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Offer and Acceptance

# Offer

1. Inclusive terms> enough detail to be accepted
2. Outward directed expression
3. Objective> no doubt for either party as to the meaning of the offer
4. Time requirements (offer before acceptance)

# Acceptance

Power of acceptance is created in the offeree once the offer has been made.

Place and time of acceptance may determine what laws apply & terms of K.

## Is there acceptance?

An offer dies if:

* Specified time lapses
* After “reasonable” amount of time (*Shatford*)
* Upon revocation of the offer
* Fundamental/unforeseeable change in circumstances (*Nielson*)

## Unilateral Contracts: Is there acceptance?

Acceptance, ~ K is formed, on performance of the offeree. No legal obligation on either until then.

# Uncertainty: Formalization and Certainty

If the terms fo the K are not sufficiently certain/definitive, no K

* courts will give force to agreements which pass reasonable & just interpretation
* More likely a court will find there is a K when:
  + There is detrimental reliance by party seeking enforcement
  + Bad faith by party seeking to avoid enforcement

\*The Role of the court is to give legal meaning to parties’ intentions, NOT to substitute their own subjective idea of what fair/reasonable intentions ought be.\*

Consideration

* BREACH OF K REQUIRES: Promise, Consideration, Breach of Promise (*Goldings*)
* Can be BENEFIT conferred or DETRIMENT suffered (*Currie*)
* Exchange; something given for a promise of something to occur
* Mutual promises must be @ same instance, or they are simply two unenforceable naked promises (*Raynbred*)
* Consideration and promise must be mutually related/for one another(*Allegheny*)
* Nominal consideration is fine, but motive does not equal consideration
  + (consideration must have some value in the eyes of the law) (*Eleanor Thomas*)

- Consideration must be separate from the promise (*White*)

* NO NEED for express exchange of promises for **unilateral Ks** (*Witham*)
* Consideration is that which is requested by promisor (*Hamer*)

## Preexisting Duty & Duress

POST-CONTRACTUAL MODIFICATION requires FRESH CONSIDERATION

* Rescission of old K (explicit or implicit, bc of frustrated circumstances)> agreeing to ‘stay’= re-entering a fresh K, ~ fresh consideration (*Hartley, Raggow*)
* promise not to breach K is not fresh consideration (*Dawson*)
* Can make same promise to multiple parties, no preexisting duty issue (*NZ Shipping*)

Intent to Form Legal Relationship

* Consider what the existing relationship is, Mutuality,
* (Rebuttable) Factual presumption against intent /w close family members (*Balfour*)
* Intention presumed in commercial relationships (*Rose & Frank*)

Contract, Tort and Estoppel

## Promissory Estoppel

Requirements (Fridman):

1. **Must have been a pre-existing legal relationship between the parties at time statement on which estoppel is founded was made (*Combe*)**
2. **Must have been a clear promise or representation made by party against whom the estoppel is raised, establishing his [objective] intent to be bound by what he has said. [Can be inferred. Reliance must be reasonable] (*John Burrows, Owen Sound)***
3. **There must be actual reliance by party raising the estoppel, upon statement or conduct of party against whom estoppel is raised. (*High Trees*)**
4. **The party to whom the representation was made must have acted upon it to his detriment. (*Ajayi*) \*and be unable to resume position /w fair notice**
5. **Promisee must have acted equitably – no undue pressure, duress, etc. (*Rees*)**

* Equitable remedy; must come to court /w clean hands to benefit
  + Where otherwise unenforceable for lack of consideration
  + Must be a pre-existing legal relationship
  + Promise cannot be extracted via pressure/undue influence/duress (*Rees*)
* Detriment of some kind is required (*Skidmore*)
  + - At the TIME OF promisor’s reneging on their promise (*Ryan v Moore*)
* Cannot be used as a sword (primary cause of action) (*Combe*)
  + - Pointy shield (*Amalgamated Investment*)
* REPRESENTATION detrimentally relied on MUST be of **existing fact, not future intention** (*Hudson, Madison*)
* Can’t enforce your strict K rights after leading the other party to think you will not (*Hughes*)
  + - Promise to not enforce must be CLEAR and show intention to be bound (*John Burrows*)
* Can’t be used to estop where the agreement was for certain terms (i.e. wartime) that have passed & would not be otherwise enforceable at common law (*High Trees House*)
* About limiting people’s contracted rights, NOT creating new rights \*shield, not a sword (*Combe*)
* Enforceability can be returned if A gives B notice they wish to enforce K rights, and give B opportunity to relieve detriment
  + - * Or if the detriment otherwise ends (*Verwayen*)

### Skidmore v Bradford (1896 UK)

**FACTS**: Uncle promised nephew 5000 to buy warehouse, S entered K to purchase, uncle paid 1500, died, estate refused to pay remainder (no consideration?).

**HELD**: Estate liable to pay what uncle promised

**TAKEAWAY**: Deceased had begun performance, S had detrimentally relied

### Re Hudson (1885 UK)

**FACTS**: Deceased promised in writing to give 20k to committee, committee relied & spent money

**HELD**: No enforceable K.

**TAKEAWAY**: Detrimental reliance must be based on a representation of FACT, representation of future INTENTION is not enough (without consideration)

- also in Maddison v Alderson (1883)

### Hughes v Metropolitan Railway

**FACTS**: P (landlord) tries to break lease (for d’s not making Kd repairs), after negotiating with D about interest

**HELD**: P cannot enforce full K rights after leading D to think they did not need to perform/they entered negotiations

**TAKEAWAY**: Estopped from demanding full K rights where you have entered into negotiations /w presumption (on your own words/actions) that you will not enforce the original K rights.

