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The Content of the Contract

* **Heart of a contract**: the **terms** (applicable only during the period of the contract), operative or non (Dec p 24)
  + Essence terms = important to heart; accident/incidental terms = interesting, not crucial to transaction

# A. Representations and Terms

* Representation vs term: Term is more likely to be the reason you entered into K, something relied upon

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

|  |  |
| --- | --- |
| Facts | D’s agent W purchased shares from P’s agent J twice based on J’s representation to D that P was a rubber company. D lost money on the transaction and sued for breach of warranty. P/A; D/R. |
| Issue | Did P’s agent’s actions constitute a representation? No, so appeal allowed. |
| Discussion and Analysis | - Damages only for fraudulent or reckless misrepresentations, or ones dealing with a material issue that fundamentally change the K (info that’s more central to the heart of the K)  - Need to clearly show intention for a representation to be a warranty in order for it to be  - Oral representation “rubber company” not enforceable since not operative term in writing |
| Ratio | One is not liable in T for damages for an innocent misrepresentation. A statement in response to an inquiry for information does not equate intention for a contractual liability over its accuracy. |

#### Leaf v International Galleries [1950] Eng. CA

* Characterization of a statement in a contract determines what actions can and cannot be taken
  + Only remedy for breach of contract: damages

|  |  |
| --- | --- |
| Facts | In K of sales, P buys D’s painting on term that it’s by Constable. 5 yrs later: P wanted to sell it, learned it wasn’t C. P asked D for money back. D examined and swore it was C. Experts found it wasn’t. P/A. |
| Issue | Is P entitled to rescind the contract on account of misrepresentation? No. |
| Discussion and Analysis | - 5 years too late since K was breached as soon as it was made (since the painting was not by C) and that’s when the election was presented to P |
| Ratio | If one elects to buy a chattel on the faith of innocent representation and delivery is accepted, then on acceptance that particular transaction ends. A statement can’t be both representation and term. |

# B. Classification of Terms

* **Secondary obligations**, remedial in nature, deal with consequences of failing to perform a **primary obligation**
* **Remedies** can take two forms:
  + Secondary obligations: damages; these give the primary obligations some meaning
  + Non-obligatory relief: e.g. rescission, termination (these are probably better known as **POWERS**)
    - **Rescission** (equitable) possible if entering K based on misrepresentation; would terminate every transaction that occurred after acceptance (if I already performed primary obligations X and Y when primary oblig. Z led to a rescission, then exchanges in X and Y must be returned)
      * Can only rescind by virtue of some condition that occurred before period of K, not if a term in the existing K is broken
      * Trying to return both parties to the positions they were in pre-acceptance
      * Damages possible if the situation also breached an existing tort (e.g. deceit)
    - **Termination** would occur if certain terms of a contract are breached
      * In previous example: X and Y exchanges stay as they are; everything after Z is now void
      * Downside: 1 party has to do obligation, while other could escape its oblig. (lopsided)
* Quantum of secondary obligation must match breach of primary obligation (“failure to pay 3 peppercorns 🡪 $30K damages” too disproportionate; damages can < the primary obligation, with some constraints, but can’t >)
  + So to put lopsided deals in a contract, make them primary obligations since you can get away with that (e.g. include parallel obligations like discounts)
* **Rights** are property; a Power is not a property, which cannot be sold
* **Repudiatory breach**: breaches an important term, and thus repudiates the contract
  + A has a contract with B for B to build a pool. B brings a bucket of water. A now is given an **election**. (1) A can elect to accept the idea that B had done a wrong thing, and thus A repudiates his own obligations. This terminates the entire contract (**rightful repudiation of the contract**) and all subsequent primary obligations for both parties. OR (2) A can elect to reject the idea that B did wrong thing, affirm the contract, and try to hold B to perform the right obligations (secondary obligations thus remain)
* **Breaches**: of less important terms; A hires B to build a pool that’s 6 m deep. B builds 5.8 m deep. This doesn’t go to the heart of the contract, and not a full repudiation of the essence of the K. A is now entitled to damages.
* Categorization of primary obligations by degree of importance:
  + 1. **Condition** could have four meanings in K law: pre-requirement, state/quality, “term” (which can be breached), or contingent condition; To clarify, specify remedies for its breach > specifying the condition
    - Remedy: Damages, innocent party can treat K as repudiated
  + 2. **Intermediate terms**: Cannot be automatically labelled until the breach has occurred and the seriousness of the consequences of the breach assessed; if bad 🡪 treat term as condition; if not too bad 🡪 treat term as warranty, and remedy as befitting (*Hong Kong Fir*)
  + 3. **Warranty**: Non-important primary obligations; won’t result in an election, probably just damages
* **Anticipatory breach**: Either breacher informing in advance or making it clear in advance that he cannot perform the promise and there is no excuse; other party has an election now, to accept the breach (and proceed to remedies) or to **affirm** (i.e. not accept the early breach, proceed to remedies only when breacher still fails to perform, which may have its own benefits a la *Asamera*)
* Entire and Severable Obligations:
* **Contingent condition**: obligations spread out over a large period of time and dependent on another obligation
  + Example: If there is a **contingency** for July 1, then the obligation becomes enforceable on July 1
  + Example: B and A have a contract for B to build a house. The acceptance was made on Jan 1. B has the obligation to complete the foundation by Jun 1. A needs to pay B by Aug 1, which is contingent (dependent) on both the date (that the world gets to Aug 1) and on B’s previous obligation on Jun 1.
    - If Jun 1 was only date in K, assume that everything is expected to be done by that date.
  + Conditions precedent, subsequent (see Dec p 13), and **concurrent** (default position of the law; if no specification of when obligations need to be performed, assume immediately and at the same time)
    - If A doesn’t perform his obligation, and as a result B doesn’t perform his either, then the law allows B to not perform the obligation if A was not ready or willing to perform his obligation, AS LONG AS B can later prove that, had A been ready/willing, B was ready to perform his obligation.
    - If A performed most of his obligation and then B doesn’t perform any of the dependent obligation, then it is likely that B can be liable for breach of contract if A had **severed** that original obligation into parts, some of which that he DID perform.
      * No obligation is infinitely severable. Non-**entire** obligations can be continuously severed up to a certain point (\*Be wary of that once severance has been done once\*)
      * Severance issues only arise in cases of contingent conditions
    - Must have **substantial completion** of the first obligation (but not perfect; *Fairbanks*) in order to trigger the other party’s entire dependent obligation (*Sumpter*)
      * Market forces (can win court sympathy) can help determine substantial completion
      * If deficiency from both sides or just from 1st party: can be remedied by damages
      * If deficiency from the dependent party’s obligations: 1st party can claim **debt**
      * Statutes can kick in to allow equivalent partial completion of a dependent obligation to match the partial completion of the first obligation (e.g. *Sale of Goods Act*)
* If you select a particular item prior to entering a contract of sales, once you accept it you cannot reject it; but if you say “give me one of these items” and the store selects one for you, you can elect to accept it
* In mercantile contracts between business people, being late for a delivery is always a breach of a condition
* **Express and Implied Terms** (Dec p 2): All contracts must have implied terms since we simply cannot think of all possible terms beforehand to make them express
  + Terms can be implied by law (CL or statute; e.g. *Hillas*) or by parties (through necessary implication, customer usage either particular or general, or reasonability)

#### Hong Kong Fir v Kawasaki Kisen Kaisha [1962] Eng. CA

|  |  |
| --- | --- |
| Facts | P rented ship to D, stated that it was fitted for use in ordinary cargo service. Repairs delayed ship for 20 weeks after the deal was made. D repudiated the K, P sued for wrongful repudiation. D/A. |
| Ratio | Test for if a breach should lead to rescission: Look at events resulting from breach 🡪 Do they deprive the party attempting to rescind of all (or a substantial proportion) of the benefits that it expected to receive from entering the contract? If yes: rescission. If no: can only award damages. |
| Holding | Appeal dismissed. |

#### Wickman Machine Tool v Schuler [1974] HL

|  |  |
| --- | --- |
| Facts | D granted P the sole right to sell their products. In the terms of the agreement, P were to visit 6 major D clients each week for the duration of the contract, which they failed to do. According to the K, this was a "condition" of the agreement. D repudiated the K. P/R; D/A. |
| Issue | Does calling something a “condition” in the K mean that its breach leads to a right of rescission? |
| Discussion and Analysis | - Classification of terms at the time of acceptance and cannot be changed, but labels not absolute (Court has last call), thus better to specify secondary obligations in K to illustrate the types of terms |
| Ratio | Labelling a "condition" in K =/= Its breach will lead to right of rescission: must look at the event. Where breach of one clause in a K, it must be read in K’ual context to decide if rescission is in order. |

