

Real Property

Law 317: Final Outline 2015

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Legend:

Contract

Rules and Statute

Case Law Principles

Case Names

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Important

Introduction Information

Process of Transaction

- **Property:** bundle of rights, social construct that we have agreed to acknowledge as a right that can be bought and sold
 - Fee simple system
 - Rights and property defined through statutes

- **Process goes in 3 stages**
 1. Gather information
 2. Prepare and execute documents
 3. Receive funds, tender documents for registration and pay out price

Checklist:

1. **Initial Contact:** verify who the client is
 - a. Confirm retainer and what they want you to do
 - b. Get all written information that may influence K

2. **Review K of Purchase and Sale, and property disclosure statement**
 - a. **Get all information on P and property** – review to ensure all elements of a contract are there (price, property, parties, closing date)
 - i. Determine deposit required
 - b. **Check for any representations or subject to**
 - c. Check any time is of the essence requirements for client

3. **Title Search: is title good?**
 - a. Review any encumbrances and inform client of any charges
 - b. Check if V is actually owner and if legal lot is correct

4. **Other preliminary matters:** property transfer tax

5. **Consult with client and get instructions:** confirm property being purchased
 - a. Review K with them so they know what they are required to do
 - b. Advise on enforceability, insurance and assess family law issues for V

6. **Follow-up from initial review and discussion with client:** summarize in writing what client needs to do as discussed in meeting
 - a. Confirm with V's lawyer about undertakings for closing
 - b. **Further title search**
 - c. Pay out information from V mortgaging bank

7. **Prior to completion:** most action happens here
 - a. Transfer form (Form A), Encumbrances (Form C), Mortgages (Form B), release of charges on title
 - b. **Pre-conveyance title search to ensure no new charges**
 - c. **Review all documents** to ensure they match instructions
 - d. Get client to execute all documents and get rest of purchase price
 - e. Send to V's lawyer for execution

8. **Closing:** **title search before putting transfer documents into LT system**
 - a. Upload application
 - b. **Do title search after**
 - c. Deal with purchase price as agreed to

9. **Post closing:** **do title search to ensure there is nothing else on title**
 - a. Final report to client with title document after V's mortgage discharged

Legal Context

- **Property Law Act:** **rights and obligations for a transaction**

- **Family Law Act:** need to know who has interest in a property

- **Fraudulent Conveyance Act:** **duty not to convey things fraudulently**

- **Volume of Transactions:** highest amount of transactions for law – good attraction for law firm (brings in 60 million a year just for fee simple transactions)

- **Liability:** highest liability for solicitor practice – causes and errors:
 - Communication: can be failure to get property instructions from client, breakdown between lawyer and paralegal, misunderstanding about what charges on title mean, between the lawyers and failing to deal with undertakings property

 - Oversights: paralegals do most of the work but lawyers remain responsible for all work coming out of the office – must check forms and ensure everything is correct
 - **Code of Professional Conduct, 6.1-1:** lawyer must have direct supervision of staff and assistants – actual and personal control

- **Code of Professional Conduct, 6.1-3:** legal assistant cannot deal with application of law, take instructions from client or make undertakings without approval of lawyer
- Unmanageable risk: fraud
- Legal Issues: keeping updated with the changing law
- Engagement Management: keeping client up to date on the file and what they are responsible for the move the transaction along
- No Trail: transaction must be documented and confirmed in writing, failure to do so causes liability

Definitions

- **Condition:** fundamental term of K that goes to heart of K – cannot go through with K without that condition being fulfilled
 - If breached, innocent party should be able to get rescission or damages
- **Conveyance:** process by which you transfer an interest in property to another (fee simple, covenant, lease, etc)
 - Numerous different steps go into conveyance
- **Covenant:** promise between 2 parties to do or not do something in relation to land, generally for benefit of another to maintain property values or amenities
 - Positive – must do something; Negative – prevents from doing something
 - S.219, Land Title Act – registering covenants
- **Easement:** right to do something on a property that they do not own (muni utilities or roads)
 - Interest in land but benefits someone other than the land owner
- **Encumbrance:** any charge on a property that limits it in some way, burdens it (easement, mortgage, restrictive covenant, judgment, lien)
- **Licensee:** real estate agent registered under Real Estate Services Act
- **Lien:** charge on real property for the satisfaction of some debt or duty (generally by contractors if they haven't been paid)
 - Builder's Lien Act – who can register lien
 - Tax liens by municipality

