Contracts CAN (FALL 2016) Professor Sarra Tracy Simpson

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**EXAM STRATEGIES**

What does client want?

|  |  |
| --- | --- |
| To destroy or adjust K? | Deny validity or enforceability   1. Construe (intentions, words, etc) 2. Imply (custom/use, law, practical necessity) 3. Rectify \*Actually **difficult** to meet, but worth considering. 4. Sever or argue K is/is not substantially complete (entire obligation?) 5. K not Voluntary (under duress?) 6. Unenforceability |
| To enforce K? | Offer  Acceptance  Certainty of terms  Consideration |
| **Finding damages** | Estoppel  Duty of Good Faith  Specific Performance |
| **Getting out of contract**  **CONTEST K EVEN IF NO BREACH – EXCUSED FROM PERFORMING OBLIGATIONS** | 1. **Void** **🡪 strongest effect (Formation 🡪 certainty of terms, Offer / Acceptance, Intention to Create Legale Relations + Mistake + Illegality)**     1. This is for situations where it would be best as a whole to have no agreement ever in existence, than one that can be modified (through CL or equity). 2. **Voidable** 🡪 **Weaker party doctrines** (**Duress, Capacity, Undue Influence, Misrep, Mistake**)    1. If some unfairness is present, contributing to the K you have, suitable to ask equity for remedy if clean hands (in general), despite valid CL K.    2. Consider whether you would be barred from using it    3. **Strong effect** -> can mean getting out of the K 3. **Unenforceable** 🡪 **illegality, privity, consideration, etc. (exclusion clause / limiting liability)**    1. You have an apparently validly formed K, but there is a technical or policy reason why you can’t ask a court to enforce the obligations**. Use if seeking party is in need of protection.** 4. **Frustration** 🡪 **Frustrated K’s Act**    1. Only useable upon extraneous unpredicted event, without fault of parties, fundamentally altering the K.    2. Wipes out everything, but damages still possible, and restitution available 5. **Breach** - Intermediate, warranty (damages), condition (termination – affirmation, damages always available) **K CAN BE CONTESTED EVEN IF NO BREACH** |
| **If dealing with an exclusion/limitation clause you want out of**  **SEE PAGE 25** | 1. Ask if there is **notice** 2. Can signature of other party serve conclusively as evidence of notice? 3. Does the clause *even apply* in the given situation? 4. Construe/interpret the clause (and rest of K) 5. Is it **unconscionable** to apply to clause? Weaker party? Duress? 6. Does the clause operate **unfairly** in the context of the actual breach? (Wilson – doubtful authority) 7. Is the clause contrary to “public policy”? (relates to formation of K not subsequent events) |

FLOWCHART FOR EXAMS

**SPOT THE ISSUES AND NAME THEM**

* **Law**
* **Authority**
* **Apply to Facts**
* **Conclude**

**FIND THE OBLIGATION**

* Invitation to treat
* Offer acceptance
* Primary & secondary obligations
* Intention to create legal relations
* Consideration
* Bilateral/unilateral K
* Contract A/B
* What duties existed
* Privity – who has obligations who is a party
* Notice – sufficient?

**FIND THE BREACH**

* Terms – certainty of terms
* Implied terms
* Were the terms written vs oral
* Breach of a term
* Fundamental breach
* Exclusion/limitation clause
* Parol evidence rule invoked

**REMEDIES**

* Estoppel
* Specific performance (Chen-Wishart article)
* Damages

History of K Common Law

**Sources of K Law**:

* Statutes (primarily provincial):
  + Statute of Frauds
  + Limitations Act
  + Sale of Goods Act
  + Law and Equity Act
* Common law

**Contract Law:**

* Set of legal rules that allow parties to rearrange their rights powers responsibilities and liabilities between themselves
* Rules that determine remedies that occur if one or both parties fail to live up to their agreement or promises

**Equity System:** based on idea certain equity or fairness should be involved w/ decision-making (Chancery Court)

* Not good at creating, good at modifying
* **Equity can order someone to do something they haven’t agreed to do b/c it’s good and equitable**
* **Equity always prevails** → follows common law, but it is superior if reaches diff. conclusion
* **Equitable remedy** - Order of specific performance

Guiding Principles for K Law

* **Who** is involved? (Capacity & quantum)
* **Voluntary** involvement? (Desired → consent)
* Importance of **individual** (assumption of quality of power – ex. institutional element injected)
* **Predictability** → trying to fix the future, need element of change in case something unforeseen arises
* **Overarching value of fairness**
* **When** did the K come into existence? When does it expire?
* **Where** did K come into existence?
* Part of law of obligations
  + K creates duty owed to the other person to do something, which creates a right for the other person to receive/get that thing **(primary obligations)**
  + Obligation works as a pair – a commitment to do something, and a remedy that will happen if the commitment is broken
  + “law of restitution”– not to be unjustly enriched or unfairly benefited at the expense of another. The court may intervene and give you remedy **(secondary obligations)**
  + Different areas of “law of obligations” may work together to govern a particular situation
  + If concurrent liability exists (ie tort and contract), aggrieved party can decide which to claim under

FORMATION OF THE CONTRACT

* A contract must be in place before it can be enforced
* Offer and acceptance is fundamental to whether or not a contract exists.
* **Formation occurs at time of acceptance**
* **Consent**-Must be intentional (except for some circumstances)
* **Balance of Probabilities** – 51% when deciding where it was formed

Contracts must contain all ingredients to form a contract incl:

* Offer
* Acceptance
* Consideration
* Certainty of terms
* Intention
* Written record
* Capacity

OFFER

* Offer must occur before acceptance – ready to enter K if accepted
* **Offeror sets terms** - determines what obligations of both parties will be under the K
  + If offeree suggests terms, only included if offeror includes them in offer
* Must show **to whom offer is made** and **how long offer is valid for**
  + Only a person to whom an offer is made can accept it *Shogun Finance Ltd v Hudson*
  + A general ad is an offer is seen to be to the world, unless the offeror expressly states some are not included OR “if a reasonable person would not have seen the offer”
* Offer at a self-service store happens at the cash register by the customer, acceptance is by clerk taking $ *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd 1953*
* Are the terms complete *enough*?
* **Parties may continue to negotiate after offer – however have K already through offer and acceptance** *Vancouver Canucks Limited Partnership v Canon Canada [2015] BCJ 621 at para 79, 2015 BCCA 144*
  + Emails may form a contract if terms are clearly laid out, and not “lead to an absurdity”

1. **Bilateral**

* Both parties have obligations
* **Acceptance occurs when offeree starts meeting obligations to accept**
* **Entitled to remedy if other party doesn’t accept**

1. **Unilateral**

* Only 1 of the parties has obligations
* **Acceptance occurs when offeree finishes meeting obligations to accept** *Baughman v Rampart Resources*
* Risk that the acceptor starts to meet obligations, offeror cancels offer before obligations are met
* You cannot do something to prevent someone from meeting their side of the contract
* Courts encouraged to consider contracts BILATERAL instead so that once acceptor starts to meet obligations, acceptance is in place and contract is formed to avoid above situation *Dawson v Helicopter Exploration Co 1955* p 48

OFFER vs. INVITATION TO TREAT

**Invitation to Treat -** communications from 1 party to another that precede the offer; **statement of readiness to negotiate but not itself an offer** (no legal significance)

Display of goods = invitation to treat; customer makes offer when bringing item to the counter, acceptance of payment triggers K Pharmaceutical Society of Great Britain v Boots Cash Chemists, [1953]

**Factors to Distinguish Offer from Invitation to Treat**

* Whether all details of the eventual K are clear or can be made out from communication
* Whether treating a communication as an offer could lead to an absurdity
* Generally multiple contracts would be absurdity, but not always the case, **look at context**  
  *Carlill v Carbolic Smoke Ball Co 1893* – communication that results in multiple contracts can still be valid offer
* *Gibson v Manchester City Council 1979* - the words “may be prepared to sell” demonstrate invitation to treat not offer

**Intention is the key to determining whether or not an offer exists** *Canadian Dyers*

* Words & Actions
* Whether the conduct of parties to an outside observer implies an offer

**Objective Test of Intention**:

* Mere price quotation usually invitation to treat; statement of price at which willing to sell = offer *Canadian Dyers Association Ltd v Burton, 1920*
* Look at language & actions (objective)
* Look at conduct of person – what did they intend? (Subjective)
* Determination of serious offer determined from words & actions

**Contract A/Contract B:**

* The terms of Contract A create acceptance of the procedures outlined in the terms which form Contract B – acceptance of A automatically implies acceptance of B
* Usually used in construction with tender process
* Usually includes deposit from tenderer which gets forfeited if they pull out
* Tenderer is accepting terms and procedures set out in invitation to tender when they submit their proposal
  + Contract A – offer that is put in by the tenderer for a construction job
  + Contract B – the actual work contract if Contract A is accepted
  + *MJB Enterprises Ltd v Defense Construction 1951*

COMMUNICATION OF OFFER

**Offer must be communicated to the acceptor**

* Cannot accept offer in ignorance
* **Motive is irrelevant in acceptance, only knowledge that the offer and some intent to accept is necessary** *Williams v Carwardine, 1833*
* Knowledge of offer and intent to accept the offer is required *R v Clarke 1927*

**2 Types of Communication:**

* Express
* Implied (conduct; inaction/silence)

TERMINATION OF OFFER

**Revocation – terminated by offeror**

* Termination can come in any way but must be communicated – implied/specific, oral/written
* Without communication, offer is not revoked (unless terms “while supplies last” or expiry)
* Early revocation – can be revoked earlier than stated deadline, anytime before accepted, unless consideration was given
* Offeree can’t accept offer after already aware that offer has been revoked *Dickinson v Dodds*
* Offeror not bound by promise to keep offer open unless there’s consideration for that promise *Dickinson v Dodds*
* To prevent early revocation must ensure offer becomes subject of preliminary contract (option): in exchange for some valuable consideration, offer kept open for stated period *Dickinson v Dodds*
* Doesn’t need to be direct from offeror to offeree
* Offer cannot be revoked be offeror if offeree doing tasks in order to accept – forms binding contract *Errington v Errington*
* Unilateral Contracts:
  + Generally offer can be revoked prior to completion in unilateral K (*Carlill*)
  + If offeree has already started actions necessary to accept the offer & **offeror knows**; offeror can’t revoke K *Errington v Errington and Woods*
  + Promise ceases to bind offeror if action left incomplete or unperformed

**Rejection – terminated by offeree:**

* Offeree can terminate an offer by rejecting (w/words or actions).
* Can reject an offer through counter-offer *Hyde v Wrench, 1840*
* Original offer can only be resurrected by original offeror (***Livingstone v Evans, 1925***
* Mere inquiry/clarification is not acceptance OR rejection ***Stevenson v Mclean, 1880***
* Rejection of counter-offer may constitute renewal of original offer 🡪 statement can be construed as resurrecting offer “cannot reduce price” therefore binding if accepted ***Livingstone v. Evans***

**Lapse of Time**

* No offer open for eternity.
* Implied rejection – passage of time deemed ‘election’ to keep status quo (reject)
* If no time specified it **lapses after** **reasonable time**   
  ***Barrick v Clark, 1950*** Offer must be taken to require acceptance within reasonable time depending on context of offer.

ACCEPTANCE

**More vital step of creating a K: when acceptance occurs, K comes into existence (consideration tested at time of acceptance).**

* Time of acceptance crucial to issues of mistake and misrepresentation
* Email exchange may constitute part of formal agreement if reasonable bystander thought terms
* Acceptance must demonstrate a **meeting of the minds** – same terms, same time
* Consideration is evidence of acceptance
* Acceptance can be based on a condition or “subject to” clause if both agree to that condition *Canada Square Corp v Versafood Services 1981*
* Can accept by conduct

Form of Acceptance

* How offeree accepts / and procedure is determined by the offeror – in particular place, writing or verbal, by a particular action *Eliason v Henshaw*
* If acceptance is shown by performing a particular action, an action that closely approximates it may suffice if offeree is prevented by offeror to do exactly what is required. Preventing acceptance might be construed as terminating offer. *Carmichael v Bank of Montreal* [1972] MJ No 71 (Man QB) *page 37*
* Conduct may confer acceptance of offer *Brogden v Metropolitan Railway p 38*
* If both parties act as if there is a contract after an offer there might be construed to be a contract based on the terms of the offer (not history of parties) *Saint John Tug Boat Co v Irving Refinery Ltd* [1964] SCR 614 (SCC)

Rules around Acceptance

* A can’t accept offer from B if A isn’t aware of the offer (***R v Clarke, 1927*** *forgot about offer*)
* If A aware of offer, but does what’s necessary to accept for another reason, can still create binding K b/c motive not relevant (***Williams v Carwardine, 1833*** *knew about offer-did actions to accept for diff. reason*)
* If A counter-offers B; A can’t accept B’s original offer unless B revives it → once revived A can accept & create binding K (***Livingstone v Evans, 1925***)
* Terms on last form wins in “battle of forms” = last offer & acceptance → **one party makes entirety of offer, other party says yes** (***Butler Machine Tool Co v Ex-Cell-O-Corp, 1979***) [not good authority for prop that courts can create a K out of parties’ communication → **BAD LAW**]

**Electronic/Internet K’s**: use of a website where use involves going deeper into site than simply viewing home page can = acceptance of contract containing terms of use as long as there’s notice of terms

3 Methods set out Century 21 Canada Limited Partnership v Rogers Communications Inc, 2011

* + **Shrink-wrap agreements –** software in “shrink-wrapped” box – purchase subject to a license & license found in manual in the box or on comp screen when software is used
  + **Click-wrap agreements** – user accepts terms of use by clicking “I accept” button when using program for 1st time
  + **Browse-wrap agreements** – similar to above w/o button; terms indicated on first page/home page of website & continued use of product/website = acceptance

Communication of Acceptance

* Acceptance **must be communicated** *Schiller v Fisher 1981*
* Offer accepted as long as communicated, even if offeror doesn’t receive message *Renault UK Ltd v Fleetpro Technical Service pg 41* UNLESS offer states otherwise
* If offeror stipulates by terms of offer that offer must be accepted in particular way, otherwise offeree can accept however they want (*Carlill* → *ad can = unilateral K that is accepted by fulfilling conditions of K*).
* K comes into existence as soon as offeree does stipulated act, whether offeror knows of the act or not, unless notice of acceptance by action is required: (*Carlill*)

###### **Acceptance can’t be assumed:**

* If no notification of acceptance, can’t assume K, can’t impose obligations on unwilling party *Felthouse v Bindley, 1862* – law may find insufficient: “if I don’t hear from you, I’ll assume acceptance”

###### **Postal Acceptance Rule:**

* acceptance happens **as soon as acceptor puts letter into post office** b/c post office acts as agent for both parties (Household Fire v Grant, 1879 D applies for shares-P sends letter of allotment-D never receives letter-P goes into liquidation-liquidator sues D for sum of shares)
* Does not apply if terms state acceptance must reach the offeror *Holwell Securities Ltd v Hughes 1974*

CERTAINTY OF TERMS

* K can fail for lack of certainty (ex. missing/ambiguous info).
* Clear terms outline what is agreed.
* If it’s impossible to ascertain what obligations of parties are, it’s impossible to determine a breach or appropriate remedy.

