Contracts CAN (Winter 2017) Prof Sarra

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FLOWCHART FOR EXAMS

* **ISSUE 1) Rule 2) Authority 3) Apply to Facts / Contrast/Analyze 4) Conclude**

**What does client want? Avoid K Compensation Fix/alter K Performance**

|  |  |
| --- | --- |
| **FIND THE CONTRACT AND OBLIGATIONS** * **Formation**
* Invitation to treat
* Offer / acceptance
* Intention to create legal relations
* Certainty of terms
* **Primary & secondary obligations**
* Bilateral/unilateral K
* Contract A/B
* **Parties**
* Privity – 3rd party involved?
* **Period**
* **Price**
* **Notice** – sufficient?
* **Enforceability**
* **Seal / Consideration**
 | **DEFENSES and time period for basis of claim*** Fraud PRE
* Mistake – Common or Unilateral PRE
* Incapacity PRE
* Duress PRE
* Unconscionability PRE
* Undue Influence PRE
* Misrepresentation – Oper / Neg / Fraud PRE
* Breach DURING
* Limitation Period DURING
* Frustration DURING
* Illegality BOTH

**FIND THE REMEDY*** **Void** 🡪Formation, Mistake, Illegality, incapacity, duress, non est factum, frustration
* **Voidable** 🡪 **weaker party doctrines** 🡪 duress, misrepr, unconscionability, incapacity
* **Unenforceable** 🡪 Illegaility, privity, consideration
* **Alter K 🡪** severance, rectification (illegaility, uncon)

**Common Law:*** **Repudiation** 🡪Election? Time passed?
* **Rescission** 🡪 misrepresentation
* **Damages for breach: Compensatory**
* Expectation Interest
* Reliance Interest
* Restitution Interest
* Liquidated damages stated in K
* Deposit Forfeiture

**Considerations:*** Mitigation
* Quantification Problems
* Remoteness

**Equitable – Keep K Alive:*** Rectification 🡪 Mistake, misrepr
* Injunction
* Specific Performance 🡪 property, CL inadequate

**Equitable - K NOT Alive:*** Equitable Damages
* Restitution 🡪 unjust enrichment, K void and need compensation for what already happened
* Tort (deceit, negligent misrepresentation)
 |
| **FIND THE BREACH*** Certainty of terms
* Failure of consideration
* Implied terms
* Were the terms written vs oral
* Parol evidence rule invoked
* Breach
	+ Repudiatory breach
	+ Condition or Intermediate term
* Exclusion/limitation clause
* Was there **notice** (signature)
* Does the clause even apply?
* Is it **unconscionable** to apply to clause? Weaker party? Duress?
* Does the clause operate unfairly in the context of the actual breach?
* Is the clause contrary to “public policy”? (relates to formation of K not subsequent events)
* Is breach fundamental?
* Good Faith

**Challenge Performance of Obligations*** Waiver
* Estoppel
* Frustration
* Impossibility
* Substantial performance
* Anticipatory Breach
 |

# MISREPRESENTATION – arises before K accepted – Remedy: Rescission, equitable (SP), tort claim

**Mere Puff:** statement that has no legal consequences at all –no reasonable person would rely on it – do not become term of K **NO RELIANCE = NO REMEDY**

**Misrepresentation:** representations of facts that aren’t true, reasonable person relies on to become terms of K

**Effect of Misrepresentation**:

* Party to whom the misrepresentation was made can rescind the K
* Can be used as defense by representor against a claim for an equitable remedy (ie specific performance) when representee is in breach of K
* Can be basis for a tort action (in negligence or deceit)

|  |  |  |
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| Operative Misrepr**Arises before acceptance****3 types:**1. **Innocent**
2. **Negligent**
3. **Fraudulent**
 | **Statement made by representor:**1) That is communicated to the representee Ryan v Moore2) That is intentionally made by the representor, Kingu v Walmar3) That is false, Melbourne Banking4) And that is material Kingu v Walmar**Response of the representee:** 5) Reasonably relied on the statement, (Nationwide Building)6) Statement one reason entering into K **\*\* Absence of any of these factors prevents there from being an operative misrepr**REQUIRES FAULT BE PROVEN BY CLAIMANT | ***REMEDIES***1. **Rescission**
2. **Specific performance**
3. **No Effect**
4. **Tort claims but only if there is fraudulent misrepresentation**

**NO STATUTES**  |
| A Statement  | **Must be fact -** Not opinion belief or promiseCan have opinion as long as based on fact**Opinion** is statement of fact: if implied it is based on fact, and when facts are not equally known by both parties **Mere puff** – “So preposterous that nobody would believe them” – and no reasonable person would act in reliance at all. NO RELIANCE = NO REMEDY | Kingu v. Walmar Ventures Ltd., [1986] B.C.J. No. 597 (BCCA)Bisset v Wilkinson [1927] AC177Smith v Land and House Property, 1884sBloomenthal v Ford [1897] AC 156 |
| Duty of care in making statements | * More than just duty to be honest
* Requires representor exercise such reasonable care as circumstances require to ensure that representations are accurate and not misleading
 | Queen v. Cognos Inc., [1993] SCJ 3  |
| Communicated by Representee | Must be communicated to the party relying on it. | Ryan v Moore, [2005] SCJ 38 |
| Expressly communicated (written, oral or through a machine) | Renault UK v Fleetpro Technical [2007] EWHC 2541 QB |
| One communication, or two or more read together | MacDougall page 192 |
| Conduct (such as a nod or wink or a shake of the head or smile) can form a statement of misrepresentation  | Walters v Morgan (1861) 3 De GF&J 718 |
| Authority can expressly or implicitly be given to another to effect communication | Avory J. in R. v. Kylsant, [1932] 1 K.B. 442 (C.A.) |
| Communication from non-contracting party | Can only come from 3rd party if closely related or acting as agent for contracting party.  | Weibelzahl v Symbaluk (1963) 42 DLR (2d) 281 (BCCA) |
| Vendor liable for manufacturer’s statement, if vendor know information is false | Pilmore v Hood (1838) 5 Bing NC 97 |
| Silence | **Can’t form operative misrep unless**: fiduciary duty to speak or when statutes state duty to disclose info | MacDougall page 193 |
| **No duty to supply factual info to other party**, even if that party has info they know would be considered vital to other party | Keates v Cadogan (1851) 10 CB 591 |
| Silence is not misrepresentation unless silent person is **negligent** in not knowing the true facts or is **reckless** as to the truth (might have claim in deceit)  | Larson v MacMillan Bloedel Alberni Ltd [1977] BCJ No 946 |
| Silence can constitute a misrep when a Q is asked but there is whole or partial silence in response  | Nixon v MacIver [2016] BCJ No 22 |
| **Silence cannot constitute a representation if the silent person is not aware of true facts**   | Begley v Imperial Bank of Canada [1934] SCJ No 61 🡪 bank ought to have known that trustee was using widows money to pay personal debts  |
| Duty to Speak | **When one party knows a statement is not accurate** – party has duty to ensure other party is aware of all the material facts | Xerex Exploration Ltd v Petro-Canada [2005] AJ No 774 |
| Insurance contracts, statutory duty, good faith in honest disclosure  | MacDougall page 194(see Bhasin v Rhynew) |
| **Duty to inform when representation becomes untrue before K is entered into**  | With v. O’Flanagan [1936] Ch 575 (CA) |
| **May have duty even before established contractual relations** | Ryan v. Moore, [2005] S.C.J. No. 38 |
| Deliberate or active concealment | **Deliberate or active concealment = representation** **“Active concealment is equivalent to a positive statement that the fact does not exist.”**  | Leeson v. Darlow, [1926] O.J. No. 52 (Ont. CA) |
| **Deliberate concealment may render the situation one of fraudulent misrepresentation** | Sidhu Estate v. Bains, [1996] BCJ No 1246 |
| Vendor must reveal latent defects in a product or land even if not asked. Purchaser must prove vendor was actively concealing or recklessly disregarded the truth of representations made. | McGrath v. MacLean, [1979] O.J. No. 4039 (Ont. C.A.) |
| Test for when party must reveal info  | **May be a duty to reveal info even when not asked for**: when one party relies on other for info for informed choice, and party in possession of info has opportunity to influence choice of other party by concealing info.**Reliance is justified in this case when**:1. Past dealing where reliance was an ‘accepted feature’
2. One party explicitly assumes advisory role
3. Relative positions of the parties with respect to information and understanding of the situation
4. How the parties came into contact might cause one party to rely on other
5. Whether ‘trust and confidence’ is knowingly reposed by one party in other

*None of the factors is determinative and “regard must be had to all the circumstances”* | 978011 Ontario Ltd v Cornell Engineering Co [2001] OJ No 1446 Leave to appeal refused [2001] S.C.C.A. No. 315 |
| Intentionally Made | ***“The representation must have been made with the intention that the plaintiff should act on it* ”** A reasonable person would interpret the purpose of the statement that it be relied on by the representee. | Kingu v. Walmar Ventures Ltd., [1986] B.C.J. No. 597 (B.C.C.A.) |
| **Meaning and Interpretation count** | A person who issues a statement is not only answerable for what he intended to represent, but is answerable for what any one might reasonably suppose to be the meaning of the words he has used. | Arkwright v. Newbold (1881) 17 Ch. D. 301 |
| **Must tell truth if discover a statement made is false** | If a representor makes a statement not known to be false, but then learns of the falsity, there can be deceit if the representor does not correct the statement | Holt, Renfrew & Co. v. Henry Singer Ltd., [1982] A.J. No. 726 (Alta. C.A.) |
| That is False / Untrue | **Person claiming other’s statement is false must prove** - not on the maker of the statement to prove it is true | Melbourne Banking Corp. v. Brougham (1882), 7 App. Cas. 307 (P.C.). |
| **The time for testing the truth of a statement is the time it was made** | Bank of Montreal v. Glendale (Atlantic) Ltd., [1977] 76 D.L.R. (3d) 303 (N.S.C.A.) |
| **Deceit** | Failure to correct statements that have become inaccurate. Withholding newly emerged information could trick representee into entering K on wrong assumption | Crystal Palace FC (2000) Ltd v Dowie [2007] EWHC 1932 (QBD) |
| Disclosed | Misrepresenation was disclosed by representor and – so not ongoing fraudulent misrepr | Burrows v Burke [1984] OJ No 3419 |
| **Ambiguous Statement** | Usually benefit of doubt given to maker of the statement But in this case judge said “you ought to have been more prudent, more cautious, more vigilant…”  | New Brunswick & Canada Railway v. Muggeridge (1860), 62 E.R. 418 (Ch.) 🡪 shareholder could have discovered true state of affairs if read prospectus carefully |
| Negligent misrepr – expert advice/ prediction | When representor is an expert, and representee seeks their advice, the special relationship could lead to **negligent misrepr** if a prediction or forecast is not made with care or is used to induce the other to enter into K based on information that was not given with reasonable care to see it was reliable | Esso Petroleum Co v Mardon [1976] QB 801 (CA) |
| Changeable quality of opinion or prediction | Opinions are difficult to characterise as “untrue” given that opinions are subject to change or, to the extent that they relate to the future, are subject to events beyond the control of the representor.  | Rasch v. Horne, [1930] M.J. No. 29, [1930] 3 D.L.R. 647 (Man. C.A.). |
| Ongoing RepresentationsDuty to correct false information | During Negotiations:A representation can be an ongoing representation; while at one time true, it might become false later — or, while at one time false, it might become true later (issue of deferred reliance)Duty to correct ongoing repr should it become untrue while still reasonable for a representee to rely on it.  | MacDougall page 198Brownlie v Campbell (1880) 5 App Cas 925 HL |
| Vendor had duty to correct the ignorance of the recipient of the representation, based on principles of equity | With v. O’Flanagan, [1936] Ch. 575 (C.A.) 🡪 Vendor had duty to correct income that had been correct but now was reduced  |
| Sophisticated parties | **Statement made during ongoing negotiations for a K are ongoing reprs*** Sophis’d parties, normally no duty of disclosure
* Except in negotiations - must make sure accurate
* Further duty to speak when silence renders a representation now inaccurate as it is already being discussed in negotiations
 | Xerex Exploration Ltd v Petro-Canada [2005] AJ No 774 |
| That is material | Statement must be shown to have induced the P to enter the K by:* Material in an objective sense - Any representee in the actual representees position could reasonably rely on it

**The misrepr was relied on as reason for entering K** | Kingu v. Walmar Ventures Ltd., [1986] B.C.J. No. 597 (B.C.C.A.) |
| **Once in K, no longer a representation! No rescission** | Once in a contract, the misrepresenations lose their effect as representations, and can be no rescission for misrep anymore | Pennsylvnia Shipping Co v Compagnie Nationale de Navigation [1936] 2 A11 ER 1167 (KB) |
| **Substantially Material** | **Representation must be “Substantial” and “Goes to the root of the K”**In Guarantee misrepr became a term, was allowed to constitute a breach when it was substantial and material | Guarantee Co. of North America v Gordon Capital Corp [1999] SCJ No 60 |
| That is relied on | Reliance must have induced the K – operative misrepr by other contracting party at least part of reason to enter into K. | **Edington v Fitzmaurice (1885) 29 Ch D 459 (CA)** |
| **Actual reliance** | Must show actual reliance on representation and causative connection  | Nationwide Building Society v Lewis [1998] Ch 482 (CA) |
| **Reliance depends on facts** | Evidence of reliance depends on facts, subject of K and who parties are 🡪 misrepr of color of car / year in car sale between dealers not likely to be relied on, but between dealer and consumer would be relied on. | **F&B Transport Ltd v White Truck Sales Manitoba Ltd [1965] MJ No 34** |
| **No duty to check representations** | Not sufficient to say they could have figured it out themselves if they read documents carefully  | Redgrave v Hurd (1881) 20 Ch D 1 (CA) |
| **Multiple contracts** | A representation could relate to multiple contracts with same parties. Misrepr might affect one or other related contracts | Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch) |
| FRAUDULENT MISREPR | * Tort aspect – relates to tort of deceit, gives rise to damages
* Contract aspect – relates to remedy of rescission and to defense to a claim for specific performance for breach of K
* Intention element at core of deceit

**Must establish**: OBJ INTENTION statement can be relied on ANDSUBJ intention to make a false statement or be reckless in disregard for whether or not it is true (hard to prove) | MacDougall 207 |
|  | Misrepresentation made with the intent to deceive, recklessly or with no honest belief in its truth to fit the tort of deceit  | **Derry v. Peek (1889), 14 App. Cas. 337 (H.L.).** |
| **Four elements of civil fraud Tort** | 1. False repr made by D
2. Some level of knowledge of the falsehood of the repr on part of D (knowledge or recklessness)
3. Materially induced person to act

P’s actions resulted in a loss | **Bruno Appliance and Furniture Inc v Hryniak [2014] SCJ No 8** |
| Honest intent | Will usually prevent fraudulent misrepresentation | Freeman v Perlman [1999] BCJ No 112 |
|  | Fraud generally not something representee is aware of and generally not thought to be possible therefore to alleviate representor of liability for deception | Demers v Desrochers [2010] OJ No 3870 |
| NEGLIGENT MISREPR | Statement was relied on to enter K with third party. Representor could owe duty of care to recipient of info b/c of position & knowledge | Hedley Byrne & Co v Heller & Partners [1964] AC 465 (HL) |
| ***Remedy*:Can be claim in tort AND rescission of K** | Fact that representor and recipient entreed into K based on misinformation does not prevent the claim for negligent misrep | Esso Petroluem Co v Mardon [1976] QB 801 (CA) |
| A K may exclude liability for negligent misrepresentation – CPR assumed no duty of care –you can’t claim negligence w/o duty | Carman Construction v Canadian pacific Railway [1982] SCJ No 49  |
| Five requirements for a successful claim in negligent misrepresentation**Each must be made out.** | 1. There must be a duty of care based on a special relationship between parties
2. Repr in question must be untrue, inaccurate, or misleading
3. Representor must have acted negligently in making the misrepr
4. Representee must have relied on the negligent misrep
5. Reliance must have been detrimental to representee
 | Queen v Cognos Inc [1993] SCJ No 3From Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465 (H.L.)🡪 Found employer/employee special relationsip, duty of care during interview to make reasonable care with repress made. Failed to exercise reasonable care. Breach of duty of care.  |
|  | **Reliance is at the heart of negligent misrepr**. Also added **public policy** constraints at the heart -  | Hercules Managements Ltd v Ernst & Young [1997] SCJ No 51R v Imperial Tobacco Canada Ltd [2011] SCJ No 42 |
| **Injustice would result if D was absolved of liability****(Held as negligent misrepr even though it was fraudulent)** | * **Defendant’s misrepresentation was fraudulent rather than negligent. However, injustice would result if defendant was absolved of liability.**
* **Five requirements of negligent misrepresentation (Queen v Cognos Inc.)**

**Duty of care based on special relationship** Anns test - *Anns v Merton London Borough Council* [1977] 2 All ER 492**Representation must have been untrue, inaccurate, or misleading*** + D admitted he never intended to register the loan on title of his land.

**Representor must have acted negligently in their representation.*** + D’s misrepresentation was fraudulent rather than negligent. However, injustice would result if defendant was absolved of liability.

