Law 110 Law of Contracts
Mary Childs
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By

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Note: The materials here may not be in the same order as in the syllabus, but are arranged in the way that makes sense to me. I'm sure that you can work this out.

110 Contracts Law

Canadian Dyers Association v. Burton [1920] HC

Quotation of price is an invitation to treat, not an offer.

Pharmaceutical Society v. Boots Cash Chemist [1953] CA

The display of goods is ITT. The presentation of the item to the cashier is an offer. Acceptance of money by the cashier is acceptance of the offer.

Carlill v. Carbolic Smoke Ball [1893] CA

Ads are generally an invitation to treat, unless the language can be interpreted as offer by q reasonable person

Goldthorpe v. Logan [1943] CA

An advertisement can be taken as an offer of a unilateral K

Harvela Investments Ltd v. Royal Trust [1985] HL

Vendor controls and specifies the form of auction with specific wording or intention.

R. v Ron Engineering & Construction Ltd. [1981] SCC

An submission of a tender gives rise to K "A". Winning of tender gives rise to K "B". You can withdraw an offer before it is accepted.

MJB Enterprises Ltd. v. Defense Construction [1999] SCC

Presence of "privilege clause" does not allow the company to accept non-compliant bids.

Submission of tender is good consideration of owner's promise.

Blair v. Western Mutual Benefit Association [1972] BCCA

Offer must be formally communicated to the offeree. Merely hearing of the intent to offer is insufficient.

Williams v. Cardwardine [1833] KB

Motivation for acceptance of an offer is irrelevant. Intention to accept an offer is not necessary,

R. v. Clarke [1927] AU HC

Acceptance must be made with the knowledge of the offer and intention to accept the offer

Counter-Offer

Livingstone v. Evans [1925] ABSC

If in rejecting a counter-offer you imply original offer is still valid you may be obliged to form contract with those terms if accepted. An inquiry about the offer is not counter-offer.

Butler Machine v. Ex-Cell-O [1979] CA

Battle of the forms is an exception to the general rule that a counter-offer kills the original offer.

Tywood Industries v. St. Anne Pulp & Paper Co. [1979] ONHC

Where the conduct indicates that the parties considered all terms except for the price to be unimportant, then the contract is valid in face of other contentions.

ProCD v. Zeidenberg [1996] USCA

It may be possible to perform contract by clicking "I agree" on specific terms after money exchanged. A contract can be binding with terms unknown at time of purchase.

Dawson v. Helicopter Exploration [1951] BCSC

Bilateral contract can be formed by exchange of promises before performance. Part performance can be construed as acceptance.

Acceptance By Silence or Conduct 16

Carlill v Carbolic Smoke Ball Co [1893] QB

Silence can constitute acceptance if offerer makes it cleat that performance is acceptance and no notice is required.

Felthouse v. Bindley [1862] ExCh

Silence (absence of rejection) does not constitute acceptance, even if stipulated by the offeror.

Communication Of Acceptance 16

Eliason v. Henshaw [1819] US

Offers must be accepted according to stipulations prescribed by offeror.

Postal Acceptance

Household Fire & Carriage Insurance v. Grant [1879] CA

The establishment of the Postal Rule. Offeror bound by offer even though acceptance is not received.

Holwell Securities v. Hughes [1974] CA

Postal rule does not apply when stipulated otherwise. Also it does not apply when the parties cannot have intended that there should be a binding agreement until the offeree had communicated acceptance.

Brinkibon v. Stahag Stahl [1982] HL

Instantaneous communication is not bound by postal acceptance. In instantaneous communication,the K is made when and where the acceptance is received

Rudder v. Microsoft [1999] ONSCJ

Clicking "I agree" is acceptance, even if one did not read the content.

Termination Of Offer 18

Revocation

Byrne v. Van Tienhoven [1880] CA

Revocation of offer must be communicated to offeree before it takes effect. Until offeree receives it, he CAN accept the offer and create binding K.

Dickenson v. Dodds [1876] CA

An offer open for certain amount of time does not put the offeror under any obligation to refrain from selling to a third party before offer expires. If there is knowledge of revocation, the the offeree has no remedy.

Errington v. Errington and Woods [1952] CA

Offer of a unilateral K cannot be revoked once the performance has begun.

Carlill v. Carbolic Smoke Ball [1893] QB

Unilateral offer may be considered to have been revoked after reasonable amount of time, given circumstances of the offer has passed.

Lapse

Barrick v. Clark [1951] SCC

An offer with no specified expiry date will expire in a reasonable amount of time depending on nature and character of the offer ,and the normal course of business.

Manchester Diocesan v. Commercial and General Investments Ltd. [1969] CHD

Where offer is made in terms which fix no time limit for acceptance, the offer must be accepted within a reasonable time to make contract.

Certainty Of Terms 21

Sale of Goods Act BC
12 Ascertainment of Price
13 Agreement to sell at valuation

Vagueness 21

R v. CAE Industries Ltd. [1986] SCC

Court will look at surrounding words, actions and circumstances in determining if there was intention to create legal relations. Reasonable meaning of words considered. The test is objective.

Incomplete Terms 22

May & Butcher Ltd. v. R [1934] HL

Agreements to agree are not contracts. Price is an essential element of K. Sale of Goods Act only applies when parties are silent on price.

Hillas v. Arcos [1932] HL

If there is a mechanism for making determination with respect to questionable term, the court will work to find the term. If courts decide the parties believed they had a K - will work to enforce.

Foley v. Classique Coaches [1934] CA

Definite agreements on price may not be necessary for contract to be enforceable, if it has been operating successfully without them for a time.

Agreements to Negotiate 23

Empress Towers v. Bank of Nova Scotia [1991] BCCA

Agreements to negotiate price are not binding, but imply a duty to negotiate in good faith.

Mannpar v. Canada [1999] BCCA

Agreement to negotiate does not imply a duty to negotiate in good faith, if there is no objective point of reference

Intention to Create Legal Relations 24

Balfour v. Balfour [1919] EN CA

An agreement between spouses is not legally binding unless intended to be such.

Rose & Frank Co v. JR Crompton and Bros. Ltd. [1923] CA

If parties explicitly state that a business agreement to be non-legally binding, then it is such

TD Bank v. Leigh Instruments Ltd. [1999] ON CA

Courts are not willing to enforce something not intended to be legally enforceable

Formality 25

RBC v. Kiska [1967] ON CA

A promise under seal need not be supported by consideration. There are no strict requirements on what can be used as a seal. Something must be understood to be a seal by signatories for an agreement to be binding without consideration.

Statute of Frauds
Law and Equity Act BC
59 Enforceability of contracts
Electronic Transactions Act BC
5 Requirement for a record to be in writing
11 Signatures

Legal Capacity 26

Hart v. O'Connor [1985] NZ PC

The validity of K entered by a lunatic who is pronounced sane is to be judged by the same standards as a K by a person of sound mind and is not voidable unless unfairness amounts to equitable fraud.

Infants Act BC

19 When infants' contract enforceable

20 Application for relief (paraphrased)

21 Application for Capacity (paraphrased)

22 Application to Public Guardian and Trustee

23 Guarantees and indemnity

Consideration 28

General Rules

Past Consideration

Wood v. Lucy, Lady Duff-Gordon [1917] NY

Courts will use consideration to try to preserve business efficacy as it was intended

Eastwood v. Kenyon [1840] QB

Past consideration is not valid consideration for a promise made today. Moral obligation is a voluntary promise without consideration.

Lampleigh v. Braithwait [1615] KB

For past consideration to work, the act done before the promise can be consideration if three things are met: (a) Had to be request; (b) Parties must have understanding of remuneration; (c) It is enforceable otherwise.

Thomas v. Thomas [1842] QB

Courts are not concerned with the value of consideration but it must have moved from the promisee.

Forbearance

B.(D.C.) v. Arkin [1996] MAN QB

Forbearance to sue is good consideration, and monies paid for a promise not to sue is a valid and enforceable legal K. If the party threatening to sue should have known they had no legal right to do so, then the consideration is void.

Pre-Existing Legal Duty 30

Public Duty

Duty to a Third Party

Pao On v. Lau Yiu Long [1980] PC

A promise of performance of a pre-existing duty already owed to a third party may be good consideration as long as the promise has not been fulfilled.

Duty to the Promisor

Gilbert Steel v. University Construction [1976] ONCA

Pre-existing contractual obligation is not consideration for new terms to a contract.

Williams v. Roffey Bros. & Nicholls Ltd. [1990] CA

Pre-existing contractual obligation can serve as consideration if the promise to fulfill the pre-existing obligation confers a "practical benefit" on the promisee

Foakes v. Beer [1884] HL

A promise to pay less than the total amount of a debt is not on its own valid consideration

Foot v. Rawlings[1963] SCC

A promise to pay less than the total amount of a debt is not on its own valid consideration

Promissory Estoppel 33

Central London Property Trust Ltd. v. High Trees House Ltd. [1947] KB

Promissory estoppel renders gratuitous promise enforceable

John Burrows Ltd. v. Subsurface Surveys Ltd. [1968] SCC

Habitual non-enforcement found to be friendly indulgence: not giving rise to promissory estoppel

D. & C. Builders Ltd. v. Rees [1966] QB

Promissory estoppel does not operate if promisee is found to have acted unfairly

Combe v. Combe [1951] KB

Promissory estoppel is a shield, not a sword

Walton Stores (Interstate) Pty Ltd. v. Maher [1988] AU HC

Controversial recognition by the court of use of promissory estoppel as a sword

M.(N.) v. A.(A.T.) [2003] BCCA

Estoppel only applies to cases where the parties are engaged in a legal relation

Privity Of Contract 35

Third Party Beneficiaries

Tweddle v. Atkinson [1861] QB

A Third Party can generally neither sue nor be sued on a contract - even if it was intended to operate for his benefit. Love and affection are not sufficient consideration.

Dunlop Pneumatic Tyre Co. v. Selfridge & Co. [1915] HL

Only parties to a contract can sue on it. Even if a contract provides Third Party with enforceable right, there must be consideration.

Beswick v. Beswick [1966] CA / HL

A Third Party who has a legitimate interest in enforcing the contract may do so in the name of the contracting party [OVERRULED by HL] A third party cannot sue on a contract

London Drugs Ltd. v. Khuehne & Nagel International Ltd. [1992] SCC

Third party beneficiaries can be covered by liability clauses in a contract if they are employees of one party.

Fraser River Pile & Dredge v. Can-Dive Services [1999] SCC

London Drugs Exception applies to all third party beneficiaries.

Negotiating the Contract: Representation And Terms 39

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

The term is a statement made for which the party intended to give an absolute guarantee

Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd. [1965] CA

Anything said to induce a party to enter into the contract becomes a term in the contract (this approach has not been widely adopted)

Parol Evidence Rule

Hawrish v. Bank of Montreal [1969] SCC

Parol evidence in a collateral agreement is admissible as long as it is not inconsistent with the written K

Bauer v. Bank of Montreal [1980] SCC

Any collateral oral agreement cannot stand in the face of the written terms of the K.

Gallen v. Butterly [1984] BCCA

Modern approach to the Parole Evidence Rule

Business Practices and Consumer Protection Act BC

187 Admissibility of parole evidence

Misrepresentation

Leaf v. International Galleries [1950] KB

Why one would want to pursue a warranty claim over a rescission claim.

Redgrave v. Hurd [1881] CA

If a person investigates a statement, he does not rely on the statement made and there can be no misrepresentation

Smith v. Land & House Property [1884] CA

A statement of opinion is a statement of fact when the facts are not equally known by both parties

Kupchak v. Dayson Holdings Ltd. [1965] BCCA

Rescission of a contract is an option even when complete restitution cannot be reached

Redican v. Nesbitt [1924] SCC

Rescission for innocent representation is not available if the contract has been executed.

Sodd Corp. v. N. Tessis [1977] ONSC

There can be a concurrent liability in contract and tort. Damages are an option in cases of negligent misrepresentation.

BG Checo International Ltd. v. BC Hydro [1993] SCC

Both contract and tort are valid avenues, but PL would chose the one with the higher standard of care.

Classification Of Terms 46

Conditions, Warranties and Innominate Terms

Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd. [1962] CA

Introduced the concept Innominate Term.

Krawchuk v. Ulrychova [1996] AB

Innominate terms are applicable to transactions under the Sale of Goods Act

Wickman Machine Tool Sales Ltd. v Schuler A.G. [1974] HL

Placing labels on terms in a contract does not imply the legal definition of the label onto the term

Discharge By Performance or Breach 48

Fairbanks v. Sheppard [1953] SCC

An obligation is completed when it is substantially completed

Markland Associates v. Lohnes [1973] NSSC

Substantial performance doctrine applied.

Sumpter v. Hedges [1898] CA

If the innocent party of an abandoned contract takes the benefit of the work done, he can be liable for the cost of that work through quantum meruit.

Howe v. Smith [1884] CA

Deposits are not recoverable by the guilty party

Stevenson v. Colonial Homes Ltd. [1961] ON CA

If a down-payment is shown to be a part payment of the price rather than a deposit, the seller is not entitled to forfeit the payment but must return it if he terminates the contract, subject to his right to damages for the buyer's breach.

Interpretation And Implied Terms 50

Machtinger v. Hoj Industries [1992] SCC

Terms can be implied into a contract based on custom or usage, business efficiency or presumed intention and terms implied by law.

Sale of Goods Act BC

17 Sale by description

18 Implied conditions as to quality or fitness

19 Sale by sample

Exclusion Clauses 51

Unsigned Agreements

Parker v. Southeastern Railway [1877] CA

A person is not bound by limitation of liability clauses unless they saw or knew of their existence.

Thornron v. Shoe Lane Parking [1971] CA

A limitation of liability clause is only binding if the customer had reasonable notice of the clause before entering into the agreement.

McCutcheon v. David MacBraybe Ltd.[1964] HL

A statement can be imported into a contract if previous dealings show that a party knew or agreed to the term in previous dealings.

Signed Agreements

Tilden v. Clendenning [1978] CA

Unless reasonable measures are taken to draw a party's attention to terms in a standard form document, the terms are not enforceable.

Delaney v. Cascade River Holidays [1983] BCCA

The formatting and labeling of the release form can render it suspect

Schuster v. Blackcomb Skiing Ent. Ltd. [1994] BC

Previous dealings and signings of the form will undermine PL's claim that they were not aware of the exclusion clause.

Karsales (Harrow) Ltd. v. Wallis [1956] UK CA

Doctrine of Fundamental Breach is invented

Photo Production Ltd. v Securicor Transport Ltd.[1980] HL

Doctrine of Fundamental Breach no longer exists, but fundamental breaches do

Hunter Engineering Co. Inc. v Syncrude Canada Ltd. [1989] SCC

There is no Doctrine of Fundamental Breach in Canada, but there is an established test to determine if an exclusion or limitation clause applies

Sale of Goods Act BC

20 No waiver of warranties or conditions

Solway v. Davis [2002] ONCA

Dissent: one should consider policy and economic reasons before striking down an exclusion/limitation clause.

PlasTex v. Dow Chemical [2004] ABCA

If the party included the limitation clause because they were aware of the defects with the product, it is struck down as unconscionable.

Duress

Pao On v. Lau Yiu Long [1980] PC

Economic duress is a valid cause of action in equity

Gordon v. Roebuck [1992] CA

Establishes the test for economic duress.

Undue Influence

Geffen v. Goodman Estate [1991] SCC

There is a presumption of undue influence in some relationships.

RBS v. Etridge [2001] HL

A transaction that is not reasonably expected to occur between parties is necessary to give rise to rebuttable evidential presumption of UI.

Unconscionability

Morrison v. Coast Finance [1965] BCCA

Establishment of the doctrine of unconscionability and the test for it.

Marshall v. Canada Permanent Trust [1992] ABSC

It is not always necessary to show that the party who gets the benefit was aware of the other side's weakness

Harry v. Kreutziger [1978] CA

There are actually two tests for unconscionability

Business Practices and Consumer Protection Act BC

5 Prohibition and burden of proof

8 Unconscionable acts or practices

9 Prohibition and burden of proof

10 Remedy for an unconscionable act or practice

Remedies 62

Damages

Bowlay Logging v. Domtar Ltd. [1982] BCCA

PL can chose which damages they will pursue. If the loss is not due to the breach, PL gets fuck all.

Sunshine Vacation Villas v. Hudson Bay Company [1984] BCCA

Both reliance and expectation damages cannot be awarded if it will over compensate

AG v. Blake [2001] HL

In some rare cases, courts will award restitution damages to deprive D of unfair profits.

Quantum

Chaplin v. Hicks [1911] CA

If there is a breach of K, PL has a right to damages even if they are impossible to calculate

Groves v. John Wunder [1939] MINN CA

One can claim damages for breach of K, even if there is no benefit for them from it. The proper measure of damages is the cost of remedying the defect.

Fidler v. Sun Life Assurance [2006] SCC

Damages for mental distress are freely available, but have to be proven by PL to be more than merely trivial.

Causation and Remoteness

Hodgkinson v. Simms [1994] SCC

The damages have to be caused by the breach and this causation has to be established using the "but for test"

Hadley v. Baxendale [1854] HL

The difference between special damages and general damages. The test for awarding damages

Victoria Laundry v. Newman [1949] CA

The test for remoteness is very broad and has to be

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

Even a foreseeably possible damage may be too remote.

Aggravated and Punitive Damages

Vorvis v. ICBC [1989] SCC

Punitive damages will rarely be awarded. Aggravated damages can be awarded for mental distress in employment contracts and if there is an actionable wrong

Wallace v. United Grain Growers [1997] SCC

If someone is fired in a demeaning way the notice period is longer and therefore there has to be more compensation.

Whiten v. Pilot Insurance [2002] SCC

Punitive damages are applicable where there is a gross and marked departure from decency and morality

Mitigation

White and Carter v. McGregor[1962] HL

Compensation only is given for the actual loss

Liquidated Damages and Deposits

Shatilla v. Feinstein [1923] CA

A fixed sum damage is presumed to be punitive, unless if there is an explicit agreement that it is liquidated damages, and the sum is not grossly disproportionate.

HF Clarke Ltd. v. Thermidaire [19] SCC

The liquidated damages amount has to be reflective of the actual loss suffered.

JG Collins Insurance v. Esley [19] CA

Courts will not interfere with a liquidated damages clause if the amount that it calls for is too small.

Coal Harbour Properties v. Liu [2006] BCCA

If the pre-estimate of damages is commercially reasonable, it does not have to reflect the actual amount of damages suffered.

Equitable Remedies 70

John E Dodge Holdings v. 805062 Ontario Ltd. [2003] ONCA

Even in the context of land transfers, to get a specific performance, one has to show something special about the land that would be irredeemable with monetary damages.

Warner Bros. Pictures v. Nelson [1937] KB

An injunction not to do something is more easy to get an an injunction to do something.

Zipper Transportation Services Ltd. v. Korstrom [1998] SCC

Injunctions are only given when there is a irreparable harm that cannot be cured by monetary damages.

There is a test of some sort here??

110.1 Offer And Acceptance

Offer and Acceptance

Contract: a legal creation in which promises about the future can be made enforceable

Offer and Invitation to Treat

Offer: an intimation, by words or conduct, of a willingness to enter into a legally binding contract, and which expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance, or return promise by the offeree.

The test for the presence of an offer is intention. This is determined by evidence and reasonable person's interpretation of intention.

Invitation to Treat: an intention to be create legal relations.

Canadian Dyers Association v. Burton [1920] HC

Quotation of price is an invitation to treat, not an offer.

Facts: PL offers to sell house. D asks for lower price. PL replies with a "lowest prepared to accept" price. D accepts and sends cheque, which PL keeps, and sends a draft of deed. Later, PL returns cheque and claims that there is no K.
Issues: Is quoting the lowest price an offer?
Discussion:

- Quoting the price is not an offer, but an ITT
- But PL's subsequent actions show that he understood D's cheque as an offer, and accepted it with his sending of the draft
- "Whether a proposal is to be construed as an invitation to treat or as an offer depends on language used and circumstances of particular case"

Ruling: there was a K

Pharmaceutical Society v. Boots Cash Chemist [1953] CA

The display of goods is ITT. The presentation of the item to the cashier is an offer. Acceptance of money by the cashier is acceptance of the offer.

Facts: D runs a self-serve drug store. According to the Pharmacy Act, some drugs are to be sold only under the supervision of a pharmacist.
Issues: Is a sale of goods completed at the moment when the customer selects an article from the shelf or at the moment when he pays for it?
Discussion:

- the mere action of picking up the item from the shelf, the selection of goods, and the pre-contractual investigation are not sufficient for the acceptance of the contract;
- displaying goods in the store, with the price attached to it, is qualified as the invitation to treat;
- The K is not completed until, the customer having indicated the articles which he needs, the shopkeeper... accepts the offer. Then the contract is completed

Ruling: judgement for D.

Carlill v. Carbolic Smoke Ball [1893] CA

Ads are generally an invitation to treat, unless the language can be interpreted as offer by q reasonable person

Facts: Unilateral offer of 100£ to anyone who contracts flu after using smoke ball as prescribed. PL met all conditions and filed suit to receive the award.
Issue: Was the advertisement a legally binding offer?
Discussion:

- D: it was only an ad and said it was too vague and extravagant
- The extravagance of the offer is insufficient to render the offer invalid;

- An ad can constitute an offer if the terms are such that a reasonable person would construe the offer as the contract.
- Performing the conditions is sufficient for acceptance
- if by its nature the offer does not show any expectation of notice of acceptance, then none is required.
- it is possible to make an offer to many people, even to those who you do not know;
- the offer is limited to those who read the offer and follow the instructions in the advertisement;

Ruling: there was a K.

Unilateral Contract: Where only one side makes a promise to be under some obligation if act is performed. In bilateral, both sides are exchanging promises, while in unilateral promises to do something if your offer is accepted and invites you to act without communicating acceptance. You can specify what kind of acceptance you would like in unilateral: acceptance through performance of conditions is sufficient.

