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# Is there a valid K?

For a K to be created you need: (1) offer and acceptance (2) certainty of terms (3) intention to create legal relations.

# A. What are offer and acceptance?

## Offer

Sets the terms of the K. In a **bilateral** K the offer determines obligations of both parties. In a **unilateral** K offer is usually made by person who will have obligations. Only person to whom offer is made can accept it.

### (a) Is the communication offer or invitation to treat?

**Invitation to treat** is statement of readiness to negotiate – can be source of terms that make it into offer and/or representations/assumptions about K. To distinguish offer from invitation to treat: are all details of K in the communication? Would treating the communication as offer lead to absurdity?

**Puffery**: claims that no reasonable person would believe or expect to hold another to.

* There must be offer and acceptance for K to exist. Price quotation is usually an invitation to treat. Look at **intentions** – language and conduct - of parties to determine whether there was offer and acceptance (*Canadian Dyers*)
* Display of price is only invitation to treat. Offer = customer placing item on counter. Acceptance by owner/cashier, as agent. Owner has final say – power to refuse (*Pharmaceutical Society*)
* Ads are generally invitation to treat unless language is clear and ordinary person would construe as offer (*Carlill*)

#### Canadian Dyers Assn. Ltd. v. Burton (1920) (18)

F: Letters exchanged between P and D re: D selling house to P. D offers to sell house. P asks for lowr price. D replies “lowest prepared to accept”. P accepts, send cheque, D keeps cheque and sends draft of deed and date of closure. D later returns cheque and claims no K. D claims no offer, and therefore no K when cheque was sent.

I: Is there a K?

A: Quotation of price is not an offer. Depends on language and circumstances. Consider communication between parties and implied intentions. Letter from D was more than quotation of price – was statement of price at which D was willing to sell – this is an offer. D acted as if there was a K – wrote draft deed, did title search, suggested closing date.

C: In favour of P. D’s words and actions were offer.

D: Focus is on how judges interpret intention, rather than actual intention of parties. Is communication of intention more important than actual intention? Intention of offeror or offeree?

#### Pharmaceutical Society v. Boots (1893) (20)

F: D had self-service pharmacy. Pharmacist supervised sale of drugs and was stationed near poisons section. Is purchase complete when customer places item in basket? Is customer accepting offer when they pick an item off shelf, or making offer when they bring it to cashier? Were sales effected by/under supervision of registered pharmacist in accordance w/ *Pharmacy and Poisons Act*?

I: What is offer and acceptance?

A: Display of goods on shelves is found to be invitation to treat. Lots of different actions in this situation could be offer. Putting items in basket is not accepting offer. Analogy to a bookseller; the customer is still browsing while putting items in their basket and there has been no acceptance until completed at the checkout. As a result a shopkeeper's display cannot be offer and must be an invitation to treat. The logical conclusion of P’s argument would be that once a customer put an item in their basket they would be committed to the purchase and would not be able to change their mind.

C: Purchases affected under supervision of registered pharmacist. No breach of regs – appeal dismissed.

D: Discussion centers on fact that parties are consenting to K. But when you’re shopping you’re not thinking of offer/acceptance. This ratio can lead to negative consequences in other circumstances e.g. *R v. Dawood* – D brings up 2 clothing items on same hanger (therefore lower price) – making offer which cashier accepts.

#### Carlill v. Carbolic Smoke Ball Co. (1893) (25)

F: Ds sold smoke ball – posted ad stating they would pay 100l to anyone who contracted cold after using smoke ball according to instructions. P used smoke ball as directed and got sick. Ds say they don’t have to pay.

I: Did D’s ad constitute offer that can be accepted?

A: Ad is offer made to public. Judge considers how public would have read ad – not vague (protection lasts during time ball being used), Ds said they had deposited 100l in bank (not mere puff). Ds benefit from proclamation so it doesn’t matter that they can’t check whether people fulfill requirements. Ad is offer made to entire world. If it is offer, then K forms when person fulfills condition. Notification of acceptance does not have to precede performance. To accept person must buy smoke ball, use as directed, get flu and make claim. D subsequently posted ad in newspaper revoking offer. You can have K w/ somebody w/o knowing that they accepted. Extravagance of promises is no reason in law why he should not be bound by them.

C: There was K.

### (b) How must the offer be communicated in order to accept?

* Knowledge of the offer and intent to accept may be required in order to accept. (*Williams)*
* Knowledge of offer must be present when conditions of offer are performed (in acceptance by conduct) – having forgotten offer = no knowledge (*Clarke*)
* Both *Williams* and *Clarke* are unclear on whether motive is required.

#### Williams v. Carwardine (1833) (50)

F: P witnessed murder of D’s brother. P did not initially provide info about murder. D stated he would give 20l to anyone who provided info about murder which led to conviction – put up posters all over town. P beaten by murder suspect, following this she thought she was going to die and voluntarily provided info about murder. D says no K because P not motivated by reward.

I: If performance of conditions is required to accept, and conditions are performed w/o intention to accept (but w/ knowledge of offer), is there acceptance?

A: **No clear statement on whether motive matters.** Judge says P must have known of offer because posters were up everywhere. Unclear whether knowledge is relevant.

C: In favour of P. There was K.

#### R. v. Clarke (1927) (51)

F: Crown offered reward for giving info leading to conviction of people who committed 2 murders. D provided info (after 1 of the 2 murderers had already been arrested) which led to conviction of person responsible for 1 of the murders. D was not thinking of reward when he provided info – he had previously been aware of the offer, but forgot.

I: Is there a K?

A: No consensus of mind – P did not assent. *Williams* said mutual consent to terms and communication of assent by offeree not necessary – knowledge of offer not necessary (NB: **possible misinterpretation of *Williams*?**). Interprets *Williams* to say that motive is not necessary (*Williams* didn’t actually say this). Re: *Carlill* – D did not act on faith of, in reliance upon, proclamation – did not have motive to accept. D did not have knowledge of offer because forgetting = no knowledge. Reward specified info must lead to arrest of all murderers.

C: D cannot accept offer that he was unaware of.

D: Is this good authority when it misinterprets *Williams*?

## 2. Termination of Offer

Only offeror can create offer, but either party can terminate it. If offeror terminates – **revocation**. If offeree terminates – **rejection**. Revocation and rejection can be communicated expressly or impliedly. In an **option K** the offeree is given a right which operates as a continuing offer in exchange for consideration.

### (a) What is required for revocation?

* There is **no requirement for a meeting of the minds** in order for a K to be formed. A revocation has to be communicated in order to be effective. Postal rule does not apply to revocation (*Byrne*)
* If an offeree learns that the offer has been accepted by someone else, it is too late for him to accept the offer. Offeror may revoke an offer at any time (unless there is consideration) regardless of how long they have said they will hold it open. Offer can be revoked by indirect communication. (*Dickinson*)

#### Byrne v. Van Tienhoven (1880) (100)

F: Ds mailed offer to sell on Oct 1st which was received on Oct 11th. Ps accepted by telegram on 11th and confirmed by mail on 15th. Ds mailed revocation on 8th that was received on 20th.

I: Does revocation have to be communicated to have effect? Does postal rule apply to revocation?

A: There is no time at which both parties wanted a K. If postal rule applied to revocation, offerees would have to wait to make sure a withdrawal had not been sent before accepting, etc. Revocation became effective on Oct. 20th when it was received – putting it in mail does not make it automatically effective.

C: Uncommunicated revocation is not operative. K entered into on Oct. 11th when Ps accepted by telegram.

#### Dickinson v. Dodds (1876) (97)

F: D made offer to P w/ time limit of 2 days. On day 1, P was told by B that D had sold property to someone else. P tried to accept offer on day 1 by communicating acceptance to D’s mother-in-law – she did not communicate acceptance to D. On day 2 P sent B to accept on behalf of P, B was told by D that property and been sold. On day 2 P then tried to accept in person w/ D.

I: Was offer revoked before P accepted?

A: D did not have to hold offer open for 2 days. Offer was revoked when it was communicated to P that property had been sold to someone else.

C: No binding K.

### (b) When can an offer be revoked in a unilateral K?

In a unilateral K, at the moment of acceptance only one party has obligations.

* Generally a party can revoke the offer prior to completion in a unilateral K, but sometimes not once performance has begun (*Carlill*)
* A unilateral K is binding once performance of conditions begins depending on the circumstances – unilateral Ks are not revocable upon commencement **if the offeror is aware** that performance has started (*Errington*)

#### Carlill v. Carbolic Smoke Ball Co. (1893) (25)

F: See above.

I: Can D revoke offer when P has started/completed conditions necessary to accept?

A: D revoked offer in newspaper – possible that many other people had started completing actions necessary to accept.

#### Errington v. Errington and Woods (1952) (102)

F: F made down payment on house for son and daughter-in-law. F says house will be their property once mortgage is made off by them. F’s promise is unilateral K – promise of house in return for act of paying mortgage. F’s estate wants to revoke offer.

I: Can F’s estate revoke offer?

A: Offer cannot be revoked even though it is a unilateral K. Estate of F cannot revoke offer while other party has begun completion of conditions and estate knows they have begun. But no obligation for son and D-in-law to continue to make payments – not yet an enforceable K, just an offer. Estate can inherit offer because there is no requirement for F to be alive. Offeror could revoke if offeree stopped performance.

C: Cannot revoke offer.

D: Contradicts *Dickinson v. Dodds* re: revocation. This could have been characterized as bilateral K. Court is basically using estoppel.

### (c) Is a counter-offer a rejection?

Offeree’s ability to reject is constrained more than offeror’s ability to revoke. Offeree must make an election – decide whether to accept or reject. Refusing to make an election will = rejection.

* Counter-offer is rejection of original offer – mere inquiry is not rejection. Once rejected, only offeror can revive original offer (*Livingstone*)

#### Livingstone v. Evans (1925) (54)

F: D wrotes offer to sell land for price A. P replies asking for lower price and saying he would pay price B. D replies “cannot reduce price” and P writes accepting offer.

I: Did P reject offer? Is there still an offer?

A: “Cannot reduce price” was renewing of offer after P’s rejection because it showed D was still standing by price and therefore it was open to P to accept.

C: There was a binding K.

### (d) When is a lapse of time rejection?

* Offeree must respond in a reasonable time according to circumstances of business. Look at: nature and character of negotiations, normal or usual course of business, circumstances of offer including conduct of parties (*Barrick*)

#### Barrick v. Clark (1951) (103)

F: D offered to buy land on Oct 30. P replied on Nov 15 w/ different price. D was away and didn’t reply until Dec 10 (but D’s wife had written to ask that offer stay open until Nov 25). In meantime, P accepted offer from H on Dec 3.

I: Is there a K between P and D?

A: SKCA found that offer had not elapsed – therefore K between P and D. SCC found that reasonable amount of time had passed and offer had elapsed. In P’s original offer it had stated that transaction would be immediately closed. D had been asked to give answer ASAP. Sale said to be concluded by Jan 1st – there would not be enough time between Dec 10 and Jan 1 to arrange everything. D’s silence caused K to lapse, even though P had not specified date of expiration. Lapse of time usually from offeree’s perspective if not set out in offer – period of time in which it is reasonable for offeree to respond.

C: Offer had lapsed.

D: Unclear whether conclusion is based on actions of offeror or offeree.

## 3. Acceptance

K comes into existence at time of acceptance – consideration, certainty of terms and intention to create legal relations must all exist at time of acceptance. Time of acceptance also relevant for damages.

### (a) Can the offeree add to the terms in their acceptance?

* Counter-offer kills original offer – adding something may be construed as a counter-offer. Inquiry about offer does not kill it. Acceptance must be an unqualified ‘yes’. (*Livingstone*)
* In a battle of the forms generally the last shot wins. Objective look at docs as a whole should determine whose terms prevail. (*Butler*)

#### Livingstone v. Evans (1925) (54)

F: See above.

I: Did P accept offer?

A: You cannot add to offer – has to be yes or no. A qualified ‘yes’ may be no answer at all. In certain situations an offer may require you to make precise what is deliberately imprecise in the offer – in this case acceptance can be more than ‘yes’.

#### Butler Machine Tool v. Ex-cell-o Corp. (1979) (56)

F: S quoted price to B which included terms and conditions. B placed order including tear-off slip listing different terms and conditions. S completed and returned slip to B. B said that their order prevailed – fixed price K. S said price variation clause in their offer was a term intended to prevail.

I: Whose terms and conditions apply?

A: Denning says there is a K – and then comes up w/ theory to justify. Traditional method would see original quotation as offer by S, then B’s order was a counter-offer which kills the original offer, following letter from S would be acceptance of counter-offer. Other method would look at all docs and consider whether an agreement was reached on essential elements. Obiter: usually in battle of forms there is K when last form is sent and received w/o objection, but this can depend on circumstances. Original quotation from S contained “These terms and conditions shall prevail over any terms and conditions in that Buyer’s order.” In some cases terms depend on shots fired on both sides – have to be construed together. If terms from both sides are irreconcilable, then they have to be replaced by reasonable implication.

C: S returning slip = acceptance – K on B’s terms.

D: **This is bad law – not authoritative. Use to criticize law. The offer must come from one party only.**

### (b) How must acceptance be communicated?

* Acceptance cannot be assumed if there is no notification of acceptance, or implied acceptance through action present. You **cannot impose obligations** on an unwilling party – you cannot impose a K on someone by saying that they accept by doing nothing. Acceptance cannot be silence. (*Felthouse*)
  + Offeror can waive right to notice of acceptance. Performance of terms can constitute acceptance. Silence can constitute notice of acceptance if offeror makes it clear that performance is acceptance and that notice is not required (*Carlill*)
* In cases of instantaneous communication, K is only complete **when acceptance is received** by offeror and K is made at place where acceptance is received. No universal rule of acceptance in cases of instantaneous communication – must be decided based on intentions of parties and circumstances (*Brinkibon*)
* **Postal rule:** K becomes binding the instant that acceptance is put in mail, so long as parties have contemplated the mail as a viable means of communication in their dealings (*Household Fire*)
  + Postal rule does not apply in situations where a **notification** of acceptance has been specified (*Holwell*)
  + Doesn’t apply: (1) Marriage proposals; (2) Land; (3) Where post is not method regularly used by parties

#### Felthouse v. Bindley (1862) (72)

F: P discussing buying horse from nephew. P wrote to nephew setting out new price, and saying if he didn’t hear anything he would consider offer to be accepted. Nephew didn’t send reply. Horse accidentally sold to someone else by D, nephew’s auctioneer. P sues D for tort of conversion. D says horse was not P’s property.

I: Can silence constitute acceptance? Can a K/acceptance be declared retrospectively? Was there K between P and nephew?

A: Nothing had been done at the time of the auction to imply that the property had changed hands to the P, and the nephew had given no acceptance. Therefore, w/ no acceptance or implied acceptance through actions the property remained that of the nephew at the time of the auction, and P has no case against D for selling goods that were not owned by the nephew. If the nephew wanted to enter into the K he must have given clear indication of his acceptance, which he had failed to do.

C: No K between P and nephew.

D: Nephew clearly intended to sell horse to P.

#### Carlill v. Carbolic Smoke Ball Co. (1893) (25)

F: See above.

A: P did not make verbal acceptance – but actions constituted acceptance. Communication of acceptance can be waived.

#### Brinkibon v. Stahag Stahl (1982) (88)

F: P, in London, telexed acceptance of offer to purchase steel from D, in Vienna. P wants to sue D for breach of K under UK jurisdiction. D says they are not under UK jurisdiction. K may have been formed by telex from P in London to D in Vienna communicating acceptance or telex from D in Vienna followed by action on their part as acceptance. LC found K created in Austria – K made where acceptance received.

I: Where was the K created? What rule of acceptance should apply to telex communications?

A: Acceptance delivered to offeror in Austria so Austria has jurisdiction. Cases around acceptance by instantaneous communication must be resolved w/ reference to intention of parties and circumstances.

C: K formed in Vienna where acceptance was received.

D: You can stipulate in an offer whose law will apply.

#### Household Fire v. Grant (1879) (81)

F: D had negotiated to buy shares from P. D’s application was accepted and name added to list of registered shareholders. D never received letter informing him, and never paid for shares. Earnings from dividends credited to D’s account. P went into liquidation and liquidator applied for $ from D. D says he is not shareholder because he had not received notification in mail. TJ said D was shareholder because he had said P could notify him of shares by mail.

I: When do acceptances become binding when they are sent by mail?

A: **Post office should be treated as agent of both parties**. K made when letter of acceptance delivered to post office. Offeror can always choose to make acceptance binding only upon receipt of notification that offer has been accepted – but this would reduce efficiency in business world. Postal rule applies when mail is medium of communication contemplated by parties. Dissent: postal rule would hinder transactions. Notice of acceptance must reach party who made offer before it is binding.

C: Appeal dismissed. D is shareholder.

#### Holwell Securities v. Hughes (1974) (85)

F: D granted P 6 month option to purchase property and stated option had to be exercised by ‘notice in writing’. Before 6 months had passed, P’s lawyer wrote to D’s lawyer stating client was exercising option and included cheque for deposit. P’s lawyer sent copy of letter to D by mail which was not delivered. D refused to sell property and P sued for breach.

I: Does postal rule apply?

A: If postal rule applies then there is a K. But use of words **‘notice in writing’** meant that D required actual notice of acceptance. Postal rule does not apply when terms point to necessity of actual communication. Acceptance must arrive and be seen by offeror, does not have to be read or understood. Ps did not give notice of acceptance to D. Postal rule doesn’t apply in marriage Ks or in land Ks.

C: No K.

# B. What is required for certainty of terms?

### Forms of Uncertainty

1. **Absence of an essential term.** Importance depends on context. P or Q of goods in K of sale. Implication of terms by operation of law or by statute (*Sale of Goods Act*). Implication by custom, usage or rest of K. Missing terms may indicate K to make a K.

* A term yet to be determined means that there is **no K if it is an essential term** – simply an agreement to agree and not enforceable. Court cannot read terms into incomplete K (*May & Butcher*)

2. **Ambiguous terms**. Statute may sometimes be of assistance through definitions etc. Court may interpret the K (*May & Butcher; Hillas*). Goal is to find objective intention of parties. Unrealistic results should be avoided. More reasonable of possible meanings should be chosen. K will be interpreted against party who uses a particular phrase/term. Don’t interpret when words have clear meaning. “Subject to’ clauses are condition precedents – may not affect whole K.