### Central London Property v High Trees House (1947)

**FACTS**: 99 year lease K, P (landlord) agrees to let D pay half rent during wartime. After P goes bankrupt, company sues tenant for back rent (from time landlord was entitled to full amount but accepted less)

**HELD**: D must pay (difference beginning ONCE wartime ended> during wartime, lower rent was enforceable.

**TAKEAWAY**: Insofar as the parties INTENDED to be bound, will be held liable (cannot use estoppel)

### Combe v Combe (1951)

**FACTS**: After divorce, husband agrees to pay 100 per year to ex-wife but doesn’t. Was meant to be binding

**HELD**: Defendant husband not liable to pay.

**TAKEAWAY**: Promisory estoppel limits enforcement of rights but cannot create rights where none were previously contracted

### Ajayi v RT Briscoe Ltd (1964)

**TAKEAWAY**: Equitabel remedy, ~ subject to equitable limitations:

- Promisor can resile from his promise by giving reasonable notice to promisee so they can have reasonable opportunity to resume their position (to fulfil K responsibilities)

### John Burrows Ltd v Subsurface Surveys

**FACTS**: S purchased property from J, paid in part /w promissory note (for monthly instalments & clause for full enforcement of debt if S was late /w payments). S was regularly late & J would accept the payments without protest. After a falling out, J sues for full amount owing based on S’ late payments.

**HELD**: For J, not estopped from enforcing full payment.

**TAKEAWAY**: Creditor’s indulgence not insisting on payment does not amount to a clear promise to not enforce.

### Owen Sound Public Library v Mial Developments

**FACTS**: OS P library contracted MD developer to build library /w clause that bills be paid within 7 days of receipt or MD can terminate K. MD delivers bill, library won’t pay until bill includes subcontractor’s seal (that they had been paid), MD agrees, OS waits to pay, MD sends sealed bill over holiday and threatens to terminate without payment and materials, Library sues for breach.

**HELD**: MD’s attempt to terminate was unjustified, held for Library.

**TAKEAWAY**: Intention to affect legal relations is objectively assessed, and can be express or inferred by conduct

### The Post Chaser (1981 UK)

**TAKEAWAY**: Detriment is not necessary if promisor benefits from promise in some other way.

### Bertkey Development v Incorporated Owners of Fine Mansion

**TAKEAWAY**: Some form of detriment is required to ground an estoppel claim.

### Ryan v Moore (2005 SCC)

**TAKEAWAY**: There must be a detriment, and it must be at the time the promise is taken back

### Grundt v Great Boulder Proprietary Gold Mines (1937)

**TAKEAWAY**: Estoppel protects against the detriment from changing position based on a promise, ~ assess detriment at time promise is taken back (not when promise is made)

### The Commonwealth of Australia v Verwayen

**TAKEAWAY**: detriment must continue to exist; if it ceases, nothing unconscionable about enforcing legal rights

### D&C Builders v Rees

**FACTS**: P did work for D, D paid part. D’s wife contacts P months later, offering to pay part of the outstanding debt as a final payment- which P contests but accepts to avoid bankruptcy.

**HELD**:P can enforce full payment.

**TAKEAWAY**: Cannot rely on estoppel if promise was extracted though unconscionable means (duress, undue pressure, otherwise inequitably)

### Collier v P & M Wright Holdings

**TAKEAWAY**: If a creditor voluntarily accepts part payment for forgiving full debt, they will be bound

### Mercantile Law Amendment Act (ON)

**TAKEAWAY**: Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish that obligation.

### Amalgamated Investment & Property v Texas Commerce International Bank

**TAKEAWAY**: You can support a cause of action with estoppel that would otherwise necessarily fail (using it as a pointy shield)

### Fridman, GHL “The Law of Contract in Canada”

**TAKEAWAY**: Reqs for Promissory Estoppel

1. Must have been a pre-existing legal relationship between the parties at time statement on which estoppel is founded was made (*Combe*)
2. Must have been a clear promise or representation made by party against whom the estoppel is raised, establishing his [objective] intent to be bound by what he has said. [Can be inferred. Reliance must be reasonable] (*John Burrows, Owen Sound)*
3. There must be actual reliance by party raising the estoppel, upon statement or conduct of party against whom estoppel is raised. (*High Trees*)
4. The party to whom the representation was made must have acted upon it to his detriment. (*Ajayi*)
5. Promisee must have acted equitably – no undue pressure, duress, etc. (*Rees*)

## Proprietary Estoppel

* Doesn’t require pre-existing legal relationship/K, can be used as a sword (*Dillwyn*)
* Can be used to enforce property rights; can confer legal rights for promisee, not just limit their enforcement by promisor (*Crabb*)

**(*Cowper-Smith*) An equity arises when**

1. A representation or assurance is made to the claimant on the basis of which the claimant expects that he will enjoy some right or benefit over property
2. The claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances
3. The claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word.

### Dillwyn v Llewelyn (1862)

**FACTS**: Father promised son a piece of land for him to build a house, son spends far more than the value of the land alone building a house, father/owner died before transferring & estate refused to grant land to the son.

**HELD**: Son entitled to ownership of the land.

**TAKEAWAY**:No pre-existing K/legal relationship required, can be used as a sword/cause of action

### Crabb v Arun District Council (1976)

**FACTS**: Both P and D purchase land from an estate, originally agreeing to a point of access . D subsequently fenced property line, eliminating access for P.