#### Fairbanks Soap v Sheppard, [1953] SCC

|  |  |
| --- | --- |
| Facts | Engineer D agreed in K to build a machine for P for $9800. P paid $1000 on account. When the machine was nearly completed, D refused to do more unless he was paid $3000. P sued to recover the $1000. D counterclaimed for the $9800. P/A; D/R. |
| Discussion and Analysis | - Expert examined the machine and judged that it was incapable of doing its job  - Stopping before completion to demand more money = abandonment of contract |
| Ratio | Substantial completion can trigger other parties’ obligations to pay, can claim back for work undone. |
| Holding | P is entitled to get the $1000 back from D (since it wasn’t substantial completion). |

#### Sumpter v Hedges, [1898] QB (CA)

|  |  |
| --- | --- |
| Facts | P had contracted to build for a lump sum. When the work was partly done, P abandoned the K. D thereby finished construction. P wanted to recover for the unfinished buildings. |
| Issue | Is P entitled to recover for incomplete construction if D finished it for him? |
| Ratio | If an innocent party of an abandoned K takes benefit of the work done, it can be liable for the cost of that work. Since having incomplete buildings on his property is a nuisance on his land, D was entitled to complete the buildings without compensating P for his abandonment of the contract. |

#### Machtinger v HOJ Industries, [1992] SCC

|  |  |
| --- | --- |
| Facts | A’s (M+Lefebvre) entered into K for employment with clause letting D terminate w/o cause (for M w/o notice; for L 2 weeks' notice). A’s entitled to min 4 wks notice (prov *Employment Standards Act*). After dismissal w/o cause, D paid each 4 wks salary. A’s brought action for wrongful dismissal. P/A. |
| Issue | What should the notice period be in order to terminate employment if none is specified? |
| Discussion and Analysis | - CA characterized term implied in law as implied in fact (which involves parties’ intentionality): error  - D’s legal obligation to give reasonable notice can only be displaced by express contrary agreement |
| Ratio | Terms can be implied in fact by parties themselves thru: 1. Custom/usage; 2. Necessity for business efficiency; 3. Reasonable standard/presumed intention; 4. Legal incidents of particular class of K. |
| Holding | Appeal allowed. |
| Misc. | Trial judge: P entitled to reasonable notice of termination; CA: Overturned this |

# C. Excluding and Limiting Liability

* **Exclusion clause**: Although the party has not fulfilled its liability, it’s excluded from owing a remedy
* **Limitation clause**: *London Drugs*; limits possible liability, no matter the amount of damage
  + Can be a discrete amount, a formula, a procedure, or limited by time
* Doctrines that are controls on the use of exclusion and limitation clauses:
  + 1. Notice requirement (CL): Was there actual notice of the term? (*Thornton, Tilden, McCutcheon, Karroll*)
  + 2. Construction (CL)
    - A. Is the clause actually a term in K? Was it included in the offer? (*Thornton*)
    - B. Can’t add terms and conditions after acceptance without fresh consideration (*Gilbert*)
    - C. Does the clause apply to a given situation? Construe situation, relationship, and clause itself
  + 3. Does statute prohibit application? (narrow meaning)
  + 4. Does clause actually apply to the particular circumstances/relate to a particular breach?
    - If onerous clause removes existing rights, courts shouldn’t enforce it if ambiguous circumstances
  + 5. Last resort: (Equity)
    - Was it unconscionable? (*Hunter*) = Inequality of bargaining power at time of K formation 🡪 Yes
    - Was it unreasonable? (Wilson in *Hunter*) = Is it fair/reasonable to enforce clause in context of specific breach? If yes 🡪 Terminate K
  + 6. Public policy (*Tercon*; Equity): added by Binnie in dissent in lieu of unhelpful “fundamental breach” and the possibly bad law of unfairness/unreasonability; seems to only apply to egregious behaviours
    - Binnie: Court must enforce valid and applicable exclusion clause unless P can find paramount PP consideration to override both public interest in freedom of K and the parties’ contractual rights
* In cases like *Fraser River*, *London Drugs*, exclusion clauses can alter the liabilities already present in a K (or may exist in future), or limit the tort obligations therein; purpose of these contracts not to create these relations
* Inability or unwillingness to read the fine print, but seeing that it’s there, is enough to equate understanding what it says (In BC, it’s rare to be held to conditions that you cannot read/understand)
* Exceptions/mistakes mentioned by Lestrange:
  + Something that the other party caused (e.g. misrepresentation is the only reason I signed something)
  + It is a mistake that the other party is aware of and took advantage of

## 1. Notice Requirement – Unsigned Documents

#### Thornton v Shoe Lane Parking [1971] CA

|  |  |
| --- | --- |
| Facts | P parked in D’s lot. Ticket from an automatic dispenser said it’s issued subject to conditions posted on the wall by the dispenser (not prominent) that exempted D from any liability for injury caused to P while his car was in the lot. P was seriously injured by a car when placing goods in his trunk. D/A. |
| Issue | Is the exempting condition, posted in the garage, part of the contract? |
| Ratio | With ticket dispensers, K is formed when P inserts money and receives the ticket. Conditions that are not seen until after this aren’t binding as the K has already been agreed upon without the conditions. |
| Holding | Appeal dismissed. |

#### McCutcheon v David MacBrayne [1964] HL

|  |  |
| --- | --- |
| Facts | P’s agent arranged to ship P's car across water. D usually asked customers to sign an indemnity note but P wasn’t asked. D negligently sank the ship. P and agent had signed a note 4 times before for other arrangements. Both knew the notes had conditions but not what those were. P/A. |
| Issue | Is P bound by an unsigned contract considering that he had past dealings with D? |
| Discussion and Analysis | - D: Even though it was not signed, the term letting P assume the risk of an accident had been incorporated into their contract through previous dealings |
| Ratio | A party is bound to a K if signed. Notice can be implied based on previous dealings and standard procedures only if P demonstrates actual subjective knowledge of the condition beforehand. |

## 2. Notice Requirement – Signed Documents

#### Tilden Rent-a-Car v Clendenning (1978) ONCA

|  |  |
| --- | --- |
| Facts | D rented a car from P. He signed the agreement with an exclusion clause denying coverage for accidents that occur due to DUI, although he testified that he’d asked what the $2/day fee covered and was told "full non-deductible coverage". D hit a pole while DUI. He pleaded guilty and tried to collect from the insurance policy to pay for his car damages. He was successful at trial. P/A; D/R. |
| Issue | Is the exemption clause valid? P didn’t notify D of the term, so no. |
| Ratio | If a term of the contract is particularly onerous, P must prove that it took measures to properly notify D of that term. D doesn’t need to know exact words of the clause, just to be aware of it. |

#### Karroll v Silver Star Mountain Resorts (1988), BCSC

|  |  |
| --- | --- |
| Facts | P broke her leg in D’s competition. D paid Vernon Ski Club for services and told V it was covered by D's liability insurance and waivers releasing them from liability. P had participated in the event 4 prior times and always signed a release. Prior to the race, she signed a doc headed "Release and Indemnity-Please Read Carefully" in caps, agreeing to assume risks inherent in participating in the race and release D and its agents from all personal injury claims arising from race participation. |
| Issue | Is the indemnity agreement binding, and if so, on whom? Yes, on P. |
| Discussion and Analysis | - P: Not given adequate notice of doc contents or sufficient opportunity to read and understand it. Alternatively, she submitted that the document afforded a defence only to D, not to V members |
| Ratio | Not a general principle of K law that a party must draw attention to an exclusion clause. To find if there is a **duty to draw attention**, one must look at: a) effect of the clause in relation to nature of K; b) length and format of K; and c) time available for reading K. |

## 3. Fundamental Breach & Its Aftermath

* *Hunter v Syncrude*: Dickson and Wilson denied **Doctrine of Fundamental Breach**, proposed eq. principles (p 6)

#### Karsales v Wallis, 1956 CA

|  |  |
| --- | --- |
| Facts | D found S’s car in excellent condition and agreed to buy. The car was left outside overnight. D found it in a substantially different state and refused to pay since it was not in the same condition as when he agreed to make the purchase. P (vendor, on hire-purchase terms)/R; D/A. |
| Issue | Does an exemption clause excuse a fundamental breach? |
| Ratio | Rule of law: If a (fundamental) breach goes to the root of the K, the exempting clause takes no effect. |

#### Photo Production v Securicor, 1980 HL

|  |  |
| --- | --- |
| Facts | D’s employee started a fire at P's factory and accidentally burnt it down. P/R; D/A. |
| Issue | Does an exemption clause excuse a fundamental breach? Yes, D not liable. |
| Discussion and Analysis | - D: An exclusion clause in its contract meant they were not liable "unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of [D]." |
| Ratio | **Fundamental breach** is a rule of construction, not rule of law. Freedom of K > other considerations. |