**Representee must have relied on the negligent misrepresentation to a reasonable degree*** + **Knowing that statement is false doesn’t bar a claim for neg misrepr**

**Reliance was detrimental for the representee*** + Causation: the plaintiff wouldn’t have made the investment without security
 | Smith v. Landstar Properties 2011 BCCA 44* Contract was for a loan of $100,000 with 8% interest secured against D’s property.
* D failed to register P’s interest in his property
* P filed a caveat against the property,
* D wanted to remove the caveat,
* Ordered to pay loan plus interest
* **“But for” the defendant’s negligent misrepresentation, the plaintiff would not have spent the money to bring an action to secure her interest against the defendant’s property**.
 |
| INNOCENT MISREPRNo remedy - can’t put parties back in original position | **Equity might extend a remedy of rescission of K in misrepresentation**Not necessary to prove that the party who obtained it knew at the time when the representation was made that it was false. *“If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, ‘If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.’”* | **Redgrave v. Hurd (1881), 20 Ch. D. 1 (C.A.)** 🡪 Court held that defendant was entitled to have the contract rescinded for misrepresentation: First case of misrep being contract issue, previously just tort |

# RESCISSION = LAWFUL SETTING ASIDE OF K

* **Undoes whatever occurs and K no longer exists**
* **Both parties will be put back to the position which they were in before the k existed**
* **If you cannot obtain the conditions that occurred before K existed, then rescission is not an option**
(though Kupchak says something contrary)
* **Therefore, there is no remedy for an innocent misrep unless you can acquire the conditions before the K came into existence**

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| **Most common remedy** | Rescission is the general form of contract relief for all forms of misrepresentation  | Morin v Anger [1930] OJ No 50 |
| **Equitable Remedy** | Generally an equitable form of relief – available at discretion of the court to provide redress in the absence of legal rights | Abraham v Wingate Properties Ltd [1985] MJ No 156 |
| Election | If rescission available, representee must elect between affirming K or rescission b/c of misrepr – cant have it both ways | Kellog Brown and Root Inc v MBCA 63 (Man CA) leave to appeal refused [2004] SCCA No 344 (SCC) |
| Must be communicated | For election to be effective – must communicate a clear intention to waive a right to the other party | Brown v Belleville [2013] OJ NO 1071 |
|  | If other party cannot be located, communicating to relevant authorities can be adequate | Car and Universal Finance Co v Caldwell [1965] 1 QB 525 (CA) |
|  | Continuing to use the K or making other arrangements with K party are actions that constitute affirmation of K - Rescission no longer available | Long v Lloyd [1958] 1 WLR 753 (CA) |
| Rescission Effect | Rescission reverses ENTIRE K and sets it aside. | Re Terry and White’s Contract (1886) 32 Ch D 14 (CA) |
| If contract rescinded “avoided” - No basis of claim to secondary obligations No claim for breach of K, no claim for damages, etc though SCC has expressly left this an open question | Guarantee Co of North America v Gordon Capital Corp [1999] SCJ No 60 |
| **Innocent misrepr can = rescission** | Remedy of recission allowed in equity in innocent misrepresentation (when party making statement didn’t know it was false) | Redgrave v Hurd (1881) 20 Ch D 1 (CA) |
| BARS TO RESCISSIONK already executed | **Nothing short of fraud will suffice**, **won’t rescind executed contract in sale of interest in land for innocent misrepr**Contradicted SHORT– not allowing rescission for **innocent misrepr** would deprive parties of their rights | Short v MacLennan [1958] SCJ No 61Solle v Butcher [1949] 2 A11 ER 1107 |
| Hardship | Rescission wont be ordered if it causes hardship to representor or 3rd party | Sheffield Nickel and Silver Plating Co v Unwin (1877) 2 QBD 214 (Div Ct) |
| Hardship is not required as pre-requisite to rescission, don’t have to show the K was ‘manifestly disadvantageous’ | CIBC Mortgages plc v Pitt [1994] 1 AC 200 (HL) |
| Delay(Laches) | Rescission may not be available if person seeking hasn’t acted in a reasonable timeLaches may prejudice D if too long between action and KLong delay is actually a form of AFFIRMATION of K – by the passage of time | Kingu v Walmar Ventures Ltd [1986] BCJ No 597Agreements made in 6/60, problem raised in 9/60, P legal action 11/61. Too much time NOT had passed 🡪 D had not been prejudiced, claim allowed |
| Defense to Equitable ClaimsIe if order of specific performance  | Misrepresentation can be used as a defense to **deny equitable forms of relief for the representor like specific performance or injunction**  *Independent from remedy of rescission – not a right like rescission is* | Cadman v Horner (1810) 18 Ves Jun 10 |
| Equitable remedy typically denied is specific performance | Prather v King Resources Co [1972] AJ 174 |
| Court may not refuse specific performance altogether but may require representor to meet some preconditions in order to obtain specific performance  | Hughes v Jones (1861) 3 De G F & J 307 |
| Tort Damages | * If fraudulent misrepr and there is loss, can seek damages in tort of deceit
* Damages also avail in negligent misrepr
 |  |
| **Damages are restorative - Attempt to put parties back in position they would have been in without tort** | **BG Checo Intl Ltd v BC Hydro & Power Authority [1993] SCJ 1** |
| Goal is to recover all of the loss suffered as a result of the fraudulent misrepresentation | Renault UK Ltd v Fleetpro Technical Services Ltd [2007] A11 ER (D) |
| RestitutionProperty | Any **property** or **property interest** transferred pursuant to K will be returned to party who made the transfer* If not able to return property, rescission impossible - money can substitute for restitution
* **Property cannot be transferred back if irreversibly altered, destroyed, or transferred to 3rd party**
 | Lowe v Suburban Developers (Sault Ste Marie) Ltd [1962] OJ No 622MacDougall 212-213 |
| **Innocent 3rd party** | Transfer to 3rd party BFPFVw/oN makes restitution of original property impossible  | Redican v Nesbitt [1923] SCJ No 47 |
| Rescission only available if no innocent parties have acquired rights for property | Kingu v Walmar Ventures Ltd [1986] BCJ No 597 |
| **Value changes, cant be returned / rescinded**  | Rescission of fraudulent representation about shares impossible – need a different remedy then! | Clarke v Dickson (1858) E1 B1 & E1 148 🡪 had bought shares but 3 years had passed and share value had changed so couldn’t return to their original condition |
| **Parties unable to be put in original position so not able to rescind K** | Lumley v Broadway Coffee Co [1935] OJ No 224 🡪 shares value changes |
| MONEY SUBSTITUTES | **Money awards can be used to compensate when restitution not possible** | MacDougall pg 214 |
|  | Equity will use money compensation by accounting for use of property and deterioration  | Carter v Golland [1937] OJ No 321 |
|  | **Money can substitute for property that cannot be returned, esp if fraudulent misrepr** | Kupchak v Dayson Holdings Co [1965] BCJ No 153 |

# MISTAKE – arises before K accepted – Remedy: Void or Voidable

**Everyone is held to their promises regardless of mistake – you are expected to know what you agree to and be ready to perform it**

* **Related to something believed at or before time of contracting, not a belief that arises after K is formed**
* **Consequence:** K is **void** (never came into existence) or **voidable** (K is brought to an end)

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| **Unilateral** | One party is mistaken and the other is not  | No relief, will not effect validity of K unless: misrepr or problem with offer/accept | Tamplin v James (1880) 15 Ch D 215 |
| **Mutual** | One thinks X and Other thinks YNeither is wrong or right | Court will find a K if it canVoidable unless court can correct (rectify)What would a reasonable person infer from the words and conducts of the parties? | Staiman Steel 1976 ON HCJ |
| **Common** | Both Parties think X but X doesn’t exist, is impossible, or otherwise erroneous | Void K | Bell v Lever Bros |

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| Mistake - GeneralDoesn’t excuse performance of promises as it goes to the heart of the point of the K in the first place  | * One party argues that he didn’t think that the K did what the other party says it did
* Almost always used as alternative to misrepr.
* Difference is **misrepresentation requires fault** to be proven.
* **Misrepresentation is a mistake made by one party *that is attributed to the other party***
* Argument can’t be made just under mistake, some other doctrine must be introduce.
* Legally operative mistake is rare b/c parties are expected that, come what may, they will both live up to their promises
* Acceptable reasons for non-performance:
	+ Misrepresentation
	+ Rescinded K for misrepr
	+ Frustrated by a catastrophic unforeseen event
 | NO absolute law on mistake |
| Allocation of Risk | Party on whom burden of risk is placed is expected to have considered this burden before agreeing to K, shouldn’t be able to get out of K responsibility by claiming mistake later  | Asco Construction Ltd v Epoxy Solutions Inc [2014] OJ No 3243 |
| **One party’s mistake or recklessness should not affect the other parties risk**  | Party can’t rely on its own mistake as a defence if mistake was made negligently or recklessly Party can’t rely on mutual mistake where mistake consists of belief that’s entertained by him w/o any reasonable ground and is used to induce same belief in other party’s mindCan’t rely on mistake as defence if they made it due to negligence, recklessness, willful blindness etc. | McRae v Commonwealth Disposals Commission, [1951] HCA 79🡪 P buys oil tanker from D that is allegedly wrecked on a reef but tanker doesn’t exist; D tries to get out of responsibility🡪 CDC mad the mistake through recklessness – therefore can not claim mistake affected existence of K |
| **Caveat Emptor** | **Unilateral mistake might not affect a K b/c parties are expected to look after their own interests (unless they are misled by other party by misrepr)*** **Buyer beware – caveat emptor**
* **Seller beware – caveat venditor**
 | **Lee v 1435375 Ontario Ltd [2013] OJ No 3726** 🡪 Property not able to be Laundromat 🡪 Purchaser responsible to check zoning & investigate own risk, not vendors responsibility  |
| **Even if one party knows the other is mistaken** | **I**f they aren’t responsible for the misapprehension, generally under no duty to disclose circumstances which might affect the bargain unless failure to do so would amount to fraud | McMaster University v Wilchar Construction Ltd [1971] OJ No 1717 |
| MISTAKE AND FRUSTRATIONMistake - before KFrustration - after K in effect | **Allocation of risk is at the heart of the K – can be upset by doctrines like mistake or frustration relieving parties from what they agreed to.** * Should only come into play where they relate to risks that the parties did not contemplate and did not provide for.

**Frustration** – termination of a K b/c of unforeseen event having catastrophic consequences | MacDougall page 222 |
| MISTAKE CAUSED BY 3RD PARTY | May not affect K if it can be shown party’s mistake is attributable only to a 3rd party where that party should be held liable for damage he/she caused the mistake (ex. Negl misrepr) | MacDougall text page 222-223 |
| Parties entered into child support agreement based on mistaken belief about tax deductions of payments by fault advice from lawyer. Didn’t rescind K though as that would shield all lawyers from advice. | Yawney v Jehring [2006] BCJ No 1682 |
| Mistake as to TermsUnilateral mistake where that party is mistaken about terms of K | * Usually resolved under law of offer, acceptance, certainty of terms
* *“If you offer me XYZ and I accept ABC we do not have a K”*
 | MacDougall text 223 |
| * If we are both mistaken as to the terms of K, there will be no K at all or it will be easy to remedy the problem ourselves.
 | Macdougall text pg 225 |
| **Mistake as to terms is relevant since there’s no “meeting of the minds” → no K & no obligation**  | Smith v Hughes (1871) LR 6 QB 597 (QB) |
| Ambiguous Terms | Parol evidence can be given to clarify, but no consensus of *ad idem* means no binding contract | Raffles v Wichelhaus (1864) 2 H&C 🡪 2 ships with same name, buyer refused to accept delivery d/t ambiguous terms |
|  | **Courts may assume a mutual mistake is actually a unilateral mistake** **and interpret the K to see which is the better view of what was agreed.** 🡪 Dissent focused on the actual offer, not the wording of the invitation to treat. “The parties were never of one mind, they were not referring to the same thing – there was no consensus ad idem”. | Lindsey v Heron and Co [1921] OJ No 75 🡪 confusion of “eastern Cafeterias of Canada” shares vs. “Eastern Cafeteria” shares, court held ambig term was couched in unambiguous language so much be taken to have used it in same sense. |
| **Courts will try to find a contract wherever possible.**  | Will only find mutual mistake (and hence void K) If terms are so ambiguous that even a reasonable bystander could not infer a common intention the court will hold no contract was created. | Staiman Steel Ltd v Commercial & Home Builders Ltd [1976] OJ No 2205 |
|  | Mistake based upon neglectful, negligent formation of the contract is not a reason to void K ***“If a man will not take reasonable care to ascertain what he is buying, he must take the consequences”*** | Tamplin v Jame (1880) 15 Ch D 215  |
| Knowledge of other party’s mistake | **K will be ‘set aside’ in** **equity** if *“one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it’s made, lets him remain under his delusion and conclude a K on mistaken terms instead of pointing out the mistake”* | Solle v Butcher [1949] 2 A11 ER 1107 (CA) |
|  | **“Snapping Up” an Offer:** One party knows that the other’s offer contains a miscalculation and “snaps up” the offer b/c error makes it such a good deal**Buyer ought to have known that there was a mistake – could not have reasonably believed that the offer contained the offerer’s real intention** | Hartog v Colin & Shields [1939] 3 A11 ER 566 (KB) 🡪 sale of animal skilns, priced at per pound instead of per piece, snapped up by buyer |
| **Where non-mistaken party is aware of the other’s mistake as to terms, it might be unconscionable to say that the parties have entered into a K.** **First Case on Mistake:**Judges lay out 3 diff. opinions on what’s required for mistake * Cockburn: **stressed difference between party’s** **motives for entering K** & **term** of K – if it’s not a term then it’s irrelevant. Assumptions outside the K are irrelevant; doesn’t matter what parties thought, it’s a matter of what K was – this was simple offer & acceptance, mistake not here
* Blackburn: **Must be mistake about what K contains** – mistaken assumption not enough. In an action for mistake, **P must show that he was mistaken about what D was promising**. What is important is **mind of P**. Did P think that D thought that P thought he was selling old oats? D’s mind unimportant.
* Hannen**: If one party knew of others mistaken belief as to terms, that could affect existence of K. P must show he was mistaken, that D knew about the mistake and knew P was mistaken (D’s mind matters) – THIS IS THE LAW TODAY**
 | Smith v Hughes (1871) LR 6 QB 597 (QB)P agreed to buy old oats from D, oats not actually old, P pissed |
| Contract A/B situation | Where mistake was not known until after Contract A was formed, unilateral mistake had no effect on Contract A  | Ontario v Ron Engineering & Construction (Eastern) Ltd [1981] SCJ No 13 |
| **Mistake is only relevant at the time tenders are opened, not when the owner elects to accept a tender.** * Traditional contracts-based rule is that **a unilateral mistake does not prevent the acceptance of an offe**r unless 1. The mistake is as to the terms of the contract and 2. The mistake is known to the offeree at the time of acceptance.

**Owner can proceed to an enforceable contract B despite the mistake** | Calgary (City) v Northern Construction Co, [1985] AJ No 741 (Alta CA**NC** erred in tender, was selected as lowest bid, asked to be hired on corrected amount or removed from tender. City refused - failure to execute within 5 days would mean breach of acceptance of tender.City won 🡪 **Northern’s mistake did not vitiate the construction contract.** |
| Unilateral mistake as to terms – no K**NO STATUTE****NO REMEDY** | **Test: Mistake by one party, no misrepresentation by CP****Remedy: Typically no remedy. CP cant get remedy of specific performance against mistaken party.****Where a seller comes to equity seeking specific performance of a K, the courts may refuse b/c of buyers mistake about a material term which the seller was, or ought to have been, aware of.** | Glasner v Royal LePage Real Estate Services Ltd. [1992] BCJ No 2454Seller knew buyer mistakenly thought property was warranted free from dangerous insulation, buyers refused to complete sale when found out K did not have term, seller sought specific performance.  |
| Common Mistake | **Three areas in which mistake can occur that can affect K**: Title, Existence of Subject-Matter, Quality of Subject-Matter |  MacDougall pg 229 |
| **\*\* STATUTE \*\*****K VOID AT CL** | **Mistake** **not to term - but to a common assumption about subject matter** * Similar to operative misrepr but need not be a misrep caused by another person.

**Unilateral Mistaken Assumptions 🡪** irrelevant unless due to fraud on non-mistaken party |  |
| **Mistake at common law 🡪 Nullifies the creation of a valid K.** | Bell v Lever Bros, [1932] AC 161 (HL)P pays severance to D then finds out D did things that he could have been fired for anyways |
| **Elements for Common Mistake** | 1. Must be **common** assumption as to existence of a state of affairs - YES CDN LAW
2. Must be **no warranty by either party** that that state of affairs exists - YES CDN LAW
3. Non-existence of the state of affairs **must not be attributable to the fault of either party** - YES CDN LAW
4. Non-existence of the state of affairs must render performance of the K impossible **–** NOT CDN LAW – overturned by Solle v Butcher
5. State of affairs may be existence, or vital attribute, of consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible – NOT CDN LAW

**If so – Bell v Lever, Great Peace – Remedy: K Void, Damages, No equitable remedy****If not so – Solle v Butcher, Miller Paving – Remedy: K Voidable, CL Damages, Possible equitable remedy** | Great Peace Shipping v Tsavliris Salvage [2002] 4 AII ER 689 D hires P to fix D’s boat but P is farther away than they both thought so D hires someone else, doesn’t pay P🡪 Freedom to contract, allocation of risk and assessment 🡪 You need to stick to the terms, the risks, etc that you elected  |
| Purchaser already owns it | Buyer is already owner of title he is buying – agreement set aside due to common mistake | Cooper v Phibbs (1867) LR 2 HL 149 (HL) |
| Subject-Matter Doesn’t exist | Might not exist or might have been destroyed - if it doesn’t exist it can’t be sold or promised**Usually void by statute (Sale of Goods Act s 10 A contract for the sale of specific goods is void if, without the knowledge of the seller, the goods have perished at the time when the contract is made)** | MacDougall page 230 |
|  | Object exists but is completely different from what parties think it is | Sherwood v Walker 66 Mich 568 🡪 barren cow was actually pregnant |
|  | **Impact of this mistake assumes that it’s not part of K that one of the parties is responsible for ensuring thing exists** → If one of the parties assumed risk that subject matter doesn’t exist, will be contractually liable for failure to perform in event of non-existence | McRae v Commonwealth Disposals Commission [1951] HCA 79 |
| Quality as K termQuality doesnt match**Must be common mistake – Voids K** | **Must be a common mistake about a fundamental matter of that transaction.** **Mistake re: quality can affect K** **→ to extent that mistake goes to essence of K it can effect** K Lord Atkin* Quality = some characteristic of the subject matter other than its existence or title to it
* Mistake won’t affect K unless it was a **mistake by both parties** & is as to a quality that the thing w/o it is essentially different from the thing as it was believed to be
* If quality is a term of contract, mistake re quality = breach of contract
 | **Bell v Lever Bros, [1932] AC 161 (HL)**  |
| **Must be fundamental to essence of K** | **Mistake as to quality will depend on whether the mistake goes to the essence of K.** * Parties had made common mistake

**Applied *Bell v Lever Bros* to see if the mistake as to quality was so fundamental as to effectively destroy the identity of the subject-matter.**  | Diamond v BC Thoroughbred Breeders’ Society [1965] BCJ No 138🡪 parties agreed to sale of horse, but thought it was a different horse 🡪 parties made common mistakeK was not void by mistake as wasn’t fundamental (a horse is a horse) |
| Common Mistake REMEDIES | **Common law 🡪 Nullifies the creation of a valid K if meets criteria by Statute****Equity - can affect K not void in CL for mistake** | Bell v Lever Bros Solle v Butcher |
| Equity**Fairness and equity principles of whether K exists** | Opens possibility of equitable effects of mistake that would operate different than CL🡪 **equity can affect the ongoing existence of K that CL has not deemed void for mistake**🡪 looks more at fairness and equity of allowing contract to continue or not🡪 whereas Great Peace looks at CL and impossibility**Court of equity would relieve a party from the consequence of their mistake so long as it could do so without injustice to third parties*** **Expands Bell v Lever 🡪** allows K to be affected not only by title, quality, existence of subject matter (Bell) but also is mistake has to do with ‘facts’ or ‘rights’ as long as fundamental to K and would be unconscientious not to allow it
* **This allows one party to avoid the K for such mistake or to permit the court to set the K aside**
* **Solle v Butcher accepted in Canada**
* **However in Great Peace Shipping v Tsavilris it was “rolled back” to its position in Bell v Lever 🡪** mistake had to be fundamental to terms, wasn’t found in this case so K was not voided.