- **Misrepresentation:** untrue statements about the quality of the property regarding a material fact (also an omission about property's quality – failing to state something)
 - Material fact – depends on what P thinks is material (if P says something is important and wants certain things in property)
 - Must be relied on by P
- **Mortgage:** charge on land as security for payment of a debt
- **Purchaser:** person buying the property and will take title on transfer
- **Repudiation:** one party breaches K to such extent that innocent party can treat K as terminated
 - Judgment – **did it amount to repudiation of K?**
- **Strata Property:** title to individual unit and undivided share in common property – facilitates collaborative ownership
- **Tender:** evidence to show that P is ready, willing and able to complete deal on the closing date (includes purchase price and any other conditions completed)
- **Time is of the Essence:** parties agree to stick to the strict timelines in K – must fulfill K obligations when they say they will
- **Title:** proof of ownership
- **Undertakings:** lawyers promise to P or V to do something – only person who undertaking was made to can release them from promise
- **Vendor:** person selling the property
- **Warranties and Representations:** promises about quality of the property that do NOT go to heart of K – still a representation but not so fundamental that party can repudiate K (only damages and remedies available)

Torrens System

- **Purpose:** **creates certainty of title – allows someone to see one title and view all registrations for that piece of property**
 - Easier to determine if you want to buy the property when you have all the information on it

- **Land Title Act:** governs the exchange of property and registration of interest on title, how registry operates
 - **S.23** – indefeasible title: title holder has good title against all the world and any interest not reflected on title is extinguished
 - Subject to exceptions
 - **S.28** – priority of charges is based on time of registration (1st registered, 1st served)
 - **S.29** – unregistered interests have no effect on registered title

Overview of Strata

- **Strata Property Act**
- **Enables type of ownership:** title to individual unit and undivided share in common property
 - Can include other rights (parking, storage)
 - Underlying land is owned or leased by the Strata Corp – individual units owned by individual owners
- **Can be bare land strata** (looks like fee simple subdivision, just houses on land) or strata (3 dimensional, owned upwards)
 - **Muni cannot impose requirements of subdivisions on bare land strata's** (they deal with their own water, roads, utilities) – avoid muni regulations
- **S.59 – disclosure: dictates what must be disclosed when selling unit**, set out in **Form B and s.59(3)**
 - Monthly Strata fees
 - Amount owner owes strata
 - If owner takes responsibility of any common property
 - Special levies anticipated or contemplated (in addition to monthly fee to make major renovation or repair)
 - Contingency reserve fund amount
 - Amendments to bylaws not yet filed
 - Notice of court proceedings or judgments
 - Notices of work orders against strata and specific unit
 - Allocation of storage units or parking stalls
 - **Right to determine affairs of Strata to see if you want to enter into a relationship with that group**
- **S.66 – common property owned in common**, only dealt with by $\frac{3}{4}$ majority resolution passed by board
 - Means that co-owners are **equally liable** for common property issues

- **S.67** – each unit and undivided share of common property is a taxable entity
- **S.69 – implied easements:** can have easements and ROW registered for bare land stratas but not for 3 dimensional (logistically more difficult)
- **S.73-77** – limited common property
 - **S.76** – use of a common area is restricted to one unit (outdoor patio only accessible through 1 unit)
- **S.183-185** – work orders: strata must complete WO levied at common property
 - For individual unit: must give notice to owner to fix and if they do not, then strata can complete the work
- **Governance:** until 1st unit sold, the developer is the strata corporation, thereafter the it is elected to deal with governance
 - **S.3-4 – responsibilities of strata:** maintain common property and assets
 - Owners elect council to deal with daily management
 - **Standard of Care: what reasonable council would do, must abide by bylaws** – met by hiring property management company and getting professional reports for repairs
 - **S.7-8** – fees to pay expenses of strata
 - Put in place by first resolution and bylaws
 - **S.31 – must act honestly and in goof faith** (not quite fiduciary)
 - **Exercise care, diligence and skill of reasonable person (reasonable council member)**
 - **S.32** – no COI allowed regarding contracts entered into for strata
 - **S.53** – each unit has 1 vote (not based on persons per unit)
- **Finances:**
 - **S.91** – responsible for common expenses and to establish operating fund for daily expenses
 - **S.92** – must establish a **contingency reserve fund** for major expenses
 - **S.108** – **can levy special assessment to pay for major expenses**
- **Bylaws:**

- **S.119 – must act according to bylaws:** provide for control, management, use and enjoyment of common property
 - Can impose restrictions on units (pets, noise, age) BUT cannot contravene human rights codes or any other statute
- **S.121 – bylaw is unenforceable if contrary to human rights code** or any other statute or if it prohibits owners to lease, mortgage or sell unit
 - **(2)** – don't apply to rentals
- **S.123** – pet and age restrictions are allowed
- **S.124** – rules regarding common property (pool hours)
- **NOTE: these bylaws can be grand parented**
- **S.141 – may restrict rentals but cannot screen tenants or have criteria for tenants if rentals are allowed**
 - **Residential Tenancy Act** will apply
 - **(2)** – can prohibit or limit but if there is a limit but have clear, unambiguous, transparent process set in bylaws for choosing which units may rent
- **Enforcement of Bylaws: variety of ways to enforce against owners that escalates** (fine of unit to requesting sale of unit from court)
 - **S.129-130** – can fine owners for breaching bylaws
 - Can register lien against unit for outstanding money (fines, strata fees) or bring action for injunction

Are there Elements of Aboriginal Title?