#### Tercon Contractors v British Columbia (Transportation and Highways), 2010 SCC

|  |  |
| --- | --- |
| Facts | D issued requests for proposals to construct a highway from group of 6, ft. P and Brentwood. As it lacked construction experts, B entered into a pre‑bidding agreement with EAC (not a qualified bidder) for a joint venture. This allowed B to prepare a more competitive proposal, with EAC as a "major” team member. D selected B for the project. P brought an action in damages against D. P/A. |
| Issue | Does the exclusion clause bar a claim for damages for breach of the tendering contract? No. |
| Discussion and Analysis | - Trial: B’s bid was a joint venture with EAC, which D knew = fundamental breach of express provisions of the tendering contract with P. Exclusion clause did not bar recovery for the breaches; it was ambiguous, so resolved in P’s favour (CA disagreed; it “barred compensation for all defaults”) |
| Ratio | **Test to assess enforceability of exclusion clauses**: 1. As a matter of interpretation, does the clause apply to the circumstances established? 2. Was it unconscionable at the time the contract was made? 3. Should the court refuse enforcement based on public policy (the onus of proof lying with the party seeking to avoid enforcement)? |

## 4. Legislative Treatment

* Just need to know that it exists as a possibility for dealing with exclusion and limitation clauses

Excuses for Non-Performance of the Contract

# A. Misrepresentation and Rescission

* Elements of **operative misrepresentation** in order to effect rescission:
  + 1. A **statement of fact**: Some sort of representation; can be silence, partial silence, not telling full truth
    - Issues: Not representing the whole truth (e.g. there were 2 things, but A only told B about 1, and it’s believed B would want to know about both), true fact A said became false over course of transaction (Q: Must A keep B up to date?)
  + 2. Untrue (even if person making it does not know it to be false: *Redgrave*)
    - Silence can be misrepresentation if there is a fiduciary duty, when the silence implies a complete answer to a question, OR when statute states that there is a duty to disclose information
  + 3. **Material matter**: Would a reasonable person determine that the misrepresentation was important?
  + 4. Relied on by the contracting party as a reason to enter into the K (\*inferred by Denning\*)
    - Reliance =/= If person had investigated about truth of statement (**due diligence**: *Redgrave*)
* Types of operative misrepresentation:
  + **Innocent misrepresentation**: D didn’t know he was saying an untruth (NO DAMAGES FOR THIS)
  + **Negligent**: D should have known
  + **Fraudulent**: D knew but didn’t tell
* Can collect remedies for misrepresentation through **estoppel by representation** (Dec p 18) or **law of misrepresentation**, which can be dealt with through $ damages (if tort) or rescission (if K action)
* Situations where the misrepresentee (P) is not entitled to claim rescission:
  + When ***restitutio in integrum*** is not possible (restoration to original condition)
  + When third party rights intervene
  + **Affirmation** (the innocent party loses equitable remedy because he was taken to have affirmed the K)
  + When there are laches or the innocent party had made an election
  + When rescission would cause radical injustice to misrepresentor
  + When there is innocent misrepresentation and the contract has already been executed

#### Redgrave v Hurd, 1881 CA UK

|  |  |
| --- | --- |
| Facts | P advertised his premises and partnership in business, representing that it grossed £300/yr. D purchased on the basis of this representation. When he found the practice "utterly worthless", he refused to complete payments. P sued for specific performance. P/R; D/A. |
| Issue | Can D rescind a contract because of a misrepresentation? Yes. |
| Discussion and Analysis | - Presumption: Any statement made in an attempt to induce another party to enter into a contract is relied upon as a condition if the contract is eventually formed |
| Ratio | Innocent misrepresentations = K can be rescinded, upon discovery. No burden of due diligence. |

#### Smith v Land and House Property Corp, 1884 CA UK

|  |  |
| --- | --- |
| Facts | D contracted with P to buy a hotel title. P had advertised that it was let to Fleck, "a most desirable tenant". F went bankrupt just before transfer of title. D refused to complete transaction. P sued for specific performance. D defence: description of F's virtues was grounds for misrepresentation. P/A. |
| Issue | Was the statement a mere opinion or a representation of fact? D wins. |
| Ratio | Statement of opinion between knowledgeable party and non- = K’tually binding **statement of fact**. |

#### Kupchak v Dayson Holdings, 1965 BCCA

|  |  |
| --- | --- |
| Facts | P bought motel shares from D in exchange for 2 properties and a mortgage. P stopped making payments on mortgage as they discovered that past earnings were fraudulently misrepped. D issued an unsuccessful writ for foreclosure against P. D claimed P accepted by continuing to live in and operate the motel and rescission impossible because properties sold and renovated already. P/A. |
| Issue | Can the plaintiffs claim a rescission and get compensation? Yes to both. |
| Ratio | Monetary compensation may be granted under rescission where it is impossible or inequitable to restore the original property, and a reasonable amount is determined. |

# B. Mistake

## 1. Introduction

|  |  |  |
| --- | --- | --- |
| Own fault | Other party is responsible | Third party is responsible |
| Understandable mistake  Careless mistake | Misrepresentation  Knowing of the mistake and not correcting it | Misrepresentation |

* If mistake due to misrepresentation (e.g. **attributable mistake**), then remedy is what’s already been discussed
* **Mistake** is about ability to start a contract, not about whether it is able to be continued
* Separate doctrines under which mistakes can occur: 1) Offer/acceptance; 2) Misrepresentation; 3) Frustration (future); 4) Implied terms; 5) Unconscionability
* Who shares the “mistake”:
  + **Unilatera**l: A made mistake X, B did not make a mistake
  + **Common** (sometimes confusingly also called mutual): A and B both responsible for mistake X
  + **Mutual**: A made mistake X, B made mistake Y, it was actually Z
* If mistake made in CL: create a contract and decide whether it should continue or be undone
  + **Void**: If K was made to not exist, parties can get back what they exchanged/performed
  + Termination
  + Damages (implied term)
* If mistake made in Equity: can change the contract, and can give an election to void the K
  + **Voidable**: First, determine if there’s still a K. Then, the badly treated party can elect to undo the K
  + Can refuse equitable remedy (no specific performance) to a non-mistaken party
  + Change K (**rectification**) to correct a typographical error 🡪 No further equitable remedy
* Lord Atkin: Situations where **mistaken assumption** might operate, and can affect a K:
  + Mistake in identity: somebody is assuming they’re dealing with a different person 🡪 May void the K
  + Both parties think something is in existence, but it’s not 🡪 K becomes void
  + A purports to sell something to B that B already owns 🡪 Impossibility of K 🡪 No K in existence
  + Mistake as to the quality of the thing contracted for (the nature of it) \*This one causes difficulties\*
* **Levels of argument in dealing with non-performance of contracts**:
  + 1. Construction (the words we both agree are there, and they carry the meanings we agree upon)
  + 2. Implied terms (argue what should be read in or understood)
  + 3. Rectification (what’s wrong is the written record, so let’s change that)
  + 4. Misrepresentation or mistake (former is easier to argue, though getting rid of K not always desirable)
  + 5. Mistake (desperate last move)

#### Smith v Hughes (1871) QB

|  |  |
| --- | --- |
| Facts | P brought racehorse trainer D a sample of green oats. D then ordered oats that he thought were old from P. No conditions in K to specify the age of the oats. P delivered new oats. D refused to pay. P/A. |
| Issue | Did D breach the contract by refusing to pay? Yes. |
| Discussion and Analysis | - Cockburn judgment: If age of the oats was not a term in K, then what one party thought about the age of the oats was irrelevant; difference between a term in K and a party’s motive for entering K  - Blackburn judgment: likes Roman law; subjective look at O/A: if A intended a contract based on this set of terms and B intended a K on another set of terms, then there can be no cohesive contract  \*But if A agreed with B on B’s terms, then they’re both held to the K |
| Ratio | P no duty to inform D of his possible mistake about the kind of oats – ***caveat emptor*** (buyer beware).  Mistaken assumption not adequate to trigger mistake remedies; it must be a mistake about what the K contains. Unilateral mistake no ground for rescission. |

## 2. Mistaken Assumption

* Mistakes of background info (pre-existing ideas, subjects, relevant facts/laws), not related to K’s actual terms
  + Example: A promised B a meal at his restaurant. Assumptions that aren’t terms are: who B is dealing with, reason for going (e.g. B heard that A is the chef, but he’s not)

#### Bell v Lever Bros, [1932] HL

|  |  |
| --- | --- |
| Facts | D agreed to pay 2 company officers to terminate their appointments. After entering the agreement, D learned they had breached their duties, so he could have terminated them without compensation. D claimed that the mistake affected the K. |
| Discussion and Analysis | - K was about termination of the employment arrangement, and the mistaken assumption of quality did not affect that aspect; severance payment was not the essence of the argument |
| Ratio | A common mistake will void a contract only if it is fundamental to a quality that goes to the very heart of the contract (and not merely an attribute). |