Consensus

* PARTIES \* PERIOD \* PRICE – no consensus, no contract *Logiko v Nessey Tools Inc*
* “Consensus *ad* idem” - Both parties agree at same time to same terms
* OBJECTIVE ASSESSMENT OF INTENTION – “would a reasonable person observing what has been said and done and knowing how the parties are situated conclude that the parties have reached an agreement” *Smith v Hughes (1871) LR 6 QB*
* if one party changes their mind later that is irrelevant, the contract was formed the moments their ‘minds met’ p 50
* Consent plays a minor role in contract law, only informs decisions – acceptance, intention to create legal relations and mistake play a larger role
* Consensus can be shown to bolster issue of acceptance, intention to create legal relations between parties an un-communicated revocation is ‘no revocation at all’

Failure of certainty

**Absence of terms important to contract:**

* If you don’t say anything about important element of K could make K unenforceable
* “an agreement to agree is not a contract” ***May & Butcher Ltd v R, 1934*** – essential term yet to be determined (i.e. price) means no K exists; not enforceable
* Price uncertainty *Sale of Goods Act –* price set by contract

**Ambiguous Terms**:

* Unsure of what parties meant – may be too much or too little info (ex. B offers to sell his car to A; A says yes; but B has 4 cars – which one is he selling?)
* Interpretation of contract through purposive lens, **best efforts** to understand intention and find meaning in words. We should make every effort to find meaning in the words the parties used. *Canada v CAE Industries Ltd 1985 page 63*
* Attempt made by courts to interpret K to construe term so as to save K from failure for uncertainty when obvious that both parties intended to enter into K (*Hillas & Co v Arcos Ltd, 1932* – apply maxim *verba ita sunt intelligenda ut res magis valeat quam pereat* “words should be interpreted so as to make the thing they relate to effective rather than perish”
* Terms of K (if vague) will be interpreted purposively from K (*Carlill*
* Objective test should be applied to understand intention and meaning *Marley v Rawlings 2014:*
  + natural and ordinary meaning of the words
  + overall purpose of the document
  + other provisions of the document
  + facts known or assumed by the parties at the time that the document was executed, and
  + common sense
  + NOT SUBJECTIVE INTENTIONS

***Meaningless/Irrelevant Clauses***

* Don’t need to be interpreted b/c irrelevant to K (**ignore**)
* Promise to negotiate in “good faith”/use “best efforts” have no legal meaning
* In support of promise to negotiate in contract:
  + *Hillas and Co v Arcos* 🡪 agreement to negotiate where negotiations are fruitless could result in court assuming contract was in place and could result in damages
  + *Gateway Realty v Arton Holdings 1991* 🡪 parties to a contract must exercise rights honestly, fairly and in good faith 🡪 contract breached when party acts in bad faith
  + *Bhasin v Hrynew 2014* 🡪 there is no implied duty to act in good faith but there is a ‘general organizing principle of good faith that underlies contract law’—so courts may impliy an obligation to negotiate in good faith.
* Against promise to negotiate enforceability of contract:
  + *Walford v Miles 1992* 🡪 agreement to negotiate lacks certainty 🡪 does not form a contract
  + *Courtney and Fairbairn v Tolaini Brothers 1975* 🡪 law does not recognize a ‘contract to enter a contract’ - we cannot recognize a contract to negotiate due to uncertain terms (hence negotiations).

Intention to Create Legal Relations

* Agreement only binding if intention to create legal relations – separate requirement in formation
* Argument that usually intertwined w/ certainty of terms → question of certainty, still negotiating so lacks intention (generalized intent but lacks details = certainty of terms).
* Letter of intent or memorandum of understanding – do not form a contract if no intention to form by parties unless terms are very clearly laid out and resulting contract doesn’t add anything new *Bawitko Investments v Kernels Popcorn*
* If the agreement is silent on intention to create legal relations, then the intention is **presumed** (if you asked for services, got them, you should pay) *Upton-on-Severn Rural District Council v Powerll [1942]* OR there is thought to be no contract
* Email correspondence – there should be a presumption against an intention to establish a binding relationship where multiple emails between consumers.  *Girouard v Druet 2012 NBCA 40*

COMMERCIAL CONTEXT

* Agreement, even if with consideration, not binding as K if made w/o any intention of creating legal relations.
* In commercial contracts, email negotiations form a contract. *Prolink Broker Netowrk v Jaitley*
* Presumption of intention – onus on proving no intention – objective test of intention applied *Kleinwort Benson Ltd v Malaysia Mininig Corp 1989*
* Test for Intention to Create Legal Relations:

1. Importance of agreement of parties
2. Fact that 1 of parties has acted in reliance on it

Agreements Expressly Not Meant to be Legal: “gentlemen’s agreement” not a K (*Rose and Frank Co v JR Crompton and Bros Ltd, 1923* → parties can expressly state in agreement they don’t wish to be bound

* Likely not valid law today → arbitration can be used

SOCIAL/DOMESTIC CONTEXT – public policy

* Common law requires intention to create agreement – public policy perspective
* Not often thought that social situations like parties, dinner engagements, holidays etc. create legal relations

***Balfour v Balfour, 1919*** → family agreements don’t constitute K; not enforceable b/c strong presumption not intended to have legal consequences (unless expressly stated) can hurt weaker party

***Jones v Padavatton 1969*** *🡪* Family arrangements depend on good faith of promises made, are not legally binding agreements 🡪 Problem – not finding intention to create legal relations creates legal immunity to most powerful members of families. However times are changing and may now be legal relations.

***Merritt v Merritt 1970*** – separated family parties ‘not living in amity’ may be more likely to be seen as intending to create legal relations (compared to those living together and tighter family relationships)

WRITTEN CONTRACTS

**Formal – requires seal SEE ENFORCING CONTRACTS SECTION FOR MORE ON SEAL**

* Seal is a formality but not required, old and only used when some statute demands.
* Consideration not required to make K enforceable. pg 71

**Informal (simple) contract – any contract not sealed**

* Oral is just as good as written, but written is easier to prove, used for evidentiary purposes pg 71
* If in writing, the writing is evidence of the contract: *Girouard v. Druet*, 2012 NBCA.
* A contract that is evidenced in writing will obviate many issues of proof.
* Some form of written required in – *Statute of Frauds,* sale of goods over certain amt, lands sales, ‘contract of guarantee’ – void if no written contract
* Enforceable if partly performed and action is ‘unequivocal’ and done in relation to actual contract *Maddison v Alderson (1883) 8 App Cas 467 (HL)* otherwise do not meet standard for part performance if ‘equivocal’ or ‘wholly neutral’ *Deglman v Brunet Estate [1954] SCJ No 47*

PAROL EVIDENCE RULE – the extent to which the written record is determinative

* Works in conjunction with Doctrine of Mistake
* Rule – a written contract forms the whole contract, so any oral agreements that aren’t part of written are not considered page 73
* Specifically invoked by “entire contract” clauses page 76 but cannot exclude some obligations ie. Honest performance *Hole v Hole 2016*
* Applies when party argues some agreements are oral and some are written – the person who wants to exclude the oral parts will argue parol evidence rule. (Ie misrepresentations by oral statements of sales person that are not included in written contract – difficult to show that oral is part of written K)
* If parol evidence rule applies, oral statements are not included in determining K terms
* Parol evidence cannot contradict written agreement *Bauer v Bank of Montreal, Hawrish v Bank of Montreal*
* Applied in situations like:
  + One party arguing some terms in K are written but others are oral
  + Party arguing that there were 2 Ks: 1 in writing & 1 oral (“collateral” or side K)
* In either of above instances, other party raises rule to argue oral terms can’t be accepted so as to vary what appears to be complete agreement in writing

|  |
| --- |
| * **ASK:** |
| * **IS THE CONTRACT ALL WRITTEN OR SOME ORAL?** * **DOES THE CONTRACT INCLUDE AN ENTIRE AGREEMENT CLAUSE?** * **WHAT EXTRA PIECES OR CLARITY DOES THE PAROL EVIDENCE ADD TO THE CONTRACT?**   + **ARE THEY GOING TO ALLOW ANY REBUTTABLE PRESUMPTION THAT ADDS MORE DETAIL TO THE CONTRACT? (HIGH THRESHOLD – MORE LIKELY TO GO TO PAROL EVIDENCE TO INCLUDE ORAL)** |

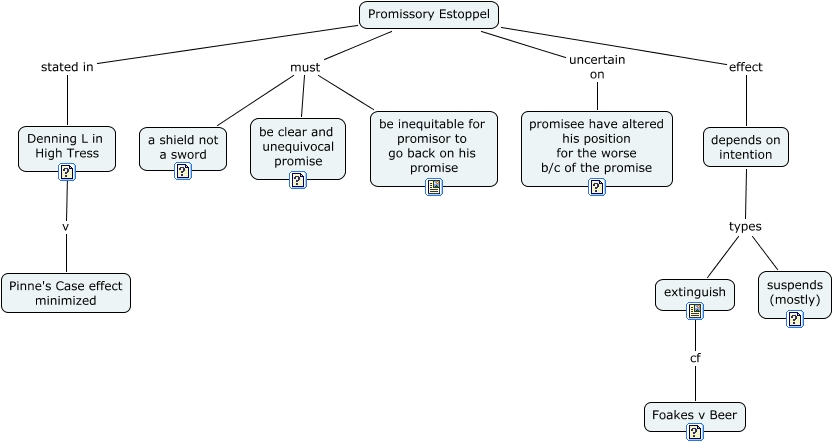
ESTOPPEL – Set of doctrines used to hold a person to their promises

* Can only be used when there is a contract– shield from person changing terms/harming
* Main way of enforcing promises = contract law 🡪 not estoppel *Combe v Combe 1951 1 AII ER 767 (CA)*
* Both parties can be held to facts they accepted as valid when entering into K page 78
* Set of doctrines in common law and equity to **hold a person to certain types** of **statements** when the justification for so holding is not because the other person gave consideration. Pg 77

Except for proprietary estoppel, estoppel is largely dependent on contract law to formulate the agreements on which and in which the estoppel works

|  |  |  |
| --- | --- | --- |
| **RELIANCE** – recipient of the statement can stop the maker from **denying the validity** of the statement if they can show they were **relying** on it and would incur **prejudice** or **detriment** if the maker were not held to the statement  *Maclaine v Gatty [1921] 1 AC 376 at 386 (HL)* | **Promisory** – express promise or assurance or statement of intention  Can be used to modify existing obligations pg 118 | Used as a defense to a claim of another (shield not sword) not a claim or action of itself *Combe v Combe 1951 1 AII ER 767 (CA)*  C**annot be used to create a new obligation, only modify or eliminate an existing one** *Gilbert Steel Ltd v University Construction Ltd [1976] OJ No 2087*  **Estopped from denying the validity of a promise/assuran**ce  If a party makes promise & other party relies on it original promisor can’t take back promise at later stage – it’s binding notwithstanding the absence of consideration (although consideration required in Canada) *Central London Property Trust Ltd v High Trees House Ltd, 194 KB 130 (KBD)* → Launched Principle of Promissory Estoppel  Requires a promise or assurance *High Trees, D&C Builders* |
| **Proprietary** – land only | Proprietary estoppel can give rise to an action *Crabb v Arun District Council [1976] ch 179*  Estopped from untrue statement about land - will not necessarily be used to fully satisfy the expectations created by the maker of the statement: *Maritime Telegraph and Telephone Co. v. Chateau Lafleur Development Corp., 2001 NSCA 167.* |
| **Representation –** create a binding factual matrix | Estopped from denying the validity of an **existing fact** –  Cannot be a promise or statement of intention ***Jorden v Money 1854 🡪 use promissory instead***  Can only relate to background facts, not obligations ***AE LePage Real Estate Sevices v Rattray Publictions Ltd [1994] OJ 2950*** |
| **AGREEMENT**  only available where there is an agreement (usually a deed or other contract) that the parties enter into. These two estoppels cannot relate directly to the obligations between the parties in that agreement but only to “background” facts. | **Deed** | From a sealed contract or deed – not common |
| **Convention**  Can be used to modify existing obligations pg 118 | Most contracts – accepted a convention that statements are true – even if they are false - for the purposes of their agreement. 1- Parties dealings must have been based on a shared assumption. Party must show **reliance** on convention and **detriment will be suffered** if other party were not held to the shared assumption / convention. ***Ryan v Moore [2005] SCJ No 38***  If parties based dealing on shared assumption, one has relied on that interpretation to its detriment, the other can not change the interpretation ***Le Soleil Hotel and Suites v Le Soleil Management [2009] BCJ 1900*** |

CONTROLLING PROMISSORY ESTOPPEL



CAN’T BE USED AS A CAUSE OF ACTION

**Shield Not Sword:** can’t use promissory estoppel as cause of action, must be part of cause of action (DEFENCE) *Gilbert Steel Ltd v University Construction Ltd [1976] OJ No 2087*

***Combe v Combe, 1951*** woman wanted promised annual payment from husband→ **estoppel only defence**, not cause of action where one didn’t exist before; can’t do away w/necessity of consideration when that’s essential part of cause of action)

**Beyond Defence? Estoppel to create incomplete contracts**   
**Waltons Stores (Interstate) Pty Ltd v Maher, 1988** [AUSTRALIA] started demo & construction before finalized K-W backs out mid-way through construction-M is fucked → promissory estoppel can directly enforce non-contractual promise on which promisee has relied to his detriment – based in **unconscionable conduct – causes detriment to other party and induces other party to adopt assumption of legal relations (assumed contract existed)**  
\*\* note not held up yet in Cdn courts, but also not rejected

EQUITABLE DOCTRINE: Court used equity as means for controlling use of promissory estoppel

**Unavailable where Inequitable *D&C Builders Ltd v Rees, 1966*** → substitute agreements [ex. accepting less for original debt] that satisfy necessary accord can be valid in equity even w/o consideration, if it would be inequitable to allow the creditor to sue for $ from original K – *in this case found it wasn’t inequitable b/c debtor forced creditor to accept shitty deal; creditor could sue to get balance owing 🡪 inequitable to ask for balance later*)

* Agreement must have been made for creditor to **voluntarily** accept lesser sum in satisfaction
* Debtor must have relied upon it
* Must be unfair / inequitable to allow creditor to claim more $

**To be used to avoid unconscionability**

***M. (N.) v A. (A.T.), 2003*** → equitable estoppel is a flexible doctrine requiring a broad approach to preclude unconscionable conduct or justice 🡪 BCCA court seemed to view ***Waltons Stores*** favourably, but found facts of case didn’t indicate promise made = **expectation of legal relationship** (see above #1&2) (*issue part of a relationship, inherent risks; failure to keep promise doesn’t = unconscionable behaviour*) See also ***Ryan v Moore [2005] SCJ No 38***

***John Burrows Ltd v Subsurface Surveys Ltd, 1968*** → In order for promise to be capable of being relied upon & having estoppel avail as defence; must be promise **intended to alter the legal relations between the 2 parties** – friendly gesture NOT binding (*allowing late payments in past didn’t estop plaintiff from discontinuing that allowance in future*)

* One party taking advantage of indulgences granted by other can’t take it as meaning waiver of rights under K in the future
* Commercial contract In John Burrows Ltd. v. Subsurface Surveys Ltd., [1968] S.C.J. No. 41, [1968] S.C.R. 607, a creditor accepted several payments late, without invoking an acceleration clause in the credit agreement, as it was entitled to do. Then, when yet another payment arrived late, the creditor sought to invoke the acceleration clause in the agreement. SCC rejected: Promissory estoppel could only be invoked if “there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced”.
* Courts tend to interpret insurance contracts in favour of the vulnerable party.

**Reliance and Detriment**

***Ryan v Moore [2005] SCJ No 38*** promissory estoppel needs to show **detrimental reliance** by the promise – the party seeking to establish the estoppel changed his or her course of conduct in acting in reliance on the assumption, and the other party abandoned the assumption detriment was suffered by the first party

**Requirements Plaintiff must prove to Establish Equitable Estoppel**: (***Waltons Stores***)

1. Plaintiff assumed or expected that particular **legal relationship exists** between plaintiff & defendant or that particular legal relationship will exist between them (in latter case defendant not free to w/draw from expected relationship);
2. **Defendant has induced plaintiff** to adopt that assumption/expectation;
3. Plaintiff acts/abstains from **acting in reliance** on assumption/expectation;
4. Defendant **knew/intended** him to do so;
5. Plaintiff’s action/inaction will occasion detriment if assumption/expectation not fulfilled;
6. **Defendant failed to act to avoid that detriment** whether by fulfilling assumption/ expectation or otherwise

WAIVER – Waive a legal right -   
Estoppel-related doctrines can operate to modify obligations in a K

* A series of waivers might be construed as a promise to continue waivers in the future. ***John Burrows Ltd v Subsurface Surveys Ltd [1968] SCJ No 41 [1968] SCR 607***
* Such a promise might be binding through promissory estoppel but tough to make the case.

|  |  |
| --- | --- |
| **ELECTION**  **Of a legal right** | * Choose between two alternatives courses of action * Can choose to affirm contract or terminate it b/c of breach * ***Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India [1990} HL***  Once election is made, other option is waived – contract is considered modified to take the other option out You don’t need consideration for waiver |
| **ABANDONMENT**  **Of a legal right** | * Party to K doesn’t have to make a choice, but decides to abandon some claim/right/power available in K anyways.   ***Saskatchewan River Bungalows v Maritime Life Assurances Co [1994] SCJ 59:***   * Only applicable where evidence demonstrates party waiving had: * Full knowledge of rights; and * Unequivocal & conscious intention to abandon them * Waiver of abandonment similar to esoppel – can be retracted |

ENFORCEABILITY ISSUES

* Enforcement requires
  + either a seal OR consideration
  + and you are named in the contract
* Freedom of contract – parties can contract whatever terms they want, courts will enforce *Prime Sight Ltd v Lavarello*
* **PRIVITY** – who can enforce the promises
* **SEAL** (SEE WRITTEN CONTRACT), **CONSIDERATION, ESTOPPEL** – which promises can be enforced

