Course: Law of Contracts
Date: Fall/Winter (2000-2001)
Professor: Berryman (Fall) & Whiteside (Winter)
Textbook: Contract Law in Canada

Please distribute and reproduce these notes freely

Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

TABLE OF CONTENTS

Introduction

What is Contract Law and why do we need it? Contracts create obligations between parties who enter into an agreement voluntarily. In essence, this act of promising allows people to create laws for themselves. Generally, people contract in order to maximize wealth – contract law, then, is an institution that helps to facilitate the process.

- Based upon a promise to do something
- A notion of promise asking which the law will enforce
- Sets out the obligations of both parties
- Establishes the remedies when the obligations are not performed or are performed poorly

Consider a vending machine analogy – coffee machine. Assume that a vending machine offers coffee for one dollar per cup. The idea is that the individual wishing to purchase the coffee values what the machine has to offer more than the dollar, while the proprietor of the machine values the dollar more than the product he/she is willing to give up for the dollar. There are multiplicities of detail that remain unsettled, yet accepted. For example, is the coffee real or instant, is the milk powdered, real, skim, or whole, what will the temperature of the water be, and what colour will the cup be?

Contract law rarely requires people to keep their promises, but rather establishes damages in the form of monetary retribution.

Utility of Contracts

Contract Law identifies those promises that should be deemed as serious. There are other bodies of law that include promises, but it is essential to contract law. There are a number of formalities, for example, included within different areas of law that must be written. In Contract law, seriously made promises do not have to be written in order to be binding. As well, there are not too many statutes to go by, but rather a large set of cases. Hence, contract law is sometimes mostly driven by common law.

Why We Need Contract Law

1. Facilitates Voluntary Exchange
    a. In a sense, we begin to create the law around us
    b. A mechanism for interaction

2. Allows the most Efficient use of Resources
    a. A tool for wealth maximization – allows commodities to move to those who give it the highest value
    b. Favours private autonomy

3. Allows for forward planning
    a. Creates things of value out of the exchange of goods

Nature of Promises

1. Enforcement as an act of human will
2. Moral sanctity of a promise
3. Enforcement as an exercise of private autonomy
4. Enforcement to protect reasonable reliance

5. Enforcement for economic efficiency
    a. These types of issues have shaped the law
    b. If you make a promise to do something, you also rely on the other person to heep their promise, thus, the law protects acts of reasonable reliance

Elements of a Contract

1. Offer and its Communication
2. Acceptance and its Communication
3. Intention to Create Legal Relations
4. Consideration
5. Certainty of Terms and Writing if necessary
6. Privity – who has a right to bring action?
7. Capacity

Types of Contract

Bilateral Contract – A contract in which each party promises a performance, so that each party is an obligor on that party's own promise and an obligee to the other's promise.

Conditional Contract – An agreement that is only enforceable if another agreement is performed or if another particular prerequisite or condition is satisfied.

Contract Under Seal – A formal contract that requires no consideration and has the seal of the signer attached. It must be in writing or printed on paper or parchment and is conclusive between the parties when signed, sealed, and delivered.

Unilateral Contract – A contract in which only one party makes a promise, undertakes a performance, or is under an obligation.

Voidable Contract – A contract that can be affirmed or rejected at the option of one of the parties; a contract that is void as to the wrongdoer but not void as to the party wronged, unless that party elects to treat it as void. It may be rendered void at the option of one of the parties.

Void Contract – A contract that is of no legal effect, so that there is really no contract in existence at all.

Offer and Invitation to Treat

Invitation to Treat – A solicitation for one or more offers usually as a preliminary step to forming a contract.

Offer – A promise to do or refrain from doing some specified thing in the future; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.

Offer to all the World – An offer, by way of advertisement, of a reward for the rendering of specified services, addressed to the public at large.

The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is made when one party accepts an offer made by the other. Further requirements are that the agreement must be certain and final; and special problems arise from conditional agreements. An **offer** is an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. Under the **objective test** of agreement, an apparent intention to be bound may suffice. An offer may be addressed to either an individual, a group of persons, or to the world at large. When parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. One party may simply respond to a request for information, or he may make a similar request. That party is then said to make an "**invitation to treat**": he does not make an offer but invites the other party to do so. The distinction between an offer and an invitation to treat is often hard to draw as it depends on the elusive criterion of intention.

Auction Sale – the general rule is that the offer is made by the bidder and accepted by the auctioneer when he signifies his acceptance in the customary manner.

Display of Goods for Sale – the general rule is that a display of price-marked goods in a shop window is not an offer to sell goods, but is an invitation to a customer to make an offer to buy.

Advertisement and Other Display – advertisements of rewards for the return of lost or stolen property, or for information leading to the arrest or conviction of the perpetrator of a crime, are invariably treated as offers: the intention to be bound is inferred from the fact that no further bargaining is expected to result from them.

Tenders – a statement that goods are to be sold by tender is not normally an offer, so that the person making the statement is not bound to sell to the person making the highest tender. Similarly, a statement inviting tenders for the supply of goods or for the execution of works in not normally an offer. The offer comes from the person who accepts one of them.

Canadian Dyers Association v. Burton (1920)

A Mere Quotation Does Not Constitute An Offer, But Rather is only an Invitation to Treat

A contract requires an offer and an acceptance. Are price quotations offers? Each case should be decided on the facts. The question is one of intention. "We quote you" has been held not to be an offer but "shall be happy to have an order from you to which we will give prompt attention" was held to be an offer. "In each case of this type, it is a question to be determined upon the language used, and in light of the circumstances in which it is used, whether what is said by the vendor is a mere quotation of price or in truth an offer to sell."

Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953)
Articles on Shelves are an Invitation to Treat
"In the case of an ordinary shop, although goods are displayed and it is intended that customers should go ahead and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed." Goods displayed in a shop are merely an invitation to treat.

R. v. Dawood (1976)
An Offer is Made Once the Item is Brought to the Counter – It is Accepted behind the Counter
A woman falsified a price tag on an article and then paid for it. "When the appellant took the jumper and blouse to the checkout counter ... she was representing to the cashier that both articles had been displayed for sale at this price, although she knew such was false. The cashier had authority to accept such offer, which she did by accepting the cash proffered. At that point a contract of sale had been made; true, it was a voidable contract as having been induced by fraud. The cashier had a general authority to accept such offer and to sell the goods on behalf of her employer."

Carlill v. Carbolic Smoke Ball Co. (1893)
An Offer is limited only to those who accept or perform the duties outlined in the offer
The company put a sum of money on deposit with a bank and said they would pay this money to anybody who got influenza while using their product. Well, a consumer caught influenza. The courts held that a special "unilateral contract" could be created in these circumstances and the Smoke Ball Co. had to pay up. A unilateral offer can be made to all the world and is accepted by anyone who performs the condition of the offer.

Goldthorpe v. Logan (1943)
A specific advertisement guaranteeing results is an offer and not an invitation to treat
A woman answers an ad guaranteeing removal of facial hair. Treatment fails. Was there a contract? The judge thought so. The ad was the offer. Relying on the Carbolic Smoke Ball case the judge added: "if the vendor's self-confidence persuaded her into an ... extravagant promise, she cannot now escape a complaint from a credulous and distressed person to whom she gave assurance of future excellence and relief from her burden. The weak unfortunate person, however gullible, can be sure that the courts ... will not permit anyone to escape the responsibility arising from an enforceable contract."

Harvela Investments Ltd. v. Royal Trust Co. of Canada (1986)
An Offeror in a call for tender is bound by the tendering system
In a fixed bidding sale where the vendor states that they will accept "the highest offer", they are so bound. In this case, the bids were to be called "offers" but the court overlooked this nomenclature: "the mere use by the vendors of the words "offer" (in "would accept the highest offer") was not sufficient."... The task of the court is to construe the invitation and to ascertain whether the provisions of the invitation, read as a whole, create a fixed bidding sale."

R. v. Ron Engineering & Construction (Eastern) Ltd. (1981)
The invitor of a tender has certain obligations to the tenderors
In this case, a tender required a deposit of $100,000 which, the tender document stipulated, would be forfeited if the tender was withdrawn. The contractor, after submitting both tender and deposit, then tried to change his tender but was denied. The contract went to another company and the deposit was not returned. The Supreme Court said that there was a preliminary, initial and "unilateral contract" which the court called "contract A" (which creates no obligation on any party until a bid is made); and the main contract, which the court called "contract B." Contracts A provide that the person issuing the tender can select one of the tenderers and enter into contract B with the tenderer so selected. Upon the person doing

so, the tenderers, other than the one so selected, would be discharged from any obligation under contract A. The tenderer selected, however, would then be required to enter into contract B with the person issuing the tender (the process has been compared to a leaseholder exercising an option to purchase). Contract B, however, does not come into force until executed by both parties. In this case, under the terms of contract A, the deposit was not refundable. The court said that the person that issues a call for tender creates an "offer to contract" which, once a bid is submitted both in conformity with, and in response to, the invitation to tender, is binding and is irrevocable if the tender conditions says that the bids are irrevocable. This case has had a profound effect on the tendering process in Canada.

Communication of Offer

Tenders

Tender – An unconditional offer of money or performance to satisfy a debt or obligation

A call for tenders by analogy to auctions, is normally regarded as a mere invitation to treat. The offer originates from the person lodging the tender. Ron Engineering case creates an obligation on behalf of the tenderor to the person calling for the tenders. The Supreme Court of Canada is protecting the person who is calling for the tender. Obligations are put on the caller for a tender to act in a certain way.

Keep in mind the contract A and contract B analysis – is this notion going to translate into all situations of tender?

For the tenderor, the risk lies on the person giving the tender. For example, in Sorachen the defense state that their change in bid was simply a clarification of the bid (there was no written clause with regard to compliant bids)

There are several ways that an implied term can be brought into a contract:
i) Custom
ii) Legal Incidence
iii) Business Efficacy

There is an implied term that only compliant tenders will be considered – where does this notion leave the plaintiff? For any cause of action you must have a substantive cause of action and evidence of loss.

The tendering process will constitute a contract where the call for tender – now an offer – contains sufficient detail and specificity to indicate that the person who has called for tenders indicates that they intend to be bound by the process that they have established.

Communication of Offer

There must be an (subjective) intention to make an offer and to communicate the same. The court will gather the intention in an objective manner.

Blair v. Western Mutual Benefit Association (1972)

There must be a clear communication of an offer and not simply a bare intention of it
A corporate resolution is not an offer unless efforts are made to communicate it. The defendant is the liquidator, who is acting on behalf of the creditors. The defense claims that there was no intention to make the offer at any time – no communication with intention. She had provided no consideration for the offer of the contract.

Williams v. Carwardine (1833)

Knowingly performing a condition is considered acceptance
A reward was posted for information leading to the arrest of a murder suspect. An eyewitness who believed she was dying, and aware of the reward but not for that reason, gave evidence which led to the arrest. When the eyewitness recovered she tried to collect the reward. The court found that she was so entitled even though "the plaintiff was not induced by the reward."

R. v. Clarke (1927)

There must be acknowledgment of an offer in order to claim acceptance

The Crown proclaimed a reward for information leading to the arrest of a murder suspect. One of the gang leaders, Clarke, turned informant fearful that he might be falsely accused of the murder and testified against the murderers. A month later, Clarke tried his luck and attempted to claim the reward. The court held that the informant, Clarke "did not intend to accept the offer of the Crown ... did not act on the faith of, in reliance upon, the proclamation."

Acceptance

Acceptance

Acceptance – An agreement, either by express act or by implication from conduct, to the terms of an offer so that a binding contract is formed. If an acceptance modifies the terms or adds new ones, it generally operates as a counteroffer. Ordinarily, silence does not give rise to an acceptance of an offer, but this exception arises when the offeree has a duty to speak. An offer can be revoked at any time before its acceptance.

An acceptance is a final and unqualified expression of assent to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. An offer may be accepted by conduct, or by beginning to render services in response to an offer in the form of a request for them. Similarly, an offer to supply goods can be accepted by using them. A communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer. The requirement that the acceptance must be unqualified does not, however, mean that there must be precise verbal correspondance between the offer and acceptance. An acceptance could be effective even though it departed from the wording of the offer making express some term which the law would in any case imply.

Livingstone v. Evans (1925)

If an acceptance does not mirror the offer, then this ought to be construed as counter-offer
In this case, two persons were haggling over the price of property. The offer was for $1,800. The buyer counter-offered "Will give $1,600 cash." Vendor replied "Cannot reduce price" after which the buyer accepted. The court stated that a counter-offer normally terminates the original offer, which is no longer subject to acceptance. But in this case, the judge thought that the "cannot reduce price" message "was a renewal of the original offer ... that (the vendor) was standing by it and, therefore, still open" to acceptance.

Butler Machine Tool Co. v. Ex-Cell-O Corp. (1979)

3 Pronged Approach to Forms: 1) Last Shot 2) First Blow 3) Shots from Both Sides
The judge said that "where there is a battle of the forms, there is a contract as soon as the last of the forms is sent and received without taking objection to it. In some cases, the battle is won by the person who fires the last shot. He is the person who puts forward the latest term and conditions; and, if they are not objected to by the other party, he may be taken to have agreed with them." But in this case, the battle of forms was resolved in favour of the original document because it stipulated that its terms would "prevail over any terms and conditions in the buyer's order."

Tywood Industries Ltd. v. St. Anne-Nackawic Pulp & Paper Co. Ltd. (1979)

Attention must be drawn to clauses added at the last minute
A battle of forms played itself out and then a purchase order came in which called for arbitration in case of dispute. The purchase order was never signed by the plaintiff. The court decided that the reference to arbitration had never formed part of the contract between the two parties. The court noted that the defendant did not draw the attention of the plaintiff to the arbitration clause nor did it complain when the plaintiff did not sign the purchase order.

Dawson v. Helicopter Exploration Co. (1955)

An Offer can be revoked at anytime before acceptance, however part performance of a condition ought to be construed as acceptance

Correspondence had been exchanged between two parties which did not make it clear if there was a contract. Plaintiff had been offered a 10% share in exploration rights if he would accompany the defendant on exploration flights. The plaintiff wrote back: "If you will inform me, if and when you obtain a pilot for your helicopter, I will immediately take steps ... to be on hand." Defendant ignored the "agreement" One judge of Canada's Supreme Court wrote that "a promise may be lacking, and yet the whole writing may be "instinct with an obligation," "imperfectly expressed," which the courts will regard as supplying the necessary reciprocal promise." Another judge wrote "the (plaintiff's) letter ... constitutes an acceptance of that offer, more particularly as every portion thereof is consistent only with the (plaintiff's) intention that he was accepting and holding himself in readiness to perform his part. While it has been repeatedly held that an acceptance must be absolute and unequivocal, it is equally clear that such an acceptance need not be in express terms and may be found in the language and conduct of the acceptor."

