MacDougall Contracts Exams – Final – Dawid Cieloszczyk

\*Strategic Notes\* (ways to approach a MacDougall K-exam). You can use this when you have studied **all** of the doctrines from first and second semester. Refer back to this for final exam.

**Intro**: what is the basic K – basic consideration/terms (*prima facie K*).

1. **Getting out of K** (void, voidable, unenforceable)
2. **Finding damages/breach** (if something can be characterized as a term which can be said to have been broken)
3. **Adjusting K**
4. **Other considerations** (where you want to consider other things

**\***Framework is very flexible – more of a guideline. Also, use of things *depends on context*. Everything is based on *what the client wants* (e.g. if the fact-pattern were written in a way suggesting the best thing would not be to destroy the K, you must then DENY invalidity, and try to seek out *enforceability* instead: basically the flipside of 1 and 2 of the framework). However, since at the same time, you are being tested on how well you can *spot EACH issue* (ALL of them), you should make good use of the “other” category to slot in issues that don’t necessarily pertain to exactly what is the best contractual solution for your client (e.g. the other party wants to deny the enforceability of a penalty clause against you, but you are mainly worried about the voidness of the K).

If not seeking to void/avoid/unenforce (you agree K is fine, but think all that is necessary/what is best is to modify the K without destroying it or seeking equity to intervene) – Generally, easiest thing to do (relatively in this order):

1. Construe (intentions, words, etc)
2. Imply (custom/use, law, practical necessity)
3. Rectify \*Actually **difficult** to meet, but worth considering.
4. Sever (blue pencil/notional) or argue K is/is not substantially complete (entire oblig)

Depending on what client needs, available options: (Laid out to elaborate on what might go into the 1-4 framework above).

1. **Void** -> strongest effect (**Formation** -> certainty, O&A, ITCR, + Mistake + NEF + Illegality could)
	1. This is for situations where it would be best as a whole to have no agreement ever in existence, than one that can be modified (through CL or equity).
2. **Voidable** -> Weaker party doctrines (Duress, Undue Influence,UNC), Misrep (recission), Mistake (if *Miller + Mcrea*, *solle*).
	1. If some unfairness is present, contributing to the K you have, suitable to ask equity for remedy if clean hands (in general), despite valid CL K.
	2. Consider whether you would be barred from using it
	3. **Strong effect** -> can mean getting out of the K.
3. **Breach of K** (intermediate, warranty (damages), condition (termination – affirmation .. damages always available)
	1. All CL remedies available, will either ultimately lead to damages or the election to terminate (or affirm) the K.
	2. **Damages**: consider what types of damages might be claimable to see if worth pursuing.
		1. Expectation, Reliance, or Restitutionary damages
4. **Unenforceability/enforcement** -> (first term), illegality, privity, consideration, etc. (exclusion/limiting liability).
	1. You have an apparently validly formed K, but there is a technical or policy reason why you can’t ask a court to enforce the obligations. Makes sense if seeking party is in need of protection.
5. **Frustration** -> Frustrated K’s Act
	1. Only useable upon extraneous unpredicted event, without fault of parties, fundamentally altering the K.
	2. Wipes out everything, but damages still possible, and restitution available
6. **Other Equitable Remedies**: (injunction/special performance)

If dealing with an exclusion/limitation clause you want out of:
1. Ask if there is **notice**

2. Can signature of other party serve conclusively as evidence of notice?

3. Does the clause *even apply* in the given situation?

4. Construe/interpret the clause (and rest of K)

5. Is it **unconscionable** to apply to clause?

6. Does the clause operate **unfairly** in the context of the actual breach? (Wilson – doubtful authority)

7. Is the clause contrary to “public policy”?

Contracts – FORMATION (First Semester)

1. OFFER

Offer & invitation to treat:

Offer mainly has all of the terms of the contract. Distinguished from *mere puff* (no legal significant)/*initiation to treat* (could have legal significane):

* Canadian Dyers v Burton: (mail correspondence – if price offered in dialogue stands) *Contract cannot be made unless*: A) there is an offer to sell and acceptance or B) an offer to purchase and an acceptance of that offer. *Quotes are generally an invitation to treat, not offer*.
	+ Issue of intention: determining intention helps differentiate an offer, IT or acceptance. Look to context, words, actions.

Acceptance triggers contract, Q of when it happens:

* Pharmaceutical Society v Boots: (shopping basket case) *the display of goods (in a store) is an invitation to treat*. *Bringing the item to the cashier is the offer and cashier accepts the offer*.
	+ (\*note: it does not imply that customer always makes offer – depends on circumstances)

Characterizing acceptance/invitation to treat:

* Carlil v Smokeball: (ad with guarantee.. Q whether ad was offer) *Carrying out terms in the ad (OFFER) constituted acceptance (buying/using/getting sick)*, *communication of acceptance was not necessary* *for contract*. Note: notice of acceptance generally required, but context here did no require it.
	+ UNILATERAL contract
	+ Offer *can* be to the world (depends on language & context)
	+ Note: you *can* include that you want acceptance communicated in the contract.
	+ You can have a contract with someone when you *don’t know* they’ve accepted. (In the case of performance in unilateral..)
	+ \*reasonable person test for the offer: in this, the offer could be ridiculous if you make it so (but it was clear what was being offered.. just not to whom and for how long).

Communication of offer:

In addition to offer, and acceptance of offer, does there need to be anything else?

* Williams v Carwardine: (woman gave info about murderer) *motivation in accepting an offer does not matter, as long as offer is accepted* (*NOT actually statement about whether knowledge of offer is relevant)*.
* R v Clark (AUS HC) \*tries to clarify what it thought *Williams* stood for: *motive doesn’t matter + you have to KNOW an offer exists, you have some sort of intention to accept on the basis of the offer, and in some sense act on the offer*.

2. TERMINATION OF OFFER

Both offeror and offeree can terminate the offer. Offeror can terminate by putting in time limit, or lapse of time (could be implied). You can revoke an offer (even with time limit) *at any time*, as long as acceptance didn’t happen before revocation. Revocation has to be communicated.

Revocation:

* Dickinson v Dodds: (property, grandmother): *despite the fact that offer was open for specified amount of time, the offeror is permitted to revoke early*.
	+ \*Use of agents for communication: third party as agent can receive communication for you (matters for time of acceptance) – can be by contract… or statute, or even implied (ostensible authority)
	+ \*Indirect communication is permissible (if you sell your house, it’s no longer possible to accept the offer – as long as you find out somehow before accepting). \*Does it have to be impossible to enforce?

If you are revoking an offer, HOW do you revoke? Communication is required.

* Byrne v Van Tienhoven: (sale of 1000 boxes of plates) 1.) SUBJECTIVE *meeting of the minds is NOT required* – based on what objectively occurred (legal point of agreement even though no actual meeting of minds) 2.) *Revocation HAS to be communicated* 3.) Postal acceptance rule: communicated when it hits post office (act as AGENT) for ACCEPTANCE, but *postal rule does not apply to revocations* (objective communication).

Unilateral contracts:

Bi-lateral contracts easier to enforce…(each party has a promise in exchange), whereas unilateral is promise on one side only – harder to enforce (lack of consideration). Unilateral: usually needs to be something done for it to come into existence and become enforceable. \*Issue: when person starts to perform what’s required in offer for unilateral contract -> offeror can normally revoke anytime. \*Often reward scenarios

* Carlil: (said ad was off) *in a unilateral contract the offeror can revoke at any time, even if performance was in progress*.
* Errington v Errington and Woods: (classic Denning, father promised to transfer land to son if payments made).. because Denning wanted equity here, considered this unilateral, and the ruled: *the offer was kept open by the performance (payments), and could not be revoked once started*.
	+ Note: there is no obligation for them to make payments (since its unilateral)
	+ This case is problematic (if bi-lateral problem gone)
	+ Not overturned yet – (this area comes under restitution later)

Rejection and counter-offer:

There is a difference between mere inquiry and counter-offer/rejection.

* Livingstone v Edwards: (sale of land.. “give lowest cash price”) 1) *Counter-offer is not a mere inquiry* (and vice versa) – *produces a new term other than original one.* 2) *The initial offeror can decline new counter, but certain responses to it can reopen initial offer.* (e.g. “Cannot reduce price” when offered a lower one was considered to reopen initial offer).

Lapse of time:

Offeror can revoke at any time, but offeree can revoke by lapse of time.

* Barrick v Clark: *An offer can be terminated by the offeree’s lack of response within a reasonable time* (depends on circumstances (language, conduct) and what can be implied.. e.g. indication that you need to have a response quickly).
	+ Note: this can be when there is no actual date of termination, and even if there is.. lack of activity could indicate offeree’s rejection. (VERIFY)

3. Acceptance:

Once this is made, contract is in business. Nothing can be added to acceptance, or else it can become counter-offer. At acceptance, there must be: intention to create legal relations, certainty of terms, and consideration.

* Butler Machine Tool Co: Bad law? (quotation was construed as offer, buyer’s acceptance /w own terms = counter, and seller’s letter acceptance on buyer’s term (no objection, because they thought their clause would override)) – traditional method: (The Seller’s quote was construed as an offer (/w pricing of Sellers prevail over buyer’s condition), Buyer places order /w own terms, Seller completes and returns slip saying it was in accordance with their terms)… *Buyer’s own conditions = COUNTER-OFFER, and thus returning/filling out form was on buyer’s terms* (seller accepted). *Contract under terms of counter-offer when accepted.* Denning’s “better method” (obiter): *battle of the forms + looking at documents as a whole to determine prevailing terms* (same conclusion, different path). Judgment for buyer.
* Livingstone v Edwards: ?

