**Class 1**

Excuses for non-performance of the contract:

* “contesting the contract,” remedies are for the party who is aggrieved, wants compensation for other party not doing what’s required.
* excuses are ways for the party who will have to give one of these remedies to contest the contract and so avoid the remedy.

Formal vs. Informal Contract

* Requirement of writing: does the contract have to look like something/take a particular form?
* Sealed contract or deed has to be, by its nature, in writing, since it needs to be in tangible form.
* not-sealed, informal contracts don’t have to be in writing unless some statute requires
* Informal contract: writing is just the evidence of a contract, it’s not the contract itself.
* Brings into creation obligations for one party if unilateral and both parties if it’s bilateral. Those elements in the offer that was accepted are called the “terms” in the contract.

Terms

* terms are the obligations, the promises, what the parties have promised to each other that give one party a right and the other party a corresponding duty.
* Nothing will lead to breach of contract but failure to perform one of those terms. Only this will lead to a contract remedy.
* The terms have to be in the offer, but not everything in the offer is going to be a term in the contract. It may even be in the contract, but still not a term.

Recitals

* they could be non-operative or non-substantive terms. They only set out why you entered the contract and who you are, those aren’t terms, no one’s promising anything, simply information
* These non-operative or non-substantive terms can determine damages. If I can establish that you knew this relevant info when we entered the contract, you will pay damages to compensate. This info is called “recitals,” not an actual term, just info that will assist if there is a breach, does not in itself constitute an obligation

Representations

* statements made, leading up to the contract, (don’t have to be written down), statements not part of the contract in the sense of being terms, but can have a profound impact.
* statements that are made that are not terms, but are background info that was important for one of the parties to decide to enter the contract.

Misrepresentation

* one of these statements, not a term but provided the motivation for entering the contract, this won’t be breach.
* While breach can never undo a contract, you can undo it is if something was said at creation of the contract upsets the law about the fact that it was created and so equity says it should be undone and the party to which this was told can undo the contract.
* A representation is a statement of fact the other party relies on.
* If representation turns out to be false, it’s not a breach of contract, can’t get damages, because it wasn’t a promise/term in the contract.
* However, misrep allows equity to undo the contract as a result - recission. I get the car back, I get the money back, we return to the positions we were in before the contract. I cannot do this through breach.
* Representations are not statements of opinion: “this is the best car.” (mere puff)
* After we have established that there is a contract, first thing to do is determining what isn’t a term, but a representation; various statements to you to try to encourage you to enter into a contract. If these are not terms in an offer, they may be representation

Operative Misrepresentation

* “operative misrepresentation”: means that it must be a representation and that it was a misrepresentation (turned out to be untrue) and that it is a misrepresentation that the law cares about (“operative”).
* person to whom the misrepresentation was made can claim the remedy of rescission: to undo the contract, make it disappear.
* A misrepresentation is an untrue statement of fact that in part, at least, led to the representee entering into a contract.
* Misrepresentation must come from party to a contract, not a third party.
* If I rescind contract, the contract disappears, so can’t get contract damages or remedy under it.

Rescission on Basis ofMisrep:

* Election with two choices:
* hold the representor to the truth, the actual truth, that the statement was not true: you must be held to the truth, which means there is no contract, as the lie was the basis for entering
* hold you to the falsehood: you are required to accept that what you told me was true, even though you knew it was false. Estoppel.

Four part test for Operative Misrep:
1. There has to be a statement of fact. Two parts: Must be a statement, and it has to be of fact. Statement of fact means it can’t be a term, as terms are not statements of fact, they’re promises.
2. Must be untrue.
3. That it is material (of some importance, comes to issue of whether it’s a mere puff)
4. It’s relied on by the other party as a reason to enter into the contract.

Implied statements

* can also be implied statements or silence. Doesn’t have to be an express statement
* Implication: I ask you how much a bike has been used, and I tell you about two trips I took, that’s a statement of fact, but I didn’t tell you the whole truth.. This wasn’t a complete truth. But there, the silence, coupled with what was said, is a misrepresentation.
* Complete silence: you ask me how much bike has been used, and I change subject and talk about the weather, you may take by my silence that it has been used for no trips at all.
* If A doesn’t ask and B only tells a partial truth, it’s hard to say misrepresentation outside a fiduciary obligation or there exists hidden defect.
* Silence on its own is rarely misrepresentation, outside of fiduciary defects or hidden defects, it’s “buyer beware.”

Misrepresentation must be a statement of fact.

* Fact is defined by what it isn’t
* If it’s only partly factual and rest of it is opinion, that’s enough. Factual component is sufficient
* If it’s purely or mostly opinion, it may not form basis for operative misrepresentation. Doesn’t have to be a wholly factual nature, but at least have a substantial factual component.
* Smith case: “desirable tenant” operative misrepresentation, as while this seems like a statement of opinion, the party making the statement had information (tenant was missing payments) that this statement was false.

**Class 2**

Constable painting

* court says could be both statement of fact and statement of opinion at the same time.
* Some statements can never be a statement of fact “i will wash your windows “ (purely a promise). But if you say “this plant is the kind that will bloom in three months” is more factual.
* People can continue to make representations after the contract already exists. Everything in the contract must be in the offer so can’t be added to after acceptance
* Offer must be before acceptance; it’s after acceptance that breach occurs, you can’t have a breach before there’s a contract in place.
* With misrepresentation, looking at representations that occur before the contract is in existence. It will be used, however, after the contract is in existence; rescission.
* The representation, to be a misrepresentation, must be relied upon to enter into the contract.

 It also must be untrue.

* There are situations where not clear whether something is true or untrue.
* Partial truths: whether this can lead to operative misrep depends on circumstances.
* What happens when something I tell is true, but before we enter the contract, it becomes untrue? Do i have obligation to correct misapprehension? Law isn’t clear
* sometimes says what someone says is an ongoing representation with duty to correct, but not clear when something is an ongoing representation and when it’s not.

Redgrave

* Is there an obligation on part of representee to check whether what is said is true or not? Redgrave says there is no such obligation.
* I don’t have obligation to tell you any facts, but if I do, you have no obligation to check into the facts, you are entitled to rely on what I tell you with no obligation to investigate
* Redgrave brings misrepresentation into equity because the misrepresentation can be innocent; a statement made that is untrue, even if the speaker doesn’t realize, doesn’t know, or doesn’t intend for it to be untrue, the speaker is nonetheless, in equity, responsible for the misrepresentation.

The statement must be material and there must be reliance on it.

* Materiality: that it be of some significance. There are some statements parties make that may be statements of fact that are untrue, but they may have no importance
* it’s a mere puff, things that no one would reasonably rely on as a reason for entering contract.
* Reliance: the plaintiff must establish that it relied on that statement of fact as one of the reasons for entering into the contract (doesn’t have to be the only reason) and would not have entered into the contract had that statement not been made.
* representations may be recorded in the recitals.

Rescission

* If there is a misrepresentation that the other party made that caused you to enter into the contract, then the law is concerned about the context/circumstances in which that contract was created due to the misapprehension you were under which was attributable to the other party.
* Law says that the contract that was created as a result of this misrepresentation is “voidable.” Voidable means a perfectly valid contract that HAS been created and usually does continue to operate in a fully functional way. It’s voidable because one of the parties to the contract, if that party acts in time, can rescind it.
* Representee is given an election: avoid/set aside or not. HAVE to make a decision and you can’t have it both ways, can’t both have and not have a contract.
* If you rescind, you are undoing the contract, you are undoing everything that occurred under contract, the primary and secondary obligations disappear, you are taken back to where you were before the contract. Everything that occurred under the contract, you have to undo: if you got something from the contract, you have to give it back and if you can’t, you can’t rescind
* Rescission is an all or nothing proposition, you rescind all of the contract or none of it.
* If you don’t do anything about voiding a contract, if you make no election, then the law assumes you’ve elected to go with the status quo: that you want the contract to continue.
* You must communicate, telling the other person through words or actions, your election if you want to avoid the contract.
* If i continue to perform my obligations, i am communicating by actions that i want to continue
* Notify the other party about your election to rescind. Give back anything you got under the contract and get anything you gave. Can’t change your mind. Contract is gone.

Bars to rescission

* you don’t have this right to rescind until equity gives it to you
* There’s never any closed list to bars of rescission.
* the impossibility of making complete restitution by both parties (parties have to return what they got, if not, impossible to get rescission)
* the execution of the contract (if both parties have actually performed everything they were meant to do then contract is executed and can’t be rescinded)
* affirmation (party trying to rescind has actually already affirmed),
* Delay
* don’t have to go to court at all to rescind if other party agrees.
* Impossibility of complete rescission: what was given under the contract, you have to give back and if you can’t, can’t get rescission. For instance, if it doesn’t exist in the same form that it did when you got it, it’s changed or deteriorated in some way or if you sold it to some third party

Kupchak

* sells land with operative misrepresentation. Can’t be rescinded because there had been significant changes to the property: sub-divided, parts of it sold, etc.
* the court determined that this was fraudulent representation. The court then allows rescission in any event despite the fact that complete restitution could not be made
* for the parts of the property that couldn’t be returned, the court gave compensation, a money substitute for what cannot be returned.
* This runs up against most other cases on rescission which says you can’t use money, can’t substitute, has to be restitution in integrity
* You can do this, should be able to do this if it is frauduluent misrepresentation (Kupchak).

**Class 3**

Laches

* Affirmation comes by way of communicating to the other party.
* One of the ways to affirm the contract, however, is also just to wait too long
* If laches is delay, when does delay begin? Generally, for laches, it starts when you know about the misrepresentation, it’s from the moment of discovery onward where delay is considered.

Categorizing terms

* Question of offer and acceptance and what was in the offer, as a term in the contract.
* How do we know if it’s a term? It’s a matter of intention.

Simons

* found certain statements to be terms, but they look like mere casual statements. Courts can be cooperative in converting what seems like not much into something substantial (a term)
* Test is “did they intend to contract by virtue of making that statement?”
* Court says it depends on what the parties intended, was it intended to be part of the contract.
* If something was said a long time before the offer came along or acceptance occurred, less likely that it will be incorporated into the offer and become a term.