SEAL

* SEAL IN PLACE OF CONSIDERATION – FORMALILTY REQUIRED IN ORDER TO BE ENFORCED
* Seal doesn’t have to be anything particular, just needs to be **acknowledged** by promisor (party executing doc on which seal is placed): *Royal Bank of Canada v Kiska, 1967* [**guarantee K** = A (lender) lends $$ to B (debtor); C guaranteed to pay B’s debt to A if B defaults – used a seal]
* For seal to make a promise binding, must be affixed by the promisor pg 100 not promisee *Royal Bank of Canada v. Kiska, [1967] O.J. No. 1028, (Ont. CA)*
* Seal can be used in absence of a consideration, or where there is concern consideration not valid pg 100
* *Re/Max Garden City Realty v 82894 Ontario Inc 1992* black circle with SEALED in it words like “signed sealed and delivered” for witness and signature constituted seal
* *Romaine Estate v Romaine 2007* signature and seal was enough to make a sealed document

PRIVITY who can enforce promises in contract

* Only parties involved in a K (offeror & offeree) can enforce obligations or have obligations imposed on them.
* **Fairness –** would be unjust to confer obligations on a party not part of the contract
* **Joint or several liability –** more than one person on one of the sides of contract – liability split up (several) or shared (joint)
  + **Partnership** - Contract with a partnership is in essence a contract with all the partners being responsible for the partnership side of the bargain – must construe the contract to see how the obligations and benefits are to be sorted out between and among the parties.
  + **Several Liability** - two or more parties on the one side of the contract are each to pay (or each to receive) a particular amount or share
  + **Joint liability** - Two or more parties to one side of a contract and there is a single amount involved which those parties are “jointly” responsible to pay or entitled to receive.
* “The doctrine of privity is alive and well and narrow in Canada” Sarra
* *Greenwood Shopping Plaza Ltd. V Beattie [1980] 2 SCR 228* “There have been many attempts to break out of the rigid mould imposed by the concept of privity and some statutory relief has been provided in special cases but the concept remains one of general application”

**Third Parties and privity:**

* 3rd parties can enforce K if they are relying on obligations of parties *Beswick v Beswick*, 1968 (HL) → uncle & nephew have K that promise to pay aunt weekly $; after uncle dies nephew pays once & stops – aunt can’t enforce as herself, but as administrator of uncle’s estate she legally becomes uncle, who can enforce the obligations)

**Privity often linked w/ consideration →** person outside K has usually given no consideration, thus can’t enforce anything under K (***Tweddle v Atkinson (1861)*** → *2 fathers promise each other to pay T’s son in consideration for him marrying G’s daughter (other dad) – son sues G’s executor for not paying (T dead so can’t sue on son’s behalf)*

**Horizontal Privity:**

* Arises in situation where A enters into K w/ B for something that benefits not only A, but also C (usually person closely related to A) (*Beswick)*
* Sometimes can benefit C alone. If B doesn’t perform obligation in K, C can’t bring action, only A. A can only sue for damages A suffers, not C. (*Tweddle v Atkinson*)
* *Lyons (Guardian ad litern of) v Consumers Glass Co [1981] BCJ NO 2180 BCSC* – glass bottle damaged baby’s eye. Court found contract was between mother and the seller but the damage was to baby – baby not privy to contract so not able to claim in contract

**Vertical Privity:**

* Chain of events – each person in chain has K w/person above & below, no K w/ any other person higher or lower on the chain  
  **Dunlop Pneumatic Tyre Co v Selfridge & Co, 1915** → Dew has K to buy tires from Dunlop, promise not to sell for less than list price. Dew has K w/ Selfridge that contains same stipulations as K between D & D. Selfridges sells for less, Dunlop sues) – action fails b/c no K between Dunlop & Selfridge

CIRCUMVENTING PRIVITY

**Suit by a Party to the K:** have somebody who *is* a party to the K take action to obtain satisfaction for person not a party (***Beswick v Beswick*** → exception rather than rule) If party to K brings claim for damages, **usually only for losses that party personally suffered**

* Argue for family unit to be lumped together and sue as one unit, but on **policy** basis (*Jackson v Horizon Holidays*)

**Reconstructing the Arrangement as an Agency Situation:** when A enters into K w/B that would benefit C, A is acting as C’s agent & so K is in fact between B & C (C now able to bring action against B)

* Could argue that B has 2 Ks: 1 w/ A (personally); 1 w/ C (A as agent) (ie *Lyons* – K with baby and mom)
* **Must show consideration for this to work (*Dunlop Pneumatic Tyre Co v Selfridge & Co*** → Court rejects agency argument made by Dunlop, says argument would work far better if it was clear parties agreed to agency – must be clear it is 2 contracts

**Collateral K:** when A & B entered into K that somehow affects C, a collateral K was created between A & C. When it works often appears as highly artificial solution contrived by law as A & C will often not have met or negotiated → sometimes a stretch to find C gave any consideration

EXCEPTIONS TO PRIVITY

**Abolition:** many common law jurisdictions have abolished to varying extents horizontal/vertical privity through statutes – allow third parties to make claims

**Limited Exception:** modification to aspect of **horizontal privity**: ability of person not a party to a K but w/relationship to parties of the K to use a clause w/in the K meant to benefit 3rd parties as a defence against a tort claim

* **London Drugs Ltd v Kuehne & Nagel International Ltd, 1992** → if there’s defence in employer’s K that 3rd party could use in face of negligence claim, can use it;
* ***Fraser River Pile & Dredge Ltd v Can-Drive Services Ltd*** extended it to all 3rd party beneficiaries in K – 3rd party generally not allowed to be privy to others K unless there is express terms in the K to include 3rd parties – cant go back on that once you agree on it **🡪 *can dive had a right to be protected by K between Fraser and Insurer***

Can use “**principled exception**” if it’s shown that: ***Fraser River Pile & Dredge Ltd v Can-Drive Services***

* Parties to K expressly intended to confer benefit of K defence on 3rd party; and
* 3rd party be performing the activities contemplated in the K

***Homes and United Furniture*** if issue was not a defense but trying to sue one of the other parties, excepton to privity would not apply

**Ways around Privity**: Agency, Trust, Specific Performance, Employment (LD), General, Assignment (selling contract)

CONSIDERATION ALTERNATIVE TO SEAL FOR ENFORCEMENT

* Consideration = THE PRICE OF THE PROMISE - price paid at moment of K; must be something of value in eyes of the law. PROMISE TOPAY = CONSIDERATION
* Value can be benefit or detriment (can also benefit 3rd party).
* Consideration must move from promisee to promisor, not from another party *Dalhousie College v Boutilier Estate 1934*
* Consideration must be give at time of promise *Dalhousie College v Boutilier Estate 1934*
* Consideration can be implied *Thoresen Car Ferries v Weymouth Portland Borough Council*
* Motive not sufficient consideration, doesn’t matter reason why, just matters consideration was given *Thomas v Thomas, 1842*
* Can be **action** or **promise of action** (important in enforcement of bilateral Ks; obligations promised to be performed in future) pg 103
* **Adequacy** - Law doesn’t generally judge value of consideration – as long as something given consideration = sufficient  *Mountford v Scott 1975* BUT inadequate consideration could be applied under law of torts (duress, undue influence, unconscionability)
* Precondition, condition precedent, condition subsequent – all can apply but /= consideration

FORBEARANCE

When promisee offers **promise** **not to do something** (ex. bring a lawsuit) **as consideration** → not valid if promisee knows case is w/o merit

* You cant forebear on something you **have** a legal obligation to do anyways
* ***White v Bluett 1853*** can promise not to do something you **couldn’t** do anyways!
* ***Callisher v Bischoffsheim, 1870*** – *D owed $ to P-D said if P didn’t sue, he’d pay-P didn’t sue, D didn’t pay* → **forbearance = consideration** if person making promise not to sue **honestly believes lawsuit has merit**

PAST CONSIDERATION

Law reluctant to accept action that’s already occurred before promise trying to be enforced as valid consideration – must be fresh not past

* Lampleigh v Brathwait, 1615 D killed someone-P tried to get D out of jail-D subsequently promised to pay $ to P for efforts-D didn’t pay → late promise for action already done is binding if action was initiated at request of promisor.
* **Eastwood v Kenyon, 1840** P spent $ as guardian of S-S promised to pay back, gave promissory note-S marries D-D promises to pay P-D fails to pay → **past consideration is no consideration**; **not valid for creating enforceable K**
* Issue = possibility of disguising something else going on (i.e. illegal activities or duress), just says past action is consideration for current promise to avoid admitting what’s actually happening.
* Past consideration **valid** if:
  + Act done at promisor’s request
  + Parties understood act was to be remunerated either by payment or conferment of other benefit
  + Payment/conferment must have been legally enforceable had it been promised in advance

PRE-EXISTING LEGAL DUTY

**Pre-existing duty or duty to public**- performance does /= consideration if duty already existed unrelated to K pg 109

* Can’t offer previous legally binding obligations as consideration for new promise (ex. A [promisee] tries to enforce promise of B but A only giving a return promise [to do existing duty to B or C in which A is promisor] as consideration)

**Duty Owed to the Public:**

* General (duty to obey the law) or specific (public servant’s duty to perform their job)
* → don’t want to reward people for doing something state already demands them to do.

**Duty Owed to 3rd Party:**

* A promises to do X for B [A already owes X to C] → law now clear that this type of consideration is valid (**Pao On v Lau Yiu Long, 1980** → L & P swap shares-P agreed not to sell for 1 year-L agreed to buy back 60% at $2.50-P realised this sucked b/c if went over $2.50 he’d miss out-2nd agreement: P wants L to reimburse if shares drop-P said wouldn’t do deal w/o “guarantee agreement”- L agrees- shares drop, P tries to enforce guarantee-L argued not valid b/c no consideration & K procured under duress
* **Promise to perform, or performance of pre-existing contractual obligation to 3rd party = valid consideration.** B does get something of value in exchange for A’s promise → B can enforce duty in addition to whatever 3rd party [C] can already enforce it
* **DON’T CONFLATE W/ PAST CONSIDERATION** (argument also made in ***Pao On*** → find that past consideration is valid, apply ***Lampleigh*** test – separate from pre-existing legal duty argument)

**Duty Owed to Promisor:**

* promise, remade as consideration by A, is to perform A’s duty already owed to B → hard to argue “fresh” consideration.
* **Ex 1. Promise to Pay More** → B promise to pay more $ for obligation A already owes B – not valid if A doesn’t give something else as well. (***Gilbert Steel Ltd v University Construction Ltd, 1976*** *G had K w/ U to deliver steel for 3 buildings-after 2 steel mill owner increased $-G approached U, new written K created for supply of steel 1-before delivery mill owner again increased $-G&U have oral agreement for U to pay more-U accepted new deliveries of steel-G invoiced w/new prices-U refused to pay, argued insufficient consideration* → **prior duty owed to promisor not legally sufficient consideration** – variation in price = modification NOT new K)
  + Questions to ask if consideration is sufficient:

1. Is it clear (not vague)?
2. Was there mutual abandonment of first K & new K created or was simply a modification of particular term in first K?
3. Did what’s purported to be consideration include something of value (in eyes of the law)?
4. Will estoppel work? (*Gilbert Steel -* by accepting invoices, estopped from denying liability – court dismissed this argument)

* **Greater Fredericton Airport Authority Inc v Nav Canada, 2008** (GFAA told Nav to relocate equipment-Nav said better to buy new stuff-GFAA said Nav had to pay acquisition costs-Nav refused said GFAA had to-GFAA signed indicating it would pay “under protest”-Nav got the equipment-GFAA refused to pay) → modifies **Gilbert Steel** – **post-contractual modification, unsupported by consideration, may be enforceable as long as it’s established variation wasn’t procured by economic duress**
* **Ex 2. Promise to Accept Less** → **Foakes v Beer, 1884** → agreement to accept less than you’re owed not binding w/o consideration; payment of lesser sum in satisfaction of larger amount not valid consideration) – overruled by **Law and Equity Act s. 43** in BC
  + **High Trees** promise to accept less rent was enforceable while the war-time conditions existed, but that this promise ceased to be enforceable once the war-time conditions ceased.
  + **S. 43** Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.
* **Foot v Rawlings, 1963** (F owed $ to R-R old-offered new agreement-F pay less $ monthly-post-dated cheques every 6 months for following 6 months-if F did this, R promised not to sue for debt-F followed this agreement-R sued anyway for balance of debt) → **accepting terms that benefit creditor for convenience can = consideration**; in this case b/c changed the form/time of payment was considered enough.

CONTENT OF THE CONTRACT

Representations and Terms

**Mere Puff:** statement that has no legal consequences at all – by its very nature no reasonable person would rely on it

**Representation:** Usually a statement of fact (i.e. about the quality of something)—can be from the contracting party or a 3rd party → statement made BEFORE ACCEPTANCE/OUTSIDE K = representation (or misrepresentation). Mere representation not part of K pg137

**Term**: Usually has a future aspect to it—i.e. a promise—a promise that is untrue gives you an instant remedy because K is strict liability → statement made AFTER K CAME INTO EXISTENCE & INSIDE K = **obligations**.

**TEST OF INTENTION** = term was intended to be guaranteed strictly & have legal effect (***Heilbut, Symons & Co v Buckleton*)** Test whether a warranty is intended to be a term: “depends on conduct of parties, on their words and behaviour, rather than on their thoughts… if an intelligent bystander would reasonably infer that warrany was intended, that will suffice”

**Termination:** Primary Obligations End. Ends the duties of both parties from that point in time onwards

**Breach of Condition:** Repudiation of Primary Obligations. If there is condition precedent, it must occur before obligations are enforceable (can be an obligation or event), but **cannot be undecided or too discretionary** (b/c the court may say that you do not have a K to begin with)

**If K is silent, conditions are concurrent:** Ability to claim damages subject to ability to show his ability to perform

***Heilbut, Symons & Co v Buckleton, 1913*** → **Innocent representation = no right to damages. INTENTION** key to differentiating representation from a term; rep was in response to Q, nothing more. No evidence to suggest parties intended to be legally bound by statement. (*Agent of B bought shares from agent of H 2 times based on what B claims was a* ***representation*** *that H was bringing out a “rubber company”. Shares fell in value, B got pissed and sued for misrepresentation or breach of warranty that company was a rubber company whose main object was to produce rubber.)*

* If it were going to be a term, would have had to be in collateral K (“warranty”) b/c main K for shares was in writing → P would have to establish evidence that such a K existed.

**Leaf v International Galleries, 1950** → (L bought painting from IG, described in K as “painting by Constable”. Discovered 5 years later that painting actually not by C – L tries to have K rescinded.) Difference is in **quality** not **substance** of thing itself – only rescission if diff in substance.

* If warranty breached = action in damages
* If condition breached = action in repudiation & in damages BUT right to reject for breach of condition limited by rule that once buyer has accepted, or is deemed to have accepted, the goods in performance of the K, he can’t reject, must claim for damages (in this case it’s been 5 years, way too long to be considered “reasonable time”) also can’t argue innocent misrep to get rescission b/c condition would trump and govern what remedy you’re allowed.