**HELD**: Right of use/easement granted to P.

**TAKEAWAY**: Proprietary estoppel can be used as cause of action to enforce property rights.

### Loranger v Haines (1921)

**FACTS**: H promised L to convey land to him if L built a house on it, L did and H refused to convey land after a falling out. H sues L for specific performance (to convey land).

**HELD**: Enforceable K bc there was consideration; would have also succeeded in estoppel

**TAKEAWAY**: Fairness/Equity: the defendant should assuredly be estopped from claiming title to, and taking possession of the land upon which, not only with his knowledge, but at his request, the plaintiff has expended so much money.

### Cowper-Smith v Morgan (2017 SCC)

**FACTS**: Parents promised to divide property equally for 3 children upon their deaths; after father died, mother executed a new will /w M in charge, sibling later takes care of mother and lives in house, M promises (before she has a property interest) him her 1/3 interest upon mother’s death- renegs and wants to sell the house once she does have control over the estate

**HELD**: M is estopped from taking back her promise to brother (made before she had property interest)

**TAKEAWAY**: Promisor not having a property interest AT THE TIME of the promise does not defeat a proprietary estoppel claim against them.

## Warranties and Misrepresentations

**Warranty**: a contractual statement or assurance given that a certain state of affairs exists in fact.

* if not true, P may have a claim for breach of K, ~ expectation damages (K remedy- putting them in the position they would have been without the breach)
* Collateral K: offer/acceptance/consideration/breach (outside of main K)> suspicious of collateral K existence, because it SHOULD really be IN the main K if meant to have contractual force
  + IF collateral K exists, you have K remedies for breach

- Can be liable for breach of warranty w/out a specific K between you and party relying on warranty (*Sperry Rand*)

**Misrepresentation**: a statement of fact or opinion usually made before K is formed, on which P relied and was induced to enter K as a result of that reliance.

* P’s remedy depends on what kind of misrepresentation was made:
  1. **Innocent MR**: rescission of K (K remedy limited to where rescission is possible; MAY be additional remedy/damages under statute, i.e. Consumer Protection Act)

Only available where return of consideration is possible & K has not been fully executed (*Redican*)

* 1. **Fraudulent MR**: rescission w/out limitation (K remedy) or reliance damages (tort remedy)

Can be intentional or reckless

* 1. **Negligent MR**: reliance damages (tort remedy)

Real v Personal Property: RP is seen as unique,

### Heilbutt, Symons & Co v Buckleton (1913)

**FACTS**: P purchased shares in D company after calling, “I understand you are bringing out a rubber company”, D: “We are.”; Shortage of rubber trees on land purchased by D & company not brought out; P sues (D made warranty or fraudulent MR)

**HELD**: Statement by D was not a warranty, not fraudulent;

**TAKEAWAY**: A warranty is a guarantee, not just a statement of fact; Collateral K (outside of main K) must meet requirements of K formation to be valid.

Warranty= requires intention for statement to have contractual force

### Murray v Sperry Rand Corp (1979)

**FACTS**: M wanted to buy a self-propelled harvester /w certain specifications, Church, distributor of SRC harvesters, assured M the SRC harvester would work, gave him SRC brochure listing attributes; M purchased SRC harvester from Church, which did not perform.

**HELD**: M has claim against both SRC and Church (for breach of warranty)

- SRC did not make a warranty directly to M (as Church did), but brochure/promotional tool guaranteed performance, ~ liable under collateral warranty

**TAKEAWAY**: Can be liable for breach of warranty w/out another K relationship existing between you.

### Bentley Productions v Smith (Harold Motors) (1965)\*actually misrepresentation?

**FACTS**: BP asked S, speciality car trader, to find a well-vetted Bentley for them, S told BP he had means to find out cars’ histories, and this car had limited miles and a new engine- sold it to BP; actually wasn’t true, and car had lots of issues. BP brought car to S for many repairs, and eventually sued for breach of K.

**HELD**: S’ representation of the miles the car had to BP was a warranty.

**TAKEAWAY**: Representation made to induce P to enter K is prima facie presumed to be a warranty, ~breach = damages, even if innocent

* If intended to be acted on, and in fact acted on, = warranty (contrast /w Buckleton)
* Knowledge/skills of the party said to have made a warranty/misrepresentation is key (someone would naturally rely on an ‘expert’)

### Redgrave v Hurd (1881)

**FACTS**: R posted ad iso “a lawyer/partner” who would also purchase the residence of R/owner; H asked about profitability of business, R stated without actual knowledge, 300-400/year. In reality, was 200/year. R explained shortfall vaguely, neither looked into it to check, H signed agreement to purchase house, realized error in $ value, moved out and refused to pay balance agreed to under K. R sues H for specific performance, H countersued for damages (moving expenses)

**HELD**: Rescission available for H, but no damages.

**TAKEAWAY**: Reliance on misstatement can be disproven, but is inferred where the party acted on the representation in entering K.

### Redican v Nesbitt (1924)\*real property

**FACTS**: R entered into K to purchase property from N, exchanged cheque for keys, then upon inspection of property, claimed it was misrepresented, ~ stopped payment on cheque; N sued for payment, R sued for recision

**HELD**: No rescission for innocent misrepresentation after K was executed (possible if fraud was made out)

**TAKEAWAY**: Rescission for innocent MR only available where: a) restitution of the consideration given is possible, AND b) K has not yet been fully executed

### Leaf v International Galleries (1950)\*personal property

**FACTS**: L bought painting from IG; K: “for one original Constable painting, 85$”. L tried to sell painting 5 years later and discovered it was not a Constable, sued for rescission.