Ways of categorizing terms

* Implied or express? If it is implied, is it implied by law or is it implied by the parties? If it’s implied by the parties, further categorized: implied by custom or implied by necessity.
* entire and severable obligations.
* primary and secondary obligations.
* Another Division of terms: conditions, intermediate terms, and warrantee.
* if there’s any overlap between these ways of categorization. Not a lot, except that categorizing of conditions/intermediate/warrantee and entire/severable are about primary obligations

Conditional/Intermediate/Warrantee

* has to do with the remedies you might get in the event of a breach of that particular term in the contract. Just because there is a breach, doesn’t mean you get all the possible remedies. Depends on the kind of term that is broken what remedy you’ll get.
* Only relevant to the determination of the availability of the remedy of termination.

Remedies

* If term is broken, automatically get a remedy. This means a primary obligation has been broken, so the secondary obligation, which is the remedy, kicks in.
* Remedies are divided into common law remedies, equitable remedies, and statutory remedies.
* There can also be contract peculiar remedies that parties can invent
* Sometimes parties put rescission, for instance, as a contractual remedy for breach
* Appointing a receiver is also another common contract remedy that the parties put in.
* A receiver is a representative of one party placed to take over the affairs of another party, they are appointed to receive any income or moneys that come into the hands of the debtor and to deal with them in an appropriate way.
* Common law remedies (secondary obligations) for breach are termination of the contract, damages, and debt
* Equitable remedies are injunctions and specific performance.
* Statutory remedies depend on the statute, though usually mirror the equitable and common law remedies
* Equitable remedies aren’t a lot of good to the parties because you can’t predict whether you’lll get them because they’re entirely discretionary.
* The ones that are in your control are the common law remedies; they are there as a right and they are also cumulative, you can use them all if you can get them all.
* Equitable remedies, however, if one comes in, it excludes everything else.
* To get common law remedy, have to find a term that’s broken.

Remedy of Termination

* If you want termination of contract, you cannot get it for ANY breach of contract, only if the broken term is sufficiently important. It has to be a condition or maybe intermediate.
* Breach of ANY obligation will lead to damages, but does not end the primary obligation, not connected. Only way you can end a primary obligation is if it gives a remedy to terminate the contract. When you terminate the contract, all the primary obligations cease
* You will have affirmed the contract if you use what you get under the contract
* Termination does not terminate the whole contract, it only terminates the primary obligations, there are still secondary obligations/remedies in place.
* It also doesn’t terminate anything that’s already occurred under the contract.
* The only way you can terminate a contract is if there is a breach in the contract that is sufficiently important to lead to that remedy. To figure out whether a term is important enough, you have to categorize.

Conditions/Intermediates/Warrantee Categorization

* At the time of acceptance, no later, examine all of the terms at that time and decide whether reasonable parties would have categorized that as an important term or an unimportant term.
* Conditions: important terms that go to the heart of the contract
* Warrantees: the terms that are not that important, though they are terms
* Only the breach of a condition will lead to remedy of termination, warrantees = damages

Hong Kong Fir:

* in contracts not governed by sale of goods act, there are terms you cannot predict at time of acceptance whether a particular breach should lead to termination or not
* Creates intermediate terms: terms at the time the contract is entered into where for that term you don’t yet know how serious the consequences of a breach will be.
* wait till term is broken and then see how serious the consequences are, and if it is serious, you get remedies as though it were a condition, but it does not formally become a condition.

**Class 4**

Breaching a condition

* the party breaking it is repudiating the contract. Breaching lesser terms is not a repudiation.
* gives you an election to either accept the repudiation and terminate the contract or you can affirm the contract and continue on as planned, even though I repudiated, the contract continues on, you will get damages, but both of us still have our contractual obligations.

Hong Kong Fir

* terms such that we can predict in advance that any breach of such a term will undermine the purpose of the contract: conditions.
* other simple contractual undertakings where no breach could ever deprive a party of a substantial benefit of a contract: warranties.
* other terms we cannot predict in advance: intermediate terms
* Difficulty in so many cases of deciding in advance whether a condition was a condition or a warranty made Hong Kong ruling was welcome.
* Problem is that intermediate term category became far too popular and various superior courts had to put their foot down. Too many intermediate terms gives rise to too much litigation. Lets the courts decide everything.
* Courts have said that particularly in mercantile contracts (between commercial contracts) there’s a limit to terms being considered intermediate. Courts try to say that terms are either conditions or warranties to a large extent.

Wicker and Schuler

* both condition and warranty also have other meanings, problematically.
* The labelling process is always done by the law. The law will look behind the label you used and decide for itself whether that label is correct in the eyes of the law.
* There is a presumption that the parties got it right, but it’s not irrebuttable.

Primary and secondary obligations.

* Equity requires the performance of the primary obligation
* equitable remedy is an order to perform the primary obligation. As such, with equity, the secondary obligations are little more than background noise.
* A true secondary obligation is either damages or debt.
* Termination isn’t quite the same because there’s no corresponding duty on the other side
* Secondary obligations get into the contract by being part of the offer. These terms are implied into the offer.
* misrep is the only reason the primary and secondary obligations can be undone

Leaf Case

* how misrepresentation overlaps with primary obligations.
* if a statement is both a term and a representation, it loses its status as a representation and you don’t get the remedies from that, only the remedies of the term.

Entire vs. Several obligations

* Connected to whether the contract contains conditions precedent or not.
* obligations that are in the contract at the time of acceptance may not mean they are immediately required of the parties. if one obligation is a pre-condition to the other, they are both in the contract at the time they are entered into, but the second condition will never be in breach so long as the other party has not performed the pre-condition.
* It’s only enforceable when the obligation that is the pre-condition is performed.
* If they’re concurrent, then obligations are to happen at the same time.
* if you have pre-conditions of one obligation to another, you may be faced with issue of entire or severable obligations.
* If it is entire, then the whole of the obligation must be performed before the other party has any enforceable obligation at all. 1000 pounds gravel delivered or no payment
* If it is severable, then you can break it up into chunks and for each chunk that is done, the other party will have its obligations triggered. 500 pounds of gravel can lead to half payment.
* It’s severable if the situation leads to you getting labour, or something, for nothing. (Sumpter)

Cutter/Powell

* Presumption is that, where there are pre-conditions, the obligations are entire.

Fairbanks

* “substantial performance”’ can satisfy entire obligation.
* What constitutes “substantial” is up in the air, case-by-case basis as to whether there is substantial completion. Certainly will be well over half to be substantially completed.
* If it is substantially completed, then that will trigger the other party’s obligation and that party will have the remedy of damages for it only being substantially completed and not entirely completed, but they must perform their obligation (payment) or they will be in breach.

Sumpter

* If you don’t get substantial completion, other party’s obligation won’t be enforceable
* in contract law, you are perfectly entitled to keep what you got and not pay for it because the obligation to pay hasn’t been triggered yet
* the only recourse you’d have if you were the part-performer is in restitution.

**Class 5**

Severance

* A contract can be severable, so if you have what looks like one contract, it can actually be broken up into several contracts, which would mean that the contract is severable.
* If there’s a problem with the contract, that means you can save part of it, instead having the whole thing become unenforceable. This is when the problem is confined to one element and the other parts can continue to operate.
* Severable/Entire classification of obligations is an entirely separate issue and meaning

No Substantial Performance

* of the other parties is meant to go first and complete it’s performance and doesn’t....the other party won’t have to perform whatever obligations it has. Contract stalls.
* can result in one party being able to receive a fairly substantial performance, but not substantial enough, and as a result, won’t have to pay anything for it. This can be a favourable occurrence. Get 30% of a house built for nothing
* problems arise because contract law says there’s no enforceable obligation.
* Law can impose trust obligations, constructive trusts on parties. But this is overkill
* One solution: where the contractual obligations the parties had don’t work, the law invents one, even though parties didn’t know about it, it’s ruled to be there.
* Another way: restitution.

Sumpter/Hedges

* where the contract that the parties had and knew they had fails to make one party compensate another because there may be entire obligations not substantially completed, sometimes there are circumstances where court will say that while no requirement to pay under the contract parties agreed to, there’s this other contract the parties entered where one party is taken to be obligated to compensate the other for what they did receive.
* Because this is an invented contract where the parties didn’t work it out, there’s a problem of certainty, never agreed what the terms of those contracts are.
* For instance, never agreed how much is to be paid, given that it can’t be the whole amount since you never completed the obligation. To law, must pay “the amount that is deserved,” the quantum-merit, a reasonable price. Thus, it’s called a quantum-merit contract.
* Example of the “circumstances” mentioned: receiving party has indicated in some way, words or action, that it ought to pay something for what was received and feels it has an obligation.

Restitution

* Very rare now to find quantum-merit contracts, as they never look particularly valid. They were used at a time where there wasn’t thought to be a law of restitution
* Contract Law is ruled to have no answer and you move into law of restitution
* If Sumpter happened today, court would say unjust enrichment of one party at expense of another so restitution come to rescue of one of the parties and orders compensation be paid to remedy the unjust enrichment.

Express or Implied

* This can be for both primary or secondary obligations
* Express terms can be oral or written or both.
* Formal contracts must always be in writing.
* Where there’s a writing requirement, you’re talking about the express terms.

Machtinger (the three bases for implying terms into contracts)

* reminded lower courts not to be too free in implying terms of certain sorts into contracts.
* Machtinger, court said there are three basis, and three only, on which you can get a term implied into a contract.
* Custom or usage: Could be between the two parties themselves, or an industry or geographical implication, just question of proving that these parties have in the past dealt in particular terms, so why dealing differently this time? Or that people in this industry usually deal in particular terms. Must be basis for this. Presumed intention leads to terms being implied. (McCutcheon).
* Law: because of what you’ve agreed to, these terms must be in your contract. For instance, sale of goods act, we have a contract for sale of goods, so Sale of Goods act says these terms are in the contract. These terms are in the contract because the law SAYS they are, irrespective of presence or absence of presumed intention.
* Necessity: Can’t imply a term just because it’s reasonable, it must also be necessary based on what else the parties have agreed to. Presumed intention. Terms necessary to give efficacay to the contract.