Communication of acceptnace:

Communication is required. How? (Not inaction):

* Felthouse v Bindley: (uncle & nephew, auctioneer.. wrote that he “assumes if no response, then deal goes through”) *acceptance cannot be through inaction, but must be communicated somehow, even if both parties intend for there to be a contract*.
* Carlil: *in unilateral contract performance is sufficient (e.g. for a reward) to constitute acceptance*. *Communication can be waived, but something still has to be done (that has communicative value*).

Communication is necessary, but WHERE you communicate is a question too:

* Brikibon v Stahag Stahl (Autria & England selling steel.. telex): *in instantaneous communication, the contract is complete when the acceptance is RECEIVED by the offeror, and made in the place that it is received*.
	+ Note: it is still possible to include jurisdiction in the contract.
	+ What does RECEIVED MEAN? -> it says that there is NO UNIVERSAL rule for instantaneous communication, and must be decided on the intentions of the parties and circumstances.

MAILED acceptance: POSTAL ACCEPTANCE RULE with respect to ACCEPTANCE.

* Household Fire v Grant: *in mail by post, acceptance communicated as soon as it hits the post-office (the agent for both parties), whether the other party knew or not*.
	+ Note: you can define the way the acceptance has to be communicated as the offeror.
* Holwell Securites v Hughes: *The postal rule does not apply where actual notice of acceptance is clearly specified*.
	+ Note: Postal Acceptance rule does not apply to all situations (e.g. contracts for land, marriage -> actual notice).

Certainty of terms:

Contract cannot exist when too uncertain what the obligations/terms are – formation issue. Needs to be agreement on *all essential elements of the contract*. Two types of general problems: 1) absent essential term (e.g. cost, or quantity) 2) ambiguous term. Different approaches taken by courts in deciding if to resurrect contract – General rules of construction: court looks for intention of parties, avoid unrealistic results, more reasonable meaning of two, etc. 3) meaningless clauses: *Nicolene v Simmonds* (*courts try to sever meaningless clauses – keeps rest of contract*).

Certainty of terms is a desperate argument -> courts try to save contracts.

* May & Butcher v R (tentage surplus): *contract was void because the essential element of price missing*; *agreement to agree, when crucial element missing is not a contract*. *Court’s approach here is resistance to reading in terms to save a contract*.
	+ Note: It said “price shall be agreed from time to time” but was not saved by SGA “reasonable price should be paid here” -> only applies when parties are completely silent. Contract not saved by arbitration, because only applies to disputes when contracts already made. Also, agreeing to set future price is like having a third party set the costs.. failure in both = contract void.
* Hillas v Arcos (HL): court’s move to more charitable reading in terms to save contract: even more uncertainty (lack of description of the timber, price ambiguous (only knew the discount amount), and no shipping & delivery dates). *If ambiguities or terms are missing, look to the whole contract/outside to see if it can be implied* – *interpretation* (e.g. it said “timber of fair specification” and for price, there would have been a market price for timber in 1931 anyways).
* Foley v Classique Coaches: (buying fuel somewhere cheaper, argued not bound because uncertainty in price) *missing specific price but parties acted liked there was contract, and where there is an arbitration clause, parties should settle the element of price this way*.
* \*ACTING like there is a contract.

Negotiations in good faith, and certainty of terms:

* Empress Towers v Scotia: *Agreements to negotiate price are not binding but can have implied terms (for business efficacy*) *of negotiation on good faith*:

 Requires that landlord doesn’t withhold agreement unreasonably. Even if the term of a contract is uncertain (e.g. price says “prevailing market price as agreed”) it can be implied based on other factors: e.g. here, prevailing market rental price.

* + Good faith = not common law obligation -> only shield.
* Manparr v Canada (Natives and gravel): *duty to negotative, although can be implied or explicit, cannot be implied here, because the language/context/meaning of the clause, and it cannot be used to GET something out of someone (uncertain damages)*. *There was also no BENCHMARK for filling in the term like in Empress*, and n*o arbitration clause as well*.

Intention to create legal relations:

Mostly a topic of public policy. Letters of intent with too much certainty of terms can sometimes become a contract.

* Rose and Frank v Compton Bros: *even in the unusual case of non-binding business interactions, both parties can intend for no legal relations/contract to exist, and hence no breach of contract*, *when it is DEFINITELY expressed*.
	+ Note: this can backfire, if there is enough certainty.
* Balfour v Balfour: *Certain kinds of agreements, particularly personal ones (marriage e.g.), involve promises that cannot be intentions to create legal relations*.
	+ Note: policy & practical reasons.
	+ It doesn’t depend on subjective intention here

4. Enforceability:

Nature of seals and consideration:

Currently, way to hold someone to their promise (something you’re entitled to) is through seal & consideration, and estoppel (shield). Consideration: *has to flow from promisee to the promisor*, *as a detriment to promisee or benefit to promisor* (the practical benefit could go to another person, but the legal benefit has to go to promisor – e.g. your exchange = promise to pay money to charity). Things that cannot be consideration: 1) Past consideration 2) Legal duty you already have.

Seals:

* Royal Bank v Kiska: *a seal can make a promise enforceable without consideration, but the promisor must place the seal on the document beforehand, and they must understand why they’re putting it there*.
	+ Note: formality of the seal is relaxed, but has to have at least *some* kind of representation.

Consideration & Motive:

* Thomas v Thomas: (widow and estate) *consideration is not the same as motive*; *why you went into a contract (e.g. out of respect for wishes of testator) is not sufficient consideration for someone else’s promise*.
* This case tells us basically that consideration is something that has to move from the promisee

Forbearance:

Forbearance: promise not to do something – deteriment to promisee.

* Callisher v Bischoffsheim: *forbearance to take legal action, even when it would not have succeeded, can be a valuable detriment to you that is sufficient for consideration* *(if you honestly believed it to have reasonable chances of success)*.

Past consideration:

Promising something that you’ve already done, and the other party promises something new: law doesn’t like this.

* Eastwood v Kenyon: (guardian raising girl) *consideration, generally, has to be fresh, in order to have enforceable contract*.
	+ Plaintiff could not go after defendant for his promise to pay for plaintiff’s past-performed duties, because defendant’s promise was unenforceable (plaintiff’s actions in past).

An exception to *Eastwood…*

* Lampleigh v Brathwait: (plaintiff got a pardon for defendant) *past consideration can be good consideration, if there is a promise and reason to hold someone to that promise* - not because of their mere courtesy. THE PRIOR REQUEST WAS LINKED TO THE PROMISE TO PAY AFTER THE REQUEST WAS DONE. BUT something is promised to the party earlier on as well.
	+ Ingredients: -Something performed in the past

-Was by the request of the other party

-Promise is made to give something for the past action

* Note: context is limited: some emergency/reason explains why the person should be held to the promise -> only a context like this.
* Not really a general rule.

Pre-existing legal duty:

Under common law, no pre-existing legal duties are valid consideration (whether public, to a third party, or owed to you), but Pao On overturns this idea (on third party).

Duty owed to a third party:

* Pao On v Lau Yiu Long: *a promise to perform, or the performance of a pre-existing contractual obligation to a third party can be valid consideration*. *The new party actually gets something: the right to enforce the pre-existing obligation* (“owning enforcement).
	+ Note: there is a different mechanism for economic duress.

Duty to the public: only valid consideration if performed in a certain way.

Duty owed to the promisor:
(two ways around this: 1) add something new of value to the contract or 2) estoppel (Walton Stores).

PROMISE TO PAY MORE:

* Gilbert Steel v University Construction: (Q of whether defendant was bound to oral agreement to pay higher price for plaintiff’s delivery of steel): *pre-existing contractual obligations are not sufficient consideration for new terms to a contract* (increase in price).
	+ Note: GF case doesn’t say this one is wrong. Different views on how to approach the issue. Seen by most people as *better* authority though.
	+ Three arguments that didn’t pass: 1. Pre-existing obligation ‘disappears’ with new contract: artificial but does work. Doesn’t work here, because the original contract not eliminated. 2. “Good price” for OTHER building as consideration: certainty of terms issue. 3. They are estopped: cannot be used by plaintiff as cause of action. (plus they did not sustain a detriment?).
* Greater Fredrickton Airport v NAV Canada: (promise to perform navigational services for the airport in exchange for payments – Fredrickton wanted NAV Can to pay more for unforeseen cost – GFA signed letter in “protest” – sufficient consideration for GFA’s promise to pay more?)*…lack of fresh consideration may not be necesssary, if all you’re doing is an increase of AN EXISTING obligation/post-contractual modification, as long as there was no duress*.
	+ Note: distinguished from *Eastwood* b/c it had no pre-existing contractual obligations.
	+ Note: seems to add that there is a detriment involved in reliance on the promise.

PROMISE TO ACCEPT LESS:

* Foakes v Beer: *Promise to accept lesser sum in satisfaction for a greater sum cannot be enforced, due to lack of consideration*.
	+ Note: this promise can be enforced if something NEW is added (anything, otherwise you give nothing new).
* Foot v Rawling: (in order to get money for debts sooner, plaintiff has option to pay less, must pay with post-dated cheque instead of notes): *promise to accept less can be binding with new consideration. Cheques are negotiable instruments (sufficient consideration – benefited the plaintiff)*.
* S43 of Law and Equity Act:
	+ Another way of enforcement offered: part performance (equitable doctrine).
	+ S43 \*Accepting less: (creditor – debtor) *when there is express acceptance of a lesser sum in satisfaction for a greater sum, and actual part performance*, *the creditor can be held to their promise by the equitable statute*.
		- Note: Can’t use for promise to accept more (maybe estoppel)
		- Does not apply to future performances.

Making promises bind – estoppel:

Still limited use in Canada and is only a shield. Proprietary estoppel: can be used as sword -> promise with respect to land that you rely on and detriment occurs. (You can get an interest, but what is MINIMALL necessary). Promissory: always about the *future*. NOT permanent like promissory & estop by representation (only binding for a duration that seems fair). Estoppel by representation: about a statement of fact (area of representation) -> you can be held to the truth or lie. About *the past.* All involves statement, detriment, and reliance.