Felthouse v. Bindley (1862)

Silence cannot be construed as a valid acceptance

An uncle and nephew were negotiating the price of a horse. The uncle wrote offering a certain amount. The nephew did not reply but asked an auctioneer to exempt the horse from an auction. The auctioneer forgot the instruction and the horse was sold to another party. The uncle sued and the court disagreed saying that there was no contract; the nephew had never communicated his intention to accept to his uncle "or done anything to bind himself."

Saint John Tug Boat Co. v. Irving Refinery Ltd. (1964)

Acceptance by Conduct – An obligation exists not to remain silent if you do not wish to be bound

In this case, while there was no written acceptance to the offer, the conduct of the respondent was such that the court drew the conclusion that is accepted the offer. Quoting an old English decision, the court said: "If, whatever a man's intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Eliason v. Henshaw (1819)

Offers must be accepted according to the stipulations prescribed by the offeror

A contract was found not to exist between these two parties because the defendant had delivered acceptance to a place other than that stated in the offer. "An offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either."

Carmichael v. Bank of Montreal (1972)

Offeror must make it possible to accept the offer

An offer was to expire at 6 pm. By the given time, in spite of best efforts, the real-estate agent (Mr. Tilley) could not locate the bank manager but managed to leave a telephone message, just before 6 pm, that the offer had been accepted. But the court held that the offer had been properly accepted because "acceptance was conveyed to defendant through its agent Tilley. The verbal communication of the acceptance of the counter-offer to a responsible person in charge at the defendant's bank was, in my opinion, sufficient acceptance of the offer."

Communication of Acceptance

An offer in writing may be accepted orally unless the offeror makes it clear that an acceptance can only be made in writing.

Qualification of earlier rule: Whether a written requirement can be accepted verbally will depend on the surrounding circumstances and documentation. A safe presumption is that a written offer normally implies a written acceptance unless otherwise stipulated.

Communication of Acceptance

The general rule is that an acceptance has no effect until it is communicated to the offeror. One reason for this rule is the difficulty of proving an uncommunicated decision to accept. For an acceptance to be communicated it must normally be brought to the notice of the offeror. The main reason for the rule is that it could cause hardship to an offeror if he were bound without knowing that his offer had been accepted. It follows that there can be a contract if the offeror knows of the acceptance although it was not brought to his notice by the offeree. However, there will be no contract if the communication is made by a third party without the authority of the offeree in circumstances indicating that the offeree's decision to accept was not yet regarded by him as irrevocable.

Where conflicting communications are exchanged, each is a counter-offer so that if a contract results at all, it must be on the terms of the final document in the series leading to the conclusion of the contract.

In a number of cases, an acceptance is effective although it is not communicated to the offeror:

- Communication to the offeror's agent
- Conduct of offeror
- Terms of offer
- Acceptance by Post

Postal Rule – Once the acceptance is received by the post office, the agreement is deemed to have occurred as it is accepted that the post is acting as an agent to both parties. The postal rule does not apply where its application would cause a manifest inconvenience or absurdity.

Revocation of an offer must be actually communicated before it effectively revokes an offer. The postal rule does not apply to revocations.

Instantaneous communication, or direct communication, signals the agreement at the place of the acceptor. However, the postal rule places the contract in the jurisdiction in which the receiving post office resides.

Instantaneous Methods of Communication

The postal rule does not apply to acceptances made by some instantaneous methods of communication, for example, telephone or facsimile. The reason why the rule does not apply in such cases is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that it is up to him to make a proper communication.

Brinkibon Ltd. v. Stahag Stahl (1983)

In an instantaneous communication, contract is formed at the place where the acceptance is communicated from

In this British case, negotiations were held internationally, using a variety of communication devices. The court first stated the general rule that "a contract is formed when acceptance is communicated by the offeree to the offeror. If it is necessary to determine where a contract is formed ... this should be at the place where acceptance is communicated to the offeror." It then decided that in cases "of instantaneous communication ... the contract (if any) was made when and where the acceptance was received." This is an exception to the "postal rule." So the "postal rule" does not apply to fax transmissions.

Mailed Acceptances

A reason for the postal rule is that the Post Office is the common agent of both parties, and that communication to his agent immediately completes the contract. The Post Office is an agent to transmit the acceptance, and not to receive it. The postal rule only applies when it is reasonable to use the post as a means of communicating acceptance. As well, the postal rule can be excluded by the terms of the offer. This may be so even though the offer does not expressly provide when the acceptance is to take effect.

Household Fire & Carriage Accident Insurance Co. v. Grant (1879)

A contract is complete when acceptance is placed in the mail box

This case was one of the first to establish the postal rule. For contracts formed by correspondence through the post, the judge said that the "post office (is) the agent of both parties. If the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance."

Holwell Securities v. Hughes (1974)

The postal rule does not apply if the offer stipulates otherwise

The postal rule does not apply if (1) the express terms of the offer specify that the acceptance must reach the offeror and (2) if, having regard to all the circumstances, including the nature of the subject-matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer ... had in fact communicated the acceptance or exercise to the other." See also where wording such as "the acceptance must be received at the head office of X" would preclude the postal rule unless there had been representations that communication by mail was acceptable or encouraged.

Termination of Offer

Revocation

As a general rule, an offer can be withdrawn at any time before it is accepted. It is not withdrawn merely by acting inconsistently with it – notice of the withdrawal must be given and must actually reach the offeree. Although withdrawal must be communicated to the offeree, it need not be communicated by the offeree. It is sufficient if the offeree knows from any reliable source that the offeror no longer intends to contract with him.

Revocation – An annulment, cancellation, or reversal usually of an act or power. In Contracts, it signifies the withdrawal of an offer by the offeror.

Byrne v. Van Tienhoven (1880)

The Revocation of an offer only takes effect when it is communicated and cannot be communicated through post

On October 1, an offer to sell was mailed. It was received on October 11 and was accepted by telegram sent on October 11, confirmed by letter mailed October 15. But on October 8, a letter was sent by the offeror revoking the offer (the offeror received the letter of acceptance on October 20). The court decided that the revocation was inoperative; that the postal rule was "inapplicable to the case of the withdrawal of an offer. The court said that "an offer can be withdrawn before it is accepted and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not." But a withdrawal has no effect until it is communicated to the person to whom the offer has been sent. "A state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all."

Dickinson v. Dodds (1876)

Revocation can take place through a third party – all that is important is that it is communicated

Once a person is informed that the thing that was offered to him was sold to another person, there is an implied communication of the revocation of the offer and it is too late for acceptance.

Baughman v. Rampart Resources Ltd (1995)

Performance must accord strictly with the offer

The court says that there was a valid employment contract at the time that she had exercised the option. The issue now, then, is whether or not she exercised the option in accordance with the terms stipulated by the company. Baughman admits that she had not exercised the option strictly to its terms – does she have to conform exactly as stipulated? She argues that she does not have to do that because they wrongfully repudiated the contract to start with. What are the obligations and rights on the other side? In a unilateral contract you must perform according to the terms of the offer. In defending your own deficiencies you cannot point to the deficiencies on the other side.

Errington v. Errington (1952)

The revocation of a unilateral contract cannot occur once the performance has begun

The father paid the down payment of a house and then told his son and daughter-in-law that they could live in it, to pay the monthly mortgage and that it would be transferred to them upon the father's retirement. When the father died, before the mortgage was paid, the court decided that the occupants did not have a contractual obligation to pay the mortgage but that as long as they did so regularly (based on the deceased's promise to them) and once the mortgage was paid, they would own the house.

Lapse

Lapse – Of an estate or right; to pass away or revert to someone else because conditions have not been fulfilled or because a person entitled to possession has failed in some duty over a specified period of time.

An offer that is expressly stated to last for a fixed time cannot be accepted after that time; and an offer which stipulates for acceptance 'by return' must normally be accepted either by a return postal communication or by some other no less expeditious method. An offer that contains no express provision limiting its duration terminates after laps of a reasonable time. The period that would normally constitute a reasonable time for acceptance may be extended if the conduct of the offeree within that period indicates an intention to accept and this is known to the offeror.

Barrick v. Clark (1951)

An offer will expire in a reasonable amount of time depending on the nature and character of the offer and the normal course of business

A potential purchaser took 25 days to respond to an offer of farm land. By that time, the land had been sold to someone else. An offer, unless revoked or containing a deadline, is only valid for a reasonable time, each case to be decided on its merits. For stocks the time frame would be far shorter than for farmland. In the context of this case, 25 days was judges to be too long, or unreasonable.

Manchester Diocesan Council of Education v. Commercial and General Investments Ltd. (1970)

Acceptance of an offer communicated by any mode that is no less advantageous to the offeror will conclude the contract

An equivocal "the sale has now been approved" letter was endorsed as a valid acceptance even though the letter went on to say that the approval of a government agency was also necessary.

Conditional Offer

An agreement is conditional if its operation depends on an event which is not certain to occur. The word 'condition' may refer either to an event, or to a term of a contract. Where condition refers to an event, that event may be either an occurrence which neither party undertakes to bring about, or the performance by one party of his undertaking. Furthermore, an offer that expressly provides that it is to terminate on the occurrence of some condition cannot be accepted after that condition has occurred, and such a provision may also be implied.

Re Reitzel and Rej-Cap Manufacturing Ltd. (1985)

If the subject matter of an offer is substantially changed, the offer fails because the implied consent has changed

An offer was given for a house which included an obligation for the vendor to insure it. When the house burnt to the ground, the offer was immediately accepted, ostensibly so the purchaser could benefit from the new construction at the price given to him based on the pre-fire building. The court held that the destruction of the building substantially altered the state of the goods, thereby voiding the offer and no longer open to acceptance.

Certainty of Terms

Introduction

An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete. A contract made 'subject to…' may be construed as two things: First, the parties do not intend to enter into a binding agreement until a formal drafting; Or, secondly, the parties have entered into a binding contract and only have to formalize it through writing.

Vagueness

An agreement may be so vague that no definite meaning can be given to it without adding new terms. There are four basic considerations dealing with vagueness that ought to be reviewed:

1. Custom and Trade Usage – apparent vagueness can be resolved by custom. That is the parties in a contract can expect to receive the 'regular' service.
2. Reasonableness – a contract can be upheld where the standard of reasonableness can be applied to make an otherwise vague phrase certain.
3. Duty to Resolve Uncertainty – an agreement may be binding because one party is under a duty to resolve the uncertainty.
4. Meaningless Phrases – a phrase that can be omitted without any effect to a contract can be excluded without vitiating the contract.

R. Cae Industries Ltd. (1986)

Where contracts are vague the court will try to determine whether the intention exists and if the contract is clear enough so duties may be performed

A memorandum signed by three federal ministers was held to be a contract even though it was somewhat vague. For example, the contract provided that the government would make "best efforts". The court repeated the principle that the onus of proof is on the person who asserts that no legal effect is intended, and the onus is a heavy one and that the courts "should make every effort to find a meaning in the words actually used by the parties in deciding whether an enforceable contract exists."

Nicolene Ltd. v. Simmonds (1953)

If a meaningless clause exists, the court will strike it out and enforce the contract

A clause to the effect that "the usual conditions of acceptance apply" was held to be so vague and uncertain as to be incapable of any precise meaning. The court then severed the clause "but the contract, nevertheless, remains good." This is an example of *meaningless phrases*.

Missing Terms

Parties may reach agreement on essential matters of principle, but leave important points unsettled, so that their agreement is incomplete. There is, for example, no contract if an agreement for a lease fails to specify the date on which the term is to commence. Similarly, an agreement for the sale of land by instalments in not a binding contract if it provides for conveyance of a proportionate part as each instalment of the price is paid but fails to specify which part was to be conveyed on each payment.

Hillas and Co. Ltd. v. Arcos Ltd. (1932)

If uncertain parts of a contract can be construed from an agreement it will be binding

If there are essential terms of a contract of sale undetermined and therefore to be determined by a subsequent contract, there is no enforceable contract. An agreement to make an agreement is not

enforceable. But if the uncertain parts can be construed from the context of the agreement, the contract will be binding. The court used the context of the 1930 contract and its option clause to create a binding contract because the terms are sufficiently clear given the nature of the business.

Agreements to Agree

An agreement may be incomplete because it expressly requires further agreement to be reached on points as yet left open. A possibility is to provide that certain matters (such as prices, quantities, or delivery dates) are to be agreed later, or from time to time. The question whether the resulting agreement is a binding contract then depends primarily on the intention of the parties; and inferences as to this intention may be drawn both from the importance of the matter left over for further agreement, and from the extent to which the parties have acted on the agreement. There will be no contract if it appears from the words used or other circumstances that the parties did not intend to be bound until agreement on such points have been reached. However, where it can be inferred that they intended to be bound immediately, in spite of the provision requiring further agreement, a binding contract can be created at once.

May and Butcher v. R. (1929, reported in 1934)

There can be no agreement if there is no agreement on a term essential to the contract

"An agreement between two parties to enter into an agreement in which some critical part of the contract matter (eg. price) is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in future agree upon a matter which is vital to the arrangement between them and has not yet been determined."

Foley v. Classique Coaches Ltd. (1934)

If terms are unsettled, there must be a mechanism provided to do so – In the absence of such a mechanism, there is only an agreement to agree and no contract

The issue of price was omitted from a contract that nevertheless ran for three years without a hitch. When the defendants tried to buy petrol elsewhere, basing their argument that the exclusivity contract was void for lack of agreement on price, the court disagreed. Each case is decided on its own merits and for three years, both parties believed they had a contract. The court implied into the contract a clause to the effect that the petrol was to be of reasonable price and quality.

Courtney and Fairbairn Ltd. v. Tolaini Brothers (1975)

When an essential element of a contract is left undecided and is to be the subject of further negotiation, then there is no contract

For a building contract, the absence of agreement on price or a method by which the price is to be calculated (not dependent on the negotiations of the two parties themselves) means the absence of an essential term and there is no contract. A contract to negotiate, like a contract to enter into a contract, is not a contract known to law.

Sudbrook Trading Estate v. Eggleton (1983)

Where the intent of the parties is clear, the courts are willing to find certainty

An agreement to purchase property set up a system for determining the price "not being less than £12,000" involving consultation with assessors appointed by each party. The court decided that this was a valid contract. "The parties intended that the lessee should pay a fair and reasonable price to be determined as at the date when he exercised the option."

DeLaval Co. v. Bloomfield (1938)
A standard of reasonableness shall be used where there is intent on behalf of the parties to be bound
The contract provided for a total payment of $400, "$200 on November 1, 1937 balance to be arranged." The court rejected the defence that the contract was void for lack of certainty. "In the present case, it is not the price but the mode of payment only that is held over."

Good Faith Negotiations

Empress Towers Ltd. v. Bank of Nova Scotia (1991)
The Court will read in an implied term to a contract so that the parties will negotiate in good faith
A tenant and landlord had a renewal contract that provided for a rent of "market rental prevailing ... as mutually agreed. If the Landlord and the Tenant do not agree upon the renewal rental within 2 months ... then this agreement may be terminated." The landlord submitted an outrageous increase including a sum payable of $15,000. The court was asked if the renewal clause was void for uncertainty and decided that it was not. The court decided that the contract used the words "mutually agreed (which) carries with it an implied term that the landlord will negotiate in good faith .... and ... that agreement on a market rental will not be unreasonably withheld."