Classification of Terms

Implied terms: *Machtinger v HOJ Industries, 1992 →* terms can be implied into K on 3 bases:

1. Custom pg 137
   1. Practice between 2 parties has developed to imply such a term into K; if there hasn’t been consistent practice in past between 2 parties then can’t establish custom
   2. Can also imply terms by virtue of type of K it is (ex. shipping Ks)
   3. Parties can prevent custom by expressly excluding its operation as a term in the K, or its exclusion can be implied from rest of K (if it contradicts/doesn’t fit w/K)
2. Necessity
   1. **Officious Bystander Test:** is it a term that it can confidently be said that if at the time K negotiated some one had said to the parties, ‘what will happen in such a case?’ they would both reply ‘of course this will happen, too clear so no need to state it explicitly)
   2. **Biz efficacy** → ***Machtinger***stands against using reasonableness as basis for implying terms
      1. Can look beyond K at circumstances in which parties are contracting & at purpose of K
3. Operation of Law
   1. Law includes implied term in that type of K (or all Ks) – can be by virtue of CL or statute
   2. CL not common; would likely be b/c of **type** of K entered; more common for statutes to imply terms (ex. *Sale of Goods Act*s) → parties may be able to contract out of statute implied terms

Note: Implied terms can be negated by parol evidence rule in cases of “entire agreement” clause

Primary and Secondary Obligations – Terms of a Contract

Primary Obligations:

* Promises which parties will perform if everything goes according to plan; if not performed = breach of K → breach triggers secondary obligation enforceable by other party
* Expressed obligations – wording in the agreement
* Implied obligations – items that are clearly put out in the law or statutes in which we are practicing (limitations act for breach of contract)

CATEGORIZING PRIMARY OBLIGATIONS – PREDICT REMEDY IF BREACHED

**All terms in a K are characterized at the time of as condition or warranty**:

1. **Condition** = more important terms - statement of fact which forms an essential term in the k
   * Breach considered fundamental breach or repudiation
   * Also considered term, precondition, quality or state of something
   * *Remedy* = damages and the innocent party can treat the k as **repudiated** = the k comes to an end, the primary obligations are terminated, but the secondary obligations remain
2. **Intermediate Term** (Innominate) – cannot tell if it is an important term goes to root of K until breach occurs – if consequences of breach are serious, result is same as condition, if not then same as warranty – results can vary if breached multiple times, might become more serious and therefore cancel K
   * Can lead to uncertainty re breach and K repudiation – some courts reluctant to use intermediate term label, so better to use condition or warranty label ***Mardelanto Compania Naviera SA v Bergbau-Handel***
   * *Remedy* = determined after the breach occurs based on the seriousness of the consequences of the breach, not the breach itself, and uses either of the remedies for condition or warranty (***Hong Kong Fir Shipping***)
3. **Warranty** = less important term - not essential to the k and is collateral to the main purpose of the k
   * Can also be called a term but should be avoided
   * *Remedy* = unless stipulated otherwise in k, does not cancel K, **only remedy is damages** (therefore must prove harm was done)

**NOTE**: These labels are put on the terms at the time the k comes into existence and CANNOT be changed.

\*\*\*Putting labels on the terms in a k is not absolute (the court makes the decision), thus it is better to specify the secondary obligations in the k to illustrate the types of terms (***Heritage Oil and Gas v Tullow Uganda [2014] EWCA Civ 1048 (CA)*). \*\*\***

***Hong Kong Fir v Kawasaki Kisen Kaisha, 1962*** → **introduced intermediate term & test to determine if something condition or intermediate term.** (P *hired ship from D. Ship not equipped w/competent engine room employees so significant time lost during voyage for repairs & damages caused by employees. P repudiated K; D sued for wrongful repudiation.*) Clause in the K that exempted D of responsibility for delay/loss/damage due to unseaworthiness unless caused by want of due diligence of owners → sufficient to show that if vessel was in some way unseaworthy doesn’t deprive P substantially of whole benefit intended by the K

* EVENT and not the fact that the event is a result of a breach of K which relieves the party not in default:
  + *Breach of Condition* = gives rise to event which relieves party not in default of further performance of primary obligations
  + *Breach Intermediate Terms* = remedies determined after the breach occurs based on seriousness of consequences, **NOT** the breach. Uses remedies for either condition or warranty.
  + *Breach of Warranty* = party can’t treat himself as discharged from K
* **Test to determine if breach leads to rescission: does the occurrence of the event deprive the party with further undertakings to perform of substantial benefits** (what was given as consideration in the K for performing the undertakings)?
* Where event occurs as result of default of 1 party, party in default can’t rely on this test as relieving him of performance of any further undertakings on his part & innocent party, although entitled to, need not treat the event as relieving him of performance of his own undertakings.
* Where event occurs as result of default of neither party, each is relieved of further performance of undertakings & rights in respect of undertakings previously performed regulated by *Frustrated Contracts Act*

Secondary Obligation: Court ordered remedies for breach of primary obligations

* Rights that you have to remedy in case of breach – can be modified by agreement but not totally excluded ***Photo Production Ltd v Securicor Transport [1980] AC 827 (HL)***

Relief of Obligations: Instead of secondary obligation, Court may relieve you of obligations

**Conditional Obligations:** provision in agreement that must be satisfied as prerequisite to enforceability of an obligation or ending of an obligation – **USE DUTY TO ACT IN GOOD FAITH DOCTRINE**

1. **Condition Precedent** = prerequisite to enforceability of an obligation
   1. **Ex.** A has no enforceable obligation under K to deliver goods to B until C provides requisite permit (provision of permit by C = condition precedent to enforceability of A’s obligation)
   2. Can trigger just particular obligation, if within an existing K ***(Wiebe v Bobsien [1984] BCJ 3209)*** or entire K
   3. Parties must make reasonable effort to facilitate fulfillment of condition precedent to secure performance of K ***Dynamic Transport v OK Detailing***
   4. If a party does not facilitate fulfillment of condition precedent the other party may get specific performance order
   5. Condition precedent can only be abandoned or waived unilaterally by the party who would benefit from it – not the other party – although this is restricted by SCC ***Turney v Zhilka***
2. **Condition Subsequent** = event that ends obligation
   1. **Ex.** A has contractual obligation to deliver gravel to B until C states enough gravel has been delivered to meet regulations. (C giving notice = condition subsequent – ends A’s obligation to B)
   2. Often ends primary obligations in K entirely
3. **Concurrent Conditions** = mutually dependent conditions precedent
   1. **Ex.** 1 party to deliver goods & other to pay for them @ same time

ENTIRE VS. SEVERABLE OBLIGATIONS

**Entire Obligations** = can’t be broken down; obligation of first party must be performed entirely (***Cutter v Powell, 1795*** → work must be completed before party has to pay)

* Presumption that obligations are immediate, concurrent & entire
* one party meets all obligations then triggers other party to meet their obligations
* don’t have to complete 100% - **substantial performance** can meet entire obligation (***Fairbanks v Sheppard***)
* A party to receive value for the partial obligations performed even if the entire obligations have not been fulfilled (***Sumpter v Hedges***)

**Severable Obligations** – can be broken down into separate obligations

* part performance of one party can trigger other party to have to perform their obligation
* at some point, all severable obligations become entire… some obligations in a K can be severable and some can be entire…

🡪 Courts are reluctant to sever contracts (Blue Pen Test = if the judge cannot draw a blue line through obligations in the k, then the k cannot be severed)

***Fairbanks v Sheppard, 1953*** → **substantial performance doctrine = obligation is completed when it’s substantially completed.** (*D contracted to build machine for P for a price. P paid small amount of account but when machine was nearly complete, D refused to finish it until he received further payment.*)

* Can also claim completion if it was the other party’s fault that you couldn’t complete obligation

***Sumpter v Hedges, 1898*** → Quantum Meruit = if the innocent party of an abandoned K takes benefit of work done, he can be liable for cost of that work. (*P contracted w/D to construct buildings for lump sum. When work was partly done, P said he couldn’t continue & abandoned K. D finished buildings himself.)*

* Abandoned K = innocent party has option to treat K as repudiated (ends K) BUT if party takes benefit of work done, then he’s creating a new K in which he’s liable for cost of work done. Must use work for ACTUAL benefit.
* Can only use quantum meruit if circumstances are such as to give D option to take or not take benefit of work done (no option when work done on land, as in this case) → look to other facts other than mere taking the benefit of work in order to ground inference of new K
  + In this case, court finds no other facts → mere fact that D is in possession of what he can’t help keeping, or even has done work upon it, affords no grounds for such an inference – not bound to keep unfinished a building which in an incomplete state = nuisance on his land

Duties Imposed by Law

* Parties agree to contractual obligations, whether expressly agreed or implied
* Some are implied by law unless parties specifically exclude them
* Some cannot be excluded by the parties as fundamental to fairness in contracts:

DUTY OF HONEST PERFORMANCE

* general organizing principle of “duty of good faith” exists in commercial contracts, and honest performance is part of that and cannot be excluded from a contract *Bhasin v Hyrnew*
* Duty of honest performance “requires parties to be honest with each other in relation to the performance of contractual obligations”, must not lie or mislead other parties
* Cannot be invoked at negotiation stage of contract *Moulon Contracting Ltd v BC [2015] BCCA 89*
* Does not impose a fiduciary duty or any other duty of loyalty, not the same as tort of deceit, not an implied term in a contract as it operates irrespective of intent of the parties *Bhasin v Hyrnew*

*Bhasin v Hyrnew* [2014] SCC 71 🡪 RESP salesman lied to by Company and competitor, contract not renewed 🡪 trial found company and competitor individual liable, CA overturned both, SCC upheld trial decision against company

🡪 general organizing principle of good faith underlies contract law

🡪 good faith considered in context of circumstances

🡪 creates a new duty under the law to act honestly in performance of contractual obligations

**Speaker Robert Yaldin – Good faith in Contracts**

* Courts not clear what breach of this “new duty” means in the courts. Misrepresentations? Must be knowingly a lie? No duty to speak? Will it lead to damages?
* Good faith requires…
  + … A highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties para 69
  + … More than honesty, may include taking reasonable steps to satisfy a condition precedent to fulfilling one’s obligations para 89

STANDARD FORM CONTRACTS AND EXEMPTION CLAUSES

Excluding and Limiting Liability

**Terms to exclude or limit liability in standard form Ks**

* Limitation more enforceable by court, less scrutiny **Ailsa Craig Fishing v Malvern Fishing Co [1983] 1 WLR 964**
* **Exclusion** clauses have attracted greater scrutiny & law has been willing to disregard some parts of the K or make them unenforceable, b/c often one party has overwhelming bargaining strength ***George Mitchell v Finney Lock Seeds [1983] QB 284***

**Techniques used to control & reduce use of exclusion clauses (b/c courts don’t like limiting liability):**

1. **Notice Requirement:**

* In order to be bound by a clause, other party must be aware of it Thornton; Tilden
* Simply signing the document does not = notice Tilden
* If notice requirement met, exclusion/limitation is part of K

1. **Doctrine of Fundamental Breach:**

* Does clause apply? **Does a statute or common law principle prohibit it?**
* If there’s fundamental breach then exclusion/limitation can’t apply (**Karsales**)
* Doctrine no longer exists (**Tercon**; **Photo Production**)

1. **Doctrine of Unconscionability (Morrison)**

* Is there are power difference between the parties?
* Is the term unreasonably in favour of the stronger party?
* If there’s inequality in bargaining power at time of acceptance, limitation/exclusion clause doesn’t apply
* Developed in response to Canada’s lack of legislation on doctrine of FB

1. **Public Policy (Tercon)**

* Perhaps another form of illegality – usually refers to time of formation of K (ex. charging 90% interest)
* (usually covered by statute, would have to prove it violates a fundamental principle of society)

1. **Will court grant an injunction to prevent a breach that would trigger operation of exemption clause?**

NOTICE

* Whether there was **notice** by **both parties** (effectively the weaker party) as to existence of these clauses. If only in fine print may not be part of K as one party has no notice of terms.
* In order to be bound by a clause, there needs to be an awareness of the clause – do not need to know exactly what it says, just know that it is there **(*Thornton v Shoe Land; Tilden v Clendenning*)**
* Simply signing the document does not constitute notice—In B.C. generally if you sign, the notice requirement has been met **(L’Estrange)**
* If notice requirement is met, then the exclusion/limitation clause is part of the k

What constitutes sufficient notice?

* Sufficient conditions – other party does not know there are conditions – no notice. Party knows there are conditions, can read them, whether or not he reads them he is bound ***Parker v South Eastern Railway (1877)***
* If particularly onerous or unusual condition, the party seeking to enforce must show that it was brought to the attention of the other party I***nterfoto Picture Library v Stiletto Visual Programmes [1989] QB 433***
* Notice must come **at or before time of agreement**; if details provided later, can’t be included as contractually binding
  + ***Thornton v Shoe Lane Parking Ltd, 1971*** – P parked in D’s parking lot, involved in accident, had ticket w/ exclusion clause on back, D argued should be exempt from liability) → limitation of liability clause only binding if customer had **reasonable notice** of clause **before** entering into agreement
  + ***OIley v Marlborough Court [1949] 1 KB 532 CA*** – sign in hotel room excluding liability came after hotel room already paid for so not reasonable notice, not included in K

Signature as Notice

* when a doc containing contractual terms is signed, then, in absence of fraud or misrepresentation, party signing it is bound – doesn’t matter whether he read the doc or not ***L’Estrange v Graucob, 1934***
* *Non est factum* – mistake doctrine – if misrepresented or fraudulently obtained signature it it inapplicable and ENTIRE K cannot be enforced ***Curtis v Chemical Cleaning and Dyeing Co [1951] 1 KB 805 CA***
* Signature alone may be enough if limitation terms are obvious, easy to see, clear unambiguous language **Fraser Jewellers (1982) LTd v Dominion Electric Protection [1997] OJ 2359**

**Tilden Rent-a-Car v Clendenning, 1978** 🡪 **LIMITING SIGNATURE DOCTRINE**

(D rented car from P, signed agreement w/o reading which was obvious to clerk helping, thought he had full insurance coverage, got in accident, tried to recover from insurance but P argues exempt due to agreement signed)→ questioned **L’Estrange** rule

* Signature alone does not represent acquiescence in the case of unusual and onerous terms which are inconsistent with the true object of the K
* Unless **reasonable measures** are taken to draw a party’s attention to **unusual terms** in a standard form document, terms are not enforceable, notwithstanding the signature
* Exclusion clause was **inconsistent w/overall purpose** of the K (insurance) so something more than a signature was required to constitute sufficient notice
* Party who seeks to enforce K knows or **ought to know of other party’s mistake** → *Karroll* limits this – says requirement to draw attention only applicable in certain circumstances

**Karroll v Silver Star Mountain Resorts Ltd, 1988**

(P signed doc releasing D from liability for injuries in ski race. P claims wasn’t given adequate notice, only would have taken 1-2min to read, doesn’t recall if had opp. to read)

* **Held**: only must draw attention to terms if a reasonable person would know that the signing party was not consenting to the terms in Q or didn’t understand them
* **2 exceptions to *L’Estrange* rule:**
  1. **Non est factum – mistake doctrine**
  2. **Inducement to agree by fraud or misrepresentation**
* Requirement to draw attention to terms only applies
  1. where party seeking to enforce to the document knew or had reason to know of the other’s mistake as to its terms (because there is lack of consent)
  2. where someone signs a document where one has reason to believe he is mistaken as to its contents (Fraud or Misrepresentation)
  3. Non est factum (not my signature)
* **General rule:** Must only draw attention if a reasonable person would know that the party was not consenting to the terms in question, because this is basically equivalent to misrepresentation by omission
* **Factors**: if clause runs contrary to party’s normal expectations, length and format of k, time available to read k.

Notice Requirement – Unsigned Documents

**Construction**: courts tend to construe exclusion & limitation clauses **strictly against party who wishes to rely on them** → if there’s ambiguity, clause will be interpreted against person relying on it

**Constructive Signature**

* Can be used to satisfy ***L’Estrange doctrine*** – although will fail in other cases.
* A statement can be imported into a K if previous dealings show that a party knew or agreed to the term in previous dealings (***McCutcheon v David MacBrayne, 1964***)
* Past practice – signatures in the past to a term – can be sufficient notice even if not obtained at the time in question → must show that by virtue of earlier transactions there **must have been knowledge** of particular provisions ***McCutcheon v David MacBrayne Ltd [1964] 1 WLR 125 HL***
* CONSTRUED Particularly relevant in Standard Forms. If Onerous term, it is to be construed narrowly

Doctrine of Fundamental Breach:

* **Fundamental Breach** = one that substantially deprives the other party of the whole benefit of K ***Karsales***
* Exclusion clause can’t be used in context of a breach of an important term or a breach w/serious consequences
* May force one party to accept a result from the K that was totally different from that contemplated when K was entered 🡪 unacceptable
* SCC decision that it may still have meaning as a doctrine ***Hunter Engineering***

**Doctrine criticized for:**

* Available for use even in Ks w/clauses that were carefully drafted by both parties
* Not directly linked to unfairness – theoretically could operate when there isn’t any
* Based on control of secondary obligations; sometimes an exclusion clause can have nothing to do w/a breach

**Karsales v Wallis, 1956** ENGLAND (NO LONGER USED IN CANADA)

Doctrine of FB is by virtue of the law, does not depend on actual intention of the parties

**Facts**: D inspected car. P then bought car and leased it to D for financing. Upon receiving the car, it was not in the same condition as when D inspected it. D told P he would not accept the car.

* Doctrine of Fundamental Breach: A BREACH WHICH GOES TO THE VERY ROOT OF THE K DISENTITLES THE PARTY FROM RELYING ON THE EXEMPTING CLAUSE

PROBLEM: REMOVES FREEDOM OF K AND APPLIED TO PARTIES THAT DID’NT NEED IT

Abolition/Reform of Doctrine of Fundamental Breach

***Photo Production v Securicor, 1980*** ENGLAND

→ OVERRULES ***KARSALES***: doctrine of FB no longer exists, but fundamental breaches do → simply a matter of **whether parties** **intended exclusion clause to apply**

**Facts**: D in k with P to patrol P’s business. D’s employee purposely set fire to P’s business. D has limitation clause.

1. Doctrine of Fundamental Breach no longer exists.
2. Words are strict but ultimately clear, P is sophisticated party
3. Courts can’t reject clause when meaning is clear
4. IF **EXCLUSION CLAUSE** IS CLEAR AND UNAMBIGUOUS, IT WILL PROTECT THE PARTY RELYING ON IT FROM LIABILITY: IT IS SIMPLY A MATTER OF WHETHER THE PARTIES INTENDED FOR THE EXCLUSION CLAUSE TO APPLY.