* K to negotiate is enforceable. **Courts should intervene** to determine terms of an agreement through context and intentions of parties. K to enter into an enforceable K is simply that enforceable K. Look at **custom and usage.** (*Hillas*)
* **Ks will be upheld whenever possible.** Ks will not be avoided simply due to ambiguity in price. Look to intention – strong presumption in business Ks that courts will fill in details (*Foley*)

3. **Meaningless or irrelevant terms**. Court will attempt to sever. Historically agreements to negotiate in good faith and use best efforts had no meaning.

* Agreements to agree cannot be enforced. Court will try when possible to give proper legal effect to any clause that parties understood and intended to have legal effect. Agreement to renew has 2 contractual obligations: (1) to negotiate in good faith and (2) to not withhold agreement unreasonably (*Empress*)
* No CL obligation to negotiate in good faith – must be in K expressly or impliedly. Renewal clauses will be void for uncertainty. Duty to negotiate is not workable w/o benchmark. A court will not imply a term into K because they think it would be reasonable/likely to be more satisfactory. (*Mannpar*)

#### May & Butcher v. R. (1934) (119)

F: P wanted to buy surplus tentage from DB. DB defined terms of agreement: DB agrees to sell all old tents; P and dates of payment shall be agreed on by parties as tents become available; delivery taken as agreed by parties; disputes submitted to arbitration. P may deposit as security. In Jan 1922 referred to verbal negotiations for extension of agreement and confirmed sale up to March 1923. Control of DB changed and DB refused to deliver to P or allow them to inspect goods. P insisted, DB didn’t consider to be bound by K, P sued for breach.

I: Were terms of K sufficiently defined for there to be a K?

A: *Sale of Goods Act* says P will be reasonable price when not determined in K – only applies when K is totally silent on P. If there was a K, parties should go to arbitration – but no agreement. Deposit was to ensure performance under K – does not give right to P to enter into further agreement.

C: K void due to uncertainty of terms.

#### Hillas v. Arcos (HL) (1932) (122)

F: P buying timber from D. Agreement that P could purchase x timber from D under condition that they have option of entering into K w/ D to purchase y timber the following year w/ reduction in price. D refused to sell y timber the next year. Quality/Q of timber, P and shipping/delivery dates all missing from K.

I: Was term negotiating future sale a condition of K? Can you make a K to enter into another K?

A: P and D intended to make K and thought they had. Court should interpret docs fairly and broadly, w/o being too astute/subtle in finding defects. Shipment dates could be implied by *Sale of Goods Act*. Quality could be implied by looking at past delivery – no problem w/ this uncertainty previously. Ps taken from price list.

C: Binding K existed to sell y timber.

D: K is more uncertain than in *May & Butcher* but the court saves it.

#### Foley v. Classique Coaches Ltd. (1934) (126)

F: D purchased land from Ps. Sale made subject to Ds entering into supplemental agreement to purchase petrol from Ps “at price to be agreed by parties in writing and from time to time.” After 3 years, D tried to renounce agreement. P sought injunction to prevent D from buying petrol elsewhere.

I: Was supplemental agreement binding?

A: Parties believed they had K and acted for 3 years as if they had. Had arbitration clause relating to subject matter of agreement to supply of petrol. Affirms *Hillas*.

C: In favour of Ps – there was K.

#### Empress v. Bank of Nova Scotia (1991) (131)

F: D leased property from P in 1972, expired in 1984. In 1984 parties entered into new lease – clause said D could renew for 2 successive periods of 5 years each provided it gave 3 months written notice and rent would be market rate as mutually agreed. In 1989 D exercised option to renew for 5 years. D proposed rate of x but received no reply from P. P replied saying D could stay if they paid z (an employee of P had been robbed of y at D and was missing z from insurance) and rent of x afterwards and tenancy could be terminable on 90 days notice. P tried to evict D.

I: Was clause void because of uncertainty or agreement to agree? If not void, what does it mean?

A: If parties say they will enter into lease at rental to be agreed upon, no enforceable lease obligation. But there may be obligation to negotiate. Interprets clause to mean: (1) P not compelled to enter into market rental value; (2) implied term that P negotiate in good faith and (3) agreement on market rate would not be unreasonably withheld – same degree of diligence as ‘best efforts’**. Terms applied because they’re reasonable and for business efficiency.** P did not negotiate in good faith. **Duty to negotiate as shield – YES.**

C: In favour of D – D not evicted. Agreement to negotiate, not agreement to agree.

#### Mannpar Enterprises v. Canada (1999) (134)

F: K to extract sand and gravel from Indian Reserve. Permit effective for 5 years. P required to pay rental on working area and royalty on materials removed. Permit provided for right to renew for further 5 years “subject to satisfactory performance and renegotiation of royalty rate and annual surface rental.” P and D expected operation to extend over 10 year term. P gave notice of intention to renew for 5 more years. But Band Council became dissatisfied w/ arrangement and D has fiduciary duty to Band. D did not renew permit. P claimed damages. TJ said renewal clause void for uncertainty.

I: Is renewal clause valid? Is there implied term requiring D to negotiate for renewal/negotiate in good faith for renewal?

A: Parties only anticipated 10 year term. Term can only be implied if both parties would agree to term being implied. Term can be implied if court finds it necessary for business efficacy. D wished to have ability to refuse to renew permit due to duties to Band. Significant that no arbitration clause in agreement. Different from *Empress* because no market rate specified – no benchmark. **Duty to negotiate as sword – NO.**

C: No enforceable agreement out of renewal clause. In favour of D.

D: In *Empress* courts allowed a good faith argument as it was a defence, but in *Mannpar* it was rejected as it was used in an offensive capacity.

# C. When is there intention to create legal relations?

To be binding as a K agreement must have intention to create legal relations. Usually assumed there is intention in commercial contexts. For social and domestic contests – circumstances in which agreement/promise made is relevant – when parties are separated, more likely that there is intention to create legal relations.

* Arrangements made between husbands and wives are not generally Ks as the parties do not intend to be legally bound by the agreements (*Balfour*)
* Generally assumed that parties in business relationships intend to be bound. If parties expressly state in agreement that they do not wish to be bound, courts must respect their actual intentions (*Rose and Frank*)

#### Balfour v. Balfour (1919) (243)

F: P and wife D went to UK for vacation, D became ill and needed medical attention. Agreement that D would stay in UK when P returned home and P would pay monthly stipend to D until she returned – relationship was amiable – D expected P to return to UK in few months. Relationship soured. LC found sufficient consideration in consent of D so K is binding. P appealed.

I: Was P’s offer intended to be legally binding?

A: Law of Ks not made for personal family relationships. Agreements between spouses do not result in Ks even if there is consideration. No intent to be legally bound when agreement was formed, so no K. Floodgates argument. Onus on D to establish that there was K – not successful.

C: No K.

#### Rose and Frank v. JR Crompton Bros. (1923) (246)

F: P were exclusive American distributor for D’s product. Agreement w/ clause stating that arrangement not intended to be formal legal agreement and would not be subject to legal jurisdiction in US or UK. D cancelled K and P sued for breach.

I: Is the clause stating no legal relations valid?

A: Intention of parties is what matters. Parties did not intend to be bound, so no K. Dissent: doc did not form legally binding K, but orders and responses between parties in process of business constitutes enforceable Ks of sale.

C: No K.

D: Usually whether parties believed there to be K is irrelevant – **may not be good law today**.

# What controls whether a promise is enforceable?

Three devices control which promises are enforceable: seals, consideration and estoppel. Seal in formal Ks, consideration in informal Ks.

# A. Making Promises Bind – Seals and Consideration

## 1. What nature must seals and consideration have to make a promise bind?

Can be detriment to promisee w/o being benefit to anybody. Must move from promisee but if it’s a benefit it doesn’t have to move to promisor. Must be given at time of promise for which it is the price – **must be in existence at time of acceptance**. Must be an actual action, not promise of a future action. In **unilateral Ks**, consideration given by promisee in exchange for promise is action completed at moment K comes into existence. Assessed on promise-by-promise basis.

**Consideration must be distinguished from**:

1. **Motive**

2. **Failure of consideration**. Term used to describe certain types of breaches.

3. **Condition**. Can be condition precedent or condition subsequent.

4. **Adequacy**. Law should not judge value of consideration.

* **Formal seal** can make guarantee binding w/o consideration. Pre-printed seal on doc by promisee is not sufficient consideration of promise. Promisor must affix seal. Promisor must be aware that what they are doing makes the agreement legally binding (*Royal Bank*)
* Consideration must have **value in the eyes of the law**. Motive is not sufficient consideration. Consideration must be something that is not already expected. (*Thomas*)

#### Royal Bank v. Kiska (1967) (252)

F: P brought action on guarantee signed by D. D used no wafer seal but “seal” was printed on doc.

I: Does word “seal” on doc suffice as to requirement for sealing a K?

A: Dissent: No consideration. Any representation of seal by promisor will suffice. Words “Given under seal” and “Signed, Sealed and Delivered” do not suffice. Promisor has to put seal on promise and understand why they’re doing it. Promisee can’t place seal.

C: No K.

#### Thomas v. Thomas (1842) (169)

F: JT orally expressed desire for wife ET to have house used as residence and its contents or 100l in addition to other provisions made for her in will. After JT’s death, executors entered into agreement w/ ET “in consideration of John’s desires.” ET would take possession of house and in return maintain house and pay 1l/year for “ground rent.” After some time, executors tried to evict ET claiming lack of consideration. LC found in favour of ET.

I: Was there sufficient consideration?

A: Motive =/ consideration. Agreement to pay 1l/year to estate rather than to landlord (which would be incidental) and promise to maintain property constitute sufficient consideration. If ET had promised to pay landlord, that would not have been consideration and house would have been seen as gift.

C: ET gets to stay in house – there was consideration.

## 2. Can forbearance be adequate consideration?

Where the promisee offers by way of consideration a forbearance to do something where they have no business doing that thing in the first place the consideration has no value.

* **If party believes he has a fair chance of success**, a reasonable ground for suing, then forbearance to sue will constitute good consideration regardless of whether the legal claim has merit (*Callisher*)

#### Callisher v. Bischoffsheim (1870) (171)

F: P alleges $ owed to him from Gov’t of Honduras and others and threatened to sue. D promised to deliver $ to P in consideration that P would forbear from taking proceedings for an agreed time. P did not take proceedings as agreed, but D did not deliver $ as promised.

I: Is the promise enforceable?

A: Forbearance to sue is good consideration. When a person forbears to sue he gives up what he believes to be a right of action and the other party gets an advantage.

C: In favour of P.

## 3. Is past consideration good consideration?

* Promises alone are not sufficient to found a K. Consideration made in the past is no consideration at all. (*Eastwood*)
* **Emergency doctrine:** When there’s a request w/ the implication of payment the court will link the subsequent promise to pay to the previous request – one can recover on the promise. (*Lampleigh*)

#### Eastwood v. Kenyon (1840) (166)

F: JS died and left P as guardian for daughter S. P borrowed money to pay for S’s education and S promised to pay him back when she came of age and paid one year’s interest to him. S then married D who also promised to pay P back. D did not pay P back and P sued.

I: Was there consideration?

A: All promises deliberately made ought to be held binding. BUT this would get rid of need for consideration. Floodgates w/ everyone seeking to enforce promises. Nothing more than benefit voluntarily conferred by P and express promise by D to repay money – no consideration from P.

C: No K.

#### Lampleigh v. Brathwait (1615) (168)

F: D killed man and request P seek pardon for crime from King. P rode around country to obtain pardon, after which D promised to pay P. Promise to pay was subsequent to action to which it was connected.

I: Can promise to pay after request has been fulfilled by binding?

A: Voluntary promise is not sufficient consideration, but there was prior request and then promise to pay. Prior request can be combined w/ promise to pay. Urgent – emergency doctrine.

C: Binding K.

D: Exception to doctrine from *Eastwood*

## 4. Is a pre-existing legal duty good consideration?

Existing legal duties can be categorized as duties owed: (1) to the public (2) to a third party (3) to the promisor.

### (a) Is a duty owed to a third party good consideration?

A promised to do X for B. A then promises to do X for C and in exchange C promises to do Y for A. *Pao On* says this is good consideration – C is gaining right to enforce A’s completion of X.

* **Promise to perform, or performance of, pre-existing contractual obligation to a third party can be valid consideration**. (1) Act must have been done at promisors’ request. (2) Parties must have understood that the act was to be remunerated by payment or conferment of some other benefit. (3) Payment/benefit must have been legally enforceable had it been promised in advance (*Pao On*)

#### Pao On v. Lau Yiu Long (1980) (173)

F: Main K = FC & P -> FC buying majority of Shingon (owned by P) shares w/ FC shares . Subsidiary

K = P & D -> P not to sell shares for 1 year after which D would buy back at $2.50 regardless of market value. Ps wanted benefit if value rose, said they would not carry out main K unless K w/ D altered -> New subsidiary K = Ds to indemnify Ps if shares lost value and P affirms main K. Shares drop, P brings action to enforce new subsidiary K. D argued new subsidiary K not valid because no consideration and procured under duress.

I: Was there good consideration? Was new subsidiary K procured under economic duress?

A: Cited *Lampleigh*: promise to perform pre-existing contractual obligation to 3rd party can be good consideration. Consideration for guarantee was promise to perform according to other contractual agreement signed by parties. Pre-existing duty must be contractual obligation. Creates doctrine of economic duress as replacement for policy reasons. No economic duress, just commercial pressure.

C: Finding for P – new subsidiary K upheld.

### (b) Is prior duty owed to the promisor good consideration?

* Prior duty owed to promisor is not legally sufficient consideration. You need consideration. (*Gilbert Steel)*
* **Post-contractual modification**, unsupported by consideration, may be enforceable as long as it is established that the variation was not procured by economic duress (*GFAA*)
* Payment of lesser amount cannot serve as satisfaction of a larger amount – not binding if nothing else occurs (*Foakes*) [BUT estoppel – *D&C Builders*]
* Accepting terms that benefit the creditor for convenience can amount to consideration. A negotiable instrument e.g. a cheque or an object of value less than debt can be consideration even if amount is less than cash debt (*Foot*) – **Accord and satisfaction**
* **Part performance of an obligation extinguishes a greater obligation when it is expressly accepted by the creditor as doing so** (*Law and Equity Act S. 43)*

|  |  |
| --- | --- |
| A | B |
| X | Y |
| Promise to pay more  X + W (*Gilbert Steel* says not enforceable, *GFAA* says enforceable)  (Additional amount of money etc. is same as if it was an entirely new promise) | a) Y (no consideration)  b) Y + Z  c) Statute  d) Y+ reliance on W (promissory estoppel?) |
| OR (much more common): | |
| a) Promise to accept less:  X – W (*Foakes -* no consideration)  b) Accord and satisfaction: X – W + Z (*Foot -* consideration)  c) Statute (*Law and Equity Act*)  d) X – W + reliance on promise | Y + promise to accept X – W  (enf?) |

#### Gilbert Steel Ltd. v. University Const. Ltd. (1976) (178)

**[X+W]**

F: P entered into K to delivery steel (y) for 3 apartment buildings at particular prices (x). Y delivered for 2 of project after which steel mill owner increased price of Y. P and D entered into new K for supply of Y for first building. Then mill owner increased price again. P and D worked out new oral agreement to pay new increased price [X+W]. P submitted written K to D w/ new terms which was not executed. D accepted deliveries of Y where invoices showed new prices, but did not pay full price. LC found insufficient consideration for oral agreement.

I: Is there sufficient consideration?

A: Court said promise of ‘good price’ for 2nd building could not be consideration for price variation – too vague. No mutual abandonment of 1st K/new K formed – just agreement of new P. There would need to be outstanding obligations on both sides to form new K. P tried to argue that increased price afforded greater credit to D which is consideration – court rejected. P claimed D estopped from denying liability because they kept accepting invoices – court says estoppel cannot be used as a sword and no detrimental reliance demonstrated.

C: In favour of D. No consideration.

#### Greater Fredericton Airport Authority Inc. v. Nav Canada (2008) (186)

**[X+W]**

F: P and D parties to agreement which included terms governing responsibility for certain expenditures. As part of extension of runway, P requested that D relocate landing system to runway. D said it made better sense to replace navigational aid w/ new equipment. P said D should pay for new equipment. D said it would not allow for new equipment in budget unless P paid acquisition cost. P said it would pay but “under protest.” P then refused to pay. Arbitration held that D not entitled to claim reimbursement for costs of new equipment from P under agreement. BUT held that correspondence between P and D created new K supported by consideration, and D is entitled to recover on that basis.

I: Was there sufficient consideration for a new K or was existing K modified? Was promise obtained under economic duress?

A: P’s forbearance from breaching existing K =/ fresh consideration. Estoppel can’t be used as sword. P promised to do more than what they were originally obliged to do. **Circumstances changed, so P’s promise to do pre-existing duty is consideration for promise of more from D**. Parties did not have authority to create new K. “Under protest” letter is variation of existing K – but no fresh consideration. Need to move away from rule in *Gilbert Steel* because: (1) Ks are frequently varied/modified; (2) there may be reasons for enforcement when there is no consideration; (3) **new commercial realities**. Consideration has already been supplied in existing K. Economic duress can be used as protection, rather than consideration.

C: Promise was procured under economic duress. P does not have to pay.

#### Foakes v. Beer (1884) (192)

**[X-W]**

F: P owed D money. Agreement that P would pay x immediately and y every 6 months until debt paid off and in return D would not take action – D agreed to accept less (no interest). 6 years later, P had paid off principal and sought lead to proceed on judgment. D claimed entitlement to interest because debt was not paid off immediately. P claimed there was K that stated no interest – D said K was invalid because no consideration.

I: Is partial payment of debt sufficient consideration for K?

A: D not bound unless there was consideration. Payment for lesser sum in satisfaction of greater cannot be satisfaction for whole. Money that D owed P was antecedent obligation. Accord and satisfaction does not apply because there was no additional promise to make up for lesser amount.

C: No consideration – D must pay interest.

#### Foot v. Rawlings (1963) (197)

**[X-W+Z]**

F: P owed D money. Original method of payment was promissory notes (X). D was old and realized current agreement made it hard for him to get money. D offered new agreement where P would pay less monthly (X-W) as long as P gave post-dated cheques (Z). If P did this, D would not sue. P followed agreement, then D brought action for balance of money owed.

I: Was there sufficient consideration in the substituted K to be binding?

A: D relinquished right to sue when entered into substitute agreement. Consideration was P’s agreement to provide post-dated chequed in advance for benefit of D. Cheques and promissory notes are negotiable instruments. Post-dated cheques were meant to supplant pre-existing promissory notes, not replace them.

C: New agreement may continue and D cannot sue unless P fails to make payments.

D: *Law and Equity Act s 43* would not apply.