- **Entered into treaties with Crown for land** – gave up land rights for use rights
 - Only 3 treaties in BC, 95% of land is Crown land
 - Method to define crown-aboriginal relationships
 - **Constitution Act of 1982, s.35 – recognizes and affirms treaty rights** (NOT Charter)
- **LTA, s.23(2): uncancelled and in force indefeasible title is legal evidence of fee simple interest in land for the entity registered**
 - Ownership is subject to restrictions in original grant from Crown
 - Crown asserts title over oil rights – own land but subject to this
 - Potential to argue that claims that existed on land before transferring into LT system would continue to exist per this section, like title
 - Either title remains with land after conversion OR Crown cannot alienate any crown land without resolving claims on land
- **Indian Land Registry, First Nations Land Management Act: Separate registry for reserve land**
 - Some bands are still in the Torrens System

How do I Establish Title? Help!

Test to establish Title: (Delgamuukw)

1. Occupation by the community at time of sovereignty
 2. Continuity of possession – lived on it from that time until now
 3. Exclusive possession/occupation – difficult because bands tended to overlap
- **Can infringe title lands with consent of band OR if infringement is justified: (Tsilhqot'in)**
 - Agriculture; forestry; mining; hydro electric

Case Law Since Constitution Act

- **Since Constitution Act, case law only recognizes rights (does NOT grant them)**
 - **Purpose of s.35** is to reconcile previous inhabitation of aboriginal with Crown – agreement about how this will work (**Musqueam**)
 - Where there is strong title, Crown has duty to consult with band for any activity/dealings with that land (**Musqueam**)
 - **Court will only find title for small, specific areas of land that was exclusively and regularly used (Tsilhqot'in)**

- **Qualities of Aboriginal Title:** (Delgamuukw)
 - Inalienable except to Crown
 - Collective – owned by the band/nation for exclusive right to use and occupy (it is sui generis)
 - Evolves – modern uses aren't exactly what they were historically
 - Burdens Crown land with pre-crown jurisdiction
 - Cannot be extinguished
- **Similar to Fee Simple:** (Tsilhqot'in)
 - Can possess it; enjoy and occupy it; receive entire beneficial interest
 - Lasts in perpetuity
 - Have the right to govern how it is used
 - Economic benefits
 - Use must be consistent with historical use or title may be extinguished
- **Title is not registerable in LT system because it lacks element of marketability that is necessary to establish good title in the system** (Uukw, Skeetchestn)
 - **Can't put value on it and not like other interests – cannot register an interest unknown to law** (Skeetchestn)
 - Unable to register CPL for aboriginal title (Skeetchestn)
- Cannot be extinguished by anyone, will burden land until explicitly dealt with (Skeetchestn)
 - **Larger issue is if Crown converts aboriginal land into fee simple and how that would work and what it means for aboriginal title** (Skeetchestn)

Implications of Case Law

- **Dealing with Land: duty to consultation and accommodation when dealing with band's land**
 - Crown's actions must sufficiently meet these duties or an action in court could prevent a sale of the land
- **Regulatory regimes for land use cannot infringe title**
 - By bringing these lands into fee simple system, would extinguish the title because title cannot be owned by P for value without notice – **more would need to be done to determine how the system would work**
- **Any transfer of land into LT system would require Crown consultation with bands who live on the lands**
 - Unwillingness to inconvenience a person who has bought land with title on it – **unfair that it can go from Crown land into LT but not the other way**

Is there an Issue in Marketing the Property?

Is there a Conflict of Interest?

- **General Rule:** lawyers cannot act for parties where there is a conflict of interest or where you would have divided interests
 - **Duty of loyalty to client** – can't act for opposing parties in the same matter or where you have personal relationship or business dealings
- **Exception:** real estate context permits lawyer to act for both V and P in certain situations:
 - **Code of Professional Conduct, Appendix C:** lawyers cannot act where there is a COI **except in real estate conveyance when:**
 - **(a) Location is remote** – for small towns with 1 lawyer
 - Must get consent of parties and explain legal effect of the information not being confidential
 - **(b) It is a simple conveyance**
 - All cash payment
 - Discharge mortgage and pay balance
 - New build
 - **NEVER in commercial real estate, purchase/selling of 3+ residential units, where there are on-going relationships between V and P regarding property**
 - **(c) One party just wants lawyer to remove encumbrances or witness documents** – be clear they should get independent legal advice
 - If conflict found, must stop
 - **Act for mortgager and mortgagee** – direct COI but common
 - If into foreclosure, cannot act for either party

Was there Sketchy Marketing?

- **Real Estate Development Marketing Act**: sets out rules for marketing property
Is there Marketing Activity? I am Roger the Shrubber.