Mannpar Enterprises Ltd. v. Canada (1997)
Unless there is a benchmark or a standard by which to reassure such a duty, the negotiation concept is unworkable
The renewal clause was merely an agreement to agree and ought to be void for uncertainty, creating no obligation to bargain in good faith.

Anticipation of Formalization

Meyer v. Davies (1989)
The words 'don't worry about it' constitute a general waiver
In this British Columbia case, two lawyers had exchanged correspondence related to the sale of a law practice. One of the letters had concluded: "please call me ... so that we can arrange to draw up a formal agreement." During a subsequent phone call, the lawyers reviewed and agreed on outstanding issues. Offering to complete and courier the documents for immediate signature before the vendor left for vacations, the vendor said "Don't worry about it ... deal with it when I get back." The court decided that at this moment "a bargain was struck." Quoting precedents, the case states: "if the documents ... relied on as constituting a contract contemplate ... a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Knowlton Realty Ltd. v. Wyder (1972)
When something is subject to an agreement to agree there can be no contract
"If we are successful in negotiating a lease on your behalf on terms acceptable to you, we will be entitled to a commission." But the lease was never fully executed, just an interim agreement "subject to execution of the lease documents." Where the words similar to "subject to contract" appear, they indicate a

conditional offer or acceptance only. The court decided that "the event on which commission became payable never occurred."

Enforcement of Promises

The Enforcement of Promises

1. *Formality* – the general reason for formality is to ensure that the parties a clearly entering a contract situation. By following some prescribed steps, the parties acknowledge that they know what they are getting into and a prepared. There are more general reasons:
    a. Evidentiary Function – provides an objective and permanent record
    b. Cautionary Function – introduces a note of deliberation and a period of reflection
    c. Channelling Function – serves to signalize the enforceable promise
2. *Seriously Intended Promise* – promises should create legal obligations if they are seriously intended and made for a good reason. If the contract has 'cause' (there must be a valid purpose, a reason for, an end to be pursued in the contract) it is mostly likely binding
3. *Reliance* – A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
4. *Exchange and Bargains* – in insisting upon existence of consideration, the common law emphasizes that contracts are primarily about exchanges or bargains, in which an act or promise was given by the promisee in consideration of the original promise.

The Governors of Dalhousie College v. the Estate of Arthur Boutilier (1934)

Dispute regarding whether the college gets a sum of money or whether the beneficiaries get the money. The college raises three arguments based on the enforcement of the contract:

1. The university had made expenditures based on the expectation of that income
2. In return for the promise of $5000, the college had made promises regarding how they would use that money
3. In return for the deceased giving the money, others have equally promised to give money to the college

Others Equally Promised – the courts decide that this not a valid consideration because there is a lack of a privity of contract between the school and the subscribers. The college does not have privity of the contract. Dalhousie itself has provided no consideration.

Promises Regarding Use – there is no request as to how the money is going to be spent. There were no restrictions at all with regard to how they would use that money. They made no promise on the facts regarding how they were going to use the money. When we look for consideration, we are looking for consideration for each of the parties. In a bilateral exchange agreement, a house sale example, the promise to exchange the money is the consideration for the house where the promise to hand over the property is the consideration for the money. The promises must have consideration on the other side. This translates into the notion that each contract has two promisors and promisees. It is wrong to say that in a purchase of a house the consideration is $300,000. It is the promise to pay $300,000 that is the consideration.

This is the key difference between a promise and a gift. 'I promise to give you all my money' is not valid until there is an act of delivery. However, 'I promise to give you $50 for that price of equipment' is binding.

University Made Expenditures – the courts states that these are things that the College would have done anyway without a real promise. There is no direct link between the promise and the activities.

Past Consideration

The consideration for a promise must be given in return for the promise. For example, if A makes a present of a car to B and a year later B promises to pay A $1000 there is no consideration for B's promise as A did not give B the car in return for it. It will only be so binding if some other new consideration or performance is introduced.

Eastwood v. Kenyon (1840)
Past consideration is not enough to create a valid contract
There was no request on behalf of the defendant to pay for Sarah's education. The plaintiff failed to show that the education was at the implied consent of the defendant, and since the consideration was not present at the time that the contract was made, then there can be no consideration – Past benefit is no consideration.

Lampleigh v. Brathwait (1615)
A request and promise to pay amounts to a binding contract
In this case, the past services (consideration) were done at the request of the subsequent promisor and it was implicit that there would be payment. There was a valid contract.

Thomas v. Thomas (1842)
The Courts do not look at the value of the consideration, but only that consideration moved from the promisee
The court reviewed a verbal promise made by a dying man, which ran contrary to his will. The executors gave effect to those wishes by putting the spouse of the deceased (the plaintiff) in possession of the home. But was there a valid consideration to make the promise enforceable? No, said the court: "A pious respect for the wishes of the testator does not in any way move from the plaintiff. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff."

The rule that consideration must move from the promisee means that a person to whom a promise was made can only enforce it if he himself provided the consideration for it. He cannot sue if the consideration for the promise moved from a third party.

Forbearance

Forbearance – The act of refraining from enforcing a right, obligation, or debt. Strictly speaking, forbearance denotes an intentional negative act, while omission or neglect is an unintentional negative act. The act of tolerating or abstaining. A promise not to enforce a valid claim is clearly good consideration for a promise given in return.

The effects of forbearance can be summed up as follows:
1. The party requesting the forbearance cannot refuse to accept the varied performance
2. If the varied performance is made and accepted, neither party can claim damages on the ground that performance was not in accordance with the original contract

A forbearance of a disputed claim can be valid consideration if:
1. The claim is reasonable in itself and not vexatious or frivolous;
2. That the claimant has an honest belief in the chance of its success; and,

3. That the claimant has not concealed from the other party any fact, which to the claimant's knowledge, might affect the validity of the claim

B. v. Arkin (1996)
The plaintiff has paid money to Zellers after Zellers had sent her a demand letter as part of the civil proceedings that they were going to take against her child for what he had done in their store. Zellers claims that they have a right to bring a claim against her as the parent, if she pays it up they will not bring the civil claim any further. She subsequently finds out that there is no basis for Zellers to make such a demand a retroactively seeks to recover the money.

Zellers claims that this was a voluntary act by the plaintiff – what Zellers had provided as consideration was that they entered a forbearance to sue in the civil courts, an action that they were going to bring against the parents.

The court decides that the lawyers should have known that this was improper and that they had no basis to send her the letter to pay. On this basis, the court finds for the plaintiff.

Pre-Existing Legal Duty

Pao On v. Lau Yiu Long (1980)
A promise of performance of a pre-existing duty already owed cannot constitute new consideration
An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration: (1) The act must have been done at the promisor's request; (2) the parties must have understood that the act was to be remunerated either by money or some other benefit; and (3) the money or other benefit, must have been legally enforceable had it been promised in advance. This case was also important because it refused to allow arguments of a "dominating bargaining relationship (undue influence or economic duress) where businessmen are negotiating at arm's length.... There was commercial pressure but no coercion."

Duty Owed to the Promisor

The notion of accord and satisfaction indicates that the payment of a lesser sum on a due day cannot be satisfaction for the whole sum as there is no benefit to the creditor and, therefore, no consideration.

Gilbert Steel Ltd. v. University Const. Ltd. (1976)
A Modification to a contract must be supported by new consideration
In this case, a verbal agreement, midway through a construction project, to pay more for steel than what was originally agreed upon, was ruled unenforceable for want of consideration. The court rejected the argument that the new agreement on price replaced the original contract (which, following *Morris v. Baron & Co.* 1918 AC 1, could have stood as valid consideration) as the evidence did not support the contention that the parties intended to rescind the original contract. "Consideration for the oral agreement is not to be found in a mutual agreement to abandon the earlier written contract and assume the obligations under the new oral one."

Williams v. Roffey Bros. & Nicholls (Contractors) Ltd. (1990)
A Modification to a contract must be supported by new consideration
A carpenter stopped doing his work midway through a construction project. The contractors agreed to give him more money if he honoured his contract. This was valid consideration. The case seems to

contradict the principle that fulfilling an existing legal duty is not valid consideration with the following 6-prong test:

1. If Adam has entered into a contract to do work for, or to supply goods or services, to Bob, in return for $100 by Bob and ...
2. at some stage before Adam has completely performed his obligations under the contract, Bob has reason to doubt whether Adam will, or will be able to, complete his side of the bargain and
3. Bob thereupon promises Adam an additional $25 payment in return for Adam's promise to perform his contractual obligations on time and
4. as a result of giving his promise, Bob obtains in practice a benefit, or obviates a disbenefit, and
5. Bob's promise of the extra $25 is not given as a result of economic duress or fraud on the part of Adam, then
6. the benefit to Bob is capable of being consideration for Bob's promise, so that the promise will be legally binding.

Foakes v. Beer (1884)

A lesser sum does not satisfy payment of a greater sum

Beer held a judgement for £2,000 against Foakes and they agreed that he would pay £500 down and "to give him time in which to pay such judgment," the rest in installments. Meanwhile, Beer agreed she "will not take any proceedings whatever on the said judgment." When the debt was paid in full, Beer sued for interest. The court had to decide if the agreement was enforceable against the respondent, for which there had to be found valid consideration. Accord and Satisfaction is when one party buys himself out of a contractual obligation and this "satisfaction" becomes valid consideration for the new contract. In this case, "there could be no complete satisfaction so long as any future instalments remained payable." The court added that "the payment of a lesser sum in satisfaction of a greater cannot be satisfaction for the whole." The court noted that if the agreement had of been under seal, the result would have been different. Note: Many Canadian provinces have adopted legislation to circumvent the Foakes v. Beer precedent. For example, the British Columbia states: "Part performance of an obligation either before or after a breach of it, 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 the obligation." The Central London case, below, may have extinguished the effect of this case as a precedent.

Re Selectmove Ltd. (1995)

Selectmove was required to deduct payments to its employees for taxation and pass them along. The defendant, however, was using the money for its own purposes and begins to have cash flow problems. The company pays some arrears owing and later winds up its business, the Crown demands all the arrears of the revenue and seeks to put the company into liquidation. The liquidation will not go ahead if the company can raise a good legal argument as per the dispute over the debt.

Exceptions to the above stated Proposition on Accord and Satisfaction

- Substitution of something else may be of more benefit to the creditor even where it is objectively of lesser value such that it will constitute good consideration in satisfaction of an existing debt.
- Payment of a lesser sum before the due date of payment, or payment of a lesser sum at a different place on the due date, will also constitute good consideration.
- An acknowledgment of satisfaction be deed is a good bar to a suit on a debt
- Section 16 *Mercantile Law Amendment Act*, R.S.O. 1990, c. M.10

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

Foot v. Rawlings (1963)

New consideration can be very minor – in the form of a different method of payment, for example

"The giving of a ... series of post-dated cheques constituted good consideration for the agreement by the respondent to forbear from taking action on the promissory notes so long as the appellant continued to deliver the cheques and the same were paid by the bank on presentation." The court distinguished this case from others which rejected the payment of a lesser amount due as valid consideration for a new contract because cheques were different from money. "If you substitute for a sum of money a piece of paper, or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of $100, a horse of the value of $5, but not $5. If for money you give a negotiable security, you pay in a different way."

Promissory Estoppel

Estoppel – A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.

Promissory Estoppel – The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.

The doctrine of promissory estoppel is equitable in origin and nature and arose to provide a remedy through the enforcement of a gratuitous promise. Promissory is distinct from equitable estoppel in that the representation at issue is promissory rather than a representation of fact.

Promissory estoppel allows courts to enforce promises for which there is no consideration, but where you can find reliance and action on the promise. It relaxes the requirement of consideration.

Where one party has by his/her conduct or words made to the other party a promise or assurance which was intended to affect the legal relations between the parties, then, once it is acted upon by the other party, the party making the promise or giving the assurance cannot afterwards revert to the previous legal position without notice as if no promise or assurance had been made.

There are five basic criteria that must be present in order to have promissory estoppel:

1. There must have been an existing legal relationship between the parties at the time the statement on which the estoppel is founded was made.
2. *Promise* - There must be a clear promise or representation made by the party against whom the estoppel is raised, establishing an intention to be bound.
3. *Reliance* - There must have been reliance, by the party raising the estoppel, upon the statement or conduct of the party against whom the estoppel is raised.
4. *Notice* - The party to whom the representation was made must have acted upon it to his/her detriment.
5. *Equity* - The promisee must have acted equitably.
6. *Sword or Shield?* Promissory estoppel can only be argued as a shield and not as a sword.

Central London Property Trust Ltd. v. High Trees House Ltd. (1947)

An estoppel can extinguish pre-existing obligations and suspend rights

A landlord agreed to significantly reduced rent because of a high vacancy rate, in apparent amendment of a contract under seal. The judge writing the decision proposed that the *Foakes v. Beer* doctrine no longer applied in contemporary law and that "a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration." In this case, the evidence suggested that the reduction was only for the duration of low vacancy. "When a creditor and 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."

Promise

John Burrows Ltd. v. Subsurface Surveys Ltd. (1968)

Promissory estoppel requires a promise and intent to be bound

A debtor was consistently late in his payments even though the contract allowed the creditor to sue for the entire amount if payments were late. When the personal relationship between the two parties soured, the creditor sued. The debtor argued equitable estoppel. "(Equitable estoppel) can not be invoked unless there is some kind of evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced. This implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations. It is not enough to show that one party has taken advantage of indulgences granted to him by the other."

Equity

D. & C. Builders Ltd. v. Rees (1966)

It must be inequitable not to allow a waiver or estoppel

Under the common law, a creditor who accepts partial payment as settlement for a debt can still go after the debtor for the balance. But equity has intervened and disallowed such action under certain conditions (see the *Central London Property Trust* case above). "But we must note the qualification. The creditor is barred from his legal rights only when it would be inequitable for him to insist on them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts on that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance." The judge went on to find that there was "undue pressure" and "intimidation" in the case so that there was no true accord.

Notice

Saskatchewan River Bungalows Ltd. v. Maritime Assurance Co. (1992)

Parties must give appropriate notice when they wish to revert to strict legal rights

A cheque lost in the mail caused an insurance policy to be canceled. The postal rule was excepted because of an express term in the policy that required that payments be made at Maritime's head office. But Maritime represented to the appellants that payments could be made by mail and in fact encouraged this practice. For this reason, "Maritime was estopped from terminating the policy for nonpayment of the premium until such time as the appellants were notified that payment had not been received and that it was required forthwith. Thereafter, the appellants had a reasonable time within which to effect payment." Because the appellants took a further three months after being so notified, the court thought that this was not reasonable.

Reliance

Reliance – Dependence or trust by a person, especially when combined with action based on that dependence or trust. Detrimental reliance, that is reliance by one party on the acts or representations of another causing a worsening of position, may serve as a substitute for consideration and thus make a promise enforceable as a contract.