***Hunter Engineering Co v Syncrude Canada Ltd, 1989 SCC*** → whether breach fundamental or not, applicability of exclusion/limitation clause depended on **construction of K**

“Should only be used in exceptional circumstances, when

* Wilson J: Left open possibility that FB could affect operation of clause in limited situations (didn’t adopt ***Photo Production*** outright b/c no comparable legislation to *Unfair Contract Terms Act*) Wilson J. accepted the abolition of the doctrine of fundamental breach, at least as Lord Denning had formulated it, but did not think Photo Production should be adopted in its entirety, because of the absence of a general statute regulating exclusion clauses as exists in England. “It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.” Wilson equated the doctrine of unconscionability with inequality of the contract
* Dickson J: preferred test based simply on unconscionability & elimination of FB (adopt ***Photo Production***) If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded.

**Tercon Contractors v BC (Transportation), 2010** \* Exclusion clause policy

**No Doctrine of FB in Canada. Exclusion clauses must be interpreted in light of the whole K (Overrules Karsales in Canada)**

* **Facts**: Province enters tendering k with 6 companies specifying that only those companies are eligible. One of the 6 companies combines with an ineligible company and enters a co-bid. P and the co-bid are the 2 finalists but P loses. P sues, saying they would have won if rules in k had been followed. Exclusion clause in k specifies no damages “as a result of participating” in the tendering process.
* **Trial**: Tercon brought successful claim against Province, Province was aware of beach by awarding work to inelgibile contractor. Breach was fundamental and not fair to enforce exclusion clause in light of the breach.
* **CA** - The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.
* **SCC** - restored trial verdict
* Must consider exclusion clauses in light of purpose & commercial context + overall terms
* **Clear language** necessary to exclude liability for breach of basic requirement of a K → tendering has implied duty of **fairness** – language would need to be clear about excluding liability
* If exclusion clause applies, then determine whether it was unconscionable and thus invalid at the time the contract was made.
* If the exclusion clause is valid at time of contract formation, should determine whether the exclusion clause can be refused based on an overriding public policy.
* TEST FOR **EXCLUSION CLAUSES**:
* DO THEY APPLY TO THE CIRCUMSTANCES AT HAND?
  + IF SO, WAS IT UNCONSCIONABLE AT THE TIME THE K WAS MADE?
  + IF NOT, SHOULD THE COURT NONETHELESS REFUSE ENFORCEMENT ON GROUNDS OF PUBLIC POLICY? (RELATES TO THE FORMATION NOT SUBSEQUENT EVENTS BUT DEBATEABLE.)

Doctrine of Unconscionability

* If there is inequality in the bargaining power **at the time of acceptance**, then the limitation/exclusion clause does not apply
* Developed in response to Canada’s lack of legislation on doctrine of fundamental breach.
* While the Supreme Court decisions on this matter accept unconscionability as a controlling factor on exclusion and limitation clauses, they do not define what that means beyond saying that it has to do with formation (“inequality of bargaining power”), not breach.

CONTESTING THE CONTRACT

* K can be contested even if no breach of K.
* Contested / excused from not performing contractual obligations.
* If not successfully contested, and that party fails to perform, they will be in breach🡪 other party can then seek remedy for breach.
* Contract can be contested for:
* Capacity
* Misrepresentation
* Mistake
* Protection of weaker parties: duress, undue influence, unconscionability
* Illegality
* Frustration
* Limitation of actions

If successfully contested, court will find the K unforceable either by:

* True unenforcability
* Void contract
* Voidable contract
* Discharge by frustration

DISCHARGE OF CONTRACT

* Once the contract has been formed and the nature of the terms and duties in the contract is known, then the parties with obligations in the contract are bound to perform their obligations in that contract.
* A party’s failure to perform an obligation without an “excuse” constitutes a breach of contract and the remedies will then apply to require the party in breach to perform a possibly different obligation or set of obligations.

Possible, however, that the contract might be “discharged” without all (or any) of the primary obligations having been performed. What “discharge” means depends on the reason for the discharge. In ***Jedfro Investments (U.S.A.) Ltd. v. Jacyk, [2007] S.C.J. No. 55,*** question arose of whether the obligations in a joint venture agreement ended because parties to the agreement had both been ignoring terms of the agreement. If so, this would have meant that there could be no action for breach of the agreement. The SCC disagreed that a contract could be discharged in such a way. McLachlinC.J: “ways in which a contract can be discharged well established. It may be discharged by performance, by agreement, by frustration and by repudiatory or fundamental breach.” Not all these methods “discharge” the contract in the same way.

**Discharge by performance** exhausts the primary obligations, leaving the secondary obligations unnecessary.

**Discharge by agreement** requires a new contract containing promises to terminate or eliminate the old contract. McLachlin stressed that there must be offer, acceptance and consideration for promises in new agreement in order for old one to be discharged. Such agreement could not happen by inaction.

**Discharge by repudiatory or fundamental breach** ends the primary obligations (and not the secondary obligations) but usually only if the other party accepts the breach and terminates the contract [Chapter 22 “Termination for Breach”].

**Discharge by frustration** [Chapter 19], something that makes it impossible to complete the K, ends both primary and secondary obligations from the moment of the occurrence of the frustrating event.

The SCC did not consider the possibility that a contract could be discharged by estoppel. There is English authority that contemplates abandonment of a contract through estoppel.

In Allied Marine Transport Ltd. v. Vale de Rio Doce Nevegacao SA Robert Goff L.J. thought such abandonment could operate where one party represented to the other that the contract was abandoned and the other party relied on that representation to his or her detriment. Such an abandonment, if possible, results from the ordinary application of estoppel principles

TERMINATION FOR BREACH

**Termination** = remedy that depends on there being a **breach** **of a term in a K that is a condition** or intermediate term (where consequences of breach are serious)

**Rescission vs. Repudiation:**

* **Rescission** = remedy available to representee *inter alia* when other party has made false or misleading representation
* **Repudiation** = occurs by words/conduct evincing an intention not to be bound by the K; depends on **election made by non-repudiating party**
  + If non-repudiating party treats K as still being in full force & effect, K remains in being for future on both sides – each party can sue for past or future breaches
  + If non-repudiating party accepts repudiation, K is **terminated** & parties discharged from future obligations
* Simply informing non-repudiating party by **words or actions** = sufficient to exercise termination
* **Constructive termination of K** = acceptance of repudiation & termination of K can possibly be effected by failing to perform one’s own obligations as they become due
* **Primary obligations cease** to be enforceable from moment of termination, but secondary obligations survive → allows for combo of termination + damages (if K were rescinded, no possibility for damages)

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|  | **Rescission** | **Termination** |
| **Remedy for:** | Misrepresentation | Breach of condition = repudiation (which triggers option for termination) |
| **Type of remedy:** | *Equitable* – therefore no right to the remedy | *Common Law* – therefore there is a right to the remedy |
| **Action:** | Ends the k, restores situation to conditions before the k (no primary or secondary obligations) | Ends the k – the innocent party has the right to terminate the primary obligations from that point forward; secondary obligations survive |
| **Comments:** | No possibility for damages b/c nothing left in K w/which to make a damage claim | This remedy is easily lost if it is not acted on right away (in some cases it is lost as soon as the k is entered into) – therefore would only be able to claim damages. |

\*\*Bar to rescission when argument for termination is rejected (*Leaf v International Galleries*)\*\*

**Losing the Remedy:** termination is tenuous, can be fairly easily lost

* If buyer has accepted part of the good, or if property has passed in specific goods, K can’t be terminated
* Can also lose by election to affirm K – can be done expressly or constructively
* Electing to affirm K not the same as estoppel → not necessary for other party to have changed their conduct as a result of reliance on affirmation
* Can also lose through passage of time = **constructive affirmation**

Termination for Anticipatory Breach

K can be breached in “**anticipatory**” way – party who is supposed to perform **can inform other party they’re not going to perform when time comes,** or it becomes **clear in advance that it will be impossible** for one party to perform as promised & there’s no “excuse” (ex. frustration) to relieve that party from liability

* Innocent party can accept breach & proceed to remedies immediately, or can affirm (not accept early breach & proceed to remedies only when other party still fails to perform at time when K calls for performance)
  + Must be clear evidence that anticipatory breach has been accepted before K terminated
    - Subsequent acts of innocent party (failing to perform contractual obligations) can be taken as evidence of acceptance of repudiation

REASONS FOR UNENFORCEABLE CONTRACT

CAPACITY

**Capacity – contract unenforceable if one or both parties do not have the metal capacity to understand what a contract is at the moment when it is formed.**

MENTAL COMPETENCE

|  |  |  |
| --- | --- | --- |
| **Mental Incapacity** |  | |
| State of mental incapacity does not have to be permanent - lucid period K would be enforceable, not lucid K not enforceable | MacDonald v Fraser | |
| Evidence of a physician does not necessarily carry more weight than that of a lay man | Sawatsky v Sawatsky | |
| **Knowledge of Mental Incapacity of Other Party** |  |
| Not voidable if - other party didn’t know someone was incompetent, no advantage is taken, no reason to suppose the other party is incompetent, the contract is enforceable | Hardman v Falk |
| Contract obtained under fraudulent advantage of purchaser’s incapacity would be unenforceable | Wilson v. Canada |
| Only voided when there is taking advantage, unfairness alone not enough to make voidable | Hart v O’Connor, Hardman |
| There ought to be no interference where there was no victimization, no taking advantage of the other’s weakness. | Hart v. O’Connor |
| **Intoxication** |  |
| K entered into by intoxicated person is voidable, not void – must have evidence they were so drunk they didn’t know what they were doing | Bawlf Grain Co v Ross |
| Person who is habitually drunk might not be so intoxicated at time to make K voidable | Murray v Smith Estate |
| If drunk at time, voidable but can be ratified or repudiated when the person becomes sober – if not done repudiated in reasonable time considered to be ratified | Bawlf Grain Co v Ross |
|  |  |

CHILDREN (INFANT STATUS)

* It is questionable whether the law should take the view that mental incapacity ought to affect the enforceability of a contract only when the incapacity is evident. **This is not the case with incapacity because of age (being an infant).**
* A somewhat complex set of rules has developed at common law to govern the capacity of minors, usually called “infants” for these purposes. British Columbia, has streamlined matters somewhat by providing a statutory set of rules as to when infants’ contracts are enforceable. **Infants Act, R.S.B.C. 1996, c. 223, Part 3**. **The statute makes contracts made by infants unenforceable by the other party, unless, among other things, the infant affirms the contract or does not repudiate it within a year of attaining the age of majority**. The other party can apply to court in some circumstances to vary this standard effect.

**Minor must pay reasonable price for goods** 🡪 e.g. **Sale of Goods Act, R.S.A. 2000, c. S-2, s. 4(2)**.

**Goods must be suitable to the needs of the infant, even if not specifically right**

**🡪** **Nash v. Inman, [1908] 2 K.B. 1 (C.A.),** an action was brought by a tailor for an amount due for clothes supplied to the defendant while he was an undergraduate at Cambridge University. The defendant was an infant at the time of the sale and delivery of the goods. The items supplied were 11 fancy waistcoats. Cozens-Hardy M.R. said that a plaintiff must not only show that “the goods were suitable to the condition in life of the infant”, but that “they were suitable to his actual requirements at the time of the sale and delivery”. The court accepted that the defendant in that case was actually well supplied with clothes when he went up to Cambridge and that these clothes could not be described as “necessaries” for this purchaser.

🡪 The **Ontario Sale of Goods Ac**t says that “necessaries” “means goods suitable to the conditions in life of the minor … and to his or her actual requirements at the time of the sale and delivery”. British Columbia has a similar definition in **Sale of Goods Act, R.S.B.C. 1996, c. 410, s. 7(1),** but not directed to infants’ contracts. It is for the plaintiff vendor to establish that the goods are “necessary” for that defendant; depends very much on the circumstances.

**Necessaries do not need to be goods**. 🡪 **Soon v. Watson**, a contract entered into by an infant to have a house built was held not to be an unfair bargain as the infant couple had married and started a family. The house was “necessary”.

**Employment or Service Contract for the Infant’s Benefit**

* An employment or service contract is binding on an infant if it can be said to be “beneficial” for the child.
* **The onus is on the other party to establish that it is beneficial to the infant 🡪 *Fry L.J. in De Francesco v. Barnum (1890), 45 Ch. D. 430 at 439 (Ch. D.)*:** “The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial.”
* **Contract that permits infant to earn livelihood may be binding on infant** 🡪 **Toronto Marlboro Major Junior “A” Hockey Club v. Tonelli, [1977] 18 O.R. (2d) 21 (Ont. H.C.J.), affd [1979] 23 O.R. (2d) 193 (Ont. C.A.)**, an infant, aged 17, entered into a three to four-year contract with an amateur hockey club. On turning 18, however, he purported to repudiate it to enter into a contract with a professional hockey club. Lerner J. said at 27 (18 O.R.) that: “**Contracts for services which permit an infant to earn his livelihood or to be trained for some trade or profession may be binding upon such infant regardless of whether the contract is executory or executed.** … if, on the construction of the whole contract, they are, in the opinion of the Court, beneficial to the infant.”
* **Some employment or service contracts are difficult to characterize as beneficial or not 🡪** ***Chaplin v. Leslie Frewin (Publishers) Ltd., [1966] Ch. 71 (C.A.)****,* it was held that the beneficial financial gains to an infant who sold his unsavoury memoirs to a publisher outweighed the discredit those revelations brought him, and so he was held to his publishing contract.

**Ratification**

* **A voidable contract entered into by an infant can be ratified when the child reaches the age of majority. If that is done, the contract becomes completely enforceable.**
* **If the contract was for the supply of something during the infancy of one party, the infant does not need to repudiate the contract on attaining adulthood in order to avoid a “deemed” ratification**. If, however, the contract is an ongoing type agreement (such as a rental contract or a partnership contract) that was entered into when the person was a child, the person needs to repudiate the contract in a reasonable time after coming into the age of majority, or the contract will be held to be binding: **Foley v. Canada Permanent Loan and Savings Co., [1883] 4 O.R. 38 (Ont. H.C.J.); Pantazopoulos v. Saskatchewan (Human Rights Commission), [1998] 5 C.B.R. (4th) 261 (Sask. Q.B.).**
* If an ongoing contract is repudiated or other contracts are not ratified on reaching the age of majority, then if there has been payment made or other consideration given by the child while minor, that payment or consideration cannot be recovered unless there is a total failure of consideration, the infant has received nothing at all from the other party to the contract: Ex parte Taylor (1856), 8 De G.M. & G. 254, 44 E.R. 388.
* In Steinberg v. Scala (Leeds) Ltd., [1923] 2 Ch. 452 (C.A.), the plaintiff, while an infant, bought shares in a company and paid the amounts due on allotment. Eighteen months later, she repudiated the contract and sought to recover the moneys paid. Lord Sterndale M.R. said the **issue of recovery depended on whether there had been a total failure of consideration for which the money was paid**. There was not, as she had received valuable shares as a result of the deal.

INTOXICATION

* A person can lack capacity from intoxication due to drunkenness or effect of drugs.
* In ***Bawlf Grain Co. v. Ross, [1917] 55 S.C.R. 232***, it was confirmed that a contract entered into by an intoxicated person is **voidable** and not **void**. As with other mental incapacity, this situation can affect a contract where the other person is or ought to be aware that drunkenness or the effect of drugs makes one party unable to understand what is being entered into. Must be evidence that the person “was so drunk that he did not know what he was doing”, assessed on a contract-by-contract basis. A person who is habitually drunk might not be so intoxicated at moment of entering a particular contract so as to make that contract voidable: **Murray v. Smith Estate, [1980] 32 Nfld. & P.E.I.R. 191 (PEI SC).**
* **A contract voidable because one party was intoxicated can be ratified or repudiated when the person becomes sober, but if it is not repudiated within a reasonable time it will be deemed to have been ratified.** 
  + In ***Bawlf Grain*** case, man was held to have lost ability to repudiate the contract he had entered into while intoxicated, given that he had left it unrepudiated for a month afterwards.

ARTIFICIAL PERSON ISSUES — CORPORATIONS

* “artificial” persons, such as governments and societies, whose capacity might affect the existence or enforceability of a contract.
* Historically, corporations statutes, made the corporation liable only for certain types of contracts, within the corporate purposes; and contracts outside purposes of the company were said to be ultra vires and void: ***Ashbury Railway Carriage (1875), L.R. 7 H.L. 653 (H.L.),*** though there were exceptions developed to protect third parties who acted in good faith.
* **Presumption now under corporations law is generally that a contract with a corporation is valid even if the corporation is not supposed to be entering into such a contract pursuant to the corporation’s own constitutional documents**
* A quite different problem relating to corporations, however, is what are “pre-incorporation contracts”.
* Here, a party is led to believe that the other negotiating party has authority to negotiate a contract for a corporation that is in existence; and a contract is concluded with the “corporation”. In fact, there is no such corporation in existence. In these situations, the usual common law response was to say that the contract never in fact came into existence. Today, however, some — not all — corporations statutes say that the contract is indeed in existence in such circumstances, but with the other negotiating party personally. Whatever the initial situation, Canadian corporations statutes all allow the corporation — once it does come into existence — to opt to ratify or adopt the contract.