Goldthorpe v. Logan [1943] CA

An advertisement can be taken as an offer of a unilateral K

Facts: PL wanted hair removed from her face. D's ad guaranteed hair removal. PL paid for a number of electrolysis treatments, but hair did not disappear. PL claims that D breached K because he failed to provide results as guaranteed.
Issues: Does an advertisement declaring a guarantee (or promise) constitute an offer that, if accepted by a purchaser, results in the creation of a K?
Discussion:

- Ads in newspapers are not always considered offers, but court looked at the explicit language and guarantee, the surrounding circumstances, intention, and actions of both parties.
- the ad creates offer from D to anyone willing to accept the terms and conditions of it;
- PL accepted the offer through her conduct;
- D failed to remove hair permanently in breach of K.
- the ad was reckless and rash and PL was gullible, but her acceptance was communicated to the D by her conduct.

Ruling: the ad was an offer and D breached K.

Harvela Investments Ltd v. Royal Trust [1985] HL

Vendor controls and specifies the form of auction with specific wording or intention.

Facts: D (vendor) issues and invitation to PL and other party to make offers to purchase shares. Offers are to be made confidentially, and highest bid would be accepted. PL offered a fixed bid. Other party offered a bid that would be $100K higher than the other bid.
Issues: Did the provisions of the ITT create a fixed bidding sale or a referential bidding) sale?
Discussion:

- a vendor initiating an invitation must choose the form of the auction, be it fixed or referential
- the form of the sale, may be deduced from the presumed intention of the vendor.
- vendor said they would accept the "highest" offer
- the specification of confidential bids points to a fixed bidding process

Ruling: this was a fixed bidding. Judgement for PL

R. v Ron Engineering & Construction Ltd. [1981] SCC

An submission of a tender gives rise to K "A". Winning of tender gives rise to K "B". You can withdraw an offer before it is accepted.

Facts: D submits a tender bid and a tender deposit as per ITT. His bid was the lowest. After the closing of the tender, D realizes that he made a mistake, and asks to withdraw the bid. The owner refuses. D refuses to commence construction. The owner refuses to recover the deposit.
Issue: Was contractor entitled to withdraw tender and recover deposit?
Discussion:

- a person who issues call for tender creates an offer to contract
- the submission of a tender is acceptance, which creates a K "A"
- this is different from K "B", which is created upon the acceptance of the winning bid.
- a tender in law is irrevocable if filed in conformity with term and conditions.
- D refused to enter into K "B" but K "A" is irrevocable

- the deposit is not refundable

Ruling: K "A" is valid.

MJB Enterprises Ltd. v. Defense Construction [1999] SCC

Presence of "privilege clause" does not allow the company to accept non-compliant bids. Submission of tender is good consideration of owner's promise.

Facts: D calls for tender and PL responds. D's invitation contains a privilege clause. The lowest bid includes qualifications which render it non-compliant. D awards the K to him. PL's bid is rejected, but he files suit on the grounds that the lowest bid was non-compliant.

Issue: Does inclusion of privilege clause in tender documents allow owner to disregard lowest bid in favor of any other, including non-compliants?

Discussion:

- The "privilege clause" said the lowest bid not necessarily be accepted.
- PL was under obligation to accept a compliant bid, which Sorochan's was not, since they qualified their offer on commodity prices.
- "Objective approach to interpretation" seeks to establish what would a reasonable person think of K and how one would understand the terms of it. Thus, due to the court interp. of Implied terms, only compliant bids to be accepted.

Ruling: breach of K by D. PL awarded damages.

Implied Terms: terms that are not explicitly stated in the K, but can be inferred by the court to be present in it, based on custom, use and precedent. These are present in all Ks, and are dominant in most day-to-day Ks.

Communication of Offer

- An offer is not effective until it is communicated to the offeree
- The can be no acceptance if one is ignorant of the offer
- There does not have to be an intention to accept the offer, just knowledge of the offer at the time of acceptance

Consensus ad idem - meeting of the minds, where both parties agree as to what is going on: in this case both are aware of the offer.

Blair v. Western Mutual Benefit Association [1972] BCCA

Offer must be formally communicated to the offeree. Merely hearing of the intent to offer is insufficient.

Facts: PL is a secretary to D who overhears about the motion to create a retirement offer to hear. She accepts by retiring, and when she does not get the benefits, she sues for breach of K.

Issue: Is the existence of the intent to offer sufficient to be an offer?

Discussion:

- The offer was not communicated officially
- The motion to propose the offer that she overheard, in and of itself, did not constitute intent to create legal relations
- If they wanted to create legal obligations, the directors would have had to communicate the offer.
- There is no evidence to suggest the PL's subsequent resignation was acceptance of the offer she believed had been made

Ruling: There was no offer, and if there was one, she did not act upon it in a matter that would show acceptance.

Williams v. Cardwardine [1833] KB

Motivation for acceptance of an offer is irrelevant. Intention to accept an offer is not necessary,

Facts: A reward is posted by D for information leading to arrest and conviction of a murder suspect. PL provides the info, but only to ease her consciousness, as she believes that she is dying. D refuses to give her the rewards, claiming that the motive for her confession is excluded in the offer. PL sues for breach of K.

Issue: Must one be motivated by a unilateral offer to form a binding K?

Discussion:

- Acceptance of offer creates a K regardless of motives

- The posting of the reward created an offer to unilateral K
- PL's confession constitutes acceptance, even though she did not intend for it
- This is sufficient to make a K

Ruling: PL is entitled to reward.

R. v. Clarke [1927] AU HC

Acceptance must be made with the knowledge of the offer and intention to accept the offer

Facts: Crown offers a reward for information leading to conviction and arrest. D provided this information, but did not remember the existence of the reward at the time. He decided to claim the reward after informing, and was denied.

Issue: Can you accept unilateral offer that you have forgotten or did not know about?

Discussion:

- An offer does not bind the person who makes it until it has been accepted.
- D didn't have the offer in mind during his actions, was just trying to keep himself from being convicted
- Thus his actions were not acceptance, since he did not "know" of the offer at the time
- This is different from *Williams* where she knew of the existence of the offer, though she did not confess with the intention to accept.
- The motive inducing consent may be immaterial, but the consent is vital. Without it, there is no K
- There is no meeting of the minds.

Ruling: no K.

Acceptance

Acceptance: an expression by words or conduct of assent to the terms of the offer in a manner prescribed or indicated by the offeror. Acceptance must be:

- communicated through manifestation/signification (something that you do or say);
- unambiguous;
- unqualified - corresponding to all the terms of the offer;
- in manner required by the offer

- If acceptance changes the offer in any way, it becomes a counter-offer. A counter-offer is a rejection of the original offer.
- Acceptance has no effect until it is communicated.
- The offeror controls many of the terms, and has the power to say what constitutes acceptance.
- If you make offer to specific persons, only those persons can accept.
- At moment of acceptance needs:
    (a) Certainty of terms;
    (b) Consideration;
    (c) Intention to create legal relations.

Counter-Offer

Livingstone v. Evans [1925] ABSC

If in rejecting a counter-offer you imply original offer is still valid you may be obliged to form contract with those terms if accepted. An inquiry about the offer is not counter-offer.

Facts: D writes to PL offering to sell land for $1800. PL wires "Send lowest cash price. Will give $1600 cash. Wire." D says that price cannot be reduced. PL accepts the offer.

Issue: Did the counter-offer of $1600 void the original offer? Was there an implied restatement of the original offer by saying that price cannot be reduced?

Discussion:

- The counter offer of $1600 negated the original offer
- But D replied by saying that the price cannot be reduced
- This implies that the original offer is still standing
- So the offer is valid.

Ruling: Judgement for D

Butler Machine v. Ex-Cell-O [1979] CA

Battle of the forms is an exception to the general rule that a counter-offer kills the original offer.

Facts: D (seller) quoted price to PL (buyer) saying a number of terms would prevail over any in buyer's order. One term was price variation clause, allowing them to charge D what they wished upon delivery. PL placed an order changing/omitting terms (p/v clause). Attached to PL's order was slip saying D was free to accept based on terms attached. D accepted order and returned slip BUT said original terms applied. D attempted to invoke p/v clause at delivery.
Issue: What party's forms regulate the offer? Which is operative?
Discussion:

- There are three ways to deal with battle of the forms situations:
  - Last blow wins - last form sent and received without objection;
  - First blow wins - if offeror says he'll sell something for certain price and acceptance has new terms hidden, original form may win;
  - Shots from both sides - if you can reconcile...otherwise you may scrap conflicting terms and decide upon reasonable implication. (combination of terms)
- Court found the contract was on PL's terms because it stipulated that its terms would prevail over any terms and conditions in seller's order, and seller acknowledged acceptance by signing

Ruling: PL's K was the final one

Tywood Industries v. St. Anne Pulp & Paper Co. [1979] ONHC

Where the conduct indicates that the parties considered all terms except for the price to be unimportant, then the contract is valid in face of other contentions.

Facts: D issued an invitation to tender. PL responded with 12 terms and conditions on the back. Condition 12 stated "No modification of the above Conditions of Sale shall be effected by our receipt or acknowledgment of a purchase order containing additional or different conditions." Neither document contained any mention of arbitration. Two purchases orders came from D containing an arbitration clause. D has moved to stay the action because the agreement of sale included a clause for arbitration.
Issue: Are terms not specifically referred to or previously agreed to that don't show up on any other documents binding if they show up on last document?
Discussion:

- Arbitration clause is not binding because it had not been clearly expressed in the K
- It was unclear if both parties had agreed to arbitration
- D added the clause without drawing attention to it and did not complain when PL failed to return the copy with the acknowledgment of the new terms
- Conduct of both parties indicates that neither consented to any of the terms besides for those on the face side - price and specification.
- Condition 12 disallowed any change in terms. PL never acknowledged the supremacy of D's new terms.

Ruling: D's action dismissed.

Acceptance By Performance

ProCD v. Zeidenberg [1996] USCA

It may be possible to perform contract by clicking "I agree" on specific terms after money exchanged. A contract can be binding with terms unknown at time of purchase.

Facts: D was making illegal copies of PL's software. License agreement stated that software is sold in personal and business versions. D says he can't be bound because the license was in the box at the time of purchase and he could not have been bound.
Issue: Can you be bound by terms that were secret at time of purchase?
Discussion:

- The agreement came up on screen during installation, so D could have read it and could have returned the product.
- He also clicked the "I Agree" button during the TOU installation. <u>This is acceptance by performance.</u>
- Printing the agreement on the outside of the box would be microscopical and impossible to read
- Detailed terms are often only available after money is exchanged (airline tickets) but one can return the product

- When one uses the product, he accepts the terms. One does not have to be notified of every term in advance.
- The vendor has the power to determine what constitutes acceptance
- The buyer must accept by performing those acts that the vendor cites as acceptance.

Ruling: Judgement for PL.

Dawson v. Helicopter Exploration [1951] BCSC

Bilateral contract can be formed by exchange of promises before performance. Part performance can be construed as acceptance.

Facts: PL communicated with D's company regarding exploration of his land claim. The agreement had PL accepting to show the property when D would provide a chopper pilot. After a long wait, D writes that he has a pilot, but no longer wants the claim. PL files for breach of K.

Issue: Was D's offer unilateral or bilateral, and thus accepted with PL's promise to perform?

Discussion:

- D offered to purchase the staked claims from PL
- The acceptance would be properly concluded when D would fly PL to the claims with D's chopper.
- Though nobody here said specifically, "I accept your offer," K was sealed by an exchange of promises and implied intent.
- Courts should interpret all plausible K as bilateral, because in bilateral you can see intentions of both parties in a more clear way
- An offer of unilateral can be revoked until the last minute, and unfairness can result.
- There was a bilateral K, and in failing to provide a chopper ride, D is guilty of a breach.

Ruling: Judgement for PL

Acceptance By Silence or Conduct

Carlill v Carbolic Smoke Ball Co [1893] QB

Silence can constitute acceptance if offerer makes it cleat that performance is acceptance and no notice is required.

Felthouse v. Bindley [1862] ExCh

Silence (absence of rejection) does not constitute acceptance, even if stipulated by the offeror.

Facts: PL was interested in buying a horse and had discussed with his nephew the purchase of a horse belonging to him. There was a misunderstanding about the price, as PL believed he had purchased the horse for £30, and the nephew believed the horse had sold for 30 guineas. PL wrote his nephew offering to split the difference. He stated in this letter that he assumed the horse was his for £30.15 if he did not receive a response from his nephew. The nephew did not reply. By mistake, D - an auctioneer - allowed the horse to be put up for an auction and sold. PL sued the defendant for damages for conversion.

Issue: Does an acceptance of offer need to be communicated in order to be effective?

Discussion:

- PL's letter to his nephew offering to split the difference in the cost of the horse did not constitute a complete bargain. It was an open offer at the time of the auction. PL would only have been bound to the bargain if his nephew had given written indication of his acceptance.
- Even though the nephew intended his uncle to have the horse at the price, he did not communicate it to his uncle.
- Policy: treating silence as acceptance would force a sale upon someone;

Ruling: There was no K

Communication Of Acceptance

Eliason v. Henshaw [1819] US

Offers must be accepted according to stipulations prescribed by offeror.

Facts: Buyer would purchase a quantity of flour for a set price. The original offer was made by letter on February 10th. In a postscript the letter stipulated that an acceptance was to be made by letter on the "return wagon" to Harper's Ferry. Upon

receiving the offer, the seller posted a response, by mail, the following day, the 19th of February. The buyer acknowledged receipt of the letter on the 25th of February, stating that "as we requested answer by return of the wagon the next day, and as we did not get it", they would not complete the original K, and mailed the letter to the seller. In the interim the flour was shipped to the buyer, who then refused to pay for the shipment, and would not take delivery. The seller then sued for damages for the sent flour

Issue: If acceptance to an offer is communicated in a manner other than stated in the original offer, is the K enforceable on its original terms, or does the offeror have the right to refuse?

Discussion:

- Offerors wanted acceptance in a particular time and place.
- They receive the letter of acceptance, but at the wrong location, and so they pulled out.
- In this case the changing of the destination to which the acceptance was to be posted, even though it was only accepting the original terms, constituted a counter-offer, which was not accepted by the buyers
- On whether location was significant, the court said: it is up to offeror to decide..."they were only judges of its importance."

Ruling: There was no K.

Postal Acceptance

Postal Acceptance Rule: as a rule of convenience, if the offer is accepted by post, K comes into existence at the moment and at the place that the acceptance was posted.

- Excludes contracts involving land, letters incorrectly addressed and instantaneous modes of communication.
- Post office is treated as a agent of the offeror
- Offer is accepted when the acceptance is handed to the postal office
- Offeror is bound at the time it is handed to the post office although the acceptance has not yet been delivered and may never be delivered.
- the rule is be applied unless stipulated otherwise. But it does not apply to instantaneous communications

Household Fire & Carriage Insurance v. Grant [1879] CA

The establishment of the Postal Rule. Offeror bound by offer even though acceptance is not received.

Facts: D offered to buy shares of PL. Company accepted by post and D was entered as a shareholder in their books. Notice never reached D. Company went bankrupt, and their books show that D owes money for shares. D refuses to pay, as he never received the acceptance.

Issue: Was D under K to buy shares, even though he never got received the letter of acceptance?

Discussion:

- There was a K because once posted, acceptance was completed. The post office was a common agent so acceptance occurred when it reached the defendant's agent.
- The postal acceptance rule balances the parties' interests. The offeror can make communication of acceptance a condition of the contract, or can inquire if he does not receive a timely acceptance.
- The offeree would have to inquire if his acceptance was received before knowing if he was bound. In addition, fraud could result if acceptance was dependent on it being received by the offeror.

Ruling: D had to pay as he was contractually obliged.

Holwell Securities v. Hughes [1974] CA

Postal rule does not apply when stipulated otherwise. Also it does not apply when the parties cannot have intended that there should be a binding agreement until the offeree had communicated acceptance.

Facts: D issued a grant to sell a property. It contained a clause stipulating that there must be notice in writing within six months in order to exercise the option. PL sent a letter exercising the option; it was lost in the mail and was never received by D.

Issue: Was K made in accordance with the postal acceptance rule?

Discussion:

- Postal acceptance rule does NOT apply in every case when the post is used: it is up to offeror to specify.
- Also, consider what the "reasonable person" would think. In this case, the letter never arrived and the option was exercisable by notice in writing within six months.
- IN this case the telephone call saying there was written notice did not constitute an acceptance.

Ruling: No binding K.

Option Contract: A promise which meets the requirements for the formation of a K and limits the promisor's power to revoke an offer." An option L is a type of K that protects offeree from offeror's ability to revoke the K. Consideration for the option K is still required as it is still a form of K.

Brinkibon Rule: in instantaneous communication, K is made where the acceptance is received.

Brinkibon v. Stahag Stahl [1982] HL

Instantaneous communication is not bound by postal acceptance. In instantaneous communication,the K is made when and where the acceptance is received

Facts: D(sellers based in Vienna) sent a telex, containing a counter-offer for the supply of steel, to PL (buyers based in London, U.K.). PL claimed that they sent back the acceptance in two ways. First, they replied by telex, which was said to have contained the acceptance. Second, PL informed the respondents about opening a letter of credit (as requested by sellers), which amounted to an acceptance by conduct.
Issue: Was K communicated by telex formed in Vienna or London?
Discussion:
- Is this postal or instantaneous? If postal, then the time/place where it was posted counts. If it is instantaneous, the acceptance is effective when/where it is received by person at other end. In this case, the parties knew where there was acceptance. Acceptor has responsibility that his message is received.
- For the future cases where instantaneity is to be established, three things are to be considered by the court:
  - intentions of the parties
  - sound business practice
  - where the risk should lie

Ruling: Telex communication is instantaneous, thus K formed in Vienna, where offeror learned of acceptance.

Rudder v. Microsoft [1999] ONSCJ

Clicking "I agree" is acceptance, even if one did not read the content.

Facts: Proposed class action suit launched by PL claiming that D charged MSN users money in breach of K
Issues: Where is the jurisdiction for this?
Discussion:
- Jurisdiction clause, stated that all concerns are in the jurisdiction of the WA State.
- PL: the clause is not binding, because it amounts to fine print.
- J: no difference between having to click new screens and turning a page; clicking "I agree" is same as signing your name;
- Policy consideration: into realm of commercial absurdity.

Ruling: Action stayed.

Termination Of Offer

Revocation

Offeror communicates that the offer is no longer open. There are two main rules in respect to this.
- Offer can be revoked at any time before the acceptance
- An offer is made irrevocable by acceptance

Byrne v. Van Tienhoven [1880] CA

Revocation of offer must be communicated to offeree before it takes effect. Until offeree receives it, he CAN accept the offer and create binding K.

Facts: D mailed an offer to sell tin plates to PL on October 1. The offer was received by PL on October 11 and immediately accepted via telegram on the same day; acceptance was subsequently confirmed by PL by letter on October 15.

D mailed a revocation of offer on October 8, which was received by PL on October 20, after PL had already made assurances to sell the goods to another party. PL brought action against D for breach of K and failure to deliver.
Issue:Does a withdrawal of offer have any effect until it is communicated to the person to whom the offer has been sent?
Discussion:

- "Meeting of the minds" is necessary for the formation of the K and for withdrawal of the offer. Thus, a revocation is effective only when it reaches the offeree.
- By the time PL received the revocation, they already entered into K to sell to someone else. Thus the protection of commerce interest requires that the original K is to be held true.
- Postal rule does not apply to revocation

Ruling: Judgement for PL

Dickenson v. Dodds [1876] CA

An offer open for certain amount of time does not put the offeror under any obligation to refrain from selling to a third party before offer expires. If there is knowledge of revocation, the the offeree has no remedy.

Facts: D said that the offer was open until Friday at 9am. On Thursday D sold the property to a third party, and on Friday, PL heard about it and tried to accept the offer. Acceptance letter never reached D - it was not acceptance because he had not received it.
Issue: Did D have obligation to keep offer till Friday 9 open for PL?
Discussion:

- There is no K until acceptance is communicated and effective.
- There has to be the potential of the reasonable performance by the offeror. Thus, if the offeror dies after making the offer, the offer is null.
- in this case, if the house is sold prior to acceptance, then the offer is null.
- how do you avoid the problem of offers being withdrawn? Options Contracts. Two stage contract (A & B). Example of where you can't withdraw an offer until it has been accepted *R. v. Ron Engineering.*

Ruling: PL's acceptance was null.

Errington v. Errington and Woods [1952] CA

Offer of a unilateral K cannot be revoked once the performance has begun.

Facts: Father bought a house for his son and daughter-in-law. He paid £250 as a down-payment, and put the title of the house in his name. He told his daughter-in-law that if they paid off the remaining mortgage (£500) in weekly installments, he would transfer the title to them when the house was completely paid for. He died before they paid it all off. The late Father's widow (PL) then sued for the house.
Issue: Does the young couple have a contractual right to continue paying installments, and upon completion of payments, take title of the house? Does their agreement remain binding despite the father's death?
Discussion:

- This case was unilateral because the couple were not bound to keep making those payments
- General rule: an offer is ended upon one party dying.
- Offer cannot be revoked as long as couple kept performing terms.

Ruling: Judgement for D

Carlill v. Carbolic Smoke Ball [1893] QB

Unilateral offer may be considered to have been revoked after reasonable amount of time, given circumstances of the offer has passed.

Lapse

Offer is not open forever when there is no stated end date. An offer can be terminated by:

- Specific revocation
- Death of offeror
- Passage of time - expressly or impliedly - determined by court.

110.1 Offer And Acceptance

Barrick v. Clark [1951] SCC

An offer with no specified expiry date will expire in a reasonable amount of time depending on nature and character of the offer ,and the normal course of business.