W. J. Alan & Co. v. El Nasr Export & Import Co. (1972)

A Waiver extinguishes strict rights. In order to prove reliance one must show that the promisee acted on a promise, which altered their position by acting differently

Although the contract called for payment in Kenyan currency, the vendor accepted a letter of credit in U.K. currency (sterling) and payments in sterling. When the UK currency was devalued, the vendors invoiced for the difference based on the different exchange rates. "The sellers ... seek to rely on the analogy of a sale of goods contract where the goods are deliverable by installments and one installment falls short. The buyer is not obliged ... to treat the contract as repudiated. That is not ... a true analogy. The

relevant transaction here is not one by instalments. It is a once-for-all transaction." Another judge (Lord Denning) came to the same conclusion saying: "One who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them. But there have been cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. Instances of these principles are ready to hand in contracts for the sale of goods: a seller may, by requesting delivery, lead the seller to believe that he is not insisting on the contractual time for delivery; a seller may, by his conduct, lead the buyer to believe that he will not insist on a confirmed letter of credit but will accept an unconfirmed one instead; a seller may accept a less sum for his goods than the contractual price, thus inducing him to believe that he will not enforce payment on the balance. In none of these cases does the party who acts on the belief suffer any detriment. He has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it."

Société Italo-Belge v. Palm and Vegetable Oils (Malaysia) (1982)

Estoppel cannot be raised if a prejudice has not been suffered

Sellers of palm oil failed for over a month to submit a "declaration of sailing." When they finally did, the buyers did not initially object and replied asking for more documents. The buyers then sent the declaration down the line to their own sub-purchasers. When the sub-purchasers rejected the overdue declaration, the buyers tried to reject it as well. The seller pleaded equitable estoppel. The court allowed the rejection of the declaration and made two statements of principle on equitable estoppel. 1. The person having made the representation which gives rise to the claim of estoppel "will not be allowed to enforce his rights where it would be inequitable, having regard to the dealings which have thus far taken place between the parties. To establish "inequity," it is not necessary to show detriment." But this does not mean, according to the court, that in every case in which the recipient of the representation has acted or failed to act, relying on the representation, it will then be inequitable for the person making the representation to enforce his rights. The nature of the action, or inaction, may be insufficient to give rise to the equity. I cannot see anything which would render it inequitable for the buyers thereafter to enforce their legal right to reject the documents."

Sword or Shield?

Promissory Estoppel can only be used in answer to an assertion of legal rights by one party against another, and cannot form the basis of a claim against the other party.

Petridis v. Shabinsky (1982)

Estoppel cannot be used as a sword

A landlord allowed continued occupancy after the lease expired while negotiations continued with the tenant. When negotiations failed, a plea of promissory estoppel was raised by the tenant. But the judge rejected that argument saying that promissory estoppel had to have a legal basis and, here, the basis would have been the option to renew, said option having expired at the end of the lease. But the court then found that the landlord had waived, by his actions, his option to terminate the lease and, invoking equity, ordered the lease renewed.

Robichaud v. Caisse Populaire de Pokemouche Ltée. (1990)

The court will permit an action based in estoppel provided that there is a pre-existing legal duty

The New Brunswick judge reviewed the principle that "estoppel could be used as a shield but not as a sword" which meant that it could be used by a defendant but not as a plaintiff. Quoting a well-known Canadian contract law expert (Waddams), the judgement said: "it seems irrational to make enforceability depend on the chance of whether the promisee is plaintiff or defendant." The judge concluded: "if the

principle of promissory estoppel could be invoked successfully as grounds of defence ... then ... to refuse its application on the pretext that it is not invoked as grounds of defence is, in my opinion, untenable and contrary to the principles of equity."

Combe v. Combe (1951)

Estoppel can be used to supplement an action, but not as a cause of action itself

A promised series of maintenance payments were never made. Seven years later, the wife sued for arrears. The court reiterated the principle of the *High Trees* case (see above) as follows: where one party has, by his words or conduct, made to the other a promise or assurance 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 or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. 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 by his word. (But) the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration." In this case, the court could not find any consideration for the promise to pay maintenance. While it may be true that the wife did forbear from suing the husband on the arrears for seven years, this forbearance was not at the request of the husband.

Waltons Stores v. Maher (1988)

The parties were negotiating a lease when on representations to the effect that "we shall let you know tomorrow if any agreements are not agreed to", the tenant began to demolish the old building on the leased premises and erect a new one. When the landlord tried then to back out, the court was faced with estoppel by representation arguments pressed by the tenant. The court opined that it was "unconscionable" for the landlord to watch the demolition and partial construction take place without advising the tenant that their position was not yet decided. "The doctrine of promissory estoppel ... extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable."

Finally, the notions of waiver and variation ought to be considered in the preceding. A variation is a change made by mutual agreement for the benefit of both parties to the original agreement. For it to be effective it must be supported by new consideration. A waiver, on the other hand, is a change for the benefit of one party and involves the voluntary relinquishment of an existing contractual right. However, the party making the waiver will not be able to insist on strict legal rights where the other party has acted upon it (more to come).

Intention to Create Legal Relations

Introduction

Intent is an element of contract formation. If you can find consideration, the presumption of intent arises. This presumption is rebuttable if the other party can introduce evidence of no intent to for the contract. There are exceptions to this rule: for example, there is no presumption of intent in social or domestic relationships.

Family Arrangements

In a family arrangement it is assumed that there is no intention to have contractual arrangements. Agreements among family members are not presumed to be legally obligating – the burden is put on the disputant's side to show that they did intend to create a contractual arrangement.

Balfour v. Balfour (1919)

There is no presumption of intent between family members
When a husband failed to pay a promised allowance, the wife sued. The court said "There are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together (or) arrangements which are made between husband and wife. They are not contracts because the parties did not intend that they should be attended by legal consequences. Each house is a domain into which the King's writ does not seek to run."

Commercial Arrangements

Rose and Frank Co. v. J. R. Crompton and Bros. Ltd. (1923)

Intent will always be inferred in a concluded contract unless there is clear language expressing otherwise
Two businessmen signed a document which read: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement ... but it is only a definite expression and record of the purpose and intention of the ... parties concerned to which they each honourably pledge themselves with the fullest confidence, based upon past business with each other, that it will be carried through by each of the ... parties with mutual loyalty and friendly co-operation." The deal went sour and one of the parties sued. The court: "It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow."

Promises Under Seal - Formality

Royal Bank v. Kiska

A promise under seal need not be supported by consideration
The majority decides the issue by saying that there is valid consideration. Laskin (dissenting) contends that there is no valid consideration – even without consideration if a document has been signed and sealed there is no need for consideration. Laskin, however, points out that the formality of sealing had not been carried out.

Formality serves a purpose here and some semblance of it should be preserved, especially when it is recalled that the common law does not require an attestation clause to make a sealed instrument enforceable – the operative act is the affixing or adoption of a seal. Laskin insists that the writing of 'seal' only affirms the need of formality rather than dispensing with it.

The Writing Requirement

Introduction

Certain contracts must be evidenced by writing, if there is nothing written then the contract is unenforceable. This notion is embodied in the Statute of Frauds, which outlines the general writing requirement for certain contracts.

Purposes of Writing Requirement

1. Evidentiary Function – writing avoids the risk of perjury and provides an objective and permanent record of the agreement while avoiding reliance on fallible human memory
2. Cautionary Function – provides parties with a period of reflection and deliberation
3. Channelling Function – serves to mark the enforceable promise

Operation of the Statute

1. Effects of non-compliance
    a. Writing relates only to procedure and not validity
    b. Non-compliance makes the contract unenforceable in court
2. The Requirement of a Sufficient Note or Memo
    a. The form of the memo must only show the existence of a contract
    b. The content of the note must include all the essential terms: price, mechanism for determining price, consideration, subject matter, signature etc.,
    c. A requisite signature must exist, where initialling will suffice, with the intent to authenticate the memo
    d. The joinder of documents is allowed if there is a sufficient connection between them, which cannot be based solely on parol evidence
3. Categories of Contracts under the Statute
    a. Promise to pay for the debt of another
    b. Contracts not to be performed within a year
    c. Contracts for the sale of goods over the statutory amount
    d. Contracts for the sale of an interest in land

Dynamic Transport Ltd. v. Oak Detailing Ltd. (1978)

The description of an object must be precise enough to identify it
A contract for the sale of "four acres more or less" was challenged as being "not sufficiently certain to satisfy the Statute of Frauds." But the court constructed the contract, including reference to the conduct of the parties, to make reasonable adjustments for a warehouse that sat on the border of the proposed division. "Courts have gone a long way in finding a memorandum in writing sufficient to satisfy the Statute of Frauds," wrote the court.

Deglman v. Guaranty Trust Co. (1954)

Performance must be connected to the contract (the object ie land) unequivocally
A nephew said that while he lived with, and cared for, his aunt, she had promised him the house they lived in. Upon her death, the court rejected his claim because there was no written document as required under the Statute of Frauds for contracts concerning land. The court stated that to succeed in a case of this nature, the acts relied upon as part performance must be "as could be done with no other view or design than to perform that agreement." But the court did allow a *quantum meruit* claim for the value of his services, considerably less then the value of the real property.

Thompson v. Guaranty Trust Co. (1974)

Doctrine of part-performance relied upon to establish an unequivocal act

A labourer worked with a farmer for fifty years, the latter promising to convey the property to him upon his death. This was done but the will was lost. The evidence showed total commitment by the labourer to the farm over the course of those fifty years and there was third-party testimony to the effect that the deceased farmer had stated his wish that the farm go to the labourer. The court allowed the land transfer to the labourer despite the absence of a written document required under the Statute of Frauds because of the circumstances, the evidence and that the actions of the labourer were referable to, and indicative of, a contract dealing with the farm.

Lensen v. Lensen (1984)

Doctrine of part performance requires unequivocal act in relation to the object of the contract

The court expounded on the requirements to circumvent the Statute of Frauds requirements for claiming a land contract without a written document. In this case, the large investments of the son could hardly be equated with that of a tenant. In addition, the court found that the son had passed up on other chances to buy land because he believed that the family farm had been dedicated to him. Acting upon the alleged contract to his detriment "is an important circumstance when determining whether or not the acts relied upon are sufficient enough."

Privity of Contract

Introduction

Privity of Contract – The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. The requirement of privity has been relaxed under modern laws and doctrines of implied warranty and strict liability, which allow a third-party beneficiary or other foreseeable user to sue the seller of a defective product. The doctrine of privity means that a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party. It does not mean that a contract between A and B cannot affect the legal rights of C indirectly.

Tweddle v. Atkinson (1861)

Consideration must move from the promisee

"No stranger to the consideration can take advantage of a contract, although made for his benefit. Consideration must move from the person entitled to sue upon the contract." This is the case most commonly cited as at the origin of the rule that a person not party to a contract cannot sue under it.

Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. (1915)

There must be an agency relationship to argue an agency principle

Dunlop sold its tires to a wholesaler on the condition that they were sold to retailers who agreed to sell at the specified prices. Selfridge was one such retailer and they sold at prices below the specified prices. There appeared to be no privity of contract between Dunlop and Selfridge. The court also noted that there was no consideration flowing from Dunlop to Selfridge so it was not possible for Dunlop to enforce against Selfridge.

Specific Performance

The common law did not specifically enforce contractual obligations except those to pay money. Specific enforcement of other contractual obligations was available only in equity.

Beswick v. Beswick (1966)

Specific Performance can be used as an equitable workaround to the rule of privity – to sue on a contract the third party must do so in another legal capacity

A nephew bought out his uncle's coal business. One of the terms was that the nephew would pay support to the uncle's wife upon the uncle's death. When the uncle died, the nephew reneged. The widow sued. The widow was able to sue, not personally, but as executor of the uncle's estate and on his behalf (the uncle, of course, having been a party to the contract). "Where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself."

Trust

A trust is the separation of legal title and equitable title. The legal title to deal with the trust is given to the trustee for the benefit of the beneficiary. The trustee has a fiduciary duty to administer the trust in a manner that benefits the beneficiary – if not, the beneficiary has the right to sue the trustee for fiduciary breach. The beneficiary has equitably title, which is what allows them to sue the trustee. To determine if a trust exists, the following four elements must be satisfied:

1. The intent to create a trust must be construed from the language of that contract
2. Express words in the contract must indicate a trust relationship

3. A corpus – subject matter or body of the trust
4. The corpus must be taken and title divided

Vandepitte v. Preferred Accident Insurance Co. (1933)
A Trust relationship will protect the rights of the third party – if there is no intention to create a trust, there can be no protection
"A party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee. If, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant.... The intention to constitute the trust must be positively affirmed; the intention cannot necessarily be inferred from the mere general words of the (insurance) policy."

Agency

A third party can take advantage of an exclusion clause made by another party when:
1. The contract expressly states that the exemption clause covers the third party;
2. The contract expressly states that the contracting party on behalf of the third party as far as the exclusion goes; and,
3. The contracting party has authority from the third party or that the third party subsequently ratifies the contract; and,

There is consideration flowing from the third party to support the promise abide by the exclusion clause.

McCannell v. Mabee McLaren Motors Ltd. (1926)
Entering into an agreement with an agent is essentially entering into an agreement with the principles
In this case, the issue was the extent to which a contract between a car manufacturer (Studebaker) and a dealer could be enforced by another dealer, with exactly the same contract with the manufacturer. The court decided that the manufacturer was "the agent of the several dealers to bring about privity of contract between them. The consideration is not moving from the company to the dealer, but from one dealer to another." The court based its opinion on the fact that the contract between the manufacturer and each dealer was exactly the same. Nor was the court swayed by the absence of an express designation to the effect that the manufacturer was the agent of the dealers. "The function which he (the manufacturer) fills in bringing the parties together and their recognition of the relationship which his efforts have created is the test of agency."

New Zealand Shipping v. A. M. Satterthwaite & Co. (1975)
Performance of an obligation is sufficient consideration
A stevedore damaged a drill and was sued by the consignee. The stevedore objected to the liability suit because it was not taken within a year of the damage as required by the bill of lading. The court decided that the limitation in the bill of lading was available to the stevedore, that the stevedore was a party to the bill of lading: "The bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the appellant, made through the carrier as agent. This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the appellant should have the benefit of the exemptions and limitations contained in the bill of lading."

