

Real Property

Law 317: Midterm Outline 2015

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Does a Contract Exist?

Is there Offer, Acceptance and Consideration?

- Contract:
 - **Clause 23**: Outlines conditions of the offer and when it is open for acceptance (must be **communicated and be in writing**)
 - **Clause 24**: States if V accepts the Ps offer and sets out conditions for acceptance
 - Must tell the other party you accept
 - Any alteration to that offer is NOT acceptance, simply counter offer – meeting of the minds requires both parties agree to the same elements
- Statute: none – common law K law
- Case Law: **Hahn v Hanson, BCSC 1994**
 - Acceptance must be in manner stipulated by offeror or there is no acceptance
 - Can withdraw offer at anytime before acceptance but must communicate to offeree
 - Counter offer cancels terms of original offer

Is there Intention to be bound by the Contract?

- Contract: none – based on LTA and case law
- Statute: **Land Title Act, s.42(4)**
 - Signature on K is proof (in absence of evidence to contrary) that the transferor:
 - (1) knows the contents of the instrument and voluntarily signed it, and
 - (2) has legal capacity to execute the instrument and intends to be bound by it
 - In order to not have to inquire into every signature
- Case Law: 2 cases build on each other
 - 1. **Larson v Charron, BCSC 2006**: must have meeting of the minds on the 3 essential terms (parties, property and price) in order to form a K
 - Case is example of “evidence to contrary under legislation” and no agreement on property or price – no K
 - Foreclosure case
 - 2. **Golden Properties v Imbrook Properties, BCCA 1991**: in addition to 3 Ps, both parties must intend to be legally bound by K in order to form K
 - Test: what did parties intend – binding or not? Did the parties consider that a K had been made?
 - Consider language, more to be negotiated?
 - Letters of intent back and forth in commercial sale case

GOOD FAITH REQUIREMENT

- Contract: none
- Statute: none
- Case Law: **Bhasin v Hrynew, SCC 2014**: parties must perform duties under K in good faith and in a manner that is reasonable, not capricious – minimum standard of performance in real estate law
 - No requirement to bargain in good faith as long as you don't make misrepresentations

Is the Contract Enforceable?

Does the Contract meet the Requirements in s.59(3), Law and Equity Act?

- **There are the valid elements of a K – then consider if it is enforceable under s.59(3)**
- Contract:
- Statute: **Law and Equity Act, s.59(3)**
 - K relating to land must be in one of three forms:
 - In writing, signed by party or agent – **s.59(7)** just need reasonable indication that K was made and subject matter, sufficient even if there's a mistake;
 - The parties charged must have done an act or acquiesced to an act that would indicate there is a K – **s.59(4)** act/acquiescence is generally giving/accepting a deposit, V accepts deposit
 - The person alleging K has altered their position so that it looks like they are reasonably relying on a K and it would be inequitable not to recognize K – often seeking financing or subdivision approval or marketing their own house
 - **s.59(3)(b)** – must be intent to create K
- Case Law: below, separated

IN WRITING

- Contract: none
- Statute: **Law and Equity Act, s.59(7)** – even if not perfectly stated, it can still be sufficient to create a K
- Case Law:
 - **Mackenzie v Walsh**: written form does not have to be extensive as long as it has the basic elements of the K (3 Ps)
 - **Nicol v Weigel, 1991 BCCA**: wasn't in perfect written form but still enforceable because the main elements of K are there (and part performance and acting to detriment), was only oral agreement so not enforceable on that ground
 - **Shears v Baxter, 2014 BCSC**: written document cannot be too vague/uncertain, lacking critical terms or there is no meeting of the minds and no K made
 - Would reasonable person have believed that parties were consenting to the same terms?
 - Test: does it disclose intention? – find meaning
 - If intention, bring in other evidence by inference about rest of details of K

PARTIES CHARGED TO THE K HAVE DONE AN ACT INDICATING A K WAS MADE

- Contract: none
- Statute: **Law and Equity Act**
 - **s.59(3)(b)** – part performance of K, intent to have K
 - **s.59(4)** – accepting deposit is an act
- Case Law:
 - **Nicol v Weigel, 1991 BCCA**: acceptance of a deposit is part performance and an acknowledgement of the K

PARTIES HAVE ALTERED THEIR POSITION TO REASONABLY RELY ON K, INEQUITABLE

- Contract: none
- Statute: **Law and Equity, s.59(3)**
- Case Law:
 - **Nicol v Weigel, 1991 BCCA**: must show party acted to their detriment on reliance of K, must change their position such that it would be unfair to refuse to enforce K

Is there any Oral Evidence to consider?