Facts: D sent a letter with an offer to buy land to PL. PL replied to it with a counter-offer that arrived 10 days later. D was away and was not able to reply until a month later, by which point the estate was sold.
Issues: Was the offer still open for D to accept?
Discussion:

- The offer was not accepted in a reasonable period of time.
- PL wanted the deal closed immediately, and said that he hoped that D would reply as soon as possible.
- 3 indications in the letter itself that show that the Dec 10 acceptance is unreasonable:
    - If D satisfied with price, transaction could be immediately closed;
    - D is asked to give answer ASAP
    - Formal agreement to be concluded Jan 1. So it unreasonable to say he could accept offer as late as December 10.

Ruling: Judgement for PL

Manchester Diocesan v. Commercial and General Investments Ltd. [1969] CHD

Where offer is made in terms which fix no time limit for acceptance, the offer must be accepted within a reasonable time to make contract.

Facts: PL calls for tender, with a stipulation that it was subject to approval by a ministry. D submitted a bid and won, but approval was pending. 3 months later, upon receipt of approval, D did not wish to be involved anymore.
Issues: Was K formed even though PL indicated they accepted offer prior to gaining ministerial approval? Did the offer contained in the tender expire because of lapse of reasonable time?
Discussion:

- the K was formed when PL awarded the tender to D
- though all conditions were not met, the awarding of the tender showed that PL accepted D's offer
- as a matter of law, PL was obliged to exercise acceptance within a reasonable time
- it is uncertain what "reasonable time" is in these circumstances

Ruling: PL's letter to D constitutes effective acceptance. D ordered specific performance.

Certainty Of Terms

Mere expression intention to be legally bound is insufficient, there has to be agreement on central terms. The court must be able to figure out what the parties obligations are. What is reasonable to read the parties to have intended, given the language, circumstances and aim of the transaction?
- Issues of price, or if the objects of the transactions are unclear, you do not have K.

Two major sources of uncertainty of terms:
1. The offer is incomplete as it lacks an important element
   - Price is essential to the K
   - Courts will consider statutes such as *Sale of Goods Act* to see if this can be compensated, as well as industry wide practices
   - If this fails, then the K is void

2. An aspect of the K is unclear
   - Courts prefer plain meaning;
   - Prefer specific clause over general;
   - Courts will look at statutes and intention for guidance to the interpretation of the unclear clauses
   - Courts can sever meaningless clause, or can void the entire L

Rules of Construction:
- Whenever possible a K will be upheld (*Foley v Classique Coaches Ltd.*)
- Meaningless clauses will simply be eliminated from the agreement without effect to the rest of the agreement
- There is no contract if there is an absent agreement on price (unless there is a statute (*Sales of Goods Act)*but this still may not apply)(*May & Butcher v. R*)
  - But in *Foley* it was found that that the absence of a price would not cause the K to be avoided.
- Uncertain terms may be determined by reference to the original agreements or normal practice (*Hillas and Co. v. Arcos Ltd.*)
- Parties must agree on the terms. If they do not, then the agreement is an "agreement to agree" and fails on lack of certainty, making the K is void (*Empress Towers v. Bank of Nova Scotia*)
- A clause for an agreement to renew is void for lack of certainty (*Mannpar Enterprises v. Canada*)
  - But in *Empress Towers Ltd.* it was found that an agreement to renew implies that: one must negotiate in good faith and that one must not withhold the agreement unreasonably

Sale of Goods Act BC

12 Ascertainment of Price

(1) The price in a contract of sale may be
- *(a) set by the contract,*
- *(b) left to be set as agreed in the contract, or*
- *(c) determined by the course of dealing between the parties.*

(2) If the price is not determined in accordance with subsection (1), the buyer must pay a reasonable price.

(3) What is a reasonable price is a question of fact dependent on the circumstances of each case.

13 Agreement to sell at valuation

(1) If there is an agreement to sell goods on the terms that the price is to be set by the valuation of a third party, and the third party cannot or does not do so, the agreement is avoided.

(2) If the goods or any part of them have been delivered to and appropriated by the buyer, subsection (1) does not apply and the buyer must pay a reasonable price for the goods.

(3) If the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Vagueness

R v. CAE Industries Ltd. [1986] SCC

Court will look at surrounding words, actions and circumstances in determining if there was intention to create legal relations. Reasonable meaning of words considered. The test is objective.

Facts: R leased an airport to D, under certain quasi-contractual terms. R bailed on terms. D sued for breach of K. R claimed there was no K.
Issues: Was there intention to enter into legal relations? Was it too vague?
Discussion:
- D wanted assurance of enough work if they bought the place, and the ministers for the R said they had work and would show "best effort" to send more work their way.
- J found and intended K by looking at the wording and the circumstances of the letter.
- K was intended, but did it succeed or was it too vague?
- R said "best efforts" term was too vague. The court to discover what the parties intended - and said it implied leaving "no stone unturned": "broad obligation to secure ... work up to the limit it lays down." Cannot guarantee results BUT in agreeing to use best efforts they were taking intermediate position.
- Vague terms do not render contract unenforceable if court can give meaning to them and look at circumstances to make certain that language is enforceable.

Ruling: There was objectively demonstrated intention to create a K, and terms were sufficiently clear for it to be valid.

Incomplete Terms

May & Butcher Ltd. v. R [1934] HL

Agreements to agree are not contracts. Price is an essential element of K. Sale of Goods Act only applies when parties are silent on price.

Facts: D agreed to sell surplus post-WW1 tentage to PL at a price that was to be negotiated at a alter term. After a dispute, D claimed that there was no K, since there was no agreement on the price.
Issue: Was there a binding K despite missing vital terms?
Discussion:
- Prices to be agreed upon from "time to time" as with delivery.
- There was also an arbitration clause that directed arbitration arising from the K to a statute
- PL uses the arbitration clause, to refer to a *SGA*, which stipulates that if no price is named, then it must be a reasonable price - and the "reasonableness referred to arbitration."
- J finds that absence of price renders the K invalid
- Agreements to agree are not contracts
- *SGA* does not apply, since the arbitration cause is relevant to "issues arising from the agreement" and no "agreement" was ever reached since there was no price

Ruling: No K

Hillas v. Arcos [1932] HL

If there is a mechanism for making determination with respect to questionable term, the court will work to find the term. If courts decide the parties believed they had a K - will work to enforce.

Facts: PL contracted to buy 100,000 standards of Russian timber but, D entered into a different contract to sell its entire production elsewhere.
Issues: Was there sufficient certainty of terms to enforce this K?
Decision:
- Courts had to deal with whether provision Hillas was relying upon was a binding agreement. Where was this term contained? Clause 9 said buyers had "option of entering into a contract" for the next year where the price was to 5% less of value of official price list.
- Both parties intended to make a K and thought they had.
- Court called this drafting "crude and inartistic." Court said to interpret it broadly and practically and look at actions of the parties: "try wherever possible to give words some meaning." Courts: this is the way you guys do business. There is enough detail for a business transaction.
- Differences between this case and *May*:
  - ability to compare with other contracts Arcos has written;
  - In tentage, there was no body of info to decipher how tentage is dealt with;
  - There was formula to determine price.
- Between previous year's agreement, pricelist and the S*GA*, it was possible to determine terms of K

Ruling: The K is valid based on context

Foley v. Classique Coaches [1934] CA

Definite agreements on price may not be necessary for contract to be enforceable, if it has been operating successfully without them for a time.

Facts/Issue: D agreed to purchase land and all petrol required for their business from PL at a price "to be agreed by the parties in writing and from time to time." D did so for three years and then tried to go elsewhere. There was arbitration clause. Was there no enforceable K due to uncertain terms?

Discussion:

- Court: they believed they had a K and acted for 3 years as if they had.
- CA (on price issue): there is an "implied term" that there would have to be a reasonable price and reasonable quality - if there are disputes there is an arbitration clause.
- The K was for both land and petrol - D wanted to null one without nulling the other. Silly wankers.

Ruling: The K was enforceable.

Summary of the Trilogy:

- *May:* an agreement to agree is not a K
- *Hillas:* you must find meaning of the K and the intention of the parties
- *Foley*: possible to imply term of reasonable price, if there are other circumstances

Agreements to Negotiate

- Sometimes a potential buyer will want to secure a right to enter into negotiations, without committing himself to a price or any other obligations.
- A binding promise to negotiate is much easier to fulfill in unknown future conditions.
- In this case, there is no intent to purchase at any price, but an intent to achieve some substantial result.
- There is a difference between an agreement to complete a transaction on unspecified terms to be agreed, and an agreement to negotiate. The first agrees on the object (the transaction) the second on the process (negotiation).

Empress Towers v. Bank of Nova Scotia [1991] BCCA

Agreements to negotiate price are not binding, but imply a duty to negotiate in good faith.

Facts: PL is the landlord and D is the tenant, with a limited lease, that has a clause to be renewed under negotiations. D tries to renew prior to expiration, but PL waits until the last day and triples the rent price. PL then wants to terminate the lease, by voiding the renewal clause due to uncertainty.

Issue: Was the renewal clause void for lack of certainty?

Discussion:

- Courts should try to give proper legal effect to any clause that the parties understood and intended to have legal effect.
- Requirements of renewal clause is that PL must not enter into agreement where rental rate does not meet market rental.
- "Business efficacy principles" - terms can be implied to give business efficacy.
- PL did not negotiate in good faith - bank not entitled to evict simply because there had been a failure to agree.
- it is an implied term that PL has a n obligation to negotiate in good faith and not to withdraw agreement unreasonably.

Ruling: K is enforceable, as it supplied mechanisms to reach agreement on price.

Mannpar v. Canada [1999] BCCA

Agreement to negotiate does not imply a duty to negotiate in good faith, if there is no objective point of reference

Facts: PL rents rights to use a quarry for five years. There is a clause in the K that the K can be renewed, but the royalties have to be re-negotiated, while imposing a lower limit on the rates. D does not want to re-negotiate, and PL sues for breach.

Issues: Is there implied duty to negotiate in good faith, as in Empress?

Discussion:

- Whether there was good faith obligation: there was no objective standard to base clause of good faith on.
- This is unlike *Emptess* where there was a standard market rate to use for the point of reference.
- There has to be a benchmark basis to negotiate from - "fair value" or "market value"
- Language D used was deliberately too vague for benchmark due to fiduciary duty.

- Terms are not going to be implied simply because the court thinks they are reasonable and should be in the K.

Ruling: There was no duty to negotiate in good faith.

Process Contract: a type of contract that obliges you to take part in a particular process, with the obligation to arrive at a any result in particular. You can satisfy the process obligations but that does not mean you have to or will arrive at agreement. A breach of a process K is a failure to try to carry out the proceedings.

Intention to Create Legal Relations

- Common Law rejects intention as the criterion for enforceability in a favour of consideration
- The presence of consideration gives rise to a presumption that the parties intended to be legally bound, but this is rebuttable
- In domestic and social agreements, however, this is reversed - the parties are presumed not to have entered into legal relations in the absence of clear evidence to the contrary.

Balfour v. Balfour [1919] EN CA

An agreement between spouses is not legally binding unless intended to be such.

Facts Husband goes to work overseas and promises to send his wife monthly payments. After a while, they decide to separate, and she treats the agreement as K and tries to enforce the payment. Lower court agrees.

Issues: Is there a legal K?

Discussion:

- Husband claims that there was no K, but an agreement
- There are agreements possible that are not Ks
- These are natural and inevitable to marriage
- Presence of consideration in such agreements does not make it a legal K
- Common law does not regulate spousal agreements - this would lead to too much work for the courts
- The onus to prove a K is on the PL, and she failed

Ruling: There is no K

Rose & Frank Co v. JR Crompton and Bros. Ltd. [1923] CA

If parties explicitly state that a business agreement to be non-legally binding, then it is such

Facts: A written business arrangement was entered into, and included a clause that it was not subject to legal jurisdiction. When it broke down, PL sued for breach of K. Lower court nulled the clause as "repugnant to the rest of the agreement".

Issues: Is such a clause valid?

Discussion:

- It is possible for parties to choose to keep the law out of their agreements
- In such case, they rely on each other's good faith and honour.
- In this case, the parties intended their agreement to be non-legally binding

Ruling: The clause holds, because it demonstrates the clear intent of both parties.

TD Bank v. Leigh Instruments Ltd. [1999] ON CA

Courts are not willing to enforce something not intended to be legally enforceable

Facts: Bank provided a line of credit to D. Plessey Co. provided 5 letters of comfort to PL and took over D. D went bankrupt. According to letters of comfort, Plessey would manage financial obligations of subsidiaries. PL reads this to mean that Plessey will pay the debt. Lower court rejected this interpretation.

Issues: Are comfort letters legally enforceable?

Discussion:

- Trial judge finds that the provision means that subsidiaries should manage their own affairs in a way to meet their financial obligations
- ON CA:
  - Letters of comfort are not security in the traditional sense
  - Their commercial value depends on the relationship between the parties
  - One of the letters said that these "do not constitute a legally binding commitment"

- The language was carefully chosen and clear
- PL knew that these were not guarantees

Ruling: Appeal dismissed.

Formality

- Less developed legal systems often require a degree of formality in order to determine which promises are legally binding.
- Original formalities required the parties to seal the K
- Development of the doctrine of consideration mean less stringent formal requirements

RBC v. Kiska [1967] ON CA

A promise under seal need not be supported by consideration. There are no strict requirements on what can be used as a seal. Something must be understood to be a seal by signatories for an agreement to be binding without consideration.

Facts: D is a student who signs a K with the bank on unfavourable terms. The K was not sealed - instead words "seal" were printed on it.
Issues: Was document still binding if under seal but with no consideration?
Discussion:

- A promise under seal does not need consideration
- But what constitutes a seal?
- There has been change since the last centuries, so neither wax nor an impression are mandatory for a seal
- But how far can this be relaxed?
- The K is binding because there was consideration, though the seal was questionable.
- Laskin J: merely agreeing on something to be a seal is insufficient

Ruling: Judgement for PL

Statute of Frauds

Though it was enacted in Britain in 1677, it became entrenched in Common Law and became part of law in some provinces by default, whereas in others it was re-enacted in substantially similar form by statutes.

4 *The presence of consideration in the creation of contract for sale of land or marriage is null if there is no formal evidence in writing, for the purposes of indemnities or contractual obligations.*

17 (similar to current Sale of Goods Act c.S-2, s.6)

(1) A K for sale of goods of value $50 and higher is not enforced unless
(a) there have been an earnest exchange of funds/goods, or
(b) there is a memo or other written formal agreement
(2) *this applies to any future or present goods*

Over the years, this has been modified, in a move for more weight to consideration:

- a majority of jurisdictions have retained the writing requirement relating to land Ks and contracts of guarantee
- in the case of land Ks, past performance is given more weight
- S.4 requirements applicable to estates and a one-year term have been repealed in England, BC, AL, ON, NZ and AU

Operation of the Statute:

- The "no action shall be brought" wording of s.4 is read as relating to procedure, not validity
- Thus, such a K is still valid, though not legally enforceable
  - this is used as defense (trespass, maintaining a deposit)
  - even though it is not enforceable now, it may become enforceable later
- The statute requires a "note or memorandum" - no specific form is needed, as long as it sufficiently evidences the existence of the K
  - The essential terms of the memorandum are
    - the parties
    - the property
    - the price

- any other essential terms

Law and Equity Act BC

59 Enforceability of contracts
(this applies to contracts of sale of land or disposition of land, as well as guarantees and indemnities)

(3) A contract respecting land or a disposition of land is not enforceable unless
(a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
(b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
(c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
(4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.
(5) If a court decides that an alleged gift or contract cannot be enforced, it may order either or both of
(a) restitution of a benefit received, and
(b) compensation for money spent in reliance on the gift or contract.
(6) A guarantee or indemnity is not enforceable unless -
(a) it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor, or
(b) the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made.
(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

Three reasons for enforcing a K in respect of land
- evidence in writing signed by D
- act (or acquiescence) by D not inconsistent with K
- PL's change of position in reliance > inequitable to enforce

Even if a K cannot be enforced under the above, then under s.59(5) the courts can order a compensation or a restitution.

Indemnity - security against, or exemption from legal liability; security or protection against a loss or financial burden

Electronic Transactions Act BC

5 Requirement for a record to be in writing
(1) A requirement under law that a record be in writing is satisfied if the record is
(a) in electronic form, and
(b) accessible in a manner usable for subsequent reference.

11 Signatures
(1) If there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature.
(2) Subsection (1) does not apply to a signature for a record prescribed, or within a class prescribed, under section 21 (2) (d) unless the proof described in section 21 (2) (d) is present.

Legal Capacity

There are two recognized types of incapacity: infancy and mental disability.

Hart v. O'Connor [1985] NZ PC
The validity of K entered by a lunatic who is pronounced sane is to be judged by the same standards as a K by a person of sound mind and is not voidable unless unfairness amounts to equitable fraud.

Facts: PL bought land from D, not knowing he had mental disability. Guardian on D applied to have the K rescinded based on unfairness.
Issues: When can person having mental incapacity have a contract set aside?
Discussion:
- The traditional CL rule is the K is enforceable, unless if the other party knew that the party is not of sound mind
- The NZ approach is that the K is unenforceable even without knowledge, on the grounds of unfairness
- The trial judge found the K unfair
- PC found the allegations of unfairness baseless
    - Not an automatic rule that parties are unable to contract: you have to look at question of knowledge and question about fairness.
    - Courts would intervene if: (a) Contractual imbalance not considered here; (b) procedural improprieties - fraud or taking advantage.
    - Procedural unfairness is insufficient to deem the whole K null, if there is no contractual imbalance.

Ruling: Judgement for PL

Infants Act BC

19 When infants' contract enforceable

(1) Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is

(a) a contract specified under another enactment to be enforceable against an infant,
(b) affirmed by the infant on his or her reaching the age of majority,
(c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or
(d) not repudiated by the infant within one year after his or her reaching the age of majority.

(2) A contract that is unenforceable against an infant under subsection (1) is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.

20 Application for relief (paraphrased)

1. If K is unenforceable under 19(1), the infant may apply to court for relief against the party to K
2. The court may order compensation, restitution of property, or discharge to parties to K
3. Before the order under (2), courts have to consider circumstances of the case
4. Having reasonable grounds to believe an infant who lies about his age is not misrepresentation of age
5. Signing a K that says that you are "over 19" if you are not, is not misrepresentation of age

21 Application for Capacity (paraphrased)

(1) An infant can apply to be granted full capacity/limited capacity to enter into K,
(2) Courts have to be satisfied that they are not in need of protection
(3) Generally applies to necessities of life. Common law says you can enforce contracts for necessities (case law describes necessity)

22 Application to Public Guardian and Trustee

(1) The Public Guardian and Trustee may, on an application made on behalf of an infant, make an order granting contractual capacity or ratifying a specific contract that the infant proposes to enter into or has entered into, if the Public Guardian and Trustee considers that the making of such an order would be in the interest of the infant.

23 Guarantees and indemnity

(1) A person who enters into a guarantee or an indemnity, or who otherwise undertakes to be responsible for the failure of an infant to carry out a contractual obligation, is bound by that K even if the K was made is unenforceable against the infant.

Consideration

Consideration: the inducement, price or motive that causes a party to enter into an agreement or contract. It is an exchange in value - the benefit to a side and the detriment to the other. The often quoted definition from *Currie v Misa* [1875]:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

General Rules

- Consideration need not be adequate - an exchange between parties is sufficient, even if it is not a fair one
- There must be a consideration for each promise within a K
- Generally, consideration must be present at the time of acceptance
- Consideration has to move from the promisor to the promisee.
  - A promises to pay money to B. In consideration of that promise, B promises to transfer ownership. Consideration moves in both directions. There are two separate promises. Each party is a promisor and promisee.
- Contract *a nudum pactum*, or an agreement to do or to pay any thing on one side without any compensation to the other, is void in law, and one cannot be compelled to perform it (unless if under seal).
- Consideration is distinct from the motive for promising.
- Discharge of a moral or honourable obligation is generally not sufficient consideration.

Past Consideration

- Generally, consideration has to be given as part of the promise. Something that has happened in the past is problematic as a basis of consideration.
- Fresh consideration must be given for each promise, because offeror asks for it at the time that offeree accepts.
- But if a reasonable expectation of compensation existed when the service was performed, a later promise to provide that compensation may bind the parties.

Wood v. Lucy, Lady Duff-Gordon [1917] NY

Courts will use consideration to try to preserve business efficacy as it was intended

Facts: PL is the executive distributor for D's fashion endorsement franchise. She places her endorsement elsewhere and withholds the profits. PL sues for breach of K.
Issues: Was there a K?
Discussion:
D: the agreement lacks the elements of the K, as there is no consideration on the part of PL
- The court finds that we have moved past the formalism of old, there are implied promises here, which can give rise to a K
- D gave an exclusive privilege
- There is benefit to both parties under K
- An implied promise is necessary for business efficacy
- There is consideration, thus there is a K

Ruling: Judgment for PL

Eastwood v. Kenyon [1840] QB

Past consideration is not valid consideration for a promise made today. Moral obligation is a voluntary promise without consideration.

Facts: PL, acting as guardian for an infant whose father had died, spent money on the infant for her education and well-being. Sarah, the infant, came of age and subsequently promised to repay PL the amount, and indeed paid one year's interest. Sarah subsequently married D, who promised PL that he would pay the amount. D did not make payments. PL brought action against him.
Issues: Does past consideration provide justification for a future claim of exchange? Can the D's action in the past be extended into the future as part of a valid exchange in the present? Is the obligation contractual, or merely moral?
Discussion:
- Past consideration is no consideration at all.

- PL's past consideration was deemed to impart a purely moral, and not contractual, obligation upon the defendant.
- D made the commitment to repay many years after consideration was given; due to this, his commitment was an express promise not supported by timely consideration, and therefore not enforceable.