#### Law and Equity Act, s. 43 (Supp. 6)

**Part performance** (X-W) of an obligation, either before or after a breach of it, when **it’s expressly accepted** by the creditor as **satisfying the earlier obligation**, even though there’s no new consideration, must be held to extinguish the obligation.

### (c) Is duty owed to the public good consideration?

Possibilities: A can promise to do A’s duty in a particular way; promise creates new person B who can enforce duty.

# B. Making Promises Bind – Estoppel

**Equitable doctrine.** Hold a party to a previously made promise if the other party has relied on said promise and it would be to their detriment if the other party was allowed to abandon. Promissory estoppel is a statement about the future. Promisee must rely on it to detriment. If you get it you’re held to the entirety of the promise. Not permanent – only binding on parties for duration of period in which law things it’s fair to be enforced – suspensory. Promisor can revert to CL presumption if it can show that it’s equitable. Much more limited in Canada than other jurisdictions e.g. US.

* Origin of promissory estoppel. If a party makes a promise and the other party relies upon the promise the original promisor cannot take back the promise at a later state (big). A promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding absence of consideration (small). (*High Trees*) - Only small version in Canada so far.
* In order for a promise to be capable of being relied upon and having estoppel available as a defence, it must be a **promise/assurance** **intended to alter the legal relations** between the 2 parties. A friendly gesture is not a binding agreement, and if it is relied upon estoppel will not be available as a defence (*John Burrows*)
* **Must be fair to enforce promise:** Substitute agreements require consideration to be binding at CL. May be acceptable in equity even if they do not have consideration, if: (1) it would be inequitable to force the debtor to pay any more; (2) there was an agreement between the 2 parties that the new sum would settle the debt and (3) this agreement was relied upon by the debtor. Creditor barred from legal rights only when it would be inequitable for him to insist upon them. (*D. & C. Builders*)
* Estoppel is only a defence, and **not a cause of action where one did not exist before** – limits to small version from *High Trees* (*Combe*). Affirmed in *Gilbert Steel*.
* (1) There are certain contexts in which you **can use promissory estoppel as a sword**. (2) Promissory estoppel can directly enforce a non-contractual (voluntary) promise on which the promisee has relied to his detriment. (3) Promissory estoppel can be used as a cause of action to avoid unconscionability. (*Waltons* – Australia – not yet adopted in Canada)
* Failure to fulfill a voluntary promise does not amount to unconscionable conduct – something more is required. Promissory estoppel requires **intention to create legal relationship** w/ a binding promise (*M. (N.))*

**Election and abandonment – ‘waiver’:** Most common use of ‘waiver’ is to describe result of election – once election is made, court of action not chosen is waived. Party may also waive a claim/right/power when it is not required by election. Courts sometimes use ‘waiver’ to describe promissory estoppel.

#### Central London Property Trust Ltd. v. High Trees House Ltd. (1947) (203)

D: Court could have used other doctrines to resolve issues e.g. *Law and Equity Act*.

F: D leased flats from P. Due to war, occupancy rates were lower than normal. Parties agreed in writing to reduce rent – neither party specified how long reduced rent should apply. D paid reduced rent for 5 years, then flats were at full occupancy again. P sued for payment of full rental costs.

I: Is agreement to reduced rent enforceable?

A: Promise of reduced rent valid for duration of war – expired once houses were full to capacity – so after this point Ds must pay original full rent. Obiter: if Ps tried to sue for full rent for 5 years they would lose – promissory estoppel. Offers 2 versions of promissory estoppel. Big version: cases in which promise was made which was intended to create legal relations and which, to knowledge of promisor, was going to be acted on by promisee, and which was so acted on. Small version: promise to accept smaller sum in discharge of larger sum, if acted upon, is binding notwithstanding absence of consideration – party not allowed in equity to go back on promise.

C: In favour of P.

D: Small version has been followed in Canada. Big version in *Waltons*.

#### John Burrows Ltd. v. Subsurface Surveys Ltd. (1968) (205)

F: P agreed to sell shares of company to D. Part of cost was to be promissory note paid annually for 10 years w/ 6% interest. P and D were friends at the time. D was late on payments and P did not take action. Relationship soured. D late on payment and P demanded full payment as per remedy set out in K. D claimed estoppel as defence.

I: Does estoppel apply?

A: Estoppel does not apply. For it to apply, P’s conduct would have to be promise intended to alter legal relations which was not the case. **Waving rights in past =/ waiving rights in future.** Interprets *High Trees* to mean: if parties who have entered into definite and distinct terms involving certain legal results afterwards enter upon a course of negotiation which has effect of leading one party to suppose that strict rights arising under K will not be enforced, person who would have enforced rights cannot enforce them where it would be inequitable.

C: Estoppel does not apply.

#### D. & C. Builders Ltd. v. Rees (1966) (208)

F: D hired P to do work. P did work and give D bill. D paid part of bill. P later in financial trouble and needed money. D offered lesser amount of debt owed and said it was all or nothing – this was all D would pay. P had to accept to avoid bankruptcy – accepted smaller amount, signed something saying that it ‘satisfied the debt’, then sued for remaining balance.

I: Does estoppel apply?

A: At CL substitution Ks are not allowed unless there is consideration. But substitute agreements which satisfy the necessary accord can be valid in equity if it would be inequitable to allow creditor to sue for money from original K. No consideration here. Pressure placed on P by D forced P to accept unsatisfactory agreement – would not be inequitable to allow P to claim remaining debt. From *Hughes v Metropolitan Ry Co* affirmed here: “if parties, who have entered into definite and distinct terms involving certain legal results… afterwards by their own act, or w/ their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the K will not be enforced… that the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties.” It must be fair to enforce promise. Promise made under duress should not be estopped.

C: D must pay P.

#### Combe v. Combe (1951) (224)

F: P made agreement to pay wife D $ every year after they split. D claims she agreed to forego rights for recovery in divorce court in consideration. P did not pay $ and D sued, claiming P was estopped from ceasing promise because she had relied on it. TJ ruled in favour of D, cited *High Trees*. P appealed. D makes more $ than P, and had waited 6/7 years to bring action.

I: Can estoppel be used as a cause of action?

A: Promissory estoppel can’t be used as a cause of action, only as a defence when someone is trying to claim that a promise they made did not have consideration and is therefore not binding. Estoppel is a shield, not a sword. D did not give consideration for yearly payments – P did not request that D forbear from going to court. Estoppel may be part of a cause of action, but not a cause of action in itself.

C: In favour of P.

D: Equity usually has short limitation periods. Limits to ‘small’ version in *High Trees*.

#### Waltons Stores (Interstate) Pty. Ltd. v. Maher (1988) (230) Australian High Court

F: D owned property and P negotiating lease of it, granted that D would demolish building on property and erect new one for P. Draft leases sent between P and D. D said lease had to be concluded in 2 days to organize building supplies, P did not object to any amendments. D began demolition. No K because parties hadn’t signed and exchanged docs yet. Later P started to have second thoughts and instructed lawyers to ‘go slow’, but did not talk to D. P then became aware that demolition was proceeding. When new building was 40% complete, P informed D it did not wish to proceed. D sought to enforce agreement.

I: Can promissory estoppel be used as a cause of action to enforce a non-contractual promise?

A: No K, but D believed that a K was inevitable. Until now, promissory estoppel had been used in pre-existing contractual relationships. No reason not to apply it to prevent departure from promise that promisor will/won’t enforce non-contractual right. Promissory estoppel can only enforce voluntary promises when a departure from parties’ basic assumptions is unconscionable. Failure to fulfill a promise does not of itself amount to unconscionable conduct, mere reliance on an executor promise to do something, resulting on an executor promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. No risk of estoppel replacing K because it is too uncertain. **To be unconscionable: (1) Reliance on executor promise resulting in promisee changing position/suffering detriment; (2) Creation of encouragement by party estopped in other party of assumption that K will come into existence; (3) Reliance by other party on assumption to his detriment to knowledge of first party.** P’s inaction constituted encouragement to D to continue to act on basis of assumption. Requirements for unconscionability fulfilled.

Dissent: Only if P induces D to believe that P is bound and freedom to withdraw is bound that it is unconscionable for P to asset that he is legally free to withdraw. Equity can be used as a shield and a sword. We should not see promissory estoppel’s role as enforcement – it’s the prevention of detriment flowing from reliance on promises – does not blow away consideration. To establish equitable estoppel, P must prove: (1) P assumed a particular legal relationship existed between parties; (2) D induced assumption in P; (3) P acts/abstains from acting in reliance of assumption; (4) D knew/intended P to do act; (5) P’s action/inaction will cause him detriment if assumption not fulfilled; (6) D has failed to act to avoid detriment.

C: P estopped from retreating from implied promise to complete K.

#### M. (N.) v. A. (A.T.) (2003) (238)

F: P said he would pay D’s mortgage in UK if D would move to Canada w/ P w/ view to marriage. D resigned from job and moved to Canada. P loaned D $ which she put towards mortgage but P did not pay off mortgage as promised. P and D broke up. P asked for $ back. TJ said D had not established existence of legal relationship.

I: Should promise be enforced?

L: Little evidence in Canadian authorities to indicate move towards a more generous approach to promissory estoppel.

A: P’s failure to keep promise to D is not unconscionable. No expectation/assumption of legal relationship. D under no enforceable obligation to stay w/ P if he fulfilled promise.

C: D must give $ back – promise cannot be enforced.

# C. Enforcement by and against whom – Privity

Who the parties are = who is privy to K. Only party to a K can enforce it or be sued under it. Person outside the K has usually given no consideration, but privity operates independently of consideration.

## 1. Can third-party beneficiaries sue or be sued?

* Third parties to a K do not derive any rights from that agreement nor are they subject to any burdens imposed by it (*Tweddle*)
* Only parties to a K can sue for a breach of the K. The only exception to this rule is if a party named in the K was acting as an agent of an unnamed party – in this case the unnamed party can sue/be sued *but* there must be adequate consideration (*Dunlop*)

**Horizontal privity**: When party A enters into K w/ B for something that benefits A and C. A can only sue for damages that A has suffered, and sometimes for specific performance. Tends to be domestic/social situations e.g. *Tweddle*

**Vertical privity:** Chain of Ks – each person has K w/ person above and below him in chain, but no Ks w/ other people in chain. Often commercial/supply chain situations e.g. *Dunlop*

#### Tweddle v. Atkinson (1861) (276)

F: JT, father of WT, made K w/ WG. WG would pay WT $ for marrying WG’s daughter and JT would pay WT $ for marriage as well. Written agreement contained clause which granted WT power to sue for enforcement of agreement. WG died and estate would not pay WT. WT sued.

I: Does WT have standing to sue for enforcement of K?

A: No stranger to consideration can take action, even if it was for his benefit. No consideration from WT – **love and affection from marriage not sufficient**. Not just for a person to be able to sue for K but not be able to be sued under it. JT could sue for breach of K, but would not be able to get damages because he has not suffered any losses.

C: In favour of D (WG’s estate).

#### Dunlop Pneumatic Tyre v. Selfridge’s (1915) (277)

F: P made K w/ C for tyres at discounted price on condition that C would not resell tyres at less than listed price and resellers who bought from C would agree not to sell at lower price. C sold tyres to D at listed price and D agreed not to sell at lower price, agreed to pay damages if they violated agreement. D then sold tyres at lower price. P brought action against D.

I: Can P sue D even though they had no contractual relationship?

A: No K between P and D and therefore P cannot sue. Doctrine of privity. Consideration would require P to give consideration to D for K to be completed – no consideration here. **Only way that a principal not named in K can be sued is if he acted as agent on behalf of one of the parties privy to the** K. D was not agent of C, therefore this does not apply. Dissent: C might be acting as agent for P, but still no consideration from P to D.

C: P cannot sue D.

## 2. How can privity be circumvented?

### (a) Specific Performance

Suit by party to K. Still requires one of parties to bring claim and courts will rarely order specific performance.

* Where a K is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly w/ him or, if he refuses to join, by adding him as a D (*Beswick CA –* overruled by HL)
* Third parties cannot sue for breach of K when they were not party to K, even if they were named as benefactor of K. Executors of wills can sue for specific performance of promises made in Ks w/ deceased person (*Beswick HL*)

#### Beswick v. Beswick (CA) (1966) (283)

F: PB agreed to sell business to N if N paid him $ each week for as long as PB lived, and then paid PB’s wife MB $ each week for as long as she lived. PB died and N only paid MB once before stating no K existed between them. MB was also administratrix of husband’s will – MB became PB’s representative when he died. MB sued N in personal capacity for breach of K.

I: Can MB sue N in her own personal capacity or as executor of PB’s will?

A: Rule of privity is simply a procedural rule going to form of remedy, not right. MB has legitimate interest to enforce K as it was made for her benefit. Distinguishes from *Dunlop* because Dunlop had no legitimate interest other than maintaining prices to public disadvantage.

C: MB can sue as beneficiary of K.

#### Beswick v. Beswick (HL) (1967) (284)

F: See above

A: MB cannot sue N in her personal capacity because she was not party to K. But MB can sue N in capacity of administrator on behalf of estate for specific performance of promise.

C: MB entitled to specific performance.

### (b) Trust

Create a trust among A, B and C – A settles property on B, as trustee, to hold that property to benefit C, the beneficiary. If B uses property in way not in conformity w/ trust terms, trust law allows C to bring claim against B, even though they have no K.

### (c) Agency

When A enters into a K w/ B that would benefit C, A is acting as C’s agent and so the K is actually between B and C.

### (d) Transfer of the Obligation

### (e) Collateral K

When A and B entered into a K which affects C, a collateral K came into being between A and C.

### (f) Assignment and Subrogation

C buys A’s position in K between A and B – C takes over A’s contractual position. Prohibited in many Ks.

## 3. What are exceptions to privity?

* **Test for employees being party to a K made by their employer**: (1) Limitation clause must (expressly or impliedly) extend benefit to employee(s); (2) Employees must have been acting in course of their employment performing services provided for in the K when the loss occurred (*London Drugs*)
* Test in *London Drugs* applies to all third parties who are intended to be able to make use of a defence, and not only employees of one of the parties. **General test**: (a) Did the parties to the K intend to extend the benefit in question to the third party seeking to rely on the contractual provision? And (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the K in general, or the provision in particular, again as determined by reference to the intention of the parties? (*Fraser River*)

#### London Drugs v. Kuehne & Nagel (1992) (298)

F: P delivered transformer to D for storage. In transfer, 2 employees from D negligently dropped machine causing $ damage. Clause in K stating that ‘warehouseman’s liability was limited to $40’. P brought action of breach of K and negligence against D and employees. Employees found liable in trial and D’s liability limited to $40.

I: Did employees owe P duty of care? Were employees covered under limitation of liability clause?

A: Employees owed duty of care and were negligent. Problems w/ strict adherence to privity: ignores practical realities of insurance coverage; doesn’t respect allocations and assumptions of risk made by parties; inconsistent w/ reasonable expectations of all parties to transaction; creates uncertainty; commercial reality. Few principled reasons for upholding doctrine of privity in these circumstances. Identity of interest between employer and employees as far as performance of employer’s contractual obligations. Only an incremental change to privity, not large enough to require legislative support. Policy reasons to support exception. Holding employees liable = injustice. Both requirements of test met in this case.

C: Employees excluded from liability.

#### Fraser River Pile & Dredge v. Can-Dive Services (1999) (310)

F: P owned ship that sank while under charter by D. D was negligent in sinking. P recovered from insurance company who then sued D. Clause in K between P and insurance company stating insurance could not bring actions against charterers of P, but P made agreement to waive right to waiver of subrogation.

I: Can D, as third-party beneficiary, benefit from and/or bring action to enforce limitation of liability clause in K between P and insurance?

A: Test in *London Drugs* applies to any third party who meets the requirements. D was expressly mentioned in K (charterers) and were doing activity anticipated in K, so they are covered under limitation clause. P was acting as agent for D when they excluded them from liability. Where there is a term in the K which benefits the third party, then if at the time the claim affecting the third party arises that clause is in the K, then in respect to the third party the K is crystallized in that form. 2 parties in K can alter it w/ respect to each other, but not w/ respect to 3rd party. Why this exception: corresponds to commercial reality, courts should be willing to make incremental changes, this does not allow D to rely on provisions to establish separate claim, exception is dependent upon express intentions of parties. Still no cause of action.

C: D can benefit from limitation of liability clause.

# D. Formal Pre-Requisites for Enforcement

Writing requirement has been interpreted flexibly – as long as there is some written evidence, requirement is satisfied. Agreement will not be void in absence of writing, just won’t be enforceable. For Ks under seal, K doesn’t exist w/o writing. Writing does not have to be intended to be K and doesn’t have to contain all the terms. Ks will have operative (terms) and inoperative (recitals) parts.

## 1. Writing Requirements

#### Law and Equity Act, s. 59 (Supp. 7)

Writing is required for property Ks to be enforceable – but there are alternative methods to make a K enforceable.

## 2. Parol Evidence Rule

When parties intend that the written evidence of their K contain the entire K, a court will not accept in evidence terms of that K which are oral and have not been reduced to writing.

* Exceptions to the parol evidence rule (“a collateral agreement cannot be established where it is inconsistent w/ or contradicts the written agreement”) (*Gallen*):
  + To show K was invalid because of fraud, misrepresentation, mistake, incapacity, lack of consideration, or lack of contracting intention
  + To dispel ambiguities, to establish a term implied by custom, or to demonstrate factual matrix of agreement
  + In support of a claim for rectification
  + To establish a condition precedent to the agreement
  + To establish a collateral agreement
  + In support of allegation that doc itself wasn’t intended by parties to be the whole agreement
  + In support of a claim for equitable remedy
  + In support of a claim in tort that oral statement was a breach of duty of care
* Comments about the parol evidence rule (*Gallen*):

1. It is a rule of evidence based on the unreasonableness of a situation whereby the same parties would enter into 2 agreements at the same time, one written and one oral, that would contradict each other
2. Principle cannot be absolute – not a tool for unscrupulous to dupe the unwary
3. Case law supports that principle is not absolute
4. *Bauer v. Bank of Montreal* explicitly recognizes an exception: If the K is induced by an oral misrepresentation that is inconsistent w/ the written K, the written K cannot stand
5. Rationale of the principle does not apply w/ equal force where the oral representation adds to (should not apply), subtracts from or varies (should maybe apply) the agreement recorded in the document, as it does where the oral representation contradicts the document
6. Not an absolute rule – simply establishes a presumption that can be rebutted - Presumption is strongest when oral representation is alleged to be contrary to the document
7. Presumption more rigorous in a case where the parties had produced an individually negotiated document
8. Less strong where there is a contradiction between a general exclusion or exemption clause and a specific oral representation

#### Gallen v. Allstate Grain Co. (1984) (422)

F: Oral representation from D to P about nature of buckwheat. P signed K w/ D to buy buckwheat which contained clause ‘no warranty as to productiveness or any other matter pertaining to seed sold to produce and will not in any way be responsible for crop.’ Representation was wrong about grain crop. P sued D.