**Not settled in common law – equity makes it too broad (Solle) so many feel like in Great Peace it should be narrowed to Bell v Lever.**In Great Peace court held it wasn’t impossible to complete the K, so K upheld.  | Solle v Butcher [1949] 2 A11 ER 1107 (CA)Equitable remedy still available for common mistake if neededBut If you put your mind to the allocation of risk, and you both signed it, then you are both bound to the result.**Accepted in Canada:**Toronto Dominion Bank v Fortin (no 2), [1978] BCJ No 1237, 88 DLR (3d) 232 (BCSC) |
| **Great Peace is NOT the last word on mistake in Canada –** Equitable remedies can apply to common mistake | **Supported Solle v Butcher as good case law in Canada, despite the debate in common law.** * Found common mistake but decided not to award a remedy
* The fact that Miller was sloppy about their invoicing, Gottardo doesn’t have to pay more

**Should allow mistake to void K in equity where it would be unconscionable not to.**  | Miller Paving v B Gottardo Construction [2007] OJ No 2227Parties sign agreement saying P has been paid for all materials. P later tries to charge for something it forgot. |
| Unilateral Mistaken Assumption | **GOOD CASE LAW** **Knowledge of other party’s mistake irrelevant at CL unless mistake induced by fraud*** The mistake was in the motive or reason for making the offer, not in the offer itself.
* There was consequently a consensus and a valid contract.
 | Imperial Glass Ltd v Consolidated Supplies Ltd, [1960 BCJ] No 89, 22 DLR (2d) 759 (BCCA) |
|  | K set aside if other party was aware but “turned a blind eye” | Ramlochan v Ramlochan [2014] OJ No 2827 |
| Mistake as to Identity of the Other Contracting Party | Order sent to a rogue by mistaken party, but addressed to a different firm with a similar address. Court held no K as had made mistake as to recipient | Cundy v Lindsay (1878) 3 App Cas 459 HL |
| K voidable as long as no third party involved | Where dealings are face-to-face, the contract is with the person present, not the person who the person present is mistaken for.Court found seller intended to sell to rogue who was present, not the well-known person he thought he was who was not present | Phillips v Brooks Ltd [1919] 2 KB 243 (KB)Parties dealing face to face. Seller believe a rogue who presented as a well known person. So seller let rogue have a ring without first clearing a cheque. Cheque bounced, rogue had already sold ring to 3rd party and left. |
|  | **K VOIDABLE so long as 3rd parties have not become involved** | Lewis v Averay [1972] 1 QB 198 (CA) |
|  | **Rule: If you enter K face-to-face** **w/ mistake about their ID, K not affected** Voidable if innocent 3rd party didn’t get rights from rogue in good faithK is w/name in K if done through indirect (written) contact (void)* Face-to-face: strong presumption that each party intends to contract w/the other w/whom he’s dealing (despite ID party may claim to be)
* Written system: no scope or need for such a presumption – concluded that the person who set up that system intended to and could rely on ID of person named in doc
 | Shogun Finance v Hudson [2003] UKHL 62Rogue bought car under false pretenses. Rogue sold to 3rd party and disappeared.  |
| NON EST FACTUM **“That is not my doing”****CL doctrine****Mistake as to nature of K****VOIDS K** | **CL doctrine dealing with mistake as to nature of the K*** Written K’s only
* Arises in the context of a written K where one party disputes that he or she ought to be held responsible for anything under the K

NOT useable if no blameworthiness on other party | MacDougall text 240-241 |
| Where a written K contains signature but other party never signed it | Shogun Finance Ltd v Hudson, [2003] UKHL 62 |
| **Forgery or Justifiable mistake*** Can argue NEF as defence b/c D was not, in fact, a party to the agreement at all, may never have heard of it before – someone else may have fraudulently named them as party or forged signature
* Party to arrangement never heard of it before.
* Right person named in K, and even signed it, but person didn’t know it was a K (not often successful 🡪 could have been simple carelessness 🡪 doctrine won’t get a careless person off the hook!
 | MacDougall text 240-241 |
| NEF TEST**Would a reasonable person with the traits similar to the party have taken the same actions as the party pleading non est factum took?** | **Doctrine also applies to situations where the signatory did sign the document but:**1. Signatory was not careless as to what they were signing
2. The document was fundamentally different than what they believed it to be

Doctrine applies to anyone who, through no fault of their own, to have no real understanding of the purport of a particular document.A party that misleads the other party cannot rely on Non Est FactumYou cannot rely on Non Est Factum if you are careless in signing the document**Applies in cases of permanent or temporary inability to have any real understanding of the document, whether due to poor education, illness, or innate incapacity.** | Gallie v Lee [1971] AC 1004 (HL) (SAUNDERS v ANGLIA BUILDING)P negotiating with ICBC and they couldn’t read. Thought they were signing something else. |
| **Must take reasonable care to claim NEF** | **P must establish that there was a difference between the doc as it is & the doc as they believed it to be** Application of the principle depends of the circumstances. It was the carelessness of the respondent that caused the loss. The respondent should bear the responsibility otherwise the innocent party would have to bear the responsibility.  | **Affirms Gaillie v Lee**Marvco Color Research Ltd v Harris [1982] SCJ No 98D re-signed mortgage b/c told there was mistake w/dates; D did this w/J present, told he didn’t have to read it; really signed a new mortgage |

# RECTIFICATION – Part of Law of Mistake – Doctrine: How much K can be changed

**K was agreed by both parties to but written down wrongly.**

**Written K is changed by order of the court 🡪 Equity can change K so that the written contract reflects actual agreement**

* **Equitable remedy** – prevents a written document from being used as an engine of fraud or misconduct.
* P must establish oral terms weren’t included in written document. D ought to have known about errors.
* **Burden of Proof: higher than BOP but below BARD** (*Bercovici; Sylvan Lake*)
* **CONSIDER SALE OF GOODS ACT**

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| --- | --- | --- |
| **Common mistake only (occ unilateral)** | **Corrective device to return people to original position.** | Performance Industries Ltd v Sylvan Lake Golf and Tennis Club 2002 SCC 19 |
| **Documentation of K** | **Not about intention; it’s about documentation of K** Compare written record to terms as agreed – were they recorded wrong? Then rectify the document | Frederick E Rose (London) Ltd v William H Pim Junior & Co [1953] 2 QB Lord Denning |
|  | If you can’t point to prior agreement that written K has departed from when K was written down, can’t be rectification  | Shafron v KRG Insurance Brokers [2009] SCJ No 6 |
|  | Subsequent actions can be considered when determining intention of the K* After K entered, subsequent actions of parties can be considered to determine what intention of K was
* Can only use rectification if no fair & reasonable doubt is left (higher than BOP)
* Necessary to show that the parties were in complete agreement & just wrote down terms incorrectly
 | Bercovici v Palmer, 1966 D agreed to buy P’s store, a misunderstanding took place and another piece of property was transferred as well. D claims transfer was intention of the K. AT trial, P won since property was never mentioned in negotiations and D never behaved as if he owned it – ruled to be a common mistake)  |
| Rectification in:Common MistakeMutual mistakeUnilateral mistake | **Common Mistake in written record -** one party (D) arguing against existence of mistake; other party (P) bears onus of showing that there was such a mistake on BOPWritten K does not reflect actual and ascertainable agreement by the parties.**Mutual Mistake** – both parties agree there is a mistake, but argue for different ways to fix it. Court may find no K at all b/c of failure of offer and acceptance**Unilateral Mistake** – one party is content w/the record as it stands & other party is not → other party acknowledges that they’re the only mistake party and that written record reflects agreement as wanted by other party * Claim for rectification for unilateral mistake is very difficult to achieve
* Mere unilateral mistake not enough – non-mistaken party must be trying to take advantage
* Error can be fraudulent or innocent → just that orally agreed terms were not written down properly
* D must be shown to have known or “ought to have known” of the other party’s error.

**4 preconditions to allow rectification to be used for unilateral mistake:**1. Must establish there was a prior oral K w/definite, ascertainable terms
2. Other party knew or ought to have known of the error and P did not
	1. Attempt to rely on erroneous written doc must amount to “fraud or equivalent of fraud”
3. P must show “the precise form” in which the written instrument can be made to express the prior intention
4. All of the above must be established w/ “convincing proof” (between civil BOP & crim BARD)

**Due diligence**: rectification not a substitute for due diligence; however, can’t be full requirement for unilateral mistake b/c P seeks no more than enforcement of prior oral agreement → just a factor that will be taken into account (b/c rectification is equitable & judges have discretion) | Fraser v Houston [2006] BCJ No 290 leave to appeal refused [2006] SCCA no 133 (SCC)Canada (AG) v Fairmont Hotels Inc., 2016 SCC 56Bercovici v Palmer, [1966] SJ No 230, 58 WWR 111 (Sask CA)Sylvan Lake Golf v Performance Industries, [2002] SCJ No 20 P wanted to build 2 rows of houses requiring 180 yards but K said 180ft; all other measurements in K were yards |
| **Burden of proof** | Balance of probabilities – makes test for rectification easier to satisfy | H(F) v McDougall [2008] SCJ No 54 |
| **Inconsistent arguments** | If you make inconsistent arguments that conflict with your unilateral mistake in rectification, the court will factor that negatively into your rectification argument. | Stevens v Stevens, [2013] OJ No 1912, 2013 ONCA 267 (Ont CA) |

# Protection of Weaker Parties

* Freedom to contract is tempered b/c there is a notion in CL or statutory law that one party needs to be protected.
* Doctrines are **equitable**, although **duress** has possible consequences in CL

|  |  |  |
| --- | --- | --- |
| **No single protective doctrine**  | CL has developed “piecemeal solutions in response to demonstrated problems of unfairness”* Equity intervenes to strike down unconscionable bargains
* Parliament regulates exemption clauses and the form of certain agreements
* CL holds that certain K require the utmost good faith
 | Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 QB 433 |
|  | One party needs protection if perceived to be at a notable and legally significant disadvantage against the other party  | MacDougall pg 249 |
|  | Attempts to unify various CL doctrines into one principle. Denning created new doctrine of “inequality of bargaining power” | Lloyd’s Bank v Bundy [1975] QB 326 (CA) |
|  | Courts can say they are “simply doing justice” instead of using a doctrine applying to protecting weaker parties. | Gaertner v Fiesta Dance Studios Ltd [1972] BCJ No 766 |
| DURESS **Pressure when making K - can be from 3rd party****CL = VOID****EQUITY = VOIDABLE****OR Obligations not enforceable****OPTION OF WEAKER PARTY** | **Duress operates w/respect to circumstances that surround the making of the K and their impact on ability of a pressured person to make a real choice.****TEST: duress must exist** **at the time K was entered into*** One party not in position to accept or make an offer, didn’t have a legally operative mind, was compelled to enter K
* Threat can be from a 3rd party outside of the K

**Equity makes K voidable or finds that certain obligations are not enforceable at option of weaker party*** May not be voidable if 3rd party would be affected

If found under CL, K is void (neither party can control whether duress makes K void) | MacDougall pg 252 |
|  | **“Coercion of the will” historical focus on duress -**  | Cumming v Ince (1847) 11 QB 112 |
| KEY CASE – DURESS TEST Factors to determine if there was coercion of the will | **Coercion of the will vitiates consent****Can be applied after formation of K but would have to argue there was some element being changed or newly agreed to – but they did it under duress.** 1. Did the person **protest**?
2. Did he have a **practical and reasonable alternative course** open to him?
3. Was he **independently advised**?
4. Did he take **timely steps to avoid the contract**?
5. *Greater Fredericton*: Added **5th Element**: Examining the legitimacy of the threat. Is there a legal reason for exerting the pressure?
 | Pao On v Lau Yiu Long, [1980] AC 614 (PC) |
|  |  |  |
| Duress to the person  | Threat to harm the person or another person | Saxon v Saxon [1976] BCJ No 1309 🡪 Threat of husband to harm children constitutes duress in mother/wife |
|  | Pressure doesn’t have to be SOLE reason person entered K– duress only needs to be one of the reasons | Barton v Armstrong [1976] AC 104 (PC)  |
| Duress to goods or property | Threat to damage or take the other party’s propertyHistorically a K could not be set aside for this type of duress  | Text 254 |
|  | Payments made under protest and duress could be recovered | Knutson v Bourkes Syndicate [1941] SCJ No 21 |
|  | Lack of physical violence doesn’t mean you cant claim duress – threat to damage property counts | Occidental Worldwide Investment Corp v Skihs A/S Avanti; the Siboen and the Sibotre [1976] 1 Lloyds Rep 293 |
|  |  |  |
| Economic Duress \*\* rarely successful | **To be economic duress ha to be more than “commercial pressure”, has to be coercion which vitiated consent.*** Economic duress can satisfy the traditional criteria for duress so as to make the contract voidable.
* **“It must be shown that the payment made or the K entered into was not a voluntary act”.**
 | Pao On v Lau Yiu Long [1980] AC 614 (PC)Pressure to swap shares with another co and then sell back at fixed rate one year later |
|  | **Emphasis on whether the threat was ‘illegitimate’ rather than ‘coerced will’**Does not matter whether the party demanding payments thought he or she was entitled to do so.  | Knutson v Bourkes Syndicate [1941] SCJ No 21 |
| KEY CASE – LEGITIMATE THREAT TEST | **Consideration of whether or not threat was illegitimate**1. Nature of the pressure (decisive?)
	* Unlawful activity usually illegitimate
	* Some lawful activity illegitimate (blackmail)
2. Nature of demand which pressure is applied to support

Duress can also exist if the threat is a lawful action (ie blackmail to report a crime) | Universe Tankships Inc of Monrovia v International Transport Wrokers Federation [1983] 1 AC 366 (HL) |
| Economic Duress in Canada | **Doctrine of economic duress is accepted in Canada** | Stott v Merit Investment Corp [1988] OJ No 134🡪 Salesman pressured to assume liability on bad customer account |
| KEY CASE – ECONOMIC DURESS TEST | **Court accepted traditional test from Pao On**1. Did the person **protest**?
2. Did he have a **practical and reasonable alternative course** open to him?
3. Was he **independently advised**?
4. Did he take **timely steps to avoid the contract**?

**Added that you must then decide if the pressure was legitimate.** **Consideration of whether or not threat was illegitimate (from** Universe Tankships Inc of Monrovia v International Transport Workers Federation)1. Nature of the pressure (decisive?)
2. Nature of the demand which the pressure is applied to support
 | Gordon v Roebuck [1992] OJ No 1499 Lawyers trustees for diff parties in property investments; duress to close documents, threats to pay moneys 🡪 **Court did not find a remedy as duress was legitimate** |
| Test for Economic Duress in Canada | **NB court of appeal rejected the relevance of legitimacy of pressure in context of modifying an existing K*** “The criterion of illegitimate pressure adds unnecessary complexity to the law of economic duress”
* True cornerstone of duress = **lack of consent**
* **Onus** on the **pressuring party** to prove modification to K wasn’t procured under duress
* **Judge doubted relevance of getting independent legal advice as consideration to duress**

**Two conditions precedent to finding Economic Duress:**1. Promise must be extracted as a result of the exercise of “pressure” (i.e. demand or threat)
2. Exercise of that pressure must be such that coerced party has no practical alternative but to comply

**Did the coerced party consent to K variation?** 1. Was there **consideration**? (Court will be more sympathetic if NO)
2. Was it made “**under protest**” or “**without prejudice**”? (Failure to voice objection may be fatal to claim)
3. Did the coerced party take **reasonable steps to disaffirm the variation** as soon as practicable? (Can’t sit on it)
 | Greater Fredericton Airport v NAV Canada, [2008] NBJ No 108GFA agreed “under protest” to pay NAV for needed equipment; NAV had existing obligation to provide that equipment. Absence of fresh consideration not important provided there was no economic duress**FREQUENTLY CITED** |
| UNDUE INFLUENCE **Contract Void / Voidable****Equity: Rescission / Unenforceable** | The unconscientious use by one person of power possessed by him over another in order to induce the other to enter a contract. While duress is coercion of the will, undue influence is “domination of the will”. Some duress falling short of the common law requirements may still be undue influence. | Brooks v Alker, [1975] OJ No 2416, 60 DLR (3d) 577 (Ont HCJ) |
| KEY CASE: Undue InfluenceTest | 1. **A relationship capable of giving rise to the undue influence**
2. **Abuse to the influence generated by that relationship**
* Magnitude of the disadvantage is evidence of the exercise of influence.
 | National Commercial Bank (Jamaica) Ltd v Hew, [2003] JCJ No 51, [2003] UKPC 51 (PC) Geffen v Goodman Estate, [1991] SCJ No 53, [1991] 2 SCR 353 (SCC) |
| Establishing relationship of undue influenceIrrebutable | **Irrebuttable Presumption of Influence in Relationship:*** Parent – child
* Guardian – ward
* Trustee – beneficiary
* Lawyer – client
* Medical advisor – patient

**Must prove:** 1. That the relationship existed (not that you put trust and confidence in that person – that part is irrebuttable)
2. That the exploitation of the relationship caused harm
 | Royal Bank of Scotland PLC v Etridge (No 2), [2001] 3 WLR 1021 (HL)Bank of Montreal v Duguid, [2000] OJ No 1356, 47 OR (3d) 737 (Ont CA)Brooks v Alker, [1975] OJ No 2416, 60 DLR (3d) 557 (Ont HCJ) |
| Rebuttable | **Rebuttable Presumption of Influence in Relationship:*** Spouses – depending on individual circumstances may rely more or less on a spouse
* Not a closed list of relationships
* Doubtful to claim in commercial relationships