\*Also, it doesn’t seem limited to just ‘promise to pay less’, but someone promises to not enforce their full legal right (e.g. right to get all the money from you) and you rely on it.

Denning created doctrine of Promissory Estoppel in obiter:

* Central London v High Trees: *Although no time element specified in rental rate of building, term could be implied that it was until the war-condition ended* *or full vacancy*.
* Important obiter:
	+ Recognizes *Foaks* (promise to pay less = insufficient consideration), but law needs to change:
		- *Big Version of Estoppel is a promise made which was intended to create legal relations, and which, to the knowledge of the person making the promise, was going to be acted on, and was in fact acted on* (reliance).
		- *\*\*Small version*: *acceptance of a smaller sum in satisfaction for a larger sum, when relied upon, despite a lack of consideration, can be binding*.
			* This is only a defense -> doesn’t obviate consideration (just reducing a larger existing obligation to a smaller one).
		- If estoppel was used, could only have estopped plaintiff until vacancy ended.

Further control on promissory estoppel [intention to alter legal relations]:

* John Burrows v Subsurface Surveys: (party was regularly late in performance, remedy waived out of kindness, argued reliance on this) *for estoppel, you need a promise/statement that was intended to alter legal relations*.
	+ Note: alternative -> past history of not enforcing the legal right does not mean it is necessarily lost (not a ground for estoppel).
	+ You actually need an explicit statement that intends to modify the legal relations to rely on it.

Constraint/qualification on the USE of Promissory Esttopel:

* D&C Builders v Rees: (builders that accepted less because of their situation, Rees claiming D&C estopped from claiming rest) *In applying the principle of estoppel, a creditor/party could only be barred from enforcing their legal rights only when it would be inequitable to do so* – *it must be FAIR to enforce the promise*.
	+ Has to be true accord between creditor & debtor
	+ Cannot insist on settlement procured by intimidation
	+ *SUBSTITUTE CONTRACT IN CL REQUIRES COSIDERATION, ONLY IN EQUITY COULD YOU HAVE ONE WITHOUT CONSIDERATION, BUT THE PERSON COULD ONLY BE ESTOPPED IF UPHOLDING THEIR LEGAL RIGHT WOULD BE UNFAIR*.

Denning clarifying the doctrine (shield not sword):

* Combe v Combe: (wife is using PE to get money she was promised, but no consideration on her part (she promised to forgo her statutory right, but this cannot be done)) *promissory estoppel is only a part of an action, not a cause of action*. *Affirms small version in High Trees*.
	+ PE cannot take over law of contract (rid of consideration)
	+ It can only act on existing obligations (contractual)

AUSTRALIAN HC APPROACH – AS A SWORD (bigger principle):

* Walton Stores v Maher: (contract not yet formed in writing, but seemed like it was, and there was reliance + detriment – Maher put down building urgently to lease land to Walton) *even though there is no contract yet formed, estoppel can still be used to hold someone to a promise, as part of a cause of action* – THIS IS DONE TO AVOID UNCONSCIONABILITY.
	+ Arguments: 1) used in the US, works fine; 2) There’s already proprietary estoppel; 3) Not going to undermine everything – equitable in nature.. limited use: only to avoid unconscionability.

Response to *Walton Stores* in Canadian Courts:

* M v A (accepting the wife’s claim to get husband to live out promise would require acceptance of *Walton Stores*): *not hostile to the doctrine, but there has to be a promise that was intended to alter legal relations*.
	+ No legal relations intended (social domestic promise).
	+ GFA -> just says *Walton stores* is NOT the law, doesn’t mean it shouldn’t be

Third-party beneficiaries (privity):

Traditional common law statement on WHO can enforce a promise against whom is that third parties are not privy to the contract, even when it’s about/benefiting them – just between offeror & offeree. 5 ways to circumvent: 1) – Beswick-syle 2) Agency situation 3) Find multiple contracts (e.g. Pao On) 4) Party not in contract buys other partie’s contractual position 5) Someone is beneficiary under a trust set up for them.

Horizontal: third party was already in the picture (A contracts with B, thinking C benefited). – tends to be domestic.

* Tweedle v Atkinson: *third party beneficiary of the contract between two parties still cannot sue for breach. (It’s not the son who sustained damages of breach, and no consideration for that promise)*.

Vertical: more common in commercial situations -> A-B and B-C (C can sue in tort but not contract).

* Dunlop v Selfridge’s (Dunlop -- Dew .. Dew – Self: Dunlop suing Self for breach when they sold below price in clause): *A has no enforceability rights against C, when there is no contract between them (no consideration, not a principal, no agency* either*).*
	+ Note: could’ve have been written to work

Circumventing privity:

SPECIFIC PERFORMANCE:

* Beswick v Beswick: (earlier – Denning.. widow and promised payments to Aunt after Unlce’s death in exchg for business): *widow is allowed to sue ON HER OWN BEHALF (as beneficiary of the will), because she has legitimate interest in enforcing the will (distinguished non-legitimate interest in Dunlop)*.
	+ Other judges agree with result, but not ignoring privity – only through her right as administrator of the will
* Beswick v Beswick (nephew appeals): *court OVERTURNS denning’s – third party can only sue as representative of the estate (not personal)*
	+ Uncle cannot succeed in getting damages, but specific performance would benefit her in this case (normally).

\*limited

Exception to privity:

Legal changes to doctrine (other than agency & trust)

* London Drugs v Kuehne & Nagel: (London Drugs suing under negligence – Q of extension of liability clause to employees): *employees can have access to someone’s contract as a shield, when they are in the course of work for the employer, and the limited liability clause implicitly or explicitly includes them*.
* Fraser River v Can-Dive: *eliminates the requirement of employment context*: *as long as you are the implicit/explicit beneficiary of the contract (with a defense under the contract), you may make use of the contract between the two other parties*.
	+ ‘the benefiting term crystalized’ at time of action.. (can’t just change the contract to exclude the defense and THEN bring about action).

Writing requiement:

Even if writing is not required, you are in a stronger position to have it. **Parole Evidence Rule**: can kick in if you have a written document that appears fairly complete. PER: *if you’ve convinced the court that the written contract is exhaustive, and evidence is in dispute, the court does not accept oral evidence of contract*. – Can be abolished by legislation (consumer leg) & many devices around it.

* **Gallen v Allstate Grain**: *Parole evidence rule is just a PRINCIPLE/PRESUMPTION and ways around it exist*: *if you can consider separate contracts or that the writing isn’t mean to be exhaustive*.
	+ 8 different propositions to bear in mind (just his view on how it should operate) – just persuasive.

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# Spring Contracts CAN - Content of the K

**Representation and Terms**

Difference between *representation* and *term*: if the thing made it into the K and is part of the offer, it can lead to breach of K + remedies (common law – predictable). If not in K, it is at best a *representation*, which at most can lead to recision (equitable – can’t be predicted in advance).

**HielBut, Symons & Co v Buckleton**: Q: *how to determine what is IN the K*?

 -**Rule: Focus is on *intention*** – was it intended to be a K-binding promise? Characteristic of statement: the more significant/central the statement is to the transaction, the more likely it was *intended* to be a term in the K. If stated in offer, also likely to be a term, if separate, not as likely (comes down to when statement was made).

**Leaf v Internatinoal Galleries:**  Q: *can something be both a term and a representation?*

 -**If it can, one characterization gets merged into the other** (reluctance to characterize in two different ways). If something can be represented as both, the **term overwhelms the rep**, and then it turns into a term. E.g. the statement of *who* painted was so crucial to the *nature of the K* (sale of painting) that it is also a term.

\*Case should’ve been under breach of condition/warranty, because term *overwhelmed*… but misrep would’ve failed because of **latches** anyway (acceptance of goods over long period).

**Classification of Terms**

**1. Primary** **Olig**: this is subject matter of the K, or what is essentially being done under it (e.g. building a swimming pool or payment). Creates a **duty & right**: (I have a duty to build the pool, you have the right to it). **Conditions**: most important terms in the K, if broken, gives other party POWER to **terminate** K; **Warranties**: obligations that do not go to heart of K. Failure to perform does not mean K repudiated – damages at best; **and intermediate terms**: relate to the importance of the term, only to 1e obligs.Distinction between **entire** and **severable**. **Contingent obligs** (e.g. upon something happening), **conditions subsequent** (something LATER occurs that ends oblig)**, precedent** (pre-condition), **and concurrent** (obligs happen at SAME TIME): has to do with **order** of performing conditions (e.g. precedent: oblig’s enforceability only kicks in on “day 3”.. obligs presumptively occur concurrently).  **2. Secondary**: *remedial* obligations, and set out what is done in case the 1e obligs are not met (e.g what happens when pool not installed) – necessary for meaning of 1e obligs. ONLY active upon condition of breaking 1e obligs.

 -**Freedom of K**: allows you any consideration for 1e obligs, but not free wrt 2e obligs (b/c it’s a substitute for the 1e obligs – money & damages). You can agree on certain 2e obligs, but law can interfere.

\***Recision**: getting “rid of the K”. K already in existence, but “setting aside or avoiding” on a basis that is **outside of the K** (before or after) – does not relate to a *term* (e.g. misrep). If outside of K, characterized as: *mere puff, misrep, representation*.. Gets rid of WHOLE K (rare).

**Termination**: *common law remedy*.. for **breach of a condition**, or sometimes intermediate term (directly in K) – removes 1e obligs. Keeps obligs that already occurred. (Doesn’t mean you can’t collect damages)

 -> You could AFFIRM…and decide to ENFORCE the existing obligations, and sue for any damages in the breach OR you terminate all of your and their obligs and still sue for any damage.

**Repudiation**: means that someone rejects what they’re supposed to be doing. (Not = breach).. can be used to characterize breach or rightful repudiation (by person not in breach). E.g. when indicate/do fail to perform *condition*, this is *repudiating* the K.. Rejecting essential oblig.. not just details. (If just a term, most you ever get is damages).