- Contract: none
- Statute: none
- Case Law: courts must be happy with written K – can only use oral evidence for collateral matters, to clarify ambiguities – CANNOT be used to find elements of K
 - **Shears v Baxter, 2014 BCSC**: insufficient written terms, oral evidence wasn't sufficient to establish a binding K

Are there any Problems with the Contract?

Is there Vagueness or Uncertainty?

- Contract: none
- Statute: none
- Case Law: **First City Investments v Fraser Arms Hotel**: courts will look to the instrument to give effect to the intention of the parties

PARTIES

- Contract: **first page** details seller and buyer information – confirm parties are well defined, spelled correctly and actually the people on title
- Statute: **Property Law Act, s.6**
 - Requires V to own property in order to sell OR able to compel company to sell
 - Entity on K must be able to compel sale of property, have control of entity on title
 - P is entitled to refuse transfer from 3rd party
- Case Law:
 - **Coal Harbour Properties v Liu, 2004 BCCA**: courts have found that if registered owner on title is not the V (company on title), P can accept this from a 3rd party (the company) as long as it has been disclosed to them and they knew about the company when signing the documents
 - **Mariner Towers v Imani-Raoshanagh, 2011 BCCA**: exception to s.6 is if parent company is building condo and the land itself is owned by sell corporation
 - K stated this arrangement so by signing it, P agrees to accept transfer from 3rd
 - **Caplan v Coles, 1982 BCSC**: P isn't obliged to accept transfer from 3rd party even where there is no prejudice
 - Requirement under s.6 that V must be contracting party – company on title and V were same person but V was K party and company was on title
 - Gave P no notice of the 3rd party

PROPERTY

- Contract: **first page** must provide the legal description and civic address of property
- Statute: **Land Title Act, Part 7** – deals with how to legally describe land
- Case Law: court will look at K to give intention to the parties, won't invalidate K just because it doesn't have legal description if civic address is there
 - **Dynamic Transport v OK Detailing, 1978 SCC**: will consider all circumstances to determine which or what part of a property is involved in K
 - **Zhilka v Turney, 1959 SCC**: can't use parole evidence to determine what property was to be sold because it presupposes there is an agreement – without elements, there is no K
 - K didn't show what was intended to be sold or kept, oral evidence can't fix
 - Parties didn't reach agreement on property to be conveyed

PRICE

- Contract:
 - **Clause 1** – sets out purchase price
 - **Clause 2** – sets out deposit amount for purchase
- Statute: **Law and Equity Act, s.16** definition of agreement for sale – possession/ownership transfer in future because P pays in instalments, V holds in trust for P
- Case Law: **Arnold Nemetz Engineering v Tobien, 1971 BCCA**
 - Court will make every effort to give meaning to K – look to 4 corners of K to find intention of parties, look to SUBSTANCE of agreement, not just form
 - **Price and payment needs to be certain in amount, method and timing of payment**

EVIDENTIARY

- Contract: none
- Statute: **Law and Equity Act, s.59** – K must be in writing OR there is act/acquiesced to act that shows reliance on K OR has changed position so it would be inequitable to avoid enforcing
- Case Law: **Nicol v Weigel, 1991 BCCA** – oral agreement wasn't valid but there was part performance based on accepting payments
 - Look at written evidence as well as conduct of parties to determine if there is K

Is there a Deposit?

- Contract:
 - **Clause 2** – sets out amount of deposit
 - **Clause 12** – if P defaults on K, V has a couple options:
 - If V accepts default of K, can keep deposit as matter of course and possible other remedies depending on K (UNLESS there is liquidated damage clause, gives pre-estimate of damages and V will be limited to that amount of damage)
 - If V does NOT accept default of K, V cannot keep deposit – essentially saying they are keeping K alive and dealing with deposit is unresolved
- Statute: **Real Estate Services Act, s.28 and 33**
 - Listing Real Estate agents holds deposit in trust account – not an agent for either party, just as stakeholder
 - If dispute about who gets deposit, can make application to court to decide who gets it
- Case Law:
 - **Tang v Zhang, 2013 BCCA**: deposit, absent contrary expression, should be given “normal” common law meaning, especially in standard form K
 - Look to CL and K, evaluate K and its wording – do NOT have to prove damages to keep deposit
 - If damages occur, deposit will be considered part of damages to avoid double recovery so V keeps deposit regardless of damages
 - **Winley Investments v Milore Sales, 1991 BCSC**: V only gets deposit automatically if they choose to terminate K after P breaches (accept the breach)
 - If V chooses specific performance, K is alive and cannot keep deposit – if V loses specific performance at court, P gets deposit back
 - **Norfolk v Aiken, 1989 BCCA**: V not entitled to keep deposit unless they are ready, willing and able to proceed with K on completion date
 - Here, neither party was ready so P got deposit back