Ruling: Judgment for D

Lampleigh v. Braithwait [1615] KB

For past consideration to work, the act done before the promise can be consideration if three things are met: (a) Had to be request; (b) Parties must have understanding of remuneration; (c) It is enforceable otherwise.

Facts: Immediately after D killed a third party, he requested PL to help him in getting a pardon from the King. PL agreed to, and undertook to meet with the King to obtain the pardon. After he had done so, D promised PL a consideration of £100. D never paid, and PL is suing to recover the damages for breach of K.

Issues: Is consideration "past" if it is coupled with a prior request?

Discussion:

- If PL did the labour for D voluntarily, and out of his own will, he cannot recover any monetary compensation for his actions.
- However, PL is entitled to recover if
  - (a) the labour is performed at the request of D; and
  - (b) if a promise of compensation follows the labour, and there is understanding; and
  - (c) it is enforceable otherwise

Thus a promise which is made in recognition of a benefit previously received can be enforced by the courts.

Ruling: Judgement for PL.

Assumpsit: A promise or undertaking, founded on a consideration. This promise may be oral or in writing not under seal. It may be express or implied.

Thomas v. Thomas [1842] QB

Courts are not concerned with the value of consideration but it must have moved from the promisee.

Facts: PL is a widow. The will appointed S.Thomas and B.Thomas as executors of the estate. On his death bed, deceased stated that he would like PL to have a leasehold interest in one of his dwellings. S and B entered into an agreement with PL, according to which the she was entitled to the leasehold property if (1) she paid £1 per annum in rent, (2) she kept the premises in good repair, and (3) she did not remarry. S and B honoured their promise and PL took possession of the dwelling. When S later died, B sought to eject PL from the dwelling.

Issues: Was there a binding K for the conveyance of the leasehold interest from the executors to PL? More precisely, did PL provide sufficient consideration for the conveyance?

Discussion:

- There was no consideration in respect for the deceased's wish to benefit PL. Gifts are not considerations. Respect for the deceased's wish merely represents the motivation for the conveyance. Moreover, respect for the deceased's wish did not flow from the promisor. As such it could not constitute good consideration.
- The promise to not remarry did not constitute good consideration. The remarriage clause was interpreted instead as a terminating condition.
- The payment of £1 per annum represents good consideration. Therefore, the agreement was binding.
- The court suggests that the promise to keep the premises in good repair might represent good consideration.

Ruling: Decision for PL.

Forbearance

Forbearance - the action of refraining from or delaying the exercising of a legal right.

B.(D.C.) v. Arkin [1996] MAN QB

Forbearance to sue is good consideration, and monies paid for a promise not to sue is a valid and enforceable legal K. If the party threatening to sue should have known they had no legal right to do so, then the consideration is void.

Facts: PL's child was apprehended for shoplifting from Zellers. The merchandise was returned to the store unharmed. Z had a policy of demanding restitution from the parents of children who are caught shoplifting. Z sent a letter to PL offering to settle the civil case against her if she paid $225. The letter stated that if she chose to not pay the $225, Z would take the case before to court to claim damages. PL paid the money but later realized that Z did not have a claim against her.
Issues: Can PL recover the money on the grounds that Z did not have a valid claim against her? Did Z's promise not to sue constitute valid consideration?
Discussion:
- Forbearance to sue is good consideration, and money paid in exchange for a promise not to sue is a valid and enforceable legal K.
- The promise is not binding if:
  - The forbearer knows the claim against the other party is invalid. If the claim is doubtful or not known to be invalid, the promise is still binding;
  - The forbearer deliberately conceals facts from the other party, knowing these facts will enable the other party to defeat the forbearer;
  - The forbearer did not seriously intend to pursue the claim.
- There is no rule that parents are responsible for their children's actions, thus, Z could not have seriously thought that their claim against PL would succeed.
- Z showed no serious intention of pursuing the claim in court, if PL did not pay the $225.
- The promise of forbearance does not make a K.

Ruling: Appeal allowed. PL was entitled to the return of the money with interest and costs.

Pre-Existing Legal Duty

Public Duty

If what you are promising to do is a pre-existing public duty - doing something that you are obliged to do as is - does not count as consideration. In order for the promise to be consideration, there has to be something above and beyound the call of duty.

Duty to a Third Party

When there is an existing K between promisor A and a promisee B, if C also makes a promise to B over the same action, then the pre-existing actions of B are valid consideration in B-C K

Pao On v. Lau Yiu Long [1980] PC

A promise of performance of a pre-existing duty already owed to a third party may be good consideration as long as the promise has not been fulfilled.

Facts: D bought a company which PL were majority shareholder and promised to protect the value of the shares held by PL for a year. Share price dropped considerably and PL demanded to be indemnified. D claimed that there was no consideration in the deal, since any consideration that existed was pre-existing legal duty to a third party.
Issues: Is pre-existing legal duty to a third party good consideration?
Discussion:
- The existing duty of D was past consideration. The *Lampleigh v. Braithwait* test is:
  (a) promise given at promisor's request;
  (b) parties understood act was going to be remunerated by money/benefit;
  (c) it could have been enforced.
- The existing valid consideration to a third party is also sufficient consideration to the K in question, if it also meets the 3 point test described above, and the promise has not been fulfilled.
- However, a problem may arise if the duty is already fulfilled before the parties enter into the K, since this would make it invalid past consideration.

Ruling: The consideration was valid. Judgement to PL.

Duty to the Promisor

Gilbert Steel v. University Construction [1976] ONCA

Pre-existing contractual obligation is not consideration for new terms to a contract.

Facts: On Sept 4, PL entered into a written K with D for the supply of steel at a fixed price for 3 building projects. D called for 2 buildings to be erected. Prior to construction of the 1st buildings, PL announced a price increase and on October 22, the parties entered into a new K for the supply of steel for the 1st building at the increased price. While the 1st building was still under construction PL announced a 2nd price increase and on March 1, the parties entered into an oral agreement for the supply of steel for the 1st building reflecting the 2nd price increase. Further to their oral agreement on March 1, a written K was sent to D, but was never executed. D continued to accept deliveries of the steel, but failed to make full payments against invoices reflecting the 2nd price increase. PL sued for breach of K for the balance owing.
Issues: Was the oral agreement legally binding or did it fail for want of consideration?
Discussion:

- Unilateral promise to increase price is unenforceable, because there is no clear agreement to rescind existing K.
- New provisions were unilaterally imported into document and consideration of oral agreement not found in mutual agreement.
- The oral agreement was unenforceable for want of consideration. There was no consideration on the part of D to pay the increased price since PL was already bound, before the oral agreement was entered into, to deliver the steel at the original price agreed to in the written contract of October 22.
- J rejected the argument that in substituting a new price in the oral agreement, the parties intended to rescind the original K. Consequently, there was no consideration in the form of a mutual agreement to abandon the earlier written K and to assume the obligations under the new oral one.
- No consideration in the promise of a "good price" on the 2nd building for agreeing to pay the increased price on the 1st. PL fell short of making any commitment in this regard.
- No consideration in the increased credit afforded by PL to D as a result of the increased price.
- PL cannot found his claim in estoppel ("it is not a sword, but a shield"). The fact that D did not reject the invoices reflecting the higher price did not mean that he agreed to them.

Ruling: Appeal dismissed

Williams v. Roffey Bros. & Nicholls Ltd. [1990] CA

Pre-existing contractual obligation can serve as consideration if the promise to fulfill the pre-existing obligation confers a "practical benefit" on the promisee

Facts: D entered into a K with the owners to renovate flats. D was to finish by a certain date. D subcontracted some work to PL. While working, PL began to have financial difficulty because the agreed price was too low. D did not want to breach their K with the owners by being late. To remedy, D recognized that they had underestimated the cost, and agreed to pay PL extra 10,300 in installments. D had made only one payment under this arrangement, and then failed to make any further payments. When the payments stopped, so did PL's work. PL sued for the remaining payments.
Issues: Can the performance of an existing contractual obligation be taken as consideration? Is this enforceable?
Discussion:

- This is an oral agreement to vary and existing K
- This is a past consideration
- D was not pressured into this, as they proposed - thus, there is no economic duress.
- If the following elements exist, the promise is legally binding:
    (1) A has entered into a K with B, and
    (2) before A has completely performed, B has reason to doubt that A will complete performance, and
    (3) B thereupon promises A additional payment in order to ensure performance on time, and
    (4) as a result of giving his promise B obtains a practical benefit, and
    (5) B's promise is not given as a result of economic duress or fraud on the part of A, and
    (6) the benefit to B is consideration.
- All of the above elements were satisfied in this case. The new agreement conferred 3 practical benefits on D:
    - actual performance of continued work
    - avoidance of penalty for delay of K between him and the owners.
    - avoid expense of finding others to do the work
- Therefore, D's promise was legally binding.

Ruling: Judgement for the PL. Appeal dismissed.

Foakes v. Beer [1884] HL

A promise to pay less than the total amount of a debt is not on its own valid consideration

Facts: D owed PL the amount of £2,090. PL sued and won for the full amount. D asked to be allowed to pay in installments. They agreed for £500 to be paid at the start, with £150 to be paid bi-yearly until the debt was cleared. This agreement was found satisfactory and commenced in 1876. In 1882 D brought a claim that the debt was repaid, asking if any payment was due in July of 1882. It was found at trial that the original amount of £2,090 had been paid in full. PL claimed interest and the CA agreed. D appealed the decision that interest had to be paid, as there was nothing in the original agreement to that affect.
Issues: Can a promise to discharge debt for less than the original amount be valid consideration?
Discussion:

- it is a Common Law rule that a promise to pay less than the total amount of a debt, in installments, is not really a K.
- To allow the judgment for Foakes, would be stating that you could have a valid K without proper consideration received by one party.
- It did not matter that the parties had not discussed interest; it should have been inherent as soon as payment by installments were decided.
- "that payment of a lesser sum on the day in satisfaction of a greater, cannot be satisfaction for the whole"

Ruling: Appeal dismissed

Foot v. Rawlings[1963] SCC

A promise to pay less than the total amount of a debt is not on its own valid consideration

Facts: PL owed the D a large sum of money under a series of promissory notes. D offered to lower the amount/month and the interest rate that PL would have to pay him. PL agreed and gave D a series of post-dated cheques. It was agreed that if any of the cheques bounced, the interest rate and the sum of monthly payments would revert to their 'actual' amounts. Thus the agreement implied that as long as the necessary payments were being made, D would not take any action against PL. Although PL had been complying with this agreement for over a year, D sued for the balance of his debt. D succeeded at lower court and at CA. PL appealed.
Issue: Was there valid consideration made to D? If so, was it sufficient enough to forbid D from taking action against the appellant?
Discussion:

- Payment in portions by a different mode (promissory notes, post-dated cheques) is sufficient consideration.
- The PL had not defaulted under the terms of the agreement.
- As long as PL continued to deliver the cheques and they were paid by the bank on presentation, the giving of the several post-dated cheques constituted good consideration for the agreement by D to forbear from taking action on the promissory notes.
- Since PL had continued to perform his obligations under the agreement, D's action was premature and should be dismissed.

Ruling: Appeal allowed.

110.4 Equity And Privity of Contract

Promissory Estoppel

Promissory Estoppel: prevents one party from withdrawing a promise made to a second party if the latter has reasonably relied on that promise and acted upon it to his detriment. Estoppel cannot be used as a basis for action on its own, nor does it extinguish rights.
Waiver: one party waving the insistence on their legal rights in a K.

Central London Property Trust Ltd. v. High Trees House Ltd. [1947] KB
Promissory estoppel renders gratuitous promise enforceable

Facts: PL granted D a tenancy of a block of flats for a 99 year term from 1937 at a rent of £2,500 a year. During war, flats were not fully occupied so an arrangement was made for the rent to be reduced to £1,250 per year. In 1940, D put this arrangement into writing and sent it to PL. PL confirmed the agreement. D paid the reduced rent from 1941 to the beginning of 1945 by which time the flats were fully let, and continued to pay it thereafter. In 1945, PL wrote D saying that the rent must be paid at the full rate and claimed arrears amounting to £7,916 were due.
Issue: Is a promise to vary an existing K that has no consideration in return by the promisee binding on the promisor?
Discussion:
- Under old common law, this is a lease under seal, and cannot be varied by subsequent verbal agreements
- Seals are no longer requisite, however, there is no consideration in this case
- But even w/o consideration, the fact is that PL made a promise about rent being £1250, and cannot go back on it
  - PL: this is not valid estoppel as defined by *Jordan v. Money*, as it goes into future.
  - KB: Difference between estoppel and promissory estoppel: statements of existing fact vs statements of intention/ promise
- A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply even though there is no consideration from the promisee.
- In this case the promise was for temporarily reduced rent while the flats were not fully occupied because of war
- The flats became fully occupied early in 1945 and the reduction ceased to apply from then.

Ruling: Reduced rent is to be paid form 1941 to 1945, with full rent paid onward form 1945.

John Burrows Ltd. v. Subsurface Surveys Ltd. [1968] SCC
Habitual non-enforcement found to be friendly indulgence: not giving rise to promissory estoppel

Facts: D purchased a business belonging to the PL for $127,000. Part of the purchase price was secured by a promissory note for $42,000. The note provided for payments in monthly installments and contained an acceleration clause permitting the creditor to claim the entire amount due if there was a default on more than 10 days on any monthly payment.
Over a period of 18 months, D was consistently more than 10 days in default with its monthly payments. On each occasion, the creditor accepted these payments without protest and without invoking acceleration clause. Finally, following a disagreement between presidents of the companies, the next time that D was late in paying, PL sued for the whole amount owing.
Issue: Whether the defence of equitable estoppel or estoppel by representation applied in this case?
Discussion:
- Equitable estoppel can not be invoked unless there is some evidence that one of the parties entered into a course of negotiation, leading the other to suppose that the strict rights under the K would not be enforced.
- There must be evidence from which it can be inferred that the first party intended that the legal relations created by the K would be altered as a result of negotiations.
- Distinction between mere indulgences and an actual agreement: simply being sympathetic does not give rise to promissory estoppel - the policy implications otherwise would impose unreasonable stringency on businesses.
- The evidence here does not warrant the inference that the PL entered into any negotiations with D which had the effect of leading them to suppose that PL had agreed to disregard the relevant part of the K.

Ruling: Appeal allowed

D. & C. Builders Ltd. v. Rees [1966] QB
Promissory estoppel does not operate if promisee is found to have acted unfairly

Facts: PL, a decorating and plumbing company, did some work for D, who also owned a building materials shop. D owed £746 to PL and paid £250 on account. The PL made an allowance of £14 off the bill, leaving a total of £482 to be paid.

D did not pay, so PL twice wrote to D asking for the remainder of their payment. Later, when D was ill, his wife called PL and complained about the work that was done. She also offered to pay only £300 in settlement and warned that if PL did not accept this sum, they may not get anything. As the PL was in financial need, they accepted the £300. PLP brought an action for the remainder of the money owed. D set up a defence of (i) bad workmanship, and (ii) that there was a binding settlement. The question of settlement was a preliminary issue and was decided in favour of PL. The judge found that there was no consideration to support the agreement over the £300: "It was a case of agreeing to take a lesser sum, when a larger sum was already due to PL." D appealed.

Issue: Is the settlement, to pay less than the total owed, binding on PL?

Discussion:

- As a point in law, the creditor is not bound by the settlement, and is at liberty to sue the debtor for the remainder of the money owed to him.
- However, a remedy has been found in equity to help the debtor:
  When a creditor and a debtor enter on a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so. (p. 230) [emphasis added]
- This equitable remedy must be qualified: The creditor will only be barred from his legal right to obtain the full amount when it would be inequitable for him to insist on it. The creditor will only be bound to the settlement if there has been true accord, meaning that the creditor voluntarily accepted it. In this case, the plaintiff was compelled through intimidation into accepting the settlement and therefore the equitable remedy does not apply.
- There is no reason in law or equity why the creditor (plaintiff) should not enforce the full amount of the debt due to him.
- Promissory estoppel applies only where it is unfair for the creditor to act. If the debtor exploits the promise in an unfair manner, then estoppel is inapplicable

Ruling: Appeal allowed

Estoppel : "where one party has, by his words or conduct, made to the other a promise which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise cannot afterwards be allowed to revert to the previous legal relations as it no such promise has been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only his word." (Lord Denning in *Combe v. Combe*)

a. There is an existing legal relation
b. There is a representation made, which is intended to create an expectation that the legal relations are changed
c. There is a reliance upon the representation by the promisee
d. It is inequitable for the promisor to go back on the promise

Combe v. Combe [1951] KB

Promissory estoppel is a shield, not a sword

Facts: PL and D divorced. The parties agreed that D was to pay an allowance of £100 per year to PL. PL requested an initial payment of £25 and subsequent quarterly payments of £25. D replied that he would not pay in advance and, from that point on, did not make any payments. The wife sued nearly seven years later, claiming £675l in back payments. At that time, the PL's income was considerably greater than the D's.

Issue: Can the breach of a promise give rise to an action in this case?

Discussion:

- lower court used High Trees principle to enforce the promise to pay, even though there was no consideration for D
- A promise ("a promise intended to be binding, intended to be acted on and in fact acted on") cannot give rise to a cause of action in damages for the breach of such promise, primarily due to the want of consideration
- High Trees only applies as a defence, where the promisee insists on his strict legal rights in spite of the promise, and it would be unjust to allow him to enforce them
- In this case, PL cannot sue D for breach of promise, as there was no consideration for the promise

Ruling: Judgement for D.

110.4 Equity And Privity of Contract

Walton Stores (Interstate) Pty Ltd. v. Maher [1988] AU HC
Controversial recognition by the court of use of promissory estoppel as a sword

Facts: PL negotiated with D for a lease of land owned by D. PL proposed demolition and replacement of an existing building. The construction schedule was tight, so there was a sense of urgency. PL's solicitor indicated he had received verbal instructions to accept amendments proposed by D, and followed up with a letter indicating that he believed approval would be forthcoming and they would be notified if any amendments were not agreed to. Ds were not notified of any objections, and proceeded with demo and commenced construction. At this time, they sent a copy of lease to PL, but PL returned it saying that they no longer want the lease.
Issue: Was PL entitled to remain silent knowing that D were doing work on the premise that they had an agreement and the completion of the exchange was a mere formality?
Discussion:
- failure to fulfill a voluntary promise does not amount to unconscionable conduct
- PL is estopped from escaping the implied promise to complete the K
- Mere exercise of the legal power not to K is not unconscionable on its own, but:
  - Urgency of situation: PL knew of the immediacy, but replied two month later
  - Ds were given the impression that necessary exchange is a mere formality
- thus PL had an obligation to communicate their intentions after the initial correspondence, and even more so after receiving the updated lease copy from D.
- the court effectively merges promissory an proprietary estoppel together.
- this kind of estoppel will only work on grounds of unconscionability

Ruling: Judgement for D.

M.(N.) v. A.(A.T.) [2003] BCCA
Estoppel only applies to cases where the parties are engaged in a legal relation

Facts: PL promises to pay off D's mortgage in England if she moves in with him in Vancouver. She quits her job and moves, but instead receives a loan of $100.000 from PL. After a few month they have a fight, and he evicts her from the home. She wants the promise fulfilled.
Issue: Is the promise, upon which D relied to her detriment, enforceable?
Discussion:
- US courts have developed the doctrine of injurious reliance, which is applicable to all promises injuriously acted upon.
- AU case of *Walton Stores* is also similar-ish to this situation
- As it stands in BC, the law is: "did parties intend to affect their legal relations by the promise?"
- In *Walton*, the same condition exists: a necessary element of promissory estoppel is the promisee's assumption of legal relations
- failure to fulfill a voluntary promise does not amount to unconscionable conduct
- thus, no Commonwealth court has gone as far as US in injurious reliance
- there is no evidence that PL intended his promise to have a binding effect, nor did D see it as binding
- thus, there are no legal relations, and the estoppel is not applicable

Ruling: Judgement for PL.

Privity Of Contract

Contractual obligations can only be imposed on those that were party to the K. Likewise, only parties to the K can enforce it

Forms of Privity
1. Horizontal = (K made by A & B for the benefit of C)
2. Vertical = (A & B have a K, B & C have a K, but A & C do not have a K)

Third Party Beneficiaries

110.4 Equity And Privity of Contract

Tweddle v. Atkinson [1861] QB

A Third Party can generally neither sue nor be sued on a contract - even if it was intended to operate for his benefit. Love and affection are not sufficient consideration.

Facts: Prior to the marriage of PL, PL's father and father-in-law made a K to pay PL £300 upon marriage. PL's father does so, but father-in-law does not. PL's father-in-law passes away, and PL tries to collect money from his father-in-law's estate, which was promised to his father.
Issue: Is PL privy to enforce a K between his father and his father-in-law?
Discussion:
- Old case law is pretty iffy on these situations
- Consideration must more from the party entitled to sue upon the contract:
- Therefore third party beneficiary who did not provide consideration cannot enforce the contract
- Filial love and affections are not sufficient consideration

Ruling: Judgement for D

Dunlop Pneumatic Tyre Co. v. Selfridge & Co. [1915] HL

Only parties to a contract can sue on it. Even if a contract provides Third Party with enforceable right, there must be consideration.