I: Is oral evidence admissible, and if so can it vary/contradict the signed K?

A: When oral terms are permitted to vary effect of written K, doesn’t matter whether they are seen as collateral agreement or part of main K. Oral evidence is admissible. Oral warranty and printed doc do not contradict each other. Clause can be interpreted: all warranties pertaining to seed are excluded and D is not responsible for yield. Harmonious construction rule – parties cannot have intended to agree to inconsistent obligations. Dissent: oral term cannot be admitted.

C: Oral evidence admissible because oral representation was warranty before K was signed.

# The Content of the K

# A. Representations and Terms

**1. Term** = statement made for which that party intended to give an absolute guarantee – test for whether a statement is a term or a representation is the **intention** (*Hielbut).* If something was part of offer, it will become a term when K comes into existence. K remedies – CL – predictable. At CL, damages are available for breach of terms (*Hielbut*).

**2. Representation** = something that was said that did not make it into K as a term. Misrepresentation = equitable remedies – unpredictable.

* One statement cannot be both a representation and a term – characterization as a term will dominate. If K cannot be ended through breach of K (repudiation), then it cannot be argued that a term is misrepresentation and should be ended in rescission. (*Leaf*)

**3. Mere puffs**: no legal consequence, no reasonable person would act in reliance on it.

#### Hielbut, Symons & Co. v. Buckleton (1913) (371)

F: Agent of D purchased shares from agent of P based on P’s representation that company was a ‘rubber company’. Company turned out to be sour. D lost money – D brought action for breach of warranty.

I: Did P’s actions constitute a representation?

A: In a **collateral K** – consideration of K was making of other K – must be proved strictly for court. These Ks were not Ks of sale. This was an innocent misrepresentation. This case deals w/ representation relating to specific thing. Distinct from Q which arises when goods are sold by description and answering to description is condition of K.

C: No damages – in favour of P.

#### Leaf v. International Galleries (1950) (378)

F: P bought painting from D described in K as original by C. 5 years later P found out it was not by C. P returned painting to D and asked for money back – D refused to pay. P brought action for rescission claiming innocent misrepresentation and that he maid money on reliance.

I: Is buyer allowed to rescind K in equity if it’s executed? Can something be a term and a representation?

A: P should have claimed damages under Sale of Goods Act. Mistake as to quality, not subject-matter. If term was condition, P can reject picture for breach of condition before acceptance. If term was warranty, P can only claim for damages. Here term was condition – but under Sale of Goods Act P is said to have accepted due to lapse of time. Innocent misrepresentation is less potent than breach of condition – if claim to reject for breach of condition is barred, claim to rescission on ground of innocent misrepresentation is also barred. Dissent/obiter: Court should still follow doctrine that executed K cannot be rescinded in cases of innocent misrepresentation. P still has painting, it has just changed in quality. If something can be a term or a representation, then it’s a term.

C: Appeal dismissed – cannot claim to rescind.

# B. Classification of Terms

|  |  |  |
| --- | --- | --- |
| **Classification** | **Why** | **How** |
| Express, implied terms | To know all contractual obligations | Terms implied by: custom; necessity; operation by law |
| Primary, secondary obligations | To know main obligations and remedial obligations and liabilities | What obligations and liabilities become enforceable or arise upon failure to perform others? |
| Conditions, intermediate terms, warranties | Only breaches of conditions or breaches of intermediate terms w/ serious consequences can lead to remedy of termination | How important is term? Classification notionally done on formation |
| Contingent conditions (conditions precedent or subsequent) – or not | To know whether something must occur before a contractual obligation (or even a whole K) becomes enforceable, or (in the case of a condition subsequent), ends | Interpret K |
| Entire, severable obligation | If entire, one party must *complete* performance of obligation before other party’s obligation becomes enforceable | Interpret K |

### Note on Termination

Prospective – anything that occurred before cancellation is valid. Secondary obligations remain – can be combined w/ damages. Result of breach of condition or breach of intermediate term where breach is serious. Party in breach is said to have repudiated the K. **Repudiation** = rejection of primary obligations; if A wants to wrongfully repudiate, they are giving B choice to either accept repudiation (so party B repudiates as well – rightful repudiation – B terminates K) or B can affirm K. If B elects to terminate, primary obligations cease to be enforceable from moment of termination, but secondary obligations still continue – usual to combine remedy of termination w/ claim to damages.

K can be breached in anticipatory way - party who is supposed to perform can inform other party that he is not going to perform when time comes, or it becomes clear in advance that it will be impossible for the one party to perform as promised.

### 1. Express and Implied Terms

**3 types of implied terms:** 1. terms implied by fact (intention required); 2. terms implied by law (no intention required); and 3. terms implied by custom and usage. #2 is type courts will read into a K. **Implication of law can be**: as a matter of custom/usage (must be evidence to support inference that parties to K would have understood such a custom/usage to be applicable); as necessary to give business efficacy to a K (not determined by reasonableness); as legal incidents of a particular class or kind of K, the nature and content of which have to be largely determined by implication (*Machtinger*).

* Test for implication of a term as a matter of law is **necessity** – practical view of necessity. In determining what is necessary regard must be had to both the inherent nature of a K and of the relationship thereby established. (*Machtinger*)

#### Machtinger v. Hoj Industries Ltd. (1992) (463)

F: Ps worked for D and were discharged w/o cause. Ps had entered into K for employment for indefinite period which contained clause allowing D to terminate employment w/o cause. Ps entitled to min notice period of 4 weeks under provincial statute. D paid each P equivalent of 4 weeks salary upon dismissal.

I: What should notice period be in order to terminate employment if none is specified?

A: Requirements for reasonable notice in employment Ks fall into category of terms implied by law. Employer had legal obligation to provide reasonable notice – can only be displaced by express contrary agreement. **Intention is not relevant to terms implied as a matter of law.**

C: Appeal allowed.

### 2. Primary and Secondary Obligations

**Primary obligations** in K are promises which parties will perform is everything goes according to plan. If a primary obligation is not performed, then party in breach has a **secondary obligation** that becomes enforceable by other party (remedies). Primary and secondary obligations are terms in K. CL damages principles will be terms implied to extent that they are not inconsistent w/ other terms parties have agreed on. Limited freedom of K for secondary obligations.

### 3. Conditions, Warranties and Intermediate Terms

Categorization is done at time K is created – both parties should be able to predict which obligations will lead to which remedies.

i) **Conditions** (statement of facts which forms essential term in K)

* Remedy = damages and the innocent party can treat K as repudiated = K comes to an end, primary obligations are terminated, but secondary obligations remain (*Hong Kong Fir, Leaf*)
* Termination only available for breach of conditions.
* ‘Condition’ can mean: (1) quality/state; (2) ‘term’; (3) ‘most important term’; (4) timing of events.
* Calling something a ‘condition’ in K does not mean that breach leads to right of termination (*Wickman*)
* When there is a breach of a clause in K, breach must be read in context w/ entire K to decide if rescission is in order (*Wickman*)

ii) **Intermediate terms**: will be treated as condition or warranty upon breach depending on consequences of actual breach (*Hong Kong Fir*)

* Look at events which have occurred as a result of breach and decide if these events deprived party attempting to rescind of benefits that it expected to receive from K (breach must lead to party not being able to obtain all or a substantial proportion of benefits that they intended to receive by entering into K) - if they do, then termination is in order, else only damages can be awarded (*Hong Kong Fir*)

iii) **Warranty** (a term which is not essential to K and is collateral to main purpose of the K)

* Remedy = unless stipulated otherwise in K, only remedy is damages (therefore must prove harm was done) – party cannot treat himself as discharged from K (*Hong Kong Fir, Leaf*)
* An affirmation made at the time of sale (contemporaneous w/ sale) is a **warranty** provided it was so intended. (*Hielbut)*

#### Hong Kong Fir v. Kawasaki Kisen Kaisha (1962) (435)

F: P agreed to rent ship to D for 24 months – stated on date of delivery that ship would be fitted for use. BUT ship was held up for 5 weeks and then needed 15 weeks work of repairs after deal was made. D repudiated K, P sued for wrongful repudiation.

I: What is test for determining if breach of K leads to right of rescission?

A: Concept of intermediate term. Here P can still get expected benefits – still get boat for 20 months. Breach should not lead to rescission, only to damages.

C: Appeal dismissed.

#### Wickman Machine Tool Sales Ltd. v. Schuler A.G. (1974) (443)

F: D granted P sole right to sell their products in UK. P were to visit 6 of D’s major clients each week for duration of K (term in K). P did not do this – was called a ‘condition’ in K. D repudiated K.

I: Does calling something a ‘condition’ in K mean that its breach leads to right of rescission?

A: Would be impossible for P to successfully complete all visits. D did not inform distributor of material breaches and demand remedy as stipulated in K. Dissent: Breach of condition should allow innocent party to treat K as at end. Should not assume parties are easygoing etc.

C: Appeal dismissed.

### 4. Contingent Conditions – Conditions Precedent and Conditions Subsequent

If it is a prerequisite to enforceability of an obligation, then it is a **condition precedent** – if it deals w/ an event that ends an obligation, then it is a **condition subsequent.** When parties have mutually dependent conditions precedent, they are ‘**concurrent**’ conditions – this is the presumptive state. Condition precedent can be to whole K – then no enforceable agreement before condition precedent is met.

### 5. Entire and Severable Obligations

Only applies to primary obligations, where one is a condition precedent to other. If part performance of first party’s obligation is enough to trigger some enforceable performance of obligation by other party, then first party’s obligation is **severable**. If first party’s obligation is **entire**, then that party will have to go outside the terms of the K to seek payment/compensation for work actually done. If first party’s obligation is severable, and they do not perform the whole obligation, then the second party only has to perform a similar partial part of their obligation.

* If obligation is **entire**, then law requires ‘**substantial performance’** – party who wants to recover must provide evidence from which any new K to accept and pay for work done could be inferred. Substantial completion will trigger other party’s obligation – but other party will still have remedy of damages for defective performance. (*Fairbanks*)
* When K is abandoned after part performance, party who abandoned K can only recover on quantum meruit (reasonable value of services) for work already done if: circumstances give other party option to take/not take benefit of work done, thus creating inference of new K (*Sumpter*)
* **Quantum Meruit** = If innocent party of an abandoned k takes the benefit of the work done, he can be liable for the cost of that work (*Sumpter*)

#### Sumpter v. Hedges (1898) (454)

F: K to build houses. P did part of work then abandoned K. D finished work. P sues for $ for part work.

I: Can P recover for work completed on quantum meruit?

A: When a k is not completed, it is treated as abandoned. Innocent party has option to treat k as repudiated (which would end k). BUT party takes benefit of work done, then he is creating a new k in which he is liable for the cost of that work. Where circumstances give no option (as to take benefit of work done) then no inference of new K. Building erected upon land, fact that D remains in possession of land =/ evidence upon which inference of new K can be founded. No facts infer new K. D not bound to keep unfinished building on land.

C: No fresh K – P cannot recover.

#### Fairbanks v. Sheppard (1953) (450)

F: D hired to make soap-chip machine, but stopped before finishing and demanded more $ to complete. P refused, sought return of payment and termination of K.

I: Can D recover $ owed to him if work is substantially complete?

A: No substantial completion of K here – what remained to be done required engineering skill and knowledge. D intentionally stopped work so P would not be able to use machine. Fact of P remaining in possession of land (w/ machine on it) =/ evidence upon which inference of new K can be founded. P has never elected to take any benefit available to him from unfinished work. Machine is unusable and conduct is abandonment of K.

C: P entitled to declaration that K is cancelled and return of $.

# C. Excluding and Limiting Liability

- Contingent terms – one party has to be in breach of obligation which triggers exclusion/limitation clause.

- Run afoul of CL idea that secondary obligations in K should be a true equivalent of primary obligations not performed

- In a **standard form/adhesion K**: one party is able to dictate terms to other on a take-it-or-leave-it basis. Attract greater scrutiny from law – especially re: exclusion/limitation clauses of stronger party’s liability.

- Estoppel can be used to fix consideration problem – e.g. if P signs release, then is injured – P did not get fresh consideration for signing release, but may be estopped from claiming damages because D relied on signing of release

### A. Notice

- What constitutes sufficient notice may depend on sophistication of parties

- CL satisfaction of notice requirement: **signature** (*L’Estrange* doctrine)

* In the consumer sphere, sufficiency of notice and proportionality trump *L’Estrange* notion that a signature alone is binding (*Tilden*)
* Party is bound to K if signed (*McCutcheon*)

- Notice of terms in K has to come **before or at time of K coming into existence** (*Thornton*)

* In cases w/ automatic ticket dispensers, K is formed when P inserts money into machine and receives ticket – conditions that are not seen until after this time are not binding as K has already been agreed upon w/o the conditions (*Thornton*)
* Knowledge of terms is tested subjectively, thus prior relations are not enough unless there was actual **subjective knowledge of the condition** (*McCutcheon*)
* Possible to construct a signature in the absence of one due to past dealings (*McCutcheon*)
* If a term of K is **particularly onerous,** party looking to enforce term must prove that it took measures to properly notify other party of term (*Tilden*)
* **Not a general principle that party must draw attention to exclusion clause** – where party has signed written agreement, irrelevant whether conditions have been read (*Karroll*)
  + **3 exceptions**: (1) non est factum; (2) induced by fraud/misrepresentation; (3) where party seeking to enforce doc knew or had reason to know of other’s mistake as to terms – then terms should not be enforced (*Karroll*)
  + To find if there is duty to draw attention, look at: (1) effect of clause in relation to nature of K; (2) length and format of K and (3) time available for reading K. (*Karroll*)

### B. Construction

- Construe clause to see whether in a given situation it was meant to apply (*Photo Production*)

- Exclusion clauses are to be construed strictly and degree of strictness appropriate to be applied to their construction may properly depend upon extent to which they involve departure from implied obligations (*Photo Production*)

- Exemption clauses are to be interpreted the same as any other term regardless of whether a breach has occurred – look at clear words to determine scope of exclusion (*Photo Production*)

- Under freedom of K, parties can determine their obligations to one another as long as they are explicit in those obligations (*Photo Production*)

- Exclusion clause must be interpreted in light of whole K (*Tercon*)

- ‘**Contra proferentem’** requires words of written docs to be construed more forcibly against party using them

- An ambiguity can arise where an exclusion clause conflicts w/ an express term indicating that there will be liability in the event of a breach – in such a situation, courts will tend to favour clause that retains liability for breach

### C. Fundamental Breach

- **No longer good law** – definitively overruled by *Photo Production* and *Tercon*

- If a breach goes to root of K (fundamental breach), exempting clause takes no effect (*Karsales*)

- Problems: only applied to exclusion clauses (not limitation); kicked in automatically; non-sensical, too blunt an instrument and tends to be used by wrong parties

### D. Unconscionability

- When assessing enforceability of exclusion clauses, the courts must apply a three-part test (*Tercon –* dissent – unclear if this is good law):

1. As a matter of interpretation, does the clause apply to the circumstances established?

2. Was it unconscionable at the time the K was made?

3. Should the court refuse enforcement based on **public policy** (the onus of proof lying with the party seeking to avoid enforcement)?

- Unconscionability not defined, other than to say that it has to do w/ formation, not breach (*Tercon*)

* Could be equivalent to inequality of bargaining power – *Hunter v Syncrude* which is discussed in *Tercon*

## 1. Notice Requirement – Unsigned Documents

#### Thornton v. Shoe Lane Parking Ltd. (1971) (478)

F: P parked car in parking lot, then received ticket from automatic machine. Ticket said subject to conditions posted in parking lot. Conditions included exemption clause. P seriously injured by another car in lot.

I: Is exemption clause part of K? Does fact that ticket was dispensed automatically matter?

A: No chance to look at conditions, reject them and get $ back. Offer is made by D in having machine w/ posted prices, P accepts when places $ in machine. Writing on ticket not visible until after K had been formed – so conditions do not apply. D did not do what was reasonably sufficient to give notice of conditions.

C: Appeal dismissed – exemption clause does not apply.

#### McCutcheon v. David MacBrayne Ltd. (1964) (488)

F: M, acting as agent for P, arranged to ship P’s car. Usually D would have customers sign risk note w/ limitation clause, but M not asked to do this. Ship carrying car sank. P had previously signed risk note 4 times – knew that notes contained conditions, but not what conditions were.

I: Is a P bound by an unsigned K considering that he had past dealings w/ D?

A: K was purely oral – any terms on receipt came after formation. Ds are liable for damage. No one reads Ks w/ D because they are the only company that ships from that island. Not able to demonstrate subjective acceptance of risk note.

C: Appeal allowed – D is liable.

## 2. Notice Requirement – Signed Documents

#### Tilden Rent-a-Car Co. v. Clendenning (1978) (492)

F: D rented car from P. D signed rental agreement which contained very onerous exclusion clause – no coverage for accidents that occur if driver had consumed any alcohol. D had previously inquired about insurance fee and been told it was ‘full non-deductible coverage’. Signed in presence of clerk – clear he did not read conditions, had not previously read conditions. D had accident after consuming alcohol.

I: Is exemption clause valid?

A: Exclusion clause conflicts w/ total coverage clause – onerous clause because it is overbroad. Purpose of signing is to manifest consent – important that clerk was aware D did not read before signing. Distinction between consumer and commercial spheres: a signature in commercial sphere creates presumption of an agreement whereas reality in consumer sphere is not that of consensus; generally signing of a K is hurried and informal. P should have taken steps to alert D to onerous provisions. Dissent: K not difficult to read, was brought to D’s attention clearly, economically efficient clause, courts should give effect to intent of commercial doc.

C: Appeal dismissed – exemption clause not valid.

#### Karroll v. Silver Star Mountain Resorts Ltd. (1989) (496)

F: P suffered injury during skiing competition sponsored by D. P had participated in comp for 4 years prior and had always signed release. Signed exemption clause prior to race – had very large heading stating ‘release and indemnity – please read carefully’ – doc was very short. P did not remember reading anything in doc, not sure if she was given time to read it.

I: Is indemnity agreement binding, if so on whom?