#### Solle v Butcher, [1949] CA

|  |  |
| --- | --- |
| Facts | The *Rent Act* controls rent. P and D made a mistake about whether the rents were controlled. Tenant caused the mistake 3 years into a 7 year lease, and tried to say *Rent Act* didn’t apply. |
| Discussion and Analysis | - Denning: Equity can affect K if CL hadn’t deemed it void for mistake (*Bell* – mistake in CL only)  - 3 situations where equity can affect ongoing existence of a K when dealing with mistaken beliefs:  1. Broader view: Court can relieve a party of mistake made as long as it doesn’t hurt other party, and he doesn’t avail himself of the advantages gained through that mistake; seems ok doling out fault  2. Misrepresentation  3. Narrower view: What can this test do that *Bell* didn’t cover yet? If parties were under a common mistaken assumption (regarding rights or facts), can void the K; seems to say parties not at fault  - After going through the broad or narrow test, next step is discretion: Is it fair to give remedy? What should it be? It must be in effect from present onwards (not retroactive to invalidate anything)  - Potential broad ability given to Courts to not just roll back K, but roll back parts of it, add conditions, impose new obligations  - Mistake in law, not mistake in fact |

#### McRae v Commonwealth Disposals Commission, [1951] HC

|  |  |
| --- | --- |
| Facts | There was a salvage K for an oil tanker that turned out to not exist. D wanted to avoid paying P damages on the ground that it was a common mistake. |
| Discussion and Analysis | - Very foundation of the agreement: There IS a tanker. Thus, in the event of non-existence, D has assumed that risk and is contractually liable for failure to perform. |
| Ratio | If mistake caused by D’s own recklessness or culpable conduct, it can’t affect the existence of the K. |

#### Great Peace Shipping v Tsavliris Salvage [2002] CA

|  |  |
| --- | --- |
| Facts | A contract for D to provide salvage services to P was entered into on the basis of the common mistaken assumption that the vessel was much closer to a particular position than it actually was. |
| Issue | Was there any effect of mistake in equity that could be different from the effect at CL? |
| Discussion and Analysis | - Phillips MR: Distinguishes *Solle* only in respect to common mistake (otherwise restores *Bell*)  - Despite the difference in distances, the services D offered were the same. |
| Ratio | Common mistaken assumption must be essentially different from the real deal to render the K void. |

#### Miller Paving v B Gottardo Construction, [2007] ONCA

|  |  |
| --- | --- |
| Facts | In their agreement, P acknowledged that it had been paid in full for all supplied. Later, P sent an invoice after discovering deliveries for which it hadn’t billed D. D relied on first agreement. P/A; D/R. |
| Issue | Does the **doctrine of common mistake** apply and should the K be set aside? No and no. |
| Discussion and Analysis | - Makes a case for *Solle* to still be good law in Canada and to not adopt *Great Peace*  - K itself outlined who should bear the risk of the relevant mistake (supplier P) |
| Ratio | No doctrine of common mistake applicable if subject matter isn’t substantially different from the mistake (CL, *Bell*) and if P itself is at fault (Equity, *Solle*). |

## 3. Mistake as to Terms

* Mistakes relating to a term of the K (aka **mistaken belief**) can affect its existence, even if it’s unilateral
  + Example: A borrows money from B. Identity of B crucial, thus a term that there could be a mistake in.

|  |  |  |
| --- | --- | --- |
|  | Mistaken Belief | Mistaken Assumption |
| Unilateral | Might affect the K but other party would have to know about it (*Smith*).  If other party knows about it, they might be said to not have clean hands (*Lindsay*).  - Would use rectification/ implying terms | NO unilateral mistaken assumption (*Bell, Great Peace*)  If one party makes an honest mistaken assumption and the other party knows and lets it continue, then it can make the K VOIDABLE (*Solle* broad) |
| Common | Might affect the K (*Smith*).  Would have to modify or rectify K/imply the term. (*Bell*) – like in *Gallen v AllState* | Can make the K VOID if the thing was essentially different from what they thought it would be (*Bell, Great Peace*) or fundamentally different (*Solle* narrow).  If following *Solle*, K would be VOIDABLE, not void. |

## 4. Mistake and Third-Party Interests

### Mistaken Identity

#### Shogun Finance v Hudson, [2003] HL

|  |  |
| --- | --- |
| Facts | A rogue got a car on credit using Patel’s driver’s licence. The credit agreement was done through telephone and faxes with P via the dealer, who was face to face with R. After obtaining the car, R sold it to D and disappeared. P claimed to get the car or its value back from D. |
| Discussion and Analysis | - Patel off the hook due to *non est factum*  - R has no property interest, legal entitlement to the vehicle because K was with Patel  - D not in legal possession of vehicle, no legal right |
| Ratio | If negotiations at face-to-face contact, K belongs to that face (voidable if evidence of deceit). If contact in writing, K belongs to the name in writing (so therefore void), because *nemo dat*. |
| Holding | P would have a contract, if one at all, with Patel. D had to return the car or its value to P. |
| Misc. | Dissent: If two parties deal with each other (any medium) & agree on terms of K, then that K will be concluded between them, despite one using a third party identity. K is voidable but not void (*Lewis*). |

### Non Est Factum

* ***Non est factum***: “That is not my deed”; Somebody else signed, or I didn’t know I was signing a contract, or I fundamentally misunderstood what I have signed

#### Gallie v Lee (sub nom Saunders v Anglia Bldg. Socy.), [1971] HL

|  |  |
| --- | --- |
| Ratio | P must establish that there is a fundamental difference between real K (as signed) and the K believed by him to be (i.e. as represented).  Not entitled to use *non est factum* if his signing K was due to own negligence (i.e. carelessness). |

#### Marvco Color v Harris, [1982] SCC

|  |  |
| --- | --- |
| Facts | Mortgagees D had signed a contract at the behest of relatives who wanted the money and assured D, deceitfully, that what was being signed was a minor change in an existing arrangement. D signed without reading. It turned out to be quite a different and more onerous obligation. P/A; D/R. |
| Issue | Can D use *non est factum* to disown the contract? No, too careless. Appeal allowed. |
| Ratio | **Carelessness** shouldn’t automatically prevent a party from disowning the document in law. Relevant factors include: magnitude of carelessness, circumstances contributing to it, and other circumstances that a Court must consider before determining whether estoppel can be used. |

## 5. Rectification (Mistake in Evidence)

* Equity, when it deems it fair to do so, will reform any written errors: **Doctrine of Reformation**
  + Often used as a preliminary step in a Parole Evidence Rule argument
* At the end, there will still be a K (similar to cure for mistaken identity, not *non est factum*); but which one?
* Need to: 1) Show the agreement and the terms of the agreement, and that both parties agreed to those terms
  + 2) Show that the written document does not reflect the original agreement
  + 3) Alter the writing to reflect true intentions of the parties and what they HAD agreed to and rely on that
* Conditions precedent for obtaining **rectification** for unilateral mistake (*Sylvan Lake v Performance Industries*):
  + 1) P must show a prior oral agreement with definite/ascertainable terms written down incorrectly
  + 2) D had fraudulently misrepresented the written doc as accurately reflecting the terms of prior oral contract. P did not know (innocently or fraudulently). D’s attempt to rely on the error = **fraud** or equivalent (court believes it’s unconscionable for person to use advantage obtained by error)
  + 3) “**Precise form**” that the written doc was supposed to be expressed in is easily ascertained
  + 4) All established on a standard of “**convincing proof**” of P’s unilateral mistake and D’s knowledge of that mistake: lower than BARD, higher than BoP
  + No due diligence required (like reading K before signing)

#### Bercovici v Palmer CA (1966) SKQB, SKCA

|  |  |
| --- | --- |
| Facts | P agreed to sell to D her business. After signing a formal agreement, P found a parcel of land to be in error, though D claimed it was always part of the deal. P sought to rectify it to not sell Lot 6, whereas D sought to rectify it to sell Block 33 instead of Block 33A. |
| Discussion and Analysis | - Mutual mistake, both parties were trying to get it rectified  - QB: Parcel of land not intended by P to be included in the transaction since it was never mentioned earlier in their negotiations; CA: Agrees |
| Ratio | Rectification can correct mistakes in the written document to show what both parties actually intended agreement to be. Can look at their actions/intentions both before and after entering into K. |

# C. Protection of Weaker Parties

## 1. Duress

* Duress 🡪 Undue influence 🡪 Unconscionability
* In CL: duress negates consent = no K = void (even if it affects a third party)
  + Now shifted to equity, which makes K voidable and subject to restraints
    - If other contracting party did not know about threat, may not be equitable to award remedy
* Oldest form: duress to person – a threat of violence to coerce someone to enter into a K
* *Pao On* lifted the limitation on duress to include economic duress. Some issues it raised:
  + Whether the person alleged to have been coerced did or did not protest
  + Whether, when he was allegedly coerced, he had separate course (e.g. legal remedy) available to him
  + Was he independently advised?
  + Whether after entering the K, he took steps to avoid it