**HELD**: 5 years is too long to ask for rescission.

**TAKEAWAY**: Chattels/personal property easier to grant recision/unwind, even after K is executed, but still restricted- Cannot get rescission if too long after K executed.

### Kupchak v Dayson Holdings (1965 BC)

**FACTS**: P bought the shares/ownership in hotel from D in exchange for 2 properties and a 65k mortgage. P realized hotel’s earnings were not accurate, lawyer stopped payment to D & informed D action would be brought against them. D sold properties given by P in payment for hotel & buildings on property were torn down.

**HELD**: K rescinded, P owed compensation.

**TAKEAWAY**: Can get $ compensation under rescission remedy if impossible/inequitable to restore original property.

### Consumer Protection Act s.18 (ON Statute)

**TAKEAWAY**: Individual **can** be awarded damages for innocent misrepresentation, even where not granted rescission.

## Contract and Tort

- Special relationship equivalent to a K relationship gives rise to a duty of care (*Hedley Byrne*)

* Policy reasons can negate D owing P a duty of care (*Hercules*)
* Statement of expected/future outcome can be a warranty if given to induce P to enter K (*Esso*)
* If a Duty of Care arises, it may not be limited to the terms of a K (*Central Trust*)

### Hedley Byrne & Co v Heller & Partners (1964 HL)

**FACTS**: HBC asked its bank (Heller) to find out the standing/credit of a 3rd party it was considering extending credit to. Heller responds: for your private use & without responsibility on the part of the bank or its officials, 3rd party is “respectably constituted & considered good for ordinary business engagements”; HBC extended credit to 3rd party and lost 17.6K when the party went into liquidation.

**HELD**: Bank owed no duty of care to HBC bc of the disclaimer

**TAKEAWAY**: Special relationship can give rise to DoC absent consideration (bank—>creditor looking for credit check), not enforceable AS a K, but loss resulting from negligent misrepresentation when a duty is owed is recoverable in tort.

### Hercules Management v Ernst & Young (1997)

**FACTS**: E&Y accountants prepared financial statements for 2 companies, HM, shareholder in those companies claimed E&Y statements were made carelessly, and they suffered economic loss bc they relied on the statements.

**HELD**: Policy considerations negate imposing a duty of care owed to HM by E&Y.

**TAKEAWAY**: Test for DoC, negligent misrepresentation, policy reasons can negate imposing DoC (financial statements were intended for internal use, NOT to be used as investment advice)

### Esso Petroleum v Mardon (1976)

**FACTS**: Esso estimated new service station would sell 200k gallons/year, building regs resulted in a station that faced away from the road. M entered K to lease station /w original estimate provided by Esso. Station sold far less than estimated, M ends up losing money and consistently owing Esso (K included promise to purchase a certain amount of petrol). Esso sued for payment and possession, M sued under warranty/misrep had induced him to enter K.

**HELD**: M owed damages for reliance/expectation (statement of estimated annual sales was a collateral K)

**TAKEAWAY**: Future prediction CAN be a warranty if given /w intent to induce party to enter K & relied on in entering K.

### Central Trust v Rafuse et al (SCC)

**FACTS**: P asked D (lawyer) to construct a mortgage (for P & third party), 3rd party stopped paying, P tries to execute mortgage (take possession), but mortgage was invalid. No K remedy bc K limited claims >6 years after breach. P sued D in tort (time limit is from when tort was discovered)

**HELD**: P can sue D in tort despite limited liability included in K. D owed P a duty of care.

**TAKEAWAY**: Cannot sue in tort to circumvent an exemption clause in the K, but DoC is independent of a contract, bc DoC cannot be limited to contents of a K.

- P can elect to sue in whichever form of liability (K or Tort) they deem most beneficial.

## Third Party Beneficiaries

**DOCTRINE OF PRIVITY**: Only a party to a K has the right to sue on a K. Someone is party to a K if they had a promise made to them, and gave consideration for that promise. (*Atkinson*)

**SCC, Principled Approach: TEST for relaxation of privity (*Fraser River*)-**

1. Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and
2. Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties

* Once this right to use the exception has crystallized, it may not be revoked by the original parties without permission of the 3rd party.
* Principled exception cannot be used as a cause of action but rather only as a defence to a cause of action.

**Agency exception to privity**: You are party to a K which your agent enters into. (*Dunlop*)

- Requires: a) proof of intention to enter agency relationship and, b) proof principal gave consideration though the agent

**Trust exception to privity**: Trust beneficiary can sue trustee for execution of the trust (*Mulholland*)

- If not amounting to a trust, **admin of an estate** can sue for specific performance to benefit a 3rd party beneficiary (*Beswick*)

**Tort duty exception to privity**: (*Glanzer*)

**Limited Liability** clause in a K for a business extends to its employees (*London Drugs*)

**STATUTORY Exceptions to privity also exist, ie**: Contracts Act 1999 UK, S 4 Law Reform Act (New Brunswick), Civil Code Quebec

### Tweddle v Atkinson (1861)

**FACTS**: Two fathers enter K to pay the son (P) $200 each upon marrying the daughter (including clause that T could sue for payment). Married, daughter’s father dies & estate refuses to pay T; T sues for enforcement.

**HELD**: T is 3rd party beneficiary, can’t sue, not a party to K.

**TAKEAWAY**: Must have a promise made to you and provide consideration for it to be party to K.

### Dunlop Pneumatic Tyre Co v Selfridge & Co (1915)

**FACTS**: Dunlop Kd for sale of tires to Dew, who Kd to sell tires to Selfridge (included price maintenance agreement /w $ penalty/damages to be paid directly to Dunlop for breach thereof). S breached and Dunlop sued S for damages under the K terms.