- **S.1-2** – applies to any developer that markets a development unit (5+ units) regardless of whether the property is located in BC
 - **Defines Material Facts**: something that can affect the value of the unit, price of the unit or the use of the unit
 - **Price** – influence on market price (make it expensive to build or decrease overall value)
 - **Use** – zoned for commercial or residential based on muni bylaws (need to know what use and density of use)
 - **Value** – value as a residential unit, not just price (how it is seen in the market, ability to buy/sell)
 - **Marketing**: any activity that will likely lead to a sale (Marzarei)
 - Any marketing within BC requires compliance with REDMA

Was a Disclosure Statement filed? I warned you but did you listen to me? Oh nooooo

- **S.14** – if marketing a property, **must file disclosure statement** with superintendent of real estate (consumer protection mechanism) and include all material facts (defined in s.1) – affect price, value and use
 - Especially important for new builds because there is no way to inspect the property or do title search
- All uses that a property may be put to must be disclosed in disclosure statement (Ulansky)
 - Would reasonable person conclude the fact would affect or be expected to affect price, value or use?

If any changes to material facts, was Amended Statement filed? And now for something completely different...

- **S.16** – if any change to the material facts, **developer must file an amended disclosure statement** (change triggers right of P to rescind K)
 - If related to physical nature of unit, should have 7 days to choose
 - Anything else (including closing date), no right to rescind
- If there is any change to material facts, developer must file an amended statement (299 Burrard)

- **S.21(2)** – right to rescind for 7 days after signing K and where there is a fundamental change in building itself

Was there a misrepresentation of a material fact? Your mother was a hamster!

- **S.23** – if misrepresentation of material fact, K is void for non-compliance
 - **Definition:** false or misleading statement of material fact OR omission to state a material fact
 - See s.1 for definition of material fact

Did they breach their Licensee Duties and Responsibilities?

- **Real Estate Services Act:** sets up governance structure for licensees as self-governing profession and includes agency law
 - **Agent:** has responsibilities and duties, puts them in fiduciary relationship when holding themselves out as having expertise, deals with buying and selling property
 - **S.1** – lists the services that are regulated
 - **Trading services** (advising on price, finding property, showing real estate, negotiating K), strata property and rental property management
 - **S.2** – act applies to everyone who provides real estate services regardless of whether they are paid
 - **S.3** – licensing requirements: have to be licensed to provide services
 - **S.4** – cannot accept remuneration unless licensed under act
 - **S.35** – lists statutory duties
 - **Overrides CL**

Assume Agency with Principal: I'm your king. Well I didn't vote for you!

- **Agency:** agent has fiduciary relationship with principal and have associated duties and responsibilities to that person
 - **Listing Licensee:** agent relationship with V
 - Provides advice about listing price, does things to get it properly listed and bring potential Ps through house
 - **Selling Licensee:** agent relationship with P – presumed buyer agency
 - Goes out to make deal for P
 - **Issues:** if listing L makes representations to P during open house, could be agency relationship with P
- Agent must:
 - Deal with parties impartially
 - Duty of disclosure to both **EXCEPT** for motivation for buying unless authorized, personal information, willingness to accept certain prices
 - Disclose defects about known physical condition of property
- **Designated Agency:** if agent is acting for a party, their entire brokerage is deemed to be acting for that party – no one else in brokerage can act for other party unless LDA is signed with consent of both parties
 - Doesn't work well in practice

Is agent acting for both parties?

- **Rule 5-10 – Limited Dual Agents: one L acts for both parties**
 - Must have consent of both parties and disclose all material facts
 - May be inferred by behaviour of parties
- LDA limits fiduciary obligations (specifically disclosure obligations) so transaction is possible (Sharif)
 - Impossible to have LDA where V and L are same person because cannot be impartial and prevent disclosure to yourself (Sharif)

What are the Statutory Duties?

You need a mandate from the masses, not some farcical aquatic ceremony!

- **RESA, s.35** – sets out duties:
 - **(1) Professional Misconduct** (for contravening rules)
 - wrongful taking or deceptive dealing (intentional misrepresentations, misappropriating funds)
 - incompetence
 - **(2) Conduct Unbecoming** (like lawyers code)
 - Acting contrary to best interest of public
 - Undermine public confidence in real estate industry
 - Brings industry into disrepute
 - **S.56** – provides for regulations for professional sanctions (Rules below)
- **RESA Rules:**
 - **3-3** – **must act in best interest of client**, according to their instructions, maintain confidentiality, avoid COI and if there are any COI they must be disclosed, and make reasonable efforts to discover facts about property
 - **3-3.1** – **these duties can be modified by agreement**, like LDA
 - **3-4** – **act honestly and with reasonable care and skill**
 - **5-4** – requires L to promptly deliver signed copy of K to V, P and brokerage (and lawyer)
 - **5-5** – L cannot induce another party to break a K with intention to enter into another

What are the Common Law Duties?

Quit picking your nose. I wasn't picking it, I was scratching!

