses anyways.

If an award on the basis of both interests is available, the P can usually choose which to claim on the basis of the greatest damages (*Sunshine Vacation Villas*).

P will be barred from compensating if D can show that the breach saved them from a loss.

### Restitution Interest

This rarely occurs but did occur in *AG v Blake*.

### *McRae v CDC* – 1951 Australian HC

**F**: D advertised the locality of a tanker, based upon a rumour. P contracted the right to salvage the tanker and spent a lot of $ towards the salvage expedition. The tanker never existed. Salvage offers a chance of very large profits but no guaranteed profit.

**I:** On what basis is P entitled to claim damages

**D**: Not for lost profits, only for lost capital (reliance interest, not expectation interest)

**A**: The chance of gain in this K was far too speculative to assess lost profits. Unlike *Chaplin* where there was a real chance of winning a prize which could be said to be worth something, here there was only a chance to make some profit, possibly none and unpredictable how much. The chance was linked to the nature of a thing that didn’t exist—impossible to assess.

**A**: P did not receive damages for things that they would have otherwise purchased. But damages were awarded from losses in reliance of the promise, including lost profits for other work foregone due to D’s promise of a tanker.

**A**: D tried to argue that reliance couldn’t be established because even if there was a boat, they may have made no money. This was untenable because the reliance costs were spent to have the right to salvage a boat, not a boat of value, so its existence was the thing upon which P relied.

**R**: If profits are speculative (and impossible to determine), damages will only be awarded on the basis of the reliance interest—assessing damages in relation to those costs assumed in reliance on a breached obligation, not those which would have otherwise been assumed (i.e. normal ship gear not included).

### *Sunshine Vacation Villas v The Bay* – 1984 BCCA

**F**: P had a K to operate travel agencies at D’s stores. D breached.

**P/H**: At trial, P was awarded loss of capital and loss of profit.

**D:** The appeal was allowed, as was the cross appeal (for more capital costs). P was only awarded with the lost capital—not profits.

**R**: If D can establish that P would have run an even larger loss but for D’s breach, P will not be able to have damages. This was not established in this case.

**R**: Damages for lost profits and lost capital are not both available, that would overcompensate P.

**R**: P was not entitled to lost profits because profits were “more than usually speculative”

### *Attorney-General v Blake* – 2001 UK HL

**F**: B was a notorious traitor. He worked for the security/intelligence services and became a Soviet agent. He was charged and put in jail for 42 years. He escaped from jail and remains a fugitive in Berlin. From Berlin, he wrote an autobiography and his exclusive UK publisher gave him enormous advances against royalties. At the time the book was written/published all of the information contained within was no longer confidential, nor was its disclosure damaging to the public interest. However, his employment K said that he would not publish/write any information about the secret service even after his employment.

**P/H**: AG commenced an action to make sure B didn’t have the financial fruits from his treachery—tried a claim on numerous grounds and eventually fell upon a private law claim for restitution.

**I**: Can there be contract damages to disgorge D of his profits?

**D**; Yes but only in **very exceptional circumstances. Should not be extrapolated to broader K law**.

**A**: Although B did not breach a fiduciary duty, which allow disgorgement, his relationship was very similar to a fiduciary relationship. His profits are derived indirectly from very serious and damaging breaches of a K which amounted to criminal conduct.

**A**(policy): His breach of K could undermine the willingness of informers to cooperate with the service and decrease the morale and trust of members of the service.

**R**: Restitution for profits may be awarded in exceptional cases if the P has a legitimate interest in preventing D’s profit-making activity arising out of a breach. This may occur if D has obtained profits doing the very thing he contracted not to do. But more than a mere breach will be required. (also possible for skimping but court suggests that might be inappropriate)

**R**: The court awarded the sum equal to that owed to Blake from his publisher in third-party proceedings (all of the remaining profits). This was because a strict money judgment of debt might be too difficult.

## Damages – Quantification

P must establish the amount that was lost by virtue of D’s breach. This is the minimal performance, not the probable performance.

If good are delivered and accepted, the damages are the difference between the market price of what ought to have been delivered and what was actually delivered. The latter is assumed to be zero unless D establishes otherwise.