#### Greater Fredericton v NAV Canada (2008) NBCA (Dec p 17)

* Test for **economic duress** (onus on pressuring party to prove not done under duress):
  + 1) Legitimacy/illegitimacy of threat not a controlling factor, but its impact on the victim
  + 2) Two conditions precedent (absolute prerequisites) for economic duress:
    - One party had an unbalanced power over the other, through the use of threats/force (express or implied threats to breach the agreement = threats)
    - The pressure was such that the pressured party had no practical alternative but to agree to it
  + 3) Did the coerced party consent to the variation?
    - Was the promise backed by consideration?
    - Was the promise made after one party raised a protest? (words “under protest” not req.)
    - After entering it, did the party make attempts to get the promise annulled as soon as practical?

|  |  |
| --- | --- |
| Issue | Was the variation enforceable given the economic duress? No. |
| Discussion and Analysis | - Absence of practical alternatives = evidence of economic duress, not conclusive proof  - Payment “under protest” = no real acquiescence to the variation  - Doesn’t recognize pressure as an essential component of the duress doctrine |

## 2. Undue Influence

* Only kicks in if it can be shown that the parties have a relationship over time (not at one pinpoint)
* Both duress and undue influence can involve more than two parties; a third party can utter the threat of harm if the initial two parties do not enter into a contract
* Only weaker party can choose to set K aside (so it’s VOIDABLE), but he’d need clean hands and no laches
* 2 part test establishing **undue influence**:
  + 1) Does relationship lead itself to automatic presumption of UI? (e.g. filial, solicitor/client, where there’s inherent dominating influence or doubt about making independent decisions)
    - Established relationship of undue influence – irrefutable presumption of undue influence
    - Actual relationship of undue influence – evidence
  + 2) Shift onus to D: Can D rebut the presumption of undue influence by demonstrating there’s none? Can D establish that P made an independent decision (based on independent advice) to participate in K?

#### Geffen v Goodman Estate, 1991 SCC

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| --- | --- |
| Facts | D’s mother’s will gave T life estate to be divided upon T's death among mother’s grandkids. After she died, they found a new will which left the estate directly to T. D suggested they act as trustees in trust. After T's death, her son P tried to have the trust set it aside arguing that his mother was unduly influenced by D. T's will left the entire estate to her children, in conflict with the trust. P/R; D/A. |
| Issue | Does presumption of undue influence in special relationships need "manifestly disadvantageous" K? |
| Ratio | For there to be a finding of undue influence, add this into UI test stage 1: I. Nature of relationship; II. Nature of the transaction: a) In commercial transactions - must be manifest undue disadvantage or benefit; OR b) In gift or similar transactions - requires only evidence of a dominant relationship. |
| Holding | Appeal allowed. Trust upheld. |

## 3. Unconscionability

* Less likely than the first two doctrines to have a third party be the source of the unconscionability
* Focus on unconscionable content of the contract, not the process by which it was entered into
* A plea that a bargain is **unconscionable** invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker (*Morrison*)
* Tested at the time K came into existence, not by what happens after (*Kreutziger* hint)
* *Hunter v Syncrude* (via *Tercon*): Test the exclusion/limitation clause to see if it fits the norms of unconscionability
* Problems with unconscionability: *Morrison* test ill-suited for big corps with lots of $ (*Hunter*); forces P to claim weakness, focuses on moment of bargain to find inequity (but may itself be unfair in operation) (*Kreutziger*)

#### Morrison v Coast Finance, 1965 BCCA

|  |  |
| --- | --- |
| Facts | L&K persuaded P to borrow $ from D on a mortgage on her home and lend proceeds to them so they could repay D and buy cars from auto co. for resale. Proceeds were applied accordingly, balance repaid to D and auto co. Mortgage repayments to P for L&K’s loan were to be made by L at D's office on P’s account. P had no other means of repaying $; her house her only substantial asset. L&K failed to pay P. She commenced action to have the mortgage set aside as having been procured by undue influence and as an unconscionable bargain made between persons in unequal positions. P/A; D/R. |
| Issue | Is the mortgage voidable for unconscionability? Yes. |
| Ratio | Test: (1) Unfair deal with (2) unequal power between parties 🡪 **Presumption of unconscionability** or fraud; once raised, stronger party must rebut presumption (show it was fair, reasonable bargain). |

#### Lloyds Bank v Bundy, 1975 CA

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| --- | --- |
| Facts | D’s house = his estate. His son asked for collateral for a loan from P. D signed the original collateral for less than asked. Later, son needed more collateral; D had to use the house since P’s lawyers + son explained that this was only way D could help. 5 months later P foreclosed on son's assets. He was bankrupt so they seized the house. D refused to leave, and P sued to have him evicted. P/R; D/A. |
| Discussion and Analysis | - Consideration from P was grossly inadequate, plus they exploited D’s obvious weakness |
| Ratio | K is voidable for unconscionability if: 1. The terms were very unfair or consideration inadequate; 2. Bargaining power was impaired by necessity, ignorance or infirmity; 3. Undue pressure or influence was used, not necessarily consciously; 4. There was an absence of independent advice. |

#### Harry v Kreutziger, 1978 BCCA

|  |  |
| --- | --- |
| Facts | P owned a boat and fishing licence. D offered to buy both and they agreed on $4,500 (license worth more). D assured P that he would be able to get another license, but he was rejected on the grounds that he had left the fishing industry when he sold the boat. P sued to have the sale set aside. P/A. |
| Discussion and Analysis | - *Morrison* test: clear inequality between them due to P’s lack of education, economic circumstances, P’s physical infirmity, difference in class, D’s aggressive actions |
| Ratio | There are two different approaches to a test for unconscionability:  1. Inequality (of both the circumstances and process) plus substantial unfairness leads to a presumption of unconscionability which the stronger party must rebut (*Morrison* test)  2. Whether transaction, viewed as a whole, is sufficiently divergent from community standards of commercial morality (a simplified *Lloyds* test, no need to look at parties’ relative strengths) |

# D. Illegality

* **Illegality** operates regardless of parties’ intentions:
  + 1) See if can attach label “illegal” and determine quantum of illegality (direct – voids the K) (look at circumstances, nature of K, possibility for severance), THEN
  + 2) See if consequences illegal (indirect – can make K unenforceable, not exist, able to be rescinded)
* **Statutory illegality**: Certain K’s, parts of K’s, or methods of performing K’s not allowed by statute
* **CL illegality**: K can be rendered unenforceable if it’s found contrary to public policy
* Examples: Immorality concerns (e.g. artificial insemination, marriage Ks, CL divorce Ks); K-stipulated delivery from Vancouver to Kelowna by truck in 1 hr is impossible within legal means 🡪 Fails due to illegality
* **Restrictive covenants** are fine; if they’re called “restrictive covenants **in restraint of trade**”, they’re illegal
* How to determine if illegal restraint of trade: Did P have a proprietary interest entitled to protection, was it too broad (unlimited time/place), was it the nature of the clause/agreement, was covenant against public interest?
  + Reasonableness determined by: geographic coverage, period of time in effect, extent of activity prohibited, can’t be ambiguous
* **Unenforceability**: K’s deemed unenforceable cannot be solved by courts. Selective equitable response: can say one part is enforceable but another isn’t (not a global response like void, since partially void is not possible)

## 1. Contracts Contrary to Public Policy

#### KRG Insurance Brokers v Shafron, 2009 SCC

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| --- | --- |
| Facts | D was employed by P in Vancouver. He left to work for a competitor in Richmond. P commenced an action to enforce the restrictive covenant signed by D which stated he would not be involved in insurance business within the “Metropolitan City of Vancouver”. The trial judge found that the restrictive covenant was neither clear, certain, nor reasonable because of that name. P/R; D/A. |
| Discussion and Analysis | - Trying to use doctrine of severance to resolve an ambiguous term in a restrictive covenant  - Onus is on the party seeking to enforce the restrictive covenant to show that it is reasonable |
| Ratio | A restrictive covenant is *prima facie* unenforceable unless it is shown to be reasonable with respect to the parties and reasonable with respect to the interests of the public (*Nordenfelt* test). An ambiguous restrictive covenant can only be enforced if the ambiguity can be resolved. |
| Holding | Appeal allowed with costs. |