Facts:. PL sold tyres to Dew, wholesalers, on terms that Dew would not sell them below PL's list prices, except to customers legitimately engaged in the motor trade, to whom they were allowed to sell at 10% below list price. Condition was that the customers would then have to sell at PL's list prices. Dew put clause in K with buyers that they would not sell below certain price and if they did, the buyer would have to pay damages to PL. D (department store) obtained tyres from Dew and signed an agreement to sell at list price, then agreed to sell tyres to two customers at below list price. PL claim injunction and damages in respect of D's breach of their agreement with Dew.
Issue: Is PL privy to sue on a K between Dew and D?
Discussion:
- This is a case of vertical privity
- Only a person who is party to a K can sue on it: even if the K explicitly says that the third party has rights under the K, those rights are not enforceable.
- Consideration must have been given by PL to D
- If one of the parties in K is an agent for a 3rd party, the agent can enter into legally binding acts on behalf of the 3rd party
- In that case, consideration must flow from the agent (promisee) to the other party in the K (promisor)
- Principal not named in the K can sue on it if the promisee was contracted as his agent; he must have given consideration through agent.
- PL: Dew was their agent
- HL: Dew bought tyres from PL, and were the owners, reselling them for profit, not agents that facilitate the sale of tyres
- PL has no direct contractual relations with D, and there is no 3rd party consideration
- Dew could not act simultaneously as agent and principle
- The only way this would work, is if K made D pay Dew who would then pay PL.

Ruling: PL cannot sue on K

Beswick v. Beswick [1966] CA / HL

A Third Party who has a legitimate interest in enforcing the contract may do so in the name of the contracting party [OVERRULED by HL] A third party cannot sue on a contract

Facts: Elder Beswick gives his company to D (his nephew), under a K where D promised to pay PL (uncle's widow) £5 per week. D paid until the uncle died, then refused to pay.
Issue: Could wife sue on own behalf, or only as administrator of the estate? If she sued as admin, could she receive specific performance or only damages?
Discussion:
- This is case of horizontal privity
- There are two potential capacities to sue in :
  - administrator of estate (not executor)
  - personal capacity as intended recipient of the promised moneys
- CA: you can enforce K by acting in name of person in K.

- Why is it not in conflict with *Dunlop*?
- In *Dunlop* the issue was price fixing - so there was no legitimate interest (inequitable) but Ms. Beswick's case is equitable, and she has legitimate interest.

- HL: Where a K by its express terms purports to confer a benefit directly on a third party, it shall NOT be enforceable by the third party.

Ruling: Judgement for D.

Subrogation: a technique, where one A (subrogee, insurer of B who is the subrogor) steps into B's shoes, so as to have the benefit of B's rights and [tort] remedies against a third party C. Unlike assignment, it can occur without any agreement between A and B to transfer B's rights.

Ways that a Third Party may acquire benefit:

1. Statutory Provisions: "Situations X, a party can sue even if they were not party to the K"
2. Common Law Vertical Privity Rule: when A sells to B, A sells a guarantee. When B sells to C, B sells the guarantee as well. Therefore, C can bring an action for breach of K with A
   - This turns personal obligations into real obligations
   - Persuasive only in common law
3. Agency (Vertical Privity): A is the principal. A enters into an agency K with B. B acts as the agent for A. When B makes a K with C, the K is effectively between C and A and there is no K between B and C. The interests of A and B must NOT conflict.
4. Constructive Trust (Horizontal Privity): When A requires B to act for the benefit of C – the K can be converted into a trust. Thus there would be a fiduciary duty between B and C (this is a very strong duty – much stronger than a K)
5. Specific Performance: parties to K can go to court to require specific performance (cannot be damages because the parties to K have not incurred any harm).
6. Collateral Contract: multiple Ks can have different parties.
7. Tort: using negligence to pursue damages, by replacing contractual relations with duty of care

London Drugs Ltd. v. Khuehne & Nagel International Ltd. [1992] SCC

Third party beneficiaries can be covered by liability clauses in a contract if they are employees of one party.

Facts: PL stores a transformer at the warehouse run by D. The K between them has a liability clause, which limits the liabilty of D to $40, unless PL declares higher value and pays extra costs. PL chose not to. Two employees of D fucked up the transformer to an extent of $34,000, for which PL sued them. They claim that they are covered by the limited liability clause.

Issue: Were employees, as third parties to the K, privy to K limiting liability?

Discussion:

- Employees here are third party beneficiaries
- PL: employees should not benefit, based on established privity rules
- D: employees are entitled to benefit, since it is time that the rules of privity are relaxed, since they are radically out of step with commercial reality
- Courts have a duty to make incremental changes to bring common law in tune with the times
- Upholding a strict interpretation of privity here would mean that PL can circumvent the extra costs of full liability
- In modern practice, employees are the intermediaries through which the service between parties to K
  - there is an identification of interest between employer and employees
- Thus, a relaxation of the doctrine is appropriate
- Employees are entitled to benefit from limited liability clause if:
  - the clause, expressly or implicitly extends its benefit to employees
  - the employees must have been acting in the course of their employment
  - the employees must have been performing the services provided in the K
- This was the case here.

Ruling: The employees are covered by the limited liability and are liable for $40 in damages.

Fraser River Pile & Dredge v. Can-Dive Services [1999] SCC
London Drugs Exception applies to all third party beneficiaries.

Facts: PL charters a barge to D, who sink it. The barge is insured by a K, which has a clause where the insurer waives any subrogation rights against a charterer, and extend coverage to all charterers. Insurer pays the damages to PL, and then makes an agreement with PL to waive the clause and to sue D. D relies on the waiver of subrogation as defence.
Issue: As a third party beneficiary under the insurance policy due to the clause, is D entitled to rely on that clause to defend himself against an action based on the *London Drugs Exception*?
Discussion:
- London drugs was never intended to limit the exception to employee/employer relations
- How does the London Drugs rule apply here?
    - There is an intention of the parties for this clause to be valid
    - The parties are doing exactly what they were supposed to by the K: the charterer is chartering the barge etc.
- London Drugs Exception applies outside of the strict employer/employee relationships, also to third party beneficiaries

Ruling: Judgement for PL

110.5 Representation and Misrepresentation

Negotiating the Contract: Representation And Terms

Statement made during the negotiation may or may not become terms in the contract. This depends on their classification.

Mere Puff: frivolously made statements with no contractual intent. These are not legally binding and have no value.
Representation: pre-contractual statement made by the party that is not intended to be a guarantee in the K. These are not terms in the K, but may lead to limited legal consequences.
Term (also called Warranty): a pre-contractual statement that becomes a term in the K, leading to serious legal liabilities. The threshold for these is that party intended to give an absolute guarantee. The test of intention is that the term was intended to be guaranteed strictly.

Collateral Contract: is a K where the consideration is the entry into another K, and co-exists side by side with the main contract. These are viewed with suspicion by the law and have to be proven explicitly. It may not contradict the main K.
Collateral Warranty: A warranty in a collateral K - the primary obligation of the collateral K.

Note that the meanings of the word "warranty" is different in different contexts.

Heilbut, Symons & Co. v. Buckleton [1913] HL
The term is a statement made for which the party intended to give an absolute guarantee

Facts: D purchased shares in PL's company understanding that it was a rubber company. The company was not properly described, as it was not solely a rubber company. D sues for misrepresentation and breach of warranty. At trial the jury finds that there was no fraudulent misrepresentation, but there was a breach of warranty, as it was called "Rubber", but did not have any rubber trees to it.
Issue: Was the statement that the company is a rubber one a term or a representation?
Discussion:
- Prior to purchasing the shares, D called PL, and PL told him that it was a "rubber company"
- Is this a term or a representation?
- The statement took place within the framework of the collateral K:
  - You can't have a K the consideration for which there is another K
- The court is reluctant to find collateral K's too often, as it complicates things, and it leaves no room for innocent misrepresentation
- It is also contrary to the idea that parties should have all of their terms in one K
- *Animus Contrahendi*: the desire to enter into a K. In the case of collateral K, the intention to enter into K (desire that statements are contractually binding) has to be proven explicitly
- Thus, the test for whether a statement is a term or a mere representation is the intention. A term in a K is a statement made where the party intended the statement to be an absolute guarantee.
- The statement was not intended to be guaranteed.

Ruling: The statement was a representation.

Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd. [1965] CA
Anything said to induce a party to enter into the contract becomes a term in the contract (this approach has not been widely adopted)

Facts: D sold a car to PL stating that it belonged to a German baron and had done only 20,000 miles on the new engine, but it proceeded show itself to be a piece of shit that broke down constantly. PL sued for misrepresentation.
Issue: Was the statement about the mileage a contractually binding one?
Discussion:
- If a statement is made in the course of dealings for a K for the purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the K, that is a prima facie ground for inferring that the representation was intended as a term.
- Here, D repeatedly said that the car had 20,000 miles on it. This made PL buy it.
- D was not aware that it was not true, so it was innocent misrepresentation. But this does not matter
- PL gets damages.

Ruling: Ruling for D

Parol Evidence Rule

Parol Evidence Rule: If a K has been reduced to writing and the writing appears to be complete, then the court will not hear parol evidence outside of the written K. Parol evidence rule does not apply only to oral evidence, but to all evidence outside (usually prior to the creation) of the main contract.

Hawrish v. Bank of Montreal [1969] SCC

Parol evidence in a collateral agreement is admissible as long as it is not inconsistent with the written K

Facts: PL is a solicitor who signed a guarantee for the indebtedness and liability of a newly formed company CDL. The line of credit given by D to CDL was almost exhausted and D asked PL for a guarantee, which he signed. Directors of CDL signed another guarantee. CDL then becomes insolvent. Bank brings action against PL. Trial judge dismissed action based on the parol evidence of the bank manager's statement.
Issue: Is the parol evidence admissible?
Discussion:
- PL claims that when he signed the guarantee, he had oral assurance from the bank branch manger that the guarantee was to cover only existing indebtedness and that he would be released from the guarantee when the bank obtains a joint one from the directors of CDL.
- Trial judge admits parol evidence on the grounds that it was a condition of signing the guarantee that the PL would be released from it, as soon as directors of CDL sign another one.
- PL claims that he did not read the guarantee before signing.
- However, the oral evidence is contradictory to the terms of the K.
- Parol evidence in a distinct collateral agreement is admissible as long as it is not inconsistent with the written K
- Parol evidence in contradiction of the K is inadmissible

Ruling: Judgement for D.

Bauer v. Bank of Montreal [1980] SCC

Any collateral oral agreement cannot stand in the face of the written terms of the K.

Facts: PL is a guarantor of a loan made by the bank to a company of which he was principal officer and a major shareholder. The bank assesses the book debts of the company, but the bank fucked up. Because of this, when the company went bankrupt, the bank did not end up being the preferred creditor. But there was a clause in the K that the bank may abstain from perfecting the securities.
Issue: Is the bank's mistake protected by the clause?
Discussion:
- Normally, the failure of a bank to perfect its security by proper registration would have provided PL with a defense to bank's action on the guarantee
- PL claims that the bank cannot rely on the clause because it was an express oral condition of the giving of the guarantee that the accounts be preserved for the benefit of the guarantor.
- As per *Hawrish*, the collateral K contradicts the written K, and does not apply.

Ruling: Judgement for D.

Gallen v. Butterly [1984] BCCA

Modern approach to the Parole Evidence Rule

Facts: PL are farmers buying seeds from D. There is a written warranty that they signed, which absolves D from any liability in case if the buckwheat fails to do anything. Contrary to oral assurances the buckwheat sold to the P by the D did not act as a blanket and smother weeds.
Issue: In spite of the written K, is the oral assurance admissible as parol evidence?
Discussion:
- There are seven principles to the modern approach to Parol Evidence Rule (see under)
- So the justification for the parole evidence exceptions is to protect the unaware from being tricked by oral agreements which are rendered void by the subsequent written K
- Policy counter-argument: If you don't treat the written K with any priority, then what is the point of having it? Law needs a degree certainty.

Ruling: Judgment for PL

Modern approach to Parol Evidence Rule:
1. This is not an absolute principle. There are exceptions.
2. Evidence can be introduced to establish an oral agreement separate from the written agreement. But in the case of two agreements made at the same time that contradict each other, the written one is stronger evidence.
3. Principles of equity apply here - this is not a tool for the unscrupulous.
4. The rationale of the principle does not apply with equal force where the oral representation adds to, subtracts from, or varies the agreement recorded in the document, as it does when the oral agreement contradicts the document.
5. There is a presumption in law that a document that looks like a K is treated like a whole K. Therefore, it is very difficult to get around this presumption when what is oral is in total contradiction with what is written
6. A unique document forms a stronger presumption than a standard form, though both have a strong presumption.
7. The presumption would be less strong where the contradiction was between a specific oral representation and a general exemption clause that excludes liability for any oral representation, than it would in a case where a specific oral representation was contradictory to an equally specific clause in the document.

Business Practices and Consumer Protection Act BC

187 Admissibility of parole evidence

(1) In a proceeding in respect of a consumer transaction, a provision in a contract or a rule of law respecting parole or extrinsic evidence does not operate to exclude or limit the admissibility of evidence relating to the understanding of the parties as to the consumer transaction or as to a particular provision of the contract.

This applies only to consumer transactions: the purchases made for one's private use and not commercial or business purpose.

Misrepresentation and Rescission

Misrepresentation: statement made before the K which induces you to enter into K. Those that have legal significance are called operative misrepresentations. The remedies to misrepresentation are not in law of contracts, but in the law of torts.

Rescission: the unmaking of a K between two parties. It is an unwinding of a transaction, which is done to bring the parties as far as possible back to the position that they were in prior to the contract. This is an equitable remedy.
- if you cannot obtain the conditions that occurred before the K existed, then rescission is not an option (though *Kupchak* says something contrary)

Misrepresentation

In order for the statement to qualify as an operative misrepresentation:
1. Has to be a misrepresentation of fact:
   - Statements about the future, the law, or opinion are not statements of fact
   - But opinion can be taken as fact if the other party has significantly less expertise or knowledge in the field (*Smith*)
2. There has to be something said that is false
   - silence can constitute a misrepresentation when:
     a. if there is a fiduciary duty
     b. when a question is asked but there is whole or partial silence in response
     c. when statutes state that there is a duty to disclose information.
3. The statement must be addressed to the party misled (material reliance)
   - Must be one of the reasons why the person entered into the K
   - Ways around this:
     a. look at who the parties are (ex: if you are selling a car to a car dealer, they should know more about cars than you)
     b. if a person has done investigations to verify the statement, then they did not rely on your statement *(Redgrave v Hurd)*
4. The representation must be relied upon
   - Must be a statement about something significant.

110.5 Representation and Misrepresentation

There are three types of operative misrepresentations, with various remedies available for each:

		Remedy in Common Law DAMAGES	Remedy in Equity RESCISSION
Innocent	Did not know that it was false. Should not have known that it was false	NO	YES
Negligent	Should have known that it was false	YES (TORT)	YES
Fraudulent	Knew that it was false or was reckless	YES	YES

Defenses from Rescission

NOTE that courts may ignore these in the cases where it is fair to do so, since rescission is a doctrine of equity.

1. Rescission would adversely affect a third party rights
   - would upset 3rd party entitlements (but this is ignored in *Kupchack*)
2. The impossibility of complete restitution (*restitutio in integrum*)
   - Some things are refundable, others are not (ie: money- can give back different notes but add up to same amount)
3. Having affirmed the K may mean that the innocent party cannot claim rescission.
   - When a person discovers the misrepresentation, they must chose to use rescission or to continue with the K.
   - When they decide not to pursue rescission, they are seen to have affirmed the K and are no longer eligible for an equitable remedy
4. Having executed the K deprives the innocent party of a right to rescind
   - This is highly arguable – may not be law (Denning thinks that it is not, in *Leaf v. International Galleries*)
   - If both parties have completed the obligations in the K then the K is finished and no longer exists. Therefore there is nothing to rescind. But this is a very iffy argument

Laches: a delay in seeking remedy that qualifies as an affirmation of the K

Leaf v. International Galleries [1950] KB

Why one would want to pursue a warranty claim over a rescission claim.

Facts: PL buys a painting. The receipt says that it was by Constable, and wants to sell it Christies, but turns out that the painting was a forgery. PL wants his money back, but D says that Christies is wrong. PL wants rescission.
Issue: Does a statement amount to a warranty?
Discussion:

- If this is a term, then PL can claim repudiation at any time prior to the acceptance, if it is a representation, then PL can claim damages (?????)
- This is term, and had PL acted on time, he could have claimed rescission. But per *SGA* s.35 this has to be done in a reasonable time.
- It is also a rule that once buyer accepts the goods in performance of the K (executing the K), he cannot reject the goods.
- The K has been executed, so rescission is no available
- Would he have been better off relying on innocent misrepresentation?
- An innocent material misrep can be grounds for rescission even after the K is executed. But Denning doubts if this is true.
- PL does not claim damages
- But if he did claim that the statement was a term, then he could have claimed damages for breach of K (getting the difference between the actual Constable and a fake one)

Ruling: PL missed his boat.

110.5 Representation and Misrepresentation

Redgrave v. Hurd [1881] CA

If a person investigates a statement, he does not rely on the statement made and there can be no misrepresentation

Facts: PL is an elderly solicitor who tries to sell of his practice and his home in a package. He tells D that he could make £2300-400 per year at practice, and showed documents indicating that he made half of that. D inquired of less income, to which PL replied that the files showed more income. D did not bother checking and made the purchase, but refused to pay when he discovered the the practice is worthless. PL sued and D sought rescission.
Issue: Was there an obligation to inspect the documents? Does failure to do so limit D's right to claim relief from K based on misrepresentation?
Discussion:

- If a person investigated a statement, he does not rely on the statement made by the other party and therefore cannot claim for operative misrepresentation.
- Providing someone with the opportunity to investigate does not necessarily mean there is no operative misrep.- they might not be able to understand or accurately investigate with the means given.
    - Court of Equity: in order to set aside a K due to misrep, it is not necessary to prove that the D knew at the time that the representation was false.
    - Common Law: a K may be set aside even if the person did not know the statement to be false but only if the statement was made recklessly and without care

Ruling: D gets back his deposit, and the K is rescinded

Smith v. Land & House Property [1884] CA

A statement of opinion is a statement of fact when the facts are not equally known by both parties

Facts: PL bought a hotel from D, as D said that it has a "most desirable tenant" Fleck. When Fleck goes bankrupt, PL claims that it was not a statement of fact but an opinion.
Issue: Was there an obligation to inspect the documents? Does failure to do so limit D's right to claim relief from K based on misrepresentation?
Discussion:

- In some circumstances statement of opinion contains implied statement of fact.
- D knew he was not paying his rent (assertion of fact).
- In the case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion.
- However, if the facts are not equally known to both sides , then a statement of opinion by the one who knows the facts best very often involves a statement of a material fact.

Ruling: ???

Kupchak v. Dayson Holdings Ltd. [1965] BCCA

Rescission of a contract is an option even when complete restitution cannot be reached

Facts: The PL purchased share of a motel company from the D via transfer of two properties to D. Later it was discovered that the earnings of the hotel were fraudulently misrepresented by an agent of the D. The D sold an interest in the properties that were given in exchange for the shares. PL claims misrepresentation. D uses defense of laches and impossibility of *restitutio in integrum*.
Issue: Do the defenses apply?
Discussion:

- D claims the defense of laches, as PL took a long time to take the matter to court:
    - Even if one party has made a misrepresentation, the other party has to act on it immediately
    - There was no misleading here, though it did not make it to court for a long time.
- D claims that complete restitution (*restitutio in integrum*) is impossible, since D has sold their interest in properties to a third party.
    - Being able to restore in full is a necessary component to rescission.
    - If fraudulent misrepresentation is the case, the courts are willing to be more strict with the punishments
    - PL is able to give back the shares
    - D, as a culprit, and as courts of equity are flexible, they can establish damages
- In this case, PL get part rescission, part damages (for the part where rescission is impossible)

Ruling: Ruling for PL

110.5 Representation and Misrepresentation

Redican v. Nesbitt [1924] SCC
Rescission for innocent representation is not available if the contract has been executed.

Facts: D purchases a property from PL. He pays with a cheque. After the purchase, D inspects the property, and finds it having been misrepresented sufficient for him to not have made the purchase. The misrepresentation was innocent (no fraud). D stopped the cheque payment and PL sued. D claims rescission.
Issue: Is innocent misrepresentation sufficient ground to rescind a contract that has been executed?
Discussion:
- Innocent misrepresentation is a defense in equity (Rescission) but not in common law (damages)
- But does it apply to K's that have been executed. The court thinks not.
- Is the K executed in this case?
  - There has been an exchange of conveyances and considerations.
  - The deed and the cheque have exchanged hands - thus the deal is finished and K is executed
- Misrepresentations are fraudulent when D knew that his representation was false and were made without belief in their truth, or recklessly, carelessly of whether they are true of false.
- This could have been fraud, so the case goes back to trial

Ruling: Ruling for PL

It is now a rule that in cases of negligent misrepresentation, PL can claim remedies in both or either contracts and torts. But only as long as the liability in tort will not permit him to escape a contractual exclusion or limitation of liability that would protect D under the K.

Sodd Corp. v. N. Tessis [1977] ONSC
There can be a concurrent liability in contract and tort. Damages are an option in cases of negligent misrepresentation.

Facts: A furniture company goes bankrupt and D is a trustee in bankruptcy, with the responsibility to sell off the assets and to distribute the money among the creditors. D tendered the furniture and PL was a successful tenderer. PL relied on the statements of D on the value of goods to prepare the tender. D in fact, negligently overvalued the furniture.
Issue: What remedies are available to PL?
Discussion:
- What is the difference between tort liability in negligence and contractual liability in negligence.
- A 1960's decision has established that both can occur at the same time.
- In this case, trial judge found D negligent in valuing the furniture
- Trustee had a duty in tort because they had a special relationship with PL, and PL had relied on their statements.
- Representation in this case is significant because there is collateral warranty
- This was a negligent misrepresentation
- In this case, rescission is not an option, so PL wants damages (why ????)
- Under negligent misrepresentation, damages are an option, but in tort, not in contract.

Ruling: D is ordered to pay damages.

BG Checo International Ltd. v. BC Hydro [1993] SCC
Both contract and tort are valid avenues, but PL would chose the one with the higher standard of care.