Assessing damages is exceptionally difficult in overtly speculative or all-or-nothing ventures.

Damages for mental distress are at best guesswork. They will sometimes succeed if the purpose of the K was to create the opposite emotion than that caused by the breach. It will either involve a K for which the object was to secure some psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and the degree of suffering was sufficient to warrant compensation. However, this is not avl in commercial or employment contexts.

### *Chaplin v Hicks* – 1911 KB CA

**F**: P had a one-in-four chance of winning an acting/beauty contest but for the breach of K of the event organizer.

**A**: The chance was personal and could not be sold but the Ct found that a jury might find that if it could have been sold, it would have had such a value as to get a good price. But the verdict would be a matter of guesswork because damages could not be assessed with any certainty.

**R**: The fact that damages cannot be assessed with certainty does not relieve the wrong-doer of liability for damages.

### *Groves v John Wunder* – 1939 Minn. CA

**F**: A lessee failed to leave the property in a particular state after removing sand and gravel.

**A**: There were two figures to work with—a high figure including the cost of having the work done by someone else—and a low figure—the difference in the value of the property now that it is not in the “improved” state.

**A**: The judges looked at the intent of the agreement: was it an agreement to have work done or was it an agreement for the return of property in a particular state (i.e. value) at the end of the tenancy?

**R**: In determining between two values of damages, courts should look to the purpose of the K to choose the quantum most in line with that purpose.

### *Jarvis v Swans Tours* – 1973 CA

**F**: Swiss holiday gone awry. The brochure promised great things which didn’t pan out and Jarvis was very upset. He used up all of his annual holidays for the trip and had looked forward to it for some time.

**P/H**: Trial J awarded half the value paid for the holiday, thinking it half as good as it was supposed to be.

**I**: Can a plaintiff be awarded contract damages for mental suffering?

**D**: Yes, appeal allowed

**A**: Historically courts did not provide K damages for mental distress—Denning found the limitation to be out-of-date.

**R**: Where the K is for a holiday or to provide entertainment or enjoyment, if the K is breached, damages can be given for disappointment, distress, upset, and frustration caused by the breach.

## Damages – Remoteness

Usually if P can show a breach and establish the quantum, D is strictly liable to pay damages as compensation. That being said, P must show that the break of K caused the loss—it need not be the only cause but it must be an “effective” cause. D may be liable if they triggered a chain of events leading to P’s loss but D is not liable if a 3rd party, natural event, or P causes an action which breaks the chain of causation.

Before entering into a K, parties are given a chance to assess their risks before agreeing to be bound. Each party must inform the other if they have a particular situation which would lead to a greater loss or of a type that would not “normally” occur in the event of a breach.

If the party in breach is not made aware, it is not fair to hold them responsible for unusual or abnormal situations of the P. Therefore, P must reveal their special circumstances if D is to be liable for losses attributable to those circumstances.

*Hadley* introduced the remoteness test which was reformulated in Victoria Laundry, making it more similar to that of tort. However, Lord Reid in *Koufos* hated it and suggested tort and contract conceptions of remoteness remain separated. Today, one can choose whether to bring an action in K or in tort, although historically a claim avl in contract law could not be brought under torts. Denning was a strong advocate for a similar principle of remoteness. However, with torts, it’s much harder to establish a duty perhaps explaining the greater damages awarded under tort (??why damages, not remoteness).

### *Hadley v Baxendale* – 1854 (UK)

**F**: Mill owners sued D for delivering a new shaft for their mill several days late.

**I**: Were the damages too remote?

**D**: Yes, it was not a probable result of the delay. (although probably wrong decision)

**R**: The damages which P ought to receive are (i) those damages which can fairly and reasonably be said to arise naturally as a result of breach, or (ii) those damages which can reasonably be supposed as those that the parties would have contemplated at the time the K was made as a probable result of the breach. The second part of the test requires knowledge of the general nature of the surrounding circumstances, not specifics.