Employment

Limitation to privity doctrine where:

1. Where the limitation clause expressly or implicitly extends benefits to employees who seek to rely upon the limitation clause, and,
2. the employees seeking to benefit from the limitation clause were acting in the course of their employment and must have been performing the very services provided for in the contract between the employer and the plaintiff where the loss occurred.
3. Clause must be drafted in such a way that the employee is to be covered by the limitation either expressly or by implication
4. Exception acts as a shield for the employee and does not confer a right to sue on the contract
5. Nothing changes the law on the recognized exceptions of agency or trust

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992)

The traditional doctrine of privity fails to recognize the special circumstances of employment

A transformer belonging to London Drugs was stored by the defendant, a storage company. Their contract had a liability clause limited to $40. When two employees of the storage company, through their negligence, damaged the transformer to the tune of $33,955 of damages, London Drugs sued them personally, for the whole amount. The employees sought to invoke the liability limitation clause. Canada's Supreme Court recognized that the privity of contract rule prevented beneficiaries from enforcing a contract to which they were not a party. To this, the court made an outright exception in the case of employees. "An employer such as Kuehne & Nagel performs its contractual obligations with a party such as the appellants through its employees. As far as contractual obligations are concerned, there is an identity of interest between employer and employee." The court then set two conditions allowing "employees (to) be entitled to benefit from a limitation of liability clause found in a contract between their employer and the plaintiff: ... (1) the limitation of liability clause must, either expressly or impliedly, extend its benefit to the employee(s) seeking to rely on it; and (2) the employee(s) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff when the loss occurred."

Subrogation

Fraser River Pile v. Can-Dive Services Ltd. (1997)

Subrogation may be an exception to the privity doctrine

The insurance policy in this case contained a waiver of subrogation rights that were expressed to cover charterers. The insurance company sought damages against those who caused the damage in the case. The insurance company, however, could not bring the action because Can-Dive was not a party to Fraser River. In so doing the courts established a two-pronged exception to privity through the notion of subrogation with the following questions:

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?
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?

Both criteria were satisfied in this case.

Contingent Agreements

Introduction

A contingent agreement is one with a condition on the promise. Where the condition is not met, the parties may be released from the contractual obligations. Most conditions are broken down into two categories:

1. *Condition Precedent* – This is where the performance of the contract is contingent upon some condition being met. The parties might be bound immediately and the contract will be suspended until the condition is met
2. *Condition Subsequent* – This is where the parties may be released from their contractual obligation until some event occurs that the parties had mutually agreed would terminate the contract

Parties' Obligations

Wiebe v. Bonsein

Facts	Holding	Ratio
○ Plaintiff offered to purchase house from defendant on the condition that he could sell his own home ○ The defendant later decides he does not want to sell the house ○ Plaintiff sells his own home and is now ready to close the deal, but defendant is refusing	○ The intention of the parties was to be bound to the agreement when they made the first interim agreement with the condition ○ The contract was suspended until which time the condition precedent had been met and the parties were already bound by it	○ Contracts contingent upon a condition precedent may have the effect of creating a suspended contract where the parties are bound immediately and performance begins with the condition is met

Dynamic Transport v. O.K. Detailing

Facts	Holding	Ratio
○ Parties enter into an agreement for the sale of land ○ The sale cannot go through until subdivision approval is obtained ○ It is unclear as to who must obtain the approval ○ Vendor decides he does not want to sell the land anymore and claims the contract is uncertain and the condition wasn't met	○ There is an implied statutory obligation on the vendor to apply for subdivision approval ○ The vendor must use his best efforts to meet the requirements of the condition or otherwise be held in breach of contract	○ The parties are obligated to employ their best efforts in order to meet the conditions of a contract ○ Where best efforts are employed and the condition is not met, the parties may be released

True Condition Precedent

Metro Trust Co. v. Pressure Concrete Services

Facts	Holding	Ratio
○ Defendant vendor is required to secure the consent of another mortgagee – no consent, no contract ○ Consent unsecured	○ The consent of the mortgagee was a true condition precedent ○ Vendor did not use best effort ○ Purchaser entitled to damages	○ In a true condition precedent the party obligated to fulfill the obligation must use best efforts to do so

Unilateral Waiver

Turney v. Zhelka

Facts	Holding	Ratio
○ Contract was subject to the town's subdivision approval ○ Neither party undertook to fulfill this clause ○ Purchaser made attempts, but it looked like it would never be granted ○ Purchaser wants to waive the condition and sue to ensure the contract is performed	○ The condition is dependent upon the actions of a third party who is independent of the contracting parties ○ Until the external condition is met, it cannot be waived ○ A party can only waive a promised advantage inserted for his/her own benefit	○ A true condition precedent may not be unilaterally waived

Beauchamp v. Beauchamp

Facts	Holding	Ratio
○ The purchase of land was subject to the purchaser able to arrange financing, otherwise purchaser can get out ○ Purchaser was able to arrange financing, but it was not of the variety contemplated by the agreement ○ Purchaser wishes to waive the clause outlining the financing required to be undertaken	○ Because the clause is for the exclusive advantage of the purchase, the vendor's only interest is in ensuring that he will get his money – which ought to be gotten regardless of the method of financing ○ The financing clause was for the sole benefit of the purchaser who could escape from the contract had it not been gotten	○ A condition inserted for the sole benefit of one party may be waived by that party

Barnett v. Harrison

Facts	Holding	Ratio
○ Purchaser wanted to buy land upon which to put a number of apartments ○ The purchase was subject to zoning approval and the land being serviced ○ This approval was not gotten by closing date and the purchaser wanted to waive the condition	○ The court held that the purchaser did not have the right to unilaterally waive the condition	○ Majority – applied Turney and held that the condition precedent is not sever able from the contract ○ Dissent – the clause was for the sole benefit of the purchaser, who should have been able to waive it unilaterally

Representation and Terms

Introduction

Characterizing the Representation

1. ***The Innocent Misrepresentation*** – A misstatement of fact where the intent is to induce, but no active deception took place.
2. ***The Fraudulent Misrepresentation*** – The statement was made knowing it was false, without believing it to be true, or acting in a reckless manner as to whether the statement was true or false. The intent is to induce and deceive.

Type of Representation	Effect of Representation
○ Innocent Misrepresentation	○ Rescission
○ Fraudulent Misrepresentation	○ Damages and/or rescission

Defenses to Rescission:

1. *Laches* – A delay or lapse of time, during which the representor is put in a position where it would be unreasonable to seek a rescission
2. *Affirmation* – The party seeking rescission has elected to adhere to the contract (proof by words, conduct, etc.,)

Innocent Misrepresentation

Redgrave v. Hurd

One is not entitled to gain a benefit from a statement that s/he knows or should know to be false

Facts	Holding	Ratio
○ The vendor misrepresented the value of a law firm ○ The books were available for the purchaser to view, he elected to take the vendor's word	○ This is a material misrepresentation – the defendant must prove that there was no reliance on the statement ○ An innocent misrepresentation as vendor did believe in what was said	○ An innocent misrepresentation requires the plaintiff to show: ○ Misrepresentation was material; ○ Statement made to induce; ○ Statement did induce to enter into contract

Smith v. Land & House Property Co.

If both parties are not equally aware of certain facts, then a statement of opinion can be equated with a statement of fact

Facts	Holding	Ratio
○ Vendor sold building with the added bonus of a 'most desirable tenant' ○ Tenant was a deadbeat – defendant argued it was merely his opinion that tenant was desirable	○ The statement was a misrepresentation, but since it was held in belief the extent of it is as an innocent misrepresentation	○ When knowledge of parties is not equal as to facts, then a statement of opinion may be implied as a statement of fact

Bank of BC v. Wren Developments

The failure to inform (silence) may result in a finding of misrepresentation – courts look at words, conduct, and actions

Facts	Holding	Ratio
○ Banker failed to inform defendant that necessary collateral had already been used – defendant entered into another loan making a	○ Courts look at words, actions, conduct – bank's action implied no change in status of the security – based on this misrepresentation the	○ The courts do not require an express statement of misrepresentation, it can be derived from conduct, such as

guarantee based on the fact that the collateral was still there	guaranty was signed	silence

Fraudulent Misrepresentation

Kupchak v. Dayson Holdings

Rescission is available in cases of fraud and monetary compensation is also available to restore parties to their pre-contractual positions (equitable remedies)

Facts	Holding	Ratio
○ There was an exchange of properties, but it was later found that a misrepresentation was made as to how much income the hotel would actually bring in ○ Defendant had already sold ½ of one property and tore down another structure	○ Where the party cannot be restored to pre-contractual condition, the court may look at equitable remedies: ○ Indemnity – indemnify against some associate liability ○ Accounting – account for loss through properties profit ○ Compensation – restore plaintiff to pre position based on market value	○ The courts will look to equitable remedies where the parties cannot be restored to their pre-contractual positions

Redican v. Nesbitt

A land contract will not be rescinded for innocent misrepresentation, however, rescission is available in cases of fraud

Facts	Holding	Ratio
○ A leasehold property was sold – vendor told purchaser it had electricity, but did not ○ Purchaser issued a cheque, but it was not yet cashed and attempted to argue that the contract had not yet been executed	○ The contract was executed as the parties had the requisite intent when the keys and cheque were exchanged – rescission not normally available ○ Subject matter, however, was substantially different than what was bargained for	○ If the subject matter is substantially different than what was bargained for, the plaintiff is entitled to rescission

Representation and Terms

There is a need to categorize the terms in a contract in order to determine what obligations are available for the breach. If the term falls into the class of condition, the effect of the breach is to release the injured party from an obligation to perform their end of the contract. Just because there is a breach though, does not mean that the innocent party can walk away, there must be a breach of some conditional term.

A conditional term is a material term of a fundamental nature that goes to the root of the contract and deprives the innocent party of the whole or substantial benefit of the contract. If a term is not a condition, it is a warranty. A breach of warranty only entitles the party to damages and they must continue performance.

Type of Term	Effect of Breach
○ Condition	○ No further obligation – can terminate contract
○ Warranty	○ No release of obligation – damages entitlement

Heilbut, Symons & Co. v. Buckleton

In order to find a collateral warranty, the parties must have intended to include it – promissory intent

Facts	Holding	Ratio
○ Defendant induced plaintiff to invest in his rubber company – no rubber produced by company	○ The defendant entered into a collateral contract warranting the company is a rubber company	○ Promissory intent is the intent to warrant the subject of the contract in some way (legal fiction)

Dick Bentley Productions v. Harold Smith Motors

If a representation is made in the course of dealings for the purpose of inducing the other party to act on it, that representation will be binding

Facts	Holding	Ratio
○ Vendor made a pre-contract statement that a car had only 20,000 miles – it had much more	○ An innocent misrepresentation is made with no fault at all, the intent for a warranty should be determined by the innocent bystander	○ To determine whether a warranty exists consider whether the reasonable person would have determined if the intention of the statement was to make a warranty – not merely an innocent misrepresentation

Leaf v. International Galleries

If you do not reject the goods within a reasonable amount of time, you are deemed to have accepted the goods and lose any claim

Facts	Holding	Ratio
○ Vendor stated that a painting was done by 'Constable' ○ Years go by before it is discovered that the painting was not a Constable	○ The plaintiff should have brought the action for damages (for breach of warranty) as time had elapsed for an action in rescission – no rescission	○ If you do not reject within a reasonable amount of time, you are deemed to have accepted the goods and have lost a claim to rescission

Liability in Contract and Tort

	Contract	Tort
Course of Action	○ Contract existed, there was a breach, damage exists	○ Must show some duty of care, a breach of the duty, and damage
Effectual Analysis	○ Expectation Damages – what expected to get ○ Reliance Damages – what would have got	○ Consequential Damages – result of personal injury, restore the party to position s/he was in before the injury occurred

Note: The statute of limitations is different in contract and tort – there is a longer limitation period in tort. Thus, if you miss the time for contractual action, go for the jugular in tort.

Sodd Corp v. N. Tessis

A misstatement may constitute both a negligent misrepresentation (tort action) and a collateral warranty (contractual action)

Facts	Holding	Ratio
○ Trustee to bankruptcy placed a value on a warehouse on which plaintiff relied	○ For a tort action one must consider: 1. Duty of Care – special relationship existed; 2. Breach of that duty 3. Damages ○ The misrepresentation induced plaintiff to enter into K	○ A pre-contractual misrepresentation may give rise to liability in both tort and contract (this is a torts case)

BG Checo v. BC Power & Hydro

Party may be freed from tort liability of expressly included in contract

Facts	Holding	Ratio
○ BG Checo undertook work for BC Power, the call for tenders stated that BC would clear the way	○ The way was supposed to be cleared, it was not – defendant should pay ○ Quantum of damage need be	○ There was a common law duty to not make negligent misrepresentations in economic

○ Way was not cleared, BG did it	determined	relationships

Classification of Terms

Where you have an intermediate term (where you cannot determine whether it is a condition or warranty), they you look to the effect of the breach to determine the remedy. Ask yourself, does the breach give rise to an event that will deprive the innocent party of substantially the entire benefit of performance?

Steps Used To Solve These Types of Problems:

1. Engage in Construction – Think of what the parties wanted when they entered into the contract
2. Classify each of the terms – There are two basic types of terms: (1) Condition; and, (2) Warranty
    a. If the term cannot be determined at the time of construction, then it is classified as an intermediate term. When you have an intermediate term, look at the effect of the breach. If the effect of the breach is to deprive the party substantially of the essence of the contract, it is a condition. If not, classify it as a warranty.

Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha

If a term cannot be classified, analyze its effect: whether the party is deprived of the very thing contracted for

Facts	Holding	Ratio
○ Ship sold as 'seaworthy', but it seemed to the purchaser to be a 'lemon' ○ Plaintiff argued the un-seaworthiness was a breach of condition while defendant argued it was simply a warranty	○ The effect of this breach was not to deprive the purchaser of the boat, but simply to delay when the purchaser would get his seaworthy boat – not a condition, but instead a warranty and parties still obligated	○ Test for intermediate term: Whether the party was deprived of the very thing they contracted for

Wickman Machine Tool Sales v. L. Schulger

Simply stating something as a condition does not make it so – look at the context of contract and intent of parties

Facts	Holding	Ratio
○ Term in contract stated that 'it is a condition that sales rep will visit once per week' ○ Sales rep missed a couple of weeks ○ Other parts of contract had built in remedies for breach	○ Because of other clauses, which include repudiation for material breaches, the effect of the breach of the sales rep term cannot be rescission	○ Simply using the term 'condition' does not allow a party to be released from the contract – one must always construe meaning from the context of the contract and the intention/conduct of the parties

Substantial Performance

Where you have a lump sum agreement, generally the performance of the contract must be rendered before full payment is made. The courts will look at whether substantial performance occurred by considering: did the party get substantially what they bargained for even if defects exist?

One should also be weary of "quantum meruit". *Quantum Meriut*: The breaching party may recover the value of services rendered in order to prevent unjust enrichment of the non-breaching party.