**-Election**: when party in breach starts repudiating, other party gets **election**: either **a)** insist party performs or **b)** accept that the contract be repudiated. Choosing **b)** leads to **termination** of K.

**Hong Kong Fir Case**: *Terms which are neither conditions or warranties* – *intermediate terms* (challenges SGA assumption of only 2 categories)

 -**Test**: **the nature of the event and its practical effect: “**does it deprive the party to perform of substantially the **WHOLE** (\*substantial) benefit of the K?” This is because sometimes you cannot predict in advance how serious a breach of the term will be. For these, you **wait and see**. If deprived, does not become condition, but similar remedies. (Facts: since charterers still got to have boat for 20 more months, the expected benefits could still be received (although not all of them).. thereofore the breach only led to *damage*s).

**Wickman v Schuler**: *Use of the word ‘condition’*

 -The K should be interpreted **as a whole** and the word “condition” should, on the facts of the case, be given an **ordinary** meaning not as a term which will entitle the innocent party to repudiate the K in the event of a breach. If the parties intended to give a condition such effect, they must make it **clear.**

**Fairbanks v Sheppard**: *Entire & Several obligations* Q: *how much of the obligation has to be performed before the other kicks in* *(how exact*)?

 -Definitions: **Entire obligation**: when oblig to do XYZ, it has to be done ENTIRELY for the other pay to have to do anything (not even pay). If **severable**: oblig to pay can be triggered before all complete, (e.g. if only XY). When severing oblig, you can still ask whether it can sever further (sometimes the won’t).

 \*Pertinent in labour/employment K’s

 -**Rule**: *sometimes the general rule that there is no recovery for a K to do work for a LUMP SUM until the work is entirely completed can be interpreted to mean that the recovery is possible if the work is “****substantially” completed***. *To recover for this kind of work, the party in default must provide* ***evidence*** *from which a* ***new K*** *to accept and pay for the work could be* ***inferred***.

 Facts: applied to building of machine.. (\*more than 50%)

**Sumpter v Hedges:** Q: *what happens if the K is not substantially complete*?

 -**Rule**: *Quantum Meruit* (substitute) K’s can be asserted, if work is to be done under LUMP SUM, and not substantially completed. The amount asserted must be **FAIR** (court determines this) under the QM K, but you need to produce **evidence** for its existence. There needs to be also an **option** presented to defendant to take/leave the benefit of the work done.

 -Facts: building incomplete and not severable, but QM K argument failed because the mere fact of the building remaining in defendant’s possession was insufficient evidence of a new K.

 -Theoretical issue: offer & acceptance, certainty of terms and consideration (with QM K’s)

**Machtinger v Hoj**: Q: *when/how can terms be implied into a K*?

 -**Definitions**: 1. **Terms implied by custom/usage** (intention of parties req) 2. **Terms implied by law** (no intention required – statute or CL); and 3. **Terms implied by practical necessity** (obvious intention and understanding required) –e.g. business efficacy.

 -**Decisio**n: implied notice requirement, given the kind of K (employment) – statute requires reasonable notice before termination. \*(stat min = 4 weeks, CL -> period = based on various factors.. 7 weeks).

**Excluding and Limiting Liability**:

Will be a ‘contingent’ term (probably triggered). **Exclusion clause**: excludes liability altogether. **Limitation**: just reduces/restricts amount of liability. Can be things like procedure, time. \*Equity steps in a lot to protect weaker parties. They are terms but ‘controls’.

* TEST CLAUSES IN FOLLOWING STEPS:
* 1. Did other party have **notice**?
	+ Can signature of other party serve as conclusive evidence of the notice?
* 2. Does the clause apply to given situation?
	+ Interpret the clause (and the rest of contract)
	+ Does statute prohibit application?
* 3. Is it unconscionable to apply the clause?
* 4. (According to Wilson J., but now of doubtful authority) Does the clause operate unfairly in the context of the actual breach?
* 5. Is the clause contrary to "public policy"?

**Thornton v Shoe Lane Parking**: *BASIC NOTICE REQUIREMNT* – *Unsigned documents* – *when is notice sufficient*?

 -**Test:** imposing terms requires they be posed in a **realistic context**; they should be given such notice that they could decide not to enter, before they actually make the K, rather than impose terms after the fact.

 -The court should not bind a party to unusually wide and destructive exclusion clauses *unless* drawn to their attention in a very explicit and realistic way.

 -Facts: the exclusions of liability in the parking garage are shown *after* you go into the parking garage. Even when you could read the terms, not much choice but to go forward (practically). The printing on the ticket gave terms also *after* the money was inserted, so no possibility of agreeing to them.

**L’estrange Doctrine**: *the idea that the signed K is better than the unsigned* – *signing presumptively satisfies notice requirement*. (Signifies acceptance of *contents* of the K, but it comes into existence with acceptance). \*Note: piece of paper is not the K itself, but *evidence* of a K, unless it is sealed.

**McCutcheon v David MacBrayne**: *Unsigned documents – Exclusion Clauses - can a signature be constructed*?

 -**Test**: previous dealings between parties are only relevant if they prove 1) **subjective knowledge of the terms** (actual not constructive) and 2) **assent to terms in previous dealings**. Technically, previous dealing can show notice of term without express statement (*estoppel by representation*), but BASIC NOTICE STILL REQUIRED.
 -Facts: car was lost on ferry due to negligence, but unable to use exclusion clause because were not able to show there ever was subjective acceptance of the risk note.

**Tilden Rent-A-Car v Clendenning**: *Signed (standard form) documents - does signature prove sufficient notice of terms*? (Limitation of K liability)

 -**Rule**: the party seeking to rely on **stringent/onerous** terms (**INCONSISTENT** WITH OVERALL PURPOSE OF K) should not be able to do so in the absence of first taking **reasonable measures** to draw attention to those terms (esp when aware that person hasn’t read K). Without them, not necessary for signing party to prove fraud, mis rep, or non-est-factum.

 -**Presumption**: difference between commercial & consumer spheres (*consensus* in the former not latter). *Sufficiency of notice and proportionality trump the notion that signature is binding.*

 -Facts: rent-a-car clause limiting liability conflicted with the “full non-deductible coverage” he was told about, and was stringent (even a sip of alc or 1km/h over limit would deny coverage). Clerk aware he didn’t read it.

**Karroll v Silver Star Mountain Resorts**: *Signed (standard form) documents - does signature prove sufficient notice of terms*? (Exclusion of tort liability)

 -**Rule**: whether the **duty to** **take reasonable steps** to advise of an exclusion clause arises depends on many factors, such as: the **nature of the K**, **length and format**, **time available**, as well as whether there are **unusual terms and fine-print**.

 -Facts: Skiing exclusion of liability clause was consistent with purpose of K (dangerous activity). None of the three contexts where signature not operative available (NEF, misrep, or taken advantage because of knowledge of mistake). K was simple to read (big font), she knew she was signing legal doc. Discharged of obligation.

**Fundamental Breach**: the other doctrines are understood as trying to *replace* FB. Denning understood it only to apply to **exclusion clauses** (e.g. excluding tort liability – limiting liability e.g. insurance kind of inconsistent). Idea that breach occurred after K already exists, and changes how the K operates.

**Karsales v Wallis**: *Formulation of doctrine of FB (equitable)*

 -**Rule**: party cannot rely on an exemption clause when they deliver something “different in kind from that contracted for, or when they have broken a fundamental term/K-obligation”. D of FB says breach going to root of the K disentitles the party from relying on the exemption clause.

 **-OVERRULED in *Photo production* (HL)**

 -Facts: car was delivered in radically different condition, but party couldn’t rely on exclusion clause, because unfair.

**Photo Production v Securicor**: *Overruling denning’s FB*

 -**Rule**: the doctrine of FB is unnecessary, and legislation in place to handle it (Unfair K Terms Act). Arbitrary that it only applies to *exclusion* and not *limitation*.

 -By taking exclusion clause out, you’re putting an oblig that was never there in the K (e.g. If I said I wasn’t liable for theft, you’re basically putting that in there and giving someone what weren’t supposed to have, in one sense).

 **-Canada**: DofFB did not get completely overruled in same way, because lack of statute.

**Hunter Engineering**: *SCC on DofFB – Laid to rest*

 -**Rule**: *if on the true construction of the K, liability is excluded for the kind of breach that occurred, the party in breach will generally be saved from liability, unless the K/clause is* ***unconscionable*** *(unequal bargaining power between parties). Wilson’s approach adds* ***unfairness/unreasonableness****.*

 -**1**. No DofFB; **2**. Construe K to see if clause is meant to apply; **3**. Test it for unconsionability (has to do with creation of K); **4** (maybe) Consider unfairness (this doesn’t allow prediction of K’s operation – occurs AFTER K exists).

**Tercon Contractors v BC**: Court’s position on *Hunter*

 -**Rule**: SCC showed fair amount of support for Wilson’s position of adding *unfairness*. Reiteration that there is no DofFB. ULTIMALTEY OPEN whether unfairness can be argued part of the law with exclusion/limitation.

 -Facts: Province argued no liability if something goes wrong in tendering process. When it did, action against province: *majority* said we didn’t get past #2 (application of exclusion clause to scenario) stage.

**Excuses for non-performance of the K**:

**Misrepresentation and Recission**:

Operative misrep requires: 1. **Statement of fact**; 2. **Untruth**; 3. **Material** (relevance); 4. **Reliance on the MR, as a reason for entering K**.

**Recision:**

* Main (restitution like) response to misrep (equitable)
* No particular way to effect, but must give notice (e.g. return of property or notifying that it is ready to be reclaimed)

**Bars to recision**: “impossibility of restitution” (***Clarke v Dickson*** – shares were already xfered, could not be restored). **Exception**: Equity may still allow recession if the thing is not “returnable” (***Wiebe v Butchart’s Motors***: buyer used car, and restitution impossible, but court gave monetary comp).