**HELD**: Dew was not acting as agent of Dunlop (no clear intention to enter agency relationship)

~ Selfridge not liable to Dunlop for breaching price maintenance agreement (not party to K, 3rd party beneficiary)

**TAKEAWAY**: Agency exception: You are party to a K which your agent enters into.

\*there must be a) proof of intention to enter agency relationship and b) proof principal gave consideration though the agent

### Beswick v Beswick (1966)

**FACTS**: Deceased sold business to nephew in exchange for continued weekly payment until his death, then weekly payment to his widow for her life. Nephew paid until uncle died, made one payment to widow then stopped.

**HELD**:Widow can’t sue as beneficiary, but can sue for her benefit in her role as admin of the deceased’s estate. (Awarded estate specific performance, as the estate itself suffered no loss/damage \*loss was incurred by widow in her position of 3rd party beneficiary)

**TAKEAWAY**: Trust Exception to privity: trust beneficiary can sue trustee for execution of trust. If a trust isn’t formed, admin of an estate can sue someone who was party to K with deceased (including specific performance, ~ payment to 3rd party beneficiary of K).

### Mulholland v Merriam (1872)

**FACTS**: Deceased John entered into K with son-in-law (D) stipulating D would get all of John’s estate in exchange for 400$, and upon John’s death, pay out 400$ to each of John’s children. After death, D refused to pay.

**HELD**: K was intended to create a trust, D was trustee, P owed 400$ (as its equitable owner under the trust agreement)

**TAKEAWAY**: Trust relationship can be implicit, and if there is a trust, the beneficiary of a trust is party to K/can sue.

### Glanzer v Shepard (1922 US)

**FACTS**: G purchased beans from corporation Z in accordance /w weight. Z instructed S to weigh and deliver beans to G, S did so and included statement of weight. G upon reselling beans, discovered weight was short by 11.5k pounds, sued S for amount they overpaid.

**HELD**: Not a k formed between S, G, BUT S owed G duty of care & G relied on S, ~ S tortiously liable.

**TAKEAWAY**:Tort/negligence/DoC exception to privity

### London Drugs v Kuehne & Nagel International (1992 SCC)

**HELD**: Employees can benefit from employer’s exclusionary K clause limiting liability

**TAKEAWAY**: REFORM to privity law (employees not party to K can benefit from limited liability clause), needed to reflect intention of parties

### Fraser River Pile & Dredge v Can-Drive Services Ltd (1999 SCC)

**FACTS**: Fraser owned barge & chartered to Can-Drive, Can-Drive negligently sank the barge. F’s insurance contained clause waiving insurer’s right of subrogation against 3rd parties. F entered into agreement /w insurer to waive original subrogation waiver.

**HELD**: Exception waiver invalid, Can-Drive (3rd party) can rely on clause, Can-Drive is not liable.

**TAKEAWAY**: affirms & expands London Drugs; take a PRINCIPLED APPROACH to privity, developed TEST FOR relaxing privity (as opposed to adding another specific exception\*above

Information Imperfections and Conditions

## Parol Evidence Rule

= Where a K has been put in writing, oral evidence is not allowed to be given on what parties said to each other before/during K preparations

* Generally rule at common law was to not allow oral evidence to be submitted against a written document (only other/additional documents)
* Doesn’t prevent rescission of written K where an oral misrepresentation has been made
* Strongest when oral evidence stands more diametrically opposed (weaker if oral statements only vary from written K) (*Gallen)*

**TEST: Should oral evidence be admitted?**

**Must allege the written K was not intended to be the full agreement, OR oral statements were used to induce to you enter into K (*Gallen*)**

### Corbin on Contracts

* Parole Evidence is a substantive (not just procedural) rule
* Newer, codified agreements take procedural precedent over older (oral) exchanges

### Gallen v Allstate Grain Co (1984 BC)

**FACTS**: G signed seed contract /w A (including general exemption clause: A gives no warranty as to productiveness of seeds/crop yield/etc.), after A made oral statement that the seeds would have no problem outgrowing weeds. Seeds did not outgrow weeds and crop was lost.

**HELD**: For G, oral statement by A admissible evidence (and a warranty)

**TAKEAWAY**: Parole evidence rule is a strong but rebuttable presumption

* presumption excluding oral evidence is weakened where oral evidence VARIES/ADDS/SUBTRACTS from written K, rather than CONTRADICTS written K.
* Also weakened where comparing a specific oral statement /w a general/standard exemption clause

## Conditions

INDIVIDUAL TERMS OF A CONTRACT WILL BE ONE OF THE FOLLOWING: Condition, Warranty or Innominate term (must wait until breached to determine whether it is a warranty or condition)

TEST for an innominate term from *Hong Kong Fir & Sail Labrador:*

Test (Condition or Warranty?): look at the events which have occurred as a result of the breach of K term, when the contract was repudiated, and to decide if the events have substantially deprived the non-breaching/innocent party of the whole benefit of the contract.