### *Victoria Laundry v Newman* – 1949 KB (CA)

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

**A**: Attempted to re-work the *Hadley* test into two rules. The first was that everyone is liable for a breach in K in which the ordinary consequences occur, which everyone should or did know of beforehand. The second rule operates in special circumstances and requires that parties actually know at the time the K is entered into that a breach will not operate in the ordinary course of things, causing greater losses.

**R**: Reformulated the *Hadley* test so that damages are recoverable if the loss is a serious possibility or a real danger—or on the cards. The result was a very broad test.

### *Koufos v Czarnikow (The Heron II)* – 1969 HL

**A**: Lord Reid hated the reformulation in Victoria Laundry; did not want remoteness from torts to be moved into remoteness in contract law. (other judges liked VL)

**R,** per Lord Reid: The crucial question is whether, on the information avl. to the D when the K was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of K to hold that the loss flowed naturally from the breach or that a loss of that kind should have been within his contemplation.

## Damages – Mitigation

**What**? The “duty” to mitigate is taken into account when assessing whether P’s claim is reasonable. P is expected to act reasonably but not perfectly. P is expected to stem ongoing losses by finding replacement Ks (for labour, facilities, parts, etc.). If P is wrongfully dismissed, they must find replacement work in a reasonable time frame.

**When**? When P learns of the breach or within a reasonable time thereafter (*Asamera*). In Canada, there is a trend away from putting the risk of market fluctuations on the P if D breaches the K.

P’s **impecuniosity** cannot be relied upon to avoid mitigating. It’s possible that if it was known to the defendant at the time the K was entered into, it would fit within the second branch of the *Hadley* test.

**Anticipatory breach**: The general rule is that P can decide whether to accept or affirm a K after an anticipatory breach. If P affirms, they may continue to incur costs leading to a greater claim for damages. If P has a legitimate interest (beyond *de minimis*) they can continue to affirm the K and do not have a duty to accept the anticipatory breach.

**Limitation period** will likely control when damages can be sought, usually six years after the claim arises.

**Statutory control on damages** may cap the amount or specify the amount. These operate in the consumer context where it costs a lot to prepare a damages claim.

### *Asamera Oil Corp. v Sea Oil & General Corp* – 1979 SCC

**F**: Plaintiff (Baud) lent shares to D. D didn’t return. P sought injunction but knew that D had sold them, granted. The shares of the business fluctuated wildly—it was struggling when the shares were due to be returned to P but by the time of litigation, it had done very well. The litigation lasted 18 years. P wanted specific performance from D based on the breach.

**I:** What is P’s duty to mitigate?

**D:** Duty to mitigate by seeking prompt legal action. The court awarded the median price of shares during the time period in which the trials could have reasonably ended, awarded $812,500 (cf $5,812,500 or $36,250).

**\*A**: Recoverable damages for the sale of goods = (the amount the purchaser would have to pay on the market) – (the contract price), measured at the time of breach. Subject to (i) P can recover all damages reasonably contemplated as liable to result from the breach and (ii) P has to take reasonable steps to avoid losses flowing from the breach. P has the onus of proving damages and D has onus of proving failure to mitigate. In this case, the *prima facie* value was the value at the date of the breach, $36,250.

**\*A**: If P were to mitigate, he could have either (i) bought replacements or (ii) litigated promptly. Purchasing replacements is not usually required if P has already spent the money and has received nothing in return; whereas, if P has the asset still in hand (hadn’t paid), then it’s reasonable to buy on the market. In all cases, the simple question in determining the presence and extent of the burden to mitigate in through consideration of fairness and reasonableness. In this case, P had already paid and due to the circumstances, which involved buying high-risk stocks in the company of someone in which he was engaged in an adversarial process, it wasn’t required that P buy replacement shares.

**A (policy)**: At the same time, P could not rely on an injunction to shield him from the losses accumulating up until trial, pushing all of the risk onto D. Nor could the fact that he had already paid (with total failure of consideration—no “asset in hand”) act as a shield against the duty to mitigate. The case of the return of shares is different than a sales K—in such a case, a party whose property has not been returned can sit by and wait for the opportune moment to institute legal proceedings while D shoulders all of the risks of market fluctuations, including bankruptcy.