**Must prove:** 1. That you were in a relationship that you put trust and confidence in stronger person
2. That the exploitation of the relationship caused harm

Once presumption established, **D must rebut** w/ evidence that transaction was entered into “as a result of claimant’s own free will and informed thought” * May entail showing:
	+ No actual influence was deployed
	+ P had independent advice
 | Geffen v Goodman Estate, [1991] SCJ No 53Trust set up by woman w/mental health issues, son argues her brothers unduly influence her to do it  |
| **Not quite duress = undue influence in equity****Makes K voidable** | **Duress** falling short of the CL requirements may also constitute undue influence in equity but is different as it is a more direct threat* Equitable doctrine in origin & scope
* Considers **nature of relationship** between parties to see whether that relationship creates a situation of UI rather than particular event at the time K was entered (duress)
 | Earl of Aylesford v Morris (1873) 8 Ch App 484 |
| Undue influence of 3rd parties | To be established, 3rd party must be agent for stronger party or with notice of that party  | Bank of Credit and Commerce International SA v Aboody, [1990] 1 QB 923 (CA) |
|  | Unless stronger party takes reasonable steps to ensure that the agreement had been properly obtained, the stronger party has notice | Gold v Rosenberg, [1997] SCJ No 93 [1997] 3 SCR 767 (SCC) |
| Unconscionability**Equitable doctrine****Remedy:** **Rescission OR** **Unenforceable** | **Relief against unfair advantage gained by unconscientious use of power by a stronger party** * Clear descendent of undue influence
* Involves examination of parties’ relationship, but focuses more on circumstances of creation of **particular agreement**; often involves relationships that last no longer than creation of particular K in Q
* Concerned w/ situations that are “tantamount to fraud” vs. UI – more concerned w/abuses of trust/confidence

**Court more apt to tinker w/K and find part of K unconscionable** | **Hunter Engineering Co v Syncrude Canada Ltd [1989] SCJ No 23** \*\* K cam be found unenforceable after formation – focus on fairness in contracts |
| KEY CASE – Test for unconscionability | **Test for determining unconscionability:**1. Proof of inequality in position of the parties arising out of ignorance, need or distress of weaker that left him in power of stronger party
2. Proof of substantial unfairness obtained by the stronger party

**Once above 2 proved = presumption of fraud;** **Burden of proof shifts to stronger party to prove that bargain was fair, just & reasonable** | Morrison v Coast Finance Ltd, 1965 [BCCA] \* also see Harry v KrueOld widow induced into mortgaging her home to allow 2 men to buy carsK between woman and bankVillians not involved in KMortgage set aside, transferred to another finance company |
| 4 necessary elements of unconscionability | 1. Grossly unfair and improvident transaction;
2. Lack of independent legal advice or other suitable advice;
3. Overwhelming imbalance in bargaining power caused by the “victim’s” ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. Other party’s knowingly taking advantage of vulnerability
 | Cain v Clarica Life Insurance Co, [2005] AJ No 1743, 2003 ABCA 437 (Alta CA) |
| 4 categories for inequality between parties**All to do with “inequality of bargaining power”** | 1. **Duress of goods** = inequality in bargaining power (voidable transaction)
2. **Unconscionable transactions** = unfair advantage gained by unconscientious use of power by stronger party
3. **Undue influence**
4. **Undue pressure (duress)** = a K should be based on free & voluntary agency of the individual who enters it
* **Subsequently rejected in England, but influential in Canada** → Wilson J. treated unconscionability as equivalent to inequality of bargaining power in *Hunter v Syncrude*; equivalency accepted by SCC in *Tercon*
* **Problem w/Dennings’ approach: doesn’t take into account all the differences in existing doctrines** → lessens the flexibility provided to the courts by various doctrines

\*Independent legal advice cannot save every transaction but absence of it may be fatal\*This view has not been generally accepted, but is sometimes used to “inform” decisions (e.g. Lambert in Harry) | ***Lloyd’s Bank v Bundy, 1975*** [ENGLAND]D mortgages his farm to help son’s debt, bank forecloses on itP wins\*\*Gives relief to one who, w/o independent advice, enters into a K upon terms that are very unfair or transfers property for a consideration that is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs/desires, or by his own ignorance/infirmity, coupled w/undue influences/pressures brought to bear on him by or for the benefit of the other\*\*  |
| Two Tests for Unconscionability | **McIntyre:** Basically, Morrison Test (inequality + fraud)**Lambert:** Sets out new test that takes focus away from the individual and puts focus on the bargaining itself and the K **Test: Did the transaction, seen as a whole, diverge significantly enough from community standards of morality so that it should be rescinded?****Problem**: What is the community? What is morality? What is immoral? **Benefits**: Much more open-ended and less structures by an intricate list of pre-requisites.  | Harry v Kreutziger, 1978 [BCCA] \*\*can use both tests b/c SCC hasn’t ruled on which one should win\*\* P sold fishing boat to D for low price, D said P could get a new license but D knew this was a lieP wins |
| Outcome of unconscionability**Rescission****OR****Unenforceability** | In order to do justice and equity in the context of unconscionability, the traditional responses are **rescission and unenforceability**.Partial rescission to the advantage of the weaker partyIn Canada, inequality of bargaining power and unconscionability are taken to be the same thing | Morrison v Coast Finance Ltd, [1965] BCJ No 178, 54 WWR 257 (BCCA)Hunter Engineering Co v Syncrude Canada Ltd, [1989] SCJ No 23, [1989] 1 SCR 426 (SCC).Tercon Contractors Ltd v British Columbia (Transportation and Highways), [2010] SCJ No 4, 2010 SCC 4 (SCC |

# Illegality - Contract prohibited / unenforceable

**Parties are trying to accomplish something in the K that they ought not to do according to law**

**Various policy concerns law has about particular type of K, its setting, or its purpose/effect**

**Could be illegal because of 1) formation 2) performance 3) intention & knowledge of parties**

**FORMATION: VOID CONSEQUENCES OF EXECUTION: UNENFORCEABLE OR VOIDABLE**

**2 Categories: STATUTORY AND COMMON LAW**

|  |  |  |
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| STATUTORY ILLEGALITY | If the **creation** of the K is prohibited by statute, then it is **void** (*Still* tries to change this) | If the **execution** of the K is prohibited, equity may step in to make it unenforceable or voidable based on the facts and policy (*Still* has a new slightly different approach). |
| **Older approach:****Formulation** | If formulation or making of K is illegal, K = void;  | Rogers v Leonard [1973] OJ No 2130🡪 Land sale breached *Lords Day Act* Court: K illegal on formation - no damages even though D knew illegal |
|  | However, this illegality must be express. Courts are reluctant to make something illegal by implication. | Archbolds (Freightage Ltd v S Spanglett Ltd [1961] 1 QB 374 (CA)🡪 Carrier did not have license to transport whisky, whisky stolen, did not know carrier didn’t have right license, K not expressly prohibited by statute so K not illegal |
| **Older Approach: Performance****Legal intent** | If the contract is incapable of being legally performed (Narcotics trafficking), it is intrinsically illegal.If a contract can be performed legally, illegal intent of the other party must be proven by the party seeking to get the contract deemed illegal (presumption = legal intent) | K-G v Presswood Bros Ltd, [1965] OJ No 1093, [1966] 1 OR 316 (Ont CA) |
| **No illegal intent** | A party who does not have the illegal intent at the outset can acquire it later if that party knowingly participates in the illegality | Ashmore, Benson, Pease & Co. v AV Dawson Ltd, [1973] 1 WLR 828 (CA) |
| Consequences illegal – K is unenforceable | **If consequences of K are illegal, K unenforceable (not void)** – courts can find a way around unenforceable K through restitution or:1. Where party claiming for return of property is less at fault
2. Where claimant ‘repents’ before the illegal K is performed
3. Where claimant has an independent right to recover (ex. recovery through tort)
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| Formation of K illegal | **TEST: Did a statute make the formation of K illegal?** | Re Mahmoud and Ispahani [1921] 2 KB 716 (CA)Order prohibited sale of linseed oil w/o license, seller had license but buyer did not tho said he did. Buyer refused to accept delivery b/c of lack of license 🡪 Court found K was prohibited so unenforceable |
|  |  |  |
|  |  |  |
| **PERFORMANCE OF K ILLEGAL****\*\* Statute \*\*** | Statute might make performance of K unlawful Enforceability depends whether parties intended to break the law**There is a presumption to enforce legality of K so if K is performed illegally, it is necessary to prove intention to break the law** | K-G v Presswood Bros Ltd [1965] OJ No 1093 |
| Intention and Knowledge of Parties | A party who does not have illegal intent can acquire it later if they knowingly participate in the illegality**Damages for breach cant be awarded where party knew of illegality** | Ashmore Benson Pease and Co v AV Dawson Ltd [1973] 1 WLR 828 (CA) |
| Modern Approach**Considers statutory purpose and whether making a K illegal will further the objects of the statute** | IF illegality is indirect, can argue K is not void **Purpose of the law** is considered & how it is best served in a specific purpose (therefore very predictable) [must go to court for this]If statutory prohibition goes to **performance** of K, not its formation, case falls outside illegality doctrine | **Remedy = void, voidable, unenforceable or a combo**  |
|  | **A contract that is prohibited by statute cannot be enforced****BUT distinguished where the illegality is on purpose or by accident** | St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267 (QB)Ship slightly overloaded by accident 🡪 no illegality |
| **Interpret goal of statute:*** **language**
* **scope**
* **purpose**
* **consequences**
 | “Whether or not the statute has this effect [of prohibiting a K] depends on considerations of **public policy**”**Must consider the “mischief’ the statute is trying to prevent with the language, scope, purpose, consequences to innocent party and other relevant considerations** | Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co [1988] 1 QB 216 |
| Consider purpose of statute | Must inquire the object of the statute. Court looks at whose actions were meant to be controlled by the statute and impact the K would have if it were declared void | Canada Permanent Trust Co v MacLeod [1979] NSJ No 754Mortgage was registered contrary to a statute. Was it void for illegality?  |
| Public Policy | *“Where a K is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so”* |  |
|  | Illegaility = public policy considerations - not interests of the parties. As such, a judge may be able to use illegality regardless of whether the parties want it | Les Laboratories Servier v Apotex Inc, [2014 UKSC 55, [2015] AC 430 (SC) |
| KEY CASE TO CITE | Courts must consider bigger context:* Serious consequence of invalidating a K,
* Social utility of those consequences and
* Class of persons for whom prohibition was enacted

→ **Affirms modern approach to dealing w/illegality** **Public policy dimension manifest in** 1. Strong belief that person should not benefit from their own wrong
2. Relief should not be available to a party if it would have the effect of undermining the purposes or objects of statutes
 | Still v Canada (Minister of National Revenue) [1997] FCJ No 1622P mistakenly thought she could work in Canada. Paid EI premiums and worked. Laid off, applied for EI, and turned down as employment had been illegal. **Court held: not disentitled to EI on grounds of illegality****REMEDY: K unenforceable** |
| Common Law Illegaility | K can be rendered unenforceable on the grounds that it **is contrary to public policy**  | **Diff to get courts to accept new heads of public policy** |
| **Restraint of Trade** | One party agrees to a restrictive covenant not to work in or use their talents, skills or knowledge in a given area (possibly everywhere) for a given period of time (possibly forever) → CL is not jazzed on this type of agreement  |  |
| Acceptable restraint of trade | Some restraints of trade are acceptable not illegal or contrary to public policy as there may be a legitimate reason for them | Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co [1894] AC 535 |
|  | Two conditions considered for acceptable restraint of trade* **Must be reasonable in the interest of the parties** – must afford adequate protection to the party whose favour it is imposed
* **Must be reasonable in the interest of the public** – must be in no way injurious to the public
 | Herbert Morris Ltd v Saxelby [1916] 1 AC 688 |
| Non-Compete clause illegal unless reasonably necessary | **Covenant to not compete will be illegal, absent a reason for the restriction**Restriction must be reasonably necessary to render the transaction contract or arrangement effective in order to be justified | Vancouver Malt and Sake Brewing Co v Vancouver Breweries [1934] AC 181 (PC)  |
|  |  |  |
| TEST for restraint of trade**Sale of business OK****Employment NOT OK** | **A balance must be struck between between Freedom of Contract and Society’s Needs.** **Test:*** **Restraint offers adequate protection to the party in whose favor it is imposed**
* **It must in no way be injurious to the public**

Different attitude to restrictive covenants in employment contracts (not ok) as opposed to those in sale of business contracts (ok):* Sale of business would be unsaleable if denied the right to assure the purchaser that they would not become competition
* Whereas in employment, imbalance of bargaining power may lead to oppression and denial of right to employee following termination

**Also upheld by Rothstein J. in Shafron v KRG Insurance**  | Elsley Estate v JG Collins Insurance Agencies Ltd [1978] SCJ No 47Sold insurance business and agreed not to work in insurance locally for 10 years and pay $1000 for every breach 🡪 reasonable as sale of business and lots of competition in area |
| KEY CASE TO CITEPublic policy on restraint of trade | **Restraints of trade contrary to public policy at CL b/c they interfere w/individual liberty and exercise of trade should be encouraged & free*** *Prima facie* presumption that restraints are unenforceable
* Exception: where the restraint of trade is found to be reasonable – **onus on party seeking to enforce covenant to show reasonableness**; absent a reason for the restriction, covenant not to compete will be illegal

How to determine **reasonableness:** geographic coverage, period of time it’s in effect, extent | Shafron v KRG Insurance Brokers [2009] SCJ No 6D signed covenant wont work in insurance in the “Metropolitan City of Vancouver” for 3 years but area not specifically defined – that term doesn’t mean anything.Restrictive covenant wasn’t in sale contract but was in employment contract. |
| Commercial ContextKEY CASE TO CITE**REMEDY Unenforceable** | **Commercial: imbalance of power not presumed between vendor and purchaser** **Priority in law: enabling a purchaser to protect its investment by building ties with new customers** * Especially important when parties negotiated on equal terms, were advised by competent professionals, and the K does not create an imbalance
* Consider why and for what purposes the non-solicitation clause was entered into. Consider if this impacts the issue?
* Geography doesn’t limit territory in non-solicitation clauses anymore!
* **ISSUE** was it an employee relationship or a business sale relationships? Different rules for each due to imbalance of power between employers and employees. No equivalent in commercial context though in vendor/purchaser relationship
 | Payette v Guay Inc [2013] SCJ No 45Sale of assets between Guay and Payette. Had a non-competition and non-solicitation clause for 5 years of sale. P could work for G as an employee. G fired P. P went to work for another company.**Held:** Non-competition clause was negotiated in sales contract, it was reasonable. |
| K to commit a crime | Contrary to public policy for a court to enforce a contractual undertaking by an assurance company to pay a sum of money to an assureds rep in the event of his committing suicide which was then a crime | Beresford v Royal Insurance Co [1938] AC 586 (HL) |
|  | Court will not enforce agreement to misstate value or revenue to avoid taxes | Alexander v Rayson [1936] 1 KB 169 (CA) |
|  | Court will not enforce agreement to dupe people into paying money or they would be alleged to have committed adultery“No court will lend its aid to the enforcement of illegal, immoral, or fraudulent contracts” | Byron v Tremaine (1898) 31 NSR 425 (NSCA) |
|  | Hockey player had contract with one team but signed with another. Sued on second contract, but they must have known he could only play for them if he broke the first contract so not helped by court. | Wanderers’ Hockey Club v Johnson [1913] BCJ No 70 |
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| K prejudicial to public administation | Situations where individuals have K to corrupt public officialsThe evil is with the tampering of a public officer | Carr-Harris v Canadian General Electric Co [1921] OJ No 145 |
|  |  |  |
| K prejudicial to administration of justice | Agreement to pay to stifle a prosecution is illegal and cannot be enforced | Peoples’ Bank of Halifax v Johnson [1892] SCJ No 27 |
| Contract to pay a witness remuneration beyond statutory fees in a divorce suit is illegal (cant bribe a witness, subverts the administration of justice) | Hendry v Zimmerman [1947] MJ No 40 |
| K prejudicial to foreign relations | Illegal to have a contract to raise money to support hostilities against a friendly government | De Wutz v Hendricks (1824) 2 Bing 314 |
| Immoral K = Illegal | **Argument whether morality has a place in the law of contract –** unless **a particular contract falls afoul of some other public policy head, morals alone is insufficient to affect enforceability of K** | MacDougall text 285 |
|  | Immoral Contract is illegal* No distinction between immoral and illegal purpose – no course of action can arise out of either
 | Pearce v Brooks (1866) LR 1 Ex 213Prostitute was sued, P could not recover b/c prostitution was immoral |
|  | Contracts prejudicial to family life / status of marriage illegalCourt found K illegal and void as it was ‘in restraint of marriage’ | Lower v Peers (1768) 4 Burr 2225Peers promised to not marry anyone but Lowe, but then he married someone else and wanted to enforce the promise to pay |
| Effect of IllegalityK unenforceable | **Historically:** illegality meant that K was void, or at least unenforceable **Basic Effect**: court won’t enforce K; **better to think of consequence as unenforceability rather than K being void b/c in some cases of illegality, 1 party can enforce the K but other can’t** * Can make a K void (traditional), voidable, unenforceable, or they can be adjusted or severed.
 | **Purposive Approach** (***Still***): Fashion a remedy that keeps w/ purpose of the statute |
|  | Illegal doesn’t mean criminal it just means unenforceable | Stephens v Gulf Oil Canada Ltd [1975] OJ No 2552  |
| Public Policy | **Court will not assist in making a party carry out illegal contract****Principle of public policy *ex dolo malo non oritur actio* – no court will lend its aid to a man who founds his cause of action on an immoral or illegal act** | Holman v Johnson (1775) 1 Cowp 341 |
| Recovery of property transferred under illegal K | Generally property including money transferred under illegal contract cannot be recovered. “Neither at law or at equity will the court enforce an illegal contract which has been partially, but not fully, performed.”There can be no restitutionary remedy when the illegal contract has to be relied on | Tinsley v. Milligan [1994] 1 AC 340 (HL)MacDougall text page 287 |
| Parties not equally blameworthy | Court will allow an innocent party to recover what was transferred under the contract, even if the transaction has been completed | Haug & Nellermoe v. Murdoch (1916) 26 DLR 200 (Sask CA) Sale of engine illegal as did not conform with statutes and regulations, unenforceable. Buyer had already paid part - court held seller could not recover balance due. Purchaser entitled to recover money paid as they were not equally blameworthy. |
| Repent before illegal purpose carried out | **If party repents of the illegality before performance of K is completed there can be recovery of property transferred**. | **Ouston v. Zurowski [1985] BCJ No 2181** Paid into illegal pyramid scheme, thought it was legal, when found out illegal wanted money back.  |
| Recovery of property | Doctrine of repentance only applies where property is transferred under a K, can only be used by the penitent party who is seeking to use repentance to recover property | Zimmermann v. Letkeman [1977] SCJ No 106 |
|  | Property can be recovered if the claim to the property does not depend on relying on the illegal contract. * Prima facie, a man is entitled to his own property, and it is not a general principle of our law that when one man’s goods have gotten into another mans possession in consequence of unlawful dealings, the true owner can never be recovered.
 | Bowmakers Ltd v. Barnet Instruments Ltd [1945] KB 65 |