Facts: PL is contracted by D to put up power-lines. PL runs into some problems - a company that was contracted by D to clear-cut a RoW failed to do so, and PL was not able to complete their work. PL sued D for negligent misrepresentation and breach of K (fraudulent misrepresentation, subsequently). There were two clauses in the K: (a) it was PL's duty to inspect the land prior and (b) it was D's duty to clear the land.
Issue: Can PL sue in tort?
Discussion:
- There is clearly a breach of K on the part of PL for failing to clear the land.
- The terms of a K can affect liability in tort.
- The general rule is that both contract and tort can be pursued in litigation
- Usually, the higher standard of care applies.
  - The standard of care created by K is higher than the standard of care by tort, but if one wants to take advantage of tort options, one can sue in tort.

- Where there is a lower standard of care created by a K, one may want to sue if there are specific clauses in K that limit liability. These clauses have to be pretty damn clear.
- If there is the same standard of care, then one can choose by which avenue to pursue litigation

• There is no difference in binding effect between express terms and implied terms.

Ruling: PL gets to choose whether to pursue in tort or contract.

110.6 Terms Of Contract

Classification Of Terms

Conditions, Warranties and Innominate Terms

Terms in a contract are characterized at the time of acceptance and can be subdivided into three types of terms which determine what the consequences of breach of the term will be.

- These labels are put on the terms at the time the contract comes into existence and cannot be changed.
- Putting labels on the terms in a K is not absolute (the court makes the decision), thus it is better to specify the secondary obligations in the K to illustrate the types of terms.

	DEFINITION	CONSEQUENCES OF THE BREACH
Condition	Statement of fact which forms an essential term in the contract, making the K contingent upon the performance of the conditions.	The innocent party is relieved from having to perform their primary obligations, treating the K as repudiated. Also damages.
Warranty	A term which is not essential to the K, and is collateral to its main purpose	The parties are not relieved of their obligations. Only damages are available, unless stipulated otherwise in the K (so one must prove that harm was done)
Innominate Term		Determined after the breach occurs, based on the seriousness of the consequences of the breach (not the breach itself) and uses either of the remedies for condition or warranty.

Innominate Term: breach of this may or not go to the root of the contract depending upon the nature of the breach. Breach of these terms, as with all terms, will give rise to damages. Whether or not it repudiates the contract depends upon whether legal benefit of the contract has been removed from the innocent party.

Primary Obligations: Central obligations arising out of the definition of contract or transaction, and from which secondary obligations arise.
Secondary Obligations: incidental obligations (such as payment of damages upon failure to perform) that arise out of the primary obligations of the contract.
Repudiation: the refusal to acknowledge the contract. The contract comes to an end, the primary obligations are terminated, but the secondary obligations remain.

Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd. [1962] CA

Introduced the concept Innominate Term.

Facts: PL hired a ship from the D. The ship had a faulty engine, which took time to repair. While the repairs were underway, the freight costs dropped significantly, so that a similar ship could be hired for 2/3 of the price that the PL paid. PL wants damages and the K to be repudiated, so that they can make a new one for cheaper.
Issue: Can PL get repudiation?
Discussion:

- When drafting a K, it is best to make it clear as to what happens if the terms are breached. Such was not done in this case.
- The condition/warranty dichotomy arises from the entrenched archaic principles of the law, but these are not exclusive.
- This old dichotomy is also contradictory the the nascent doctrine of frustration
- There are many terms of which it is unrealistic to classify them in advance - the consequences of these have to depend on the seriousness of the breach. These should be assigned a new category: Innominate terms
- In this case, the term is "providing a sea-worthy ship" - it can be breached in a minor way, or a major way, as it was in this case where the ship was out of commission for a long time.
- The following remedies are applied to the breach of different kinds of terms:
  - Breach of a Condition: gives rise to an event which relieves the party not in default of further performance of primary obligations
  - Breach of a Warranty: party cannot treat himself as discharged from the K

  - Breach of Innominate Term: remedies determined after the breach occurs based on the seriousness of the consequences not the breach and uses either of the remedies for a condition or warranty
- The breach here was quite serious, so it should be treated as a condition.

Ruling: The contract is repudiated due to the breach of a condition.

Krawchuk v. Ulrychova [1996] AB

Innominate terms are applicable to transactions under the Sale of Goods Act

Facts: PL bought a horse from the D when the D assured that the horse was in good heath. The PL later noticed the horse was cribbing (addiction to getting high by sucking paint from fences). So PL wants to repudiate the K and get his money back. The purchase was under the jurisdiction of the *Sale of Goods Act*.

Issue: Do innominate terms apply to contracts under *Sale of Goods Act*?

Discussion:

- The *SGA* does not talk about innominate terms.
- In 1976, Lord Denning found that the notion of innominate terms applies to all cases, even under *Sale of Goods Act.*
- The court finds that the *SGA* can include innominate terms.
- But the breach was fairly minor:
  - The issue of cribbing can be fixed by a special collar
  - The horse was bought not as a show horse, but as a work horse, and cribbing is not as big of an issue for it.
- So, the term was a warranty, but not a condition.
- The breach here does not entitle PL to repudiate the K and get his money back

Ruling: No repudiation, but damages awarded..

Wickman Machine Tool Sales Ltd. v Schuler A.G. [1974] HL

Placing labels on terms in a contract does not imply the legal definition of the label onto the term

Facts: PL entered into a K with the D to be the sole seller of the D's products. In order to ensure aggressive sale tactics, the K contained provisions that the PL would use very specific sale tactics: weekly soliciting the six largest car manufactures in UK to purchase their goods. PL failed to comply strictly. D points to the clause in the K: "It shall be a condition that...". Trial court finds that there is a breach of a condition.

Issue: Is it a condition because it is called thus?

Discussion:

- Using the word "condition" in a K does not imply the legal definition of a "condition" into the K.
- There are three definition of "condition" according to the OED. Only one of them is legal. Which one was used here?
- The surrounding clauses in the K will be examined to determine what definition of "condition" was implied.
- Here, the wording of the K in general is pretty obscure and half-assed.
- But the judge finds that "condition" was not the legal definition.
- Then it becomes an innominate term, and the consequences are dependent on the scope of the breach.
- The breach of the term was fairly minor, so it is to be read as a warranty

Ruling: Damages awarded.

	REPUDIATION	RESCISSION
Remedy For:	Breach of condition	Misrepresentation
Type of Remedy:	Common Law - therefore there is a right to the remedy	Equitable - therefore no right to the remedy
Action	Allows the innocent party has to terminate the primary obligations and end the K	Ends the K, restores situation to conditions before the K
Comment	This remedy is easily lost if it is not acted in right away - therefore one would usually only be able to claim damages	

Discharge By Performance or Breach

Severable Contracts (Obligations): that can be cut up into smaller obligations or contracts.
Entire Obligations: these cannot be broken down, and a breach of one is the breach of contract.
Substantial Performance Doctrine: an obligation is completed when it is substantially completed

- Courts in general are reluctant to sever contracts.
- The old case of *Cutter v. Powell* [1795] featured a sailor contracted by his employer who died 2/3 of the way into the voyage. His estate was unable to claim his wages, because it was a lump sum K and it was not completed.
- Since then, courts have been less rigorous, applying the doctrine of substantial performance:
- Restitution may allow a party to receive value for the goods or services performed even if the obligations of the K have not been fulfilled in their entirety.

Fairbanks v. Sheppard [1953] SCC
An obligation is completed when it is substantially completed

Facts: D is contracted to build a soap machine for PL for a price. PL paid a small amount on the account, but when the machine was nearly complete, D refused to finish it until he received further payment.
Issue: Can D claim the money if he has not finished his part of the contract?
Discussion:
- This is an entire agreement - a lump sum contract.
- Does the substantial performance doctrine apply here?
- It seems that D deliberately sabotaged the machine to make it unusable, to ensure that he will get his money. He based this on previous cases where PL did not pay full money to the contractors.
- So, D deliberately abandoned the work, to force PL to pay him.
- In light of this, D is not entitled to claim the money.
- There is no substantial completion, as the machine is entirely unusable, and PL cannot use it.
- In this case, D can take his machine back.
- But PL does not get back the deposit, as he did not fulfill his obligation to build the machine. The court treats the deposit as a "part payment".
- So D is in breach, PL goes for repudiation.

Ruling: K is repudiated.

Markland Associates v. Lohnes [1973] NSSC
Substantial performance doctrine applied.

Facts: PL was contracted to build a house for D, for a lump sum of $8,300. D made a down-payment of $4,000, but refused to pay the balance owing on completion, because the workmanship was poor, and there were defects in the building. PL brought an action for the balance.
Issue: Can PL claim all or part of the price?
Discussion:
- The K is a lump sum K.
- It is not possible to sever any parts of it.
- If substantial performance can be found, then PL will be able to claim part payment (payment minus the damages)
- Unless there is a breach of performance that goes to the core of the K, substantial performance will be found, and the employer will not be able to resist payment.
- The building was completed, albeit shittily - this is what they were contracted to do.
- So the core obligation was to build the house - this was completed.
- The piss-poor performance should be remedied through damages.
- So PL gets the money minus the damages.

Ruling: Damages awarded.

Quantum Meruit: Law of "quasi-contract". Restitution remedy allowing a party to receive value for the goods or services performed, even if it was only a part performance (ie. partial delivery of goods)

Sumpter v. Hedges [1898] CA

If the innocent party of an abandoned contract takes the benefit of the work done, he can be liable for the cost of that work through quantum meruit.

Facts: PL contracted with the D to construct a building for a lump sum. When the work was partly finished, PL said that he could not continue and abandoned the K. D then finished the building himself.
Issue: Does the fact that D keep the building entitle PL to money?
Discussion:

- This is a lump sum K.
- There is no evidence that D entered into a fresh K by completing the work.
- When a K is not completed, it is treated as abandoned.
- The innocent party has the option to treat the K as repudiated.
- But if the party takes the benefit of the work done, then he is creating a new K, in which he is liable for the cost of the work.
- In some cases, though PL has abandoned the K, it is possible to infer a new K through *quantum meruit* if D has taken a benefit from the partial work done.
- But the circumstances must be such, as to give an option to D to take or not to take the benefit of the work done.
- Such is not the case here, as D has no option not to take the benefit: the house is on his land, and is a nuisance to him.

Ruling: PL is not entitled for the work done

Howe v. Smith [1884] CA

Deposits are not recoverable by the guilty party

Facts: PL and D entered into an agreement, by which D agreed to sell real estate to PL, and PL agreed to pay £12,500 for it on a certain date. PL made a down-payment of £500. On the stipulated date, PL fucked the dog and did not pay. There is a clause in the K that if PL fails to comply, D is at liberty to re-sell the premises
Issue: Is PL entitled to claim his deposit?
Discussion:

- PL lost his right to claim in equity because he missed the date.
- The £500 was paid as a "deposit and in part payment of the purchase money"
- The court thinks that D is entitled to keep the deposit:
  - The function of the deposit is an earnest to bind the bargain agreed upon.
  - The point of it is that it motivates the party to perform, otherwise they will lose the deposit.
  - If they would have gone through with the purchase, then the language calling it "part payment" will apply.
  - But the performance did not go through, so it is merely a "deposit"

Ruling: D cannot recover the deposit.

Stevenson v. Colonial Homes Ltd. [1961] ON CA

If a down-payment is shown to be a part payment of the price rather than a deposit, the seller is not entitled to forfeit the payment but must return it if he terminates the contract, subject to his right to damages for the buyer's breach.

Facts: PL pays $1000 as a deposit for the purchase of a cottage, and after defaulting tries to recover the deposit.
Issue: Is the money recoverable?
Discussion:

- PL is in breach and D can terminate the K. But what about the money? Does the *Howe v. Smith* rule apply?
- Was this a "deposit" or a "part payment"?
- Interpretation concept of Contra proferentum: you interpret something against the interest of the party who wrote it
- If one party draws up K and its language is vague – that party who had opportunity should not have benefit of ambiguity, so the court will interpret K in favor of other party.
- Language was not clear enough to make it a "deposit" that can be forfeited
- So based on vagueness and contra proferentum it is interpreted as a "part payment"
- But D can still seek damages for the breach.

Ruling: PL gets the money back

110.7 Standard Form and Exclusion Clauses

Interpretation And Implied Terms

General Principles of Interpretation
- The starting point for interpretation is the plain, popular and ordinary meaning of the words
- One may use extrinsic evidence where parties have given special meaning or where there is ambiguity
- There should be a limited use of evidence of negotiations or subsequent conduct, except in the custom/usage approach
- Contextual consideration: what happened in the K to gauge parties' expectations?
- The intention is to be approached objectively: subjective intention is not held to be a weighty argument ;
- *Contra Proferentum*: where one party drafts the documents and other party had little input, courts should construe document less favorably to party who drafted it IF something is ambiguous;
- Specific changes and clauses prevail over a standard form document
- The same word used in one place in a contract should be given the same meaning throughout the document.
- Industry practice is to be considered.

A term may be implied in certain cases to prevent an unjust operation of the K, however a court is not in a position to create a new K in order to mitigate some injustice to a party.

Terms may be implied by the facts of a particular case, which are considered to reflect the parties' intentions. The general principles are that an implied term must:
- not contradict any express term of the contract
- be reasonable and equitable
- be necessary to give business efficacy to the contract, such that the contract cannot be effective without it
- so obvious that it goes without saying, and

Implied:	Specific to	Reason	Source
AS A MATTER OF FACT	K in question	Business Efficacy	• What would have been agreed if parties were asked at the time of formation • Something parties intended but overlooked • Officious bystander doctrine
BY LAW	All Ks of this nature	Necessity	• Relied on statute or common law • Sale of Goods Act
BY CUSTOM/ USAGE	K in question		• Presumed intention • Well-established customary terms

Business Efficacy Test: a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended.

Machtinger v. Hoj Industries [1992] SCC

Terms can be implied into a contract based on custom or usage, business efficiency or presumed intention and terms implied by law.

Facts: Employer (D) terminates employment of employee (PL) with little notice. The K had no legally enforceable term providing for notice of termination.
Issue: Can the court imply a term of notice?
Discussion:
- Requirements for reasonable notice would be implied by law
- The relevant statute (whatever the hell that is) prescribes a notice period to termination
- It would be unconscionable to be able to allow employees to contract out of statutes that are meant to protect them
- Therefore, the court should imply a term by law
- So D was under legal obligation to give reasonable notice.

Ruling: Judgement for PL.

110.7 Standard Form and Exclusion Clauses

Sale of Goods Act BC

17 Sale by description

(1) In a contract for the sale or lease of goods by description, there is an implied condition that the goods must correspond with the description.

(2) If the sale or lease is by sample, as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.

18 Implied conditions as to quality or fitness

Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:

(c) there is an implied condition that the goods will be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease;

(d) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(e) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent with it.

19 Sale by sample

(1) A contract of sale or lease is a contract for sale or lease by sample if there is a term in the contract, express or implied, to that effect.

(2) In a contract for sale or lease by sample,

(a) there is an implied condition that the bulk must correspond with the sample in quality,

(b) there is an implied condition that the buyer or lessee must have a reasonable opportunity of comparing the bulk with the sample, and

(c) there is an implied condition that the goods must be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample.

Exclusion Clauses

Exclusion Clause: a term in the contract that seeks to restrict the rights of the parties to the K. A true exclusion clause recognizes a potential breach of K and excludes liability for the breach. Alternatively, the clause is constructed in such a way it only includes reasonable care to perform duties on one of the parties.
Limitation Clause: places a limit on the amount that can be claimed for a breach of K, regardless of actual loss.
Time Limitation: The clause states that an action for a claim must be commenced within a certain period of time or the cause of action becomes extinguished.

The courts have held that exclusion clauses only operate if they are a part of the K. There are three ways of incorporation:

- By signature.
- By notice:
  - An exclusion clause will have been incorporated into K if the person relying on it took reasonable steps to draw it to the other parties' attention: *Parker v. Southeastern Railway*
  - The wider the clause, the more the party relying on it will have had to have done to bring it to the other party's attention.
- By previous course of dealing:
  - Terms (including exclusion clauses) may be incorporated into a K, if course of dealings between the parties were "regular and consistent" (*McCutcheon v. David MacBraybe Ltd.*)
  - Equality is to be considered here

Courts do not favour limiting liability, so there are techniques used to control and reduce the use of exclusion clauses:

Notice Requirement

- In order for a clause to be binding, there must be awareness of the clause.
- The notice must be given before formation of K, as illustrated in *Olley v. Marlborough*
- One does not need to know what it says, just know that it is there
- Simply signing the document does not constitute notice
- If the notice requirement is met, then the clause is a part of the K

Doctrine of Unconscionability

- If there is inequality in the bargaining power at the time of acceptance, then the clause does not apply

110.7 Standard Form and Exclusion Clauses

Unsigned Agreements

Parker v. Southeastern Railway [1877] CA

A person is not bound by limitation of liability clauses unless they saw or knew of their existence.

Facts: PL left their bags in D's storage room and received a claim tag that had a clause that excluded liability on the back. The PL states that they did not see the clause. Through the negligence of D's servant, the bags are lost. PL attempts to recover damages.
Issue: Is PL bound by the limitation clause if he was unaware of it? Should he have taken reasonable steps to find out?
Discussion:

- If a person did not see or know about the limitation of liability clause, he is not bound by it
- If a person knew about the writing, he is bound by it (whether be believed that it contained conditions or not).
- If the ticket is delivered in such a way so that the writing is visible, then there is reasonable notice of the condition.

Ruling: New trial ordered.

Thornron v. Shoe Lane Parking [1971] CA

A limitation of liability clause is only binding if the customer had reasonable notice of the clause before entering into the agreement.

Facts: PL parked in D's parking lot and was involved in an accident that was partially D's fault. D states that the ticket should exempt him from liability since it stated that the ticket was issued subject to the conditions posted in the parking lot. The conditions posted in the parking lot were only visible at the exit.
Issue: Is the exclusion clause posted at the exit of the parkade valid?
Discussion:

- The customer is only bound by the terms on a ticket if the terms were sufficiently brought to his notice beforehand, but not otherwise (as long as the customer can get his money back if he does not agree with the terms).
- Reasonable notice requires that the person must have a chance to read the conditions.
- In this case, it was impossible to do so until leaving the parkade.

Ruling: Finding for PL.

McCutcheon v. David MacBraybe Ltd.[1964] HL

A statement can be imported into a contract if previous dealings show that a party knew or agreed to the term in previous dealings.

Facts: PL asked a friend to have D's shipping company to deliver his car on a ferry. The friend took the car to the D, dropped it off, and received a receipt, though he did not sign it. The ferry sank on its way. PL sues for the value of the loss.
Issue: Was there a K between the parties?
Discussion:

- D argues that PL has done the transaction many times, and he should by now know the rules.
- The terms of the receipt are not the terms of a K (?)
- According to the law of contracts, if someone signs something, then it does not matter that they have not read it - they are still liable
- But here PL did not sign, so D cannot impose something on him based on previous dealings
- Previous dealings are relevant if they prove knowledge of the terms, actual and not constructive, and assent to them
- If a term is not expressed in a K, then it can only be put into the K by implication. No implication can be made against a party that was unknown
- If previous dealings show that a party knew or agreed to a term, there is a basis for arguing that it can be imported into the K without an express statement, but it depends on the circumstances.
- Such is not the case here
- So the courts are reluctant to find implied terms such as this.

Ruling: Finding for PL

Signed Agreements

Traditional view held that a party's signature on a K gives that party's assent to all the terms written in the K, in the absence of fraud or misrepresentation. This has been undermined by the following cases:

Tilden v. Clendenning [1978] CA

Unless reasonable measures are taken to draw a party's attention to terms in a standard form document, the terms are not enforceable.

Facts: When D rented a car from PL, he signed the agreement without reading it, which was obvious to the clerk helping him. There is a clause that says that insurance does not apply to anyone operating the vehicle illegally. D gets a little drunk, smashes the rental car up, but refuses to pay damages, as he alleges that if he knew about the terms of the K, he would not have entered into it.
Issue: Is D liable to follow all of the terms of the K?
Discussion:

- PL in this case has had a few, and was driving impaired. This precludes him from relying on insurance.
- He claims that if he would have known, he would not have gotten the insurance or rented the car.
- The clause is quite onerous, as even driving 1kp/h over the speed limit would deprive one of insurance: it can be seen as contradicting the nature of the K.
- So the standard of judgement here must be pretty high
- A party seeking to rely on standard form documents cannot unless they have taken reasonable measures to draw the party's attention to the terms. A signature will not suffice.
- In this case, D's staff was quite aware that PL did not read the document. So they were aware that he signed something that undermines the K in its entirety without knowledge of it. D's staff did not draw his attention to it.
- Absent of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove fraud, misrepresentation or *non est factum*

Ruling: Finding for D.

Delaney v. Cascade River Holidays [1983] BCCA

The formatting and labeling of the release form can render it suspect

Facts: PL went on on a white water rafting trip with D's company. PL signed a liability release form, which was printed in bold and highlighted as a "Standard Liability Release." He then bailed while rafting and died. The family is suing for compensation. Trial judge finds that D is negligent in supplying improper life jackets.
Issue: Does the liability release clause apply here?
Discussion:

- Majority of the court finds in favour of D on the terms of causation: there is no proof that PL would not have died "but for D's negligence"
- Dissenting Judgement:
  - Causation passes fine. But what about the limitation of liability clause?
  - In this case, the term was misleading as it was called "Standard Liability Release", which lulled PL in a false sense of security. It spoke of loss and damage, but made no mention of death.
  - A reasonable person would think that a form called "Standard" is to be standard and not exceptional in its content.
  - This is misrepresentation by omission.

Ruling: Finding for D.

Schuster v. Blackcomb Skiing Ent. Ltd. [1994] BC

Previous dealings and signings of the form will undermine PL's claim that they were not aware of the exclusion clause.