- if so, they have right to repudiate K

- standard of what a reasonable/ordinary party would consider (whether substantially or who benefit was received/deprived) (*Jacobs*)

**Condition**

* A term of the contract that if breached, gives rise to damages and the right to suspend further performance under the entire contract (known as a right to discharge/ repudiate/ rescind the contract)
* Can be Implied or Express
  + Implied conditions: if deprived every single time, party would be deprived of the benefit of the K
  + Express: parties make clear if a condition is breached they will walk away
* If X condition does not occur, then the party who does not receive X is substantially deprived of the whole benefit of the contract, ~ are entitled to treat the contract as at an end and they are **excused further performance**

**Mere Warranty**

* A term of the contract that if breached, gives rise only to damages (not a right to suspend the K)
* There has been a deprivation, but this breach is not sufficient to deprive the person of the whole benefit of the contract (like a condition), ~ never deprives breaching party the benefit of the whole contract.
* **No excuse from performance** if other party breaches a warranty

### Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd (1962 UK)

**FACTS**: HK owned ship chartered by KK, HK promised it would be sea-worthy, it was not. KK repudiated the contract, HK sued for damages from breach (KK claims they had right to walk away)

**HELD**: KK did not have a right to repudiate the K, they had not lost the entire benefit under K (was made seaworthy in a reasonable amount of time)

**TAKEAWAY**: Test (Condition or Warranty?): look at the events which have occurred as a result of the breach of K term, when the contract was repudiated, and to decide if the events have substantially deprived the non-breaching/innocent party of the whole benefit of the contract.

- if so, they have right to repudiate K

### Sail Labrador v Navimar Corp (1998)

**TAKEAWAY**: Courts will give force to intentions of parties (if they make clear any particular term amounts to a condition

- otherwise, defect in performance must attain a level of seriousness to make rescission available

### Jacob & Youngs Inc v Kent (1921)

**FACTS**: P built house for D, K had specifications for plumbing to be of a particular grade, of reading manufacture; contractors unintentionally used different pipes of same quality (but from different manufacturer). Error noticed after substantial work was done, D directed P to redo the work at P’s expense, P did not. D refused to make final payment.

**HELD**: P plumber entitled to payment from D

**TAKEAWAY**: DO MAKE explicit any terms you want to be considered conditions!

Damages were nominal, pipe manufacturing specifications were not clearly indicated as a condition.

## Anticipatory Breach

* When it is clear the other party is not going to complete their performance under contract
* Repudiation =/= RESCISSION (like K never existed> done for innocent and fraudulent MR, not for breach of conditions/K)
  + Parties are discharged from further performance (but not put in the place they were before the K)

### Hochster v De La Tour (1863)

**FACTS**: D contracted in April to employ P in June. In May, D changed mind and declined P’s services. P commenced action for breach of K (which was not to be in effect for a month).

**HELD**: P could sue in anticipation of breach.

**TAKEAWAY**: OPTIONS: 1) Accept the repudiation and sue for damages & attempt to mitigate loss, OR 2) Refuse to accept repudiation, wait until performance is due and sue for breach.

### Hurst v Byrke (2003)

**TAKEAWAY**: If A breaches or anticipatorily repudiates K, B can treat K as no longer binding (repudiated), NOT as if K NEVER existed (rescission)

Remedies

### Fuller & Perdue “The Reliance interest”

The law states that it is attempting to “compensate” the victim of a breach of contract by awarding a remedy that corresponds to promised performance.

But in the case of contract law, we compensate by giving the plaintiff something which he or she **never had**.

Three principal purposes for awarding damages or three interests that can be served:

1. **Restitution**: (subset of reliance) restoring, compensatory, not advantaging any party. (*Restore to party A, something that was improperly given to party B*)
2. **Reliance**: one-sided, no balancing both sides. A hasn’t received a benefit but B has suffered a detriment (*Compensate A for costs expended/changed position done in reliance of party B’s promise*)
3. **Expectation**: Puts A in the position they would be in if K had been performed (Forward looking remedy, doesn’t require proof of loss). (*Confer the benefit promised by B onto A\*the non-breaching party*)

### Wertheim v Chicoutini Pulp Co (1911)

**TAKEAWAY**: K Remedies attempt to do more than undo harm (as tort remedies do), but rather put the wronged party in position they would be in were K fulfilled.

The Measure of Damages

## Expectation

- About loss sustained bc party did not get what was promised under K (not punching breaching party). Question of FACT.

* Measured in difference between market value of promise and what was actually received (*Hawkins*)
* Diminution of value awarded in lieu of expectation damages where it would be economic waste (*Peevyhouse*)
* Construction Ks- appropriate measure is cost of performance (*Groves*)
* **Fixity of Intention** (to use cost of performance damages to actually execute performance, NOT to secure a profit):
* (*Radford*)You can prove fixity of intention by:
* Doing the work yourself and then sue for the cost of the fence;
* Asking for specific performance;
* Proving it through evidence or undertaking to the court; - making a promise to the court to do it
* Showing that you have a duty to do it for others. – obligation you have to perform for others.
* As a general rule, the aggrieved party cannot recover damages for injured feelings.
  + - * One well established exception is when the object of the contract is to afford pleasure (e.g. a vacation).

### Hawkins v McGee (1929)

**FACTS**: M, doctor, promised to restore H’s hand (severely damaged in childhood) via skin graft operation to “a 100%/perfect hand” (approached H’s parents over years, asking they allow him to try new grafting techniques). Eventually agree to surgery, H’s hand is left much worse than before. M claimed no reasonable person would take his words as warranty/guarantee.

**HELD**: M’s promise amounted to a guarantee/warranty, and had been breached (new trial ordered to assess expectation damages+ any consequential losses\*not pain and suffering, which would accompany even a successful surgery).