# Frustration

T**ermination of a K consequent upon an unforeseen catastrophic event that makes the K impossible, or prevents the K from being performed in a manner at all similar to what was contemplated by the parties when they entered the K**. (Davis Contractors v Fareham UDC, 1956, [1956] AC 696 (HL) )

* Event must be **unforeseen**
* Can’t be self-induced, not caused by either party
* Must render K impossible to perform or to be wholly different from what was expected

**Frustration vs. Mistake:**

* **Frustration** – essentially mistake that occurs AFTER K came into existence
	+ Has nothing to do w/actions or thoughts of parties themselves → has to do w/event that occurs outside control of the parties
* **Mistake** – deals only w/what happens BEFORE K comes into existence
	+ Connected to the mind of one/both of the parties

**Very unpredictable → can have 2 cases w/seemingly same K/facts & 1 frustrated the other not!**

* Background for lots of cases; parties just trying to get out of a bad deal → courts suspicious of this!
* LESSON: NEVER GIVE ADVICE K IS FRUSTRATED UNLESS STATUTE SAYS SO

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| --- | --- | --- |
| DEVELOPMENT OF CL DOCTRINE | **Historically**: CL didn’t recognize such a catastrophic event was possible**Original attitude of CL** = No such thing as frustration – if you make a promise then you must fulfill it * K set out allocation of risk definitively
* Each party assumed any risks that would make their own promises unexpectedly burdensome or benefits forthcoming unexpectedly meager → K absolute on this point
* If one party failed to perform their primary obligations, no matter what, then secondary obligations were triggered
 | Paradine v Jane, 1647 AI 26, 82 ER 897 (KB)D leased land from P but was forced off land during civil war. P sued for unpaid rent. |
|  | * **1860s, change in attitude** = fact that K could come to complete halt b/c of unforeseen event first thought of as arising by virtue of implied term in K
* Frustration occurs when an item perishes and makes performance of K impossible, at no fault of the parties, as long as they didn’t provide for the circumstances in the K (Frustration = implied term in K)
 | Taylor v Caldwell, (1863), 3 B & S 826 D entered K w/P to supply a concert hall but then the hall burnt down |
| Current Doctrine of Frustration  | **Rule: Frustration occurs when law recognizes that without default of either party a contractual obligation has become incapable of being performed b/c circumstances in which performance is called for would render it a thing radically different from that which was undertaken by K** Frustration CAN’T OCCUR if thing that prevents K from being fulfilled could reasonably have been foreseen | Davis Contractors v Fareham UDC, 1956, [1956] AC 696 (HL) P agreed to build houses for D. Due to post war market not enough labour and construction took longer than anticipated in K [22 months vs. 8] P sues D for more $$ |
| **Unforeseen event****Not fault of parties****K impossible****Or****K radically altered** | **Three overriding factors that govern whether event frustrates K:**1. **Event is unforeseen**
2. **It is not the fault of the parties**
3. **It makes the purpose of the K impossible or drastically more difficult to achieve**
 | J Lauritzen AS v Wijsmuller BV “The Super Servant Two” [1990] 1 Lloyd’s Rep 1 (CA) |
|  | **Multi-Factorial Approach**1. Terms of the K
2. Matrix or context of the K
3. Parties knowledge expectations and assumptions of risk
4. Nature of the supervening event
5. Parties reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances
 | Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage Ltd); The “sea Angel” [2007] EWCA Civ 547 |
| **UNFORESEEN** | **What a reasonable person would have foreseen or contemplated as a risk when entering into K*** If you have insurance for it, hard to say it was unforeseen (ie natural disasters)
* Not intended to relieve from a bad bargain or from consequences of deficient negotiation skills

**Events must be unforeseeable to qualify for frustration. Normal economic/labour issues don’t qualify.*** Economic & Political Events → expected to take into account various economic possibilities including strikes or inflation – highly unlikely as business people must consider economic possibilities
* If event can be anticipated & guarded against in K, party in default can’t claim relief b/c it has happened
* Can’t imply a term where a reasonable man wouldn’t have
 | Canadian Gov’t Merchant Marine Ltd v Canadian Trading Co, [1922] SCJ No 30 CGM contracts to transport things by boat to CTC but, because of dispute between CGM and shipbuilders, boats are not ready in time |
| **Political Events** | Unforeseen political events, such as war between the countries of two contracting parties, that either end the contract or make it extremely difficult to perform, frustrate the contract. | Bayer Co v Farbenfabriken vorm Fried. Bayer and Co, [1994] OR 488 (Ont CA) |
| “Force Majeure Clauses” NOT frustration | State what could happen if certain events occur → NOT FRUSTRATION – if it’s listed in clause, hard to say it was unforeseen Relieves from liability for non-performance – construed strictly**Do not operate if one party caused the event covered by the clause** | Ottawa Electric Co v Ottawa (City) [1903] OJ No 520Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp and Paper Co [1975] SCJ no 46 (found to be cause of “non-availability of markets” in FM Clause so not able to rely on it) |
| Eventualities Reasonably Foreseeable | Parties might not have foreseen events but OUGHT to have | Walton Harvel Ltd v Walker & Homfrays Ltd [1931] 1 Ch 274 (CA) |
|  | **Not providing for things that ought to have been foreseen is not fatal to frustration, for some judges.** Lord Denning said doesn’t have to be unforeseen, just not provided for in K. | Ocean Tramp Tankers Corp v V/O Sovfracht “The Eugenia” [1964] 2 QB 226 |
| Not Caused By The Parties | **Self-induced frustration doesn’t lead to a frustrated K*** If one party causes the sudden rise in prices or the change in law, they should not be able to use that event to get out of K
* If K can’t be performed due to an act or election of 1 party, then K can’t be frustrated
 | Maritime National Fish v Ocean Trawlers, [1935] AC 524P chartered trawler from D knowing there was legislation limiting # of licenses granted for trawler type. P had 5 trawlers but only granted 3 licenses - P could choose which boats they applied to. Tried to say K was frustrated for the boats chartered from D |
| Makes the purpose of K impossible or drastically more difficult | **Cases where frustration is used:*** K could be carried out but circumstances have changed so the K would be totally different that previously contemplated
 | Claude Neon General Advertising Ltd v Sing [1941] NSJ No 9 |
| **Death****Destruction****Illness****Method****Purpose destroyed** | * Destruction of the essence of the K after K in existence
* Death of one of the parties esp if service cannot be provided by estate or successor
* Certain illnesses, incapacity of a nature likely to continue long enough to make it impossible to perform or be completely different
* Death or illness of a 3rd person relied on in the K
 | Taylor v Caldwell (above)Text p 297Lafreniere v Leduc [1990] OJ No 405Krell v Henry [1903] 2 KB 740 (CA) |
|  | * METHOD – may still be technically able to perform promises, but the method they contemplated cant be used now
 | Tsakiroglou & Co v Noblee Thorl GmbH [1962] AC 93 (HL) |
|  | * DISAPPEARANCE OF PURPOSE – reason for K no longer exists through no fault of parties.
 | “Coronation cases cancellation of coronation of King Eward VII d/t illness caused property use and ships Ks to be frustrated. |
| Change in Legislation | **A change in legislation after K is entered into can make K impossible** Ie. Planning Act change in Ontario frustrated lot sales d/t zoning changes* Frustration NOT allowed if Act was fault of one of the parties (self-induced) OR the possibility of such an event was contemplated by parties or provided for in K
* Allowed b/c change in legislation went **to the heart of the K**
 | Capital Quality Homes v Colwyn Const Ltd, [1975] OJ No 2435P agreed to buy 26 lots from P w/intention of splitting them up. New legislation then passed restricting ability to convey lots. P wants his deposit $$ back |
| Change must go to heart of the K | Change in legislation won’t always cause frustration – change must go to the **foundation of the agreement/K*** Distinguished from ***Capital*** on basis that this K was only for parcel of land, not for 26 deeds → as such, change in legislation didn’t go to “very foundation of the agreement” b/c it was merely for sale of parcel of land (despite the fact that both parties knew P intended to subdivide)
	+ Subdivision wasn’t provided for in K; K wasn’t conditional on ability of purchaser to carry out his intention → if you want to guard against risk of zoning/law changes, should provide for it in K
 | Victoria Wood v Ondrey, [1977] OJ No 2143P agreed to buy land from D to subdivide, before completion of K, new legislation introduced that precluded subdivision |
|  | Distinguised Victoria Wood as there was more than mere knowledge of the vendor that the purchaser wanted a certain development. In this case the change in circumstanced in zoning “radically altered” the contract within the meaning of the Davis Contractors test. | KBK No 138 Ventures Ltd. V Canada Safeway [2000] BCJ No 938 |
| EFFECTS OF FRUSTRATION | * At CL, K comes to a halt at moment of frustrating event
* Obligations that were not yet performed disappear
 | MacDougall pg 300 |
| CL Consequences | If one party performed but was not to be paid until after the frustrating event, then no payment unless the performance was part of a severable obligation | Appleby v Myers (1867) LR 2 CP 651 (Ex Ch) |
|  | **Payments that were due before the frustrating event are still due** | St Catherines (City) v Ontario Hydro-Electric Power Commission [1927] OJ No 139 |
|  | If one party paid but the other didn’t do anything can recover $If something was done by other party, then no $ could be recovered.  | Fibrosa Spola Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 (HL) |
| Problem with CL approach | All or nothing approach – if K is frustrated the WHOLE K is frustrated Can have drastic consequences and provide profound injustices Ex. 1 party did everything pre-frustration & other party did nothing → 2nd party gets full benefit for free |  |
| Statutory Consequences | * More strictly divides loss between the parties
* Sets out a restitution based method for calculating the value of benefits and expenditures
* Losses are split between parties
* Right to restitution for any benefit conferred prior to frustration
 |  |
| Frustrated Contracts Act | **S 4** Allows for severance of contracts, where possible, of parts of the contract that are wholly performed or wholly performed but unpaid.**S 5** Right of restitution for any benefits conferred prior to frustration. **S 5(2)** Strictly divides loss between parties: If the frustrating event has caused a loss in the value of the benefit conferred, then the parties split that loss. | Frustrated Contract Act, RSBC 1996, c 166 |
| Limitation Act | **Contracts claims have to be made within 6 years of existence of claim*** “in more modern statutes” must come within 2 years or less
* New breach of K every time the obligation is supposed to have occurred (can be daily)
* Delayed claims can be subject to objection by other party of laches or delay
 | Limitation Act, [SBC 2012] c 13, s 6(1) |
| When the limitation period starts | Runs from the time at which the breach ought reasonably to have been discovered by the party alleging breach* Limitation period only affects court getting involved, not legitimacy of claim
* Passing limitation period doesn’t mean claim isn’t valid, just isn’t enforceable
 | Central Trust Co v Rafuse, [1986] SCJ No 52, [1986] 2 SCR 147 (SCC) |
| BC Limitation Period | **2 years from the discovery of the claim** | Limitation Act, [SBC 2012] c 13, s 6(1) |
| Recurring breaches | Damages can be claimed for all breaches that come within the limitation period before the claim for damages is asserted. | Pickering Square Inc v Trillium College Inc, [2016] OJ No 1118, 2016 ONCA 179 (Ont CA) |

# Frustrated Contract Act

**Section 1:** Statute doesn’t tell us when K is frustrated

**Section 4:** If any part of K is wholly performed before frustration kick in OR it’s all done except for payment & can be severed from remainder of K, then that part must be treated as a separate K

**Section 5:**

**Defines benefit in 5(1)** - something done in the fulfillment of contractual obligations, whether or not the person for whose benefit it was done received the benefit (“means” = exhaustive definition)

**s. 5(2)** - If aspects of transaction frustrated, still governed by K law → primary obligations don’t exist but secondary obligations still apply. If circumstances creating frustration cause **total or partial loss in value** of a benefit to a party required to make restitution then **loss is** **split equally between parties**

**Section 7 Restitution**:

1. If restitution is claimed for obligation other than to pay $$, claim based on **reasonable expenditures** incurred in performing the K (not necessarily the **actual** expenditures incurred)
2. If performance under **s. 7(1)** consisted of or included delivery of property that could be and IS returned (undamaged) w/in reasonable time post-frustration, amount of claim must be reduced by value of property returned
	1. This step is **discretionary** – only kicks in if party decides to return the party

**Section 8:** Calculation of Restitution $$ → don’t take into account any: (a) loss of profits OR (b) insurance $$ where it may be payable

* + Restitution based on whatever fair value is of the gain → causing **disgorgement of gain**, not rewarding someone’s loss
	+ Value of things **when they were created** is what’s taken into account
	+ Account must be taken of any benefits which remain in the hands of the party claiming restitution
		- Benefit created for K, but remains in hands of person claiming → assess value of that benefit **at time of frustration** & deduct it from the claim

# ELIMINATING OR ALTERING THE CONTRACT

Applies to Mistake and Frustration

|  |  |  |  |
| --- | --- | --- | --- |
| ELIMINATING* Result: No K
* Either undone, or never existed legally
* No obligations
* Anything transferred must be returned
* Declarations:1) contract is void2) K is rescinded

**VOID** - NO K - BOTH PARITES **VOIDABLE** – K UNDONE – PROTECTED PARTY | Void at Common Law * Void=never existed = NO CONTRACT
* Assessment of law
* Parties can try to create a valid K
* Any person can argue K is void (even 3rd party)

**Reasons**: 1) **Flaw in formation** (missing offer/accept/certainty/etc) MacDougall 3212) **Incapacity** (but may be *unenforceable)* Soon v Watson, INFANTS ACT3) **Illegality** (but may be *unenforceable)* Restraint of trade Shafron v KRG  Insur Brokers [2009] SCJ No 6 Imbalance of power in commercial  context Payette v Guay Inc [2013] SCJ No 454) **Common Mistake** Bell v Lever Bros, Great Peace Shipping Ltd. V  Tsavliris Salvage (International Ltd. “The Great Peace”), [2002] 4 A11  ER 69 (CA)5) **Duress** (but now *voidable*, able to elect to keep alive) Saxon v Saxon,  [1976] BCJ No 1309. [1976] 4 WWR 300 (BCSC) 6) **Non est factum** \*\* see next column7) **Fraudulent misrepr** – tort damages | Consequence of voidness | * No remedies
* No K (nothing to terminate)
* No CL damages
* If transfers have occurred, may have restitution
 |
| Voidness in context of non est factum(mistake) | * If one party misled the other, the first cannot declare void K Gallie v Lee (Saunders v Anglia Building Society) [1971] AC 1004 (HL)
* Can only be argued by mistaken party
 |
| Mistaken Identities | * If face to face K not void Shogun Finance Ltd v Hudson, [2003] UKHL 62, [2003] 3 WLR 1371 (HL)
* K VOIDABLE so long as 3rd parties have not become involved Lewis v Averay
 |
| Voidable: Setting Aside K / Rescinding / Avoiding - Equity* K is valid, but flawed to disadvantage of one party
* Weaker party given option to undo the K or keep it
* K undone, neither party liable for obligations
* **Equitable relief** **– most cases – facilitates money substitutes**
* Court will consider fairness or hardship to other parties even 3rd party
* If no property transferred, easy to rescind Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 130 ALR 570 (HCA)
* Parties put back in original position

**Equitable Reasons**:1) **Misrepresentation**: Express or implied communication: Ryan v Moore, Intentional: Kingu v Walmar, Falsity: Melbourne Banking, Material:  Guarantee Co of N.A. v Gordon Reliance: Nationwide Building Society2) **Undue influence**3) **Duress**4) **Common mistake** Solle v Butcher [1949] 2 A11 ER 1107 (CA)5) **Unconscionability**6) **Incapacity****Theme: one party has been treated dishonestly** **or unfairly at formative stage, largely due to other party*** + If dishonesty or unfairness caused by 3rd party, only voidable if other party knew of it and took advantage Duranty’s Case (1858) 26 Beav 268, 53 ER 901
 | Availability of Damages | * Should be no basis for claim of secondary obligations under avoided K, altho this is still open Guarantee Co of North America v Gordon Capital Corp [1999] SCJ No 60
* Could still claim damages in tort even if K undone (ie operative misrepr)
 |
| Severability | * Must be whole K, not part Kingu v Walmar Ventures Ltd [1986] BCJ No 597 (BCCA)
* However could sever void part from valid part into two separate Ks
* If not severed into 2 separate Ks, severed part of K is considered *unenforceable*
 |
| ALTERING * Result: altered K
* K has different impact than when it was created
* **Part of K altered through:**1) severance2) judicial adjustment of terms3) unenforceability4) discharge by frustration
* **Termination for breach also alters K**
 | Severance of K **Removing part or dividing into 2 Ks*** **Reasons**: 1) illegality (most common)2) Unconscionability

**Peripheral terms only:*** Not heart of K, only peripheral
* Cannot create significantly different K than agreed to William E Thomson Associates Inc v Carpenter [1989] OJ No 1459

**Blue Pencil Test**:* Courts can’t add to K, only take away
* Remove certain words of a clause and see if the K still makes sense Transport North America Express Inc v New Solutions Financial Corp [2004} SCJ No 9
* **New Approach**: “**Notional severance” Court allowed term to be rewritten for parties to make what is left of K consistent with original intent** Transport North American Express Inc v New Solutions Financial Corp, [2004] SCJ No 9
* **Abuse of Process**: Court may not use blue pencil test if it abuses court processes Canadian American Financial Corp (Canada) Ltd v King [1989] BCJ No 701
 | “Hiving off” / Removing partCourts try to save KMacDougall 317Peripheral terms only – not at the heart | * Some terms taken out – those parts considered void, voidable, or unenforceable
* Whether void or unenforceable depends on why its being severed