DEPOSIT VS. LIQUIDATED DAMAGES

- Contract: as above, liquidated damage clause is dependent on K
- Statute: as above
- Case Law:
 - **Moberg v Cleveland, 2010 BCSC**: for V to claim deposit AND damages depends on construction of K
 - If shown that parties agreed to genuine pre-estimate of liquidated damages, V cannot recover more than that
 - Term “non-refundable” is not enough to show they intended liquidated damages
 - Loan vs. Deposit – looked at K and found that loans actually were deposits and since P breached, V kept deposit
 - **Fraser v Van Nus, 1987 BCCA**: must look at whole K to determine whether deposit is liquidated damages – “as liquidated damages”
 - **Amiri v One West Holdings, 2013 BCCA**: referring to deposit as “genuine pre-estimate of liquidated damages” does NOT mean it is not true deposit – look to specific terms to determine the nature of deposit

Are there issues between V and P during the Interim Period?

- Legal roles and entitlements when there is valid K but transfer has not occurred yet
 - K signed and agreed to = equitable ownership to P but V remains trustee of property while still legal owner on title
- Unpaid price: until price paid in full, V retains possession (can be altered by K) – P has legal interest in property but V keeps possession
- Contract: **clause 16** – modifies CL, risk remains with V until 12:00am on completion day and P is responsible for risk at 12:01am
 - Must arrange for insurance to be effective on completion date
- Statute: **Court Order Enforcement Act, s.86**
 - Judgment can be registered on title and form lien/charge but this is subject to right of P who got the property/interest BEFORE the registration of judgment
- Case Law: relationship between P and V is one of trustee – V must keep property in same state as when P saw it
 - **Rich v Krause, 1974 BCSC**: as soon as K in which specific performance could be ordered, V becomes trustee in equity for P
 - P gets beneficial ownership in equity and has equitable obligation to pay
 - **Martin Commercial Fuelling v Virtanen, 1997 BCCA**: must have notice of other 3rd party interests on title
 - If K signed and deposit paid but lien registered after this, it CANNOT after P
 - P gets interest in land as soon as K signed – as long as there is no notice of potential judgment and are bona fide purchaser, P's interest trumps judgment creditors interest
 - Judgment can only attach to V's personal interest in proceeds of sale since they don't have beneficial interest in property after signing K

DUTIES OF TRUSTEE

- Contract: **clause 8** – must be in substantially the same condition on possession date as when P viewed (date noted)
- Statute: **Land Title Act** – registered owner remains owner until legal title transferred
- Case Law: As trustee, must take reasonable care of property and make sure it doesn't deteriorate between time K signed and completion
 - **Terasen Gas v Utzig Holdings, 2012 BCCA**: V must abide by statutory ROW and restrictive covenants during interim period
 - Regardless of nature of interest, registered owner is still owner at law and will be bound by charges on title even after entering into K
 - Have control so court unwilling to let you escape from things that happen on property during interim period

RISK

- Contract: **clause 16** – modifies CL, risk remains with V until 12:00am on completion day and P is responsible for risk at 12:01am on completion day (regardless of possession date)
 - Must arrange for insurance to be effective on completion date
 - At CL, risk passed when K was signed – modified by K
- Statute: none
- Case Law:
 - **Wile v Cook, 1986 SCC**: K stated V bears risk until closing, arson
 - If property was damaged P could continue K and get insurance OR cancel K and get deposit back
 - P wanted to wait to see how much insurance could be collected so asked for extensions on K before making decision – this was repudiation of K, only gave right to election of insurance, not right to wait and see

Are there any Covenants or Conditions in the Contract?

- Conditions of Sale: must be satisfied or waived by party benefiting from them by a specified date, must occur before K completes
- Covenants: require someone to do/not do something, K held in abeyance until things are done according to terms
 - Subject to: finance, property inspection, fitness of title, insurance, disclose statement

Are there Conditions Precedent?

- Normally for benefit of P
- Requires precision as to thing needed to be done and date it has to occur – if it doesn't occur by that date, then benefiting party can waive condition and continue K OR K lapses
- Case Law: **Wiebe v Bobsien, 1985 BCCA**
 - Implied term in K that P or V will take all reasonable steps to get condition fulfilled, act in good faith and make reasonable efforts if implicated in CP
 - Will look to intentions of the parties to determine if binding K is formed