**R**: The P, by instituting proceedings seeking specific performance and/or damages may not shield himself from the accumulation of losses which the plaintiff by acting with reasonable promptness in processing his claim could have avoided.

**R:** If the reasonable response by the injured plaintiff would have been mitigation by replacing their property but instead proceed with a bare institution of judicial proceedings, they have not mitigated. Although the P was not required to mitigate by buying replacement property due to the circumstances of the case, P was required to at least mitigate by pursuing prompt legal action.

**R**: Before P can rely on a claim for specific performance to insulate himself from the consequences of failing to mitigate, some fair, real and substantial justification for the claim to performance must be found. Otherwise, D would shoulder all the risk of aggravated losses from the delay in bringing the issue to trial.

## Time of Measurement of Damages

A right to damages arises upon breach and that date is used in assessing damages. This is not an absolute rule. If there are ongoing obligations, damages may be assess at different times unless P is expected to find an alternative supplier, which is likely.

If there is an anticipatory breach, P may elect to terminate immediately and damages are assessed at the time the breach was accepted.

### *Semelhago v Paramadevan* – 1996 SCC

**F**: P buys house from D, D breaks K. P wants SP or damages. Market value of house rose from

$205K or $325K in between breach and trial. Which price should be used?

**D**: appeal dismissed, for P

**A**: General rule CL rule is to assess damages based on the value at time of breach so P can buy goods in the market. However, if P asks for specific performance, the K is ‘saved’ as D can deliver at any point before judgment. In this case, damages should be valued at the time of judgment (as this when the K is really broken).Trial date is used for this because value at judgment date is often impossible to predict.

**R**: Damages at common law are to be calculated at the time of breach. Damages in lieu of specific performance are to be calculated at the time of judgment.

## Liquidated Damages, Deposits, and Forfeitures

To avoid the costs of litigation, parties may agree to a quantum for damages beforehand. They may provide for only certain claims for damages or may represent an exhaustive amount.

Liquidated damages are subject to the overarching principle of damages which are that damages are meant to compensate for a failure to perform the primary obligations, and no more. They should be **genuine pre-estimates of damages**. They should not put P in a better position by creating a threat of a penalty clause upon D. If D is held *in terrorem* it will be a penalty clause. There is a presumption of a penalty clause if there is a single lump sum to be paid by way of compensation for one or more or all of several events, when some cause serious damage and others trifling damage.

To get around the rule against penalty clauses, it’s possible to set out two prices, one if paid by a particular date, and a greater or lesser amount paid at another date. Courts may see through this if it holds the paying party *in terrorem*. Penalty clauses are **not enforced due to illegality**.

**Who**? The law on penalty clauses in equitable and protects one of the contracting parties and not the other. In the context of a penalty clause, equity will see who wanted it in the K (i.e. stronger) and who is treated unfairly by it not being a genuine pre-estimate (i.e. weaker). In this case, the weaker party could ask equity to render it unenforceable, but the stronger could not. If there is no oppression of one party having to pay the penalty clause, equity will likely not strike it down due to freedom of contract. Also based upon the principle that contracts should create certainty and predictability, courts will often not call a clause penal in commercial contexts were they were carefully drafted. As long as there was some genuine attempt at a pre-estimate of loss, courts will likely uphold.

Instead of a fixed sum, the parties might also choose a formula for liquidated damages. The formula will give a varying figure depending on the seriousness of the consequences. These are upheld unless whatever figure the formula generates is too great an amount, demonstrating a punitive response.

**Accelerations clauses** are distinct from liquidated clauses. They move up (or increase) primary obligations in the event of particular events. Some may operate to have all payments due at once. These are not secondary obligation so the law on penalty does not apply.

**Exclusion/limitation clauses** are simply the flip-side of penalty clauses because they attempt to give another party too little in the event of a breach. They also derogate from the basic principle that damages should compensate, no more and no less. In the case of E/LC and liquidated damages, CL simply determines whether the parties agreed—notice and agreement. Equity intervenes in both contexts if they are too greedy. However with limitation clauses, they may only operate through the doctrine of unconscionability which is a doctrine not readily defined and not likely successful in practice. The result is imbalance between the response of equity to liquidated damages and limitation clauses.