**Class 6**

McCutcheon

* extent to which statute intervenes due to perceived inadequacies in the common law.
* Problem is that these statutes are very specific to particular contexts
* Exclusions and limitations of liabilities have to go through numerous hurdles in order for parties to be able to use them. Public policy norms and standards of behaviour to see if they’re even enforceable.

Limitations of Liability

* A stronger party will often be interested in getting as much as possible from damages for itself if the other party is in breach (try to put in overgenerous liquidated damages), but that party will also want to restrict its own liability in the event that it breaks one of its own obligations.
* It will tend to say that in the event of a particular breach, there’s a limit to how much it has to pay the other party by way of these secondary obligations/damages.
* Quantitative limitation of liability: if I break my obligations, you only get $40 in damages.
* Procedural limitation of liability: before you get damages, have to fill in these forms, talk to this person, by this date, etc.
* can also try to exclude all limitations, say that in breach of this obligation, no liability
* lawyers try to disguise them, sometimes by using time limits or giving alternativesin the event of a breach, another obligation kicks in). Have to convince the court that it is a limitation
* historically, exclusion clauses were subject to greater scrutiny as it entirely eliminates the duty entirely, how can i have a duty to you if failure to perform leads to no liability.
* Of course, you can also limit a liability to the point where it’s basically an exclusion clause.
* Whether you have one or not isn’t always clear. Jurisdiction: you can claim damages, but most go to a particular court which is clearly inconvenient, it’s not directly a limitation or exclusion clause, but it is, as it effects the party’s attempt to claim for a breach.
* they’re generally found in standard form contracts where one party has all the advantages and the other has few or none. Generally take it or leave it contracts, called “adhesion contracts.”
* problem: if you design a doctrine to control the use of devices in an adhesion contract with all sorts of fine print), etc, then do those doctrines also apply to a contract that has been carefully negotiated between parties. Giant grey area where you’d put the line between standard form contract and carefully negotiated contract. As such, courts won’t do this.

Controls on Exclusion and Limitations of Liability Clauses

* The law treats certain parts of the contract different from other parts of the contract, targets a particular term.
* Void and voidability don’t operate well here, so response is unenforceability.
* Unenforceability means courts won’t assist in getting someone where they want to be. Unenforceability is rarely retrospective.
* no such thing as freedom of contract for secondary obligations as, by their very nature, are meant to reflect the primary obligations. You’re not meant to be better off through the secondary obligations than you would’ve been through the primary obligations.

Devices of Control

* Devices to control them are largely equitable in nature
* First control device: notice. Does the other party even know that that term is in the contract? If not, if it’s exclusion or limitation, good argument that it’s not considered part of the agreement
* Second control: Construction of contract. Construe the contract and if whatever has occurred is such that this exclusion or limitation clause doesn’t apply to this situation, you’re untroubled by it. Courts have been very good at giving exclusion and limitation clauses EXTREMELY narrow meanings, allowing them to say that these clauses don’t apply to whatever situation has arisen.
* Third control: doctrine of fundamental breach (no longer good law).
* Unconscionability: if unconscionable to apply the clause, then it won’t apply
* Doctrine of unfairness/unjustice: Unconscionability had to do with the creation of the contract, not how it operates afterwards. Unfairness is to deal with unfairness not evident when the contract was entered into and only started occurring after the contract was created and started
* SCC later cast doubt on unfairness, but gave control of public policy, to say that it is against public policy for this exclusion or limitation clause to apply.

Notice

* an exclusion or limitation clause or really any other onerous provision in a contract was not treated as part of the contract unless the other party that was going to bear the burden of this term had notice of its existence.
* Did not mean party had to understand all the consequences of the term, didn’t even have to read it, just had to be aware that there were such terms that, if it chose, could examine them to determine whether or not to enter the contract
* Just notice that these terms existed, not necessarily what they were.
* you had to know that such terms existed before you entered the contract. They can’t be added later. Therefore notices in your hotel room don’t work as you’ve already entered the contract, these rules can’t be added later unless person was told in contract (by the way, there are more terms in your room, be aware that they are there).

Thornton

* you can add these onerous terms, but you have to not just give someone notice of these terms, but give them notice in a context where they actually have a choice.
* If they’re already in the parkade so they can’t not accept this and you’re imposing terms at that stage, it’s too late, you must let people know before they enter into that so they have a real chance to say no and not enter into that contract.
* notice req can be resolved by custom/usage; we always made contracts w/ these clauses.

**Class 7**

Signature

* common law: means person who’s signing is aware of the terms in the contract and has accepted them. This is called constructive notice. Not objective test. Not about whether the person knew or ought to have known, it’s all in the signature itself as acknowledgement of terms of a contract. (McCutcheon).

Tilden

* shows generosity by courts regarding signatures, not as meaningful as in other cases
* Court saw clause relating to primary obligation (not to pay insurance) as onerous, which is of course debatable/discretionary.
* Must show that the signature represented the intention of the signer to agree to the onerous terms.

Carrol

* more traditional approach: don’t look at whether the person signing meant signature to mean acceptance of the terms, but rather whether there was something unfair on the other side.
* The signature is determinative unless there has been some misrepresentation, fraud, or deceit by the person presenting the terms. In that case, signature is not binding, but otherwise it’s very persuasive.
* Carrol relates to limiting liability someone was having in tort.
* Court is aware of Tilden, but say that the circumstances in which signature was given is different. Tilden signature was given in a hasty and informal way.
* Yet the facts here are in some ways more compelling than in Tilden and were just as hasty.
* The court here says that absent fraud, or concealment of some sort, the signature is binding.
* Still notice requirement: other person must know about the terms in the contract

Notice Cont’d

* Some courts will say that there must be some awareness of what the terms say, others don’t, just notice of their existence.
* For exclusion/limitation clauses, weaker party must have notice that the terms exist. But with sig requirement, for some courts, this notice requirement/protection for the weaker party, this is easily done. Signature is binding, notice requirement is no longer of concern

Construction of the Term

* where there is an onerous or peculiar provision, even if other party has notice of it, it is interpreted against the person relying on the term in the contract (Tirkon).
* Canon of construction, they are construed as narrowly as possible and against the person proposing to rely on it
* They are all very specific situations. The court will give narrow application. Court will limit you. For instance, if you provide A, B, and C as examples of what the term applies to, only examples, the court will treat these as the ONLY uses for the term. The more detail you put in the clause, easier it will be for court to give a narrow application.

Karsales (Doctrine of Fundamental Breahc)

* Denning said that it’s just not fair, even if you agreed to it and knew what it said, if what the other party, the stronger party, is doing is excluding their liability for damages for the fundamental terms in a contract.
* Fundamental Breach: it’s a doctrine of the law that the clauses simply don’t apply.
* Idea was restricted to exclusion clauses, never applied to limitation clauses.
* for unimportant terms in contracts (warranties), you can exclude liability but if you are excluding liability for a fundamental term in a contract (condition) then you undermine the contract
* Doctrine of fundamental breach, makes it so that when something happens, the law
* problems: concern that protective doctrine is created in a very sympathetic environment, but gets taken over by people who weren’t intended to benefit (Hunter). Get these big corporations carefully drafting contracts to take advantage of it.

Photo Production

* there is no doctrine of fundamental breach
* a statute takes care of this situation so don’t need a doctrine anymore.
* Problem is that while this is fine for England, we got this doctrine from England, but they took comfort in having a statute to take care of it, but we didn’t have this

Hunter (Canadian response to fundamental breach)

* Court splits equally
* Wilson: it’s about unconscionability at the time of the creation of the contract. If so, then its unenforceable due to doctrine of unconscionability even if notice and construction apply
* Wilson says it’s whether it was unconscionable if the exclusion/limitation clause were to apply. Fundamental breach is replaced by an assessment of unconscionability.
* unclear what constitutes unconscionability. Wilson says unconscionaibility has to do with inequality of bargaining power, has to do with the creation of the contract, the bargaining.
* Dickson says unconscionability only up to time of creation of contract, while Wilson says it can be enforced if consequences/context of the breach would be unjust and unfair.

Tircon

* both Wilson and Dickson lead to same result in future cases Most courts favour Wilson
* say by inference, no specific statement, that Wilson’s test is not good law; seems to disapprove of fairness consideration, but they never explicitly approve of Dickson’s test.
* Instead, they just add another layer to the test: public policy.

**Class 8**

Tircon (public policy test)

* You test for unconscionability or unfairness (the two tests of Hunter) but you also test for public policy in order for the clause to survive. What the court doesn’t tell us is what they mean by public policy, nor do they particularize WHEN they test for public policy.
* Wilson’s test is specifically designed to test for things that happen after creation of contract (unfairness test) while unconscionability is only at creation of contract. Not clear here whether public policy takes the former or the latter approach. T
* the examples it gives, seems to suggest that the court thinks it’s at creation or before the contract is created, as that’s when all the examples take place, but it doesn’t explicitly say.
* Public policy has to do with the larger context, not so much the parties themselves, it’s about why they entered the contract and how it affects the public at large.

**Class 9**

Parole evidence rule

* if you do have a written contract, if there’s written evidence of an informal contract, the written evidence is the only evidence that a court will use to consider any disputes arising out of the contract. Any oral evidence as to what the contract contains will not be considered.
* Stronger party will often want a contract in writing, including exclusion and limitation clauses.
* If parole evidence rule applies, problems to someone given various assurance and representations about other aspects of the contract and it takes people by surprise that these oral assertions won’t be considered by the court. They are still part of the contract, but this is an evidence rule, if there is a dispute, it will not be considered.
* Weaker party will want to argue that even if the PER applies, the written record should be changed to reflect what it is the parties have agreed and if there’s a mistake made, the weaker party may be content with PER, as the written record now reflects what they want (rectification

Parole Evidence Rule Problems

* if there is a written record of the contract and the parties meant for it to be the complete written record of the contract, then it is, no other evidence.
* runs up into problem that there’s now all sorts of written contracts, where parties are signing without having had anything to do with drafting or not a full idea of the terms of the contract or the specifics of the writing.