* + **Kupchak v Dayson Holdings**:
		- **Rule**: equity is discretionary and flexible enough to order monetary compensation (+ rescission). This *more interventionist* approach more warranted when party is at fault…(**fraudulent** misrep). Even possible in innocent misrep, but not likely.
			* **General rule**: *-> there is no rescission for misrep if a 3rd party has acquired rights, or when* ***restitution in integrum*** *is impossible, or if the action to rescind is not taken within a reasonable time, or the contract is executed (except in the case of fraud), or if the injured party affirms the contract*.
			* *Two step test for dealing with possibility of recission for fraudulent misrep:* ***a)*** *is rescission practical and restitution possible?* ***B)*** *was the claim to rescind submitted in a timely fashion?*
		- Facts: property was not able to be returned, but money ordered. Latches did not apply.. because later clearly stated they weren’t happy. Gap of time, but not too big (1yr).
		- **Restitution**: comes up with a figure for compensation. (Can also bring tort damages as well).

-**Affirmation**: *recession gives you an* ***election***: if the misrepee KNOWS and CHOOSES to keep the K, cannot rescind. Can be through *action* -> e.g. continue using the car.

**-Laches** (delay): *if you act too late*… you formally affirm. Only has an impact on recission (misrep remedies different from breach of K). \****Gaurantee case*** – if you have BOTH misrep and breach of term: no reason you can’t rescind (but you lose 1e and 2e obligs).

**1. Statement of Fact**: Opinion or belief = puff, and statement of a *promise* is related to olibgations = a term. Statement of law is not a basis for misrep: everyone is presumed to know the law (***rule v pals***).

**Mixture of statement of fact and opinion?** CAN give rise to misrep, if it has an important factual component, and depends on the position of the statement maker. -**Smith v Land and House Property Corp**:

 -**Rule**: the representor is more likely to be liable if he knows the facts better (making material statement of fact). When facts are *equally* well known, what one party says is frequently an expression of opinion.

 -Facts: “most desirable tenant”, although actually behind in paying rent. Decided statement of fact, because one has all knowledge.

**Silence** (nature of the statement): there has to be a **statement** (words, actions, e.g. nod, wink, etc.) *Generally*, absolute silence cannot be basis for misrep: *caveat emptor* (no CL duty to speak). **Consumer situations**: duty to speak -> seller must disclose to buyer any latent defect making premises unsuitable for habitation + K’s of utmost good faith (insured has to disclose things) + Fiduciary situations. **Misleading silence** *can* lead to MR sometimes though (untrue as well).

**Statement by Third Party**: Key test -> what is the relationship between representor and K-ing party. Can be operative IF: **by agency relationship**, or **a close relationship** (***Pilmore v Hood***). With no connection, unlikely that rep affects K – it can become the basis for tort action against the maker though (must show: duty owed by the statement maker to recipient, the breach of the duty – ***Peek v Gurney***).

**2. Untrue**: awareness of the falsehood not required. Innocent misrep can be operative. Requirement to inform the recipient in case statement does become false.

**3. Materiality**: **Test** -> **Context**: type of K, position of the parties. Closely related to the concept of reliance.

**4. Reliance**: Statement that induced the K doesn’t have to be the *sole* reason, just *a* reason you entered. This depends on the **context**: the subject of the K, the parties.

 -**Redgrave v Hurd**:

 -**Rule**: no duty to check the accuracy of the statement; a K can be rescinded due toe materially false misrep: “a man is not allowed to get a benefit from a statement which he now admits to be false”. Failure to exercise due

 diligence is not relevant if a person is induced to enter into a K by a false rep.

 -Facts: solicitor representing business as making X but really makes Y (less).

 -**Introduces**: equity in misrep (when it was tort action before, and fraud required – negligent misrep added after redgrave).

**Mistake** :

Much of it taken care of by MR. **Causal & Time element** (future, present, past?) + **who** is mistaken: **Unilateral** (only one party), **Common** (A is mistaken about X and B is too), or **Mutual** (A is mistaken on Y, and B on Z – both wrong).

 -Q: do we need a separate doctrine?

 -Could be covered by O&A, Misrep, Frustration, implied terms, duress, undue influence and unconc?

 -Problems of proof (their mental state)

 -CL: didn’t have much to do with mistake -> (NEF, fraud -> void).

 -Equity: entered by making K’s voidable, or modifying, protecting.

-**Presumption**: trying to get out of a ‘bad bargain’.

**Smith v Hughes**: *Case developing the law of mistake* (as to terms, unilateral) .. COMMON LAW.

 -**Two judges, source of mistake**: Blackburn -> when parties not *ad idem* on what the *terms* of the K are, there is no K UNLESS one party is **estopped** from denying your view of the terms of the K (I behave as if your view of the K are correct). Another view: “not what I thought the K was about, but what I thought YOU thought the K was about. Hannen: could be a unilateral mistake, but the other party *KNEW* about the mistake: the mistake has to be about the *terms* of the K (void).

 \*NOT about motive or assumption or bilateral.

**Bell v Lever Bros**: *Mistaken Assumption – Effect on K*

 **Rule**: Mistake as to the **quality** of the thing contracted for, presuming it was not meant to be a term of the K/is not, despite *smith*, it CAN have an impact on the K, but has to be about **something fundamental**, and has to be a **mistake of BOTH parties**. If there is such a mistake, it affects assent, making the K void.

 -**Mistake as to the subject matter** (**non-existence or destruction, or you already own it**) easier, but also possible… it won’t really matter for this if bi-lateral or uni.

 -**Effect**: makes K void.

 -Facts: employers trying to get out of having to pay them under employment K, although they already made the termination offer, but found out later they didn’t have to (argued mistake).

**Solle v Butcher**: *Mistaken Assumption* – *elaboration* – *Denning – equity in mistake*

 **Rule**: equity can make a K **voidable** due to mistake. **Broader version** (easier to satisfy): it could include a unilateral (and bi) mistake, as long as equity can relieve the party without injustice to a **third party**, when it would be **unfair to enforce** the K. So not limited to terms, but assumptions as well. This holds even if mistaken party **is at fault**. **Narrower version**: K can be set aside when there is a **common mistake** as to the **facts** or **respective rights**, provided it was **fundamental** and party seeking to set aside is **not at fault**.

 **-Effect on *Bell*:** ADDING to Bell, because saying that although CL may be happy with K, it could still be avoided.

 -Facts: Denning uses equity to give landlord remedy, but what actually happens is election to tenant (who was paying for more than necessary): to pay at statutory rate or end lease. CL voiding would be too harsh (means you have to give back the money to tenant, but tenant had enjoyed occupation).

**Great Peace Shipping**: *UK disagreement with Solle, not binding here*

 **Rule**: *Solle* is incorrect and there is nothing for equity to say on the topic of mistake (tries to reverse).

 \*Incorrect because equity has history of intervening in mistake. Denning maybe wrong on the particular remedy (rescinding, refusing remedy), but not about equity’s involvement with mistake.

**Miller Paving v B Gottardo Construction**: *Canada on Solle*

 **Rule**: shows Canada prefers to be favourable diposed towards *solle* and not the *great peace* route (seems true across Canada), but not clear on exactly how to use *solle* (whether it’s big or small doctrine).

**Arguing mistaken assumption**: really argued because your party doesn’t like K – assumption has led to K they don’t like. Mistake usually COMES LAST … they are trying to get the K they like, or (if necessary) out of the K.

* **First argument**: construction. You’re going to argue other party is misconstruing, and your construction is correct.
* **Second argument**: if not, you can *ADD* to the K – usually implied term (more work).
* **Third argument**: *rectification* – a “mistake” of recording.
	+ –If these three fail (you cannot get K you want), you go to **getting rid of the K**…(e.g. mistaken assumption, or terms) – desperation.

**McRae v CDC**: *Putting Mistake in place*

 -**Rule**: you must first **construe the K**, and THEN look at **fault**. You cannot use mistake to when you are **at fault** or caused the problem.

 -Facts: The P won salvage operation bid, faulty info given by commission, and ended up being no tanker there. D using mistake as a defense (saying NO K at all). There might be a COMMON mistake, but it’s on the disposal comm was responsible for.

**Shogun Finance v Hudson**:

 **Rule**: Distinction between K entered first hand vs at a distance -> **face-to-face** **k’s lead to the K coming into existence**, **but not at a distance** (even if in writing). **Written** **at a distance**-> K comes into existence, **but with the person *NAMED* in the doc**, not with sender. At most, you have a K with the person NAMED on a written K. However, **non-est-factum** can be argued by the named person (when at a distance). Face to face: you have valid CL K with the person in front of you (your intention imputed). So any person from the outside could only hope to argue that the K was void. The fooled in the face-to-face K could argue the K was *voidable* due to deception however.

 **Application**:

* + If K entered into face to face, *it is still possible for equity to come in, even though valid CL K, and say the K was voidable*. You have to show an action that was fraudulent or tantamount to fraud (here, pretty easy). CL would’ve said K was with rogue (if face to face), and equity could’ve said voidable at behest of person defrauded (Shogun), and hence voidable. The rescission would be equitable.. and it won’t necessarily give the car back, it would have to be shown as fair to get the car back (Hudson is a bona fide purchaser for value, hence this part would be adversely affected by allowing the rescission).

**Non-Est-Factum** (NEF):

Not your signature – *null deed* (and not responsible for what it says). Expanded to situations where you put yourself down, but say that you’re not responsible for what the document says. Also protects those without *capacity*. **Makes the K void** (CL).

**Saunders v Anglia Bldg. Society**: *NEF – carelessness – Fraud - CL*

 **Rule**: (Marvco as well) – Pulling back from earlier generosity of NEF, generally speaking**, carelessness on its own, unless it amounts to fraud by the other party,** will not allow you to use NEF (if you’re careless, it is your own fault). Put an end to equity dealing with NEF.