Offer

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| Invitation to Treat | Communications that result in multiple Ks can be valid, look at the context  Advertising is usually invitation to treat, unless language is so clear that an ordinary person could construe it as an offer  K accepted when acceptor starts performing  Bound to extravagant promises you made in offer  Display of goods = invitation to treat  Customer makes offer by bringing item to counter, **acceptance** of payment triggers K | Carlill v Carbolic Smoke Ball Co, (1893) 1 Q.B. 256 (C.A.)  Pharmaceutical Society of Great Britain v Boots Cash Chemists, [1953] 1 AII ER 482 (CA) |
| Intention Key to whether offer exists  Objective Test of Intention | Mere price quotation is invitation to treat, statement of price willing to sell = offer  - Need to look at language and actions (objectively)  - Look at conduct of the person, what they intended, subjectively | Canadian Dryers Association Ltd. v. Burton, [1920] O.J. No. 138, 47 O.L.R. 259 |
| Invitation to Treat vs offer | Words “may be prepared to sell” = invitation to treat | Gibson v Manchester City Council [1979] 1 WLR 294 HL |
| Knowledge of offer | Knowledge of offer and intent to accept is required | R v Clarke 1927 |
| Contract A/Contract B | Contract A – offer put in by tenderer - accepting terms and procedures of invitation to treat (tender) when submitting proposal  Contract B – actual work contract if Contract A is accepted | MJB Enterprises Ltd v Defense Construction (1951) Ltd [1999] SCJ No 17 |

Termination of Offer

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| Revocation | Revocation must be communicated.  Offer can be revoked anytime.  Can accept offer if don’t know it has been revoked – acceptance makes offer irrevocable. | Byrne. & Co. v. Leon Van Tienhoven & Co. (1880), 5 C.P.D. 344 (C.P.D.). |
| Can’t accept offer after revoked  Not bound to keep offer open unless consideration | In this case, it had been sold to another person - no explicit revocation required  Offeror not bound to keep promise if there is no consideration for that promise | Dickinson v Dodds, (1876) 2 Ch. D. 463 (C.A.) |
| Can’t revoke if aware other party started tasks | Offer cannot be revoked once offeree doing tasks to accept & offeror knows– forms binding K | Errington v Errington, (1952) 1 A11 E.R. 149 (C.A.) |
| Can revoke unilateral prior to completion | Offer can be revoked prior to completion in unilateral K | Carlill |
| Rejection | Can reject offer through counter-offer | Hyde v Wrench, 1840 |
| Resurrection of Offer  Acceptance of revived offer binding | Original offer can be resurrected by original offeror  Rejection of counter offer may constitute renewal of original offer if statement can be construed as resurrecting “cannot reduce price” 🡪 **binding if accepted** | Livingstone v Evans, [1925] A.J. No. 67, [1925] 4 D.L.R. 769 (Alta. S.C.) |
| Inquiry is not rejection | A mere inquiry or clarification does not kill the offer or force acceptance | Stevenson, Jacks, and Company v Mclean (1880), 5 Q.B.D. 346 |
| Lapse of Time | Offers not open for eternity, if no time is specified it lapses after “reasonable time”  Something must have happened to make the acceptance ‘too late,’ time does not expire arbitrarily | Barrick v. Clark, 1950 |

Acceptance: when it occurs, the K comes into existence

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| **FORM of acceptance**  Saying “Yes” | Acceptance is only effective if made according to the prescribed procedure (set out by offeror)  Anything other than what is specified to say yes is a counter-offer  Can accept by conduct  K in effect once offeree does stipulated act, whether offeror knows or not unless notice of acceptance by action is required | Eliason v Henshaw 17 US (4 Wheat) 225 (1819)  *Canadian Dryers*  *Carlill* |
| Offeror must make it possible to accept offer  Close approximation of action good enough | Offeror must make it possible for the offer to be accepted (can’t run and hide for the period specified)  If acceptance is shown by performing an action, an action that closely approximates it may suffice if prevented from doing exactly what is required | Carmichael v. Bank of Montreal, [1972] M.J. No. 71, (Man. Q.B.) |
| **Acceptance by CONDUCT** | Parties act as if contract had been renewed but there was no verbal or written agreement  This case was renewal of an existing contract  Conduct can = acceptance  Where both parties behave as though the contract existed, there might be a K | *Saint John Tug Boat Co. v. Irving Refinery Ltd*., [1964] S.C.R. 614 (S.C.C.)  Candian Dyers  *Brogden v. Metropolitan Railway Co*. (1877), 2 App. Cas. 666 (H.L.) |
| **Rules of Acceptance**  Motive for Accepting Irrelevant | If offeree fulfills the duty of the offer, even if they did so for some other reason, there CAN be a contract | *Williams v Carwadine*, 1835, 5 C. & P. 566, 172 E.R. |
| Can’t accept if unaware | Can’t accept offer if they are unaware of the offer | *R v Clarke,* 1927 |
| Can add subject to YES if both parties approve | If saying anything beyond acceptance, or modifying in any way, then it’s a counter-offer. BUT in some case additions to the YES “subject to approval of” is ok as acceptance IF both parties approve. | *Canada Square Corp v Versafood Services Ltd [1981] OJ No 3125, 130 DLR (3d) 205 (Ont CA)* |
| Electronic and Internet Contracts | Use of a website where use involves going deeper into the site, rather than just the home page = acceptance of contract containing terms so long as there is notice of terms   * -Shrink-Wrap Agreements * -Click-Wrap Agreements * -Browse-Wrap Agreements (where terms are just listed at bottom of page) | *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 (B.C.S.C.). |
| Acceptance determines where K comes into being | If not explicit term in the contract then contract is made when and where contract was accepted | *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft mbH,* [1982] 1 All E.R. 293 (H.L.) |
|  | Can be expressly stated | Sarabia v “Oceanic Mindoro”, [1996] B.C.J. No. 2154, 4 C.P.C. (4th) 11 (B.C.C.A.) |
| **Communication of Acceptance** | Acceptance must be communicated  Offer accepted as long as communicated, even if offeror doesn’t receive message – unless offeror states otherwise | Schiller v Fisher [1981] SCJ 51  Renault UK Ltd v Fleetpro Technical Services [2007] EWHC 2541 (QB) |
| **Acceptance CANNOT be assumed**  **Silence = rejection** | If there is no notification, or implied acceptance through action, action can’t assume despite intention (you can’t impose obligations on unwilling party)  Silence is interpreted as rejection | Felthouse v. Bindley (1862), 142 E.R. 1037 (Ex. Ch.) |
| Postal Acceptance Rule | Communication of acceptance occurs at the moment the letter is put into the hands of the post office worker - not when it is received | *Household Fire & Carriage Accident v Grant* (1879), 4 Ex. D. 216 (C.A.) |
| Exceptions to Postal Acceptance Rule | 1) where expres terms require that the acceptance must reach offeror  2) if it would result in an absurdity or manifest inconvenience | *Holwell Securities Ltd. v. Hughes*, [1974] 1 All E.R. 161 at 166 (C.A.) |

Certainty of Terms

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| **Consensus**  *Bolsters acceptance, shows intention to create legal relations* | Objective assessment of formation of K - “would a reasonable person observing what has been said and done and knowing how the parties are situated conclude that the parties have reached an agreement” | Smith v Hughes (1871) LR 6 QB 597 |
| 3Ps: Price, Product, Parties | K must have these, no matter how much parties want a contract despite their absence | *Logikor Inc. v. Bessey Tools Inc* [2013] O.J. No. 3607 (Ont. S.C.J.) |
| **Absence of Terms**  Agreement to Agree is not a contract | There was no price established, it would be negotiated, no certainty of terms even though parties wanted it  If crucial term is missing, no K | *May and Butcher Ltd. v. R*., [1934] 2 K.B. 17 (C.A.) |
| Can have an agreement to agree if it is done with certainty | Agreement to agree not full K but has meaning  Obligation to negotiate in good faith, not withhold agreement unreasonably  If there is certainty in a contract about the renewal, and the requirement for the renewal (in this case market rate) is specified than an agreement to agree | Empress Towers Ltd. v. Bank of Nova Scotia, [1990] B.C.J. No. 2054,(B.C.C.A.)  Mannpar Enterprises v Canada |
| Agreement to Negotiate not K | Agreement to negotiate lacks certainty of terms, does not form K | *Walford v Miles 1992* |
| **Ambiguous Terms**  Fail for Uncertain Terms | Interpretation of K through purposive lens, best efforts to understand intention and find meaning in K  Courts try to save K from failure when obvious both parties intended to enter K “words should be interpreted so as to make the thing effective rather than perish” | *Canada v CAE Industries Ltd 1985*  *Hillas and Co v Arcos Ltd 1932* |
| If terms can be implied: its binding K | In business Ks strong presumption that courts will fill in the details especially if both parties believed and acted as if they had a K | *Foley v Classique Coaches Ltd.,* [1934] 2 K.B. 1 (C.A.) |
| If court CAN make it a K, then its a K | Courts won’t create a K where there isn’t one, but will try to preserve one if both parties intended it to exist  Agreement to negotiate, when negotiations are fruitless could result in court assuming K in place | Hillas and Co. v. Arcos (1932), 147 L.T. 503 (H.L.) |
| **Objective test to understand meaning and intention**  NOT SUBJ TEST | (a) intention found in:  (i) natural and ordinary meaning of words,  (ii) overall purpose of the document,  (iii) any other provisions of the document  (iv) facts known or assumed by the parties at the time that the document was executed, and  (v) common sense,  but (b) ignoring subjective evidence of any party’s intentions. | Marley v. Rawlings, [2014] UKSC 2 |
| Crude language can still make a K if between business parties | “While business people may use ‘crude and summary’ language, they can still establish clear and enforceable contracts, where machinery is in place to provide a method to calculate specifics …” | Klemke Mining Corp. v. Shell Canada Ltd, 2008 ABCA 257 |
| **Meaningless Clauses**  **Bad Faith** | Can severe meaningless clauses to save a K  Parties must exercise rights honestly, breached when acting in bad faith  No implied duty to act in good faith but there is a “general organizing principle of good faith that underlies contract law” – so courts may imply obligation to act in good fatih | Nicolene Ltd. v. Simmonds, [1953] 1 Q.B. 543 (C.A.  Gateway Realty v Arton Holdings 1991  Bhasin v Hrynew 2014 |
| “contra proferentem” rule: “words are interpreted more strongly against the person who uses them”. | This principle is used to interpret words in insurance policies strictly against the insurer; that is, in a manner favourable to the insured. | Indemnity Insurance Co. v. Excel Cleaning Service, [1954] S.C.R. 169 at 179 (S.C.C.) |

Intention to Create Legal Relations

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| “Gentlemen’s Agreements” | If Parties say no intent to create legal creations then no K (not likely valid today) | Rose and Frank Co. v. J.R. Crompton and Bros., Ltd., [1923] 2 K.B. 261 (C.A.), |
| Discussion is not a contract | Preliminary communication is not an intention to create legal relations | Blair v. Western Mutual Benefit Assn., [1972] B.C.J. No. 620 (B.C.C.A.) |
| “letter of intent” LOI “memorandum of understanding” MOU | Are not contracts, not intentions to create legal relations UNLESS terms clearly laid out and resulting K doesn’t add anything new | B*awitko Investments Ltd. v. Kernels Popcorn*  *Ltd.*, [1991] O.J. No. 495 (Ont. C.A.) |
| If agreement silent on intention, its presumed  Use of service = K | Falls under an objective test: outside person would find it was a contract that was made  Use of a service creates a contract, even if under mistaken belief | *Upton-on-Severn Rural District Council v. Powell*, [1942] 1 All E.R. 220 (C.A.) |
| Gifts | Gifts do not create legal intentions | Esso Petroleum Co. v. Commissioners of Customs and Excise, [1976] 1 W.L.R. 1 (H.L.) |
| Subject to clause | Not a K if subject to, shows negotiations | Girouard v. Druet, 2012 NBCA 40 |
| Personal emails MIGHT not be considered contracts | Limited to consumer to consumer contracts  Considered preliminary negotiations | Girouard v. Druet, 2012 NBCA 40 |
| **COMMERCIAL context**  Assume business people are making legal relations | Either when they are negotiating a contract, or making changes to a pre-existing one  Onus on whoever wants out of K to rebut presumption of intention to create legal relations – heavy onus, hard to prove | *Kleinwort Benson Ltd. v. Malaysia Mining Corp. Bhd*., [1989] 1 All E.R. 785 (C.A.)  Attrill v. Dresdner Kleinwort Ltd., [2013] 3 All E.R. 607 (C.A.) |
| Email negotiations form K | Commercial parties exchange of emails can be a contract | Prolink Broker Network Inc. v. Jaitley, [2013] O.J. No. 3065, 2013 ONSC 4497 (S.C.J.) |
| **Social / Domestic**  Domestic arrangements not contracts | Family arrangements depend on good faith, not legally binding agreements.  Might be softening now but no case authority | Balfour v Balfour 1919  Jones v. Padavatton, [1969] 1 W.L.R. 328 (C.A.) |
| Student/University | Scholastic relationship between student and university is not a contract | Turner v. York University, [2012] O.J. No. 3873, 2012 ONSC 4272 (Ont. Div. Ct.) |
| Separated families might have K | Separated family parties ‘not living in amity’ may meet criteria for intentional legal relations | Merritt v Merritt 1970 |

Privity

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| **Privity**  Only parties, not 3rd party | Only parties involved in a K can enforce obligations  Third party cannot enforce a K  Would be unjust to confer obligations to 3rd party | Beswick v Beswick, 1968 AC 58 HL |
| General application | “There have been many attempts to break out of the rigid mould imposed by the concept of privity and some statutory relief has been provided but the concept remains one of general application” | Greenwood Shopping Plaza Ltd. V Beattie [1980] 2 SCR 228 |
| Privity linked w/consideration | Only party who has provided consideration can enforce K | Tweedle v Atkinson (1861) 1 B&S 393 |
| **Horizontal Privity**  **3rd party can’t enforce**  **Agent can sue** | A has K with B, C can’t enforce terms even if it receives the benefit  A is agent for C, sues B, must show consideration between A and C | Lyons (Guardian ad litem of) v. Consumers Glass Co., [1981] B.C.J. No. 2180 (B.C.S.C.), Beswick, Tweedle |
| **Vertical Privity**  **Chain of events** | Can’t sue a party that you don’t have K with (even if K says 3rd party has rights, those rights aren’t enforceable) | Dunlop Pneumatic Tyre Co. v. Selfridge & Co 1915 |

Circumventing Privity

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| **Collateral K** | A and B entered into K that somehow affects C, a collateral contract created between A and C  Can be VERY contrived and artificial | *Shanklin Pier Ltd. v. Detel Products Ltd*., [1951] 2 K.B. 854 (K.B.D.) |
| **Trust** | -K between A and B, benefits to C. If A is trustee to C, can enforce benefits to C from B  -C can sue A if they refuse to sue B on their behalf  -Courts are reluctant to find that a trust has been created where the parties have not explicitly established one. | *Vandepitte v. Preferred Accident Ins. Co.*, [1932] 3 W.W.R. 573 (P.C.)  *Re Schebsman*, [1944] Ch. 83 at 89 (C.A.) [can’t find a trust where it was not expresly mentioned] |
| **Have party to K sue** | Circumvent privity by having a party to K sue to satisfy a 3rd party – usually only for personal loss | *Beswick v Beswick* |

Exceptions to Privity

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| **Abolition by Statute** | Many common law jurisdictions have abolished to varying extents horizontal/vertical privity through statutes – allow third parties to make claims | |
| Limited Exception (for negligence) called the “principled exception” | Exception to horizontal privity, allowed employees to benefit from K  3rd party not allowed to be privy to others K unless express terms allow it. Extended exception to privity to all 3rd parties in general. | London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299 (S.C.C.)],  Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., [1999] 3 S.C.R. 108 (S.C.C.). |
| Above can only be shield not sword | The exception cannot be used as a basis for a non-contracting party to sue to enforce an obligation under the contract of others | Holmes v. United Furniture Warehouse Limited Partnership, 2012 BCCA 227 |