Fairbanks Soap Co. v. Sheppard

No one who benefits from the labor and materials of another should be unjustly enriched – depends on substantial performance

Facts	Holding	Ratio
○ A contract was entered into for a soap machine ($9,000)	○ A new contract is implied only where a benefit is derived from a	○ If there is no substantial performance, the party will be

○ Soap machine was delivered, but did not make any soap!	contract in which no substantial performance has been given ○ A reasonable amount should be paid for what is gotten in order to avoid unjust enrichment, or give it back	released ○ If there is substantial performance, the party will pay the original contract price less that required to repair

Markland Associates v. Lohnes

If work is completed with defects, the beneficiary must pay the contract price less the price of repairs – unless there is a breach going to the root of the contract

Facts	Holding	Ratio
○ Parties contracted to renovate property – a number of defects existed in the work ○ The payments were to be made in installments and not a final lump sum	○ A benefit was here gotten – there was substantial performance ○ A breach includes 1. Abandonment of work 2. Work of no benefit at all 3. Work not contract for	○ Unless there is a fundamental breach, quantum meruit (based on a test for substantial performance) dictates that there shall be no unjust enrichment

Sumpter v. Hodges

A plaintiff who abandons the work may not be able to recover any money on the basis of quantum meruit

Facts	Holding	Ratio
○ Sumpter begins a project and abandons it halfway through ○ Attempts to collect money for labour already done	○ Sumpter did not substantially perform the condition – abandonment of the work is a breach of the contract	○ There can be no quantum meriut after abandoning a contract – it will only be awarded in cases of abandonment where a choice can be made to receive the benefit

Down Payments v. Deposits

A deposit is usually forfeited while a down-payment is returned. Where a breach occurs, all money involved in the transaction will be considered a deposit and, therefore, forfeited.

Howe v. Smith

In the event of a breach, any money provided will be considered a deposit and forfeited

Facts	Holding	Ratio
○ Estate transferred for 12,500 – with 500 money down at time of contract formation ○ Purchaser wants out of the contract	○ If purchaser leaves, the money down will be considered a deposit and forfeited ○ The money will be considered a down payment only of there is performance of the contract	○ Monies provided in the event of a breach will not be returned

Stevenson v. Colonial Homes

Any intent must be clearly established in contract, party is bound to what is above signature line in standard form

Facts	Holding	Ratio
○ Clause in standard form contract below signature line	○ Party only bound by what is above signature line – shows clear intent	○ In order for a seller to retain a deposit, there must be evidence in the language of the Contract that the parties so intended

Interpretation

Introduction

Most contractual litigation stems from some break down in interpreting what was agreed to by the parties. There are a number of sources that we can look to in order to find the meaning of a contract:

1. *The Contract* – problems arise where the parties ascribe different meanings to the same term; or, certain terms may appear to be ambiguous;
2. *The Parties* – it might be useful to consider what it was the each side thought they were contracting for or expecting to gain;
3. *The Surrounding Circumstances* – examine what happened in the contract to gauge the parties' expectations;
4. *Custom* – what is the custom of the industry;
5. *Community Standards* – examine the relationship between parties and relative bargaining power and then ask, "What burdens and duties would public policy impose?"

The Imposition of Terms

Machtinger v. Hoj Industries

The terms of a contract may be implied on the basis of fact (custom/usage or business efficacy) or legal incidents

Facts	Holding	Ratio
○ A contract of employment regarding a notice of termination period ○ Court was asked to determine when to imply a reasonable notice period into a contract of employment ○ Legislation stated that a contractual period would prevail over the minimum statutory period required – in this case, the contractual period was shorter	○ There are three types of implied terms 1. Custom and usage; 2. Implication by fact – presumed intention; and, 3. Implication by legal incidents (necessity) ○ The express term in the contract, which was less than the statutory minimum, could not displace the statutory requirement	○ The court may impose a term into a contract by necessity and legal incidents

Scott v. Wawanesa Mutual Insurance Co.

The courts may use contra proferentum in a contract that is ambiguous obligating the drafter to ensure clear terms

Facts	Holding	Ratio
○ The plaintiff's son set fire to the house and he is trying to claim insurance ○ Contractual term: "Loss or damage caused by a criminal or willful act or omission of the insured or any person whose property is insured hereunder" would not be covered	○ Majority – terms are clear and unambiguous, no insurance ○ Dissent – the clause is ambiguous and as should any detriment should be faced by the drafter, the insurance company, as the insured had no chance to negotiate the terms – interpret contra proferentum	○ Where a term is ambiguous, interpret contra proferentum may apply – construe the ambiguous term against the drafter where the other party had no chance for input

Intepretation Contra Proferentum – The simple rule is that a contractual term will be construed strictly against the party who requested the insertion of the term

Notice

A party will be bound to the written terms of a contract if they have actual notice and knowledge of the existence of the terms. A party will not, however, be bound to the written terms of a contract if they had no knowledge of the terms, nor is it reasonable to assume that they should have had knowledge of the existence of the terms.

Note, though, that a party will be bound to the written terms of the contract if they had 'reasonable' notice of the existence of the terms, which will be considered through the administration of an objective test. What constitutes 'reasonable' notice will vary, but some factors to consider are:

1. The reasonableness of the clause itself;
2. The steps taken to bring the clause to the attention of the party;
3. The market in which the contract is formed; and,
4. Whether the party has given assent by a signature

The doctrine of notice looks at the extent to which one party must bring the other party's attention to terms of the contract. The doctrine was originally formulated to avoid the abuse of bargaining power by a superior party.

Parker v. South Eastern Railway

A party must receive reasonable notice of an onerous term to be bound by it

Facts	Holding	Ratio
○ Plaintiff left luggage with the defendant for storage ○ When he deposited luggage he was given a ticket with a liability exclusion clause of up to 10 pounds ○ Bag was lost and plaintiff claim 24 pounds	○ The plaintiff had no knowledge of the clause and he was under no duty to make himself aware ○ If the receiving party is unaware that there is writing on the back of the ticket, then he is not bound by those terms ○ Reasonable Notice Test: Would a reasonable person expect to find terms on the back of a receipt?	○ Where the contract is reduced to writing without a signature, assent must be proven independent of the contract ○ If you know there is writing contained on the form, but did not know that it contained conditions of a contract, then you are only bound if there was reasonable notice that the writing contained conditions

Thornton v. Shoe Lane Parking Ltd

An exclusion clause is ineffective unless it is brought to the attention of the party before the contract is concluded

Facts	Holding	Ratio
○ Plaintiff parked his car at the defendant's garage ○ Upon getting ticket plaintiff came to a dispenser with a notice indicating charges and a statement that car was parked at owner's own risk ○ Plaintiff pays for ticket and then dispenser administers a ticket with terms on the back ○ While proceeding to his car, plaintiff suffered injury due to defendant's negligence and awarded 3,637 pounds at trial	○ The contract was formed when the money was put in the machine – by this time, the only term with notice was 'at owner's own risk' and, therefore, any terms beyond this on the back of the ticket are of no effect ○ Moreover, the clause on the back of the ticket "Not liable for bodily injury" is fairly onerous – onerous conditions require explicit notice before the formation of a contract	○ Onerous conditions require explicit notice before the formation of a contract (Sufficiency of Notice Approach)

Interfoto Picture Library v. Stiletto Visual Programmes

Fair and reasonable notice is require to enforce one condition in a set that is particularly onerous

Facts	Holding	Ratio
○ Picture slides were loaned and delivered via mail with a number of terms written – 5 pound per day if not returned within 14 etc., ○ Def't argued the note was not read and he couldn't be bound ○ 5 pound fee was more onerous than regule 3.5 pound late fee	○ The defendant's were not liable for the 5 pounds, but for the 3.5 pound fee based on a revision of the above ratio ○ Te defendant's are relieved of the condition, not because they did not read it, but because it was necessary for the plaintiff's to draw it to their attention	○ Revised "Onerous conditions require explicit notice" – in this context, can it be said whether the plaintiff's fairly and reasonably did bring the defendant's attention to the condition ○

McCutcheon v. MacBrayne Ltd

Constructive knowledge of an ordinary exclusionary clause is sufficient for a part to rely on it

Facts	Holding	Ratio
○ Plaintiff regularly shipped a car on board the defendant's ferry ○ Plaintiff did not acquire a ticket on one occasion, and as luck would have it he lost his car	○ Defendant argues that plaintiff normally gets ticket with clause ○ It is possible to import prior knowledge of terms, def't here cannot prove that plaintiff did have that knowledge though	○ If you can establish prior actual knowledge that conditions apply, those can be imported to present knowledge

Disclaimer Clauses

There are two basic types of disclaimer clauses:

1. Exclusion Clauses – these limit liability or exclude it altogether; and,
2. Limitation Clauses – these limit the amount of damages payable upon a certain described event

The law has developed several doctrines to deal with unreasonable exclusion or limitation clauses.

Tilden Rent-A-Car v. Clendenning

Onerous clauses require explicit notice despite the presence of a signature

Facts	Holding	Ratio
○ Plaintiff signed a rental car form without reading it – it contained a collision damage waiver limiting liability to nil ○ Clause stipulated that clause would not apply if damage sustained through some sort of legal violation – or, if the operator consumed 'any intoxicating liquor' whatever the quantity ○ Defendant hit a pole and pleaded in an unrelated proceeding he was impaired	○ Where there is an opportunity for the parties to consider the proposed terms, then a signature may constitute a complete assent. However, the transaction was here carried out in haste and the overwhelming effect of this particular clause defeated the purpose of much of the contract – before assent to such a harsh term could be found, Tilden would have to do something to bring it to Clendenning's attention ○ There was no reason to believe that Clendenning had assented to all the contractual terms as he did not read the contract	○ Despite the existence of a signature supporting assent, the requirement of notice for an onerous clause is explicit

Delaney v. Cascade Holdings Ltd

The support of any new term to a contract must be accompanied by some new consideration

Facts	Holding	Ratio
○ Delaney went on a white water expedition in which he was drowned	○ Majority – exclusionary clause is part of the contract ○ Dissent (adopted in Ontario) –	○ Where the signing of a release comes after the formation of the contract, there must be some new consideration

○ Before going on the raft, passengers were to sign a release ○ Delaney had paid a deposit of $100 before meeting for trip	Delaney was not told about the onerous clauses. A disclaimer clause dealing with death or injury must be reasonable: ○ Is it a standard form; 1. Is there equality of bargaining power; 2. What was the nature of the breach? Fundamental?	to support any modification or new term present

Doctrine of Fundamental Breach

There is no real doctrine of fundamental breach per se. All that the doctrine indicates is that where a breach of contract exists to sufficiently justify the innocent party in repudiating the contract and treating it as discharged, the innocent party will have the right if the parties have stipulated it in the contract or where the event substantially deprives the innocent party of all the benefits of the contract.

Karsales Ltd. v. Wallis

A breach that goes to the root of the contract may have the effect of striking down the entire contract

Facts	Holding	Ratio
○ Stinton sold a car to Wallis to be financed through a hire purchase deal ○ A blank hire purchase form was signed by Wallis ○ When the defendant received the car it was in a deplorable state and would take 150 pounds to return it to the state at viewing ○ Wallis refused to pay for the car and Karsales, the financing company, sought recovery	○ Denning is prepared to imply a term – the car would be kept in the same condition as it was when it was inspected ○ An exemption clause existed covering this precise issue ○ Denning responds by asserting that you cannot rely on the exemption clause when the breach goes to the root of the contract	○ As a matter of law, you cannot rely on an exclusion clause for the fundamental breach of a contract

Photo Production v. Securicor Transport

The terms of the provision speak for themselves taking into account what is just and reasonable in the circumstances

Facts	Holding	Ratio
○ Photo production hired a security guard from Securicor who subsequently set the building he was guarding on fire with an errant match ○ An exclusion clause limited the companies liability to the extent that they were not negligent	○ Court looked at how the parties would allocate risk – look at what the parties actually contracted. Photo Production paid very little for security – what did they expect? ○ The parties, through the price for the service allocated their risk such that Securicor would not be liable	○ In considering the allocation, take into account what is just and reasonable via an examination of what is contracted for and the extent of the consideration

Hunter Engineering v. Syncrude Canada

Unconscionable exclusionary clauses should be struck down as a matter of principle

Facts	Holding	Ratio
○ Hunter was to provide gearboxes for a conveyor belt, which were built by Syncrude's specifications ○ The gearboxes failed and	○ Any exclusion clause should be strictly construed against the party seeking to invoke it ○ Clear and unambiguous language is require to oust an	○ Unfairness can be dealt with in the context of unconscionability alone

Hunter is seeking to recover the cost of repairs ○ Hunter conceded that the gearboxes were built weakly, but denied liability ○ Contract for services expressly excluded any statutory warranty and contained a liability waiver of 24 months	implied statutory warranty ○ If the clause is clear and unambiguous, ask: 1. Equal bargaining power?; 2. Any 'sharp dealings'?; 3. Was the innocent party deprived of the benefit of the contract? ○ SCC: whether there is unequal bargaining power – such a clause was unconscionable	

Davidson v. Three Spruces Realty

Entirely unreasonable terms of a contract will be of no force

Facts	Holding	Ratio
○ Defendant provided a safe deposit box service – contract for services contained a limitation clause ○ The defendant was negligent in the performance of the contract, not providing industry standard precautions ○ A theft occurred	○ The point of providing a service, such as safe deposit boxes, is to ensure the safe-keeping of the object, any term limiting the liability of the service provider because the objects were not, in fact, kept safely is entirely unreasonable	○ The terms of a contract will not be enforced if they are entirely unreasonable. Consider: 1. Strict construction approach – clarity of terms 2. Nature of the breach – fundamental? 3. Fair and Reasonable or Unconscionable to enforce

Fraser Jewellers v. Dominion Electric Protection

Facts	Holding
○ Plaintiff hired security team to protect his jewellery store ○ Contract had a clause limiting liability to $10,000 or the cost of the service, whichever was less ○ The store was robbed and the security company failed to notify the police of the robbery in progress	○ The plaintiff had signed the contract, the term was visible on the one page contract, and the appointment or allocation of risk was appropriate in light of the remuneration that the security company had contracted ○ The breach was not fundamental and the exclusion clause should be enforced

Hirst v. Commercial Union Assurance Co. of Canada

The first step is considering a strict construction for clarity and once satisfied apply the fair and reasonable test

Facts	Holding	Ratio
○ Insurance for home protection was contracted, however, a clause specified that no coverage would be granted for damage occurring if the house is vacant for 30 days	○ Only if there were a causal connection between the vacancy and the damage should the insurer be freed ○ An exclusionary clause must be fair and reasonable under Act	○ The statutory requirement in the Insurance Act regarding exclusions requires a direct causal link between breaking the term and resulting damage

Parol Evidence Rule

In General

The parol evidence rule aims to restrict what evidence is admissible before the triers of fact. Three are two traditional rationales to the rule:

1. Historically, the courts used to control unpredictable and unreliable juries from being influenced by the prejudicial effect of oral evidence where written evidence existed; and,
2. Straying from the admission of oral evidence gives finality to the written bargain.

In modern times, the courts have found that it is easiest to avoid the controversy of uncorroborated oral evidence by sticking to the parole evidence rule, which provides for only limited exceptions. The parole evidence rule, then, is an evidentiary rule to which there are many exceptions. It can be enunciated as follows: No extrinsic evidence is admissible for the purpose of altering, varying, or interpreting the written terms of the agreement.

Goss v. Lord Nugent (1833) Eng CA

"If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, even before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."

Exceptions

There are a number of exceptions that have developed in order to temper the burdens imposed by a strict adherence to the parole evidence rule.