A deposit relates both to primary and secondary obligations. They usually trigger acceptance, part of primary obligations, and are forfeited upon breach, usually forming secondary obligations. When the word “deposit” is used, it usually implies forfeiture in the event of default. Relief from forfeiture is unusual (whereas relief from a penalty clause operates almost by way of right). Some statutes deal with relief from forfeiture.

**Punitive Damages** are assess from the perspective of the defendant; this only occurs in the rare context of restitutionary damages. These are awarded to punish D’s bad behaviour, not to compensate P although they do go to P. They are extraordinarily rare but may address retribution, deterrence, and denunciation. They are usually awarded when the impugned conduct departs markedly from ordinary standards of decency in situations described as malicious, oppressive, highhanded or offensive.

### *Shatilla v Feinsten* – 1923 Sask CA

**F**: D sold a wholesale dry goods business to P. The terms of sale included a covenant to not engage in any capacity in men’s furnishings and wholesale dry goods, etc. within Saskatoon for 5 years. D purchased shares in a business and became a director. The business was a wholesale merchant of some goods which fell within the description of the terms of sale covenant. The sale of good covenant prescribed a $10,000 award for liquidated damages (“not as a penalty”) for any breach of the covenant.

**I**: Is this a liquidated damages clause or a penalty clause?

**P/H**: Trial decision for D.

**D**: Appeal dismissed. Penalty clause was not enforced by Ct.

**A**: If there is a one-time penalty for a breach, such as revealing a trade secret, a presumption of penalty won’t necessarily be triggered, nor will it be triggered if there are different sums ascribed to breaches of varying degrees of seriousness, which might suggest proportionality.

**R**: What the parties choose to call the sum “penalty”, etc. is irrelevant, as is a statement that the clause is “not a penalty clause”.

**R2**: Liquidated damages are such if they are genuine pre-estimates of the damage resulting from a breach. If damages are not proportionate to the loss which could possibly arise out of a breach, a presumption of penalty will arise. However, in all cases, the circumstances of the transaction must be examined to see whether the clause was meant to hold D *in terrorem*.

**\*R3**: If there are various breaches to which an indiscriminate (“liquidated damages”) sum is applied, the nature of the clause (whether penal or not) is judged based on the most conceivable trivial breach which could trigger the sum. If the loss associated with that smallest breach could never amount to the sum stated for liquidated damages, the clause is a penalty clause and will be unenforceable.

### *H.F. Clarke Ltd. v Thermidaire* – 1976 SCC

**F**: The appellant (A) was the exclusive distributor of the respondent’s (R) products within a specified area. The K included two covenants, one which prevented A from selling R’s competitors’ products during their agreement, and one which prevented A from so doing for three years after the agreement was terminated. The agreement was terminated. A sold competitor products during both time periods but the real question in this case pertained to the period after the termination of their K. After discovering A’s activities, R did not seek an injunction for nonsense reasons. A also didn’t stop selling competitors products. R sought the gross profits of selling competitive products, which amounted to a number more than double that of R’s actual loss net profits. There were complicating factors which made the actual loss difficult to ascertain because of the marketing, customer-base, brand name, etc. considerations.

**P/H:** The restraint of trade question was settled by lower courts and not at issue. Both lower courts found for the respondent.

**I**: Was the covenant to provide R with the gross profits from the sale of competitive products during the three-year post-K period a penalty clause?

**A**: This was a case of a formula to determine profits, rather than a fixed sum, which seemed to misdirect lower courts as to its penal nature. The subjective intention of the parties does not stop the courts from refusing to enforce a promise because it was unfair or unreasonable. It was complicated by the complexities of determining exact damages due to intangible but valuable factors like brand name.

**D**: Appeal allowed, the liquidated damages for the post-agreement non-compete covenant were not enforced.

**R**: Even if a party subjectively intends to consent to a foolish liquidated damages clause, the courts may still intervene if the clause is an unfair and unreasonable penalty.