## 2. Effects of Illegality

* If illegal clause can’t be severed, then whole K would be void, voidable, or unenforceable
* **Severance** can strike out one illegal term of a severable contract and keep the rest of it intact and enforceable (unless the struck out term was essential to the core of the contract)
  + **Blue Pencil Test** recognizes that part of what a party wants is illegal. It can strike things out (trivial, not part of main purport of restrictive covenant) so they no longer count. It cannot add to the K
* **Notional severance**: Reading down an illegal provision in a K to make it legal and enforceable – really only used with illegal interest clauses
* Doesn’t count as severance if the contract already comes with a series of multiple-choice clauses, and the other party just needs to cross out the terms it doesn’t find legal

#### Still v Minister of National Revenue [1998] FCA

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| --- | --- |
| Facts | P genuinely and mistakenly thought she had the proper papers to work in Canada. She did work and paid UI. When she was laid off, her application for UI benefits was denied since her employment contract was illegal. Her permanent resident status came later. |
| Issue | Does illegality disentitle P to UI? No. |
| Discussion and Analysis | - Relief should not be available to P if it would undermine the purposes of 2 federal statutes  - “No person, other than a Canadian citizen or permanent resident, shall engage or continue in employment in Canada without a valid and subsisting employment authorization.” |
| Ratio | Public policy weighs in favour of legal immigrants who have acted in good faith. Purposive approach choice of remedy: based on purpose of law, how it’s best served in given context. |

# E. Frustration

## 1. Development of the Doctrine

* Unforeseeable event (for both parties) makes it impossible to perform contractual obligations OR makes performance of K profoundly unfair or radically different from what was undertaken originally in K (*Davis*)
  + Possible circumstances: death, incapacity/unavailability of a party, destruction/unavailability of subject matter, illegality (something becomes illegal after K formed), method of performance becomes impossible, thwarting of common venture, natural disaster (but insurance)

#### Paradine v Jane [1647] KB

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| --- | --- |
| Facts | During the English Civil War, the Cavaliers took possession of land owned by P which was under lease to D. After they finally relinquished it, P brought suit against D to recover for breach of the lease. |
| Ratio | Previous courts would not allow a lessor to proceed against a lessee in time of war. But D still liable. |

#### Taylor v Caldwell [1863] KB

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| Facts | D agreed to rent its music hall to P. It burned down. P sued D for breach of K for failing to rent. No clause within K to allocate risk to underlying facilities, just “God’s will permitting” at the end. |
| Discussion and Analysis | - Continued existence of the Music Hall = implied condition essential for fulfillment of the contract  - Until this case, parties in K were absolutely bound; failure to perform was not excused by radically changed circumstances. This ruling 🡪 modern **doctrine of contract avoidance by impracticability** |
| Ratio | The destruction of the music hall was the fault of neither party, and rendered the performance of the contract by either party impossible, hence **frustration**. |
| Holding | Both parties were excused from their obligations under their contract. |

#### Davis Contractors v Fareham UDC [1956] HL

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| --- | --- |
| Facts | D hired P to build houses over 8 mths. Longer since P lacked labour and materials and cost more. P submitted K was frustrated, void, so they were entitled to *quantum meruit* for value of work done. |
| Discussion and Analysis | - Reid: Saying frustration was an implied term was fanciful, because people do not write about unforeseeable events |
| Ratio | Although the performance of it had become more onerous, the contract was not frustrated. |

## 2. Application of the Doctrine

* Factors to govern whether an event can frustrate a K (all-or-nothing):
  + 1. It’s unforeseen for the region (*Can Gov’t*): plagues, earthquakes, death/illness, etc.; Act of God (though an AoG clause = event not unforeseen); if insurance available, likely foreseeable
    - Exemption and limitation clauses can cover for these *forces majeurs*
  + 2. Not the fault of the parties (*Maritime Nat’l Fish*)
  + 3. Makes the purpose of the K impossible or drastically more difficult to achieve: change in legislation can cause frustration (*Capital*) but depends on nature of agreement (*Victoria*)

#### Can Gov’t Merchant Marine v Can. Trading Co. [1922] SCC

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| --- | --- |
| Facts | Vessels were not ready at the time set for sailing because of labour difficulties. D claimed that their contract had been frustrated because of this. P/A; D/R. |
| Discussion and Analysis | - Mignault: By making an absolute contract without providing the contingency of non-completion in time, P assumed the risks of this contingency |
| Ratio | A delay that could count as frustration must be due to extraordinary occurrence of events. |

#### Capital Quality Homes v Colwyn Const. [1975] ONCA

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| Facts | An agreement for P to purchase 26 building lots from D was frustrated because of changing legislation. P demanded the balance of its deposit from D. P/R; D/A. |
| Issue | Can the doctrine of frustration be applied here? Yes, P should get its deposit back. |
| Discussion and Analysis | - D: Since P’s equitable owner, he assumes burdens from legislation affecting land zoning/alienation  - P: New legislation 🡪 impossible to fulfil terms of K. Also failure of consideration. Equity wouldn’t force P to take something fundamentally different from what it had bargained for |
| Ratio | If there is a clear “frustration of the common venture”, K is at an end and the parties are discharged from further performance. |

#### Victoria Wood v Ondrey [1977] Ont. HCJ

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| --- | --- |
| Facts | P bought from D 90 acres of land, and both parties knew P intended to subdivide and develop the land. Legislative changes precluded subdivision. P sought the return of its deposit, relying on *Capital*. |
| Discussion and Analysis | - Distinguishing from *Capital*: K not made conditional on a continuing ability to subdivide; instead, it was for the transfer of one large plot (not a bunch of smaller ones) |
| Ratio | If very foundation of the agreement had not been destroyed, there’s no frustration. |

#### Maritime National Fish v Ocean Trawlers [1935] PC

|  |  |
| --- | --- |
| Facts | P contracted to hire *St. Cuthbert* from D. Both knew use of such a vessel without govt license was illegal. P applied for 5 licenses, granted 3. P did not name *St. C* as one of the licensed vessels, and refused to go through with the hire, on the grounds that K was frustrated. D/A. |
| Ratio | Frustration must be neither party’s fault; any supervening event must be unforeseeable and due to external factors. P not bound to not select *St. C*; chose not to after receiving 3 of 5 expected licenses. |
| Misc. | Trial: Not unreasonable to imply condition that if law prohibits operation, obligation to pay D ceases |

## 3. Effects of Frustration

* VOIDS K at time of frustration, but doesn’t undo what has already been done under K
* Terminates primary and secondary obligations at the specific time of frustration
* It’s a CL reaction; equity cannot impose remedies afterwards for K no longer exists!
* After finding frustration at CL, turn to statute to determine what happens after obligations have stopped (if something has already been performed) in order to make restitution
* ***Frustrated Contract Act***: Intends to divide loss equally (restitution for some loss)
  + S.2: Only if the K contains no provision for the consequences of frustration or avoidance
  + S.3: Binds the govt and its agencies
  + S.4: Sever if you can and (if one part has been wholly performed) treat as separate K, pay for work done
  + S. 5(2): Every party to whom K applies is entitled to restitution (rest of Act fleshes out what this means)
  + S. 5(4): Apportion the loss from the frustrating event equally between parties
  + S. 6: Deals with expectations of insurance (Not responsible for this)
  + S. 7(1): In amounts recoverable, include only reasonable expenditures (not loss of profits or insurance $)
  + S. 7(2): [Amount of claim] – [Value of goods returned in reasonable time]
* Practical example: Builder B is contracted to build owner O a house for $10K. Construction stops exactly halfway through due to a frustrating event. Materials had been brought on site for the completion. Material also sat off-site to be used for construction. At CL: unfair for B to get nothing for not building whole house.
  + S.4 severance. Ex: Not possible here.$10K left.
  + S. 5: Calculate the value of the “benefits created” (everything done for completion of K to owner) even if not received (S. 5). Ex: Cost of building half the house that B incurred was $5K can be claimed.
  + S. 7(1): Minus cost of raw materials that could be sold and still in builder’s hands using reasonable market price (not necessarily what was paid). Ex: $1K original value for all the off-site material. $4K can be claimed. Even if that was marked up (e.g. estimators say the pile is worth $1.5K), B can only claim for $1K. However, if the pile was marked down (e.g. at $750), then B can only claim the difference ($250).
  + S. 7(2) Ex: Lumber on-site cost $1.5K and can be returned from O to B. $2.5K is total benefit. If new value of on-site material is $900, only difference ($600) can be claimed by B. O would get a $900 credit.
  + If insurance shouldn’t have been sought, subtract HALF the value of the loss caused by frustrating event. Ex: The roof burned down for $1K loss, so B and O each shoulder half ($500). B can claim $2K.
  + Ex: Before frustration, creating shitty windows = Breach obligation X = Gives O claim for damages. Right to damages arises at breach of X (ASSUME not claimed yet). Even though K no longer exists (due to frustration), K law is preserved by S.5(3) and still entitles O to claim a breach of K for the shitty windows.
  + Ex: B built 1.5 houses out of P’s requested 3. Fire destroys house 1 and the half-completed house 2. O still needs to pay B for house 1, even if K’s subject is destroyed (it’s not a frustration). For house 2, since it was part of the frustrated K, there should be a 50/50 split by S. 5(4); if the fair market value for house 2 was $15K, then B is entitled to claim for $7.5K.