**Reasons**:1) nonsense terms - Void Nicolene Ltd v Simmonds [1953] 1 QB 543 (CA)2) terms too uncertain Nicolene Ltd v Simmods3) illegal terms MacDougall 3224) Exclusion or limitation that other party had no notice of5) Clause is unconscionable MacDougall 322 – one party has choice whether to sever or not then severed part is unenforceable |
| Dividing KMacDougall 312K split in 2, one part kept alive, other part not**Can be used to avoid parole evidence rule** | * **Statute may require written K only** so oral terms divided off
* **Main contract (written) and collateral K (oral)**
* In practice not thought of by parties as 2 Ks, so it is a “legal fiction” VK Mason Construction v Bank of Nova Scotia [1985] SCJ No 12
* **Privity** – if more than two parties, CL may create separate Ks for each set of parties
* However multiple Ks for one situation can become awkward for consideration issues Pao On v Lau Yiu Long [1980] AC 614
* **Breach** – breached part can be separated and leave rest of obligations intact
* **Frustration** – severed into constituent parts to prevent whole agreement being frustrated – can sever parts that have been performed
 |
| Judicial Adjustment of Terms* No recognized doctrine or principle of generalized judicial intervention or adjustment
* Positive interference into the contract be the court: 4 ways
* Unconscionability can be the basis for promissory estoppel, and at least some courts have used promissory estoppel to rewrite contracts. M (N) v A (AT), [2003] BCJ No 1139, 2003 BCCA 297 (BCCA)
 | Creation of K / terms | * Court supplies K by implied terms
* Not good law?? Butler Machine Tool Co v Ex-Cell-O Corp [1979] 1 A11 ER 965 (CA)
 |
| Setting Aside on Terms | * Court allowed substitution of one set of obligations to be replaced by a different set Solle v Butcher [1949] 2 AII ER 1107 (CA)
* Doubtful, but not yet overturned
 |
| Notional Severance | * Adding reasonably substantial terms Transport NA
* Grants lots of remedial discretion to judges
* SCC limited this approach in Shafron v KRG Insurance Brokers (Western) Inc [2009] SCJ No 6
 |
| Correct Written record of K | * Can allow adjustment of K to correct unconscionability Morrison v Coast Finance Ltd [1965] BCJ No 178 🡪 Court altered the arrangement of lending agreement to correct old ladies position
 |
| Unenforceability **– NO remedy or order of performance**- **Court can declare all or part of the K unenforceable** MacDougall 317* Application by one of the parties
* Machinery of the court cannot be used to assist in enforcing obligations or provide a remedy MacDougall 317
* If don’t need court then not an issue to worry about, won’t affect K performance
* **Anything transferred under unenforceable K is legally transferred** Monnickendam v Leanse (1923) 39 TLR 445 (KB)
* Unenforceable obligations that are preformed are effective as intended in K
* **Unenforceable obligations not performed cannot be forced by courts or get remedy for non-performance**
 | **Reasons for Unenforceability:****Consideration** Dalhousie College v Boutilier Estate, [1934] SCR 642 (SCC)* No consideration then K unenforceable
* If promise carried out w/o consideration, law of gift applies to make property transfer effective and law of restitution or unjust enrichment might require compensation for what has been given
 |
| **Exclusion and limitation clauses** If unfair or unconscionable p 318 |
| **Illegality -** makes K void, better said as unforceable MacDougall p 317 |
| **Capacity not shown** MacDougall p 318-319 |
| **Statutory Limitation Periods expired**Limitation Act, SBC 2012, c 13) |
| **Penalty Clause** Elsley Estate v JG Collins Insruacne Agencies Ltd., [1978] SCJ No 47, [1978] 2 SCR 916 (SCC)) |
| Discharge by Frustration * Primary AND secondary obligations discharged
* Up to point of frustration, K was valid
* Mostly dealt with by statutes in most jurisdictions
* Frustrated Ks are unenforceableMacDougall 319
 | **Unforeseen catastrophic event making contract impossible** MacDougall p 300**;** Frustrated Contract Act, RSBC 1996, c 166**; exception:** Appleby v Myers (1867), LR 2 CP 651 (Ex Ch)* If one party had performed an obligation before the point of frustration, but was not to be paid until after the frustrating event, that party went without payment at common law
* Unless it could be said that performance was part of a severable obligation for which payment could have been claimed before the frustrating event
 |

|  |  |  |
| --- | --- | --- |
|  | **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*)\*\*

# Remedies – Primary Obligation Breached – Termination, Damages, Equitable Rem

**As soon as a primary obligation is breached = right to damages**

**Assumes K not contested therefore excusing performance of obligations**

**Contract remedies** arise when there is a breach of an obligation – ie a term or a duty of honest performance – termination of K

**Statutory remedies**

* Many remedies available for certain events including breach
* Vary jurisdiction to jurisdiction, limited to specific situations
* **Sale of Goods Act** remedies are generally statutory versions of existing CL and equitable remedies

**Damages - Compensation**

* Point is to compensate party to put them in position they would have been in had the promises been fulfilled (vs. torts, which is backwards looking – meant to restore party to position they were in before tort occurred)

**Normal Rule of K Recovery:** measures damages by value of promised performance

Damages

1. **Principle of Damages**: Interests Protected per Fuller and Purdue, from Text pg 339
2. **3 reasons for contract damages:**
	1. **Fulfill Expectation** = the money expected to get or save from the k (e.g. profits) \*\* usual reason
	2. **Fulfill Reliance** = the expense incurred because the innocent party relied on the k (e.g. expenses)
	3. **Restitution** = tend to be a debt owed by the innocent party

 🡪 Expectation and reliance damages tend not to both be awarded – 1 or the other *Sunshine v Bay*

1. **Forms of Damages:**
	1. General 🡪 compensation
	2. Specific 🡪Loss of profit, wasted expenditure, interest, etc
	3. Punitive
2. **3 Types of Damages:**
	* **Expectation** - Put innocent party in position they would have been in had K been fulfilled = **ruling principle for breach of K**
	* **Reliance** - Put innocent party in position they would have been in had they not entered into K (position pre-K)
* **Restitution** - give back what the innocent party transferred to the breaker of the K (disgorge D of value he received from P)

Expectation Interest

**POLICY – POINT OF DAMAGES is to hold parties accountable to their promises – Fairness, justice, ability to rely on the other party to meet their obligations**

**EI harder to bail on than reliance interest – incentivizes people to fulfill their obligations!**

* Forward looking! Certainty about the future in contracts - ought to be able to rely on that future potential
* **Aspect of** **distributive justice** – no longer merely seeking to heal disturbed status quo, looking to bring it into a new situation
* **Promotes market activity – commercial certainty, people more confident in entering Ks**
* **Value of expectancy** = position you would have been in if K finished
	+ Ex. lost profits – sometimes hard to quantify
* **Weakest argument** = disappointment in not getting what was promised
	+ Arouses sense of injury
	+ Enforcement of promises is important – discourages breach of K
	+ Purpose = penalizing breach (not compensating P)
* **Rule of “avoidable harms**” = **P is protected only to extent that he has in reliance on the K forgone other equally advantageous opportunities for accomplishing the same end**
	+ Qualification on the protection accorded the expectancy
* **Easier method of recovery vs. reliance interest = more effective sanction against K breach**
* Also important to promote & facilitate reliance on biz agreements

Reliance Interest

**Aims to put innocent party in position they would have been in had they not entered into K (position pre-K)**

* Good for when P hasn’t suffered loss measureable by expectation interest or has been unable to prove/establish expectation losses w/requisite degree of certainty
* P can also seek these damages if they will get more $$ this way than through expectation or if expectation measures difficult to value monetarily
* Can’t claim reliance to get out of a bad bargain

**2 Ways of Looking at Reliance:**

1. **Compensation for wasted expenditure** – P may have incurred expenses b/c they were relying on other party to perform their obligations – where that party fails to perform, some or all of P’s expenditure is wasted
2. **Way of using $$ to undo the loss P would have avoided if they’d not entered into K in the first place**

Restitution

**Aims to give back what the innocent party transferred to the breaker of the K (disgorge D of value he received from P)**

* **Object:** Prevent gain by a promisor defaulting at the expense of the promise (i.e. D-based)
* Can involve both losses occurred & gains prevented (**disgorgement damages**)
* Strongest case for judicial intervention

**2 elements**

1. Reliance by the promisee
2. Resultant gain by the promisor

In assessment of damages you **measure the extent of the injury**, determine whether it was **caused** by D’s act, and ascertain whether P has included the **same item** of damage twice in his complaint

- what doctrine asked to address – Damages for Breach – EI

|  |  |
| --- | --- |
| DAMAGES Expectation Interest* At CL, at the moment of the frustrating event the K come to a halt
* **Obligations that were not yet performed disappear**
 |  |
| **The rule of CL is that where a party sustains a loss by reason of a breach of K he is so far as money can do it to be placed in the same situation with respect to damages as if the K had been performed** | Robinson v Harman (1848) 1 Exch Rep 850 |
|  |  |
| **Compensation should only be for the expectation, no more no less*** It would be against justice for a party to be permitted to profit by a breach
* Cannot be compensated for a loss never suffered
 | Sally Wertheim v Chicoutimi Pulp Co [1910] JCJ No 3 |
| Frustration Damages Notes |  |
| Payments that were due before the frustrating event are still due | St Catherines (City) v Ontario Hydro-Electric Power Commis [1927] OJ No 139 |
| If one party performed bt was not to be paid until after the frustrating event, then no payment unless the performance was part of a severable obligation | Appleby v Myers (1867) LR 2 CP 651 (Ex Ch) |
| If one party paid but the other didn’t do anything for it, the first party could recover on a total failure of considerationIf no total failure of consideration, something was done by other party, then no money could be recovered.  | Fibrosa Spola Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 (HL) |
| Reliance Interest |  |
| Test for reliance damages: Would the plaintiff have suffered the loss even if the contract had not been broken? If no, then damages | Water’s Edge Resort Ltd v Canada (Attorney-General), [2015] BCJ No 1458, 2015 BCCA 319 (BCCA) |
| **When expectation interests can’t be determined, reliance interests should be awarded** **TEST**: **has there been any assessable loss resulting from breach of K complained of?*** **Purpose of awarding damages:** to put P in position they’d be in if K had been performed (expectation) – when it can’t be quantified, court will look to reliance damages (establish on BOP)
* **Wasted Expenditures:** Claim for wasted expenditure must convince court that $$ was **truly wasted** – can’t claim if you would have incurred costs anyway, or if you can use it elsewhere .
	+ In this case fact that expense was wasted flowed *prima facie* from fact that there was no tanker (first fact = damage; 2nd fact = breach of K)
	+ **Burden of proof** shifts to CDC to establish that, had there been a tanker, expense incurred would equally have been wasted
 | McRae v CDC, (1951) 84 CLR 377 (HC)P buys oil tanker from D that is allegedly wrecked on a reef. P goes to salvage the wreck but there is no boat. Cannot assess potential profits from a salvage tanker |
| **Both reliance and expectation damages can’t be awarded unless it won’t overcompensate** * Can’t get both if = double compensation – P would end up in better position than they started in
 | MacDougall 343 |
| * One should not be able to have the other party pay by way of damages both the lost profit and one’s expenses that were needed to earn profits
* P must elect between either wasted expenditure OR loss of profits
 | Cullinane v British “Rema” Manufacturing Co [1953] 2 A11 ER 1257 (CA) |
| * If profits are too difficult to quantify, reliance damages awarded instead
	+ In this case SV didn’t establish that loss of profits award would have exceeded expenditures, so expenditures = appropriate amount to award as damages for breach
* **Onus on P to show profits > reliance**
* Onus on D to show P’s expenditures to date of breach less than net loss which would have been incurred had the K been completed
* If profits too difficult to quantify, reliance damages awarded instead
 | Sunshine Vacation Villas Ltd v Governor and Company of Adventurers of England Trading into Hudson’s Bay,[1984] BCJ No 1794 – Bay reneged on deal to allow P to become exclusive travel agency in several of its stores |
| Restitution Interest |  |
| **An award of damages to a plaintiff on the basis that the defendant has unfairly retained a profit as a result of his or her own breach*** Restitutionary damages looks at what D has (unfairly) gained or retained as profit as a result of their own breach
* Guide for Restitutionary Damages:
	+ Did P have legit interest in preventing D’s profit-making activity and depriving him of profit?
	+ Did D profit by doing exactly what he contracted not to do?
* Account of profits (disgorgement of D) only appropriate in exceptional circumstances, where other remedies insufficient
 | Attorney General v Blake, [2000] UKHL 45, [2001] 1 AC 268 (HL) – British spy becomes agent for USSR then gets sent to jail for leaking secrets. Busts out of jail & writes book about it. AG sues b/c spy K had a term saying he couldn’t divulge info in books or press |
| A recognized example is interest to account for the time-value of money retained by the defendant at the expense of the plaintiff.**Policy considerations**, such as discouraging business and increased insurance costs, restrict this recovery on most instances | Bank of America Canada v Mutual Trust Co., [2002] SCJ No 44, [2002] 2 SCR 601 (SCC)Surrey County Council v Bredero Homes Ltd., [1993] 1 WLR 1361 (CA) |
| DAMAGES – QUANTIFICATION  |  |
| General Damages:* = (market value of what was supposed to be delivered) – (market value of what was delivered) OR
* = (market price that innocent party paid) – (K price that innocent party was supposed to pay)

When K is broken, P is an innocent party, court will assist P when possible BUT **burden of proof w/P to satisfy court as to amount lost by virtue of D’s breach**Assumed that incorrect goods delivered have no value – up to D to establish that they have some market value |  |
|  **If there is a breach of K, P has right to damages even if they are impossible to calculate** * Court accepted it was impossible to say P would have been one of the winners (had ¼ chance) & that she couldn’t have sold her chance b/c it was personal to her BUT jury might say that if her spot could have been transferred it would have been valuable
* Fact that damages can’t be assessed w/certainty doesn’t relieve wrong-doer of necessity of paying damages for breach → jury must do it’s best, even if it’s guesswork
 | Chaplin v Hicks, 1911Breach of K by organizer of acting/beauty contest, P (1 of 50 finalists) was unable to attend a meeting where she would have had a chance to be one of the 12 winners chosen |
| Speculations & Chances  |  |
| * Depends on how speculative chances of gain were had K not been broken as to whether damages will be awarded
 |  |
| Injured Feelings, Disappointment, Mental Distress* Difficult to quantify damages where what results from breach are injured feelings or other emotions
* **Traditional** CL approach: these types of losses couldn’t be compensated for in damages claim
* **Now:** increasingly common for courts to award compensation = **mental distress damages**
	+ Important = purpose (or at least 1 of the purposes) of K was opposite emotion to that caused by breach
 |  |
| Test to prove Mental Distress Damages: * That an object of the K was to secure a psychological benefit that brings mental distress upon breach w/in the reasonable contemplation of parties
* That the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation

**Mental distress damages should be situated w/in general *Hadley* principle that such a loss have been in the reasonable contemplation of the parties** | Fidler v Sun Life Assurance Co of Canada, 2006 bank teller covered by LTD, lasted a few years, cut off and then reinstated later 🡪 was she entitled to damages for mental distress? YES |
| More than 1 Quantum of Damages**Cost of Completion**: cost of buying substitute performance from another including undoing any defective performance **Difference in Value**: market value of the performance the K breakers undertook minus that actually given |  |
| **Damages should be for the work to be provided, not the difference in value of the property being worked on.*** Economic waste” is not a claim – owner entitled to what he has lost (i.e. the work/structure he was promised)
* D’s breach of K was willful – allowing him to just pay damages for diff. in value is rewarding bad faith & deliberate breach of K
* In reckoning damages for breach of a building or construction K, law aims to give disappointed promisee, so far as $$ will do it, what he was promised
* No unconscionable enrichment when result is to give one party to the K only what the other has promised
 | Groves v John Wunder, 1939 P owns a crappy lot, leases it to D for gravel extraction on condition D leaves it in its original state. D intentionally breaks this. Value of property assessed at $12K but cost of returning it to that state would be $60K |
| Minimal Performance* Issue = where it’s not clear from K exactly what performance the other, breaching party, was to provide (K may have provided for possible range of performance)
* **Principle:** **assessment of damages only requires determination of minimum performance P is entitled to under the K**
 | If not void for uncertainty, damages awarded based on minimal performance by party in breach Hamilton v Open Window Bakery Ltd [2003] SCJ No 72 |
| DAMAGES – REMOTENESS **Damages that are too remote to make the defendant responsible for them cannot be recovered** MacDougall 348* Any claims for damages must first go to **Hadley v Baxendale**
* Then look at other cases (can cite **Victoria** or **Koufos** after that)
 |  |
| \*\*\*\*\*TEST FOR AWARDING DAMAGES\*\*\*\* MUST CITE**Damages** will be awarded for losses that:1. **General Damages** = occurred naturally from the breach (anyone else that would have suffered the breach would suffer the same losses) – “may fairly and reasonably be considered arising naturally, according to the usual course of things, from the breach itself” → only terms of K are relevant (not purpose, intention, etc.)
2. **Special Damages** = were contemplated by the parties as a probable result of the breach of K (i.e. will flow from a breach of K from **what the parties know**, not what is in the K) – “anything that may reasonably be supposed to have been in the contemplation of both parties at the time they made the K, as the probable result of the breach”
	1. Special circumstances needed to be known at the time the K was entered into → P must communicate them to D
	2. Just need to know general nature, not details/specifics
 | Hadley v Baxendale, 1854 P had component of steam engine broke causing them to shut down their mill, D was supposed to take component to shop for new part. Delivery of component was delayed due to D’s neglect, callusing P’s mill to remain closed longer than expected. P sued to recover those damages **Decision**: For D. P did not let D know about the necessity of shaft so can’t claim profit losses. |
| [BROAD] Made the **remoteness test very broad** – introduced 6 points on law of remoteness for damages:1. Governing purpose of damages is to put the party whose rights were violated in same position, as $$ can do, as if his rights had been observed. This would included improbable losses (too harsh) so there are qualifications (2-6)
2. Aggrieved party is only entitled to recover such part of the resulting loss that was **foreseeable at time of K**
3. What was at the time reasonably foreseeable depends on the **knowledge then possessed by the parties**, or at all events, by the party who later commits the breach
4. Knowledge possessed is of 2 kinds – **imputed** & **actual**
	1. Imputed = knowledge that is ordinary/normal/expected (first branch of ***Hadley***)
	2. Actual = special circumstances (2nd branch of ***Hadley***)
5. **For the breacher of K to be liable, NOT necessary that he should actually have asked himself what loss might result from a breach**. Suffices that, if he HAD considered the Q, he would, as a reasonable man, have concluded that the loss in Q was liable to result (**objective test**)
6. Nor, to make a particular loss recoverable, need it be proved t hat upon a given state of knowledge the D could, as a reasonable man, foresee that a breach must necessarily result in that loss. It’s enough he could foresee it was **likely** to result = **serious possibility or real danger that’s likely to occur**
 | **Victoria Laundry v Newman, 1949** P bought a boiler from D, D agreed to deliver by certain day. Boiler was broken during the dismantling process on D’s property & had to be fixed, ended up being delivered late**Decision:** P gets some damages (reasonably foreseeable) but not others. |
| [NARROW] → Overrules broad definition of remoteness in ***Victoria*** for a much **narrower definition*** Test for remoteness in Ks should be more difficult than test in torts – in ***Hadley*** not every type of foreseeable damage could have been intended to be included as either arising naturally or be w/in contemplation of the parties at time of entering into K
* **Crucial Q:** whether, on the info available to D when K was made, he should, or the reasonable man in his position would, have realized that such loss was **sufficiently likely to result** from breach of K to make it proper to hold that loss flowed naturally from breach or that loss of that kind should have been w/in his contemplation
 | **Koufos v Czarnikow (The Heron II), 1967** A ship delivering sugar breached its k to deliver the sugar on time. The sugar arrived 9 days late and the price for sugar had dramatically decreased in this time. Ship captain ought to have known this was “not unlikely.**Decision:** Loss of profit too remote |
| DAMAGES – MITIGATION **What constitutes mitigation?** – Depends on the type of K & obligations (dependent on the facts Payzu Ltd v Saunders [1919] 2 KB 581 (CA)* Assessment of damages by reference of market prices most obvious & frequent use of mitigation principle in practice (ex. P may pay more for a replacement item/service but is only able to recover what the market was demanding for that item/service)
* P also expected to take steps to stem ongoing losses where they result from breach (ex. malfunctioning piece of equipment will be expected to be repaired/replaced w/in reasonable period of time so as to stanch the losses that result
* Also expected to find replacement K to put unused labour/facilities to use
* If employee wrongfully dismissed, have a duty to find replacement work
 |  |
| **P has obligation to take reasonable steps to mitigate the losses and keeps damages reasonable** | O’Grady v Westminster Scaffolding Ltd [1962] 2 Lloyd’s Rep 238 (QB) |
| P efforts to mitigate are factor to be taken into account in assessing whether P’s claim for damages is reasonable  | Text page 361 |
| **When to Mitigate:*** Mitigation not expected until P learns of breach, or w/in reasonable time thereafter