A: Burden on P to show fraud/misrepresentation, or that D knew or had reason to know she was mistaken as to terms. Release was consistent w/ purpose of K. P signed knowing it was a legal doc affecting her rights. Reasonable person would conclude P was agreeing to terms. D took reasonable steps to discharge obligation to bring contents of K to P’s attention.

C: Action dismissed – D not liable.

D: Hard to reconcile *Tilden* and *Karroll*. Could be lack of consideration in *Karroll*. Distinction might be that *Tilden* limits K liability, while *Karroll* limits tort liability.

## 3. Fundamental Breach & Its Aftermath

#### Karsales (Harrow) Ltd. v. Wallis (1956) (506)

F: D viewed car being sold by S. D agreed to buy car. S set up hire-purchase agreement. P bought car from S, then lent to D on hire-purchase terms. When D saw car again, it was in very different state. D refused to pay for car. Clause in hire-purchase agreement said no condition/warranty as to car’s condition.

I: Does an exemption clause excuse a fundamental breach?

A: Created fundamental breach doctrine. Under a hire-purchase agreement of this kind, when hirer has himself previously seen and examined car and made application for hire-purchase on basis of his inspection of it, there is an obligation on lender to deliver car in substantially same condition as when it was seen. Implied term that car would be kept in suitable order.

C: Appeal allowed – fundamental breach so clause does not apply.

#### Photo Production v. Securicor (1980) (508)

F: D security company working for P. Employee of D started fire at P’s factory. D argued that exclusion clause in K exempted them from liability.

I: Does exemption clause excuse fundamental breach?

A: Exclusion clause applies – precludes all liability even when harm caused intentionally. Rule of construction instead of doctrine of fundamental breach. Secondary obligations can be modified by agreement, but not totally excluded. **General secondary obligation**: pay monetary damages to other party when you breach K. **Anticipatory secondary obligation**: unperformed primary obligations of other party are discharged. Agreement must retain legal characteristics of a K; must not offend against equitable rule against penalties – must not impose upon breaker of primary obligations a general secondary obligation that is manifestly intended to be in excess of amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation.

C: Appeal allowed – clause applies.

#### Tercon Contractors Ltd. v. British Columbia (Transportation and Highways) (2010) Supp.

F: D accepted bid from bidder who was not eligible to participate in tender, then tried to hide this. K included clause excluding claims for damages ‘as a result of participating’ in bidding process.

I: Did D breach tending K by accepted bid from ineligible bidder? Does exclusion clause bar claim for damages for breach of tendering K?

A: Bid was ineligible and D was aware – K A was breached. **Terms should be read in context of entire K.** Exclusion clause did not apply (minority would have held it to apply). D acted in manner that was affront to integrity and business efficacy of tendering process. Consider: is there a statutory/other legal reason why parties would not have been free to negotiate the clause; any other reasons why clause should not be enforced.

C: Appeal allowed – clause does not apply.

## 4. Legislative Treatment

# Excuses for Non-Performance of the K

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Device** | **Reason** | **Who Uses?** | **Prerequisites** | **Effect** |
| **Misrepresentation** | One party misled other party | Party who has misled | Erroneous factual statement inducing K | K rescinded; sometimes tort damages |
| **Mistake** | (One or) both parties mistaken about assumption (or terms) | Mistaken party | Usually common mistaken assumption before K; sometimes mistake about other’s identity | K void (usually); some law saying K voidable |
| **Duress** | One party coerced by other to K | Coerced party | Illegitimate threat | K voidable (historically, void) |
| **Undue influence** | One party dominated by other | Dominated party | Relationship of undue influence leading to questionable K | K voidable |
| **Unconscionability** | Contracting circumstances unfair and tantamount to fraud | Weaker party | One party taking unfair advantage of position of other | K voidable or unenforceable or subject to judicial adjustment |
| **Illegality** | Public policy disapproves of some contractual situations | One or both parties, depending on type of illegality | Formation/performance of K prohibited by statute or CL | K void or unenforceable |
| **Frustration** | K purpose becomes impossible | Both parties | Unforeseen catastrophic event | K wholly discharged from point of frustration; statutory consequences |

**Pre-K you can make claims on**: mistake, misrepresentation, duress, undue influence, unconscionability

**During K period you can make claims on**: breach, frustration, limitation period, unfairness

**Both pre- and during-K you can make claims on**: illegality, public policy

## Altering the K or its Effects

|  |  |  |
| --- | --- | --- |
| **Method** | **How** | **Why** |
| **Severance**  **- Notional severance** involves reading down a contractual provision so as to make it legal and enforceable.  **- Blue-pencil severance** consists of removing part of a contractual provision. | Removing part of K | Illegality  Unconscionability |
| Treating as 2 Ks | To meet form requirements; to treat 1 K as terminated for breach or frustration; to resolve privity problems; to avoid whole K being frustrated |
| **Judicial adjustment of terms**  **Creation of K (battle of the forms)** – see e.g. *Butler* | Assist in creating terms | Difficult to tell what was in offer |
| Set K aside on terms | Mistake in equity; unconscionability |
| Severance | Reconstituting agreement after removing a part |
| **Unenforceability of all or part of K** | Court refuses to order performance or give remedy of non-performance | Illegality (practical effect); lack of consideration/seal; expired limitation period; exclusion/limitation clause; penalty clause |
| **K discharged/terminated after frustration**  Now see *Frustration Act* | Primary and secondary obligations disappear after frustration (NB: different from termination for breach where secondary obligations remain) | Frustration |

### Non-existence of K – Void K

Where there is a flaw in formation that prevents K from coming into existence at all. Any result from performance is non-existent. No discretionary aspect. No basis for CL damages or termination. May be possible to sever aspects of K that will be unenforceable rather than void.

**Reasons CL might find a K void:** (1) Flaw in formative stages (e.g. offer/acceptance); (2) Illegality; (3) Common mistaken assumption; (4) Duress (historically); (5) Non est factum; (6) Some mistaken identities

### K that can be undone – Voidable K

K exists, but is flawed in some way. Law allows injured party to elect to undo K. Until K is undone, it is perfect valid and enforceable. If party chooses to undo K, then they have ‘avoided/rescinded/set aside’ the K. If avoided, parties are restored to their positions just before K existed. Should be no basis for claim to any secondary obligations under K if it is voided. Monetary compensation may be granted under rescission where it is impossible or inequitable to restore the original property (*Kupchak*).

**Reasons K might be voidable:** (1) Duress; (2) Fraudulent misrepresentation; (3) Undue influence; (4) Unconscionability (sometimes); (5) Mistake (scope uncertain)

**Bars to rescission** (but nothing in equity is absolute)**:**

(1) Rescission would adversely affect a 3rd party’s rights

(2) The impossibility of complete restitution

* May be able to substitute money compensation – *Kupchak*

(3) Affirmation = the innocent party may lose an equitable remedy because they are taken to have affirmed the K. *(Leaf)*

(4) Execution of K – K has been discharged *(Leaf)*

* Highly arguable – may not be law (particularly for innocent misrepresentation)
* If both parties have completed the obligations in the k – then the k is finished and there is no k – therefore there is nothing to rescind.

(5) Delay (Equity is taking election away from you - laches) *(Leaf)*

* Unwarranted delay in claiming the remedy, the person is guilty of laches and delay would cause hardship.
* Person loses claim to rescission but can still claim for damages for deceit or negligence.
* *Kupchuk*is quite generous w/ laches

# A. Misrepresentation and Rescission

- For an **operative misrepresentation** there must be: (1) statement of fact; (2) that is untrue; (3) that is material; (4) that is relied on by the other contracting party as a reason to enter into K

**- Innocent misrepresentation may** lead to a K being able to be rescinded – if rescission not available, then only damages (*Redgrave*)

- **Results:** Party to whom misrepresentation was made may **rescind** K and/or file tort claims for negligence/deceit (*Hielbut*). Misrepresentations results in **voidable K**, so representee can elect to either rescind or affirm K.

* Parties are not liable for damages arising from their own innocent misrepresentations. Damages are only awarded for fraudulent or reckless misrepresentations, or misrepresentations that refer to a material issue that fundamentally changes the K. Innocent representations are only referred to as warranties if they have clearly been intended to be warranties by the parties (*Hielbut*)
* **Misrepresentee not entitled to claim rescission when**: restitution in integrum not possible; third party rights intervene; election/affirmation; laches/delay; rescission would cause radical injustice to misrepresentor; innocent misrepresentation and K has been executed (*Kupchak*)

|  |  |  |
| --- | --- | --- |
| **Type of Operative Misrepresentation** | **CL (damages)** | **Equity (rescission)** |
| **Innocent** | No (*Redgrave*) | Yes (*Redgrave*) |
| **Negligent** | Yes | Yes |
| **Fraudulent** | Yes | Yes |

### A. Statement of Fact

Must be about something in present/past. Cannot be statement of opinion, prediction, belief or promise. Cannot be statement of law. Absolute silence cannot be operative misrepresentation (must be statement of words/action). BUT misleading silence may be misrepresentation. Some situations where a person is under a duty to reveal factual info before K exists: (1) consumer situations; (2) good faith duty; (3) fiduciary situations.

* Need not be entirely ‘factual’ – can have elements of opinion, belief or promise as long as it has an important component that is existing or past fact (*Redgrave*)
* Position of maker of statement and relationship to recipient may affect whether it is sufficient to constitute misrepresentation – representor more likely to be liable if he knows facts better (*Smith*)
* **Statement of opinion** between a knowledgeable party and one who is not is a contractually binding statement of fact. A mixture of statements and facts is enough for a misrepresentation. (*Smith*)

- A statement by a third party may be operative if it is made by an agent of a contracting party OR there is a close relationship between the representor and the contracting party. If no connection, then unlikely that it can be operative.

### B. That is untrue

If maker does not know of falsity = **innocent misrepresentation** – can still lead to rescission of K (*Redgrave*). If statement is ambiguous, usually benefit of doubt goes to maker. Maker MIGHT be under duty to inform recipient if statement subsequently becomes false. Recipient is not under duty to verify truth (*Redgrave*).

### C. That is material

Depends on context of K – type of K and position of parties. Must be substantial or go to root of K.

### D. That is relied on by the other contracting party as a reason to enter into K

Might have been other inducements.

* An untrue statement can be relied on for these purposes **even where the person to whom the statement is made is given the opportunity to check the veracity** of the statement (*Redgrave*)
* Presumption that any statement made in an attempt to induce another party to enter into a K is relied upon as a condition if the K is eventually formed – can be rebutted by proving knowledge to contrary of statement, or express proof that party did not rely on statement - equity (*Redgrave*)

#### Redgrave v. Hurd (1881) (355)

F: P advertised to sell his business premises and a share in his business. P represented that income would be higher than it actually was. D purchased property and partnership in business on basis of representation. D then refused to complete payments when he discovered misrepresentation. P sued for specific performance.

I: Can D rescind K because of misrepresentation?

A: Only limitation on suing for misrepresentation is limitation period, which starts when fraud reasonably should have been discovered. Misrepresentation was innocent – K can be rescinded but damages not awarded.

C: Appeal allowed, K rescinded.

D: Introduction of equity for 1st time in dealing w/ misrepresentation.

#### Smith v. Land and House Property Corp. (1884) (359)

F: D contracted w/ P to buy title of hotel. P had advertised F as desirable tenant. F was overdue w/ rent, and then went bankrupt before transfer of title. D refused to complete transaction on grounds of misrepresentation.

I: Was statement mere opinion or representation of fact?

A: Statement of ‘desirable tenant’ was not a true statement – misrepresentation.

C: Appeal dismissed.

#### Kupchak v. Dayson Holdings Ltd. (1965) (363)

F: P bought shares of motel company from D in exchange for 2 properties and mortgage for motel. P stopped making payments on motel because they discovered past earnings of motel were false. P wrote to D referring to ‘proposed action’. D then sold half of interest in 1 of properties which they had bought from P – building was torn now and new building built. D issued unsuccessful writ for foreclosure. P commenced action against D for rescission – in meantime they ahd continued to live in and operate motel.

I: Can Ps claim rescission, if so what can they get? Did Ps affirm K? Is P’s right to rescission barred by laches?

A: Remedy of rescission (and restitution) is equitable – application is discretionary. Courts will not be as interventionist in cases of innocent misrepresentation. In cases of fraudulent misrepresentation, courts will order rescission to fullest unless it would be impractical/unjust. **Here to return property that D bought would be unjust because it was fundamentally altered. Order of rescission and compensation of value of property as it was at time K was signed.** P did not affirm K because they didn’t have other options but to continue running motel. Dissent says P affirmed K.

C: Appeal allowed, K rescinded, compensation ordered.

**D: Not clear whether money compensation instead of rescission is only available for fraudulent misrepresentation.**

# B. Mistake

Relates to something believed at or before time of contracting. Exception to caveat emptor, freedom of K. K is about re-arranging risks – mistake is difficult because of its potential to upset the risk balance the parties have struck in their bargain. Mistake and frustration only come into play where they relate to risk that parties did not contemplate and did not provide for in their agreement. Can be argued it is actually an irrelevant doctrine – simply talking about aspects of other doctrines.

- **Hierarchy in how you make arguments in this area**:

1. Construction of K – K already says what you want it to say, and other party is misconstruing
2. Implied terms
3. Rectification of written K

* If first 3 fail, then you are left w/ K that other party wants

1. Misrepresentation – easier way to get rid of K
2. Mistake

**- Cause for mistake**: own mistake; other party is responsible (misrepresentation; knowing of other’s mistake and not correcting); third party is responsible (misrepresentation)

- **Legally operative mistake is rare**: parties are responsible for their promises; potential to upset risk balance; assumed that parties consider burden of risk; mistake relates to matters before/at time of K creation; should only come into play when parties did not contemplate the risk; should be rarer than frustration; should not affect K if caused by 3rd party

## Types of Mistake

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Description** | **What kind of mistake** | **Effect at CL** | **Effect at Equity** | **Notes** |
| **Unilateral Mistake** | One party is mistaken (X) and other is not mistaken (Y) | Terms or assumptions | No K if mistake as to terms (*Smith*) | Rectification (see e.g. *Sylvan*)  OR  K is void (in ‘snapping up’ or tendering context (*Solle*)). If *Solle* is interpreted broadly, court may be able to set aside if unconscientious. | If mistake about assumption – irrelevant unless can be seen to amount to fraud (*Smith*) |
| **Mutual Mistake** | One thinks X and other thinks Y, and neither is clearly wrong (or right) | Tends to be mistake as to terms | K is void if Court cannot infer common intention and mistake is fundamental (*Bell*) | Rectification (see e.g. *Bercovici*) | Court may have no choice but to rectify K. Court may try to interpret as unilateral mistake. |
| **Common Mistake** | Both parties think X, but X does not exist | Tends to be mistaken assumption | At CL, will make K void (*Great Peace* – says no equity – only impact at CL where impossibly or where vital attribute is at issue). | At equity may be voidable, if it is about something fundamental (*Solle*).  For rectification: P must prove that what was executed was not agreement made and must also prove what outwardly expressed continuing common mistake actually was | *Miller* says look to K to see if parties have provided for who bears risk of relevant mistake, because if they have that will govern |

## 1. Introduction

* Cockburn says: mistake is irrelevant; **Hannen says**: one party’s mistake could affect K, but that party’s mistake has to be a mistake about terms in K – that mistake has to be known to the other party – if that can be established, the **K is void**; Blackburn says: sort of the same thing as Hannen, if other party knows that party A is mistaken about terms, then that operates by way of estoppel – K is on A’s terms (terms of the mistaken party), not terms of the actual K (*Smith*)

#### Smith v. Hughes (1871) (546)

F: Unilateral mistake. K for sale of oats by P to D. P had shown sample of oats to D. D refused to complete sale because he believed that K had been for sale of old oats, while P thought it was for new oats and provided new oats (mutual mistake). P denied having known that D never bought new oats.

A: Cockburn: Age of oats irrelevant because D did not make it a condition in the K. **Caveat emptor – buyer beware.** Blackburn: purchaser must accept sale if no warranty re: quality of item. Purchaser is bound even if vendor knew of mistake, unless vendor guilty of fraud/deceit. No K if parties have different intentions as to **terms** of K, unless one party is estopped from denying that other party’s view of what terms in K are is correct. Hannen: promisor is not bound to fulfill a promise in a sense in which the promisee knew at the time the promisor did not intend it. In order to relieve the D it was necessary that the jury should find not merely that the P believed the D to believe that he was buying old oats, but that he believed the D to believe that he, the P, was contracting to sell old oats.

C: New trial ordered.

D: Invented law of mistake?

## 2. Mistaken Assumption

**Limitations:** Party cannot rely on mutual mistake as defence where mistake consists of a belief which is, on one hand, entertained by him w/o any reasonable ground and, on other hand, deliberately induced by him in mind of other party. **You cannot use mistake if it is attributable to one of the parties.** (*McRae*)

- One party or all parties can be mistaken; parties can be mistaken as to (1) identity; (2) existence of subject-matter; (3) quality of subject-matter (*Bell*)

* **Existence of subject matter**: K of A and B to purchase specific article is void if article had perished before date of sale (*Bell*)
* **Mistake as to title (res sua):** K is void if contracting to buy something that you already own and both parties did not know (*Bell*)
* **Mistake as to quality**: will not affect assent unless it is the mistake of both parties, and is about the existence of some quality which makes the thing w/o the quality essentially different from the thing as it was believed to be – in that case makes K void (*Bell, Great Peace*)

**Test to avoid K for common mistake:** (1) common assumption as to existence of state of affairs; (2) no warranty by either party that state of affairs exists; (3) non-existence of state of affairs must not be attributable to fault of either party; (4) non-existence of state of affairs must render performance of K impossible; (5) state of affairs may be existence, or vital attribute, of consideration to be provided or circumstances which must subsist if performance of K is to be possible (*Great Peace* – not intended to be different from *Bell*)

- **Equity:** Court can set aside K in contexts of unconscientiousness – K can be set aside if parties were under common misapprehension as to facts or rights, provided that misapprehension was fundamental and party seeking to set it aside was not himself at fault (*Solle* – narrow view)

* **What is unconscientious?** K will be set aside if mistake of the one party has been induced by a material misrepresentation of other, even though it was not fraudulent or fundamental, or if one party, knowing that other is mistaken about terms of an offer, or identity of person by whom it is made, lets him remain under his delusion and conclude a K on mistaken terms instead of pointing out mistake (*Solle*)
* At equity court has discretion – can decide whether to set aside K in circumstances where it is voidable

- At equity, court has power to set aside K whenever it is unconscientious for other party to avail himself of legal advantage which he had obtained (*Solle* – big view)

*-* **Is *Solle* good law?** Bell says K is void, whereas *Solle* says K can be set aside. *Great Peace* (UK) says mistake does not exist in equity – overrules *Solle*. *Miller* (Canada) indicates that *Solle* may be good law in establishing a separate equitable branch of mistake.