Bank of Montreal cases

* Court simply says that the PER applies, if you have a contract reduced to writing and the written evidence looks like a complete contract (like it says “no other terms,”) the SCC says PER applies,
* in dispute, the decision will be based on the written terms

Canadian Application of Parole Evidence Rule

* some courts just apply PER full-force but generally there’s a lot of give on this rule. It’s more a nuisance than anything else that can be gotten around.
* The PER is not a rule that applies across contracts. If you have more than one contract, you may have one with written evidence and the other doesn’t.
* You can also imply the term. The PER doesn’t apply to implied terms, only express terms
* Can also just have a helpful judge, like Lambert, who tries to make it as narrow as possible. It’s not a rule that excludes oral terms, so much as it expresses a hierarchy so that where there’s a conflict, the written prevails over the oral. Idea is to try to make the oral terms work as much as possible where there’s a written record.

Rectification

* Parties can change the written record themselves, but in a dispute, when will the court change it for them? Mistake.
* Misrepresentation is an example of mistake, one that is the fault of the other party.
* A mistake that is other than misrepresentation is one that can’t be attributed to the other contracting party.

Three types of mistake

* Common mistake: both are wrong about what the contract says, but both believe the same thing
* Mutual mistake: both parties are wrong but wrong in different ways, believe differently
* Unilateral mistake: one party is mistaken, but the other is not.

Mistake

* two categories of mistakes: mistakes as to assumptions and a mistake as to terms in the contract.
* Assumptions are not terms. You’re not mistaken about what contract says, you were just misled about something significant that led you to enter into the contract. It’s an assumption you made yourself, or caused by third party, not by the other party (that’s misrep)
* Terms: i thought there were terms but there aren’t. This is where rectification is important. You are arguing that the terms in a contract are of a particular sort, but what you’re mistaken about is the written record, which has a mistaken record of the terms you agreed upon
* if you can show there was a common mistake, that you did have an agreement on a different contract and this written record doesn’t reflect the agreement, it’s not difficult to get the court to change. However, what’s difficult is to show that the other party is also mistaken. Otherwise, it’s a unilateral mistake.
* Mutual mistake will almost always get you rectification. The contract as it exists probably cannot stand, because contract says x but neither party says that it’s x. It’s hard for the court to force x on the parties where clear neither praties want x. Court can rectify or say no contract
* If contract is going to be rectified, it’s going to be rectified in one or other of the directions argued by the parties, not a cobbling together of both.

Bercodicci

* court will often look at evidence after the fact. Look at evidence to see what the parties thought the contract said, look at how the parties have been behaving.
* In cases of mutual mistake, courts have really no choice but to rectify unless they say there was no contract at all.

Unilateral mistake

* where one party is mistaken but the other isn’t. Very hard to rectify. Why should the contract be changed, when I wasn’t mistaken and I didn’t misrepresent?
* Sylvan Lake is a generous view. Unilateral is often where there’s a suspicion that there’s a common mistake, but one party realizes that the contract is actually more advantageous then their shared mistaken apprehension, so you assert that the contract IS actually what you meant,

Sylvan Lake (how to rectify in cases of unilateral mistake)

* rectification is an equitable doctrine, therefore these fairness considerations permeate it, there’s no such thing as common law rectification and hence no RIGHT of rectification.
* Must show there is a prior actual agreement, a prior oral agreement between the parties and this written evidence doesn’t jive.
* That there is a mistake in the written record at least from the perspective of one party.
* Court says that you have to show that the other party ought to have been aware of your mistake; knowingly taking advantage of someone else’s mistake can constitute fraud or equivalent to fraud.
* Have to explain to the court exactly how the written document should be. Can’t just say this isn’t right, you have to let the court know exactly what the mistake was. It cannot be too significant, not a major rewrite
* something close to the criminal burden of proof (beyond reasonable doubt) is what’s required, particularly for step 2.
* Traditionally, the party who wants the contract rectified must showed that they were not careless or negligent in entering into the contract.
* Sylvan denies this possible fifth hurdle, says the other four are good enough.

**Class 10**

Issues with Mistake

* Not clear when mistake is relevant. Does it relate to the terms of the contract or to assumptions about the contract or both
* Remedies: Denning made it not just void, if you can’t say void because of a mistake, it’s possible the contract is also voidable. For certain mistakes, like mistaken identity, this is still the case. Denning also presented possible result of setting aside the contract on terms
* Other extreme is to remove mistake altogether outside of specific contexts, just say it is aspects of other doctrines (offer/acceptance, misrepresentation, certainty of terms)
* Mistake generally occurs before acceptance.

Smith/Hughes (sets out law of mistake originally)

* One of the parties clearly made a mistake and thought that the oats were old, the other party presented oats that were new. Does the other party, the buyer, have to take those oats and pay for them or does this mistake effect the contract?
* Colburn says there’s no such thing as the law of mistake, doesn’t even talk about it. Instead says just interpret the contract, look at offer/acceptance see if offer had a term about the age of the oats. If there was one, then breach, if not, then nothing.
* Blackburn says that if one party intends to make a contract on one set of terms and the other intends to make a contract on another set of terms, or parties are not ad idem, then there is no contract unless the circumstances are such to stop one party from denying that they didn’t agree to terms of the other. If one party thinks offer says one thing and the other party thinks it says something else, there can be no contract. Void.
* Blackburn emphasizes what one party believes. Under his approach what the other party knows or doesn’t know about that belief is irrelevant. So this is a unilateral belief. Mistake has to be about something I thought was a term in the contract. Both parties must believe the contract has terms and their beliefs must coincide, otherwise no contract.
* Hannon: the party is making a mistake but the other party must be aware of that mistake, and it’s a mistake about assumptions regarding what is and is not in the contract. For me to get out of the contract, I must show that I thought the contract was about old oats (basically Blackburn’s test) but in addition, I must show that you knew that I thought that the contract was about old oats. This is a unilateral mistake by one of the parties, but one that the other party is aware of.

Culpability Where Didn’t Cause the Mistake?

* If a party made a mistake that the other party didn’t directly cause, does it make any difference that that party knew and is culpable in not correcting the mistake the other party has made?
* current view in English law is no, even if you know the other party is mistaken, that is not one party’s responsibility to correct other people’s mistake, not culpable.
* Denning and Canadian courts take different view, say where there is this unilateral mistake, there is some scope in saying that the other party is culpable though not actually causing

Bell/Lever Bros (law on mistaken assumptions)

* court sets out several situations of common mistake that court says is where mistake operates.
* Case talks about “subject matter not existing/destroyed,” where both parties thought object exists, but it gets destroyed, so we’ve entered a contract over something that no longer exists. Contract void.
* Another example: ownership by buyer, I contract to buy that computer from you but I already own it. Contract is void.
* mistake as to quality does not affect a contract unless it is a mistake of both parties and it is a mistake of some quality that makes thing essentially different from what it was thought to be. This is a mistake as to essential quality. Arguable what an essential quality is.
* List of examples are exhaustive, but all are common mistakes... so no unilateral mistake? Suggests court is saying that Smith/Hughes is bad law because no such thing as unilateral
* seems to allow for no other result beyond contract being void.

 Soling/Butcher

* says that Bell is only the common law, did not considered what equity would do.
* makes remedy of equity for mistake is to make contract voidable.
* Court has power to make contract voidable, set it aside, when it is unconscionable or unconscientious for one party to continue with that contract (unilateral).
* If mistake has been adduced by a misrepresentation, even innocent misrep, by one of the parties, contract is voidable.
* unilateral mistake as to terms or identity where it is fraud (this is usually in rectification) also makes it voidable.
* contract is liable to be set aside in equity if parties are under a common misapprehension as to facts and their relative and respective rights, a common mistake about something fundamental and the party that wants to make it voidable based on this was not at fault.

**Class 11**

Great Peace Shipping

* makes it difficult for even a common mistake to affect a contract in any way.
* Miller Paving points out that that may not be the case in Canada.
* Hesitation to use mistake to affect the contract when it’s not the other party’s fault somehow,
* Mistake: mistakes about events before the contract is made.
* Contract says there’s strict liability, not based on fault or basic equitable principles
* Law of mistake is probably not going to be successful in many cases due to basic concern of court that one party is just trying to get out of the basic obligations of the contract.

McRae

* situation where the parties made a common mistake about something very fundamental.
* ordinary result of mistake in common law: if it can be said that the parties have allocated the contract, the risk, in such a way that this is simply the way it’s supposed to unfold, even if it means one party has taken on an impossible obligation, nonetheless the party took on that obligation, and liability is strict in contract, and a party can’t get out of an obligation just by saying they’re mistaken, they must perform.
* Bell and Solli are exceptions, where court says not withstanding this basic principle, in certain cases, court allows mistake to have some impact on the contract.
* court says that you cannot use mistake where even though it’s a common mistake, it’s attributable to one of the parties, that party can be said to have taken on the responsibility for the facts being correct.
* If you’re offering a party a tanker for salvage, and it’s not there, you can’t get out of the contract by saying it’s not there.
* For unilateral mistake, just knowing of my mistake is not enough; there has to be some duty in that situation for you to correct my mistake, has to be some element of unsavoriness or sharp dealing for unilateral mistake to have any bearing.

Shogun

* Argument here is unilateral mistake about who the other party was, issue of mistaken identity
* Depending on whether you’re dealing in person or through a documentary transaction. I
* the law presumes that when you are dealing with someone in person, that whatever that person says about their identity, you intend to deal with that actual person.
* If I say I’m the Queen, it doesn’t matter that you believe me, you do not have a contract with the Queen, it’s with me. It’s not affected by any mistake.
* If we’re dealing at a distance through writing and I tell you in writing that I’m such and such a person, and I’m not that person, then you do not have a contract with the person named
* Non est Factum: it’s not that person’s document, didn’t sign it, so it’s a void contract, doesn’t exist. And contract with the person who tried to assume the identity is voidable.
* Denning disagrees: mistaken identity was always unilateral mistake, the result shouldn’t be the same result as common mistake (which is that the contract is void, as both parties are mistaken and the result should be the same for them both), but for unilateral mistakes, the result should be the equitable result (voidable, because it’s unilateral).
* Miller Paving case: goes along with Denning in Canada about contract being voidable.