**Required to stem losses as early as is reasonable and to bring your damages claim in a timely way** * Damages will be recoverable in an amount representing what the purchaser would have had to pay for the goods in the market, less the K price, **at the time of breach**
* P’s own impecuniosity not a defense for not taking reasonable steps to mitigate
* Damages only awarded for reasonable amount of time
 | **Asamera Oil Corp v Sea Oil and General Corp, 1978**P had rights to shares from D, D broke k. Share prices changed over long trial – when should $ be calculated? **Decision:** Use price when P should have started their claim (after all steps to save K failed). |
| TIME OF MEASUREMENT OF DAMAGES* At CL damages calculated at the time of breach
* Damages in lieu of specific performance calculated at time of judgment
 |  |
| **Damages at common law are to be calculated at the time of breach.****Damages in lieu of specific performance are to be calculated at the time of judgment.****General rule: use value @ time of breach so P can buy goods in the market*** **BUT** if P asks for specific performance K is ‘saved’ as D can deliver at any point before judgment

In this case, damages should be valued at the time of judgement (as this is when the K is really broken). Even though you are entitled to SP, at some point you have to face reality and if you wait beyond what is reasonable, you will get less damages because you did not mitigate.If there is an **anticipatory breach**—one party says they are not going to perform before an actual breach, then you have an election to opt for breach today or to affirm the K (and wait and expect performance and go for damages then). If you know that waiting will increase the amount of damages, courts are divided as to whether this is allowed.  | **Semelhago v Paramadevan, 1996** P buys house from D, D breaks K. P wants SP or damages. Market value of house rose from $205K to $325K in between breach & trail. Which price should be used? |
|  |  |

LIQUIDATED DAMAGES, DEPOSITS AND FORFEITURES

**Liquidated Damages –** what damages will be in event of a breach, agreed to in advance at time K is entered

**Penalty Clause** - If liquidated damages clauses are there to hold a party *in terrorem* or to overcompensate Dunlop Pneumatic Tyre Co v New Garage and Motor Co [1915] AC 79

* **Penalty = agreed to liquidated sum is extravagant and unconscionable**
* Breach consists only in not paying a sum of $$ and sum stipulated is a sum greater than sum which ought to have been paid
* **Presumption** (but no more) that it’s a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serous & others minimal damage
	+ Can be rebutted if it’s shown on the face of the agreement, or on evidence, that the parties have taken into consideration the diff. amounts of damages that might occur and arrived at an amount they felt proper
* CL principles fill in the blanks where parties haven’t agreed to oust CL assessment completely
* Still subject to overarching principle of damages that damages are meant to compensate for failure to perform primary obligation, and no more
	+ Not meant to put P in better position than they would have been had primary obligations been performed, also not meant as a threat to compel other party to perform to avoid more onerous penalty

**Q of construction** to be decided upon the terms & inherent circumstances of each particular K, judged **at time of making the K, not at time of breach**

**Example to understand Cavendish Square Holding 2015:**

**Ratio: XXXXXXX**

**If I gave you an offer of $10 or a sack of sugar, and you choose $10, giving $10 is the primary obligation.**

**If I gave you an offer of give me a sack of sugar OR if not you give me $10, then giving $10 is the secondary obligation, and is a penalty for failing to give a sack of sugar. (The courts don’t care if the value of sugar is only $2, you agreed to the secondary obligation so you need to pay $10).**

|  |  |
| --- | --- |
| Liquidated vs. Penalty |  |
| **Liquidated damages must be a genuine pre-estimate of damages**Simply calling something “liquidated damages” won’t preclude the court from finding it a penalty | Dunlop Pneumatic Tyre Co v New Garage and Motor Co [1915] AC 79  |
| **Test: if the sum is larger than any actual damage which could arise, it is not a bona fide estimate of damages and will be found to be a penalty** | Cavendish Square Holding BV v Talal El Madessi; ParkingEye Ltd v Beavis [2015] UKSC 67 |
| **Liquidated damages provisions should be analyzed on the basis of equitable principles and unconscionability over the strict CL rule of penalty clauses**  | Peachtree II Associates – Dallas LP v 857486 Ontario Ltd [2005] OJ No 2749 |
| **Protection for one party, not both** * Penalty clause amount should not be exceeded, and should not be ignored just because it is to one party’s advantage.
 | Elsley Estate v JG Collings Insurance Agencies Ltd [1978] SCJ No 47**USE PEACHTREE AND CAVENDISH, NOT ELSLEY** |
| **Upholding Agreed Damages if Possible*** Courts hesitant to call a liquidated damages clause a penalty clause, especially in commercial context where parties carefully drafted their K
 | Philips Hong Kong Ltd v Attorney General of Hong Knog (1993), 61 BLR 41 |
| **Amount must be reasonable and not “picked out of the air”**  | Meunier v Clouthier, [1984] OJ No 3188  |
| **Formula instead of fixed sum*** Formula acceptable unless it is clear that whatever figure the formula generates will be too great an amount to satify any legitimate interest
 | HF Clarke Ltd. V Thermidaire Corp, [1974] SCJ No 151Formula found much higher amount than loss of profits, so considered a penalty (“a grossly and punitive response to the problem to which it was addressed”) |
| **Revolving credit agreement - had early termination fee. Was it a genuine** * Did the respondent breach? Yes
* Was it a continuing breach? Entitling the appellant to continue to benefit? No
* Were they required to pay early termination fee? Yes

**Can early termination fees be called fees or are they penalties?** * Look at Dunlop, parties reasoning at time of K not at time of breach
* Since the fee was mutually agreed on, it cant be characterized as a penalty

**FEES THAT are attached to an event and not a breach per se and are reasonable and not overburdensome on parties can be characterized as fees** | Doman Forest Products Ltd v GMAC Commercial Credit Corp – Canada, [2007] BCJ No 265 |
|  |  |
| **Punitive Damages** |  |
| * Punitive damages must be resorted only in exceptional cases and with restraint

Criminal law and quasi-criminal regulatory schemes are the primary vehicles for punishment (not contract punitive damages) | Fidler v Sun Life Assurance Co of Canada [2006] SCJ No 30Insurer had not acted in bad faith, refused to pay punitive damages, upheld by SCC  |
| **Punitive Damages are designed to address the purposes of retribution, deterrence and denunciation** * Requires actionable wrong in addition to the breach (in this case was failure to deal with claim in utmost good faith, especially in insurance)
* Behaviour was exceptionally reprehensible, forced her to settle for less than should have, appellants were financially desperate. Insurance co knew arson claim was contrived
 | Whiten v Pilot Insurance Co, [2002] SCJ No 19 🡪 fire, family escape in only clothes, lost everything. Insurance company delayed for years arguing arson despite no evidence of arson.Punitive damages awarded. Reduced on CA, SCC overturned reduction and gave full award |
| **Aggravated damages must only be imposed where there is an actionable wrong which caused the injury to the P** | Vorvis v Insurance Corp of British Columbia, [1989] SCJ No 46 |
|  |  |
| Formula for Liquidated Damages |  |
| **Formulas for liquidated damages must be reasonable and fair*** If parties intend to be bound by a liquidated damages clause, they must take into account notions of **fairness and reasonableness** (to be judged by the court)
* Even if a formula is used, must be able to defend its results as reasonable

If formula is dependent on time, important that P brings the claim w/in reasonable time | **HF Clarke Ltd v Thermidaire Corp, 1974** Breach of covenant against competition clause not to sell competitors products, remedy stipulated as “gross trading profits”. **Decision**: Formula altered to be net profits and extent of damages limited within a reasonable time. |

Comparison w/Exclusion/Limitation Clause:

* Exclusion/limitation clause can be seen as flip side of a penalty clause in some cases – limitation clause will be an attempt to limit amount of damages that will have to be paid in event of a breach; penalty generally attempt to get too much by way of damages
	+ Both derogate from basic principle of damages – compensation, no more, no less
* CL ascertains whether parties in fact agreed to the provisions (was there notice, was the provision meant to apply in particular context etc.) – if there was notice & agreement, CL would enforce the provision
	+ Equity is different:
		- For liquidated damages that are too greedy, uses penalty doctrine
		- Limitation clause = doctrine of unconscionability (and public policy)
	+ In practice much easier to challenge clause for too much in damages than a limitation clause

Deposits & Forfeitures of Deposits

* **Deposit** = preliminary payment often used to confirm acceptance of a K, to be acceptance itself, or to trigger the other party’s obligations → used as part payment of total purchase price
	+ Has characteristic of primary obligation of payment, but also a condition precedent to other party’s obligations becoming enforceable → if party making payment fails to complete payment obligation after having paid deposit, deposit is forfeited by way of remedy to party who has received it
	+ Damages claim can be made by that same party but credit would have to be given for amount of the deposit that has been forfeited → in this way deposit forms part of remedies (secondary obligations) of party who has paid it
* Whether there is a deposit and whether it can be forfeited on breach is up to the parties to decide in the K – usually “deposit” implies forfeiture in event of default, but doesn’t have to
* Parties can also express intention to have payment be forfeited w/o using “deposit”
* If an amount of $$ is paid and it’s not a deposit or otherwise to be forfeited on breach, then if K is ended, the party who has paid the $$ might be able to claim it back, subject to a cross claim in damages

**Stockloser v Johnson, 1954** (P buys stuff from D by installments, clause in K says D = owner until all payments made, P failed to pay once near the end of K & then sued to recover previous payments, saying clause was a penalty)

→ **Forfeiture clauses have no remedy at common law (but possibly in equity, provided that the required circumstances are met.**

* Judge rules this is not a penalty, D seeks to keep $$ that already belongs to him
* **If there is no forfeiture clause**: as long as seller says buyer can still finish K, buyer can’t get his $$ back
	+ If seller rescinds, buyer can get his $$ back
* May have a remedy in equity by ordering seller to pay back the $$
* Requirements for court to use equitable remedy:
	+ Forfeiture clause must be of a **penal** nature (i.e. sum forfeited out of proportion to the damage)
	+ It must be unconscionable for the seller to retain the $$

***Law and Equity Act, s. 24*** → **Deposits**: Court may relieve against all penalties & forfeitures, & in granting relief may impose any terms as to costs, expenses, damages, compensations & all other matters that the court thinks fit

Debt

CL remedy = claim to have enforced a contractual promise to pay $$ by one K party to the other

* CL compels promisor to do the very thing which he has promised (pay the specified amount of money) – different from damages in which CL doesn’t compel the undertaking party to specifically perform his undertaking but compels him to pay a pecuniary substitute for such performance
* Debt and action for the price are not usually thought to be subject to diminution on basis of a “duty” to mitigate → not a $$ substitute, they directly relate to primary obligation which was a fixed amount of $$
* Might be damages in addition, but debt amount itself is not damages

Equitable Remedies

First look at damages, and if not adequate then go to damages (compensatory usually, can be punitive or equitable damages)

**NOTE**: Neither will be ordered for labour Ks (***Warner Bros v Nelson, 1937***)

Factors Governing Granting Equitable Remedies

|  |  |
| --- | --- |
| **Consideration of the CL matrix** * **“equity follows the law**”
 |  |
| **Adequacy / inadequacy of CL damages** * Is there a remedy available in CL? (if contract void or rescinded, or contract precludes damages as remedy)
 |  |
| * Will CL remedies/damages by adequate or does equity need to order specific performance or injunction to cause primary obligations to be performed
 | Jeffrie v Hedriksen [2016] NSJ No 23  |
| * Is subject matter so unique that nothing else will suffice
 | Cohen v Roche [1927] 1 KB 169 |
| **PROPERTY**:Historically, real property treated as something unique that $$ could not substitute for – increasingly that is being challenged (condo etc.) |  |
| → especially the case if the land is to be used as an investment or for early resale | John Dodge Holdings Ltd v 805062 Ontario Ltd, [2003] OJ No 350 |
| 🡪 although investment could still attract specific performance | 1244034 Alberta Ltd v Walton Intl Group [2007] AJ No 1260 |
| 🡪 Court ordered specific performance for dispute over farmland left to brothers, family history to the land made it unique | Raymod v Anderson [2011] SJ no 313 |
| Similar properties in the same area does not mean property is not unique 🡪 subjective desires of the purchaser make it unique | Lalani v Wenn Estate [2011] BCJ No 2358 |
| **Applicant must come “with clean hands”*** Equity looks at P’s behaviour & conduct re: K
* No misrepresentations, no breach
* Where agreement is one which involves continuing or future acts to be performed by P, he must fail unless he can show that he’s ready & willing to carry out obligations
 |  |
| **Timely request*** If P hasn’t acted in timely fashion, P guilty of **laches** (delay)
* Factors to consider:
	+ Length of delay
	+ Nature of acts done during the interval
 |  |
| **Hardship to D or to 3rd parties*** Court will protect interests of a 3rd party who has an existing K w/D, which could not be performed if K w/P were ordered performed

Even if K w/ 3rd party is later, if that later K has been performed & 3rd party is a *bona fide* (“good faith”) purchaser w/o notice of P’s claim, then SP won’t be ordered so as to upset its position |  |
| * if a stranger to the contract gets possession of the subject-matter of the contract he may be liable to be made a party to an action for specific performance of the contract
 | Irving Industries (Irving Wire Products Division) Ltd v Canadian Long Island Petroleums 1974 |
| **Obligations extending over a period of time** * SP generally won’t work b/c obligations said to need constant supervision (***Beswick*** = **exception** b/c obligations weren’t complicated [just fixed payments])
 |  |
| **Obligation to perform a personal service** * Generally court won’t order equitable remedy where it would mean ordering D to perform a personal service (disinclined to supervise performance over period of time)
* Court ought not enforce performance of negative obligations if their enforcement will effectively compel the servant to perform his positive obligations under the K *Warner Bros v Nelson*
 |  |
| **Mutuality** * Court won’t order equitable remedies if both parties can’t get the same remedy
 |  |

|  |  |
| --- | --- |
| Injunction* Order of the court to a party of the K to do or not do something (perform an obligation or not break it)
* **Forces someone to not breach**
 |  |
| **Limitation clause precludes damages 🡪** equitable remedy of injunction often available  | AB v CD [2014] EWCA Civ 229 |
|  |  |
| Specific performance* Order by court to a contracting party to perform the K obligations – very much like an injunction to perform the whole K
	1. Common claim in context of contractual disputes
	2. Confirms primary obligations in K
	3. Equitable nature – no binding rules, what is most fair in circumstance, discretionary
 |  |
| **If land is being used for investment or resale, likely not “unique” enough to attract specific performance beyond damages**Test for uniqueness of property* For real property, SP can be granted if person seeking it can show that the property in Q was unique **at the date of the actionable wrong**
* Look to ***Semelhago***: “The property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended”
* Only obligated to mitigate damage by seeking alternatives if you’re NOT entitled to SP
 | John Dodge Holdings Ltd v 805062 Ontario Ltd, [2003] OJ No 350 (P agreed to buy land from D for development, D didn’t complete sale so P sued for SP |
| Injunction for personal services* Courts won’t enforce a positive covenant of personal service, even if it’s expressed in the negative
* Court won’t enforce an injunction to enforce a negative covenant if the effect of doing so would be to drive the D either to starvation or to specific performance of the positive covenants.
* Court won’t enforce an agreement by which one person undertakes to be the servant of another.
* Here, D can do something else during the length of the k if she doesn’t want to make movies for P. She is only barred from being in the movies of other companies.
* Here, damages aren’t good enough – the thing is of a particular value “the loss of which cannot be reasonably or adequately compensated in damages” 🡪 injunction is appropriate.
* Court should make the period of the injunction such as to give reasonable protection and no more to the P against the ill effects of them to D’s breach of contract
 | **Warner Bros v Nelson, 1937** (D had K w/P saying she’d only act in their movies but she wants more $$ so she breaks K. P wants injunction)  |
| **Primary obligations affirmed 🡪** If there’s an order for equitable remedy, K can’t have been terminated, **Specifc performance revives K 🡪** postpones a breach by ordering obligations get performed | Semelhago v Paramadevan [1996] SCJ No 71 |
| **Specific performance traditionally regarded as exceptional remedy** | Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 |