Facts: PL takes part in a 3-day ski camp ran by Blackcomb. After several times doing it, she wants to enroll her entire family. She gets the forms forwarded to her. She reads the part of the waiver that is in bold type and signed it. There were no other warning about the exemption of liability. Of course, she eats shit down the hill and smokes a lift post.
Issue: Does the waiver exempt D from liability?
Discussion:

- A possible exception would be if it were unconscionable to hold the waiver true. But it is not the case here.
- Was there adequate notice of the waiver and its content?
  - PL seems to have just read the heading of the waiver, not the whole text, though she had some idea of what it was.
  - There was no need for verbal notice of the waiver - D did what was sufficiently reasonable to notify her as it is.
- This is different from *Tilden* as the waiver is printed in bold and is clearly visible
- PL has done this before, and it seems reasonable that she should know about the waiver and its content

- So really, she deserves to have hit that post. She's a fucking moron.

Ruling: Judgement for D.

Fundamental Breach

Doctrine of Fundamental Breach: A breach which goes to the very root of the contract disentitles the party from relying on the exempting clause.

- This was developed by Lord Denning at one point, but then common sense prevailed and it was overruled.
- There is no doctrine of fundamental breach in Canada

Karsales (Harrow) Ltd. v. Wallis [1956] UK CA

Doctrine of Fundamental Breach is invented

Facts: D inspected a car, which PL then bought and leased to D for financing. There was a K signed between the two. Upon receiving the car, D found out that it was not in the same condition that it was when he inspected it: some cheeky bastards stripped it down. D told PL that he would not accept the car.

Issue: Is D bound by the terms of the contract to pay?

Discussion:

- There was a term in the K that said that the seller was not liable for the condition of the car
- So according to the literal reading of the K, D is obliged to pay for the car, even though it is now a piece of shit.
- Denning wants to make up a new law that would sound all fancy-like: the Doctrine of Fundamental Breach
  - Without consideration for the exclusion clause, one has to consider what the K is really about
  - If the clause allows a party to do something that violates the very nature of the K (goes against the fundamental root of the K), then the clause will not be allowed.
  - So as long as there is a fundamental breach, any exclusion clauses allowing it are struck down.
- In this case, the condition of the car was a fundamental part of the K
- The breach of this condition went to the root of the K
- So D is not bound by the K

Ruling: Judgement for D.

Photo Production Ltd. v Securicor Transport Ltd. [1980] HL

Doctrine of Fundamental Breach no longer exists, but fundamental breaches do

Facts: D is a security company that was in a K with PL to provide patrols to PL's factory. D's employee purposely set fire to PL's premises and burned the factory down.

Issue: Is D liable to PL for the damages?

Discussion:

- There is a clause in the K which claims that "under no circumstances is D responsible for the actions of their employees which could have been foreseen and prevented" and the "damage by fire is not covered... "
- Under Fundamental Breach doctrine, these clauses would be struck down.
- HL:
  - The Doctrine of Fundamental Breach bullocks
  - Even if the breach is fundamental, one has to consider the clause in context
  - In commercial contracts where both parties are reasonable, we need to give the parties some credit - they were not morons and they put into the K only that, which they intended to put.
  - It is a matter of whether the parties intended the exclusion clause to apply.
- In this case, the clause was sensible, as it aimed to strike a balanced economic approach.
- The event that a guard would end up being a maniacal pyro was reasonably unforeseeable.
- It is an unfortunate event, but sometimes these occur - there is no reason to strike down reasonable clauses based on random contingencies.
- So the clause holds.

Ruling: Judgement for D.

110.7 Standard Form and Exclusion Clauses

Hunter Engineering Co. Inc. v Syncrude Canada Ltd. [1989] SCC
There is no Doctrine of Fundamental Breach in Canada, but there is an established test to determine if an exclusion or limitation clause applies

Facts: D contracts PL for a supply of mining gearboxes to use in a tar sands project. D then contracts another company for a supply of extraction gearboxes. Both sets are delivered and put in use; all of the gearboxes under both contracts are designed by D. There is a warranty included in the K, which expires within 12 months of delivery or 24 months of entering service. The general warranty covers "all damages proximate". This sentence is waived by one of the sale contracts. Each sale L also references *Sale of Goods Act* clause that says that there is no implied warranty anywhere. Two years after the sale, defects are found in the gearboxes. D denies responsibility relying on the expiration of the warranty.
Issue: Is D liable to PL for the damages? Does the warranty apply?
Discussion:

- Which of the doctrines should the court use: the Fundamental Breach from *Karsales* or the contextual interpretation from *Securicor*?
- The court considers this and decides that the contextual construction approach is more flexible and reasonable.
- So there is no doctrine of fundamental breach in Canada.
- However, in UK there is legislation to protect consumers in the case of exclusion clauses that abuse fundamental breaches.
- In Canada, there is no such legislation.
- So, where there is a fundamental breach, there should be some power of the court to strike down the clause, even if it is reasonable in the context, and was intended to be applied.
- The court outlines the test, which is a mixture of notice and unconscionability/unfairness
- In this case, PL is liable

Ruling: PL is liable. The other company is not.

Canadian Test for determining if an exclusion or limitation clause applies:

1. Is the clause part of the secondary obligations or is it characterizing the primary obligations?
2. Is there a statute that prohibits or regulates this clause?
3. Was there notice of the clause?
4. What does the construction of the clause mean?
5. If having construed it, you can still say that it was intended to apply then:
   a. Unconscionability Test:
      If there was an inequality in bargaining power at the time of acceptance, then the clause does not apply. If not, considered Unfairness Test;
   b. Unfairness Test:
      The court should consider what occurred subsequent to the K and decide whether, in the context of the exclusion clause, it can be said that it would be unfair to apply the exclusion clause to the particular situation.

Sale of Goods Act BC

20 No waiver of warranties or conditions

(1) For the purpose of this section, retail sale or lease includes every contract of sale or lease made by a seller or lessor in the ordinary course of the seller's or lessor's business but does not include a sale or lease of goods
(a) to a purchaser for resale or to a lessee for subletting,
(b) to a purchaser or lessee who intends to use the goods primarily for business purposes,
(c) to a corporation or an industrial or commercial enterprise, or

(2) Despite section 18 (e) or 69, in the case of a retail sale or lease of goods, other than goods that on reasonable inspection appear to be used goods or goods that are described or represented by the seller or lessor to be used, any term of a contract of sale or lease, or any collateral or contemporaneous contract or agreement, that purports to negative or in any way diminish the conditions or warranties under sections 17, 18 and 19 of this Act, is,
(a) if a term, severable from the contract and void, or
(b) if a collateral or contemporaneous contract or agreement, void.

(3) Despite section 18 (e) or 69, in the case of a retail sale or lease of new or used goods,
(a) any term of a contract of sale or lease, or
(b) any collateral or contemporaneous contract or agreement,
that purports to negative or in any way diminish the condition or warranty under section 16 is,
(c) if a term, severable from the contract and void, or

Summary:
- Any terms of contract that diminishes warranties under ss.16-19 of the Act is severable and void
- This does not apply to used goods
- This does not apply to business purposes or purchases made by a corporation.

Solway v. Davis [2002] ONCA

Dissent: one should consider policy and economic reasons before striking down an exclusion/limitation clause.

Facts: D is a moving company contracted by PL to move some goods. Their parking lot is under repairs, so they leave the trailer with the goods on the street, and it gets stolen. PL wants recovery of damages, but D relies on the limitation clause that only covers damages up to $7,000. Trial judge refused to enforce the limitation clause.
Issue: Is the limitation clause unenforceable on the basis of unconscionability and unfairness?
Discussion:
- The goods in the storage are not ordinary household goods, they were of special value, which was emphasized by PL, so D was well aware of it.
- PL was also made aware of the limitation clause at the moment of signing
- But the clause is still unconscionable and unfair, and is struck down.
- Dissent claims there are policy reasons for limiting the liability of the company:
  - This is a case of items of exceptional value. There is a reason that it is not covered by carrier's insurance - if the mover was to factor in losses like that into the insurance costs, the insurance prices would rise for everyone, and the people whose items are not of exceptional value (which make up the majority) would be the ones to bear the brunt of the price increase.
  - The interpretation of *Hunter* is that it would take an exceptional circumstance to drop a limitation clause
  - This is not a fundamental breach.

Ruling: Finding for PL

PlasTex v. Dow Chemical [2004] ABCA

If the party included the limitation clause because they were aware of the defects with the product, it is struck down as unconscionable.

Facts: D provided resin to PL, which PL used to make pipe-line for gas projects. There were serious problems with the resin, and the defects in the pipe-lines caused D to lose customers and reputation. When it came to legal action, D tried to rely on an exclusion clause that absolved them of all liability.
Issue: Does the exclusion clause apply?
Discussion:
- Trial judge found that there was contractual liability and tort liability.
- The limitation clause in the K had a limited time period.
- But the clause was signed at a later date - after the shipments of resin started, and after D already knew that the product is defective.
- So at the moment of signing the clause, D were aware that the pipe will have defects. This makes the clause unconscionable.
- They were also aware that the pipes would be laid underground in such a manner that the defects will cause damage to property and people.
- So the clause is struck out.

Ruling: Ruling for PL.

110.7 Standard Form and Exclusion Clauses

Mistake

If one of the parties argues that he did not think that the K did what the other party says it did.
- There is no absolute law on mistake.
- Mistake is almost always used as an alternative to misrepresentation. Mistake is different from misrepresentation in that misrepresentation requires fault to be proven.
- An argument cannot just be made under mistake, some other doctrine must be introduced
- Mistake works in both Common Law and Equity, though Equity is a little questionable, as it was written by Denning and a little bit overruled. But when did that ever stop Denning?

COMMON LAW	K is Void: it never came into existence	• Interpretation of the K determines if a mistake operates
EQUITY	K is Voidable: it is brought to an end	• Mistake occurs if: • A party was induced by a material misrepresentation • One party, knowing that the other party is mistaken lets them remain under the delusion • The parties are under a common misapprehension that is fundamental (not necessarily in the K)

Common Mistake
- A mistake committed by both parties, regarding the state of affairs, which renders the performance impossible
- Under common law, the parties can be relieved by making the K void
- There must be no warranty and no fault
- Consideration or circumstances (?)

Mutual Mistake
- A mistake in the understanding of the parties as to the proper meaning of the K
- If it can't be figured out what the parties had in mind, then there is no consensus ad idem, and no K

Unilateral Mistake
- One party makes a mistake regarding the identity of the other party - fraud and identity theft

Non Est Factum
- A document signed based on misrepresentation or misunderstanding
- *Non est factum* is applicable only where there is no negligence and no innocent third party that relies on the performance on the K

Frustration

Frustration occurs when then law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the K.

- The event causing frustration must be unforeseen
- The event cannot be self-induced

- K can contain a specific clause which allocated the risk in the event of frustration
- If no clause exists, the K is brought to an end.
  - Both primary and secondary obligations are ended at the time of the frustrating act
  - Therefore, if the K is ended before one party has performed any obligations, then the other party shoulders the entire burden of the frustration.
- If a K is frustrated, it is likely that K's that depend on the frustrated K will also be frustrated (though there is no guarantee)

110.8 Protection of Weaker Parties and Remedies

Protection Of Weaker Parties

The following doctrines are equitable, though duress has possible consequences in Common Law

Duress

Duress: the compulsion under which a person, at the time of making the K acts through fear of economic interest or personal suffering of injury to the body, or from confinement (actual or threatened) so as to vitiate the consent and to make the K voidable. To succeed on the ground of economic duress, PL must prove that his will was coerced and that the pressure exerted to do that was legitimate. There are 4 factors to consider in determining if a party has been coerced:

1. Did PL protest?
2. Was there an alternative course open to him?
3. Was he independently advised?
4. After entering the K did PL take steps to avoid it?
5. Was the coercion illegitimate?

- Duress is concerned with a particular event, localized in time that the K was entered.
- If Common Law recognizes the duress, then the K will be void.
- However, it is usually dealt with as an equitable doctrine, and the K is merely rendered voidable, or some of the obligations are not found enforceable.

Void: the K is terminated, as if it had never existed.
Voidable: the K is valid, but the innocent party has a choice to repudiate it.

Pao On v. Lau Yiu Long [1980] PC

Economic duress is a valid cause of action in equity

Facts: D bought a company which PL were majority shareholder and promised to protect the value of the shares held by PL for a year. Share price dropped considerably and PL demanded to be indemnified. Another ground for appeal was that the replacement subsidiary agreement was secured by a threat to break the original agreement
Issue: Is the threat enough to vitiate consent?
Discussion:

- The court outlines the duress test (see above)
- In this case, the replacement subsidiary agreement was entered into by Lau as a matter of business necessity and to avoid litigation
- There was commercial pressure but not coercion

Ruling: No duress here

Gordon v. Roebuck [1992] CA

Establishes the test for economic duress.

Facts: PL and D are both solicitors each acting as a trustee for different investors in a joint development of two apartment buildings. PL needed D to execute some documents for sale of a a building. PL and D negotiated and agreed to a settlement in exchange for the execution. After execution of the sale, PL refused to honour the promissory notes and commences action to have K voidable for reasons of economic duress.
Issue: Was there any economic duress?
Discussion:

- The court establishes a new test for economic duress, by adding the question of whether the coercion was illegitimate.
- The last point means that the defenses of economic duress are rarely successful, because usually the economic duress is legitimate.
- In this case, there was no duress.

Ruling: Judgement for PL

110.8 Protection of Weaker Parties and Remedies

Undue Influence

Undue Influence: the influence which disables a person influenced from acting spontaneously or from exercising an independent will. The concern of undue influence is the nature of relationship between the parties. The test for undue influence is:

1. Is this a special relation where there is a presumption of undue influence?
2. Can PL establish that they were incapable of acting spontaneously or exercising independent will?
3. Does the actual K evidence or suggest that the undue influence led to an unfair K (this only applies in the context of commercial transactions)
4. Once this is established, D can rebut with evidence that the transaction was entered into as a result of own free will and informed thought.

- Undue influence makes K voidable.
- This is related to duress, but considers the nature of relationship over time, rather than the particular event at the time that the K was entered, as duress does.
- Undue influence does not look at gifts.

Geffen v. Goodman Estate [1991] SCC

There is a presumption of undue influence in some relationships.

Facts: A trust is set up by a "manic depressive and immature" woman. She goes to see a lawyer recommended by her brothers to set up a trust. After her death, her son is not happy with the trust, and tries to have it set aside, arguing that his mother was unduly influenced by either her brothers, or the lawyer.
Issue: What is undue influence, and what do you eat it with?
Discussion:

- When undue influence is called upon, it is the burden of the influenced to show that they were incapable of acting spontaneously or exercising independent will
- But in some relationships (often those with a fiduciary duty), there is a presumption of undue influence:
  - Parent/child, guardian/ward, solicitor/client, trustee/beneficiary, physician/patient, etc.
- The test to establish undue influence in a K is:
  - Establish that there was undue influence between parties
  - Examine the actual K to see whether influence led to an unfair K
  - Once this is established, it can be rebutted with evidence that the transaction was entered into as a result of own free will and informed thought.
- In this case, the relationship is that of a brother and a sister.

Ruling: The trust is alright.

RBS v. Etridge [2001] HL

A transaction that is not reasonably expected to occur between parties is necessary to give rise to rebuttable evidential presumption of UI.

Facts: D decided to buy a house, securing the finances with two mortgages, one of them to PL. The house was bought in Mrs. E's name, who took no part in negotiations that were held by her husband, she merely signed all that was given to her. In due course, PL sought repayment of the loan, and took possession of the house. Mrs. E relied on undue influence by her husband, saying that she did not want to sign the papers and was pressured into it.
Issue: Is this undue influence?
Discussion:

- What is important is not the question of undue benefit/disadvantage, but whether the transaction is inexplicable within the context of the relationship
- A transaction that is not reasonably expected to occur between parties is necessary to give rise to rebuttable evidential presumption of UI.
- The essence of undue influence is the notion that equity will step in where one party enters into the transaction as a result of an external influence, arising not from threats but from trust and confidence.
- Prior to signing the K, a solicitor from PL met with both D's and discussed it. He also urged her to take independent advice
- In this case there was no undue influence. D should have read the papers that she signed and taken separate legal advice

Ruling: Judgement for PL

Unconscionability

Unconscionability invokes relief against unfair advantage gained by an inconscientious use of power by a stronger party against a weaker one.
- This is evoked when the stronger party takes advantage of the weaker party
- Unlike undue influence, it does not need for a previous relationship between the parties to exist.
- It does not focus on the parties as much, but on the mechanics of the transaction, determining when the K itself is unconscionable.
- Because of this, courts are more inclined to focus on the K and find parts of it unconscionable.

Unconscionability Test (as per *Morrison)*:
1. Is there proof of inequality arising out of the weaker party's ignorance, distress, or need which left him in the shadow of the stronger party
2. Is there proof of substantial unfairness obtained by the stronger party?
3. Once this is proven, a rebuttable presumption of fraud is raised.
4. Can stronger party repel this finding by proving that the bargain was fair, just and reasonable?

Morrison v. Coast Finance [1965] BCCA
Establishment of the doctrine of unconscionability and the test for it.

Facts: A 79 year old widow rents out her home to two sleaze-ball lodgers. She is after a while induced into mortgaging her home to allow them to buy cars and pay off their debts.
Issue: What an outrage
Discussion:
- The test to determine unconscionability (see above)
- In this case, the widow was clearly taken advantage of.
- The bank was quite aware of the fishiness of the whole thing.
- So, the mortgage was unconscionable, and is void.

Ruling: Finding for PL.

Marshall v. Canada Permanent Trust [1992] ABSC
It is not always necessary to show that the party who gets the benefit was aware of the other side's weakness

Facts: PL purchases a property from Walsh, an elderly person who is in a retirement home. The people taking care of Walsh say that the transaction is unconscionable, because Walsh cannot take care of oneself and has no idea what was going on. PL applies for specific performance.
Issue: Is this unconscionable?
Discussion:
- The transaction was unfair, because:
  - The payment is much less than the value, and
  - Walsh was incapable of protecting his interest.
- PL claims that he was unaware of Walsh's state
- It is not always necessary to show that the party who gets the benefit was aware of the other side's weakness.
- So the transaction is found void based on unconscionability

Ruling: Judgement for D.

Harry v. Kreutziger [1978] CA
There are actually two tests for unconscionability

Facts: A fishing boat with a fishing license attached to it is sold under dubious circumstances in a high pressure bid by D. In the end, the price paid is less than half of the actual value.
Issue: What to do?
Discussion:
- One judge reiterates the *Morrison* test. Inequality in position due to ignorance/distress > Proof of substantial unfairness by the stronger party.

- The other judge proposes a new test, trying to take the focus away from the individuals and onto the K:
  - Does the transaction, seen as a whole, divert significantly enough from the community standards of commercial morality so that it should be rescinded?
- The problem with this is two-fold: what is the community that one should look at? What is the morality of it?
- The suggestion is to look at recent cases from Canada.

Ruling: Finding for PL

Business Practices and Consumer Protection Act BC

5 Prohibition and burden of proof

(1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

8 Unconscionable acts or practices

(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

- *(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;*
- *(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;*
- *(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;*
- *(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;*
- *(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;*
- *(f) a prescribed circumstance.*

9 Prohibition and burden of proof

(1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

10 Remedy for an unconscionable act or practice

(1) Subject to subsection (2), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.

(2) If a court determines that an unconscionable act or practice occurred in respect of a consumer transaction that is a mortgage loan, as defined in section 57 [definitions], the court may do one or more of the following:

- *(a) reopen the transaction and take an account between the supplier and the consumer or guarantor;*
- *(b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;*
- *(c) order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;*
- *(d) set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;*
- *(e) suspend the rights and obligations of the parties to the transaction.*

110.8 Protection of Weaker Parties and Remedies

Remedies

- There is a right to Common Law remedies (damages), but one must argue for equitable remedies (specific performance, injunction) as there is no right to them.

	Type	Cause	Effect
DAMAGES	Common Law	A breach of obligation	• Expectation Interest puts PL in the position he would be if the K was fulfilled • Reliance Interest puts PL in the position he was before the K • Restitution Interest forced D to disgorge any profits received from PL
RESCISSION	Equity	Misrepresentation	• the unmaking of a K between two parties. • an unwinding of a transaction, which is done to bring the parties as far as possible back to the position that they were in prior to the K. • if you cannot obtain the conditions that occurred before the K existed, then rescission is not an option
REPUDIATION	Equity	Breach of Obligation (Only available to the innocent party)	• the refusal to acknowledge the K. • the K comes to an end, the primary obligations are terminated, but the secondary obligations remain.
SPECIFIC PERFORMANCE	Equity	Damages are inadequate as injury is beyound monetary compensation	
INJUNCTION	Equity	Damages are inadequate as injury is beyound monetary compensation	

Damages

- Damages are the most common remedy
- As soon as an obligation (primary or secondary) is breached, there is a right to damages
- One exception to the rules of damages is damages concerning contracts dealing with land
- The damages can be seen as either "forward looking" (Contract damages - Expectation interest), and "backward looking" (Tort damages - Restitution and Reliance interest)

Expectation Interest:
- Most common type of damages
- Puts PL in as good of a position as he would have been had the K been performed
- One of the main reasons for these damages is economic efficiency
- When expectation interests cannot be determined, reliance interests should be awarded

Reliance Interest:
- If PL in reliance on a promise made by D has changed his position - incurred expenses or lost an opportunity
- Damages seek to undo the harm that PL suffered due to D's failed promise by restoring PL to the position prior to the K

Restitution Interest:
- This is the least common type of damages
- If PL has conferred some benefit on D, but D did not fulfill their part of the the K
- Courts will force D to disgorge his profits that he received from PL
- The object is to prevent unfair gain by defaulting promisor.

Bowlay Logging v. Domtar Ltd. [1982] BCCA

PL can chose which damages they will pursue. If the loss is not due to the breach, PL gets fuck all.