Non est factum

* if my signature is on a piece of writing, but I didn’t put it there, I am not a party to the contract. It’s not my doing. It’s not a contract with me.
* Later rulings say non est factum can work in other situations: where I DID sign the contract, but I had absolutely no idea what this contract was. I put my name to a contract which I couldn’t be expected to realize it was a contract, or a contract of that sort, I can also argue non est factum. This was first introduced in context of illiterate people.
* you can’t get out of a contract on non est factum if it’s really your own fault for signing a contract without knowing what it was, you can’t use non est factum.
* If however, in the circumstances, if you are able to argue that I can read and did sign, but I just reasonably could not be expected to know what I was agreeing to, non est factum.
* As long as you can argue that you weren’t negligent or careless in signing a contract, you can argue non est factum.
* Non est factum means it’s void.

**Class 12**

Great Peace shipping

* unless the mistake is about identity, the mistake to have an effect on the contract must be a common mistake by both parties about something fundamental
* result of such a common mistaken assumption is that the contract is void

Broadening Non Est Factum

* Move to broaden the doctrine and make it part of the mistake: if someone just misapprehends or doesn’t fully understand what the contract is about
* Cases reject this. The focus here is on the person who is raising the mistake, saying if you were not careful yourself, then you’re going to be denied non est factum.
* If for some reason you are at fault for your own carelessness , you cannot use non est factum.

Frustration

* Mistake and frustration are both doctrines that upset the risk allocation in a contract.
* Mistakes are made before the contract was entered into and the effect of them usually is to make the contract void
* Frustrations are about mistakes that arise after the contract, the world doesn’t enfold as you thought it would, you were mistaken about the future.
* contract is fully effective up to the point of frustration.
* It’s thus terminated, but not avoided, there’s nothing to be undone.

Paradign

* frustration was said not to exist (very old case).
* Original common law position: “that’s the bargain you made, you take the risk of what’s going to happen, take the good with the bad.” This is the position that frustration must argue against.

Taylor and Caldwell

* contract to use a music hall, which burns down.
* Court says there sometimes are unexpected or impossible things that occur and that that should affect the contract, some of those unexpected things can occur after the contract is in existence
* judge says it somehow relates to an implied term that says that if that fundamental goal of the contract changes or the nature of the contract changes, then the contract is at an end when the event occurs.
* Parties’ arrangement have certain basic goals and where those goals become impossible, the parties must be taken to have agreed that the contract would end.
* Problem: law developed along lines that frustration arises where the parties HAVEN’T allocated the risk and because it doesn’t know what to do about what has occurred

Davis

* frustration is not about parties’ intentions.
* When unexpected events occur that aren’t caused by the parties and destroy nature of what contract is supposed to be, then contract is frustrated
* this is not a response by the parties, it is a response by the law itself, which says that this contract is at an end when this event occurs.
* Frustration: “occurs whenever the law itself recognizes that without the default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was agreed to in the contract.” (what’s radically different?)
* Problem: can lead to situation where one party gets lots of things while the other party gets nothing (remember, everything up to the point of frustration is validly performed)
* Frustration is rarely successful. Circumstances must be unforeseen and have to cause profound change to the contract.

Frustration cont’d

* largely be broke up into natural phenomenon, political phenomena, and economic phenomena.
* Courts often now see that economic situations should be foreseen, stay informed, easier to foresee than it would’ve been 100 years ago. We expect fluctuations in our world.
* Political changes can affect, but they are expected to some extent. Also political change tends to happen gradually, rarely happens fast enough for parties to be not foresee.
* There’s often an element of surprise necessary where frustration is successful.
* Most frequent cause of frustration is when someone dies. If they were expected to die, then no. But if someone dies, and personal contract, probably frustrates the contract
* Industry standards affect foreseeability, if it’s standard in your industry, harder to claim unforeseeable.
* Existence or non-existence of insurance affects what you can argue, if you have insurance to cover a situation or were expected to, unlikely to be able to argue frustration.

**Class 13**

Merchant Marine Case

* even though there were labour difficulties, etc, the court said the contract allocated the risk there and even if the parties didn’t know this would be a problem, they ought to have foreseen the labour difficulties which should’ve been allocated in the contract
* to let one party use frustration would upset the balance of risk allocation that was made in the contract itself. This is typical of courts in defeating frustration claims.

Examples of Defeated Claims of Frustration

* Coronation cases: coronation of Edward VII was cancelled due to his illness, people had been super excited and had rented viewing positions, paid a lot of money to get access
* Suez: canal is closed. Shipping contracts where timing made it likely that the ship was to go through the canal, even though going through the canal wasn’t explicitly mentioned.
* Sometimes the court will say the purpose was to see the coronation or go through canal, while others will say the purpose was simply to use the balcony or to ship the goods. Tendency overall was nott to frustrate the contract

Capital Quality

* Well known that legislation was going to be passed but it was proclaimed earlier than expected
* In this and Victoria Wood, the purpose is the same: buyers want to subdivide and they entered contracts early enough to avoid the legislation, in their minds, but they were caught.
* The buyer wants out arguing frustration in that the contract has become impossible.
* Can argue that Capital had nothing to do with frustration as the parties allocated the risk for never being able to transfer 26 lots to the seller, but in the other contract, there was no such risk allocation. So in one case, frustration succeeds but fails in the other.

Maritime National

* Self-induced frustration: if one of the parties have caused the event that supposedly frustrates the contract, then that party cannot argue frustration.
* Frustration should affect the parties equally.

Time of Frustration

* Frustrated at the moment of frustration, whenever the event occurs is when contract is frustrated so after that stage, no primary obligations are enforceable and secondary obligations are gone. The obligations performed prior are valid.
* as long as your claim for damages arose before the frustrating events, you can still claim it afterwards even though you hadn’t raised it yet.

Frustrated Contract Act.

* Says every party of a contract to which this act applies is entitled to restitution for benefits created by the party’s performance or part-performance of the contract.
* says it applies to any frustrated contracts.
* It doesn’t apply to certain contracts: those entered before 1973 and only applies to the extent that the contract doesn’t say what happens in the event of frustration. Of coruse, problem is that the contract wouldn’t be frustrated if the contract did say what happened in event of frustration. So really just says the statute doesn’t apply if no frustration.
* if part of any contract is wholly performed before the frustrated event accept possibly for the payment of moneys that can be ascertained under the contract, and if it can be severed from the contract, that part must be treated as a separate part of the contract that has not been frustrated with this Act only referring to the rest of the contract.
* Compensation for a benefit, but issue is what a benefit is. Other issue is what the restitution is, what is the amount to be paid for those benefits that were created.
* anything that was done by the party that is claiming for restitution by fulfilling some obligation or taking a necessary step in fulfillment of the contract obligation.
* Figure out what was to be done under the contract and if party did something in that direction, doesn’t matter that it wasn’t received by the party who was to pay for the benefit.
* Figure out what the benefits are that were created (half of a building and a pile of materials). Owner must pay restitution for those benefits.
* s.8 says that “in determining the amount you do NOT take into account loss of profits or insurance money that becomes payable because of the circumstances that give rise to the frustration but account must be taken of any benefits which remain in the hands of the party claiming restitution.”
* meant to ignore whether any party is going to receive insurance money from insurer for the event. It’s theoretically possible then, to be overcompensated
* s.8 give credit for any benefits that remain in the hands of the party claiming restitution.
* s.7 – if you claim restitution for the performance of an obligation than insofar the claim is based on expenditures incurred then the amount recovered should only include reasonable expenditures. Only allowed to claim for the reasonable expenses. If you hugely overpaid for the materials, the other party can argue that this was not reasonable

Affect of Return of property under the statute

* If performance consists of delivery of property that is returned to the party making the claim in reasonable time then the amount of the claim must be reduced by the value of that property
* if the benefit was 8K and, after returned, the material was 5K, the benefit is now only 3K. It’s affected by fair market value: the value of the material can go down.
* Can choose to keep or return the property. For instance, if they only have to pay the cost of it and not the contract cost, they may be getting a good deal – getting materials at cost.

Damage/Destruction

* Restitution assumes the frustrating event didn’t affect anything and everything came to standstill, but many frustrating events will DAMAGE what was done (natural disasters).
* owner has to pay for the benefit even where the benefit is totally destroyed
* If the frustrating event itself or the circumstances giving rise to it cause total or partial loss in the value of a benefit to the party required to make restitution then that loss must be split between the parties.
* If the damage/destruction was subsequent to the frustration event it wouldn’t matter

**Class 14**

Protection of Weaker Parties: possible to argue all three doctrines for one contract

Duress

* if someone is coerced into a contract, it doesn’t exist.
* If someone is forced say, by physical harm, the contract doesn’t exist.
* Originally, you had to threaten the person. Then it was extended to the physical integrity of their property. Any contract established under that duress is void, even if the person wanted the contract, they can’t argue that it’s valid.
* Duress doesn’t have to be the party actually in the contract. The pressure could be one stage removed. Duress relates to a specific contract and what circumstances were when created

Greater Fredericton

* Law has more recently accepted that threates to someone’s economic situation can constitute in certain cases economic duress.
* It probably doesn’t make the contract void, unlike other duress, is probably voidable.

Undue influence

* about relationship between parties in a longer, bigger sense
* One party will basically do what the other says due to that relationship and so that contract is suspect because it was entered into when one party had undue influence over another.
* Presumption that the weaker party can argue that the contract is unenforceable or voidable if it wants to and the other party has to rebut that presumption that there is no relationship
* if they can’t do that, they can show that with that contract, there is no problem, usually because independent advice was retained by the weaker party.

Unconscionability

* looking at contract itself, the other two doctrines don’t look at contract itself.
* It’s simply unconscionable that this contract was entered into, given that this contract really does seem unfair to weaker party
* The result is that the contract is made unenforceable.