Remedies

# A. Damages - Rationale

* Court looks to the future and awards $ that puts the party in the position it would have been in had the promises been fulfilled (burden of proof on P)
* **General damages** = [Market value of what was supposed to be delivered] – [Market value of what was delivered] (*Jarvis*) OR [Market price that innocent party paid] – [K price innocent party was supposed to pay]
* Example: X made a K to deliver goods to Y for $100. But Y rejected the goods because of X’s breach of K. Now Y buy goods at market value $175. So Y claims $75 in damages. If X had delivered goods that Y is obliged to keep, and the value of those delivered goods was $125, Y can claim $50 (Market value – Delivered value). If Y only needs $45 to return to the position that he should be in, then he cannot get more than that, despite the greater difference between market value and agreed upon price ($75 above). Mitigation issue: Y rejected X’s delivery, got a bad deal at market, and paid $190 instead of the $175 value. It was Y’s own fault, so no damages. No entitlement to damage in breach of K where delivered value (say, $225) > market price ($175).
* The cause of the loss need not be the only one as long as it’s an “effective” cause
* A true **remedy** for breach of obligation is access to a different one, i.e. **remedial obligations**, aka secondary
* A **relief** isn’t a remedy; it just stops the undesirable behaviour

## 1. The Interests Protected

* **Fuller and Perdue** (1936), The Reliance Interest in Contract Damages:
  + Explains why damages are awarded; E.g. for breach of K, it comes out of area of primary obligations
  + Categorized reasons to award K damages, protect interests in: **Expectation**, **Reliance**, **Restitution**
* Need to cure and prevent harms occasioned by reliance: Breaches arouse a sense of injury and deprivation in the promise. This is especially so because the parties have set out a system of private law between themselves. The Court will only enforce if the promise is important enough to society to justify the law’s interest with it

## 2. The Expectation Interest

* Almost all damages cases are expectation interest cases; default setting of the law
* Forward looking aspect of the K: Something should have happened that didn’t, so distributive justice steps in
* Canadian courts have espoused this expectation measure of damages as a normal entitlement, with controls on damages recoverable based on the limiting principles of mitigation and remoteness

## 3. The Reliance Interest

* Fuller: A relied on K and incurred costs as part of this reliance. So if the K was broken, A deserves damages for those wasted expenditures, and for any wasted opportunity
* Something that shouldn’t have happened did happen
* Need to facilitate reliance on business agreements: Business agreements stimulate economic activity and it’s good for parties to rely upon such agreements, justifying legal protection of the reliance interest
* Damages based on reliance surface in jurisprudence where P is unable to prove or establish expectation losses

#### McRae v CDC [1951] Aust.

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| Discussion and Analysis | - D: No liability for breach of contract because it was void given the subject matter did not exist  - Claim for incurred expenses (reliance interest), not for lost profit (too speculative) |
| Ratio | Contract was void because D had promised the tanker did exist. |

#### Sunshine Vacation Villas v The Bay

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| Facts | K for P, a travel agency, to do business in D’s locations. P incurred expenses in preparation for carrying out the K, but they weren’t required within the K, just expenses P should reasonably have done to get ready for the K (e.g. rent). Then D broke the K and didn’t allow P to move in. |
| Discussion and Analysis | - Is it possible to choose among the damages options and claim in one area if the other is too difficult to establish or “speculative” |
| Ratio | CL: Faulted party can’t pay for both P’s loss in profits and incurred costs; it might overcompensate. |

## 4. Restitution

* **Restitution**: A inappropriately gained something (B not necessarily lost), the law wants A to hand over that gain
  + Damages: based on difference between what owner should have got and what owner did get
* Restitution measured by benefit to the wrongdoer; fiduciary obligation to not take that **unjust enrichment** (applicable to directors of organizations, corporations, lawyers)
* **Law of Restitution** also known as a quasi-contract (missing offer, acceptance, consideration)
  + Amount to be paid = compensation or ***quantum meruit*** (reasonable sum of money to be paid for services rendered or work done when the amount due is not stipulated in a legally enforceable contract)

#### Attorney-General v Blake [2000] UK

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| Facts | For D’s MI6 employment K, he signed declaration to disclose no info about his work, applicable after employment ceased. He wrote a book on info no longer confidential. D received advanced payments and was entitled to more. Crown brought an action for all his profits + those not yet received. |
| Ratio | Restitution can be awarded where P has a legitimate interest in preventing D from profiting from a breach of K that harms public interest. |
| Holding | Normal remedies (specific perform or injunct) not enough; publishers pay any $ owed to D to Crown. |
| Misc. | HL dissent: Since the information was no longer confidential, no misuse of confidential information |

# B. Damages – Quantification Problems

* Could be an issue of trying to figure out how much lost time/effort is worth in damages

#### Chaplin v Hicks (1911) KB

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| Facts | D in breach of contract prevented P from taking part in the final stage of a beauty contest where 12 of the final 50 (out of 6,000 original entrants) would be rewarded with places in a chorus line. |
| Discussion and Analysis | - Court seemed to proceed on P's statistical chance of winning (as if she were a lottery player) without any actual assessment of her physical attributes against any particular criteria of beauty |
| Ratio | If breach of K, P has a right to damages even if nearly impossible to calculate (applied a reasonable estimate based on the lottery chance of winning). |
| Holding | P was awarded damages for the loss of chance, assessed at 25% of winning the competition. |

#### Groves v John Wunder 1939 Minn.

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| Facts | D contracted to remove sand & gravel from P’s premises and leave property at uniform grade, substantially same as current grade. D willfully failed to leave property at uniform grade. |
| Ratio | Damages = Reasonable cost to P of doing the work called for by K (that D willfully didn’t do). Not [Value the land would have had had D fully performed] – [Value of the land at the time of K]. |
| Holding | D can’t escape his obligations, therefore liable to P for the cost of leaving property at uniform grade |

#### Jarvis v Swans Tours [1972] Eng.

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| Facts | P planned a trip based on a brochure from D. The trip was nothing like what the brochure promised. |
| Ratio | Entitled to get damages for **mental distress** (K version of **aggravated damages**) in a breach of K when you rely on an expectation – when K itself was for enjoyment and pleasure. Avoid double comp. |
| Holding | P compensated for loss of entertainment and enjoyment he was promised. |

# C. Damages – Remoteness

* Even if D is strictly liable for damages, it can legally not be D’s fault; this line of measurement = **remoteness** test
* Quantum of damage doesn’t affect strict liability

#### Hadley v Baxendale [1854] Eng.

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| Facts | P’s mill sent broken shaft to D to pattern new one. Shaft delivery to D was delayed, so final delivery of new shaft to P was delayed. P brought suit against D for lost profits from mill not operating. |
| Issue | Was it P’s responsibility to ensure that delivery occurred? |
| Discussion and Analysis | General **Test for Remoteness**:  1. What was the breach?  2. Two branches for dealing with damages:  a) **General Damages**: compensates loss that arises naturally from such breach of K itself, OR (b)  \*Simply need to know what the obligation was, and that it was broken; anyone would suffer this loss  b) **Special Damages**: (explicitly or implicitly) reasonable contemplation of both parties at time of acceptance that the loss was the probable (*Koufos*) result of the breach (foreseeability + probability)  \*Special characteristics arise from surrounding circumstances of the K  \*Contemplation depends on knowledge that was communicated |

#### Victoria Laundry v Newman [1949] KB

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| Facts | Late delivery of boiler from D to P. It was 20 weeks late and caused P to have to turn down a very profitable government contract because they didn't have the boiler. |
| Discussion and Analysis | Attempted to re-work *Hadley* test into two rules (to avoid improbable losses too harsh to breacher):  1) Both liable for a breach in K with ordinary consequences, which all should be aware of beforehand  2) \*For special circumstances\* Parties required to actually know, when entering K, that a breach will not operate in the ordinary course of things 🡪 causing greater losses. |
| Ratio | Broader test: Damages recoverable if D had considered the loss was a serious possibility or a real danger at the time of entering K. For P to recover profit, D would have had to know at the time of K the prospects and terms of such contracts. |
| Holding | P able to recover regular profits, not extraordinary profits. |