**TAKEAWAY**: Expectation damages = promised value - what was actually received

### Peevyhouse v Garland & Mining Co (1963)

**FACTS**: P leased land to G to extract coal, G performed all K terms except filling in pits created from extraction. Cost of performing term/filling pits was 29k, and pits on P’s property = diminution in property value (previously 3500$) by 300$

**HELD**: P awarded diminution of property value (300$)

**TAKEAWAY**: Where K breach is incidental (not the main purpose of the K), and cost of performance would be an economic waste, award **diminution of value** damages

### Groves v John Wunder Co

**FACTS**: G leased land to JW for 105k, /w JW entitled to talk gravel off land (but had to leave it levelled); JW deliberately breached lease & left gravel unlevel. Property value was 12k, cost of performance 60k.

**HELD**: G awarded cost of performance (60k)

**TAKEAWAY**: Construction K’s: only appropriate remedy is cost of performance (not diminution value)

### Radford v De Froberville

**FACTS**: R sold land to D on the terms that D would build a house and a brick wall to divide the properties. D never built either. (building the wall would not have increased property value in any way, ~ diminution value = 0)

**HELD**: R had undertaken building the wall themselves, ~ awarded cost of performance.

**TAKEAWAY**: Test for fixity of intention

* You can prove fixity of intention by:
* Doing the work yourself and then sue for the cost of the fence;
* Asking for specific performance;
* Proving it through evidence or undertaking to the court; - making a promise to the court to do it
* Showing that you have a duty to do it for others. – obligation you have to perform for others.

### Ruxley Construction v Forsyth (1996)

**FACTS**: F contracted R to build a 7 1/2 ‘ deep pool. Once built, pool was 6’ deep. F refused to pay R reminder of contract price (39k).

**HELD**: R owed 39k$, less 2500 for F’s loss of amenity.

**TAKEAWAY**: Reasonableness assessed in awarding damages (not about providing a gratuitous benefit to the aggrieved party)

- consider: actual loss in value, intention to apply damages to carrying out performance.

## Reliance

* Plaintiff can elect between being compensated for lost profits or wasted expenditure (not both); P can collect wasted expenditure (including pre-K with D) where P can prove D could have reasonably foreseen the waste of expenditures that would result from their breach. (*Anglia TV*)
* If full performance by D would have resulted in net loss for P, P’s recoverable damages limited to actual loss incurred from breach (if no damage was sustained BECAUSE of the breach, only nominal damage will be awarded for breach of K) (*Bowlay*)

### Anglia Television Ltd v Reed (1972)

**FACTS**: AT had contract to film a play, incurred expenses related to its production, signed on R in the lead role, continued to spend on production. R had conflict and backed out. R argued he should only be liable for expenses incurred after he had signed on.

**HELD**: R fully liable for losses incurred by A prior to and after R’s signing on to picture.

**TAKEAWAY**: Plaintiff can elect between being compensated for lost profits or wasted expenditure (not both);

- P can collect wasted expenditure (including pre-K with D) where P can prove D could have reasonably foreseen/contemplated the waste of expenditures that would result from their breach.

### Bowlay Logging v Domtar Ltd (1978 BC)

**TAKEAWAY**: If full performance by D would have resulted in net loss for P, P’s recoverable damages limited to actual loss incurred from breach (if no damage was sustained BECAUSE of the breach, only nominal damage will be awarded for breach of K)

## Restitution and Unjust Enrichment

UNJUST ENRICHMENT (*Rathwell*): 1) D enriched, 2) P suffers corresponding deprivation, 3) No juristic reason for the enrichment

- No unjust enrichment where detriment was not payed/enriching D (*Boone*)

STATUTE OF FRAUDS: Agreements for real property interests must be in formalized/in writing

- no breach of K if K was never formed

### Rathwell v Rathwell (1978 SCC)

**TAKEAWAY**: Unjust Enrichment:

1) D enriched

2) P suffers corresponding deprivation

3) No juristic reason for the enrichment

- legal/juristic reasons to account for enrichment: K, court order, gift, statute

### Deglman v Guaranty Trust Co of Canada (1954 SCC)

**FACTS**: P, nephew of deceased, lived with aunt for several months (& helped her out while there), she promised him a neighbouring property when she died for his ongoing help. He did continue to assist her, she died without leaving property to him in her will.

**HELD**: P can recover for unjust enrichment (benefit of his services provided as consideration for property interest)

**TAKEAWAY**: Statute of Frauds: an unenforceable contract (ie not formalized K for real property) isn’t technically a juristic reason for awarding unjust enrichment, really detrimental reliance on aunt’s promise.

### Boone v Coe (1913 US)

**FACTS**: D orally promised P a 1 year lease of farm in Texas, including dwelling & share of profits. P moved from Kentucky to Texas (spending 1400$) & D failed to honour promise.

**HELD**: Statute of Frauds- oral agreement was not enforceable K. ALSO Ps deprivation did not actually enrich D.

**TAKEAWAY**: No breach where Statute dictates no K was ever formed. No unjust enrichment where detriment was not payed/enriching D.

## Specific Performance

* Discretionary equitable remedy
  + Where bc of nature of breach, monetary damages cannot compensate for what the party has lost
* No longer a prima facie presumption of specific performance in **Land Ks** (ONLY where land is unique, ~ damages are inadequate remedy) (*Stewart*)
* Available for chattel when it is special and cannot be easily replaced (*Fackle*)
* Possible where market conditions create impossibility of getting performance from anyone else (*Sky Petroleum*)
* CANNOT get specific performance of a positive covenant for personal services (you must act for company), but CAN get for negative covenants (you cannot act for any other company), so long as it doesn’t effectively guarantee positive performance of personal services \*if you would otherwise starve\* (*Warner Bros*)
* CANNOT get specific performance of a promise to run a business (*Coop Insurance)*

### Falcke v Gray (1859)

**FACTS**: P rented house from D /w option to buy unique vases for 40$. D sold vases to 3rd party, P sued for specific performance.