Facts: PL was hired by D to log 10,000 units of timber. But D was unable to provide enough trucks, so PL sued for breach and damages. But there was no evidence of loss. PL spent $230,000 and was paid $108,000 so they want the difference as reliance interest. Trial judge gives them $250.
Issue: How does this work?
Discussion:

- It is up to PL which measure of damages they want to claim. They chose reliance interest over expectation interest.
- PL spent $230,000 and was paid $108,000 so they want the difference.
- But D argued that the loss was not a result of the breach. PL, D argued, ran a highly inefficient business and would have lost much more had D not have pulled its trucks. Evidence supports this and shows that PL's losses were not due to breach of K but due to grossly inefficient work practices.
- So, had the K been performed, PL would have lost heaps more money. The breach prevented PL from incurring losses.
- The court agreed. PL, having elected to claim for expenses, was rebutted by D showing that PL would have incurred a loss had it completed the K

Ruling: Nominal damages of $250 to PL.

Sunshine Vacation Villas v. Hudson Bay Company [1984] BCCA

Both reliance and expectation damages cannot be awarded if it will over compensate

Facts: PL was granted licences to operate travel agencies in HBC's stores in BC and contracted for another four in Vancouver and Victoria starting in Spring 1977, after it would terminate the Ks with the travel agencies who were currently there. In April 1977, PL discovered that D had renewed the licences with the other agencies, thus reneging on the deal. But PL carried on the negotiations, and in hope of winning the licences incurred expenses of $195,000.
Issue: What damages are available to PL?
Discussion:

- Lower court awarded PL reliance interest of $195,000 and expectation interest of $100,000. D appeals this.
- Court stated that PL may choose between a claim for reliance interest or the normal measure of damages (expectation interest)
- Since, as had been done in *Bowlay*, PL had elected to proceed on the basis of reliance interest, they have the onus of establishing that the amount of lost capital was less than the net loss which would have been incurred had the contract been completed.
- PL had not established that an award for lost profits would have exceeded the amount of lost capital.
- The court accepted the amounts submitted as lost capital including the $80,000 initial investment by the investors and the line of credit balance of $115,000
- Damages cannot be awarded for both reliance and for expectation because it would result in double compensation
- One can only receive both reliance and expectation damages if it would not overcompensate the innocent party

Ruling: PL gets only reliance interest of $195,000.

AG v. Blake [2001] HL

In some rare cases, courts will award restitution damages to deprive D of unfair profits.

Facts: D is an ex-military attache and double agent of the British Government who publishes a book that reveals information in breach of his confidentiality contract. British government wants a ruling to deprive him of the profits derived from sales of this book.
Issue: Can PL be awarded damages if they have suffered no monetary loss?
Discussion:

- The purpose of damages is not to punish the wrongdoer, but to compensate the innocent party for the loss
- In most cases, expectation damages and equitable remedies will take care of any wrongs suffered
- There are some situations, where these are not enough, or not available
- In extremely rare cases, restitution damages will be awarded, to deprive D of the profits that they have incurred through the breach of K
- There are no fixed rules for finding this: it has to be considered on a case by case basis
- There is also the consideration that people should not profit from their crimes
- In this case, D is a self-proclaimed traitor and caused great damage to public interest and interest of the Crown

Ruling: PL gets restitution damages

Quantum

- Putting damages into categories is simple, quantifying them is not.
- When K is broken and PL is is an innocent party, the court will assist PL wherever possible, but the burden of proof is on PL to show the amount of money that they should get.
- The court must do the best it can to reach what seems to be the right figure on a reasonable balance of the probabilities, avoiding undue optimism and undue pessimism

DAMAGES = [Market Value of the Supposed Delivery] - [Market Value of Actual Delivery]

OR

DAMAGES = [Market Price that Innocent Party Paid] - [Market Price that Innocent Party was Supposed to Pay]

Chaplin v. Hicks [1911] CA

If there is a breach of K, PL has a right to damages even if they are impossible to calculate

Facts: A contestant in a beauty contest complained that although she was one of fifty finalists, the final selection appointment was given on such short notice that she did not receive the letter on time to make the appointment. There was a breach of K and the PL has a right to damages.
Issue: Can damages be calculated?
Discussion:

- D argues was that the chances of the contestant to win, in any case, were impossible to assess.
- The fact that the expectation damages are almost impossible to calculate does not relieve the wrongdoer of the necessity to pay damages for breach of K
- When K is breached and PL has proved causation of some harm, this gives rise to a right to damages and a corresponding duty on the court to assess the amount of compensation, even if such seems impossible.
- It maybe very difficult to come up with a figure for damages, but the court is required to award something and must do the best it can.
- In this case PL had not been afforded a reasonable opportunity of presenting herself for selection and damages were assessed at £100.

Ruling: Judgement for PL

Groves v. John Wunder [1939] MINN CA

One can claim damages for breach of K, even if there is no benefit for them from it. The proper measure of damages is the cost of remedying the defect.

Facts: PL leased some land to D. He let D use the land and take sand and gravel from it. D was supposed to pay PL $105,000 and leave the property at a "uniform grade". D intentionally breached and didn't leave a uniform grade. It was found it would cost about $60,000 to fix the grade. However, the property itself if D had performed would only have been worth about $12,000. At trial, the PL recovered the $12,000 plus interest. The PL appealed.
Issue: Was the PL entitled to (1) the reasonable cost of doing the work the D was supposed to perform under the K or (2) the difference between the value of the land as it was originally and the value of the land as it would have been had the defendant performed?
Discussion:

- PL wants damages in the cost of grading $60,000
- D claims that the reasonable value is that of the land itself - trial judge agrees and gives PL only $12,000.
- Making the property uniform grade would not increase the property value very much at all, and it would cost more than the property itself is worth
- CA ordered the $60,000 in damages saying that "in a case such as this, PL is entitled to compensation for what he has lost, that is, the work ... which he has been promised and of which he has been deprived by the D's breach."
- It is not about how much the property value will be increased.
- D agreed to make the property uniform grade regardless of the price it was to him. Awarding less money will be encouraging the party that deliberately breached the K.

Ruling: Full damages to PL

Fidler v. Sun Life Assurance [2006] SCC

Damages for mental distress are freely available, but have to be proven by PL to be more than merely trivial.

Facts: PL was a receptionist at RBC, covered by insurance policy by D. She suffered from chronic fatigue syndrome. But she was denied long-term disability benefits based on the definition of "totally disabled". At CA, PL was awarded $20,000 for mental distress from breach of K, and $100,000 in punitive damages from D for their bad faith in their dealings with her.
Issue: Do damages apply to cases of mental distress?
Discussion:

- In *Jarvis*, Denning ruled that sometimes the point of a K is some intangible personal benefit (pleasure) to a person.
- Damages for mental distress should not be treated any different than others.
- The PL has to prove that:
  - They have suffered a mental distress
  - An object of the K was to secure an intangible benefit, which would brings mental distress as breach within the reasonable contemplation of the parties. (It doesn't have to be the principle object of the K)
  - The degree of mental suffering caused by the breach is sufficient to warrant compensation.
- Most of the time, mental distress is still not something that PL can recover.
- In this case, PL gets $20,000 for mental distress, but the $100,000 award for bad faith is overruled.

Ruling: Judgment for PL. Somewhat.

Causation and Remoteness

- The question is whether the losses were caused by the unlawful conduct of one party?
- The standard of causation is the "But for" Test
- The courts historically tended to be more restrictive in finding remoteness and causation than in torts
- But there has been a recent tendency to treat the two as more similar

Hodgkinson v. Simms [1994] SCC

The damages have to be caused by the breach and this causation has to be established using the "but for test"

Facts: PL got some tax advise from D to invest in multi-unit residential schemes. Unknown to him, D was employed by the people who ran these schemes. When the value of the investments collapsed, many investors lost their money, including PL.
Issue: Where does one draw the line between damages arising from breach of K and other cause?
Discussion:

- The damages have to be caused by the breach, and it was D's advise that led to PL's losses.
- So, PL is entitled to be put back into the position that he would have been "but for" the breach, and get back what he invested.
- Dissent:
- The damages were not caused by the advise: the cause of the loss were the market forces.
- PL should not recover damages because it was not the advise of D that led to him losing money, but the investment itself.
- Chances are that he would have invested money into something shitty either way, and lost his money.

Ruling: Finding for PL.

Hadley v. Baxendale [1854] HL

The difference between special damages and general damages. The test for awarding damages

Facts: A broken shaft was given to a carrier to bring to a repair shop. The carrier (d)was not told that the absence of the shaft meant complete work stoppage for the owner (PL). D was in breach of K by being several days late in delivery. Admitting to damages, D nevertheless argued that the loss of profit damages were too remote.
Issue: Was the breach too remote to cause the damages?
Discussion:

- Damages will be awarded for losses, either General or Special.
- In the majority of the cases, D's breach would not have caused the loss, as most mills would have a spare shaft
- So in this case the Special Damages are applicable.

- D were not warned of the urgency and the consequences, and it was not in their contemplation at the time that the K was made.
- So, damages are not applicable as the cause is too remote.

Ruling: New trial ordered.

Type	Cause	Effect
GENERAL	Objective Occurring naturally from the breach	• "May fairly and reasonably be considered arising naturally, according to the usual course of things, from the breach itself" • Causation is easier to establish
SPECIAL	Subjective Were contemplated by the parties as a probable result of the breach	• Will flow from a breach of K from what the parties know but not what is in the K • "anything that 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" • There is causation only if the party in breach reasonably foresaw the probable result of their breach.

Victoria Laundry v. Newman [1949] CA

The test for remoteness is very broad and has to be

Facts: PL bought a boiler from the D who agreed to deliver it by a certain day. The boiler was broken during the dismantling process on the D's property and therefore had to be fixed. Thus, the boiler was delivered to the PL late, causing loss of profit.

Issue: Was the delay too remote of a cause for the damages?

Discussion:

- The rule that damages try to put the innocent party in the same position as it his contractual right has been fulfilled, can be too harsh at times because some damages are too unpredictable or improbable.
- Only damages which are "reasonably foreseeable" from the breach are recoverable.
  - What was 'reasonable' depends on the knowledge of the party that commits the breach
- Knowledge can be imputed or of special circumstances outside the ordinary course of things of such a kind that a breach would be liable for more loss
- It is not necessary to prove that the wrongdoer contemplated the loss. It suffices that,a reasonable man foresaw that the loss in question was liable to result.
- It is not necessary to foresee that a breach must necessarily result in the specific loss. It is enough if he could foresee that loss was likely so to result.
- In this case, delivery of the boiler was reasonably foreseeable as something crucial to the running of the company
- Also, it is reasonably assumed that a laundry needs a boiler to function as a business and derive their profit.
- So, D should have known that their failure to deliver the boiler would cause losses to PL's business.

Ruling: Appeal allowed

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

Even a foreseeably possible damage may be too remote.

Facts: A ship delivering sugar breached its K to deliver the sugar to Basra on time. The sugar arrived 9 days late and the price for sugar had dramatically decreased in this time.

Issue: Is the loss of profit too remote to claim damages?

Discussion:

- The test for remoteness in contracts should be more difficult than the test for remoteness in torts
- Not everything which is reasonably foreseeable by the parties at the time that the K was made should be recoverable.
- Was it fair that D recognized that they will be responsible for this type of loss?
- Liability is easier to establish in contracts:
  - At the outset of the K the parties decide to make a relationship and determine the obligations of that relationship.

  - Therefore damages should be less in contracts than in torts because it is harder to establish liability in torts but once it is established the remoteness is easier to fulfill.
- The loss of profit in this case is not too remote - it is foreseeable that ships would be delayed on their journey.

Ruling: No damages.

Aggravated and Punitive Damages

Aggravated Damages: damages which compensate PL for intangible injuries suffered as a result of the way that the breach has been performed.
Punitive Damages: damages which punish D for their improper behaviour in a way that the breach has been performed. To get punitive damages, PL have to show and independently actionable wrong (though this has become more flexible with time)

Vorvis v. ICBC [1989] SCC

Punitive damages will rarely be awarded. Aggravated damages can be awarded for mental distress in employment contracts and if there is an actionable wrong

Facts: A lawyer was dismissed in a rather heavy-handed way from a BC Crown corporation, for "putting too much work into his files" and was too thorough in his work habits.
Issue: Do punitive damages apply in wrongful dismissal cases?
Discussion:

- Yes, but very rarely and only "in respect of conduct which is of such a nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.... extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment."
- The majority did not think that the conduct deserved punitive damages.
- SCC noted that punitive damages are not compensatory in nature.
- Aggravated damages are different and are compensatory in nature, taking into account "intangible injuries."
- SCC endorsed the *Jarvis* precedent "that aggravated damages may be awarded in actions for breach of contract in appropriate cases."

Ruling: PL gets aggravated damages only

Wallace v. United Grain Growers [1997] SCC

If someone is fired in a demeaning way the notice period is longer and therefore there has to be more compensation.

Facts: The D hired PL with assurances of job security and remuneration. PL was the top salesperson in the D's business and without any explanation the D fired the PL.
Issue: Are punitive damages appropriate?
Discussion:

- *Vorvis* was right, but if someone is fired in a demeaning way, the notice period is longer and therefore there has to be more compensation.
- Damages for mental distress are not recoverable for wrongful dismissal unless there was a separately actionable wrongful conduct.
- Dissent finds that if there is a duty to act in good faith, then the breach of it is sufficient to be an independently actionable wrong, and punitive damages may be awarded.

Ruling: too ... many... cases....

Whiten v. Pilot Insurance [2002] SCC

Punitive damages are applicable where there is a gross and marked departure from decency and morality

Facts: PL's house burns down and they are left destitute. The insurer D gives them a single $5000 payment for living expenses and covers their rent for a few months before cutting off all the payments and being a dick in general. D then claims that PL burned down their own home, which is complete bullocks. Trial jury awards PL $100,000 in compensatory damages and $1,000,000 in punitive damages, for D being a complete ass.
Issue: Are punitive damages appropriate?
Discussion:

- There is a duty to act in good faith
- Improper behaviour - when there is a marked departure of decency and morality - is a breach of this duty
- So punitive damages are appropriate in this case, as D has acted offensively and maliciously
- The award of $1 million in punitive damages was more SCC would have awarded, but was still within the high end of the range where juries are free to make their assessment.

Ruling: Judgment for PL.

Mitigation

White and Carter v. McGregor[1962] HL

Compensation only is given for the actual loss

Facts: D executed a 3-year K with PL - a local waste disposal firm for the rental of advertising space on garbage cans. The K had a clause that if any payment was late, the whole 156 weeks worth was immediately payable. When D discovered it, he was furious with the K and repudiated it, refusing to pay. But PL still ran the ads for the length of the K, and claimed damages for the 3 years.

Issue: Is D liable for the 3 years worth of damages even though he repudiated the K immediately?

Discussion:

- If one party to a K breaches it, making it clear to the other party that he refuses to carry out his part of the K, the innocent party has an option:
  - He may accept that repudiation and sue for damages for breach of K, whether or not the time for performance has come, or
  - He may disregard or refuse to accept the repudiation, so that K is in full effect.
- Therefore, in situations where accepting the anticipatory breach would reduce the amount of harm from a breach of the K, a legitimate interest must be shown in order not to accept the anticipatory breach and receive full damages for the breach of K (including the extra harm caused by not accepting the breach)

Ruling: D is only liable for the actual loss.

Liquidated Damages and Deposits

Liquidated Damage: amount of money agreed upon by both parties, which one will pay to the other upon breach of K. Sometimes the liquidated damages are the amount of a deposit or a down payment, or are based on a formula (such as 10% of the K). The innocent party may obtain a judgment for the amount of liquidated damages, often based on a stipulation (clear statement) contained in the K, unless the party who has breached the K can make a strong showing that the amount of liquidated damages was so "unconscionable" that it appears there was fraud, misunderstanding or basic unfairness.

- Historically, liquidated damages were only enforced when there was a clear agreement about them by both party in the K
- There is a new direction in this doctrine, where liquidated damages are approached as being mitigative, not punitive in nature - the courts not enforce a clause that is clearly punitive by imposing a grossly disproportionate liquidated damages amount.

Shatilla v. Feinstein [1923] CA

A fixed sum damage is presumed to be punitive, unless if there is an explicit agreement that it is liquidated damages, and the sum is not grossly disproportionate.

Facts: D sold a business, agreeing in K to not compete with PL, with a payment of $10,000 "as liquidated damages, and not as penalty." D then breached a no-competition agreement, by opening a business that competed with PL. PL sued for breach of K and liquidated damages.

Issue: Is the liquidated damages amount a penalty or a realistic estimate of damages?

Discussion:

- When the damages for a breach of a K are uncertain, the parties can agree beforehand on the amount to of damages in case of a breach.
- But courts do not enforce penalty clauses.
- Whether the agreement is a penalty clause or not will be decided on a case-by-case basis.
- If a fixed sum is given on the breach of a number of obligations, there is a presumption that this is not a liquidated damage clause but a penalty clause
- This presumption can be rebutted if it can be shown that it has been carefully thought out provided that it is not "extravagant or unreasonable."

- To figure out if it's grossly disproportionate:
  - Compare the damages proposed to the consequences of a breach
  - But often a breach will be very minor, still incurring the damages
  - So, one has to compare the damages to the consequences of the most trivial breach that will incur these damages.
- In this case, the clause was considered to be a penalty clause and thrown out

Ruling: Judgement for D

HF Clarke Ltd. v. Thermidaire [19] SCC

The liquidated damages amount has to be reflective of the actual loss suffered.

Facts: PL is a distribution company that agreed to not sell goods made by D's competitors. A "liquidated damage" clause provided, rather than a set sum, a formula, "an amount equal to the gross trading profit realized through the sale of ... competitive products." The amount claimed for gross profits was $200,000 which both parties greed on. But the actual net profits was only $90,000, which was the secondary claim if the first one failed.

Issue: Is the liquidated damages clause valid?

Discussion:

- SCC is alerted by the fact the there is a wide discrepancy between the gross profits claim and the actual loss suffered (the net profits claim)
- The liquidation clause, though flexible, is not reasonably reflective of the damages that D would have actually incurred.
- The clause is thus void, as it is grossly excessive and punitive response to the problem to which it was addressed.
- A liquidated damages clause "must yield to judicial appraisal of its reasonableness in the circumstances."
- The power to relieve from penalty clause is of equity and it does not relieve from liability from normal damages "which a court would fix if called upon to do so."

Ruling: the clause is struck down, but PL is still liable for damages.

JG Collins Insurance v. Esley [19] CA

Courts will not interfere with a liquidated damages clause if the amount that it calls for is too small.

Facts: In the event that D fails to observe an employment covenant, D is bound by a clause in the K that provided for "$1,000 as and for liquidated damages." But the actual loss in this case was much greater than the amount claimed.

Issue: What happens if the amount in a liquidated clause is too little?

Discussion:

- Striking down a penalty clause is a blatant interference with the freedom to contract
- So it should only be done for the purposes of protecting D from oppression.
- If the actual loss turns out to exceed the penalty, the normal rules of enforcement of K should apply to allow recovery of only the agreed sum.
- So the clause is alright
- Any further damages are worked out on their own.

Ruling: Judgement for PL

Coal Harbour Properties v. Liu [2006] BCCA

If the pre-estimate of damages is commercially reasonable, it does not have to reflect the actual amount of damages suffered.

Facts: PL is a condo developer that has a K with D to sell a condo. After a trivial dispute over parking stalls, D pulls out of the K. PL then sells the condo to someone else for a profit of $800,000. There is a clause in K between PL and D that says that a purchaser loses the deposit.

Issue: Can the clause be enforced even if it is grossly disproportionate to the damages suffered.

Discussion:

- The K was drafted in a commercially reasonable way
- For the purposes of economic efficiency, it should not matter that the actual damages are insignificant, as long as there is a possibility of large damages that the clause protects.
- Either way, D was a dick and pulled out of the K for a retarded reason.
- So, the clause is valid and enforced.

Ruling: Judgement for PL.

110.8 Protection of Weaker Parties and Remedies

Equitable Remedies

- Equitable remedies only step in where common law is not adequate
- But courts are very loath to apply them when there is a possibility of applying monetary damages.
- Order of specific performance is very rare in K cases,
  - It will not be applied where it requires any sort of personal work (employment K) where it may amount to forced labour
  - It is only common with land purchases

Injunction: an order to a party to refrain from doing something. Injunctions can be temporary, pending a consideration of the issue later at trial. Courts can also issue permanent injunctions at the end of trials, in which a party may be permanently prohibited from engaging in some conduct--for example, infringing a copyright or making use of illegally obtained trade secrets. Although most injunctions order a party not to do something, occasionally a court will issue a "mandatory injunction" to order a party to carry out a positive act - for example, return stolen computer code.

As per *R. v. RJR Macdonald* [SCC], injunction requires the court to consider three requirements:
1. Seriousness of the issue
2. Presence of irreparable harm, which is not compensable in damages
3. Balance of convenience should favour the PL.

Specific Performance: an order of the court which requires a party to perform a specific act, usually what is stated in a contract. While specific performance can be in the form of any type of forced action, it is usually used to complete a previously established transaction, thus being the most effective remedy in protecting the expectation interest of the innocent party to a contract. It is usually the opposite of a prohibitory injunction but there are mandatory injunctions which have a similar effect to specific performance.

John E Dodge Holdings v. 805062 Ontario Ltd. [2003] ONCA
Even in the context of land transfers, to get a specific performance, one has to show something special about the land that would be irredeemable with monetary damages.

Warner Bros. Pictures v. Nelson [1937] KB
An injunction not to do something is more easy to get an an injunction to do something.

Zipper Transportation Services Ltd. v. Korstrom [1998] SCC
Injunctions are only given when there is a irreparable harm that cannot be cured by monetary damages. There is a test of some sort here??