POLICY: Speaker Mandy Chen-Wishart on Specific Performance

* Remedies in CL – damages, specific performance after damages inadequate
* Arguments against SP as contractual right:
* Remedies ought to put you in position you would have been in
* People have autonomy to enter contract voluntarily and have right to change mind
* Right to enforce contract – parties have a duty to perform obligations
* Right to enforce performance – rarely awarded
* Bars to SP – impossibility, vague terms, adequate damages, unjust enrichment of one party, personal services (cant force), procedural unfairness, consideration and failure of consideration, limits on damages by contract
* Judicial concerns – avoidance of harshness, admin concerns, public policy concerns

|  |  |  |
| --- | --- | --- |
| Termination for Breach**Follows breach sufficiently serious to justify terminating K OR for anticipatory breach – ends all primary obligations from moment of breach** | Repudiation **Breach of a sufficiently important term by one party. Acceptance of repudiatory breach by non-breaching party leads to termination of K.** Potter v New Brunswick Legal Aid Services Commission [2015] SCJ No 10**Repudiatory breach** Party in breach of K has repudiated the K b/c breach makes the result of the K essentially different from what was contemplated when it was made *\*\* Also referred to as fundamental breach* Breach of a term that is properly classified as: a) Condition or b) An intermediate term where on basis of ***Hong Kong Fir***the particular breach deprives the party not at fault of **substantially the whole benefit** of the K.**Constructive termination of K** = acceptance of repudiation & termination of K can be affected by failing to perform obligations **Primary obligations cease** to be enforceable, but secondary obligations survive → allows for combo of termination + damages (if K were rescinded, no possibility for damages)**Election to terminate must be clearly and unequivocally communicated (words or actions) to repudiating party within reasonable time** Brown v Belleville (City), [2013] OJ No 1071, 2013 ONCA 148 (Ont CA)Repudiation (vs rescission): * **Occurs when a party shows by words or conduct intention not to be bound by the contract** Guarantee Co of North America v Gordon Capital Corp [1999] SCJ No 60
* **Effect depends on election by the non-repudiating party**:
* Reject repudiation and affirm the contract
	+ Contract remains in force.
	+ Each party has a right to sue for damages for past or future breaches, or;
* Accept the repudiation
	+ Contract terminated
	+ Both parties discharged from future obligations
 | Rescission **Available to the representee when other party made a misrepresentation – allows rescinding party to treat K as void*** General form of relief for misrepresentation – obligations are dissolved Mortin v Anger, [1930] OJ No 50, 66 OLR 317 (Ont CA)
* No need to show hardship to get rescission CIBC Mortgages plc v Pitt, [1994] 1 AC 200 (HL)
* Election: Representee can affirm or rescind K – one or other not both Kellogg Brown & Root Inc v Aerotech Herman Nelson Inc, [2004] MJ No 181, 2004 MBCA 63 (Man CA)
* Communication of election decision necessary Hyrenko v Hyrenko,  [1998] BCJ No 2945, 168 DLR (4th) 437 (BCCA)
* Action as affirmation: proceeding with K as normal despite knowledge of misrepr = affirming KLong v Lloyd, [1958] 1 WLR 753 (CA)
 |
| Anticipatory Breach**Person who is supposed to perform informs the other party that he is not going to perform, or it becomes clear in advance that K will be frustrated**. MacDougall 334**Innocent party has election** - can accept breach and proceed to remedies (termination) OR can proceed with K until other party fails to perform Hochester v De La Tour (1853) 2 E1 & B1 678 |
| Losing the Remedy:* **Can be lost by statute** (if property has passed cant be terminated, acceptance of goods can no longer terminate, electing to affirm K)
	+ **Buyer is deemed to have accepted goods when**: delivered, kept for lapse of time, intimates to seller they are accepted Sale of Goods Act, RSBC 1996, c 410, s 3
* **Passage of time** – constructive affirmation. Innocent party is expected to terminate K promptly upon knowledge of the facts that give rise to the election Morrison-Knudson Co v BC Hydro and Power Authority, [1978] BCJ No 128
* **Election to Affirm:** If non-breaching party affirms K, they can repudiate it later for another breach of same obligation Dosanjh v Liang, [2015] BCJ 42
 |
| DAMAGES**Common law remedy** **Also equitable if no other suitable remedy****Right to damages arises upon any breach of primary obligations OR breach of duty of honest performance****Statutory damages** = codification of common law damages**Parties can expressly agree on damages provisions (secondary obligations – only arise with a breach)**\*\* May also have tort damage claims | Expectation Interest**POLICY – POINT OF DAMAGES is to hold parties accountable to their promises – Fairness, justice, ability to rely on the other party to meet obligations*** **Put innocent party in position they would have been in had K been fulfilled = ruling principle for breach of K**
* Promotes market activity, ensures confidence in contracts
* **Goal:** Put party in position they would have been in if K had been performed Robinson v Harman (1848) 1 Exch. Rep 850
* **Profit loss**: can be hard to quantify, define “profit” gross or net? Western Web Offset printers Ltd v Independent Media ltd [1996] CLC 77 (CA) 🡪 gross profit used
* **Goods not delivered** 🡪 difference of market price vs contract price = what profit would’ve been earned selling them
* **Compensation**: **no more no less, not double recovery**: Sally Wertheim v Chicoutimi Pulp Co [1910] JCJ No 3 🡪 no profit from breach, no compensation for loss not suffered or put in better position than would have been in
* **Problem**: difficult to quantify non-monetary loss
 | Restitution Interest* **2 elements:**
	+ **Reliance by the promise**
	+ **A resultant loss by promisee**
	+ **A resultant gain by the promisor**
* **Aims to give back what innocent party transferred to breacher of K (disgorge profits or gain from breacher)**
* **Equaling D’s gain with P’s loss -** Bank of America Canada v Mutual Trust Co [2002] SCJ No 44 Defendant’s gain is the P’s loss 🡪 but for the breach the P would have had the interest benefits earned by D
* **Prevent gain by a promisor defaulting**
* **Undo the loss that the P incurred –** any loss that P would have avoided if not entered K
* An award of damages to a plaintiff on the basis that the defendant has unfairly retained a profit as a result of his or her own breach Attorney General v Blake, [2000] UKHL 45, [2001] 1 AC 268 (HL)
* **Policy considerations**, such as discouraging business and increased insurance costs, restrict this recovery in most instances Surrey County Council v Bredero Homes Ltd., [1993] 1 WLR 1361 (CA)

Both Expectation and Reliance Interest* **Both reliance and expectation damages can’t be awarded unless it won’t overcompensate** Sunshine Vacation Villas v The Bay, 1984
* **Can only recover for either wasted expenditures (RI) OR lost profit (EI)– not both** Cullinane v British “Rema” Manufacturing Co [1953] 2 A11 ER 1257 (CA)
* In some cases can recover in EI for lost income, and RI for expenses Sunnyside Greenhouses Ltd. V Golden West Sees Ltd (1972) AJ No 140

Frustration Termination* **Payments due before frustrating event still due** St Catherines (City) v Ontario Hydro-Electric Power Commission [1927] OJ No 139
 |
| Reliance Interest* **Put innocent party in position they would have been in if they had not entered into K in the first place**
* Generally you aren’t saving P from a bad bargain – but its unfair to make D cover Ps expenses and losses when the D has in fact by his breach saved the P for a greater loss had the K been carried out. Bowlay Logging v Domtar Ltd [1982] BCJ No 1916
* **Test: if loss would not have been sustained but for the breach, even if: K had not been broken** (expanded the but for test from torts from Clements v Clements) Water’s Edge Resort Ltd v Canada (A-G) [2015] BCJ No 1458
* **When expectation interests can’t be determined, reliance interests should be awarded** McRae v CDC, (1951) 84 CLR 377 (HC)
* **Compensation for wasted expenditure**: May have incurred expenses as was relying on other party to meet obligations – claim can be made to have other party cover expenses
 |
| Damages**Must establish breach****General calculation:****Market value of:**what was supposed to be delivered **–** what was delivered | Quantification issues* P must establish breach and must quantify how much $ was lost due to breach MacDougall 353
* Can assume delivered goods (wrong goods) have NO value, D has to prove they have value. P has no incentive to establish a market value for goods delivered which are not in accord with contract Ford Motor Co of Canada Ltd. V Haley [1967] SCJ No 29

**Can be concurrent liability in contract and tort** BG Checo International Ltd v BC Hydro and Power Authority [1993] SCJ No 1**P has right to damages even if they are impossible to calculate** Chaplin v Hicks [1911] 2 KB 786 (CA)Speculation and Chances* Court wont award damages for speculative loss of profit McRae v Commonwealth Disposals Commission (1951
* If breach of K, P has right to damages even if impossible to calculate Chaplin v Hicks [1911] 2 KB 786 (CA)
* Difference of Chaplin to McRae = speculative nature of loss hard to calculate – cant award on a sunken tanker!

Injured feelings, disappointment, mental distress* **Traditional** CL approach: these types of losses couldn’t be compensated for in damages claim
* **Now: increasingly common for courts to award** **damages**

**POLICY = purpose of K opposite emotion to that caused** **Test to prove Mental Distress Damages**: Fidler v Sun Life Assurance Co of Canada, [2006] SCJ No 30* + **Object of K** was psychological benefit that brings mental distress upon breach w/in reasonable contemplation of parties
	+ **Degree of mental suffering** caused by the breach was of a degree sufficient to warrant compensation

**Damages for mental distress can be recovered in contract** P(C) v RBC Life Insurance Co [2015] BCJ No 100 🡪 ins co action caused mental distress, should have caused P peace of mindMinimal PerformanceIf not void for uncertainty, damages awarded based on minimal performance by party in breach Hamilton v Open Window Bakery Ltd [2003] SCJ No 72More than 1 Quantum of DamagesToo many amounts to choose from: pick which best meets purpose Groves v John Wunder Co 286 NW 235 (Minn CA 1939) | Remoteness Issues* Damages that are too remote to make the defendant responsible for them cannot be recovered MacDougall 348
* **Causation**: Breach of K must be reason for loss County Ld v Girozentrale Securities, [1996] 3 All ER 834 (CA)
* **Mitigating factor –** breach may not be only cause for the loss, **only needs to be one of the effective reasons** for the lossLambert and Lewis[1982] AC 225 (HL) – defective hitch, but farmer still liable for injuries sustained by

**Hadley v Baxendale (1854) 9 Exch Rep 341 156 ER 145****Test: Where two parties made a K, one of them has broken, damages should be such as may “fairly and reasonably be considered arising naturally, or may be reasonable given circumstances considered at time of K being entered into**. * Courts in Canada have tried to elucidate the test, but it was stood the test of time.
* **Test broken into 2 branches:** Fidler v. Sun Life Assurance Co of Canada [2006] SCJ No 30

**Branch 1: General damages -** naturally arising loss as an ordinary course of the breach (anyone else would have suffered the same loss if suffered same breach)**Branch 2: Special damages –** What parties contemplated as probable result of breach (special circumstances known at time K was entered into)* [BROAD] Damages recoverable if loss is a serious possibility or real danger. **Objective test** – whether he wondered it or not, would a reasonable man have foreseen the loss \*\*see full CAN Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 (CA)
* [NARROW] → Overrules broad definition of remoteness in ***Victoria*** for a much **narrower definition**- important to maintain the distinction in remoteness btwn contract and tort – in contract the crucial question if a reasonable man would have realized a loss was likely to result from the breach in order to hold D liable Koufos v Czarnikow Ltd (The Heron II) [1969] 1 AC 350 (HL)

TIME OF MEASUREMENT OF DAMAGES* At CL damages calculated at the time of breach
* Damages in lieu of specific performance are to be calculated at the time of judgement.Semelhago v Paramadevan, 1996
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| Mitigation* Not a DUTY but a factor to take into account in assessing whether P’s claimed damages are reasonable MacDougall 361
* Dependent on the facts Payzu Ltd v Saunders [1919] 2 KB 581 (CA)
* **P has obligation to take reasonable steps to mitigate the losses and keep damages reasonable** O’Grady v Westminster Scaffolding Ltd [1962] 2 Lloyd’s Rep 238 (QB)
* P efforts **to** mitigate are factor to be taken into account in assessing whether P’s claim for damages is reasonable MacDougall 361
* **Time to mitigate**: Can’t be until P learns of breach, or within reasonable time **thereafter**. Required to stem losses as early as is reasonable and to bring your damages claim in a timely way Asamera Oil Corp v Sea Oil and General Corp [1978] SCJ No 106
* **Anticipatory breach:** Party needs to mitigate the cost in an anticipatory breach, not saddle other party with the burden of the cost White and Carter (Councils Ltd. V McGregor [1962] AC 413 (HL)
* **Mitigation might arise when P has to choose EITHER claim for equitable relief OR seeks damages.** Asamera Oil Corp v Sea Oil and General Corp [1978] SCJ No 106

Deposits and Forfeiture of Deposits* **Forfeiture clauses have no remedy at common law (but possibly in equity, provided that the required circumstances are met.**

**Stockloser v Johnson, 1954** (P buys stuff from D by installments, clause in K says D = owner until all payments made, P failed to pay once near the end of K & then sued to recover previous payments, saying clause was a penalty)* ***Law and Equity Act, s. 24*** → **Deposits**: Court may relieve against all penalties & forfeitures, & in granting relief may impose any terms as to costs, expenses, damages, compensations & all other matters that the court thinks fit
 | Liquidated Damages, Penalties, Deposits**Liquidated Damages –** what damages will be in event of a breach, agreed to in advance at time K is entered. Should not overcompensate or put party in better position. MacDougall 369**Dunlop Pneumatic Tyre Co v New Garage and Motor Co [1915] AC 79*** **Court must determine if payment stipulated is a penalty or liquidated damages**
* If liquidated damages clauses hold a party *in terrorem* or overcompensate = penalty clause
* Whether penalty or liquidated damages is estimated at time of K, not time of breach
* **If extravagant and unconscionable it is a penalty**

**Liquidated damages must be a genuine pre-estimate of damages Dundas v Schafer [2014] MJ No 289 leave to appeal refused [2014] SCCA No 253,** **Amount must be reasonable and not “picked out of the air”** Meunier v Clouthier, [1984] OJ No 3188 **Test: if the sum is larger than any actual damage which could arise, it is not a bona fide estimate of damages and will be found to be a penalty Cavendish Square Holding BV v Talal El Madessi; ParkingEye Ltd v Beavis [2015] UKSC 67*** **Liquidated damages provisions should be analyzed on the basis of equitable principles and unconscionability over the strict CL rule of penalty clauses** Peachtree II Associates – Dallas LP v 857486 Ontario Ltd [2005] OJ No 2749
* Courts hesitant to call a liquidated damages clause a penalty clause, especially in commercial context where parties carefully drafted their K Philips Hong Kong Ltd v Attorney General of Hong Kong (1993), 61 BLR 41

Punitive Damages* Punitive damages must be resorted only in exceptional cases and with restraint Fidler v Sun Life Assurance Co of Canada [2006] SCJ No 30
* **Punitive Damages are designed to address the purposes of retribution, deterrence and denunciation** Whiten v Pilot Insurance Co, [2002] SCJ No 19
* Aggravated damages must only be imposed where there is an actionable wrong which caused the injury to the P Vorvis v Insurance Corp of British Columbia, [1989] SCJ No 46
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| EQUITABLE Remedies**Goal: Keep Primary Obligations alive – postpone breach** | Party is about to breach or has breached KFirst look at damages, and if not adequate then go to damages (compensatory usually, can be punitive or equitable damages)**Factors Governing Granting Equitable Remedies*** **Consideration of CL matrix**
* **Adequacy of damages** – if CL damages not adequate, equity can order SP or INJUNC to force primary obs to be performed Jeffrie v Hedriksen [2016] NSJ No 23 \*\* also see Property below
* **Applicant has clean hands** (no fault) – person who seeks justice ought to merit justice. If not clean hands, even a small misrepr, may not get SP Cadman v Horner (1810) 18 Ves Jr 10 and if by fraud no SP Shaw v Masson [1922] SCJ No 61
* **No delays or laches –** consider length of delay and actions in the interval to affect balance of justice Lindsay Petroluem Co v Hurd (1874) LR 5 PC 221
* **No hardship to D or 3rd parties –**hardship to D in ordering SP might cause hardship to P if not ordering! Eastes v Russ [1914] 1 Ch 468
* **No obligation to perform personal service** Warner Bros v Nelson, 1937
* Mutual – both parties able to get same remedy

**Order of SP or INJUNC keeps K alive – affirms primary obligations – K has not been terminated Semelhago v Paramadevan [1996] SCJ No 71** | Specific Performance **One party is about to breach or has breached K**Order by court to a contracting party to perform the K obligations – very much like an injunction to perform the whole K * **Common claim in context of contractual disputes**
* **Confirms primary obligations in K**
* **Equitable nature – no binding rules, what is most fair in circumstance, discretionary**

**Speaker Mandy Chen-Wishart on Specific Performance*** Arguments against SP as contractual right:
* Remedies ought to put you in position you would have been in
* People have autonomy to enter contract voluntarily and right to change mind
* Right to enforce contract – parties have a duty to perform obligations
* Right to enforce performance – rarely awarded
* **Bars to SP** – impossibility, vague terms, adequate damages, unjust enrichment of one party, personal services (cant force), procedural unfairness, consideration and failure of consideration, limits on damages by contract
* Judicial concerns – avoidance of harshness, admin concerns, public policy

PROPERTY ISSUES* **Historically, real property “unique” - $$ could not substitute** Adderley v Dixon (1824) 1 Sim & St 607
* I**ncreasingly that is being challenged (condo etc.)**
* Land to be used as investment or resale = not unique John Dodge Holdings Ltd v 805062 Ontario Ltd, [2003] OJ No 350
* Although investment could still attract SP 1244034 Alberta Ltd v Walton Intl Group [2007] AJ No 1260
* Court ordered specific performance for dispute over farmland left to brothers, family history to the land made it unique Raymod v Anderson [2011] SJ No 313
* Similar properties doesn’t mean property not unique 🡪 subjective desires of the purchaser make it unique Lalani v Wenn Estate [2011] BCJ No 2358
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| Injunction | * Order of the court to a party of the K to do or not do something (perform an obligation or not break it)
* **Forces someone to not breach**
* **Limitation clause precludes damages 🡪** equitable remedy of injunction often available AB v CD [2014] EWCA Civ 229
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