**Marvco Color v Harris**: *NEF – carelessness – Fraud­*

 **Rule**: If you *can* use NEF the difference has to be **significant** -> **about the substance of the agreement** (e.g. you thought you were signing a delivery receipt, while it was a mortgage, as long as you weren’t negligent). The other party has to be culpable of fraud -> awareness of its taking place (egregious unfair behavior – the Bank’s knowledge of wife being manipulated by husband).

**Rectification**:

Mistake in the *written record*. It’s about the fact that the recording process of the K involved some inaccuracy. If you would be happy with a rectification of the written K, you’ll want the *Parole Evidence Rule* (usually stuck with the writing). Usually *unilateral*, or both say it’s mistaken but want different things.

**Bcuvici v Palmer**: *Development of rectification*

 **Rule**: rectification will always be difficult to argue (looks like esc from bad bargain). High standard of proof (almost BRD). Look to behavior and intentions of parties to help establish what is meant to be included. You can include **evidence after the fact** (behavior (in)consistent with the mistake).

 Facts: one party arguing that part of the property included in the K was mistaken, but other said it was included. Intentions, behavior (before and after) = property not included.

**Sylvan lake (SCC)**: *Leading Case* – *Doctrine of rectification – UNILATERAL mistake (avail for bi, but modifications) - Equity*

 **Test for rectification** (conditions precedent):

1. **Inconsistent prior oral agreement**: there was an oral K in existence, but the writing conflicts with the prior agreement.
2. **Show that the writing does not correspond with that agreement, and that the other party *knew or ought to have known* that the writing was an inaccurate reflection of the prior agreement**
3. –Subsumed under 1: **precise words**.
4. **Burden of proof**: Not BRD, but it won’t be easy (**still civil)** – mental element looking like mens rea.

 -(5) **That you weren’t careless**: denied as the 5th element. The fraudulent party shouldn’t prevail over the careless party (equity favours). CAN be FACTORED in though.

 Facts: the way the K was recorded indicated a smaller amount of property was included, and could not develop according to plan. Not that K was mistaken, but that unilateral mistake wrt to recording.

**Protection of weaker parties (UI, DUR, UNC)** :

Not clear if total shift from CL to equity. Mistake & Misrep -> not seen as *protective doctrines* - > knowledge. The three come out of **consent** – cannot be said to be “consenting” .. and **offer & acceptance** -> cannot do this if not in capacity.

**DUR & UI**: *process of consenting* (“HOW”), not with content of that result. Focus on situation of parties. **DUR ->** *occasion by occasion* basis (what happened at that particular time – NOT ).. **UI** **->** about the *ongoing relationship* (\*Maybe content\*)

**UNC** -> derives from UI, but looks more like *mistake*: one party takes adv of another’s weak position…but looks to the **result** of the K
(All three: have to start before the K in existence – Wilson’s “unfairness” in *hunter* may work *after* the fact).

**Duress:**

Duress was about threat to the ***person*** (to enter K). CL reacted with voiding it (part of illegality). Idea also came up that it could be threatening ***property (goods****) or economic well being*. **Effect: *VOIDABLE* (historically void).**

**Pao On**: *Extension (eco) and statement of Duress*, *equity*, *vitiates consent*

 **Rule**: In a K-situation, commercial pressure is not enough. There must be a factor present which could in law be determine as *coercion of the will*. Important to ask whether the person alleging **protested**, whether an **alternative course** **open**, **independently advised**, and whether **steps taken to avoid it** afterwards.

 -\*Factors are not determinative… the since on the facts it couldn’t pass even these 4, no other additions were necessary (although this one is*too easy to satisfy* – no “enough of a threat” element).

**Greater Fredrickton**: *5th factor added to Eco Duress* (control)

 **Two stage test**:

**1.** **Two conditions precedent**: a) K variation MUST be extracted as a result of the exercise of **PRESSURE** whether demand or threat; b) Exercise of pressure is such that other party had ***no practical alternative*** but to agree

**2. Factors deciding Eco-DUR**: a) whether promise supported by **consideration;** b) whether coerced party made agreement under **protest**; c) whether coerced party made steps to avoid the duress as soon practical.

 -\***Legitimacy** **NOT a factor** -> rarely successful (pressure is always illegitimate in *person* and *property*).

 -Facts: Court did find variation **unenforceable** -> **equity:** unenforceable (not void). Promise to pay more (modification of K is acceptable), but lack of consideration makes the modification suspect.

**Undue Influence (UI)**:

\*Focus is on the **relationship**… whether content of K is relevant is not clear (*Geffen* – different views). **Effect**: ***VOIDABLE.***
Establishing UI:

 **1. The relationship**:

 a) relationships of **presumed UI** (*irrebutable*) – e.g. Dr. and patient, teacher & student (maybe), parent & child (sort of), trustee & beneficiary.

 b) UI actually **established** on the **facts** (e.g. *Geffen*) – have to go through the nature of the relationship & evidence.

 **2. Contents of the K** (possibly)

-Result: K is **presumably voidable** -> defendant has to rebut. (For category a).. first step is automatically fulfilled).

**Geffen:** *Establishing UNDUE INFLUENCE (UI)*, *Content of K?*

 **Rule**: two differing judgments.. Wilson: **content of K is relevant for a commercial trans** -> need to establish an **unfair K** (lob-sided), and weaker takes adv of stronger, but for **non-commercial** trans (e.g. WILL) the **relationship** process above is sufficient. Laforest: rejects the judgment about comm-trans, (obiter for wills), and clearly prefers the English **context** over **content**.

**Unconscionability (UNC)**:

\***Overtly about the contents of the K** (*Morrison, Harry* – leading cases).

Effect: **K *voidable or unenforceable, or judicial adjustment*.**

**Morrison**: *Doctrine of UNC* – equity

 **Rule**: *unfair advantage is gained* (in a K) by an UNC use of power, where the need arises out of the weaker’s ignorance, distress, etc. and the stronger takes advantage of this weakness – imbalance in bargaining power (like UI on “one-off” basis, /w content analysis). **Substantial proof** of unfairness necessary. You have to **look to the transaction.** Once this is proven, presumption of fraud which other party must rebut, if other party shows it was **fair, just and reasonable**.

 Facts: two rogues and finance co .. rogues unavailable (and **third party**), so courts have to do something with the K between her and finance CO. Remedy is **equitable**: *quite a bit of lee-way* -> **can set aside on terms, re-write obligs**, etc. (here obligs ADDED, not avoided). Finance CO took advantage of her ignorance.

 -> the presumption of fraud and rebuttal = paradoxical (proof of “presumed fraud”.. then you show it’s not at all)

\*In general, equity should seek to avoid affecting **third parties** and is normally **destructive** (*Morrison* = constructive).

**Lloyds Bank v Bundy**: *Denning’s Attempt to UNIFY the protection of weaker doctrines - badlaw*

 **Rule**: all of the doctrines have in common the ***inequality of bargaining power***… by virtue of it, the law gives relief to someone by his own **ignorance, needs, or desire**s, and **without independent advice**, enters the K.

 Facts: father, son and bank case (UNC used).

**Harry v Kreuziger**: *Different approach to unification (BC)/UNC*

 **Rule**: all of the tests are a variation on the same single Q -> whether the transaction **as a WHOLE** (how created and what’s in K, also possibly, how it pans out after), is seen as **sufficiently divergent from the *commercial standard of morality***.

* Canadian cases most relevant
* Advantage of not calling the other person “weak” or “ignorant”
* This is ANOTHER WAY of looking at *Morrison*, or perhaps unification.

**Illegality**:

**Effect**: ***void or unenforceable* or nothing at all**.
Is about a K contrary to public policy.

 Two sides:

 1. **Whether K is illegal**.

2. **If it is, what is the *effect*** (migrated from always void in CL to equity -> more complex relief and NOT automatic) – whole or part of the K?

 **Characterization**:

1. **Statutory Illegality**: specific rule saying X in K can’t be done. It can be either **specific term** (necessarily breaks the law), or about **performance** (even MAKING of it).

2. **Common Law Illegality**: have to explain why your particular situation is one of the *heads of public policy*: e.g. K’s prejudicial to admin of justice, e.g. K precluding marriage).

**Restrictive Covenant**: not itself problematic, but can become illegal when against policy -> Labour K that prohibits the engaging the in the same trade for a certain period of time.

**What Happens**: -Clarify uncertainy –Rectify –Sever if possible.. if these don’t whole K is **void, unenforceable, or policy**.

**KRG insurance brokers v Shafron Case**: *When is a provision of a K, restrictive covenant, illegal*? + *Severability* test

 **Rule**: law will generally permit restrictive covenants in *sale* (competition), but will be suspicious of employment ones (imbalance). Relevant factors in assessing fairness are: time, geograpgic area, whether there is competition (what will taking them out of the business in the area for that time do?) – ambiguities have to be resolved.

 **Test for severability**:
1. **Blue Pencil:** can only strike things out, and ask whether everything else still makes perfect sense (strict) [**problem**: sometimes can’t isolate the problem, or sometimes too much is done – can do too much for other party] e.g. criminal interest (need to have agreement – intent).

2. **Notional Severance**: you can re-write the part of the K that causes the illegality, only to the extent necessary to remove the illegality (e.g. bringing crim rate below 60%) – can only be used if there is a *BRIGHT LINE* to draw – only **reads DOWN**.

 -Facts: issue on whether there even was a restrictive K – “metropolitan Vancouver” (meaningless) -> **what is being affected by the illegality** (what part, or is it whole?) – **Blue pencil** doesn’t work, and **can’t just re-write it**. UNCERTAIN + ambiguous.. and appeal court erred in thinking it could use **NS**, because it was actually just clarifying the ambiguity by putting “City of Vancouver, UBC, Richmond, Burnaby”.