**Class 15**

Summary of Protective Doctrines

* Duress: direct coercion, pressure put on somebody, immediate threat so that they have no real choice.
* Undue Influence: one party has taken over another’s decision so they don’t really have any capacity. Usually this is for a longer period, not just context of that one contract
* Unconscionability: a taking advantage of someone else, an extreme form of sharp practice, really taking advantage of someone else’s situation in context of the contract
* They usually arise in similar contexts so you could argue all of them in some cases.

Duress

* The threat doesn’t have to be between the two contracting parties, it can be that neither of the two parties is directly involved, just people they are connected with are threatening each other and so these two parties enter this contract knowing it’s the only way to avoid those threats.

Pao On (test for duress)

* created economic duress – duress can arise in circumstances where pressure is economic
* test for duress from Pao On that applies to all duress, including economic:
* four elements to be considered actually it has been established that there was pressure:
* Did somebody protest?
* Was there an alternative course open to that person?
* Was the person independently advised?
* Did you take timely steps to avoid the contract?

Universal Tank Ships (adds extra step for economic duress) (Gordon/Robuck in Canada)

* once you get past those 4 traditional steps you must look at the legitimacy of the pressure/threat
* For physical harm/property, this step isn’t necessary, as those threats are by nature illegitimate.
* Economic, you must consider legitimacy, which has two aspects: the nature of what the person threatens to do and also an examination of the bargain that’s entered into as a result.
* This test tended to result in negative determinations, economic duress becomes famously unavailable. As long as someone thought they could put that pressure on someone else and as long as contract looked somewhat reasonable and no tort committed, contracts are generally allowed to stand.

Greater Fredericton’s Changing the Test

* Greater Fredericton changes the test in only one context: If the parties are already in a contract and the variation is simply an increased obligation on one side, you don’t need consideration if you have agreement.
* if what you’re concerned about is that a person should have to abide by their promise to paid more where previously obliged to pay less, it’s not a consideration problem if they agreed – rather you look at whether that promise was entered into under economic duress, if not it’s binding, if so, not binding.
* court says this issue of looking for illegitimate threats or pressure might be okay if what you have are parties entering into a new contract, but where pressure is put on in context of existing contract to enhance the obligations, illegitimacy of the pressure is not relevant.
* easier to find economic duress in the context of this type of promise/change because legitimacy of the pressure is not going to be required anymore.
* the test in the context of a change to an existing contract: dependent initially on two conditions precedent: the promise must be extracted as a result of pressure and the exercise of the pressure must be such that the coerced party had no practical alternative.
* If these two conditions are satisfied, you go on to consider the “threshold requirements”: three factors: whether the promise was supported by consideration (doesn’t have to be, but if it is, less likely to be economic duress), whether the coerced party made promise under protest, and if not whether the party tried to disaffirm the promise as soon as possible.

Result of duress

* historically void, law says there is no contract, even if we both wanted it.
* However, with economic duress, the result is never that the contract is void, rather it’s voidable.
* becoming more common in other types of duress, court asks why the person who had the pressure put on them not be able to keep the contract if they want it?

Relationships of Undue influence

* presumption that stronger party is in control of the other, calling into question as to whether the contract entered between them should be enforceable.
* Need to establish that there is a relationship of undue influence in which a contract is created. If this is established, consider whether the contract is suspect. Finally, the stronger party can rebut the conclusion that the contract is voidable or unenforceable.
* there are established relationships where undue influence is irrebuttably presumed; don’t even have to consider whether the contract is suspect.
* In the other, not established relationships, you have to categorize between commercial relationships and non-commercial relationship (Geffen).
* Established categories:all plaintiff has to show is that status (solicitor/client, doctor/patient, trustee/beneficiary)
* If it falls under “other”, you have to establish the nature of the relationship and the way it functions, establish it as a relationship of undue influence.

Geffen

* Aside from parent/child, there is no presumption of undue influence for family relationships.
* Wilson: If it is a commercial relationship that the contract results from, you have to establish whether or not the contract is disadvantageous to the party who is claiming undue influence.
* In non-commercial relationship, the disadvantageous aspect is not relevant, all you have to establish is whether there’s a relationship of undue influence.
* LaForest disagrees and fail to see why there’s a difference between commercial and non-commercial, or why you have to show manifestly disadvantageous for undue influence
* Other party then has to rebut, this often means strongest party has to ensure weaker party got independent advice before entering into the contract. It could also be rebutted by being shown to be a straightforward and/or low-stakes contract

**Class 16**

Morrison (test for unconscionability)

* invokes relief against an unfair advantage (including content of any agreement entered into) gained by the unconscientious use of power by a stronger party over a weaker.
* Proof of the inequality of the parties arising out of the ignorance, need or distress of the weaker leaving party in the power of stronger
* proof of the unfairness of the bargain.
* These two requirements create a presumption of unfairness which the stronger party can rebut.
* Remedy is very flexible, though will most often lead to unenforceability
* Here, court doesn’t even make it unenforceable. Court rearranges everything, just a rearranging of property.

Hunter

* unconscionability has to do with the formation of the contract.
* do this Morrison test at the time the contract is formed. A bargain cannot become unfair if it wasn’t unfair at the outset.
* Wilson has some problems with that, she expresses need for another doctrine of unfairness to deal with situations where something wasn’t unconscionable at the outset but becomes unfair because of the way things unfold.
* It’s the unconscientious use of power: it’s not a threat or an ongoing relationship, it’s just one party taking advantage in the other that the law doesn’[t accept, getting into a lopsided bargain obviously in favour of the stronger party.

Harry

* Lambert says i it’s been too particularized and tries to set out a broader doctrine for regulating contracts and protecting parties who need protection in context of contracts.
* He says that these various doctrines or approaches are all aspects of a single question: whether the transaction seen as a whole is sufficiently divergent from community standards of commercial morality that it should be rescinded.
* not been overruled, it’s just difficult to apply. What are community standards?

Lloyd’s Bank

* Denning attempts to unite everything under “inequality of bargaining power”
* this case was overruled in UK, but found resonance in Canada, as seen in Harry and also in Wilson’s opinions in general.

Illegality

* a contract contrary to public policy
* flexibility of remedy
* Two part approach: labelling process – decide whether contract is illegal and why then secondly, given that it’s illegal, what are the consequences of that illegality?
* Two categories of things that makes contracts illegal: could be because a statute says its illegal or it could be because common law says it’s illegal. They often overlap.
* Another categorization: Question of whether the contract is illegal as to its formation, or as to the way it is performed.

Statutory illegality

* just look at a statute and if it says that if such a contract cannot exist or such a method of doing something is prohibited, then the contract is illegal.

Common law illegality

* grey area with lots of kinds.
* Examples: Restraint of trade is a common one.
* Contract to commit a crime or to do a legal wrong (like a tort).
* Contract prejudicial to good public administration (bribing an official for instance).
* Contract prejudicial to the administration of justice.
* Contract against morals. Of course this last one is open to question.
* If the reason you’ve entered into a contract is for a base cause (like to sell drugs, or to harass somebody), than ex turpi argument will arise, contracts to commit a crime.
* Contracts for sex would fall within contracts against morals.

Restraint of trade

* one party through a contract ties that party’s hands in the future in terms of employment or work. Question is whether that contract or part of a contract is illegal and what results.
* No satisfactory test = lots of litigation over this

Shafron (restraint of trade)

* There’s a balance between freedom of contract and societal interest (society has an interest in people not having their hands tied in this way and free and open commerce)
* you also have to protect weaker parties. Parties who often agree to restraint of trade have no negotiating power.

**Class 17**

Remedies for Illegality

* Rare for an entire contract to be found illegal, more likely to be just a part of it
* Possible remedies: void, voidable, unenforceable, or rewrite the bargain.
* If it’s only a small part of the contract, court may be reluctant to give remedy. As a preliminary step, court will often try to decide whether the situation is severable or not.
* Severability: Can it be said that the parties have actually made more than one agreement so that whatever it is that’s seen as a problem, does it affect the whole arrangement or can you break it up into multiple contracts, of which it only affects one
* common to just hive off the part of the contract where the problem is, just say that a particular clause is where the problem is, so sever that and whatever the impact of the illegality, only affects thatt part of the contract

Shaffurn

* restraint of trade might have been too wide.
* Notionally severed so it can be rewritten.
* Court said ambiguous clause couldn’t be saved, so used blue pencil test to strike out this clause

Blue pencil test

* where you’re simply removing something entirely from the contract. Court decides not to just remove bits and pieces of the provision, just take out the whole provision as otherwise it can invite litigation.
* isn’t a remedy in itself, it’s deciding how much is affected by the illegality.
* You can’t predict with certainty what the outcome will be of the illegality, because there’s so many reasons for the illegality, it’s not a single doctrine.

Usual Remedies

* very few contracts were illegal, those that were would be thought to be void and where there was a serious illegality, like a crime involved or a serious breach of public policy
* your basic recourses beyond these clear situations are voidable, unenforceable, or rewrite bargain. Unenforceable is the most common remedy.
* Severance can lead to blue pencil test or notional severance/rewrite.
* Considerations: if you repent in time, how the contract operates, degrees of blameworthiness,.

Still

* talks about statutory illegality only but it can also be applicable to common law illegality.
* remedy is to be determined by how to best further public policy in dealing with the contract.
* Doctrine is meant to protect society in general. Court decided no purpose would be served by making her immigration work contract void or unenforceable, so they did nothing.
* Statutory illegality: court says if you want a penalty, you should say what you want so not making us guess. Here, it depended who the person was and what they were up to. Policy considerations.

Doctrine of Last Resort

* Illegality is often, because it is so obviously concerned with public policy, the doctrine of last resort. So should try another doctrine, but if you don’t have another: two part approach.
* Start by asking “is it illegal” (slot it into head of public policy or statute that says something shouldn’t happen), but the difficult thing is predicting the result.
* If it’s really egregious, it’s void, but beyond that, it’s either going to generally be unenforceable or nothing. It’s very rare for it to be voidable. Tends to be unenforceability or nothing at all.