#### Bell v. Lever Brothers Ltd. (1932) (560)

F: Common mistake. Employment K. D had to buy P out. Afterwards, D found out P had violated employment K – D could have terminated K w/o buying out. D seeks return of compensation.

I: Is K void due to mistake?

A: D already owned what they paid for. Important for Ks to be observed – if parties honestly comply w/ essentials for K formation, they are bound and must rely on stipulations of K for protection from effect of facts unknown to them. If K expressly/impliedly contains a term that a particular assumption is a condition of K, K is avoided if assumption is not true. Condition not implied unless new state of facts makes K something different in kind from K in original state of facts.

C: Appeal allowed – compensation agreements not void.

#### Solle v. Butcher (1949) (571)

F: D owned a house w/ flats in it which he was repairing w/ P. P told D that flats would not be subject to rent control. P rented a flat from D at non-rent control price. P found out flat was subject to rent control and sued to recover overpayment. D counterclaimed for rescission on grounds of mistake.

I: Is lease void?

A: **2 types of mistake: mistake which render K void (CL) and mistake which render K voidable (equity).** K only void where mistake prevented formation of K. Here there was a K – landlord was under fundamental mistake. *Bell* represents law at CL – but different w/ equity. Parties misapprehended application of law – common misapprehension. Lease can be set aside on terms as court thinks fit.

C: Rescission granted on terms – not totally void. Tenant can opt to continue lease (at statutory rent) or end lease.

D: **Introduces equity into mistake.** Might be bad law. Denning was one of three judges – one judge dissented (said *Bell* was right, did not need to be expanded upon) and other judge simply applied *Bell*. Has been relied upon in Canada for both unilateral and bilateral mistakes.

#### McRae v. Commonwealth Disposals Commission (1951) (565)

F: Common mistake. D entered into K to sell to P a tanker located at a specific location. There was never a tanker at that location. P spent a lot of $ in discovering that they had bought a non-existent tanker.

I: Is K void?

A: D took no steps to verify that tanker was there. Ps only mistake was believing D. K should be constructed to include promise by D that there was a tanker there. Ds mistake was their own fault, cannot be relied upon to avoid the K. **If it can be said parties have allocated risk in K in such a way that this is simply how it’s supposed to unfold, liability is strict, that party can’t get out of its obligation simply by saying it was mistaken**.

C: Enforceable K – no tanker – breach of K – Ps entitled to damages.

D: Usual situation for mistake.

#### Great Peace Shipping v. Tsavliris Salvage (2002) (574)

F: Common mistake. K to salvage boat. D salvor retained to provide assistance in salvaging CP. D entered into K w/ P to offer assistance to CP. D and P thought P was 35 miles away, was actually 410 miles away. D got someone else to salvage boat, and then refused to pay cancellation fee to P.

I: Is K void?

A: To determine impossibility, look at express terms and surrounding circumstances. *Solle* and *Bell* are not reconcilable. Cannot grant rescission on ground of common mistake where K is valid and enforceable on ordinary principles. Equity should not be added – should not play role in law of mistake (like in *Solle*). ***Bell* should be complete code.** Common assumption of both parties when K formed that 2 vessels were sufficiently close. No mistake fundamental enough to render K void.

C: Appeal dismissed – difference in miles doesn’t matter – K not impossible to perform. D must pay cancellation fee.

#### Miller Paving Ltd. v. Gottardo Construction Ltd. (2007) (579)

F: P selling materials to D. P and D signed agreement in which P acknowledged that it had been paid in full. Then rendered invoice after discovering it had not been fully paid for. D refuses to pay.

I: Did TJ err in failing to apply doctrine of common mistake to set aside K?

A: Common mistake as to important contextual circumstance. CL and equitable doctrines of common mistake have been accepted in Canada. P had responsibility to determine what was owing – K clearly allocates to P risk that payment in full has not been received. If following *Bell* – nothing about mistaken assumption changes subject matter. If following *Solle* – P must show it is not at fault. Obiter: *Great Peace* shouldn’t be followed in Canada.

C: In favour of D – Appeal dismissed.

## 3. Mistake as to Terms

Can be resolved under certainty of terms/offer and acceptance. *Bell* says there is no mistake as to terms.

#### Smith v. Hughes (1871) (546)

See above. Cockburn’s approach is often followed w/ mistake as to terms – usually dealt w/ under offer and acceptance.

## 4. Mistake and Third-Party Interests

### A. Mistaken Identity

Mistake as to identity: mistaken belief by A that he is contracting w/ B, whereas in fact he is K w/ C – will negative consent where it is clear that intention of A was to K only w/ B (*Bell*)

* Valid distinction between situations where parties deal face-to-face and where they deal through docs, at a distance (*Shogun*)
  + Where there is some form of **personal contact** between individuals who are conducting negotiations, apply strong presumption that each intends to K w/ other w/ whom he is dealing (*Shogun*)
  + Where there is a **documentary K**, there is no K w/ the person that sends the doc if they are not named in the written K (*Shogun*)

#### Shogun Finance Ltd. v. Hudson (2003) (583)

F: Rogue acquired Patel’s driver’s license. Rogue went to car dealership, posing as Patel, and agreed to buy car. Dealer made hire-purchase K – sold car to finance company (P). P hired car to rogue. Rogue allowed to take possession of car, and then sold it to D – then rogue disappeared. P claimed car or its value from D, D claims rogue passed good title to him.

I: Is K void due to mistaken identity?

A: Parties must be shown to have agreed w/ each other. To an extent, dealings here were interpersonal through medium of dealer. P had set up formal system under which Ks would be concluded in writing – treat this as documentary K. P decided to K w/ Patel and no one else. K is void because it was contracted w/o Patel’s consent – therefore rogue could not convey title to D. If K had been voidable, then rogue would have had voidable title to goods.

C: Appeal dismissed – no K.

### B. Non Est Factum

CL doctrine – where one party disputes that he ought to be held responsible at all for anything under K, though it names him as a party and the doc contains his signature. If plea is successful, **K is rendered void** – no title can pass to a buyer or other person under K. **Try to argue:** (1) Rectification; (2) Parol evidence rule; (3) Non est factum.

* P must establish that there was a **fundamental difference** between the doc as it is and the doc as it was believed to be – P is disentitled to rely on non est factum if his signing of the doc was due to his own **carelessness or negligence** (*Saunders, Marvco*)
  + **Test:** Would a reasonable person w/ traits similar to party have taken same actions as party pleading non est factum took? (*Saunders*)
* Any person who fails to exercise reasonable care in signing a doc is precluded from relying on the plea of non est factum as against a person who relies upon that doc in good faith and for value (*Marvco)*

#### Saunders v Anglia Building Society (1971) (591)

A: Person who signed the doc should have burden of proving that his signature was not brought about by negligence on his part. Doc as it is and doc as it was believed to be must be fundamentally different, radically different or totally different as to content, character or otherwise.

#### Marvco Color Research Ltd v Harris (1982) (593)

F: D re-signed mortgage because he was told there was a mistake w/ dates. D did this w/ J present and J told him he did not have to read it. D really signed a new mortgage.

I: Is defence of non est factum available to a party who, knowing that a doc has legal effect, carelessly fails to read doc thereby permitting a 3rd party to perpetuate fraud on another innocent party?

A: As between an innocent party (A) and the Rs, the law must take into account the fact that the A was completely innocent of any negligence, carelessness or wrongdoing, whereas the Rs by their careless conduct have made it possible for the wrongdoers to inflict a loss. D is barred by reasons of their carelessness from pleading that their minds did not follow their hands when executing the mortgage so as to be able to plead that the mortgage is non-binding.

C: Appeal allowed.

## 5. Mistake as to Written Record - Rectification

Mistake as to terms in written record of K – dispute is as to written record that is used as evidence of K. Rectification is not about intention, but about documentation of K. Often operates in conjunction w/ parol evidence rule. **Equitable doctrine**.

* Power of rectification must be used w/ great caution; and only after court has been satisfied by evidence which leave **no fair and reasonable doubt** that deed impeached does not embody final intention of parties (*Bercovici*)
  + In determining intention, court can consider evidence both prior and subsequent to execution of K (*Bercovici*)
* Due diligence on part of P is not a condition precedent to rectification BUT rectification is an equitable remedy and its award is in discretion of court. (*Sylan*)
* Rectification is predicated on existence of a prior oral K whose terms are definite and ascertainable – term must be easily returned to its original state (*Sylvan*)
* **P must establish:** that terms agreed to orally were not written down properly; attempt of D to rely on the erroneous written doc must amount to fraud or equivalent of fraud; at time of execution of written doc the D knew or ought to have known of error and P did not (*Sylvan*)

**- Requirements for unilateral mistake rectification**: (1) P must show existence and content of inconsistent prior agreement, (2) P must show that written doc does not correspond w/ prior oral agreement, and that D either knew or ought to have known of mistake in reducing oral terms to writing [must be unconscientious/unfair for person to avail himself of advantage], (3) P must show precise form in which written doc can be made to express prior intention, (4) All of foregoing must be established by convincing proof. (*Sylvan*)

#### Bercovici v Palmer (1966) Sask QB (601)

F: Mutual mistake. P selling business to D. P and D prepared agreement together. Formal K later signed. Parcel of land RR in formal agreement which P says was there in error, and D says was always part of deal. P and D seek different rectifications of K.

A: No relationship between business interests that D wanted to buy and RR. RR never mentioned in negotiations or first agreement. Purchase price did not include RR. D did not demand possession of RR from takeover. D never paid taxes or insured RR. Letters between solicitors indicate no RR. Formal agreement lists all contents of buildings but not RR. P acted as if RR was not in agreement.

C: Order for rectification deleting reference to RR in K. In favour of P.

#### Bercovici v Palmber (1966) Sask CA (603)

A: TJ followed principles for rectification. Evidence must make it clear that alleged intention to which P asks that deed be made to conform, continued concurrently in minds of all parties down to time of its execution.

C: Appeal dismissed.

#### Sylvan Lake Golf & Tennis Club Ltd (R) v Performance Industries Ltd (A) (2002) (604)

F: R and A pooled resources to buy golf course. R would operate facilities there for 5 years, after which it would be bought out by A. Issue is option for residential dev’t. Was discussed orally, no specific boundaries decided but R showed A photos and plans. A agreed to option land to permit residential dev’t, otherwise R would not have agreed to joint venture. A’s lawyer put agreement into writing. Contained clause that would not allow for planned residential dev’t (not enough space). Written K but R did not read it before signing. A says that a party who fails to exercise due diligence in its business affairs should be refused rectification. ABQB granted A order for specific performance and A took possession. R commenced action for rectification or damages in lieu.

I: Is there a requirement for rectification to show that you have not been careless?

A: Here there is existence of convincing proof – A fraudulently misrepresented written doc BUT R did not read section at all. BUT most cases of unilateral mistake involve a degree of carelessness on the part of the P – this does not disqualify a party for rectification.

C: In favour of R, but no punitive damages.

# C. Protection of Weaker Parties

Many of these doctrines are very complex – hard for those who are intended to benefit to use them. There are some instances where you may be able to argue all three doctrines under this heading. Duress and undue influence mostly have to do w/ process of consenting, not w/ content of K that results – relationship does not have to be between parties of K itself. Unconscionability looks more at where one party is taking advantage of the other party’s weak position – looks at K that results.

## 1. Duress

Operates w/ respect to circumstances that surround making of K and their impact on ability of pressured person to make a real choice. **Focus on one particular K** – doesn’t look at what happened before or after between parties. Historically treated as form of ‘coercion of will’ – not true assent. Now more emphasis on legitimacy of pressure placed by stronger party. Shift from CL of making K void to equity of **making K voidable at option of weaker party** (*GFAA*) – may not be a complete shift.

Categories of duress:

1. **Duress to the person** (physical threat)
2. **Duress to goods or property**

* For #1 and #2: coercion of will leads to no assent to K – void ab initio at CL

1. **Economic duress**
   * Adopted by JCPC in *Pao On* - to be economic duress, there had to be more than ‘commercial pressure’; there had to be **coercion of will which vitiated consent** – made duress an equitable doctrine, at least for economic duress – result is setting aside K – otherwise did not modify test for duress

**Test for (economic) duress from *Pao On***: (1) whether person alleged to be coerced protested, (2) whether that person had an alternative course open, (3) whether he was independently advised, and (4) whether after entering into K he took steps to avoid it - Possibly (5) requirement (*GFAA*): legitimacy of pressure – but unclear what ‘legitimacy’ means – look to nature of pressure and bargains entered into as a result

**Test for economic duress in context of modification to existing K (***GFAA*): Finding of economic duress is dependent initially on 2 conditions precedent: (1) Promise (contractual variation) must be extracted as a result of the exercise of ‘pressure’, whether characterized as a ‘demand’ or a ‘threat’; (2) Exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer’s demand to vary the terms of the underlying K. Once these 2 threshold requirements are met, legal analysis must focus on whether the coerced party ‘consented’ to the variation, examine: (1) whether the promise was supported by consideration; (2) whether the coerced party made the promise ‘under protest’ or ‘without prejudice’; (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable.

#### Greater Fredericton Airport v NAV Canada (2008) (666)

F: Agreement to pay more – post-K modification. Court decided that promise could be enforced, provided that it was not procured under economic duress.

I: Was there economic duress?

A: AA had no practical alternative but to agree to pay $ it was not legally bound to pay. Party seeking to enforce variation must establish either that it was not procured under economic duress or that other party is precluded from raising duress doctrine for having subsequently affirmed variation. Test from *Universe Tankships* for economic duress: (1) pressure amounting to compulsion of will of victim; (2) illegitimacy of pressure exerted. **Illegitimate pressure is not a condition precedent to a finding of economic duress in cases involving post-contractual modifications to executory Ks. Different test should be applied for economic duress, at least in cases of modification of existing K.** Failure to object to variation is not necessarily fatal to plea of economic duress. **Look at lack of consent – impact of pressure on victim.**

C: Plea of economic duress established – appeal dismissed.

## 2. Undue Influence

Equitable – results in voidable K/unenforceable K. **Unconscientious use by one person of power possessed by him over another in order to induce other to enter a K.** Looks at relationship between parties to see whether it created a situation of undue influence, then at context of that particular K. 3 situations: (1) irrebuttable presumption of undue influence in the relationship; (2) rebuttable presumption of undue influence in relationship; (3) relationship of actual undue influence.

**Test:** (1) Relationship of undue influence. Established by P. (i) Established relationships where undue influence is irrebuttably presumed [e.g. parent-child, advisor-patient]. (ii) Other relationships – examine whether potential for domination exists in nature of relationship.

(2) If relationship of undue influence, consider whether K is suspect (established by P). (i) Commercial – P is obliged to show that K worked unfairness either in sense that he was unduly disadvantaged by it or that D was unduly benefited by it. (ii) Non-commercial – enough to establish presence of dominant relationship.

(3) Can D rebut presumption that K is voidable/unenforceable – D must show that decision of other party was result of full, free and informed thought, despite establishment of relationship (*Geffen*)

#### Geffen v Goodman Estate (1991) (680)

F: TG was mentally ill. TG’s mother’s will left life estate to TG. TG’s brothers sent her to a lawyer who suggested she set up a trust w/ her brothers as trustees (brothers were worried about how she would deal w/ estate). After TG’s death, her son not happy w/ trust and tried to have it set aside arguing undue influence. TG’s will left estate to her children, in conflict w/ trust.

I: Was trust created under undue influence?

A: No evidence of undue influence, so consider relationship. Nothing per se reprehensible about persons in a relationship of trust/confidence exerting influence over beneficiaries – depends on motivation/objective (La Forest dissents on this point). Ds have rebutted presumption of undue influence.

C: Appeal allowed, trust upheld, no undue influence.

D: Suggests that doctrine is moving towards looking at content of K, rather than just relationship.

## 3. Unconscionability

Equitable – discretionary remedies. **Assessment of circumstances surrounding creation of K** – unconscientious use of power and examination of K that resulted. Usually result is K or part of K is unenforceable – but court may be creative in remedies (e.g. *Morrison*).

**There are five historical categories of unconscionability** (*Lloyds*):

1. Duress of goods – owner is in a weak position because he is in urgent need of goods
2. Unconscionable transaction – a man is in need of special care and protection, yet a stronger party exploits his weakness and his property is taken for grossly under value.
3. Undue influence:
   1. stronger party is guilty of fraud to gain the advantage of the weaker; or
   2. stronger has taken advantage of their relationship of the weaker to gain an advantage for himself.
4. Undue pressure – stronger party forces weaker to enter into an unfair K by threatening them.
5. Salvage agreements – when a ship is sinking and requires assistance, the rescuers cannot take advantage of the sinking ship's urgent position to demand ridiculous fees.

* All 5 categories share scenario of inequality in bargaining power: law relieves party who, w/o independent advice, enters into a K upon terms which are very unfair or transfers of property for a consideration that is very inadequate when his bargaining power is seriously impaired by reason of his own desires (*Lloyds*)

**Test for unconscionability**: (1) proof of inequality in the position of the parties arising out of the ignorance, (2) need or distress of the weaker, which left him in the power of the stronger, and (3) proof of substantial unfairness of the bargain obtained by the stronger; (4) proof of these circumstances creates presumption of fraud, which stronger party must rebut by proving that bargain was fair, just and reasonable or by showing no advantage was taken (*Morrison*).

**Alternative test**: **Is transaction as a whole sufficiently divergent from community standards of commercial morality that is should be rescinded?** (*Harry* – just simpler version of *Morrison* test)

**Alternative test – inequality of bargaining power**: K is voidable for unconscionability if: (1) terms were very unfair or consideration inadequate; (2) bargaining power was impaired by necessity, ignorance or infirmity; (3) undue pressure or influence was used, not necessarily consciously; (4) there was an absence of independent advice (*Lloyds*).

#### Morrison v Coast Finance Ltd (1965) (697)

F: P, elderly widow, persuaded by L and K to borrow $ from D on first mortgage on her home and lend the $ to L and K so that L could repay $ that he owed D, and L and K could pay other D for 2 cars they were buying. L and K gave promissory note to P. P got money, and L and K repaid Ds. P had no independent advice, but she wanted it and asked for help. L and K did not repay P – P commenced action to have mortgage set aside as having been procured by undue influence and as an unconscionable bargain.

I: Should K be set aside for unconscionability?

A: Inequality in positions of P and Ds and L/K. Loan to advance interests of D, L and K.