- **Obey Instructions of Principle:** must obey instructions that are lawful and reasonable – if disagree with instructions, must cease acting
- **Exercise Care and Skill of Reasonable L within that market:** reinforced by s.35
 - When giving property valuation, must exercise care of reasonably skilled L in that particular market – doesn't have to be best price, use reasonableness standard (Nixon)
- **Duty to Verify all Material Facts of Property:** must check representations and facts given by V to see if they are true
 - Duty to exercise care and skill in verifying all material facts about property when acting for either V or P (Fletcher)
 - Check to see if renovations or alterations meet building code requirements (Jakube)
- **Duty to Take Care in Preparing Marketing Materials:** cannot misrepresent property in materials
- **Take Care in Preparing K:** have training to properly fill in K so held to standard of reasonable L, use skill and diligence
 - Must create legally enforceable K – cannot allow parties to covenant to sell/buy something that doesn't exist (Price) – wanted swimming pool but huge easement in backyard for muni utilities, L didn't include that information in K
- **Standard of Care:** held to standard of reasonable L operating in that market
 - If hold themselves out as having specialized skill, they will be held to higher standard of L with that type of skill (specialise in waterfront property) (Baillie)

Fiduciary Relationship?: I mean, why do we bother? We should let you all burn.

- **Presumptive Duty: court presumes fiduciary relationship between V-listing L and P-selling L**
 - **Duty Includes:**
 - Duty not to breach confidences
 - Duty to Disclose all material information to principle
 - Duty to avoid conflict of interests
 - Fiduciary **presumed** between L and principal (Sharif)
 - **Onus is on the L** to rebut this presumption
 - Where the principle puts trust in L for knowledge about the market (Sharif)
 - **Test to determine fiduciary relationship:** look to nature of relationships between parties, NOT the categories of relationships – actual interaction dictates relationship (Guerin v R)
 - Occurs when there is reposing trust or confidence in the professional and they assume responsibility to act in the principles best interest (Baillie)
 - **If not confidence reposed, no relationship**
- **Rule 5-10 – Cannot Act for 2 Principals without consent:** LDA concept
 - Relationship arises when there is direct contact or dealings and renders advice on K or offer (Knock Estate)
- **Rule 5-11 – No Secret Profit:** cannot make a profit off the selling of the property without disclosing that profit to the principal – where there is inside information from the client
 - If done, L must give profit to principal
 - **Strict duty – must be full and timely disclosure of all material facts to meet the test (Baillie)**
 - **Proof of loss by principal is NOT required (Baillie)**
- **Cannot put Interest in Conflict with Principal's**

- **Rule 5-10 – Full Disclosure:** duty to disclose all material facts
 - Must disclose any facts that L knows could be of importance to the principal – everything that is known regarding the subject matter of the K **that would likely influence the client’s conduct** (Ocean City Realty)
 - Will depend on what is known about the client

Any Duties to 3rd Parties? I have a good friend in Wome named Bigus Dickus!

- **Duty of principal to agent:**
 - Disclose all material facts about the property to the agent
 - Must co-operate with agent
 - Must pay commission

Is there a Duty of Care to 3rd party?

- **Duties to 3rd Parties:** generally no duty but will be one imposed if 3rd party relies on statements made by L – duty to exercise care and skill in giving advice to anyone that may reasonably rely on the advice
 - Generally statements during open house from listing L to P that P reasonably relies on
 - Presume duty of care since people are interacting – will look to quality of representation and if it amounted to misrepresentation (Hedley v Bryne)

Duty of care → breach of duty by misrepresentation → P reasonably relied → loss *Was there a Misrepresentation that breached the duty?*

- **Misrepresentation to 3rd party:** positive statement about the property regarding material facts that L didn’t check or misstated
 - L is expected to know material facts – if misstated, will attract liability
 - L expected to know basic land use bylaws and other material facts so P should be able to rely on what L tells them (Williams)
 - L expected to verify material facts in order to provide complete and accurate information to P – can’t just rely on what V says (Fletcher)

Was there Reasonable Reliance by the 3rd Party on the Misrepresentation?

- Court will look at whether P **reasonably relied** on representation

- **Must have reasonably relied on the misrepresentation to their detriment** ([Hedley v Bryne](#))
- L will be unreasonable if they rely on incomplete information from listing L or V – negligent to communicate to P without verifying ([Bango v Holt](#))
 - Higher reliance and standard if P went to L specifically for specialized knowledge
 - Damages follow from detrimental reliance ([Bango v Holt](#))

Mortgages

- Zombie Foreclosure: owner walks away and entity that is entitled to property is taking no action so the property just sits there – impacts value of neighbourhood
- Terms:
 - **Mortgagee**: creditor, bank or lender
 - **Mortgagor**: land owner, person in debt
 - **Mortgage**: interest in land in payment for security of debt or obligation
- History:
 - **Lender took title to the property** and the only way for owner to get legal title back was by fully paying off M – very difficult
 - Courts of Equity changed this
- Law and Equity Change:
 - Dealt with harshness – **not a true transfer of land but security for debt**
 - **Bank only holds a charge on title, not actual title**
 - **Equity of Redemption**: if there is default, there is equitable right for owner to have additional time to redeem M (pay off M) – 6 months
 - This right can only be extinguished by:
 - Lapse of time
 - Foreclosure or sale
 - Order for sale is provided for in M documents
 - **S.16, Law and Equity Act – Right to Foreclose**: right to redeem in 6 months UNLESS court orders that a shorter/longer period is justified

Is there a Mortgage? Are you suggesting coconuts migrate?