**Class 18**

Remedies

* Arise in the form of secondary obligations when one of the primary obligations has not been performed, depends whether time for performance has arisen
* Two questions: do you have the right to use the secondary obligation and what does it give you
* Equitable remedies are usually just an order, damages are harder to quantify/determine.

Anticipatory Breach

* the time has not yet arisen for the party to perform, but that party makes it clear that there will be no performance when the time arises.
* leads to election, you can elect to proceed to the secondary obligation now or to affirm the contract and continue to expect me to perform when the contract calls for it.
* Remedies will ultimately be the same either way, you can just get them earlier than the contract would seem to allow
* in order to claim the damages you must show that you yourself were ready to perform what you were supposed to have done under the contract. Can be hard to do earlier on in the contract which may be why you want to wait.

What the remedies are

* there’s a variety, put into the contract. There can even be remedy of rescission provided the parties agree to it. Has to be that the parties expressly put it in the contract as a term; you can invent whatever remedy you want if it’s not illegal and you expressly put it in the contract.
* Otherwise, barring express provision, there are three sources of remedy: common law (termination, damages, debt), equitable (specific performance and injunction), statutory
* Often the contract does just spell out what these common law/statutory/equitable damages are, like saying what the liquidated damages are.
* Parties put liquidated damages in so that parties can’t argue for reduction under mitigation
* Generally, common law and equity do not mix, you cannot combine them and get both, even within equity it’s hard to mix equitable remedies with each other. Common law, however, tends to let you pile up remedies. You can terminate, go for action for damages, and action for debt,

Fuller and Purdue (reasons for damages)

* one way of talking about damages is to talk about why you’re getting them, what’s the point of them and what purpose do they serve in the contract
* three reasons : expectation interest, reliance interest, and restitution interest.
* Expectation interest: Contract is about reorganizing your future in a predictable way against the other person, you’re expecting to get to a particular place and if the other party prevents that, the damages are meannt to put you where you were supposed to be but are not because of the breach. It’s from perspective of the person claiming the damages and that person’s expectations and how they have been adversely affected by the breach.
* Reliance interest: you incurred costs that you shouldn’t have, paid too much, and damages are meant to return you to the position you were in before this misadventure occurred because of the breach. FIt’s from his perspective, how he relied on it and what his costs were. My costs and reliance are irrelevant.
* Restitution interest: claiming I should have to give him the profit I got from breaking the contract, nothing to do with his losses.
* Expectation interest and reliance interest are very commonly accepted types of claims/reasons for getting damages in contract. The point of damages is to remedy the person’s interests affected. Restitutionary interest, however, has not been widely accepted at all.
* Claims for restitutionary damages can be made even where you don’t know what the quantum can be, court just takes a figure out of the air to punish you for having broken the contract.
* one context in which they are awarded is where somebody has given something to the other party and because of the way contract plays out, that thing has to be returned, very often if it can’t be returned or returned in the same state, there is money given to compensate

Blake (restitutionary interest)

* The govn’t says there’s been breach of contract
* But govn’t couldn’t claim expectation or reliance: suffered no loss from book and made no reliance on his promise not to publish.
* Restitutionary: even though govn’t lost nothing, you gained something by breaching the contract, damages will be this amount.
* Court says restitutionary works here because this is a “special” case, without saying why
* Problem: party is basically benefiting from a breach. Also, it basically makes it as though the party performed the contract, so it seems similar in result to an injunction/specific performance
* If one party has been unjustly enriched by the other, court will use equitable to compensate. But the problem is, what is “unjust?” Also, this happened in England where, unlike Canada, there isn’t a developed system of restitution, so did it under contract law.

Expectation interest

* the contract price is $10, the breach is non-delivery, and the market price is $25. The damages are $15, because those damages put the party in the position the party would have been in had the contract been performed
* breach is wrong delivery, market price of the delivered goods prices is $20, the market price of the contract goods is $25, damages would be $5
* Expectation tends to be associated with profit, that you were supposed to be better off.
* Expectation is the normal measure, the most common, unless the plaintiff wants additional or instead reliance interest

Reliance interest

* costs that you incurred, paid too much or paid for something that you haven’t at all, it is associated with waste, true waste, incurred expenses you shouldn’t have due to the breach and the other party should have to pay you because of the waste.

**Class 19**

Claiming both Expectation and Reliance (profits and losses)

* whether you can recover for disappointment, like lost profits as well.
* Most cases say you cannot claim both your costs AND your profits, as this can lead to overcompensation, you’re in a better place that you otherwise would’ve been in, as you’re getting costs AND profits. You have to choose, can’t get both.
* Other cases say it depends on what you mean by profits or costs.
* Overarching principle is compensation so if you can claim both costs and profits and establish that they are both necessary to put you in healthy position with respect to contract and not overcompensation, then you should be able to claim both.

Sunshine Vacation (where choice is taken from you)

* This is owner didn’t allow business to use the premises they promised they could.
* loss of capital (the expenses that can’t be used now to get ready for use of the premises) and also claiming for loss of profit.
* normally you can choose, but where it’s so obvious that one of the figures is fanciful and picked out of the air, the court may make you pick the other if it’s just as defensible and more certain. Can’t get both in this situation either.

McRae:

* Problem with the expectation claim in this context for lost profit: there’s no way to tell how much the tanker would’ve been worth, as it wasn’t there. It is a gambling contract.
* Go with costs, not lost profits as the latter is completely uncertain.
* they assess whether there really was waste, as expenditure is not the same as wasted expenditure. If you acquired materials, hired people, you may have some value in what you acquired and won’t get damages for the whole amount. Expenditures are often not wasted, there is some market value to them, and thus you could end up getting very little.

Hadley and Baxendale: formula for damages

* Whether you are using expectation or reliance interest, you still use this formula, though less clear for restitution, as less jurisprudence on point.
* Because of theoretically voluntary nature of contracts, once you’ve entered into it, you’ve become strictly liable to perform what you’ve promised

General damages

* damages anyone with that contract or that breach would be expected to suffer. Need only look at the contract itself and its terms to assess that contract and know that it was broken.
* you look at the terms, see what was broken, then come up with the damages, don’t need to know who the parties are or their special circumstances.
* Usually fairly straightforward, aside from coming up with market prices, you just figure out what the breach is and what the consequences are.

Special Damages (Hadley Test)

* It has to be reasonably supposed, in the contemplation of the parties when they made the contract, and contemplated as a probable result of a breach.
* Reasonable + contemplation + probable.
* Look at motive for entering the contract and surrounding circumstances to determine what you will get in breach of it. If my breach prevents you from getting there (your reasons for entering), you are responsible for it, but only if you knew at time contract was entered into that that was why I entered into the contract. This is why I need to tell you these things, often in the recital,
* You take the party as you know they exist because they’ve explicitly told you
* A lot of things can be assumed, but better advised parties will make it clear so those damages can’t be dodged, particularly since usually special damages are higher.
* It’s only the nature of the loss that has to be known, not the specifics of it.
* Was contemplated as the probable result of a breach that that loss would occur.
* in the reasonable contemplation of the parties upon entering the contract as a probable result.

Chaplin/Hicks

* it was a contest, she lost her chance to win by breach of contract. She only had a 25% chance of getting anything and she either would have gotten zero or the whole amount, so how can you assess damages? It was only a chance to get something.
* judge must do the best they can and it may be that the amount of their verdict will really be guess-work, but the fact that damages cannot be assessed with certainty does not free the wrongdoer from paying any damages at all.
* There has been a breach and the person has been deprived and if that’s the only basis for assessing damages, you just come up with something. There is a limit to that though: reasonable chance, not like you never bought a lottery ticker, so the changes are REALLY slim.

Groves/John Wunder

* this is too many ways of assessing, not too few like Chaplin. different ways of framing problem.
* Judges didn’t agree here, took a different approach to what the purpose of this contract was, why you entered into it, and the purpose of damages here. Highly fact-specific.
* shows they usually go for the higher amount in US, while Canada-UK go with the lower amount (Ruxley Electronics). There is ultimately no hard rule for this.

Jarvis

* what about money compensation for something money can’t buy? Do you get damges in contract for injured feelings, disappointment, sadness.
* Denning, who said he was entitled to damages for his disappointment. He claimed general damages that anyone in this situation will get damages,
* use Hadley formulation but the figures are clearly plucked out of the air.
* You have to show that the point of the contract was to get one emotion and the breach led to the opposite emotion.

**Class 20**

Victoria Laundry

* tries at that point to restate some of the words of the second branch of Hadley test.
* He’s not doubting fact that you have to foresee what sort of damages they’re going to be, have to be able to foresee that at the time contract is entered into, but issue is the degree of certainty that those damages will occur. He tried to make it easier for parties to claim damages

Mitigation

* burden on the party claiming damages to keep those damages within reason.
* Although that party is the innocent party, that party must take steps that are reasonable to stem the losses.
* The most usual illustration of mitigation principle is the market value; if you go and get a replacement for whatever wasn’t delivered, market value is used to calculate mitigation; if i go into the market and buy something that is exorbitant, i may not be able to recover those costs
* Another element is *when* I get a replacement as well. I may be required to do that earlier rather than later as the later I get it, it will change the losses I will incur by not having it
* you have to act reasonably quickly. The fact that you don’t have any money to mitigate is not an excuse. However, if you tell the other person and that person knows you have no money, that can be taken into account, as they knew that when they entered into the contract, knew you would not be able to mitigate or buy a replacement.

Asamera

* damages being awarded where the equitable remedies couldn’t be fulfilled. You can’t get specific performance in these cases as the property can’t be returned.
* the question is when they have to go into the market to buy substitute shares. Price of shares go up or down all the time and to a certain extent, may be that the person claiming damages is going to play the market, don’t buy until the shares are sky high in price then claim damages.
* You’re allowed to wait a little bit, don’t haves to go into the market right away, that very moment, but there’s a limit to the extent that you’re able to wait, you haveve to go in and mitigate within a “reasonable” amount of time.
* this is ambiguous and opens arguments about what constitutes reasonableness.
* Possible that you can wait longer when you got absolutely nothing than you would be able to had you gotten something

Mitigation and Anticipatory breach

* affirm the contract and waiting for the breach, because this can lead to higher damages.
* Some courts have said that duty to mitigate means that if you elect to affirm, you must show that you had a legitimate interest in affirming the contract.
* Other courts disagree with this: an election is an election, need not justify your choice.