Consideration

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| Definition | “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.” | *Currie v. Misa* (1875), L.R. 10 Ex. 153 at 162 (Exch.) |
| Nature of Consideration | Consideration must originate (“move”) from the promisee (not from another party)  Consideration must be given at the time of and in exchange for the promise.  It’s the price paid at the time of acceptance | *Dalhousie College v. Boutilier Estate,* [1934] S.C.J. No. 44 |
| Implied Consideration | Consideration can be implied by the promisee  “The true consideration ... was an implied promise by Thoresen (Ps) to use the berth daily and thus make themselves liable to pay the council’s charges.” | *Thoresen Car Ferries Ltd. v. Weymouth Portland Borough Council,* [1977] 2 Lloyd’s L.R. 614 at 619 (Q.B.) |
| Action or promise of action | Can be action or promise of action (obligations promised to be performed in future) | Text pg 103 |
| Value of Consideration (Nominal Consideration) | Anything of value is sufficient – if it is an agreed-upon and bargained price for the promise, then consideration is usually thought to exist and to be valuable.  Under or over-valuing can be used as evidence for doctrines like: unconscionability, undue influence, illegality or the availability of a remedy such as specific performance. | *Mountford v. Scott,* [1975] 1 All E.R. 198 (C.A.) |
| Distinguishing Consideration | Consideration should be distinguished from motive ie love (motive is insufficient)  Consideration must be something of value in eyes of the law: can be a benefit or detriment  Must move from promisor to promisee | *Thomas v. Thomas* (1842), 2 Q.B. 851, 114 E.R. 330 |
| **Failure of Consideration** | Where a promise was consideration, but that promise is not kept there has been a failure of consideration (the promise is no longer sufficient) | |
| Equivocal Promises are NOT consideration | Equivocal Promises: “if I feel like it”, “if I think circumstances are appropriate” and such like, are too subjective and unpredictable to allow for any real value when connected as qualifiers to the purported consideration. They fall afoul of the certainty required in a contract. | |
| **Forbearance** | **Forbearance is consideration in the form of a promise NOT to do something.**  **Not valid if promisee knows it is without merit (can’t forebear on something you have legal right to do or obligation to not do) White v Bluett 1853** | |
| Forbearance to sue can’t be good consideration if its a bad lawsuit | There is no valuable consideration where the forbearance to bring an action, claimed as consideration, is in a context where the promisor knows the claim to be invalid or does not seriously intend to pursue it. | *B. (D.C.) v. Arkin,* [1996] M.J. No. 362, affd [1996] M.J. No. 499 (Man. C.A.) |
| Forbearance to sue can be good consideration – not valid if suit has no merit | Forebearance valid if person making promise not to sue honestly believes lawsuit would have merit | *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449 |
| Reasonable time for forebearance | “A specific request for forbearance for a precise period of time is not necessary where it can be implied from the surrounding circumstances that such a request was made and that forbearance for a reasonable time was extended…” | *Stott v. Merit Investment Corp.,* [1988] O.J. No. 134 (Ont. C.A.) |
| **Past consideration** | Consideration must be “fresh”, cannot be “past” | *Eastwood v. Kenyon* (1840), 113 E.R. 482 (Q.B.) |
| **Past Consideration is Valid IF... TEST** | 1. Act done at promisor’s request 2. Parties understood act was to be remunerated by either payment or conferment of other benefit 3. Payment/conferment must have been legally enforceable had it been promised in advance   Act done before promise to pay can sometimes be consideration for the promise if understanding that it will eventually be paid for. | *Lampleigh v Brathwait,* 1615 |
| **Problematic consideration**  **→ Duty owed to the public** | A party doing something they are already legally bound to do can never count as consideration. UNLESS it was services beyond their normal duty. | ***Glasbrook Brothers Ltd. v. Glamorgan County Council*, [1925] A.C. 270 (H.L.)** |
| BUT….Some courts have held that going above and beyond their legal requirements can count as consideration. | ***Ward v. Byham, [1956]* 1 W.L.R. 496 at 497 (C.A.)** |
| **Problematic consideration**  **→ Duty owed to a third party** | Past consideration between two contracting parties can be used as consideration from one of those parties to a third party.  Defense of economic duress prevents exploitation in similar situations, vitiates consent, and renders a K voidable. | *Pao On v. Lau Yiu Long,* [1980] A.C. 614 (P.C.) |
| “An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration ... the promisee obtains the benefit of a direct obligation which he can enforce.” | *N. Z. Shipping Co. v. A.M. Satterthwaite & Co.,* [1975] (P.C.) |
| **Problematic consideration**  → Duty owed to the Promisor  **Promise to pay more than in original K** | **Prior duty owed to promisor not legally sufficient consideration**  Promise to do more than original promise in K cannot be sufficient consideration unless what is received is changed (price variation is modification, not new K.)  Consideration could only be found if the previous contract was rescinded by both parties (in this case, it wasn't, so no consideration)  Questions to ask if consideration is sufficient:   1. Is it clear (not vague)? 2. Was there mutual abandonment of first K & new K created or was simply a modification of particular term in first K? 3. Did what’s purported to be consideration include something of value (in eyes of the law)? 4. Will estoppel work? (*Gilbert Steel -* by accepting invoices, estopped from denying liability – court dismissed this argument) | *Gilbert Steel Ltd. v. University Construction Ltd.,* [1976] O.J. No. 2087, 67 D.L.R. (3d) 606 (Ont. C.A.) |
| A pre-existing duty to the promisor can be legally sufficient consideration if there is a practical benefit to the promissor.  Only in English courts | *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.,* [1990] 1 All E.R. 512 (C.A.). |
| **→ Duty owed to the Promisor**  **Modification of K enforceable w/o new consideration if not done under duress** | A post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress | *Greater Fredericton Airport Authority Inc. v. NAV Canada,* [2008] N.B.J. No. 108, 2008 NBCA 28 (N.B.C.A.)  **Conflicts with Gilbert Steel**  **See also Pao On duress** |
| Promise to accept less not binding w/o consideration | At common law, given no consideration, you cannot pay less than what was originally agreed to.  \***OVERRIDEN BY LAW & EQUITY ACT IN BC NOW \* S 43 part performance of obligation… when expressly accepted by creditor… must be held to extinguish the obligation (see CAN)**  **Was acceptable in High Trees to take less rent during war times, but promise ceased to be enforceable when war time over** | *Foakes v. Beer* (1884), 9 App. Cas. 605 (H.L.) |
| **Promise to accept less is okay if new consideration is given** | In exchange for B’s promise to accept less, if A is giving not just less but also something new, A has given sufficient consideration. | *Foot v. Rawlings* [1963] S.C.R. 197 (S.C.C.) |
| Statute: allows for the enforcement of a promise to accept a settlement of a debt for less, even when nothing new is given in exchange | “Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.” | British Columbia’s Law and Equity Act, section 43 |
| Seal can be consideration | Seal affixed by promisor shows he is aware of K and is legally binding  For seal to make promise binding, must be affixed by promisor (NO AGENTS) | *Royal Bank of Canada v. Kiska, 1967 (ONCA)* |

Estoppel

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| **Estoppel GENERAL** | RELIANCE - Recipient of the statement can stop the maker from denying the validity of the statement if they can show they were relying on it and would incur prejudice or detriment if the maker were not held to the statement | Maclaine v. Gatty, [1921] 1 A.C. 376 at 386 (H.L.) |
| **Promisory estoppel**  Express promise or assurance or statement of intention | Contract Law is the main way of enforcing promises, not estoppel  Estoppel is defense to another claim (shield not sword)   * In absence of consideration of promise cannot be used to enforce the promise * Estoppel can be used as part of an action but not the whole cause of the action | Combe v Combe 1951 1 AII ER 767 (CA) |
| Cannot create new obligations  Cant take back later | Estopped from denying the validity of a promise/assurance  If party relies on to their detriment, cant take back promise at later stage  Cannot be used to create new obligations, only modify existing one or eliminate existing one | *Gilbert Steel Ltd. v. University Construction Ltd., [1976] O.J. No. 2087 (Ont. C.A.).* |
| **Reliance and Detriment** | Promise intended to be binding, that is acted on, is binding so far as its terms properly apply, but must have consideration (in Canada)  **Must show it was detrimental reliance**  Requires a promise or assurance to be estopped | *Central London Property Trust Ltd. v. High Trees House Ltd.,* [1947] K.B. 130 (K.B.D.).  High Trees and Gilbert Steel  *Ryan v. Moore*, [2005] S.C.J. No. 38  High Trees and D&C Builders |
| **Promissory Estoppel used as Cause of Action to Finalize A Contract**  **(persuasive only: from Australia)** | * **allows court to rectify unconscionable outcomes** * **can be a sword and a shield even where no pre-existing legal relationship** * **note Cdn courts would likely use restitution instead of estoppel**  1. P assumed or expected that there was a legal relationship between P and D 2. D has induced P to adopt that expectation or assumption 3. P acts/abstains from acting in reliance on the assumption/expectation 4. D knew and intended P would do so 5. P’s action/inaction will cause detriment if assumption/expectation is not fulfilled AND 6. D failed to act to avoid that detriment whether by fulfilling assumption/expectation or otherwise | *Waltons Stores (Interstate) Pty Ltd. v. Maher* (1988), 164 C.L.R. 387 (H.C.), |
| Equitable doctrine used to avoid unconscionability | * Require intention to create legal relations and a binding promise to use estoppel * Court considered Walton favourably, but facts didn’t merit its application * Test: did parties intend to create legal relations? * Is there a binding promise? | M. (N.) v. A. (A.T.), [2003] B.C.J. No. 1139, 2003 BCCA 297 (B.C.C.A.) |
| **Promise must be intended in order to be relied on and estopped** | **Promise must be intended to alter legal relations between 2 parties, friendly gestures not binding** | John Burrows Ltd v Subsurface Surveys Ltd, 1968 |
| **Substitute agreement OK if equitable** | **Substitute agreements that satisfy K can be valid in equity even w/o consideration** | D&C Builders Lts v Rees 1966 |
| **Proprietary Estoppel**  **CAN BE cause of action OR defence** | **Must be about land, if you make a promise about land you are held to it (land is special)**  Must:  - show reliance and detriment  - where party makes representation in relation to land | Crabb v. Arun District Council, [1976] Ch. 179 at 187 (C.A.) |
| **Estoppel by Representation** | **Relates only to statements of fact and not directly to obligations**  Estopped from denying validity of the fact if the recipient can show that he or she has relied on the statement and would incur prejudice or detriment if the maker were not held to the statement. | A.E. LePage Real Estate Services v. Rattray Publications Ltd., [1994] O.J. No. 2950 (Ont. C.A.). |
| Statement must be a fact | Statement estopped from denying cant be a promise or statement of intention – must be a fact (otherwise use promisory) | Jorden v Money 1854 |
| **Estoppel by**  **Agreement - Convention**  **Must show reliance on convention and detriment if other party not held to convention** | Parties to a contract (or other agreement) can agree how that contract is to operate and the estoppel prevents them from denying the validity of that agreement or “convention”  Person raising the estoppel must show reliance on the convention and detriment if the other party were not held to the convention  Can only relate to facts NOT obligations. | *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management In*c., 2009 BCSC 1303 |
| **Estoppel by**  **Agreement - Deed** | In a sealed contract or deed, both parties to a bargain are estopped from denying the validity of facts, even if they know that they are false  Can only relate to facts NOT obligations. | *Greer v. Kettle, [1938] A.C. 156 (H.L.).* |
| **Once there is no legal relationship you can’t estopp it** | Can’t revive a contract that has ended on the basis of estoppel | *Canadian Oil Ltd. et al. v. Paddon-Hughes Development Co. Ltd, Hambly, et al, [1970] S.C.R. 932* |
| Equity and estoppel  Estoppel suspends legal rights | * Must be fair to enforce promise * A promise made under duress should not be estopped * Promissory estoppel suspends legal right and precludes enforcement of them | D. & C. Builders Ltd. v. Rees [1965] 3 AII ER 837 CA |

No Grounds for Estoppel

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| Past term not enforced can still be estopped | Lack of enforcement of a term in a contract IS NOT grounds for estopping that enforcement later | *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.J. No. 41, [1968] S.C.R. 607 |
| Estoppel unavailable where inequitable |  | *D. & C. Builders Ltd. v. Rees,* [1965] 3 All E.R. 837 (C.A.) |
| Estoppel must preserve equity | Will stop where it would be unconscionable or unfair to continue estoppel | M. (N.) v. A. (A.T.), 2003 BCCA 297 |

Waiver

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| **Election of a legal right** | Party made a choice between two inconsistent courses of action: once decision is made other option is waived and can’t be relied on. Contract considered modified to take other option out. | Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corp. of India (The “Kanchenjunga”), [1990] 1 Lloyd’s Rep. 391 at 398 (H.L.) |
| **Abandonment of a legal right** | Waiver is found only where the evidence demonstrates the party waiving had:  - Full knowledge of rights  - Unequivocal and conscious intention to abandon them | Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co., [1994] 2 S.C.R. 490 |
| **You can take an abandonment back** | A “waiver” could be retracted if reasonable notice is given to the party in whose favour it operates. If the other party has not relied on the waiver, then there is no requirement of a notice to abandon the waiver. | Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co., [1994] 2 S.C.R. 490 |
| **Past waiver not guaranteed again but might be construed** | Waiving rights in the past does not mean promise to waive rights in the future  Series of waivers might be construed as promise to continue waivers in future (might be binding but hard) | John Burrows Ltd. v. Subsurface Surveys Ltd., [1968] S.C.J. No. 41, [1968] S.C.R. 607 |

Enforcement

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| **Formal K** | **Requires seal (formality, can replace consideration) OR consideration**  **Seal must be affixed by promisor not promisee** | Royal Bank of Canada v Kiska 1967 |
|  | “Signed sealed and delivered” signature/witness sig sufficient to make a sealed document  Signature and seal sufficient | Re/Max Garden City Realty v 82894 Ontario Inc 1992  Romaine Estate v Romaine 2007 |
| **Informal (simple) K** | Oral is as good as written, but written easier to prove  Written evidence of K – obviates issues of proof | Girouard v Druet 2012 NBCA |
| Freedom to Contract | Partires can contract whatever terms they want, courts will enforce | Prime Sight Ltd Lavarello |
| Enforceable if partly performed | Enforceable if partly performed, action is unequivocal and done in relation to actual K  Otherwise doesn’t meet standard for part performance if “equivocal” or “wholly neutral” | Maddison v Alderson (1883) 8 App Cas 467 HL  Deglman v Brunet Estate [1954] SCJ No 47 |
| Rectification | Written K is changed by order of the court: asking court to rectify the written evidence to follow oral K  Equitable doctrine to prevent written contract being used as engine of fraud or misconduct  Restores parties to original bargain NOT to deal with recognized belated error of judgement | Performance Industries Ltd. v. Sylvan Lake Gold & Tennis Club Ltd., [2002] S.C.J. No. 20. |
| **PAROL EVIDENCE RULE (PER)** | **A written K forms the whole K, oral agreements not part of written K not considered**  **When parties intend that written evidence of K contains the entire K, court will not accept evidence of terms that are oral.**  **Works in conjuction with doctrine of mistake.**  **Establishes a rebuttable presumption.** | |
| Cannot use oral K that contradicts written K | Parol evidence (oral agreements) cannot contradict the written agreement | Hawrish v. Bank of Montreal, [1969] S.C.J. No. 17  Bauer v Bank of Montreal [1980] SCJ No 46 |
| If K has oral component that is compatible with the K, then it can be included despite PER | “Softer rule” PER is rebuttable presumption:  - presumption strong if oral K contradicts written K  - presumption is weak if it adds to written K | Gallen v. Butterley, [1984] B.C.J. No. 1621, (B.C.C.A.) |
| Entire agreement clause excludes parol evidence | Parties can agree to exclude parol evidence by including an ‘entire agreement’ clause in contract.  Duty of honest performance still exists in entire obligations clause contracts | Hole v Hole [2016] AJ No 126 |
| Oral statements excluded from K | Parol evidence rule justified on basis of certainty, but does not apply to preclude evidence of the surrounding circumstances – its important to consider the facts and circumstances as a whole. | Sativa Capital Corp v Creston Moly Corp [2014] SCJ No 53 |
| **All evidence, written agreement, oral representations and conduct form the totality of the agreement** | SCC acknowledged the parol evidence rule, but held “But that doctrine ... has little or no application where one is not concerned with a contract in writing ... But with a contract [as in this case] which, as I think, was partly oral, partly in writing, and partly by conduct.” In such cases, the judge said, one does not need to resort to collateral warranties; all the evidence and terms together form the totality of the agreement. | J Evans and Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 WLR 1078 (CA) |

Representations and Terms

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| **Test for what is a term**  **Intention key to differentiating representation from a term** | Test whether a warranty is intended to be a term:   * depends on conduct of parties, on their words and behaviour, rather than on their thoughts… * if an intelligent bystander would reasonably infer that warrany was intended, that will suffice   **Term intended to be guaranteed strictly and have legal effect**  **If a representation was going to be a term it would have had to be in a collateral K (warranty)** | Heilbut, Symons & Co v Buckleton [1913] AC 30 HL |
| **Difference in quality or substance of representation** | Only recission if different in substance, not quality | Leaf v International Galleries 1950 |
| Expertise = more likely a term than representation | The expertise of the maker of statement can be taken into account in deciding whether a statement has become a term of the contract | Esso Petroleum Co. v. Mardon, [1976] Q.B. 801 (C.A.). |