**R2:** Gross trading profits as liquidates damages were found to be a grossly excessive and punitive response which was unenforceable by the courts.

### *J.G. Collins Insurance v* *Elsley,* 1978 SCC

**F**: D sold insurance business and agreed to become employee. Also agreed if he left the business, he would not compete in the Niagara area for 5 years of else $1000 in liquidated damages. D breaks K with liquidated damages clause but P sues because the actual damages were much higher.

**I**: Who can challenge the enforceability of a penalty clause?

**R**: Only the party that is oppressed by the penalty clause (that being the party that was sought to be held *in terrorem* of breaching) may ask equity to not enforce a penalty clause. The oppressing party may not rely on the penalty clause to intimidate compliance and then when it turns out to be disadvantageous, seek to have it rendered unenforceable.

### *Stockloser v Johnson* – 1954 CA

**F**: P buys quarry plant and machinery from D by installments. Clause in K says D is owner until all payments are made. P failed to pay once and D terminated. P was gambling that the royalties on the property were higher and when they weren’t, he couldn’t pay the installments with royalties and tried to get out and have his money returned on the basis of it being a penalty clause.

**I:** Was the forfeiture clause a penalty clause, unjustly enriching P such that it should be rendered unenforceable by Equity?

**D**: No

**A**: Denning didn’t view this as a case of a penalty clause but viewed it as a claim for unjust enrichment. The gamble associated with P’s investment made D keeping the installments not unconscionable.

**R**: Equity may find a forfeiture clause unenforceable if (i) it is of a penal nature; and (ii) it would be unconscionable for D to retain the money.

**R**: A vendor cannot avoid the operation of equity by calling a large forfeited payment a deposit in the same sense that a penalty cannot be avoided by calling it liquidated damages.

### *Law and Equity Act*, 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.

## Money Claims Other than Damages

### Debt

These are claims to have a contractual promise to pay money enforced. When there are unpaid liquidated damages, a debt claim may arise. These are not subject to mitigation and relate directly to a primary obligation to pay a fixed sum of money, although there may be damages in addition but the debt claim is not damages.

### Compensation for amount paid and value transferred

Claims for amounts transferred are restitutionary claims. They are restorative. They may occur when one has paid and received nothing in return such that the K was lawfully terminated. They may occur when one has transferred something of value and received nothing in return because payment obligations did not arise until more was done by the first party, who becomes unable/unwilling to complete.

If the other party fails to deliver anything (i.e. total failure of consideration), the first party may terminate the K on the grounds of the total failure of consideration. That first party might then not be able to have returned what was previously transferred and can only claim damages.

When the other party is responsible for one party’s inability to complete performance, that party may recover back any money paid absent a total failure of consideration. P can also consider a restitutionary remedy based on unjust enrichment if there is no total failure of consideration and apportionment cannot be carried through.

When one party has transferred something other than money (i.e. labour) and the other party’s obligation to pay has not yet arisen before K is terminated, the first party may attempt to (i) sever the obligations to get payment for part of the work, (ii) argue that $ should be paid under a contractual *quantum meruit* claim, or (iii) make a claim in restitution based on unjust enrichment.

# Equitable Remedies

These remedies are entirely discretionary and are of two kinds: injunctions (orders to do or not to do something) or orders of specific performance (an order perform a contractual obligation). These are remedies which seek to keep primary obligations alive and are useful when money is no substitute for the primary obligation. Seeking an equitable order of either type will affirm the K rather than terminate the K.

### Factors to consider (none determinative)

(1) Equity follows the law: It looks to what the CL says and will then decide if equity should step in. If a K is void or otherwise terminated through the operation of CL, equity can do nothing in the way of remedies. If the K is otherwise avoided or rescinded through equity, these equitable orders are also unavailable. In other words, if the primary obligations have otherwise been ended, no equitable remedy is available

(2) Adequacy of damages: as mentioned, equity looks to what CL would do, and in particular, if CL remedies are adequate. Damages will be inadequate if the subject matter of the K is unique, which is traditionally the view with real property. It is likely less the case today that real property is always unique, particularly where the land is investment property, some examination of the claim of uniqueness will be necessary (*John Dodge*). Uniqueness is not necessary but is indicative that damages may be insufficient. Other factors like time, place, and financial constraints might also lead to the subject matter being insufficiently compensated with damages.