 -> **Result**? **\*Unenforceability**

**Still v Minister of National Revenue**:

 **Rule**: when there is a plain statutory illegality, the *purpose* of the illegality has to be taken into account, and how the *effect* would *further* the purpose of the law. Illegality can have **no effect at all**, if it does not further the purpose of the law it goes against.

 Facts: here, S worked in contravention to the law, and wanted to take advantage of those benefits during the time she wasn’t technically allowed to work under the permit she *thought* she had. Here there is **no impact at all**. K still valid – because looked like *justice*.

**Frustration**:

Deals with an excuse from K obligations *after* the K is entered into… (subsequent events). Impact: from moment of problem everything after ceases. Different from *termination* -> only causes 1e obligs to cease, but doesn’t touch ones from before, and 2e obligs. ***Frustration* -> both 1e and 2e eliminated**.. to the extent that something is done under 1e oblig, has to stay that way (can be lob-sided). \*reluctance to use.

**Paradine v Jane**: *Development of Doctrine – older formal view*

 **Rule**: There is no law of frustration.. just because things didn’t pan out how they were supposed to doesn’t mean you can get out of your obligations. Process is about holding people to their bargains.

 -War made land unusable for their purpose, and want to get out of obligs.

 **Taylor v Caldwell**: *Development* – *Early frustration*

 **Rule**: Intention of the parties must be looked to in certain unforeseen circumstances…a frustrating event can effect the K such that the agreement the parties wanted to achieve cannot be achieved – they might not intend to continue in the circumstances.

 Facts: music call burning down.

 **Problem**: artificial view that there was an **implied term** in the K, not that the law itself frustrated the K -> the events couldn’t be foreseen, yet they are implied?

**Davis Contractors v Fareham UDC**: *Accepted Definition*

 **Rule**: not looking into the parties minds anymore, but “frustration occurs whenever the law recognizes that *without fault* of either party, a contractual obligation is *incapable* of being performed, because the circumstances of performance now would make the K “not what I promised to do” – the performance would become ***radically different*** (context disappeared).

 -**Problem in application**: “what constitutes *fault* of the parties?” – when can you say they haven’t forseen?

**Green book examples**: *eco concerns* almost never work, domestic political not common, **natural disasters** = usually (depends on circ), death or severe illness (if really personal), wars (sometimes).

* **Capital Quality Homes v Colwyn Const. Ltd.** and **Victoria Wood v Ondrey**: *Examples of application*

 **Rule**: “there can be no frustration if the supervening event results from the ***voluntary*** act of one of the parties, or if the **possibility** of such event arising during the term of the agreement was c**ontemplated** by the parties and provided for in the agreement”.

 **Facts**: same facts about certain suburbs having control legislation imposed upon them. They knew this was coming, but came much earlier than anticipated. Because of wording of one, the one with separate K’s is frustrated and the other is not. It is not possible to do what statute says in that one.

**Can. Gov’t Merchant Marine v Can. Trading Co**: *Example of ECO argument*

 **Rule**: same as above

 **Facts**: the labour strike was ‘*forseeable*’ and frustration was their fault – was not ‘profoundly’ unexpected (knowledge about the possibility of this problem).

 **Logical problem**: why should it matter that the one party is at fault? Non-mistake party may want to use it.

* **Maritime National Fish v Ocean Trawlers**:

**Rule**: emphasizes that frustration can’t be argued if it’s *one party’s* *fault*

**Facts**: K for hiring of boats.. based no expectation that they would be able to get licenses for all of them. Allocation was for 3/5.. and boat hired w/o license. It was their fault for allocating the way they did: you could’ve put a license on the boat hired.

FRUSTRATED CONTRACT ACT [RSBC 1996] CHAPTER 166

\***Purpose**: tries to give *restitutionary* measure to give benefit for work done. To the extent that there are loses, they are split. So you go through whether there first, there is frustration, then s4, if not, s5.

**Application of Act**

**1** (1) Subject to subsection (2), this Act applies to every contract

(a) from which the parties to it are discharged by reason of the **application of the doctrine of frustration**, or

-This will be determined on facts by the CL

(b) that is avoided under section 11 of the Sale of Goods Act.

(2) This Act does not apply to

 (a) a charter party or a contract for the carriage of goods by sea, except a time charter party or a charter party by demise,

(b) a contract of insurance, or

(c) contracts entered into before May 3, 1974.

**Application of this Act**

**2** This Act applies to a contract referred to in section 1 (1) only to the extent that, on the true construction of that contract, it contains no provision for the consequences of frustration or avoidance.

 -Applies when the K doesn’t have any *force majore* clause, specific risk allocation. (Can still be implied term of risk allocation).

**Government bound**

**3** The government and its agencies are bound by this Act.

**Act applicable to part of contract**

**4** If **a part** of any contract to which this Act applies is **wholly performed**

(a) before the parties are discharged, or

(b) except for the payment in respect of that part of the contract of sums that are or can be ascertained under the contract,

and that part may be **severed from the remainder of the contract**, that part must, for this Act, be **treated as a separate contract** that has not been frustrated or avoided, and this Act, excepting this section, is applicable only to the remainder of the contract.

 -Payment for a severable completed obligation will be untouched by F, and will be recoverable.

**Adjustment of rights and liabilities**

**5** (1) In this section, “**benefit**” means something done in the fulfillment of contractual obligations, whether or not the person for whose benefit it was done received the benefit.

 (2) Subject to section 6, every party to a contract to which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by the party’s performance or part performance of the contract.
 -**Core**: F only applies to parties inside of the K. ‘Benefits’ has to refer to parties’ performance/part.. some explanation needed that this loss was related to the K in some way.

 -If what is done is simply *monetary payment*, you just give it back.

(3) Every party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed before the frustration or avoidance but were not performed, **excep**t in so far as some other party to the contract has become entitled to **damages** for consequential loss as a result of the failure to fulfil those obligations.

 -You are relieved of every unperformed oblig you were required to fulfill before the F-event. However, **claim to damages survives**. (Preserves the claim you could’ve made for damages before F-event).

(4) **If the circumstances** giving rise to the frustration or avoidance **cause a total or partial loss** in **value of a benefit** to a party required to make restitution under subsection (2), that **loss must be apportioned equally** between the party required to make restitution and the party to whom the restitution is required to be made.

 -If house totally destroyed, assumption is that the value has totally disappeared to person supposed to receive the benefit, so loss split between parties.

**Exception**

**6** \*Insurance -> not responsible for.

**Calculation of restitution**

**7** (1) If restitution is claimed for the performance or part performance of an obligation under the contract, other than an obligation to pay money, in so far as the claim is based on expenditures incurred in performing the contract, the amount recoverable must include **only reasonable expenditures**.

(2) If performance under subsection (1) consisted of or included delivery of property that **could be and is returned** to the performer within a *reasonable time* after the frustration or avoidance, the amount of the claim must be **reduced by** the value of the property returned.

 -(Assuming damage not created): If a pile of materials is left with owner, worth 10k, it is **optional** for owner to decide to return it (if it makes financial sense). If the value is 2k when returned, only 8k can be claimed by builder.

**Calculation of restitution**

 **8** In determining the amount to which a party is entitled by way of restitution or apportionment under section 5, account must not be taken of

(a) loss of **profits**, or

(b) insurance money that becomes payable because of the circumstances that give rise to the frustration or avoidance,

 but account must be taken of any **benefits which remain** in the hands of the party claiming restitution.

 -(a) is supposed to rule out *pure profit*, but materials left with other party matter.

 -(b) e.g. if material initially created has value of 25k, but 5k at frustration, builder is able to claim 25k – 5k (figure drawn by someone). This process is **mandatory**, while 7(2) is **optional**.

**Damages**:

\*Clearly identify **what the obligation being broken** is on the exam -> damages *tie* to this.

**Fuller & Perdu**:

Three interests/reasons damages are awarded:

1. **Expectation Interest**: main point is to just get us where we *wanted to be* with the K – what our future was supposed to look like. Straightforward if you can find market price. E.g.: K price: 10$.. market price 25$, if not performed, damages = 15$).
2. **Reliance Interest**: deals with *costs & wasted expenditures* in preparing for the K, or something that was done (e.g. transferring property). If you can’t get it back in same state, compensation necessary. Looks like tort damages: restorative – something that *shouldn’t have happened* but did. Common use: where you cannot at all come up with a profit amount.
3. **Restitution Interest**: relates only to *what you have gained* by breaking the K (the other party hasn’t really “lost” anything). Popular in **employment K’s**, **trust obligations** (fiduciary). K’s where you’re not supposed to gain anything at all.

**McRae – illustration of reliance interst (2) – salvage operation**

 **-Rule**: when it’s impossible to tell what the *expectation damages* are, you can switch to *reliance interest*: easier to come up with costs of reling on K. Go through a variety of considerations.. e.g. buying equipment, wages lost, paying for licenses, fees, replacements, etc. (quantity + quality). HOWEVER, has to be considered whether something is really “lost”…(might not get all of the value for things you needed anyways).

**Hudson Bay Case**: **answers whether you can claim both (2) reliance + (1) expectation** **interest**

 -**Rule**: generally, you cannot get both reliance and expectation interest (here, loss of capital, and loss of profit), because that would mean you get paid for the performance of the K, and the expenses you would’ve had to shoulder. **However, this is not absolute**: as long as you can show that you are not in a better position because of getting both – depends on framing. **Up to plaintiff to decide** which damage, but can be taken away (happened here, because one was too ambiguous) – **when one method more certain, go with that**.

**AG v Blake**: **example of restitutionary interest** – spy case

 **Rule**: suggests that restitutionary interest can be awarded even where no fiduciary obligation broken, and no loss suffered by P, when there is a **legitimate interest** in preventing the person from profiting. D had to hand over all profits made from breaking an obligation he had in the past.