C: Whole transaction should be set aside but not possible. Set aside mortgage, w/o requiring P to repay money. Appeal allowed.

#### Lloyds Bank v Bundy (1975) (704)

F: D’s son asked D for collateral for taking out loans from P. D signed original collateral for smaller $ after considering it overnight and talking to lawyer. Later, D’s son needed more money – lawyers from P came to D’s house and convinced D to sign doc to put up house as collateral as only way to help son. Bank then foreclosed on son’s assets – and seized D’s house. D wouldn’t leave house, and P sued to have him evicted.

I: What is unconscionability? Is K void for unconscionability?

A: Denning: Usually no way out of signing bank charge. BUT exception when parties have not met on equal terms. Here P took advantage of D – D’s relationship w/ son and desire to help him negated his bargaining power. P should have told D to get independent legal advice.

C: Appeal allowed.

D: Not good law (at least in UK).

#### Harry v Kreutziger (1978) (709)

F: P was poor Indian w/ little formal education, physical infirmity. Owned boat w/ fishing license – boat was not worth much but license for very valuable. D offered $ for boat, P took some convincing before agreeing. D later unilaterally reduced price. D told P he would be able to get another license, but P was not able to get another license due to selling boat. P sued to have sale set aside.

I: Is K void for unconscionability?

A: Application of *Morrison* test. Clear inequality between parties. D’s actions demonstrate his power. Deal is clearly unfair. D unable to demonstrate that deal was fair. Lambert’s community standards test – K fails test and should be rescinded.

C: Appeal allowed, K rescinded.

D: Lambert’s test not supposed to overrule *Morrison*, just be simpler.

# D. Illegality

Doctrine of last resort because of uncertain results. If you want to use illegality then: (1) Label K as illegal (does it fall into one of the categories of public policy?); (2) Consider the results of illegality.

## 1. Ks Contrary to Public Publicy

#### KRG Insurance Brokers v Shafron (2009) (730)

F: D sold shares he owned in his insurance agency to P. D was employed by P under series of Ks. Restrictive covenant prohibited D from working w/ a competing insurance business for 3 years in ‘Metropolitan City of Vancouver’, after leaving employment of P. D began working for another insurance agency in Richmond. P commenced action against D.

I: Can doctrines of severance/rectification be applied to resolve ambiguity in a restrictive covenant in an employment K or render an unreasonable restriction in a covenant reasonable?

A: Restrictive covenant in an employment K will be subject to more rigorous scrutiny than one in a K for sale of business. Geographical ambiguity here – ‘Metropolitan City of Vancouver’ doesn’t exist. Applying severance to an unreasonably wide restrictive covenant invites employers to draft overly broad restrictive covenants w/ prospect that court will only sever unreasonable parts or read down covenant to what courts consider reasonable. Severance/rectification cannot be used.

**Notional severance** has no place in construction of restrictive covenants in employment Ks: no bright-line test for reasonableness AND applying doctrine of notional severance invites employer to impose an unreasonable restrictive covenant on employee w/ only sanction being that if the covenant is found to be unreasonable, court will still enforce it to extent of what might validly have been agreed to.

**Blue pencil severance** may be resorted to sparingly and only in cases where part being removed is clearly severable, trivial and not part of main purport of restrictive covenant - General rule must be that a restrictive covenant in an employment K found to be ambiguous or unreasonable in its terms will be void and unenforceable

C: Allow appeal – dismiss P’s claim.

## 2. Effects of Illegality

Usual basic effect of illegality is that court will not enforce K – rare that whole K will be illegal. BUT property that has been transferred under illegal K generally cannot be recovered. UNLESS parties are not equally blameworthy. Effect of a restrictive covenant that is in restraint of trade is usually to render whole K unenforceable if restrictive covenant is essence of K, or to have restrictive covenant severed from K if it can be severed. Court may sometimes ignore the illegality if it is not possible to isolate the problematic provisions in the K, but voiding the whole K would be overkill.

1. **CL illegality**: involves consideration of what statutory purpose is and whether making a given K illegal, considering all surrounding circumstances of that particular K, will further objects of statute – rejects understanding that simply because a K is prohibited by statute it is illegal and therefore void ab initio - approved in *Still*

* At CL, Ks can be rendered unenforceable on grounds that they are contrary to public policy (*Still*)
* CL has developed various **categories of public policy** that can make a K illegal:

1. Restraint of trade
   * **Restrictive covenant** = promise not to do something – when a restrictive covenant becomes illegal, then = restraint of trade
   * Bare covenant not to compete is prima facie unenforceable unless reasonable.

* At CL, restraints of trade are contrary to public policy because they interfere w/ individual liberty of action and because exercise of trade should be encouraged and should be free. Onus is on party seeking to enforce restrictive covenant to show that it is reasonable. **Court should consider**: geographic and temporal scope of covenant and extent of activity being prohibited. **Ambiguous** restrictive covenant will be prima facie unenforceable (*Shafron*)
* Distinguish between K for sale of business and employment K – greater freedom to K in K for sale of business (*Shafron*).
* Creates tension between concept of freedom to K and public policy considerations against restraint of trade.

1. K to commit a crime or do a legal wrong
2. Ks prejudicial to good public administration
3. Ks prejudicial to administration of justice
4. Ks prejudicial to good foreign relations
5. Morals

2. **Statutory illegality**: A Ks creation or execution is prohibited by statute. If **creation** of K is prohibited, then it was generally void at CL (*Still* tries to change this – court should be free to decide consequences). If **execution** of K is prohibited, then equity may step in to make it unenforceable or voidable based on facts and policy (*Still* has a slightly different approach).

* **Modern approach -** Look at: (1) purpose underlying statutory prohibition; (2) Remedy being sought; (3) Consequences which flow from finding K unenforceable. (*Still*)
* *Still* dealt only w/ statutory illegality – appears that old law on recovering property still applies even in context of statutory illegality – old law on unenforceability still applies to CL illegality
* Where a K is expressly or impliedly prohibited by statute, court may refuse to grant relief to a party when, in all circumstances of case, including regard to objects and purposes of statutory prohibition, it would be contrary to public policy, reflected in relief claimed, to do so (*Still*)

#### Still v Minister of National Revenue (1997) (762)

F: P genuinely and mistakenly thought she had proper papers to work in Canada. She did work and paid unemployment insurance premiums. When she was laid off, her application for unemployment benefits was turned down on basis that her employment K had been illegal.

A: Affirmation of modern approach. Where statutory prohibition goes to performance of a K and not its formation, a party acting in good faith is entitled to relief notwithstanding statutory breach. Where a statute prohibits formation of a K, courts should be free to decide consequences. Public policy here weighs in favour of legal immigrants who have acted in good faith.

C: Applicant was not disentitled to unemployment insurance on ground of illegality – no impact of illegality.

# E. Frustration

Termination of a K consequent upon an unforeseen catastrophic event that makes K impossible, or prevents K from being performed in a manner at all similar to what was contemplated by the parties when they entered K. Very difficult to successfully argue frustration.

## 1. Development of the Doctrine

- **Rule of absolute promises** – when a person enters a K they cannot escape liability from that K simply because events turned out differently than expected rendering it impossible to perform the K. Bargain in K sets out allocation of risk definitively – no doctrine of frustration (*Paradine*)

- **Origin of Frustration:** Where foundation of K ceased to continue to exist, w/o fault of contracting party, then parties are excused from performing their promises by virtue of an implied term (*Taylor*)

**Test:** Frustration operates other than by virtue of implied term: occurs whenever law recognizes that w/o default of either party a contractual obligation has become incapable of being performed because circumstances in which performance is called for would render it a thing radically different from that which was undertaken by K – ‘it was not this that I promised to do’. (*Davis*)

* Consider what a reasonable person would have foreseen (*Davis*)

#### Paradine v Jane (1647) (620)

F: P had leased certain lands to D and brought this action in debt for rent which D had failed to pay. D claimed Prince Rupert invaded his land and expelled him.

A: When the party by his own K creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his K.

C: In favour of P.

#### Taylor v Caldwell (1863) (621)

F: K to use hall for concert, but hall burnt down before concert. Ps seek damages from Ds for failure to supply music hall.

L: If nature of K is such that parties must have known at time of contracting that it could not be fulfilled unless some specified thing continued to exist, it is not a positive K. BUT if a party gives an express/implied condition that that thing will continue to exist, that party is liable for breach if it ceases to exist.

A: Parties contracted on basis of ongoing existence of music hall.

C: Both parties excused from obligations - K frustrated.

#### Davis Contractors Ltd v Fareham UDC (1956) (628)

F: P contractors entered into building K to build houses for D within 8 months. Owing to unexpected circumstances, and w/o fault of either party, adequate supplies of labour were not available in post-war market and work took 22 months. Contractors claimed that K was frustrated and that they were entitled to a sum of money on a quantum meruit basis in addition to K price.

L: Parties can’t intend terms they didn’t foresee. Frustration is not about parties’ intentions.

A: Cause of delay was not any new state of things which parties could not reasonably be thought to have foreseen. Not right to treat possibility of delay as having same significance for each party.

C: No frustration.

## 2. Application of the Doctrine

**3 factors that govern whether an event can frustrate a K:** (1) that it be unforeseen; (2) that it not be fault of parties; (3) that it make purpose of K impossible or drastically more difficult to achieve. (*Davis*)

* To consider for #3: impossibility and difficult – destruction and death and illness or method or disappearance of purpose; change in law and illegality (*Capital Quality*)
* No frustration when it is possible to hold that reasonable men could have contemplated the taking risk of circumstances being what they turned out to be (*Merchant Marine*)
* Purpose/foundation of agreement must be destroyed (*Capital Qualify* versus *Victoria*)
* Frustration may not be due to act/election of a party (*Maritime*)

#### Can Govt Merchant Marine Ltd v Can Trading Co (1922) (623)

F: P contracted w/ D to transport lumber in 2 vessels. To knowledge of both parties, ships were, at time of contracting, under construction. Because of a dispute between P and shipbuilders, vessels were not ready in time and contracted voyage could not be made.

**L: Consider nature of K and circumstances in which it was made in order to see from nature of K whether parties must have made their bargain on footing that a particular thing or state of facts should be in existence when time for performance should occur.**

A: Delay was not due to extraordinary occurrence – strikes/labour difficulties are not unforeseeable.

C: No frustration.

#### Capital Quality Homes Ltd v Colwyn Construction Ltd (1975) (632)

F: P agreed to purchase from D 26 building lots within a registered plan of subdivision. P was planning on building house on each lot and selling them by way of separate conveyances. When sale agreement was executed, designated land was not within an area of subdivision control. Then change in law – prohibited and restricted conveyancing of lands, 33 days prior to anticipated closing date. P would not withdraw its demand for 26 individual conveyances w/ consents attached and D did not provide such conveyances. P contended that D was in default and repudiated agreement.

A: D is required to convey marketable title in FS. Leg was not contemplated by parties, not provided for in agreement and not brought about through voluntary act of either party – destroyed foundation of agreement.

C: Frustration – D must refund to P balance of deposit money.

#### Victoria Wood v Ondrey (1977) (635)

F: K to convey a large plot of land which both parties knew P meant to be subdivided. Land could no longer be subdivided due to leg changes. P sought declaration that K was frustrated and return of deposit.

A: Foundation of agreement not destroyed. K was for transfer of one large plot which could still be performed.

C: No frustration.

#### Maritime National Fish v Ocean Trawlers (1935) (648)

F: Parties were aware of leg which required licences. As were able to obtain only 3 fishing licences for 5 trawlers they had hired. Did not allocate a licence to trawler they had hired from Rs and claimed that K for that vessel was frustrated because of inability to obtain enough licences.

A: It was act and election of As which prevented vessel from being licensed.

C: No frustration.

## 3. Effects of Frustration

CL: K is valid and effective up to frustrating event – after that no primary or secondary obligations. CL still indicates when a K is frustrated, and statute deals w/ consequences.

#### Frustrated K Act, RSBC 1996, c 166

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

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

(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 K for carriage of goods by sea, except a time charter party or a charter party by demise,

(b) a K of insurance, or

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

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

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

4 If a part of any K 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 K of sums that are or can be ascertained under K,

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

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 s 6, every party to a K to which this Act applies is entitled to restitution from the other party or parties to the K for benefits created by the party's performance or part performance of K.

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

(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.

7 (1) If restitution is claimed for the performance or part performance of an obligation under the K, other than an obligation to pay money, in so far as the claim is based on expenditures incurred in performing the K, 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.

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.

9 (1) An action or proceeding under this Act must not be commenced after the period determined under subsection (2).

(2) For the purposes of subsection (1), a claim under this Act must be a claim for a breach of the K arising at the time of frustration or avoidance, and the limitation period applicable to that K applies.

# Remedies

Legal action available to a person when another person has broken some obligation that was owed to 1st person. Arise only when there is a breach of a K obligation.

**Consider:** (1) Do you have the right to that remedy? (2) What will it give you? (3) Can you combine more than one remedy?

|  |  |  |  |
| --- | --- | --- | --- |
| **Remedy** | **When available** | **Who can claim** | **Nature and effect** |
| **Termination (CL)** | For breach of condition (or intermediate term sometimes) | Party not in breach | Ends primary obligation of both parties from termination |
| **Damages (CL)** | Upon breach of any primary obligation in K | Party not in breach upon showing: breach of other; amount of loss (quantum); reasonableness of claim (not too remote and claimant mitigated) | Money substitute for obligation broken, quantified by reference to: (a) pre-agreed amount (liquidated damages); (b) CL rules and principles; (c) combination of a and b |
| **Debt (CL)** | Upon failure to pay contractually specified sum | Party not in breach | Order to pay sum stipulated in K. |
| **Specific Performance or Injunction (Equity)** | One party is about to breach or has breached K | Other party who: has clean hands; is not tardy; is not seeking labour; can show above remedies are not adequate; can show K not terminated or avoided | Order to perform K. Keeps primary obligations alive. |
| **Equitable damages** | When specific performance or injunction appropriate but unavailable (or P opts for money substitute) | Party who might have got specific performance/injunction | Equitable remedy; money substitute for specific performance/injunction (discretionary) |

# A. Damages – Rationale

Awarded by virtue of fact that K contains an obligation w/ respect to damages. Parties themselves can oust implied terms by agreeing expressly on damages provisions – **liquidated damages** – then it will be a debt claim.

## 1. The Interests Protected

K is a device whereby 2 parties can arrange aspects of their futures and rely on expectations thus generated to be fulfilled when time comes – main point of Ks is to eliminate surprises. Primary obligations have legal meaning because law provides for consequences in event that they are not carried out as agreed and expected. K damages must always be paired w/ a primary obligation which has been broken.

#### Fuller and Perdue, The Reliance Interest in K Damages (783)

To protect reliance interests K law should award expectation measure of damages. The 3 interests do not present equal claims to judicial intervention.

- **Theories of why expectation interest should be protected:**

- **Psychological:** promisee has formed an attitude of expectancy such that a breach of promise causes him to feel that he has been ‘deprived’ of something which was ‘his’

- ‘**Will theory’**: views contracting parties as exercising a leg power, so that legal enforcement of K becomes merely an implementing by state of a kind of private law already established by parties

- Essence of **credit economy** lies in fact that it tends to eliminate distinction between present and future (promised) goods – expectancy = property

- **Juristic:** courts have protected expectation interest because they have considered it wise to do so

- Foregoing of other opportunities is involving in entering most Ks, but this is difficult to measure.

- Policy in favour of preventing and undoing harms resulting from reliance, but also a policy in favour of promoting and facilitating reliance on business agreements

- Law measures damages by expectancy in part because society views expectancy as a present value; society views expectancy as a present value in part because law gives protection to expectancy

## 2. The Expectation Interest

- Seek to give promisee value of expectancy which promise created – object is to put P in as good a position as he would have occupied had D performed his promise (*Blake*).

- E.g. K-price is $10, market price is $25, so damages are $15

- Measure of damages for non-delivery of goods: damages will be recoverable in an amount representing what purchaser would have had to pay for goods in market, less K price, at time of breach (*Asamera*)

## 3. The Reliance Interest

- P has in reliance on promise of D changed his position – object is to put him in as good a position as he was in before promise was made – backwards-looking.

- Useful when claim based on expectation interest is difficult to make, because it is impossible to say what financial position of claimant would have been had other party not broken K (*McRae*).

- Cannot recover on both reliance interest and expectation interest (*Sunshine*)

- Onus rests on D to establish that amount of P’s expenditure to date of breach was less than net loss which would have been incurred had K been completed (*Sunshine*)

- As long as damages awarded do not overcompensate, P can elect to claim damages for either expectation interest or reliance interest – whichever is larger - unless one of them is too speculative (*Sunshine, McRae*)

#### McRae v Commonwealth Disposals Comm (1951) (793)

F: P won a competition to purchase a wrecked oil tanker ‘said to contain oil’. P incurred expenses in preparing to salvage ship, but turned out that there was no tanker at that position.

A: Claim for lost profit too speculative. In *Chapin* the very subject of K was giving of chance to win, whereas here subject of K was provision of wrecked tanker that only indirectly led to chance of profit. Burden on D of establishing that, if there had been a tanker, expense incurred would equally have been wasted. **P can be compensated for reasonable courses of action.**

C: Damages awarded on basis of expenditure incurred (reliance interest).

#### Sunshine Vacation Villas Ltd v The Bay (1984) (801)

F: P was granted licenses to operate travel agencies in stores operated by D. D broke K after P making preparations. TJ awarded damages based on loss of capital (reliance interest) and loss of profit (expectation interest).

I: Can you claim both reliance interest and expectation interest?

L: Normal measure of damages in K: if one party makes default in performing his side of K, then basic loss to other party is market value of benefit of which he has been deprived through breach. D must be credited w/ amount P has saved by no longer having to perform his side. P cannot also recover any expenses he has incurred in preparation or in part performance.

A: P has not established that a proper award for loss of profits would have exceeded amount of lost capital.

C: Damages should be awarded on basis of reliance interest – expectation interest too speculative.

## 4. Restitution

- P has in reliance on promise of D conferred some value on D – prevention of gain by defaulting promisor at expense of promisee. Normally available when there is a fiduciary obligation.

- On rare occasions, award of damages to a P is discretionarily made on basis of what D has (unfairly) gained or retained as profit as a result of his own breach. (*Blake*)

- **Test:** Did P have a legitimate interest in preventing D’s profit-making activity and hence in depriving him of his profit? (*Blake*)

#### Attorney-General v Blake (Jonathan Cape Ltd Third Party) (2001) (805)

F: D was employed as member of security and intelligence services, then became an agent for SU. D escaped from prison, wrote autobiography, and got publishing deal. D had previously signed a declaration saying he would not divulge official info – publication of book is breach of K. AG commenced action against D, w/ view to ensuring he should not enjoy any further financial fruits from his treachery.