Zell v. American Heating Co. (1943) US 2nd Circ

Facts	Holding
o Plaintiff was employed and to be paid by the defendant $1,000 per month plus a % commission o The contract did not include provision for the commission o Defendant refused to pay the commission and seeks to rely on the parole evidence rule	o There are four exceptions where we may admit oral evidence: 1. To interpret the contract; 2. To remove ambiguities; 3. To imply terms for the sake of business efficacy; and, 4. Where rectification is needed o The key for exceptions is to help gather the parties' intentions o The parole evidence rule will apply where the following three conditions are met: o A written contract exists that contains the terms of the agreement between the parties; o The parties have actually concluded a valid and binding contract; and, o Parole evidence would have the effect of varying, adding to, or contradicting express terms of the written agreement

It is necessary to ensure that the parties have, in fact, created a written contract that contains all the relevant terms. Where it does not parole evidence may be necessary to find the complete contract. Parole evidence may also be admitted in order to determine the intention of the parties entering into the contract.

Hawrish v. Bank of Montreal (1969)

Facts	Holding	Ratio
○ Hawrish had taken a loan from the Bank on the oral assurance that he would be released of his obligations as a guarantor once the Bank gained a joint guarantee from Crescent ○ The Bank did gain this joint guarantee, but Crescent later went bankrupt ○ Defendant claims that a collateral oral contract exists	○ If you have an oral agreement that contradicts the written contract, then it will not be admissible	○ You cannot have an inconsistent collateral contract contradicting the express written terms of the agreement

Bauer v. Bank of Montreal (1980)

Facts	Holding	Ratio
○ The bank had improperly registered the security to a loan ○ Plaintiff argues that the bank orally promised to secure his debt and that he would not have entered into the agreement unless the bank would do so	○ A collateral contract that is inconsistent with the written contract will be inadmissible ○ The burden to prove the existence of the collateral contract rests with the party seeking to free him or herself of the obligations of the contract – the burden is quite hight	○ There is no room for a collateral agreement that contradicts terms under a written agreement ○ Note: Where there is a misrepresentation, the parole evidence rule does not apply

J. Evans & Sons v. Merzario (1976)

Facts	Holding	Ratio
○ The plaintiff had contracted with the defendant shipping company to have a number of containers shipped ○ The defendant promised orally that the containers would be shipped below deck – the containers were shipped above deck and lost at voyage ○ Defendant pled exclusion clause as the written agreement specified that any special clauses must be in writing	○ The promise was given by the defendant to the plaintiff in order to induce him into entering the contract ○ A collateral contract may be admissible where the oral evidence provided adds to the contract by way of inducing the party to enter into the agreement	○ A collateral contract may be admissible in so far as it adds to the contract, but does not contradict the express written terms of the agreement

Gallen v. Butterley (1984)

Facts	Holding
○ A farmer purchased a set of seeds on the oral assurance that it would kill crop-killing weeds ○ The written contract had an exemption clause limiting liability ○ The new crop did not kill the weeds, the weeds smothered the crop instead	○ The judge considers eight points regarding parole evidence: 1. If a written contract exists, then it will be assumed that inconsistent oral agreements not only have no effect, but they do not exist; 2. This is not an absolute rule, though, as it is subject to a number of exceptions; 3. Canadian cases, such as Bauer and Hawrish allow for the evidence to be heard; 4. Parole evidence rule does not apply where there has been a misrepresentation 5. Parole evidence might be admitted where it adds or subtracts to the contract; 6. The rule will be strongly supported where oral evidence contradicts; 7. The rule will be strongly supported in cases of a negotiated contract; 8. The presumption is not very strong applied against a general exclusion term ○ The vendors statement here was a warranty – point 8 also applies

Mistake

Mistake is commonly used as a defense against actions brought for a breach of contract. There are two basic effects of the mistake:

1. The mistake may render the contract voidable – set aside the contract because there has been a mistake (similar to rescission); or,
2. The mistake may render the contract void ab initio – there was no *consenus ad idem* (meeting of the minds) and, thus, there could never be a contract to begin with.

There are two basic kinds of mistake:

1. Mistake with respect to terms; and,
2. Mistake with respect to assumptions; and,

Note: no relief will be given to a party who alleges a mistake of law. As a general rule, when approaching the mistake problems one should consider, first, how fundamental the mistake was and, secondly, who is bringing the case to the court. Also, a person who makes the mistake will not be entitled to benefit from his or her own mistakes.

Mistake with Respect to Terms

Lindsey v. Heron & Co.

Facts	Holding	Ratio
○ Defendant wished to purchase "Eastern Cafeterias Ltd" shares and not "Easter Cafeterias of Canada" shares ○ Defendant realizes that he mistakenly purchased the wrong shares	○ The plaintiff clearly used correct language in selling "Eastern Cafeterias of Canada" shares – a reasonable observer would assume a binding contract was properly formed ○ Minority – the offer made was not the same offer that was accepted – the parties were not ad idem	○ A meeting of the minds requires a manifest intention as observed by the 'reasonable person'

Staiman Steel v. Commercial & Home Builders

Facts	Holding	Ratio
○ Plaintiff made a bid on steel and understood it to include both used and building steel ○ Defendant refused to deliver any steel until the plaintiff renounced any claim to the building steel	○ A reasonable person would have realized that the offer excluded the building steel ○ The plaintiff was mistaken in the belief that the building steel was being offered	○ A mutual mistake will not negate a contract where the reasonable person would see no mistake

Glasner v. Royal LePage Real Estate

Facts	Holding	Ratio
○ Plaintiff listed a home for sale ○ The plaintiff redrafted an interim agreement stating that the home does not have UFFI in it opposed to the original provision of it never having UFFI ○ Purchaser was unaware of the	○ The plaintiff was in a position to know that the intending purchasers were mistaken under circumstances where the contract should be set aside	○ Equity will give relief where a contract was concluded where one party knew the other party was mistaken about a material fact and took advantage of the mistake ○ A party who makes a material change is under an obligation to

change and wishes to go back		inform the other party of it

Snapping Up

This is a situation where B accepts an offer on terms expressed by A knowing or suspecting that A has made a mistake as to the terms and really intended to make a different offer. Is the non-mistaken party who is taking advantage under any obligation to inform the other of the mistake that has been made in the offer, or can the non-mistaken party enforce the contract on the negotiated terms?

R. v. Ron Engineering & Construction

Facts	Holding	Ratio
o The defendant lodged a tender quoting $2.7 million along with a security of $150,000 o The defendants realized that they had made a mistake in their calculations by underestimating – they did not withdraw the tender because it would have resulted in a loss of the security, instead they intended to argue that the other party knew of the miscalculation and could not accept the mistaken tender	o The tendering process involves two contracts: the first is a unilateral contract where the tenderer agrees to lodge a tender on the terms advertised by the call o This tender is irrevocable where the tenderer has paid a security deposit o The tenderer takes the risk of possible error by subjecting him or herself to this first unilateral contract – losing the security might have been the less of two evils	o A tender, regardless of the existence of an accounting error, will be binding upon the parties where a deposit has been provided

Calgary v. Northern Construction

Facts	Holding	Ratio
o Calgary called for tenders o Contractor tendered for a bid and realized a mistake had been made – he reported this to the city who told him to abide by the original tender o Defendnat does not honour the original tender and City wishes to sue for damages	o Two contract analysis as above: the tenderer has agreed to abide by the terms of the first contract o The city could have validly accepted the tender as tended even with the knowledge of a mistake o The city is allowed to 'snap up' the tender as the risk of error lies with the one making the tender	o An honest or latent mistake as to assumption does not prohibit the formation of a contract

Smith v. Hughes

Facts	Holding	Ratio
o A buyer was shown a sample of old oats at the time of purchase and assumed that he would be delivered old oats o The Vendor sent the purchaser new oats	o A distinction must be made between mistake as to quality (assumption) and mistake as to terms o Unless the seller is responsible for inducing a mistaken belief in the buyer, which induces him to enter into the contract, he is not responsible o However, a reasonable third party would have seen a contract for oats	o Courts will generally not enforce relief from mistaken assumptions unless the mistaken assumption deprives the party of what was bargained for

	and not a contract for oats warranted to be old oats	

Mistake as to Assumptions

A mistake in assumption is said to occur when one or more of the parties has been induced to enter into a contract on the basis of a false assumption involving a material aspect of the bargain. If the parties share the false assumption, then this is called a common mistake. If the false assumption is limited to one party, then it is called a unilateral mistake.

There are a number of types of mistakes:
Common Mistake – All the parties involved share the same mistaken perception. An agreement has been reached where the parties share a common mistake about some important fact;
Mutual Mistake – Both parties are mistaken about different things; and,
Unilateral Mistake – A situation where only one party makes a mistake while the other party knows about it and does not act to rectify.

Bell v. Lever Brothers

Facts	Holding	Ratio
○ A company merger resulted in two employees entering into severance contracts ○ The two employees, at the time, were engaged in insider trading, which would have had the effect of terminating the employment contracts – later discovered	○ Bell claimed that they entered the contract under the mistaken apprehension that there was a valid employment contract ○ The mistake is as to the quality of the employment contract, which is fundamental and goes to the very root of the contract	○ Motives or reasons to contract (mistaken assumption) does not invalidate the contract unless: 1. The subject matter of the contract does not exist; 2. There is a mistaken identity as to one of the parties; or, 3. Quality is fundamental to the subject matter of the contract

If parties are to all outward appearances agreed, the contract is good unless it is set aside for failure of some condition on which the existence of the contract depends.

McRae v. Commonwealth Disposals Commission

Facts	Holding	Ratio
○ CDC advertised for the sale of a ship stranded in a reef ○ Plaintiff's purchased the ship and were not able to locate it ○ Defendant attempts to void the contract for common mistake – both parties were mistaken as to the existence of the ship	○ CDC had promised the existence of the ship ○ Any mistake was solely attributable to their own culpable conduct – This is not a case of mistake, but rather a breach of condition	○ A common mistake can be relied upon to void a contract where: 1. A party deliberately makes the mistake to induce another to enter; 2. Where the contract is silent on the allocation of the risk of the mistaken to one of the parties

Solle v. Butcher

Facts	Holding	Ratio
○ Butcher renovated a set of	○ Court may set aside a contract	○ A contract may be set aside in

apartments believing that they were not subject to rent controls o Solle confirmed for Butcher that they were not subject to controls o Solle discovers that there are rent controls and attempts to void lease	where it's unconscientious for the other party to avail itself of the advantage: mistake induced by a material misrepresentation of other o Rent control issue is fundamental to the contract – equity sets aside	equity where: 1. The mistake is fundamental and goes to the root of the contract; or, 2. The party seeking to set the contract aside was not at fault

Mistake and Third Parties

Lewis v. Averay

Facts	Holding	Ratio
o Lewis sold a car to a rogue who he thought was a famous actor o The rogue then sold the car to Avery o Lewis is attempting to get the car back from Avery, who acquired the car from the rogue in good faith	o The title to the automobile passed to the innocent third party who was entitled to set up that title against the original owner	o Where two parties come to a contract and one is mistaken about he identity of the other, this mistake in identity may only void the contract in so far as the subject matter of that contract has not already been acquired by a third party acting in good faith

An action based on mistaken identity will only be successful where:

1. At the time of making the offer, the offeror regards the identity of the offeree as vital (a service contract, for instance); and,
2. The offeror intended to deal with someone other than the offerree

Non Est Factum

Where the plaintiff signs a document mistaking its character, the plea of non est factum can be raised and will result in the transaction covered by the document to be of no effect. The mistake is as to what the person is signing (not actually knowing what s/he is signing) and its affect. Two basic issues:

1. The difference between what the person understood was signed and what is actually signed; and,
2. Whether the person pleading non est factum is affected by his/her own negligence

Saunders v. Anglia Building Society

Facts	Holding	Ratio
o The plaintiff mortgaged a house for his nephew who was a rogue	o The party pleading non est factum cannot escape the consequences of their own negligence	o Test for Non Est Factum: 1. Carelesness – not reading the documents; or, 2. Documents are fundamentally different from one another

In order to claim 'non est factum', the document signed must be fundamentally, radically, or totally different from the document that it was believed to be as between the contracting parties.

Marvco Color v. Harris

Facts	Holding	Ratio
o Marvco attempted to foreclose a mortgage against Harris, who raised a plea of non est factum o Harris signed the mortgage	o Issue: Could Harris' negligence in not reading the document preclude him from raising the plea of non est factum in circumstances where	o Non Est Factum is not available unless reasonable care is exercised o Carelessness hinges upon the magnitude and extend of the

presented by daughter's boyfriend on representations made by him that they were clearing up an error in the date of an earlier mortgage owed to the Bank of Montreal ○ Harris signed without reading it	it would otherwise be available? ○ Harris should have exercised reasonable care before signing the document	carelessness and any other contributing circumstances

Frustration

Introduction

Frustration deals with the issue where the future factual circumstances have departed in reality from what the parties forecasted. There are two basic formulations to the law of frustration:

1. Judicial intervention is based on the criteria of fairness when it is discovered that subsequent unexpected events have substantially increased the cost of performance; and,
2. The court must only by mindful of the way risk of the unforeseen has been allocated by the parties, if in their absence the risk should be allocated to the party that can best prevent the risk.

The second approach raises two issues dealing with the cost of prevention or the cost of insurance – whichever party can prevent or insure for the lowest cost is the best loss avoider and that is where the risk should lie.

Legal Developments

Paradine v. Jane (1647) UK

Facts	Holding	Ratio
○ Paradine leased to Jane, but the land was subsequently invaded by Prince Rupert ○ Jane did not have uninterrupted enjoyment of the land as a result	○ Issue: Did Jane have to pay rent for the period of time that the civil war interrupted enjoyment? ○ Jane was ordered to pay full rent as provisions could have been made to avoid losses ○ Since Jane was able to enjoy profits, he should take responsibility to bear loss	○ Escape from a contract requires provisions considering frustrating events

Paradine v. Jane has been harshly criticized in that it takes a very rigid approach.

Taylor v. Caldwell (1863) UK

Facts	Holding	Ratio
○ Defendant leased to plaintiff for four days at 100 pounds a hall intended to house concerts ○ The hall was destroyed by fire ○ Defendant claimed that they were discharged from performing the contract as the plaintiff attempted to collect damages	○ The rule in Paradine is only applicable where the contract is positive and absolute and not subject to any condition either expressed or implied ○ Where, in the nature of the contract, it appears the parties must have known that it could not be fulfilled, they must have contemplated such continuing existence as the foundation of what was to be done	○ A party would be discharged of his or her duty under the contract if the subject matter of the contract is gone/destroyed

Taylor v. Caldwell poses two issues:

1. How do you determine whether the contract is a positive and absolute one, as against one with an implied term that the continuing existence of the present state of facts exists?
2. What degree of destruction will affect the continuing existence of the subject matter?