(3) Clean hands: this is assessed in the context of the particular transaction or closely-related transactions and has nothing to do with the broader reputation of the P.

(4) P’s conduct in respect of the K obligations: if P has breached her own obligation, she will not get the remedy. Also, a P who seeks the order with respect to a K which would require future performance by P will need to show that she is ready and willing to carry out those obligations, otherwise she must fail.

(5) Timely request: P cannot be guilty of laches or delay. This doesn’t include P’s attempts to genuinely work things out with D. The “clock starts” only after P ought reasonably to have been aware of the breach or potential breach leading to the request of the equitable remedy.

(6) Hardship to other parties or to D—3rd parties are more sympathetic but not determinative. If a 3rd party has entered into an existing K with D and is *bona fide* for value without notice, their position will not likely be upset by the court.

(7) Obligations extending over a period of time: equity will not grant an order if it will require the constant supervision of the court to ensure that it is carried out. However, if the ongoing obligations are uncomplicated, such as a set payment schedule, it may be appropriate, as was the case in *Beswick* (nephew periodic payment to aunt).

(8) Obligations re personal services: the court will not order an injunction or specific performance if to do so would require D to perform a personal service (*Warner Bros*).

(9) Mutuality: courts will not grant an equitable remedy of D could not get from P what P seeks to get from D. This will not be the case if D doesn’t have clean hands, guilty of laches, etc., P’s claim will not be barred on those grounds.

### Damages in lieu of an equitable remedy

Equitable damages may be awarded to replace an order of specific performance or injunction that a court would like to make but can’t (or doesn’t). This is usually on the basis of undue hardship. These damages are assessed at the date of the judgment rather than the time of breach.

### *John Dodge Holdings v 805062 Ontario* – 2003 ONCA

**F**: P had a K to purchase land from D. It was for a hotel very close to a new mall and Canada’s Wonderland. D notified P that it was terminating the K. P sought specific performance because it believed the location to be unique and more advantageous than other commercial properties in the area.

**R**: To show that a property is unique it must possess (i) a quality that cannot be readily duplicated elsewhere and (ii) the quality should relate to it being particularly suitable for the purpose for which it was intended. For real property, specific performance can be granted if the person seeking it can show that the property in question was unique at the date of the actionable wrong.

### *Warner Bros. v Nelson* – 1937 KB (UK)

**F**: D was an actress with a stringent employment K which allowed P to continuously extend her K at intervals, indefinitely. The K contained a restrictive covenant that she would not work for any other stage or motion picture production (and other work) without the written consent of the producer (P). D went to the UK to work for a third party for more money. P sought a “limited” injunction to prevent her from working for anyone else in the film or stage production business without P’s consent.

**R**: Courts will not order specific performance of positive covenants of personal service. Courts should also never grant an injunction if to do so would enforce negative covenants which would have the effect of driving the D employee into starvation or into specific performance of the positive covenants (which is essentially specific performance). But if enforcing the negative covenants (through an injunction) will not amount to specific performance or force D to choose between being idle and performing the positive covenants, the Court will enforce the negative covenants, at the courts discretion (b/c discretionary remedy).

**A**: Quite strangely, the Ct found that ordering the injunction (which was limited to only some negative covenants—rendering services in motion picture or stage production to anyone but the P) would not, in the circumstances, be tantamount to ordering D to perform her K or remain idle (also not a case where damages would be more appropriate). The Ct thought she could “do something else” even if it makes less money than a film artiste, it wouldn’t be so great to have the effect of forcing her to perform her K.

**A**: This was not a case where damages would be appropriate, the K itself noted the “special, unique, extraordinary” character of her labour, the loss of which could not be reasonably or adequately compensated in damages.

**D**: The Court ordered an injunction for 3 years (or end of K, whichever shortest) to provide reasonable protection to the P of D’s breach.