A: Crown has legitimate interest in preventing D profiting from disclosure of official info.

C: AG entitled to be paid a sum equal to whatever amount is due and owing to D from publisher under publishing K.

# B. Damages – Quantification Problems

P has burden of satisfying court as to amount that was lost by virtue of D’s breach of K. Date of breach usually used to assess damages.

- Fact that damages cannot be assessed w/ certainty does not relieve wrong-doer of necessity of paying damages for his breach of K (*Chaplin*).

- When breach of K because work contracted for is not completed, damages =

* **Cost to complete work that was contracted for** (*Groves* – Stone)
* Difference between market value of property in condition received by P and what its market value would have been had D completed work (*Groves* – Olson)

- **Speculations and chance**: Ks that are overly speculative or all-or-nothing can be problematic. Resolution depends on just how speculative the chances of gain were had K not been broken.

* In *McRae*, court said that the chance of any gain was too speculative. In distinguishing *Chaplin*, judges said the very subject of K was giving of chance to win, whereas in *McRae* the subject of K was provision of tanker that only indirectly led to chance of profit.

- **Injured feelings, disappointment and mental distress**:

* In a proper case damages for **mental distress** can be recovered in K – damages can be given for disappointment, distress, upset and frustration caused by breach (*Jarvis*)
* Have to show point of K was to get one emotion and breach led to opposite emotion (*Hadley*)

#### Chaplin v Hicks (1911) (814)

F: Because of breach of K by organizer of acting/beauty contest, P, one of 50 finalists, was unable to attend meeting where she would have had chance to be one of 12 winners chosen. She had ¼ chance to be chosen. P sued for loss of chance of selection.

I: Are damages so uncertain as to be impossible of assessment?

L: **Jury must do best they can, and it may be that amount of their verdict will really be a matter of guesswork.** **Damages are assessed, not calculated.** There are cases where loss is so dependent on mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from breach – not the case here.

A: P could not have sold her chance. BUT if it could have been transferred, it would have had value.

C: Appeal dismissed – should get ¼ value of winning.

#### Groves v John Wunder Co (1939) (816)

F: D was supposed to leave property in a particular state after removing sand and gravel from it. D did not – deliberate breach of K. 2 figures to work w/ in awarding damages: high figure (cost of getting work done that was not done by party in breach) and lower figure (difference in value of property now that it was not in its ‘improved’ state). P appeals sum awarded for damages (low figure).

I: Is P entitled to higher damages?

A: Stone: Correct doctrine is that cost of remedying defect is proper measure of damages – **cost to complete work that was contracted for.** Olson: if P is awarded higher figure, he will receive more than what his property was worth when breach occurred. Damage recoverable should **be difference between market value of property in condition it was when delivered to and received by P and what its market value would have been if D had fully complied w/ its terms**.

C: New trial ordered.

NB: There can be more than one feasible, logical, defensible amount for damages – you can argue for either, just justify it.

#### Jarvis v Swans Tours (1973) (825)

F: P bought a 2-week holiday package. Holiday did not live up to brochure. P sued D for damages, including failure of holiday to meet expectations generated by tour company through its brochure and mental distress and aggravation he experienced both on holiday and in its wake.

A: Statements in brochure were representations/warranties so P has right to damages for breach. P should be compensated for loss of entertainment and enjoyment which he was promised, but did not get.

C: Appeal allowed.

# C. Damages - Remoteness

P has to establish that loss is not too remote to pin responsibility on D. Breach of K must lead to damages claimed – must be ‘effective’ cause, need not be only cause. D will not be liable if intervening event breaks chain of causation.

**Test for remoteness** set out in *Hadley:*

**1. General damages: First part of test allows for damages ‘arising naturally’ – damages that any P would suffer, whatever surrounding circumstances, assuming it would be within reasonable contemplation of parties**

- One need simply have reference to terms of K itself

- More explicit and detailed terms = greater number of factors that can be brought into an assessment under first part of test

**2. Special damages: Second part of test – special circumstances need to be known at time K was entered into**

- What needs to be known at time of entering K = general nature of special circumstances

- Many of special circumstances will be known implicitly from what other party ought to be aware of

- **Test reformulated in *Victoria***: damages are recoverable if loss is a **serious possibility or a real danger**

* In order to make K-breaker liable under either rule it is **not necessary that he should actually have asked himself** what loss is liable to result from a breach – knowledge can be imputed (*Victoria*)
* Nor to make a particular loss recoverable, need it be proved that upon a given state of knowledge the D could, as a reasonable man, foresee that a breach must necessarily result in that loss – enough if he could foresee it was **likely so to result** (*Victoria*)

- In K, crucial Q is whether, in info available to D when K was made, he should, or reasonable man in his position would, have realized that **such loss was sufficiently likely** [probable] to result from breach of K to make it proper to hold that the **loss flowed naturally from breach or that loss of that kind should have been within his contemplation** (*Koufos*)

#### Hadley v Baxendale (1854) (858)

F: Action by mill owners against carriers for profits lost when there was a delay of several days in delivery of a new shaft for their mill. Delay of delivery prevented mill from operating. Ds objected that damages were too remote.

A: Not the probable result of delay in delivery that mill would have to close; carriers might well have supposed that mill would have another shaft they could use in meantime. Special circumstances not communicated.

C: New trial ordered. Judge ought to have told jury that they ought not to take loss of profits into consideration at all in estimating damages.

#### Victoria Laundry (Windsor) Ltd v Newman Indust Ltd (1949) (861)

F: Ps wished to expand their laundry and agreed to purchase a large boiler owned by Ds. Ds knew that Ps were launderers and dyers and that they required boiler for use in their business. Repairs to boiler caused delay – Ps sued for loss of business profits. TJ refused to allow anything for loss of profits.

A: **Carrier commonly knows less than seller about special circumstances.** Was conveyed to Ds that delay was likely to lead to loss of business. Circumstance that Ps had assured expectation of special Ks qualifies as special circumstance which was not communicated.

C: Appeal allowed.

#### Koufos v Czarnikow (C.) (The Heron II) (1969) (868)

F: Rs chartered A’s vessel. Vessel in breach of K made deviations in course which caused delay of 9 days. Was intention of Rs to sell sugar promptly upon arrival. A did not know this, but knew that there was a market for sugar where they were going. Market price fell – profit would have been bigger had there not been the delay. Rs did not have in mind any particular date as likely date of arrival. No reason to suppose it was more probable that during relevant period such fluctuation would be downwards rather than upwards. Rs claim that they are entitled to recover difference as damage for breach of K.

I: Can a P recover as damages for breach of K a loss of a kind which D, when he made K, ought to have realized was not unlikely to result from a breach of K causing delay in delivery?

L: Interprets *Hadley* as relating to probability, rather than possibility – high probability = reasonably foreseeable. Disapproves of reformulation of *Hadley* test in *Victoria* – too broad.

C: Loss of profit claimed not too remote to be recoverable as damages – appeal dismissed.

# D. Damages – Mitigation

- P has obligation to keep damages within reason – must either (1) buy replacement goods or (2) commence litigation as fast as possible – **within a reasonable period of time** (*Asamera*).

- **When:** Taking steps to mitigate cannot be expected until a P learns of breach or within a reasonable time thereafter (*Asamera*)

- P cannot rely on his own impecuniosity to avoid taking reasonable steps to mitigate – unless other party knows about it

- Where acceptance of early termination will ‘aggravate’ innocent party’s losses, he will have a substantial and legitimate interest in looking to performance when K calls for it (*Asamera*)

- P need not take all possible steps to reduce his loss – P need not put his money to an unreasonable risk including a risk not present in initial transaction in endeavoring to mitigate his losses (*Asamera*)

#### Asamera Oil Corp v Sea Oil & General Corp (1979) (871)

F: Baud Corp wanted return of 125,000 shares in Asamera from president of Asamera. Shares lent to Book in 1957. Term of K said to be returned by 1960, Pres sold in 1958. Share prices fluctuated greatly. Baud didn’t mitigate losses. Brook made subject to injunction restraining him from selling 125,000 shares in Asamera in 1960 – but Brook interpreted that as meaning that he must at all times remain in possession of at least 125,000 shares, rather than the identical shares.

I: What action did law require of A by way of mitigation of damages?

A: **At least by July 1967**, it could not be said that Baud would reasonably be discouraged from replacing the 125,000 shares in open market because of low price of an inactive company. For a breach of K by vendor on sale of shares: breach would normally allow buyer use of his funds formerly committed to purchase and consequently damages should be calculated on basis that he ought to have taken steps to avoid his losses by purchase of shares on market at time of breach. In case of non-return of shares, breach does not give rise to any asset in hands of P since he has already parted w/ his funds.

C: Damages fixed on basis of adjusted median price of Asamera shares from late 1966 to mid-1967.

# E. Time of Measurement of Damages

- Presumptive time of measurement of damages is **time of breach** (*Semelhago*).

* If innocent purchaser is compensated on basis of value of goods as of date of breach, purchaser can turn around and purchase identical or equivalent goods (*Semelhago*)

- Not appropriate to insist on applying date of breach as assessment date when purchaser of a unique asset has a legitimate claim to **specific performance** and elects to take damages instead – then damages may be assessed at **date of trial** because that is when K is broken (*Semelhago*)

#### Semelhago v Paramadevam (1996) (879)

F: R purchaser agreed to buy house from A vendor. R negotiated 6-month mortgage on current house to pay for new house, so that he could close deal on new house and then sell old one at appropriate time. Before closing date, A vendor reneged. R remained in old house, which appreciated in value. R sued for damages and specific performance. R elected to take damages rather than specific performance. TJ awarded difference between purchase price he had agreed to pay and value of property at time of trial. As appealed on ground that assessment was a ‘windfall’ because R was benefiting not only from increase in value of new house, but also from gain in value of old house. Court of Appeal allowed appeal.

I: What principles apply to assessment of damages in lieu of specific performance and how do those principles apply to these facts?

L: Under CL every piece of real estate was generally considered to be unique. **A claim for specific performance has effect of postponing date of breach.**

A: Should not deduct increase in value of R’s residence – he would have gotten this had there been order for specific performance.

C: Appeal dismissed – damages should be assessed at date of trial.

# F. Liquidated Damages, Deposits and Forfeitures

### Liquidated Damages and Penalty Clauses

- **Liquidated damages:** parties to a K can try to avoid all complications by agreeing in advance, at time K is entered into, what damages will be in event of a breach. CL principles of damages will fill in blanks. Both liquidated and CL damages are meant to compensate for failure to perform primary obligations, and no more.

* **Test:** Was agreed upon sum a genuine estimation of creditor’s probable or possible interest in due performance of principal obligation? (*Shatilla*)

- **Debt** is a CL remedy – claim to have enforced a contractual promise to pay money by one K party to other – the action you bring for liquidated damages

- **Penalty Clauses:** If liquidated damages clauses are there to hold a party in terrorem or to overcompenstate - not enforceable. (*Shatilla*)

* If repeated breach is possible or if K has one award for breaching many things, presumption of a penalty - presumption may be rebutted if it is shown that parties have taken into consideration different amounts of damages that might occur, and had actually arrived at an amount which was considered proper under all circumstances (*Shatilla*)
* There is **no freedom of K for secondary obligations – they must mirror primary obligations** (*Shatilla*)
* Sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison w/ greatest loss that could conceivably be proved to have followed from breach (*HF Clarke*)

- **Power to strike down penalty clause will not be used if there is no oppression** i.e. if penalty amounts to less than actual amount of loss (*JG Collins*)

#### Shatilla v Feinstein (1923) (885)

F: D sold his business to P. There was a covenant stating that if D competed against P in various degrees then he must pay 10K to P. D breached the covenant.

I: Is the agreement to pay 10K a penalty or liquidated damages?

A: Covenant provides for payment of a lump sum upon occurrence of any one of a number of things differing in importance, and some of them trivial in character. Sum here is a penalty – can be seen clearly that loss in one particular breach could never amount to sum stated.

C: Penalty which Court will not enforce.

- **Exclusion/limitation clause** can be seen as flip side of penalty clause in some cases

* Both derogate from basic principle that damages should compensate, no more and no less
* For liquidated damages provisions – penalty doctrine is applied w/ some predictability and ease
* For a limitation clause – doctrine of unconscionability - not readily defined and not successfully used much

#### JG Collins Insurance Agencies Ltd v Elsley (1978) (896)

F: Breach of restrictive covenant. Clause stating that D had to pay P $1000 for liquidated damages in case of breach.

L: **Agreed sum payable on breach = max amount recoverable whether sum is a penalty or a valid liquidated damages clause.**

C: Penalty clause enforced.

D: Arguable that this was actually a limitation clause – court used wrong principles to assess.

### Formulas

- In cases of clauses that can be breached w/ varying degrees of severity in terms of consequences, a better approach might well be to have not a particular sum as liquidated damages amount, but rather a **formula** that gives a varying figure depending on seriousness of consequences of breach – acceptable unless it is clear that whatever figure formula generates, it will be too great an amount (*HF Clarke*)

HF Clarke Ltd v Thermidaire Corp (1976) (889)

F: Clause in K not to sell competitors’ products said that in event of breach, ‘Clarke shall pay amount equal to gross trading profit realized through sale of such competitive products’ for a given period’. P broke covenant. D did not seek interim/interlocutory injunction, so D is claiming damages equal to gross trading profit for 3 year period during which P was breaching K.

I: Penalty or liquidated damages?

L: **Parties’ intentions will not alone be allowed to determine how prescribed sum/loss formula will be characterized**.

A: Formula necessarily yielded a result far in excess of loss of net profits.

C: Clause is penalty because it was a grossly excessive and punitive response to problem to which it was addressed.

### Deposits and Forfeitures

- **Deposit**: preliminary payment often used to confirm acceptance of a K, to be acceptance itself, or to trigger other party’s obligation

* Primary obligation: preliminary payments often used to confirm acceptance of a K, to be acceptance itself, or to trigger other party’s obligations – can only be a condition precedent to other party’s obligations becoming enforceable
* Secondary obligation: if party making payment fails to complete payment obligation after having paid deposit, then deposit is forfeited by way of remedy to party who has received it
* **Use Law and Equity Act, s 24 as authority\*\***

- **When there is no forfeiture clause** if buyer defaults, then, so long as seller keeps K open and available for performance, buyer cannot recover money. BUT if seller rescinds K or treats it as at an end, then buyer is entitled to recover his money by action at law, subject to cross-claim by seller for damages (*Stockloser*)

- **When there is a forfeiture clause** or money is expressly paid as a deposit, then buyer who is in default cannot recover money at law at all (*Stockloser*)

* BUT equity can relieve buyer from forfeiture of money and order seller to repay it on such terms as court thinks fit: (1) forfeiture clause must be of a penal nature; (2) must be unconscionable for seller to retain money – evaluate when amount is claimed, not when K is formed (*Stockloser*)

#### Stockloser v Johnson (1954) (898)

F: D sold land to P to be paid for in installments. Term of K that D remained owner until entire purchase price was paid. K provided that if P defaulted in payment, D was entitled to terminate K and that all payments made by P to D would be forfeited to D. P failed to make necessary payment, D terminated K, P seeks to recover installments paid to D.

L: When there is no forfeiture clause, if money is handed over in part payment of purchase price, and then buyer makes default as to balance, then, so long as seller keeps K open and available for performance, buyer cannot recover money, but once seller rescinds K or treats it as at an end owing to buyer’s default, then buyer is entitled to recover his money by action at law, subject to a cross-claim by seller for damages.

A: Not unconscionable for D to retain money.

C: In favour of D.

D: **Not good law – equity has no place w/ regards to deposits.**

#### Law and Equity Act s 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.

# G. Equitable Remedies

Don’t sit well w/ other remedies – you are unlikely to get both an equitable remedy and a CL remedy.

If there is an order of specific performance or an injunction, then K is affirmed. Focused on performance of primary obligations – useful when there is no substitute for performance of primary obligations.

- **Equitable damages**: money that serves as replacement for order of specific performance/injunction.

* Damages ‘in substitution’ for specific performance must be a substitute, giving as nearly as may be what specific performance would have given (*Semelhago*)

- **Injunction**: order of court to somebody to do or not to do something

- **Specific performance**: order by a court to a contracting party to perform K obligations; it is very much like an injunction to perform whole K

* Very unusual to make an order for specific performance for a monetary amount (see *Beswick*)

- **Factors governing availability:**

1. Consideration of CL remedies

* Not available if CL says K is void or has been rightly terminated or rescinded.

1. Adequacy of damages
   1. Damages are inadequate when subject matter of K is unique in that it could not be bought anywhere else (*Semelhago*)
   2. Increasingly not case that Ks or land will automatically attract remedy of specific performance, particularly if land is to be used as an investment or for early resale (*Dodge*)
   3. Specific performance will only be granted if P can demonstrate that subject property is unique (*Dodge*)
2. Applicant must come w/ clean hands
3. P’s own conduct in respect of K obligations
4. Timely request (laches)
5. Hardship to D or to third parties
6. Obligations extending over a period of time (generally not subject to orders of specific performance – too much work for court)
7. Obligation to perform a personal service (see *Warner Bros* – generally a court will not order an injunction/make an order of specific performance where it would mean ordering D to perform a personal service)
8. Mutuality (K must be enforceable against P if P is to have it enforced against D)

#### John E Dodge Holdings Ltd v 805062 Ontario Ltd (2003) (904)

A: In order to establish that a property is unique person seeking remedy of specific performance must show that property in question has a quality that cannot be readily duplicated elsewhere. **Quality should relate to proposed use of property and be a quality that makes it particularly suitable for purpose for which it was intended.** Price can be a factor in uniqueness. Time when a determination is to be made as to whether a property is unique is **date when an actionable act takes place**. May in some cases be a later date, but will never be date before breach takes place.

#### Warner Bros Pictures Inc v Nelson (1937) (910)

F: Film producers (P) sought an injunction against actress D to prevent her from breaching contractual agreement not to do any entertainment-related work for any other person w/o producers’ consent. K contains clause stating that if D fails/refuses/neglects to perform her services, Ps may extend term of agreement for period equivalent to period during which such failure etc. continued.

L: Court will not grant an injunction in case of a K to enforce negative covenants **if effect of so doing would be to drive D either to starvation or to specific performance of positive covenants.**

A: Here injunction is not tantamount to order of specific performance.

C: Injunction ordered.