1. Positive Contracts

Canadian Government Merchant Marine v. Canadian Trading Co. (1922)

Facts	Holding	Ratio
○ Appellants contracted to transport lumber from Vancouver to Australia in two vessels ○ The vessels were under construction and were not ready in time for the contracted voyage ○ Appellants claim that the contract had been frustrated b/c the ships were not fit for sailing	○ It was reasonable to assume that the appellant had accepted the potential risk in delay of the ships ○ Delay, to frustrate the contract, should have been taken into consideration at construction since it was foreseeable that they might not be ready ○ Would be different if they burnt	○ Frustration requires: 1. A particular thing or state of facts be existence at the time performance should occur; 2. Reasonable persons should have agreed the contract would come to an end should those circumstances not exist – this may be implied; and, 3. No such term should be implied where it is possible to hold that reasonable people could have contemplated the risk ○ Foresight negates frustration

2. Level of Destruction/Impossibility

Claude Neon General Advertising v. Sing (1942)

Facts	Holding	Ratio
○ Plaintiff agreed to construct and lease to the defendant a neon sign ○ After the sign was erected, Canada entered into WWII and lighting restrictions were imposed ○ The defendant could not use the neon sign during the night ○ Defendant refused to pay the lease	○ While the defendant got less from the contract than anticipated, it was not a total impossibility ○ The plaintiff does get the use of a sign that can be illuminated legally during the day and the sign still has some value at night	○ Where the thing contracted for is gotten, frustration will not be applicable because of restrictions on use

Davies Contractors Ltd. v. Fareham (1956) UK

Facts	Holding	Ratio
○ The plaintiff entered into a contract to build 78 houses in 8 months ○ Due to labour shortages, it took 22 months ○ The plaintiff sues for quantum meruit, but requires a show of frustration to do so	○ A change in circumstances must be different from what was contracted for ○ The failure of this contract was based on the fact that they have not foreseen the unforeseeable ○ Two factors prevent frustration in this case: ○ A labour shortage is not a completely unforeseeable thing; ○ The contractor adjusted his tender based on a margin of profit reflective of completing the project over a certain time period	○ Frustration occurs whenever the law recognizes that without the fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render is as being radically different from what which was undertaken by the contract

Capital Quality Homes v. Colwyn Construction Ltd (1975)

Facts	Holding	Ratio
○ The plaintiff agreed to purchase 26 building lots on 15 June 1969 ○ A new Planning Act came into force on 27 June 1970, 3 days before close, preventing the defendant from conveying the 26 lots separately without consent ○ The defendant could not convey the 26 individual lots ○ Parties failed to close and the plaintiff sought return of deposit	○ The legislation was not foreseen by the parties and fundamentally changed the character of the contract ○ The contract was frustrated	○ Completely unforeseen events will be proper grounds for frustration

Kesmat Investment Inc., v. Industrial Machinery Co. (1986)

Facts	Holding	Ratio
○ Industrial Machinery undertook to obtain a re-zoning, but would be unable to do so unless they completed an environment study ○ The study would cost btwn 25 and 50,000 – Industrial did not carry out the study ○ Kesmat relied on Industrial to get the rezoning as a $50,000 bond depended on it ○ Kesmat sues to recover	○ The requirement of an environmental study was foreseeable and Industrial Machinery cannot claim frustration ○ While the impossibility of performance also encompasses impracticality of performance due to extreme or unreasonable difficulty, these circumstances were neither extreme nor unreasonable	○ Mere hardship or inconvenience or material loss or the fact that the work becomes more onerous than originally anticipated does not amount to sufficient grounds for frustration

Self-Induced Frustration

Maritime National Fish Ltd. v. Ocean Trawlers (1935)

Facts	Holding	Ratio
○ The appellant had chartered a trawler at $590 per month from the respondent ○ Appellant owned 4 other trawlers ○ Canadian Regulations give the Minister the right to determine how many boats may fish with an otter trawl ○ The appellant applied for licenses and only got three ○ Appellant seeks to return the chartered trawler and pleads frustration	○ When the parties entered into the charter, both were quite aware that the fisheries amendment would apply to their licensing ○ The appellant was aware of the legislation and could not cite frustration ○ It was also within the appellant's own hands to select which three of the five trawlers would get licenses ○ The loss of the license for the leased trawler was due to an act of self-induced frustration that made the doctrine inapplicable	○ Frustration should not be at the act or election of one of the parties ○ Self-induced frustration makes the doctrine inapplicable

Frustration and Contracts in Land

Early English authorities suggested that a contract for a lease could not be the subject of frustration. This issue was raised in Ontario:

Capital Quality Homes Ltd. v. Colwyn Construction (1975)

Facts	Holding
○ As above	○ There is no fixed rule preventing the doctrine of frustration to apply to leases or sale of land contracts ○ There is no reason why the doctrine cannot be logically extended to contracts involving the purchase and sale of land if the supervening event makes the contract incapable of fulfillment as contemplated by the parties

Force Majeure Clauses

A force majeure clause is an exempting clause in the contract for a numerate class of events which are beyond the control of the parties. There are three basic types of force majeure clauses:

1. Suspends performance for a period of time;
2. Vary the contract for a period of time; and,
3. Lead to termination without payment of damages

Atlantic Paper Stock v. St. Anne Nackawick Pulp and Paper (1976)

Facts	Holding	Ratio
○ Atlantic contracted with St. Anne for delivery of 10,000 tons of waste paper per year for 10 years to be used in the manufacture of corrugated cardboard ○ After 14 months, St. Anne advised Atlantic that it would no longer accept any more paper ○ Force majeure clause included that the waste would be delivered unless there was a 'non-availability of markets for pulp or corrugated medium'	○ The simple truth was the St. Anne could not produce at a competitive selling price to meet the market ○ There was a market for the product, St. Anne just was not able to meet the market demands because of poor planning and other deficiencies	○ The contract is only brought to an end when the act bringing about the failure of the contract is not attributable to one party's fault

Effect of Frustration

The effect of frustration is to terminate the contract at the point of frustration: Obligations that have arisen before frustration remain enforceable – obligations after frustration are automatically discharged. There are two major problems:

1. The party who has prepaid the purchase price could not recover; and,
2. The party who has started to perform the contract, but has conferred no benefit on the other will not be able to recover any sum to compensate for the wasted expenditure

The Protection of Weaker Parties

Duress – The Coercion of Will

The key to duress is the over-bearing of a person's will – the lack of ability to make a free decision to enter into the contract. The courts take a strict approach and will not allow conduct that verges on the unlawful to corrupt the bargaining process. A contract can be set aside if there is no voluntary consent (no consensus ad idem). The necessary element to prove duress is the coercion of will. How can one characterize and determine whether or not there has been a coercion of will?

There are four major criteria for with a qualifying fifth element. The court will consider:

1. The party did not protest the conditions;
2. The viability of alternatives that were available and open;
3. The presence of independent advice; and,
4. Whether steps were taken to avoid the contract after entering into it

Finally, the court will take a principled approach and ask whether or not the duress was justified under the circumstances.

Pao On v. Lau Yiu Long (1980)

Facts	Holding	Ratio
○ The defendants entered into a second contract with the plaintiffs that amounted to a guarantee ○ The guarantee was given so that the plaintiffs would do business with another company for which the defendants were shareholders ○ The share value of the other company dropped and the defendant did not want to honour the guarantee claiming economic duress	○ The decision to enter into the second contract was a calculated business risk – nobody foresaw the value of the shares dropping dramatically ○ There was no coercion of will – mere commercial pressures are not enough, there must be some coercion of will so as to vitiate consent	○ There must be some coercion of will in order to claim duress ○ To determine whether there was such a coercion, the court will look at: 1. Whether the party protested at the time; 2. The viability of alternatives open to the party; 3. The presence of independent advice; and, 4. Whether steps were taken after entering into the contract to avoid it

Gordon v. Roebuck (1992)

Facts	Holding	Ratio
○ Gordon sold a building and did not forward the cash entitlement to Roebuck ○ When Gordon sold the second building, he required Roebuck to sign off on the securities ○ Roebuck told Gordon that he would not sign off unless he got his entitlement ○ Gordon gave $50,000 and $80,000 in promissory notes ○ Gordon refused to honour promissory notes	○ Trial judge held that there was no economic duress ○ On appeal the court adopted the test from Pao On and added that you must ask whether the duress is justifiable in the circumstance ○ While there was some protest and Gordon had not choice but to sign, the duress was justifiable because Roebuck was acting in the best interest of his own client	○ Even where the four point test is satisfied, the court may enjoin an application for duress by considering whether or not it was justifiable under the circumstances ○ The party claiming duress must prove that the other party did not have a reasonable and justified bona fide claim

Undue Influence

There are two general categories to consider under undue influence:

- Actual undue influence where one party is actually coerced by the unconscientious use of power by a stronger party (Unconscionability); and,
- Circumstances of a special relationship (such as doctor-patient, parent-child, lawyer-client) resulting in a contract that is disadvantageous to the weaker party – there is a presumption in such cases that the one party had used undue influence over the other

In the cases of the special relationship, it is presumed that such contracts are formed under the auspice of undue influence. The burden is on the stronger party to prove that the contract had not suffered from undue influence. The main question to ask is whether the relationship created the degree of trust and confidence that permitted one of the parties to influence the other into unduly entering into the contract.

Geffen v. Goodman Estate

Facts	Holding	Ratio
○ Home was left in fee simple to daughter with mental disorder ○ The brother sought to ensure that the estate remained within the family so they created a trust providing a life estate to the daughter with a remainder to the grandchildren ○ Daughter dies and leaves a will leaving the property only to her own children – these children attempt to claim that the brothers exerted undue influence on their mother	○ While there was a relationship of trust here, the motivation and objective of the brothers has to be considered ○ There is a presumption of influence because of the woman's mental state – however, there was no suffering of undue disadvantage as the presumption is properly rebutted by the presence of independent advice	○ In order to show undue influence one must consider: 1. That there was a relationship of trust and confidence sufficient enough to create the potential for domination; and, 2. The bargain is improvident – consider whether there is an undue disadvantage and a reciprocal undue benefit ○ Simply identifying the relationship as one of trust or confidence is not enough to justify the presumption

Unconscionability

Unconscionability involves the unconscientious use of power by a stronger party over a weaker party. The underlying theme is taking advantage of a situation of unequal bargaining power. Consider the example of Peter Johnson driving along the 401 back to Toronto and seeing a driver stranded in his rolled over Lexus. "That Lexus driver must have wads of doe," thinks Peter out loud before pulling over. Peter casually strolls up to the rolled over Lexus and casually offers to the driver, "Hey, I'll pull you out of your car and help you to safety, but I'm going to need …" Unconscionability, however, is not always this straight forward, so how do you apply it? Note: relief is equitable.

Morrison v. Coast Finance (1965)

Facts	Holding	Ratio
○ 79 year old widow was persuaded to mortgage her home by two men so they could finance their cars ○ The men never repay her and now the mortgage company wants their cash	○ There was an unequal bargaining power between the two men and the widow relative to her old age, emotional distress, and lack of business experience which was taken advantage of	○ Test for Unconscionability: 1. Inequality of bargaining power; and, 2. A substantially unfair bargain ○ These two elements give rise to a presumption of constructive fraud, which the other side may attempt to rebut by showing the opposite

Marshall v. Canadian Permanent Trust Co. (1968)

Facts	Holding	Ratio
○ Plaintiff offered to purchase a section of land from an old man in a rest home ○ A lease was prepared and the old man signed it, but a committee was later appointed for Walsh (Cdn Permanent) to make decisions for him and they seek a rescission of the contract based on an 'inadequacy of consideration'	○ The contract was rescinded by reason of Unconscionability ○ The twin pillars of Unconscionability are evidence of weakness or incapacity to look after ones own affairs coupled with an improvident transaction ○ The old man was laboring under an incapacity and the transaction was undervalued	○ An individual may be entitled to rescission based on Unconscionability if they can prove: 1. The individual was not capable of protecting his/her own interest (unequal bargaining power); and, 2. That the transaction was improvident for the individual (an unfair bargain)

The Wider View – Denning

Denning attempted to combine the previous three heads (duress, undue influence, and unconscionability) and make them into one (note: Denning's test is not the law):

Lloyd's Bank v. Bundy (1975)

Facts	Holding	Ratio
○ Bundy mortgaged the farm as a bank guarantee for his son's loan – the home was mortgaged far beyond its value ○ The bank manager advises Bundy as to a course of action (this is a conflict of interest) ○ Bundy loses house after making second mortgage and is unable to pay up	○ Denning argues that the contract is unconscionable because of the unequal bargaining power between Bundy and the bank: 1. Overpriced mortgage; 2. Bank-Client relationship; 3. Undue pressure of father to support son; and, 4. No legal advice	○ Be careful about taking a wider view as it might blur the line between the improvident bargain that is based on exploitation that the law finds unconscionable and, simply, a bad bargain – the wider view is supposed to catch only the bad bargain that is entered into because it is the only deal, because of the wider circumstances, that an individual could enter into

Harry v. Kreutziger (1978)

Facts	Holding	Ratio
○ An Native, an individual with a grade five education, a hearing problem, and little business experience sold his boat after being hounded over and over ○ He was also assured that he would be able to get another fishing license quite easily ○ The vendor was denied another license	○ The vendor had relied on the defendant to the effect that eh would be able to get another license easily, which was not the cased ○ The boat was actually worth $16,000 while he only got $4,500 for it – inadequate consideration ○ There was an inequality in the positions of the parties dues to ignorance, need, and distress coupled with proof of substantial unfairness	○ When faced with an unfair transaction, consider whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded ○ Dominant Test: ○ Inequality of Bargaining Power; ○ Substantial Unfairness giving rise to a presumption of fraud rebuttable only by proof that the transaction was fair and reasonable

Incapacity

Generally, a minor does not have the requisite authority to bind him or herself to contract. However, any case should be broken down into three categories of contract, each with varying effects:

1. *Contracts of Necessaries* – contracts for food, medicine, health, teaching, etc., the minor will only be liable to pay the reasonable cost of such necessaries where they have been sold and delivered

2. *Voidable Contracts* – These contracts may be enforced or repudiated by the minor at his or her own discretion with the added bonus of being treated as voidable up until the minor reaches the age of majority: land contracts, marriage settlements, etc.,

3. *Void Contracts* – Contracts that are not for the minor's benefit are void ab initio and are, thus, incapable of ratification.

Note: In Ontario a minor is anyone under the age of majority – the age of majority is 18

The court held in *Archer* v. *Cutter* that anytime a bargain is struck between parties (not necessarily unconscionable) with one party who is mentally incompetent the bargain will be struck down regardless of whether or not the other party knew of the mental incapacity. This decision has been tempered a bit to deal only with situations of an unfair transaction where the other party knew of the state of the mental incompetent:

Hart v. O'Connor (1985)

Facts	Holding	Ratio
○ Hart was unaware that O'Connor was mentally incompetent at the time of the contract	○ The court in Archer upset a transaction for contractual imbalance alone – not requiring some unequal bargaining power as between the parties ○ The law should require both	○ Before a contract is said to be void due to mental incapacity, the state must have been known or ought to have been known to the contracting party