**HELD**: P can get specific performance

**TAKEAWAY**: Specific performance available for chattel OR land when it is special and cannot be easily replaced

### Sky Petroleum v VIP Petroleum (1974)

**FACTS**: D agreed to sell petrol to P for fixed price for a set time period/P agreed to use D as exclusive supplier. Market changed drastically, D claimed P had breached K, sought to terminate K & refused to sell any more petrol to P. P sought injunction for specific performance from D until the time of trial.

**HELD**: Injunction/specific performance granted (damages NOT sufficient bc petrol was effectively impossible to buy from anyone else)

**TAKEAWAY**: Specific performance granted bc of market conditions.

### Warner Bros Pictures v Nelson (1937)

**FACTS**: Betty Davis (Nelson) was restricted under K from acting for anyone else & was required to provide acting services to WB during this time.

**HELD**: Negative covenant restricted her from acting but not from all work, ~ enforceable

**TAKEAWAY**: Cannot be awarded specific performance of personal services (Can enforce negative covenants~ withhold personal services from other potential employers/non-compete)

### Co-operative Insurance Society v Argyll Stores Ltd

**TAKEAWAY**: CANNOT get specific performance of a promise to run a business

## Remoteness of Consequential Loss

Consequential loss = secondary losses resulting from inability to use property/equipment etc.

Modern Remoteness Test: Could the defendant have reasonably contemplated as a serious possibility/not unlikely that the failure to do “X” would lead to the loss “Y” at the time of contract formation? (*Koufos*)

- **foreseeability + likelihood**

Liable for ordinary losses & special losses (that have been made known to D by P) (*Baxendale*)

- not for special losses that were not contemplated at K formation

- can always recover for ordinary/foreseeable losses (even when some losses are deemed too remote) (*Victoria Laundry*)

### Hadley v Baxendale

**FACTS**: H employed courier for a delivery. Late delivery via courier resulted in H incurring large losses.

**HELD**: Courier not liable for loss (potential for loss not known to courier or expressed by H)

**TAKEAWAY**: you are liable for damages that could be reasonably considered as naturally arising from the breach (ordinary losses) and those that are in reasonable contemplation and known to both parties at time of K formation (special losses)

### Victoria Laundry Ltd v Newman Industries

**FACTS**: Late delivery of boiler to P resulted in loss of ordinary profits and profits of lucrative gov’t contracts P was unable to fulfil without the boiler.

**HELD**: awarded damages for lost profits

**TAKEAWAY**: Can recover for ordinary losses, even if other (special, uncontemplated) losses are too remote

### Koufos v Czarnikow Ltd

**FACTS**: D delivered sugar 9 days late (regular/standing delivery relationship between parties), change in market prices for this fluctuating market good meant sugar was sold at a much lower price as a result of the delay.

**HELD**: damages not too remote (in this case, should have been in D’s contemplatio)

**TAKEAWAY**: modern remoteness test (above)

## Mitigation of Loss

* Non-breaching party/plaintiff is required to mitigate their losses by doing everything a reasonable person would do on the facts. (*Payzu*)
* Must mitigate as soon as it is reasonable to do so
* Need not mitigate losses for specific performance (assuming you have a fair, real and substantial claim for specific performance) (*Asamera*)
  + - Anything /w a unique value that cannot be compensated for /w damages

### Payzu v Saunders (1919)

**TAKEAWAY**: reasonable steps in the cricumstances- question of fact

### Asamera Oil Corp v Sea Oil & General Corp (1979)

**TAKEAWAY**: Need not mitigate losses for specific performance (assuming you have a fair, real and substantial claim for specific performance)

- P must mitigate as soon as is reasonable (& not reasonable if not able to mitigate /w a unique/irreplaceable good/service

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Representation** | **Warranty** | **Fraudulent**  **Misrepresentation** | **Innocent**  **MR** | **Negligent**  **Misrepresentation** |
| **Reason for Relief** | Contract | Tort | Unclear: Unjust Enrichment /Contract? | Tort |
| **Requirements** | A warranty is a representation that has contractual force. **Guarantee.**  It needs:   1. Offer & Acceptance; 2. Consideration 3. promissory intent; 4. Breach. | 1. Representation of fact made by Δ; 2. Representation is untrue, inaccurate, or misleading; 3. Fault/Knowledge: Δ knew that the representation was false or was reckless to the truth; 4. Causation: the misrepresentation must have caused the π to enter the contract. | 1. Representation of fact made by the Δ; 2. Representation is untrue, inaccurate, or misleading; 3. Representation not known to be untrue by the π; 4. Causation (plus?): Representation was the basis for π to enter the contract. It was material. | 1. Representation of fact made by Δ; 2. Representation untrue, inaccurate, or misleading; 3. Fault/Breach of standard: Δ did not take reasonable care in making the statement (i.e. negligence); 4. Causation: the misrepresentation must have caused the π to enter the contract; 5. Duty: based on proximity and reasonable reliance; 6. Damage. the reliance is detrimental. |
| **Remedy** | 1. Expectation & consequential losses; | 1. Rescission (without limitations); 2. Reliance Damages (even where no rescission). | 1. (Equitable) Rescission 2. No damages. | 1. Reliance Damages. |