- Elements of a Mortgage:
 - Amount of Loan
 - Interest rate
 - Payment schedule (how much per month, how many payments)
 - Terms (2 year, 5 year)
 - Real Property must be named as security
 - Default provisions if payments are not made

- **Common Elements between Legal and Equitable M**
 - **Redemption** – ability to redeem it or pay it back after the legal rights have lapsed/defaulted
 - This right is valuable and can be mortgaged
 - **Requirement of redeemability** – M'ee must allow for the loan to be paid back in full within a certain period of time
 - S.10, Interest Act – M'or can pay out M after 5 years, 3 months interest paid as a penalty
 - **Collateral advantage** – M'ee allowed to add other fees on top of M payments to recoup more money but not to rate of criminal interest
 - Engagement fee, processing fee, etc.
 - **Clog on Equity** – cannot have M that impedes equity or prevents equity from having an effect
 - **Cannot K out right to redeem** – illegal clause
 - **S.20-24, Property Law Act – Release of Liability** – in M there are personal covenants so even if M sold, could still be personally bound
 - PLA overrules CL – M'or can be released from personal covenants when they assign M to another
 - Must give notice and the assignee must be satisfactory to M'ee
- **Implied Covenants in M**
 - **Part 3, Land Transfer Form Act** – shortens what is required to be included in M for it to be binding
 - **S.10** – M includes buildings on the lot
 - **S.225, LTA** – 2 parts to a M
 - **Power of Sale** – right to redeem for M'or AND right to foreclose for M'ee
 - Application to court for both of these

Is it a Legal Mortgage? You can't wield supreme executive power just because some watery tart threw a sword at you!

- **S.1, Land Title Act** – M is “charge” and “encumbrance” on title
 - **Charge: giving interest, less than fee simple, to lender**
- **S.231, LTA** – M is just a charge, not a conveyance
 - **Overrules CL rule in North Van v Carlisle (M was transfer of land)**

To find Legal Mortgage:

- **S.28, LTA** – priority of charges is based on time of registration (1st registered, 1st served)
 - 1st M tries to bind ALL legal and equitable rights to get 1st place to realize on security for payment
- **S.29** – unregistered interests have no effect on registered title
- **S.225** – **must comply with this section:** M required to be in 2 parts
 - Form approved by director of LT – Form A
 - Standard M terms included – prescribed or specific filed terms
 - Mechanical error or error of form shouldn't affect validity of M (Richmond Savings)
- **S.227** – standard terms are prescribed
- **S.228** – can apply to file own set of standard M terms (banks)
- **S.230** – can require entity to file set of regularly used terms
- **S.220** – **terms of M must be given to owner and acknowledged by them**
 - Must sign receipt of terms
- **S.238** – cannot register M unless it complies with LTA
- **M is an agreement between parties for debt** – must be read in entirety and both parties must understand what it means to be valid M (Richmond Savings)
 - Can secure more than one obligation (M and LOC)

Or is it an Equitable Mortgage?

- **S.44, Law and Equity Act** – rules of equity take precedence over statute
- **S.43, LTA** – equitable M isn't registerable, not good against the world BUT it is good as between the parties
- **K that passes equitable interest but not legal interest in property**
- **Created by:**
 - **Equitable or Future Interests** – right to redeem is mortgaged, subsequent mortgages after default
 - **Legal M fails** – legal M wasn't effective so court may recognize an equitable M (anything that looks like M, will be an equitable M)
 - Will look to see if elements are present to indicate K was M and was intended by parties: (**RBC v Mesa**)
 - Words of pledge, M or charges (not just the duplicate is held for security)
 - Words of seizure, sale or foreclosure
 - M debt stated as ascertainable (fixed amount)
 - Provision for duplicate to be given to M holder to be deposited on event or default
 - Suggestion that registerable form of M was requested
 - Use evidence of surrounding circumstances and communications between parties to see nature of transaction (**Kreick**)
 - Failed legal M must meet elements above or it will simply be a K between the 2 people – can still be good K (**Nguyen**)
 - If K is clear that it isn't M but something else, will be difficult to claim it is M – depends on evidence and credibility (**Blackaby**)
 - **Deposit of Duplicate Infeasible Title** – can get duplicate title from LTO to show they own property and then deposit it, there is allegation that there is an equitable M
 - **S.176** – if not subject to M, registrar must issue duplicate and endorse a note that it has been issued
 - **S.189** – if duplicate is in your possession and you want to sell land, must return it to LTO

- **S.192-193** – if lost or destroyed, must prove that and registrar can issue another
- **S.195** – when applying to register M or agreement for sale on title, duplicate must be surrendered
- **EFFECT:** giving duplicate to someone means you cannot deal with your land until you get duplicate back (from bank)
- Must be intent between parties to create M (from words used) in order for deposit of duplicate to create equitable M (RBC v Mesa)
- Other reasons to give duplicate other than to create equitable M (RBC v Mesa)
 - Safekeeping, undertaking not to sell under M discharged

Is Mortgage in violation of Statutory Protections? Help! I'm being repressed!