Primary and Secondary Obligations

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| **Primary Obligations** | **What the parties promise to do in the K** |  |
| **Secondary Obligations** | **Provide remedies for breach of the primary obligations: come from K or law**  Can be modified by agreemt but not excluded | Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827 (H.L.) |
| **Conditions** | **Fundamental terms to contract**  **Statement of fact which forms essential term of the K**  **Breaching condition = “fundamental breach,” remedy is K repudiated - end of contract – party not in default does not have to perform any more obligations** | **\*\* SEE BIG CAN FOR MORE ON THIS \***  Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26 (C.A.) |
| **Intermediate Term**  Can only tell if fundamental term if breach occurs – determined by seriousness of breach | **Test for whether it is intermediate term or condition:**  Does the occurrence of the event deprive the party with further undertakings to perform of substantial benefits?  **Breach of Intermediate Term =** Remedies determined after the breach occurs based on the seriousness of the consequences, not the breach, and uses either of the remedies for a condition or warranty. | Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26 (C.A.) |
| Some courts reluctant to use intermediate term label, so better to use condition or warranty label | Mardelanto Compania Naviera SA v Bergbau-Handel |
| Sales of Goods Act doesn’t mention intermediate terms, but they have been read into it | Cehave NV v. Bremer Handelsgesellschaft MbH (The “Hansa Nord”), [1975] 3 All E.R. 739 (C.A.) |
| **Warranty** | **Term not essential to contract, collateral to the main purpose of K**  **Breaching = damages, does not cancel K** |  |
| **Secondary obligations specify remedies for breach** | Courts place labels on terms, K doesn’t have to. Better to just determine 2nd obligations so court can interpret labels. | *Heritage Oil and Gas Ltd. v. Tullow Uganda Ltd.,* [2014] EWCA Civ. 1048 (C.A.). |
| Relief of Obligations: Instead of secondary obligation, Court may relieve you of obligations | | |

Conditional Obligations

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| **Conditional Precedent (2 Types)** | 1) A condition that is a prerequisite to the enforceability of a particular obligation  2) Can trigger the contract formation.  Determine which one it is from intention of parties as expressed in K itself, surrounding events. | *Wiebe v. Bobsien*, [1984] BCJ No 3209 (BCSC) |
| Parties must make reasonable effort to fulfil condition precedent to secure performance of K  If a party does not facilitate fulfillment of condition precedent the other party may get specific performance order | Dynamic Transport Ltd. v. O.K. Detailing Ltd., [1978] 2 **S.C.R.** 1072 |
| **Unilateral Abandonment of Conditional Precedent** | To abandon, the condition precedent must be:  1) in favour of party that wishes to abandon it  2) in no way dependent on a 3rd party | Turney v. Zhilka, [1959] **SCJ** No. 37 |
| In B.C. you can unilaterally abandon even if it depends on a third party provided (1) is met | s. 54 of the Law and Equity Act, RSBC 1996, c. 253. |
| **Concurrent Conditions** | **Mutually dependent conditions (they happen at the same time)** | |
| **Condition Subsequent** | **Event that ends an obligation** | |
| **Entire Obligation** | Can’t be broken down.  Obligation of 1st party must be performed, then other party performs (ie. Work must be completed before gets paid) | Cutter v. Powell (**1795**), 6 Term Rep. 320, 101 E.R. 573 (K.B.) |
| **K not complete, treat as abandoned**  **Innocent party must pay for benefit of part performance of other party** | **Quantum Meruit** If the innocent party of an abandoned K takes benefit of work done, he can be liable for cost of that work (from law of restitution)  When K not complete, treat as abandoned.  Innocent party has option to treat K as repudiated and terminate K. | Sumpter v. Hedges, [1898] 1 Q.B. 673 (C.A.)  **\*\* SEE CAN NOTES PAGE 25** |
| **Substantial Performance** | An obligation is complete when substantially completed. It's not necessary that the entire obligation is performed 100%:  Can also claim completion if it other party’s fault you could not complete | *Fairbanks Soap Co. v. Sheppard,* [1953] 1 S.C.R. 314 (**S.C.C.).** |
| **Severable Obligation** | **Can be broken down into separate obligations. Part performance of one party is sufficient to trigger other party to perform obligations.** | |

Duties

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| **Duty of honest performance**  Requires parties to be honest with each other in relation to the performance of contractual obligations, must not lie or mislead other parties | **Cannot be contracted away**  General organizing principle of “duty of good faith” exists in commercial contracts, and honest performance is part of that and cannot be excluded from a contract.  Does not impose fiduciary duty or any duty of loyalty, not an implied term in K, operates irrespective of intent of the parties.  **Good faith considered in context of circumstances** | *Bhasin v. Hrynew,* [2014] **S.C.J.** No. 71 |
| **Is a duty within the K, cannot be invoked during negotiation stage** | *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89 (B.C.C.A.) |
| **About performance of K, not its creation.** Ks do not get judicially rewritten in event of a dispute | *Royal Bank of Canada v. 4445211 Manitoba Ltd*., [2015] S.J. No. 483, 2015 SKQB 261 (Sask. Q.B.) |
| **Duty not to deceive another when negotiating a contract** | Breach leads to damages and recission of K | *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.). |

Excluding and Limiting Liability

Steps to Test a Clause:

1. Did other party have notice -> signature? Can you use the signature?
2. Does clause apply to given situation? -> interpret the clause (rest of the contract), does a statute or common law prohibit application?
3. Is it unconscionable to apply the clause? -> 1) is there are power difference between the parties? 2) is the term unreasonably in favour of the stronger party?
4. Is the clause contrary to public policy? -> usually covered by statute, would have to prove it violates a fundamental principle of society.
5. Will court grant an injunction to prevent a breach that would trigger operation of exemption clause?

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| **Exclusion Clause** | A clause that says you cannot sue us for X if we breach  Courts don’t like these | Ailsa Craig Fishing Co. v. Malvern Fishing Co., [1983] 1 W.L.R. 964 at 966 (H.L.) |
| **Limitation** | Limits $ amount for secondary obligation / breach OR imposes onerous procedural requirements for a claim  These can have same effect as exclusion clauses, should not be considered categorically different | Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] S.C.J. No. 23 |
| **Court looks at this equitably** | Concern by court that strong party will use its power over weaker party | George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd., [1983] Q.B. 284 |
| **NOTICE** |  |  |
| **Must be aware of clause to be bound** | In order to be bound by a clause, there needs to be an awareness of the clause before entering K – do not need to know exactly what it says, just know that it is there  If only in fine print may not be part of K as one party has no notice of terms. | Thornton v. Shoe Lane Parking Ltd., [1971] 2 Q.B. 163 (C.A.) |
| **SUFFICIENT NOTICE** |  |  |
| **Basic Notice Requirement:**  **Must Be “Sufficient” Notice** | Both parties must know that a clause is there to be bound by it.  Party is bound if they ‘ought’ to have known about the term: if the other party had done what was sufficient. | Parker v. South Eastern Railway (1877), 2 C.P.D. 416 (C.A.) |
| If term is “particularly onerous or unusual” | Party seeking to enforce the term, must ensure that it is brought to the other party’s attention | *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] Q.B. 433 at 439 (C.A. |
| Notice must be given at time of K creation or before | Sign in hotel room excluding liability came after hotel already paid for – so not notice, not included in K | *Olley v. Marlborough Court Ltd.,* [1949] 1 K.B. 532 (C.A.) |
| **Signature as Notice** | **If you sign something, that person acknowledges receiving notice** |  |
| **If you sign you are bound:**  **Doesn’t matter if you haven’t read the document** | **Unless you can claim fraud or misrepresentation, you are bound to the K you signed** | **L’Estrange v. F. Graucob, Ltd., [1934] 2 K.B. 394 (Div. Ct.).** |
| **Mistake Doctrine** | **non est factum**: mistake doctrine  if misrepresented or fraudulently obtained signature it it inapplicable and ENTIRE K cannot be enforced  innocent misrepresentation is enforceable though | Curtis v. Chemical Cleaning & Dyeing Co., [1951] 1 K.B. 805 (C.A.) |
| **Limiting signature doctrine** | **Signature alone does not represent acquiescence** in “unusual and onerous terms which are inconsistent with the true object of the contract”.  Unless reasonable measures are taken to draw a party’s attention to unusual terms in a standard form document, terms are not enforceable, notwithstanding the signature  **Party who seeks to enforce K knows or ought to know of other party’s mistake → Karroll limits this – says requirement to draw attention only applicable in certain circumstances** | ***Tilden Rent-A-Car Co. v. Clendenning,* [1978] O.J. No. 3260 (Ont. C.A.)**  [drunk rental car driver case - more than a signature was required to constitute sufficient notice] |
| **Only must draw attention to terms if a reasonable person would know that the signing party was not consenting to the terms in Q or didn’t understand them** | **2 exceptions to *L’Estrange* rule:**   * Non est factum – mistake doctrine * Inducement to agree by fraud or misrepresentation   **Requirement to draw attention to terms only applies**   * Where party seeking to enforce to the document knew or had reason to know of the other’s mistake as to its terms (because there is lack of consent) * Where someone signs a document where one has reason to believe he is mistaken as to its contents (Fraud or Misrepresentation) * Non est factum (not my signature) | **Karroll v. Silver Star Mountain Resorts Ltd., [1988] 33 B.C.L.R. (2d) 160 (B.C.S.C.)** |
| **Sophistication of Parties is Important** | What binds a specialized commercial party might not bind others | *Promech Sorting Systems BV v. Bronco Rentals and Leasing Ltd.,* [1995] M.J. No. 100, 123 D.L.R. (4th) 111 at 117 (Man. C.A.) |
| Signs as Notice | Plastering notifications all over, is enough to establish onerousness in identical circumstance to above | *ParkingEye Ltd. v. Beavis*, [2015] UKSSC 67 (S.C.). |
| Electronic Signature | Entering one’s name is sufficient for notice in electronic contracts | *Girouard v. Druet, [2012] N.B.J. No. 136, 2012 NBCA 40 (N.B.C.A.)* |
| Unless it's clear and easy to read in K | Even if you don’t read the contract it still binds you | *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co., [1997] O.J. No. 2359 (Ont. C.A.)* |
| Court MIGHT be able to construct a signature from previous dealings | Context of repeated contractual agreement: if individual didn’t sign, even if they had in the past, they are NOT bound, but a commercial party might be | *McCutcheon v. David MacBrayne Ltd., [1964] 1 W.L.R. 125 (H.L.)*  [car on ferry which sunk] |
| If you put a exclusion and limitation clause in, they are construed more forcefully against you | “principle of contra proferentem “ | *Mobil Oil Canada Ltd. v. Beta Well Service Ltd., [1974] A.J. No. 123, (Alta. C.A.)* |
| Where there is exclusion clause AND express terms that conflict | Courts will favour the clause that retains liability for the breach. | *Mendelssohn v. Normand Ltd.*, [1970] 1 Q.B. 177 (C.A.). |
| Courts might read negligence into an exclusion clause... | IF the words are wide enough to cover it but it is not expressly mentioned  Resolved against the proferens | *Canada Steamship Lines Ltd. v. R.,* [1952] A.C. 192 at 208 (P.C.) |

DOCTRINE OF FUNDAMENTAL BREACH

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| **Fundamental Breach (somewhat dead)** | Party cannot agree to a term in the K which would lead them to receive no damages from an outcome totally different what they agreed into | Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc 2008 ONCA 92 |
| **Old rule of FB** | Doctrine of FB is by virtue of the law, does not depend on actual intention of the parties | Karsales v Wallis, 1956 ENGLAND (NO LONGER USED IN CANADA) |
| **FB exists, just not a doctrine** | OVERRULES ***KARSALES***: doctrine of FB no longer exists, but fundamental breaches do → simply a matter of **whether parties** **intended exclusion clause to apply**  **Meaning of words was clear, sophistaicated parties – court can t reject exclusion clause when meaning is clear and unambiguous** | Photo Production v Securicor, 1980 ENGLAND |
| Whether breach fundamental or not, applicability of exclusion/limitation clause depended on **construction of K** | “It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided | Hunter Engineering Co v Syncrude Canada Ltd, 1989 SCC |
| **No Doctrine of FB in Canada.**  **Exclusion clauses must be interpreted in light of the whole K**  **(Overrules Karsales in Canada)** | Must consider exclusion clauses in light of purpose & commercial context + overall terms  Clear language necessary to exclude liability for breach of basic requirement of a K  If exclusion clause applies, then determine whether it was unconscionable and thus invalid at the time the contract was made.  If the exclusion clause is valid at time of contract formation, should determine whether the exclusion clause can be refused based on an overriding public policy. | **Tercon Contractors v BC (Transportation), 2010** |
| **Unconscionability (replace for fundamental breach)** | Two part test:  1) proof of inequality in the positions of the parties  2) substantial unfairness in the bargain obtained by the stronger | *Roy v. 1216393 Ontario Inc.,* 2011 BCCA 500 |
| **Injunction** | Court could order prohibition on breach of contract IF non-breaching party would be unable to claim damages due to exclusion or limitation clause | *AB v. CD, [*2014] EWCA Civ. 229, [2014] 3 All E.R. 667 (C.A.) |

Discharge of the Contract

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| **Ways to discharge a contract:** | 1) performance  2) agreement (requires a new contract that says old one is gone)  3) frustration  4) repudiatory (parties accept breach)  5) breach of fundamental terms | *Jedfro Investments (U.S.A.) Ltd. v. Jacyk, [2007] S.C.J. No. 55* |
| **In UK can discharge by estoppel (maybe Canada?)** | One party represented to the other that the contract was abandoned and the other party relied on that representation to his or her detriment | *Allied Marine Transport Ltd. v. Vale de Rio Doce Nevegacao SA Robert Goff L.J* |

Incapacity

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| **Mental Incapacity** | **If one or more parties do not have capacity to understand what contract is when it is formed, they have not given assent.**  **Is voidable not void** | |
|  | Evidence of physician does not give more weight than that of “lay” witnesses | *Sawatzky v. Sawatzky*, [1986] S.J. No. 371 (Sask. Q.B.) |
|  | Mental incapacity does not have to be permanent - can create K in lucid moments | *MacDonald v. Fraser,* [1993] N.S.J. No. 446 (N.S.S.C.). |
|  | **Is a valid K and enforceable if:**  **1) made in good faith**  **2) no knowledge of other person’s incapacity**  **3) no advantage is taken** | *Hardman v. Falk,* [1955] B.C.J. No. 119 (B.C.C.A.) |
|  | Knowledge by representative of a party is construed to the whole party. | *Wilson v. Canada, [1938] S.C.J. No. 13, [1938] S.C.R. 317 (S.C.C.)* [postoffice worker] |
| **Intoxication** | **Is voidable not void.**  **Must be evidence that the person was so drunk they didn’t know what they were doing.** | *Bawlf Grain Co. v. Ross, [1917] 55 S.C.R. 232* |
|  | **A person who is habitually drunk might not be so intoxicated at moment of entering a particular contract so as to make that contract voidable:** | *Murray v. Smith Estate*, [1980] 32 Nfld. & P.E.I.R. 191 (PEI SC). |
| **Infant Status** | Statutory set of rules in B.C.: are unenforceable UNLESS: infant affirms the contract or does not repudiate it within a year upon coming of age | *Infants Act, R.S.B.C. 1996*, c. 223, Part |
|  | Can sell “necessaries” to a minor (P vendor must establish that goods are necessaries) | *Sale of Goods Act,* R.S.A. 2000, c. S-2, s. 4(2).  *Nash v. Inman, [1908] 2 K.B. 1 (C.A.),* [fancy waistcoat  *Soon v. Watson* [house could be necessary] |
| **Employment or Service Contracts for Infants** | Can be binding if “beneficial” for the child: court looks to whole contract | *De Francesco v. Barnum (1890), 45 Ch. D. 430*  *Toronto Marlboro Major Junior “A” Hockey Club v. Tonelli, [1977] 18 O.R. (2d) 21 (Ont. H.C.J.), affd [1979] 23 O.R. (2d) 193 (Ont. C.A.)* |
| **Affirmation/**  **Ratification** | Voidable child entered into by infant can be ratified upon infant reaching age of majority: becomes enforcable  Child can repudiate contract upon coming to age of majority | *Foley v. Canada Permanent Loan and Savings Co., [1883] 4 O.R. 38 (Ont. H.C.J.)* |
|  | Ongoing contract: consideration by child cannot be recovered unless there was total failure of consideration from the other parties | *Ex parte Taylor (1856), 8 De G.M. & G. 254, 44 E.R. 388.*  *Steinberg v. Scala (Leeds) Ltd., [1923] 2 Ch. 452 (C.A.), [infant shareholder]* |
| **Pre-Incorporation Contracts** | **If corporation not in existence yet, then deal is with the person who represented themselves (or there is no contract)**  **Upon incorporation, Canadian statutes allow the corporation to opt into such agreements.** |  |