How to Determine Damages

* What the damages are can be determined when you go into the market and when you take steps to mitigate
* It could be at the formation of the contract that can be used to come up with the figure, can be date of breach or knowledge of breach, commencement of trial, the making of the claim, the judgment, and payment. Market value could be determined at any of these times
* The one that’s normally used is the time of breach.
* Orders so have the pay the exchange at a specific time.
* If being paid in different currency than the order, conversion made at the date of payment.
* parties will often put in the contract, at the time of formation, what the damages are in the event of breach as otherwise these issues can take years of litigation to figure out.

 Damages by stronger party/liquidated damages

* part of secondary obligations;it’s assumed parties want them, it’s implied in the contract, which means of course that they can be ousted by an express term that deals with breach differently.
* There are limits on this due to concern that stronger party will put in a liquidated damages provision that is not an honest assessment of what the losses will be in event of breach.
* just as limitation and exclusion clauses are subject to constraints, there are also constraints on liquidated damages provisions in contracts which are actually more onerous

Penalty Clauses

* If the liquidated damages provision cannot be justified as a legitimate, reasonable pre-estimate of the loss, then equity is going to say it’s a penalty clause and as such, it is illegal and as an illegal provision, it is unenforceable. You’ll still get damages, but they’ll be assessed by the usual principles, not this provision
* If I want the liquidated damages provision in the contract, I cannot subsequently argue that it is unenforceable/penalty. Equity is not treating us the same, the protective doctrine is for the person who bears the consequences, not me.

Collins

* Even if a provision is a penalty clause, it’s up to the party to make that argument and you’re not required to argue in equity, it’s simply there if you want to.
* Weaker party is usually treated as the one to bear the consequences, and therefore the payor is usually seen as the weaker party in equity.
* It’s the person who pays that argues it’s a penalty clause and in this case it was the other party who argued it, that they shouldn’t be able to use the restriction of how much money they could get when their losses were much higher, but the court said they were not allowed to make that argument.

**Class 21**

Freedom of Contract for Secondary Obligations and Equity’s Response

* no freedom of contract for secondary obligations; they are meant to mirror the primary obligations, or else equity steps in.
* If secondary is not consistent with primary (either too low or too high) then equity strikes them down as unenforceable. Only primary obligations get freedom of contract
* meant to compensate for breach of primary compensation. When it’s overcompensation, they became “penalty clauses” which are unenforceable.

Skatilla

* dangers of picking one figure out when the figure bears no relationship to what the losses actually are. For instance, if they sold a pair of socks in breach of contract: $10K. You don’t put those things in contracts and expect them to be enforced.
* Fact that there’s an unenforceable liquidated damages clause in a contract doesn’t mean that you won’t have to pay any damages in the event of breach.
* Penalty clause will typically be a single amount payable regardless of what the consequences of the breach might be, or a figure picked out of the air.

HF Clarke

* get around this by creating a formula – however if the formula is a method of assessing damages that the law doesn’t accept (giving over any income that you got through the breach, which are restitutionary principle), it will be unenforceable.
* Figures picked out of the air can work if there are formulas, but you must be careful in using them as the method of assessing must follow a form the law will accept.

JG Collins

* Employment contract: agreed that if he left the employment, promised not to compete in insurance business in the Niagra area for 5 yrs and if he did, he would pay to other party $1000 as liquidated damages.
* Employer not happy about the limitation of the damages to $1000 so tries to strike it down as a penalty clause.
* Court says it’s not open to the party who is going to receive the money to challenge it, as they were the ones who presumptively put it into the contract. It is only open to the party who it is being enforced against to challenge.

Deposits

* a payment of money, usually up front, often what is required to accept the contract.
* Or it could be part of the obligation – as first payment.
* What if the person who is required to pay doesn’t continue to do so, and the payments are made to me, do i get to keep the amounts that have been paid under the contract? Are the deposits forfeited to me upon breach of the payment obligation or is there any possibility of relief of forfeiture/party to get it back.

Stockloser

* Probably wrong: there is no such thing as relief of forfeiture of what is a primary obligation. If deposit was required under the contract and that party was entitled to them and where the contract says that if the other amounts are not paid, i get to keep what was paid
* Denning says that yes you can argue that you should get relief from forefeiture. It comes out of situations where you would end up being better off due to the breach than if the contract hadn’t been breached.
* Problem: it’s treating the deposit as damages – this is a damages proposition, that you ought not be better off through damages than had the contract been performed, but the payment of deposits is part of primary obligations and ISN’T damages.

Part Payment and Forfeiture Clauses

* Where there is no forfeiture clause, payments just come in instalments, and the money is handed over in part payment of purchase price and buyer defaults on balance, as long as seller keeps it open and doesn’t rescind the contract, he can keep the payments, but if he rescinds, he must give it back. If the goods are never delivered, no basis for keeping the payments.
* if there’s a forfeiture clause, that the money can be kept, or if it’s paid as a deposit, then the buyer in default can’t recover it at all in law.
* Denning tries to inject a new equitable idea: says equity can demand return of the deposit, but provides no explanation.
* If you use word “deposit” the presumption is that the money is kept even if nothing ends up being given in exchange or if the payments/performance stop.
* If you pay me the deposit and then break the contract and I sustain losses, I can claim damages in addition to the deposit, but the deposit then converts into part of the secondary obligations.
* If my damages are the same as or less than the deposit, you’ll get no more damages. Question is whether you ever have to give some of it back, Denning says :equity may say it’s too much and puts in you far better a position than you would’ve been.
* in BC there’s a provision that does exactly what Denning says. BC Law and Equity Act says law can give relief in forfeiture in any circumstances as it sees fit.

Equitable Remedies

* Specific performance: an order to perform the whole contract.
* Injunction: relating to a specific obligation
* it’s important to remember you don’t have a right to these, you only get them when the court says you do.
* To argue for equitable remedy you first have to say what you’re entitled to under the common law/contract and then convince the court that you need the equitable remedy because common law isn’t satisfactory.
* Always look at common law first. However, equity prevails over common law; if it does something different than common law, you go with that.
* in contempt of court if I don’t honour the injunction created by the court.

**Class 22**

Equitable Remedies

* force someone to perform the required obligation
* discretionary – must make an argument that the court should award them.
* these remedies require for there to be a contract, they force the performance of certain obligations in the contract but you have to actually have a contract to do that.
* You can’t get both common law and equitable remedy – one’s a secondary and the other’s a primary obligation, you can’t get both
* if you’re getting an injunction for a particular obligation, you can get damages for the breach of another obligation. You can get them both in the context of a given contract, but not the same obligation. This also means you can’t get damages and specific performance, as specific performance refers to the entire contract.

Adequacy of damages

* trying to argue that damages are not a sufficient remedy, you cannot get through damages what was promised to you under the contract. Example: it’s not money want but a specific thing that you can’t replace or get any other way

Specific goods

* if you know that the contract was entered into for identified property, not a computer but THAT computer, that’s specific goods, the only goods you can deliver under the contract and not be in breach. Specific performance is given where the goods are readily identified. Make the argument that you need THAT particular computer.

Clean Hands

* Equity is looking at how you have behaved in that transaction. If the reason i’m not performing is that i’ve decided you’re a fraudster who tricked me into contract, it’s unlikely to get specific performance or equitable remedy. Like if you asked me for too much money or didn’t tell me everything I needed to know about the contract.

Your own conduct

* if you’ve been running about breaking a contract and then ask me to perform my obligations; your hands aren’t sullied by having broken the contract, but court won’t see why it should require one party to do something when the other party hasn’t been following obligations

Timely requests

* Not to do with limitation period, usually equitable time limit will come well before this. If you’re guilty of delay/laches, equity will say you waited too long. Seen as too much hardship on the other party as you’re taken to have elected to proceed to secondary obligations rather than worry about the primary ones.

3rd party involvement

* if the goods have been transferred to 3rd party, it you can’t award specific performance anymore. It would cause hardship.

Complication/Complexity

* if there’s anything that’s remotely complicated or time consuming if it has to order specific performance, then it won’t.
* Court order – court would have to monitor whether it has been complied with, and if that’s going to be a complicated business that it’ll have to assess over a period of time. Court doesn’t want to have to monitor something of that complexity and take that much time. That’s why there’s an obligation to perform a personal service – to do work – is extremely unlikely to be subject of court order (Warner Bros)

Mutuality

* if you could not get an equitable order against me, the court may not order an equitable order against you at my behest. Court is looking for a balance. Usually, however, this is ignored.

Overall issue: Balance

* what’s going to happen if they do and if they don’t grant these remedies. Zipper illustrates this. Who’s worse off? Whose situation cannot be remedied if we make the wrong decision? This happens particularly in context of interim injunctions.

Interim and Permanent Injunctions

* Interim is where court hasn’t had time to fully hear the case and decide for sure, but there’s an urgency about it, so make an interim order then come back later when parties had a chance to make fuller arguments to decide whether or not to confirm that and make it a permanent injunction. Very unlikely that theree is a specific performance interim though, usually that would go right to permanent.
* If it’s really urgent, you can get an order ex parte, where the other party is not even before the court – highly unlikely that this would be permanent injunction, it would be interim.

Weighing process

* courts trying to decide what the interests are on both sides and where the balance of fairness lies when it comes to making the order or not to.
* May just get an injunction for a particular part of a contract where specific performance may be too onerous or too complicated.

Equitable Damages (Semelhago)

* If you get an order for specific performance or an injunction, the court would like to give it to you....but can’t (usually because a third party has gotten involved somehow and it would upset their interests), possibility that the court will give money instead
* it’s also possible equity will reject you in this situation, make you just go to common law.
* time for calculating these damages is different from common law (which is at time of breach, that’s when fair market value would be considered).