- **Interest:** % paid to M'ee on top of principle amount – paying for privilege of borrowing money
- **Simple Interest:** principle X rate X time
 - Calculated over term without compounding
- **Compound Interest:** payments partially for interest, partially for principle
 - Calculation made every 6 months and adds on each month
- **Nominal Rate:** rate on the face of the document
- **Effective Annual Rate:** amount of interest when compounding occurs, amount that is actually paid and received by lender

Are there violations of Federal Protections?

- **S.6, Interest Act – Blended Payments:** no interest is recoverable unless M'ee shows amount of interest and principle left on M calculated yearly and ½ yearly – applies to:
 - **Sinking Fund plan** – no longer relevant
 - **Allowance on stipulated repayments** – no longer relevant
 - **Blended payments** – payments partially to interest, partially to principle
 - Intention of section is to protect from concealment of rate of interest actually being paid (Kilgoran Hotels)
 - **EFFECT:** cannot collect any interest from M'or if breached
 - Disclose rate of interest, principle and how it is calculated and the section will not be breached

- **S.7 – How Much Interest:** cannot get more interest than what is stated in M
- **S.8 – Default:** cannot charge penalty of increased rate of interest upon default
 - Can have other penalties but increase in rate is NOT one
 - If increase in rate is triggered by passage of time and NOT default, it will not contravene the section – contravention only if default is the trigger for the increase (Reliant Capital)
- **S.9 – Over Charging:** if overcharge on interest, must be paid back
- **S.10 – Length of Debt:** requirement of redeemability – cannot be indebted forever, after 5 years, can pay out principle and 3 months interest
- **S.347, CC – Criminal Rate of Interest:** prohibits interest rate over 60% either on the face of M or the cumulative effect of the payments
 - **(1) 2 different offences:**
 - Cannot enter into agreement with criminal rate of interest
 - Cannot receive payment of criminal rate
 - Must look at face of document to see if rate exceeds 60% based on time period in agreement (Degelder)
 - **(2) Criminal rate is an effective annual rate that exceeds 60%**
 - Aggregate of all fees/interest/expenses paid for the advancement of capital in M
 - Look at what actually happened to see how rate is calculated and if it is criminal (Degelder)
 - Whether rate is criminal is determined at time payment is received and time frame over which the credit is extended or paid (Degelder) – not criminal rate because M was over 3 years, not 11 months as P argued (if 11 months, would have been criminal)
- **S.450, Bank Act – Disclosure:** bank must disclose to non-commercial borrowers the cost of borrowing

What about violating Provincial Protections?

- **Business Practices and Consumer Protection Act:** prohibits unconscionable transactions and rates – if consumer doesn't understand what was involved in transaction, court can step in
 - **Supplier:** person who participates in transaction by supplying goods, services or real property – should not engage in unconscionable transaction for consumer
 - **Goods:** includes supplying credit – catches M
 - **Consumer Transaction:** for household purpose, not commercial
- **S.4-5** – provides for relief to borrower if lender is engaged in deceptive act
- **S.8** – look at surrounding circumstances of transaction and what lender should have known to see if it was unconscionable
- **S.9(1)** – cannot engage in unconscionable consumer transaction
 - **(2) Burden of proof on lender to show it wasn't unconscionable**
- **S.10** – if unconscionable, transaction isn't binding on borrower subject to court finding (specific relief in s.106-107)
- **S.66-67** – lender must provide borrower with disclosure statement
- **S.72** – can get registerable discharge within 30 days if M paid off
 - **Must be within 30 days in order to prevent M fraud (Wirick)**
- **Part 2, Mortgage Brokers Act** – broker must disclose rate of interest

Is there a Problem with Mortgage? Is this part of your brain?!

- **Assignment:** can assign or sell M to another – will not impact terms for M'ee
 - **S.209, LTA** – transfer must be approved by director
 - **S.27(3), LTA** – transfer subject to equities and existing accounts between parties (cannot assign more than what is due at the time of transfer)
 - **S.36, Law and Equity** – M'ee must give notice to M'or that interest is being assigned to another bank/entity
- **Assumption:** applies to assumption of existing M, limits liability of M'or and gives bank ability to extend M for another M'or
 - **S.20-24, Property Law Act – Release of Liability** – in M there are personal covenants so even if M sold, could still be personally bound