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

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| Facts | P chartered D’s vessel with sugar to Basra. It arrived 9 days late. The sugar was sold but the market price had fallen. Without the delay, the sugar would have been sold for a higher price. P/R; D/A. |
| Discussion and Analysis | Test: (1) On the info available to D when K was made, should he, or (2) a reasonable person in his position, have realized that (3) such a loss was sufficiently likely to result from breach of K to make it proper to hold that the loss flowed naturally from the breach or should have been in contemplation? |
| Ratio | Something foreseeable yet unlikely to occur isn’t sufficient to award damages. Appropriate to award damages where the damage suffered was a result which is likely to occur in great majority of cases. |
| Holding | Without relying on *Victoria Laundry* and taking the principle that had already been established, the loss of profit claimed in this case was not too remote to be recoverable as damages. |

# D. Damages – Mitigation

* Take reasonable steps to avoid losses flowing from breach, not ALL of them (nor unreasonable risks)
  + Helps to replace property and litigate promptly, without waiting too long to start mitigating

#### Asamera Oil Corp. v Sea Oil & General Corp. [1979] SCC

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| Facts | 125,000 shares lent from Baud to president of P under agreement requiring the return of the shares to B by Dec 1960. Prez P sold the shares lent to him. In 1960, injunction against prez restraining him from selling 125,000 shares in P, though prez interpreted that he must always possess at least that many shares (and not the very shares he got from B). B sought return of those shares from prez. P/A. |
| Issue | Is P required to take steps to mitigate damage/costs caused by D’s breach of K? |
| Ratio | In order to seek specific performance as opposed to damages, one must have a legitimate and substantial interest (can justify one’s inaction and might recover losses), and onus is on P to prove legitimate interest. If not legitimate and substantial, must claim damages and have duty to mitigate. |

# E. Time of Measurement of Damages

#### Semelhago v Paramadevan [1996] SCC

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| Facts | P agreed to buy a house under construction from D for $205,000. To finance this purchase, P planned to pay $75,000 cash and $130,000 from mortgaging his current house for 6 months. Before those 6 months were up, D reneged; the title of the house was taken by A’s relative. P sued D for specific performance or damages in lieu. At the time of trial, both P’s old house and the property at case had risen in value. P/R; D/A. |
| Ratio | Damages at common law are to be calculated at the time of breach (*Asamera* too). Damages in lieu of specific performance are to be calculated at the time of judgment. |
| Holding | Specific performance is not to be granted automatically in all cases. |

# F. Liquidated Damages, Deposits and Forfeitures

* **Liquidated damages**: Genuine pre-estimates of damage from a breach
  + Damage provisions that the parties expressly agree upon, which will oust any implied terms
* **Debt claims** are agreed upon in the K, describing an intangible property, something owed (an obligation)
  + Example: Primary obligation is A paying a deposit. When A fails to continue making payments (thus breach of K), the deposit becomes a secondary obligation, so is B allowed to keep that deposit?
  + Primary obligation = price; but price itself is the debt claim too
* **Penalties** are illegal for individuals to impose on each other (e.g. B demanding $20,000 from A after A failed to pay $10,000); only governments can penalize people. If actual loss > penalty, P only has to pay the penalty.
* **Deposits** usually trigger acceptance (part of primary obligations) and are forfeited on breach (usually forming secondary obligations), usually implying there was default. Courts unlikely to interfere and reverse forfeiture
* *Law and Equity Act*, s. 24: Relief against all penalties and forfeitures
  + When Courts grant this relief, they have the power to impose any terms that they see fit (e.g. costs, expenses, damages, compensations)

#### Shatilla v Feinstein [1923] Sask. Prov. Ct.

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| Facts | D sold business to P. D was not to compete in city limits. If D breached, D agreed to pay $10K. D became shareholder in company that competed against P. P sues for liquidated damages of $10K. |
| Issue | Is it a penalty or is it liquidated damages? Court treated as penalty. |
| Ratio | If damages not proportionate to the loss which could possibly arise, there’s presumption of penalty. However, must examine circumstances of the transaction to see if the clause meant to warn D. Liquidated damages are penalties if they’re much higher than actual estimate of loss, and expressed as an indiscriminate fixed sum for all the possible breaches. Courts will not enforce penalties. |

#### HF Clarke Ltd. v Thermidaire [1976] SCC

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| Facts | P agreed to distribute product made by D and not to sell competing products. If K breached, P was to pay sum of liquidated damages equal to gross trading profit. |
| Ratio | Liquidated damages need to be reasonable compared to actual damages. LD is punitive if damages > actual estimate of loss. If punitive, equity will declare that part of the K unenforceable and court will determine appropriate damages. |

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

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| Facts | Seller of a successful business D was hired as an employee by purchaser P. As part of employment K, D promised not to compete in the insurance business for 5 years. He did. This covenant not in original sales agreement. Actual damages higher than the $1K penalty stipulated in K. |
| Discussion and Analysis | - D: Restrictive covenant restricts trade and is thus illegal and can’t be part of his K, so he never breached his K for it is unenforceable first |
| Ratio | Only the party that is oppressed by the penalty clause may ask equity to not enforce it. The oppressing party can’t first rely on the penalty clause to intimidate compliance and then, when it becomes a disadvantageous mistake or if he wants more $, seek to have it rendered unenforceable. |
| Holding | P entitled to injunction and to such damages as he could prove to date of trial (not exceeding $1000). |

#### Stockloser v Johnson [1954] Eng.

* At CL: Party that paid deposit can recover if (1) there is a **forfeiture clause** in the K that states “party can recover its losses by keeping the deposit” or if (2) $ is explicitly called a deposit (implying a forfeiture clause)
  + Where no forfeiture clause (if money is in part payment of purchase price, and P defaults), so long as seller keeps contract open and available for performance, the buyer cannot recover money
* At equity: A forfeiture clause may be unenforceable (so breacher may get it back) if (1) it’s penal, if (2) sum is proportionate to the damage, and if (3) it would be unconscionable for seller to keep the deposit
  + Unclear if this is good law; if kept, subtracted from damages given for losses

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| Facts | P buys machinery from D in installments. Clause in K says D is owner until all payments made. If P defaulted once, D entitled to retake possession of machinery and retain P’s payments. P gambled to pay with royalties; when not enough, he tried to have his $ returned on the basis of it being a penalty clause and thus unjustly enriching him so that it’s rendered unenforceable by Equity. |
| Issue | Was the forfeiture clause a penalty clause? No, not unconscionable for D to keep the money. |
| Discussion and Analysis | - Once D rescinds the K, P is entitled to recover his money, subject to a claim for damages by D  - Forfeiture clauseis treated the same way as a penalty clause, even though they are different |

# G. Equitable Remedies

* These **equitable remedies** are discretionary: **injunctions** or **orders of specific performance** or **constructive trust**
  + Seek to keep primary obligations alive
  + Useful when money is no substitute for the primary obligation
  + Seeking an equitable order of either type will affirm the K rather than terminate it
* Restrictions:
  + Not available if CL says K is void or that the primary obligations have ended (because they’re secondary)
  + Remedy must not interfere with third party rights
  + Cannot impose undue burden on D (e.g. employment K’s will never get specific performance)
  + P must come without delay, with intent to carry out those obligations, and with clean hands
  + Remedy must be mutual (if D cannot get from P what P seeks to get from D, no equitable remedy here)
  + Courts do not want to monitor obligations extending over a period of time
* **Prohibitory injunctions** can prevent someone from doing something
  + Threatening to not do something promised to do in K can also lead to a prohibitory injunctions
* Specific performance = **mandatory injunction**

#### John Dodge Holdings v 805062 Ontario [2001] ONCA

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| Facts | Magna (D owner) agreed to sell land to P. For sale to proceed, severance approval needed, which required that M construct a road extension to the City. M didn’t like this and sought to terminate the agreement. P refused to consider alternatives and sued and obtained an order of specific performance for M to reapply for the severance approval, which had lapsed. P/R; D/A. |
| Discussion and Analysis | To show that a property is **unique** it must possess (1) a quality that cannot be readily duplicated elsewhere, which (2) relates to it being particularly suitable for the purpose for which it was intended, and this must be determined on the date the actionable act takes place. The wronged party must decide whether to keep the agreement alive by seeking specific performance or accept the breach and sue for damages. |
| Ratio | For real property, specific performance can be granted if the person seeking it can show that the property in question (i.e. the subject matter) was unique at the date of the actionable wrong. |
| Holding | Appeal dismissed. Judgment for P. |

#### Warner Bros v Nelson [1936] Eng.

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| Facts | D entered into contract to render her exclusive services, and only perform for P. If D does not perform contract, P can extend contract. D left country and signed contract with another company. P brought injunction to restrain her from working for someone else, so she would work for P. |
| Ratio | Court will not grant specific performance of a K for personal service, nor an injunction if it interferes with someone’s livelihood. Court will enforce negative covenants in a K for personal service by an injunction, which will not amount to specific performance or a decree requiring D to remain idle. |
| Holding | Injunction for 3 years to provide reasonable protection to P of D’s breach. |