TYPES OF CP

- Contract: **clause 3** – sets out the terms and conditions of K, what parties must do for CP
 - Unless each condition is fulfilled or waived, K is terminated and deposit returnable in accordance with RESA – give notice of fulfilling or waiving by date specified
- Statute: **Real Estate Services Act**
- Case Law:
 - **Wiebe v Bobsien, 1985 BCCA**: Dissent sets out types of conditions precedents:
 - **Subjective**: wholly subjective that indulges fancy/whim of P, impedes K and makes it simply an offer – cannot determine if it was satisfied
 - **Objective**: objective standard against which you can evaluate whether it has been satisfied or not – suspends enforceability of valid K
 - Called a True Condition Precedent – relies on approval of 3rd party for something that is necessary for K to complete (ie. Subdivision)
 - **Partly Subjective/Partly Objective**: objective standard with subjective element
 - Must reasonably fulfill the subjective element, which leaves discretion with P (satisfactory building inspection)
 - **Zhilka v Turney**: **true CP** is an uncertain future event that is dependent on 3rd party
 - Only right to waive CP if it is for your SOLE benefit
 - True CP cannot be waived because it is fundamental aspect of K and benefits both parties – external to K
 - Can imply obligation in K that one party must act to fulfill the true CP
 - Until the condition occurs, there is no right to performance of K and there cannot be a breach of K until the condition occurs
 - **Manderscheid Article**: **clarifies true CP** – K cannot be fulfilled without it occurring (subdivision is best example – 3rd party approval over which parties have no control)
 - **Dynamic Transport v OK Detailing, 1978 SCC**: CP does not make other K duties unenforceable, just suspended until CP occurs
 - Implied promise on each party to do all that is necessary, in good faith, taking reasonable steps to fulfill CP – for subdivision, V to take steps because P would have to do it in Vs name, more sense for V to do it
 - **Peier v Cressey Whistler Townhomes, 2012 BCCA**: have to determine if it is actually a CP
 - For a true CP, has to be necessary for K to take place – if it just suspends Ps obligation to complete, it is NOT true PC
 - Court requires words “subject to” or “this is CP to K”

ZONING CPS

- Contract: draft subject tos in this sense very clearly
 - Make sure use of property is legal for what P wants in that zone, clarify with muni
- Statute: **Local Government Act**
 - **S.903** – zoning, unfettered discretion to muni to divide land base into zones and state what land can be used for and how much of that land can be used for the purpose
 - Can prohibit uses in certain zones
 - **S.911** – non-conforming uses, land uses change and will take forever to bring existing areas into conformance with new zoning
 - Allowed to continue use indefinitely as long as adhere to certain requirements
 - Cannot stop use for more than 6 months – industry specific, if only in use 4 months of year, have to use for 4 months each year
 - Cannot expand use at all – cannot change physical set up
- Case Law: none

Has there been any Waiver or Satisfaction of Conditions Precedent?

- Contract: **clause 3** – must be in writing and communicated to the other party if you are waiving or satisfying condition prior to date stated – must be clear what you are doing
- Statute: **Law and Equity Act, s.54** – can waive fulfillment of CP, even if it depends on a 3rd party if:
 - (a) CP is to that parties benefit
 - (b) K is capable of being performed without fulfillment of CP
 - (c) if time for fulfillment stipulated, the waiver is made before the time – if no time stipulated, the waiver is made in reasonable time
- Case Law: **Gulston v Aldred, 2011 BCCA**
 - True CP cannot be waived at CL BUT can be waived under s.54 of Law and Equity
 - In this case it wasn't true CP because it didn't depend on will of 3rd party, just a warranty which is less fundamental – remediation certificate from muni

DUTIES AND EFFECTS OF FULFILLING/WAIVING CPS

- Contract: **clause 3** – unless each condition is waived or fulfilled by specified date, K is terminated and deposit is returnable to P
- Statute: **Law and Equity Act, s.54**
- Case Law: must act in good faith and use best efforts to get performance of K, if you do nothing then you have breached that obligation
 - **Wiebe v Bobsien, 1985 BCCA**: Lambert in dissent
 - Each CP must be considered on its own facts
 - **Griffin v Martens, 1988 BCCA**: Lambert sets out test for satisfactory action in subjective/objective CP – satisfactory means to satisfactory to a reasonable person with all the subjective but reasonable standards of the particular P
 - Must use best efforts to fulfill – if you do nothing, breach
 - Cannot withhold satisfaction unreasonably
 - **Cox v Alley, 1991 BCSC**: V cannot dictate what P is comfortable with in terms of satisfactory CPs, cannot dictate what advice they should rely on or with what info they could be content
 - Purpose of CP is to allow P to get out of K if certain things don't happen
 - Behave reasonably and in good faith
 - **Tau Holdings v Alderbridge Development, 1991 BCCA**: CP that is entirely subjective results in an unenforceable, non-binding K – “at sole discretion of P”
 - Cannot reject reports arbitrarily, must act reasonably and reject on reasonable grounds – not reasonable in this case
 - **Yung v GNR Property Management, 2006 BCSC**: “subject to lawyer’s approval” is too broad to be enforceable, just P rejecting conditions on a whim, CP is entirely subjective and therefore K is not binding and only an offer – no intent to have binding K
 - In this case V could have revoked at any time because it was offer

Is there a Valid Contract?