**Chaplin v Hicks**: **How to calc dmgs when chance involved – difficulty**

 **Rule**: although there may be chance involved, the judge/jury must do the **best it can**. You don’t simply get nothing and let wrongdoer off because hard to calculate. The amount may be a bit of *guesswork*.

 -she had about 1/5 chance of winning something, so awarded a corresponding damage claim.

* Groves v John Wunder
* Facts: K is to take gravel off land and property be restored to good state. They took off gravel but property left in bad state. Question: how much in damages?Difference in value of property OR difference in what you should have got and what you did get.
* **Decision**: it really depends on what K was designed for and how you frame obligation. Was K to do work per se or have property of particular value? Courts tend to require person claiming damages to show that they would use higher amount (difference in what they got and should have gotten) to actually fix damages; if this is established will likely get higher amount. In this case higher amount given

**Jarvis v Swans Tours**: **quantifying the unquantifiable – special + general dmg**

 **Rule**: **general damages** are ones that everyone would be awarded (about the difference in value btwn what you got and were supposed to), but **special** are ones **peculiar** to the P. The emotional distress suffered here is usually one of *special damages* – difficulty in quantifying it.

 -Has to fall under Hadley 2nd branch..

**Hadley v Baxendale**: **Test for remoteness – used for *compensatory* dmgs (really for the P to establish, but used a lot by the D’s)**

 **Rule**: when two parties make a K and one broke it, damages the other party ought to receive should be such as may be **fairly and reasonable considered**, either as arising **naturally** (general dmgs) from the breach of K, **or** such as may **reasonably** be supposed to be **in the contemplation** of both parties.

 -Pass facts through this (inclusive OR) – if not sat, no dmgs.

 -**1st Branch**: assuming breach, anyone would have sustained the particular loss. (GENERAL)

 -**2nd Branch**: usually loss of profit. You just have to be able to recognize the **probable result of the breach** (not necessarily reflected on it). \*Better view on comparison to tort (remoteness): the quantum is easier in tort, but the right is harder, whereas the right is easy in K, but quantum is harder. K test = **probable** not forseeable. If it is a **special damage** (particular plans), you have to show the person **KNEW** at time of K creation that the circumstances existed.

 -> crankshaft: couldn’t have foreseen the loss of profit

**Victoria Laundry + Koufos**:

 **Rule**: these cases show the variety of views.. what level of knowledge, etc. parsing aspects of the test (e.g. “reasonably”). **Vic Laundry:** Knowledge can be both **actual and imputed** (result: reasonably forsaw the loss of profits would be forseeable, given knowledge they **should have known** (engineering company).. but special K with other party was not reasonable – could not not know). **Koufos**: Sets probability requirement ambiguously (“on the cards”) – use the ambiguity. \*Sugar delivery: found that late delivery of sugar, leading to damages (price drop because already sugar in market), on info known, losses were **sufficiently probable** -> foreseeability.

**Asamera Oil**: **Duty to mitigate** + **when to**

 -**Rule**: duty to act *reasonably in the circumstances.* Poverty is not a defense (to get a substitute), if financial situation KNOWN by other side, may be relevant. Less likely to be raised in commercial situations. Even if you have equitable claims to performance, you may be excepted to bring a damages claim earlier. In this case, waited a long time with the stocks. (A factor: I don’t take action till later and realize you’re not as wealthy as you might have been).

# Date of breach damages calculation

When do you calculate damages? The presumption is at the date of breach. This isn’t the very moment of breach, there is reasonableness taken into account.

Damages can be awarded at time of judgment when talking about equitable damages.

Semelhago v Paramadevan

**Facts**: case involved sale of land where land was not transferred. Court said while sale of land doesn’t always entitle you to SP, in it would if house wasn’t sold to innocent third party.

**Decision**: court grants damages at time of decision, not breach because they are equitable damages. You don’t have right to equitable damages until court gives it to you. Therefore, damages awarded at decision date even though house price goes up.

# Liquidated damages, penalties, deposits

Can agree ahead of time what damages will be through two mechanisms

1. Write it in as primary obligations and not secondary, that way there is freedom of k. (Just be careful not to make it sound like penalty clause)

2. Exclusion and limitation clause: these are more likely to be hold up than LD. This may be unfair because why does thing meant to protect the def hold up, and not thing meant to protect the pl.

3. Liquidated damages: damages are quantified at a particular amount if you break K. This is supposed to make damages predictable: no remoteness, mitigation involved. LD are a debt claim: claim for a certain amount of money. LD can be part of damages claim or all of damages claim: presumption is that they exhaust damages (all claim) unless otherwise clearly stated.

* But this doesn’t really work a lot because courts can construe it as penalty.

Stahilla v Feinsten

**Facts:** K not to sell particular products. K Said in breach, party would be paid 10,000 for every breach, no matter how serious. This was way too much money.

**Decision**: this was a penalty clause because it provided too much compensation. No freedom of K for liquidated damages. **LD must be genuine pre-estimate of damages, lump sum presumed to not be good estimate because it doesn’t take into account severity of breach**

HF Clarke v Thermidaire

**Facts:** breach of covenant against competition clause. It said the party would get all profits if breach occurred. This was too high.

**Decision**: if parties intend to be bound by LD, must be fair and reasonable. If formula is used, it must be clear. In this case, the time requirements of profits should have been reduced from forever to only within reasonable time.

When liquidated damages is turned into penalty clause, the def party can still choose to pay the penalty clause if they want. It is equitable remedy: they have choice of complying.

JG Collins v Elsley

**Facts:** like restraint of trade in Chaffron. Sold business to someone else and became employee and in E K, he promised not to compete in Niagra area. He did, so he would have to pay 1000. (No illegality found here). JG Collins is arguing that this is penalty clause and this 1000 is too low.

**Decision**: the person who is receiving money to be paid my damages cannot claim it is penalty clause. Have to be the person paying (right person) to argue penalty clause.

* Insurance company could have argued this was limitation clause. **Just because something is dressed up as penalty clause doesn’t mean it can’t be limitation clause. However, it is easier for limitation clause to survive.**

**DEPOSITS**

These are mix of primary and secondary obligations. Primary: payment made to pay whole price of K. Law assumes in the event of breach the person who received the deposit will get to keep it (secondary obligation)

Advantage of deposit: don’t have to go to court to get it, already have it. Even though it is not all of damages, at least have some. (It is not presumed to exhaust damages, unlike LD)

Is it subject to same restrictions as LD, w.r.t reasonableness/penalty provision?

Stockloser v Johnson

**Facts:** 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 near the end of the K and then sued to recover previous payments, saying the clause was a penalty. Decision for D: deposit wasn’t too high and it was not unconscionable for D to keep it

**Ratio:** Denning says no. This is not a penalty. D just seeks to keep the money which already belongs to him.

1. If deposit is handed as part of payment, then as long as K remains open and pl can finish payments, then pl cannot get money back.

2. If K is rescinded as a result of buyer’s default of payment, buyer is entitled to get his payments back subject to damages claim (damages may require buyer to pay seller them back)

**If there is forfeiture clause, buyer may have equitable remedy where equity can order seller to repay deposit if forfeiture clause is too high (penal clause) and it would be seen as unconscionable.**

**Law and Equity Act Section 24**

**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.

* Even though deposit is made as part of primary obligations, it allows court to intervene if it is too high. Very rare event of court effecting primary obligations.

# EQUITABLE DAMAGES

Equity is concerned with getting you what you ought to have had in the first place. The other equitable remedies we have seen (unenforceability, rescission, penalty just REMOVE obligations) these ED actually add obligations.

These are entirely discretionary and only be provided once you have shown that CL cannot provide adequate remedy.

If these cannot be provided, equity will order money payments: ***Selmenhago and Kupchak***

There are a number of factors that will help decide if SP can be granted:

1. Equity looks at CL context: if CL has terminated or voided K, equity cannot do anything.

2. Equity will look and see if CL damages are sufficient. They will not be adequate if: CL damages are too complicated to be assessed OR subject matter of K is unique and money cannot replace it. (Also maybe argue that damages can be adequate but your circumstances are SO SPEICIAL that it is not adequate). Historically land was said to be unique. But that may be changing now?

* But then the Semelhago and John Dodge cases say that land may not always be unique, but give SP anyways. Is this courts saying something but not following through?

John Dodge v Ontario

**Facts:** P agreed to buy land from D, D didn’t complete sale and P sued for SP.

Decision: property is unique if the property has a quality that cannot be readily duplicated elsewhere. This quality should relate to **the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended.** (AND DOES not have to be literally one of a kind) **THIS IS TEST FOR UNIQUENESS OF PROPERTY**

You are only obliged to mitigate damage by seeking alternatives if you are not entitled to specific performance.

3. Equity only helps when pl comes with clean hands. Misrepresentation or something else untoward can get you out of E (doesn’t have to be fraud)

4. Pl cannot be guilty of laches. However, this is fairly relaxed test. *Kupchak example:* one year time delay was not enough

5. Equity will not order SP if this causes too much hardship on def. This is usually related to laches and will be rare. It also usually not order SP if it hurts innocent third party.

Kupchak Case

Couldn’t get house back after it was sold. But court remedied this by providing equitable damages.

6. Equity will not order SP when there is complex set of obligations ,the K extends over long period of time, or there is labor involved. Equity is lazy: only really does straight forward obligations like land transfer.

Injunction and SP are the same thing. Factually speaking, you should not be able to get more from one than the other (but this did happen)

Warner Bros v Nelson

**Facts**: injunction asking the court to prohibit N from breaking K. She had promised not to work for any other studio, if studios had sought SP she would have been ordered to work for WB and this was not allowed because court won’t order labor SP. But they framed it as injunction.

Decision: court granted injunction even though it really did make her work for WB. Court got around this by saying they were not forcing her to work, she could work in another industry.