- PLA overrules CL – M’or can be released from personal covenants when they assign M to another and cease to be liable
 - Must give notice and the assignee must be satisfactory to M’ee
- **Priorities:** any interest registered in property is based on the time it is registered
 - **S.22, LTA** – cannot have interest in land unless it is registered, a legal interest in land
 - Interest passes at time of registration
 - **S.28** – if 2+ M’ee registered, charges have priority according to date and time of their application of registration
 - Can have agreement between M’ees as to who is first
 - **S.23(2)** – if legal title, have indefeasible title subject to (i) fraud
 - Proof that owner obtained title through fraud
 - **S.25(1)** – if interest in property is under a void instrument, party does NOT actually acquire any interest in property
 - (2) If you take interest under fraudulent instrument, no interest is received **UNLESS you are a bona fide P without notice of fraud**
 - **Fraudulent M is ineffective to pass any interest** – M will be void regardless of registration on title (Gill)
 - **S.26** – registered owner is **deemed** to be entitled to estate or interest related to the registered charge
 - **Presumption** – not sure if everything on title is valid so assume there is interest BUT there may not be
 - Anyone less than owner is DEEMED to be entitled
 - **Protection to the owner, but NOT to lesser interest like M** – registration is DEEMED to be entitled but this is a rebuttable presumption (Gill)
 - (2) Something registered on title does not automatically mean that the charge itself will stand up at law – legality, effectiveness and validity of charge can be challenged
 - Even if interest is registered, doesn’t make the interest valid if it was granted through fraud (Gill)
 - **S.28, PLA** – discusses priority of M’ee

- **Conflict of Interest:** allowed to act for M'ee and M'or – common in real estate
 - **Appendix A, Code of Professional Conduct** – deals with COI in real estate
 - **Cannot act in foreclosure action if acting for both parties in M**
- **Fraud:** important in client verification and discharging M in reasonable time
 - **Failure to verify ID can result in unenforceable M (Homewood Mortgage)**
– someone impersonated older man to get 750,000 M, clearly not his drivers license or signature on file but didn't verify so unenforceable against owner
 - **M discharge must be given within 30 days but if haven't received one within 60, must report to LSBC – report to LSBC director within 5 days if you deliver funds to lawyer to discharge M (Wirick) – intense M fraud**

What are the Undertakings for Closing?

What is an Undertaking?

- **Professional promise to do something** – can expedite and simplify real estate transactions
 - Agreement or promise to hold document or property in trust until certain conditions are fulfilled (until received completed transfer documents)
- Use in order to:
 - **Deal with matters of process** – delivery/exchange of documents, registration and payment of purchase price
 - **Agree on what happens in case of default** – must be self determining in that there is a resolution regardless of whether the deal goes through
 - Should lead to the end of the transaction or back to parties' original position

Who can give one?

- **Only Lawyers and Notaries** – must have client's consent to use undertaking to complete transaction
 - Will be enforced on lawyer even if it is inconsistent with client's position or agreement between parties
- **ONLY RECIPIENT OF UNDERTAKING CAN RELEASE LAWYER**
- **Clause 13 – Buyer Financing:** P gives lawyer authority to close on undertaking
- **Clause 14 – Clearing Title:** V gives authority to close on undertaking
- **Rule 7.1-3, Code of Professional Conduct** – lawyer must report any breach of undertaking or trust condition that has not been consented to or waived
- **Rule 5.1-6** – lawyer must fulfill every undertaking, strict!
- **Rule 7.2-11** – lawyer cannot give undertaking that cannot be fulfilled, must fulfill every undertaking and scrupulously honour any trust condition accepted

How should you give an Undertaking?

- **In writing:** must be in writing what is being undertaken and be agreed in writing
 - If lawyer doesn't agree with undertaking being imposed, don't agree and make it clear that it is rejected

- **Clear, Unambiguous and Explicit:** must have timeframe for completing and be self executing (either transaction occurs or back to original position)
- **Not Unreasonable:** do not impose conditions that are unreasonable or are unable to be personally fulfilled
- **Guidelines:**
 - Never give an undertaking to do something beyond your absolute control at the time the undertaking is given.
 - Try not to give undertakings.
 - Get irrevocable client instructions.
 - Do not give open-ended undertakings.
 - Do not impose conditions after undertakings are settled.
 - Confirm oral undertakings in writing.
 - Take care with undertakings imposed by others.
 - Give self-determining undertakings.
 - Draft undertakings precisely.
 - Do not impose undertakings that modify or conflict with the contract

Wait! Is there an Implied Undertaking?

- **By conduct, LSBC and other lawyers will interpret behaviour as an implied undertaking**
 - **Rule 7.2-12** – trust cheques: by authorizing the withdrawal of funds from trust there is implied undertaking that the cheque will be paid and that it is capable of being certified for that purpose
 - **Rule 7.2-13** – Real estate transactions: if you receive money in trust form P and get registreable conveyance from V, will be implied undertaking to pay purchase price to V upon completion and registration of transfer

Omg. Did someone Breach the Undertaking?

- Client can sue lawyer
- LSBC can undertake disciplinary proceedings against lawyer

Is there a Pre-Closing Claim?

- **When P may refuse to close:** (Perell) – **condition, title, warranty**
 - Non-satisfaction of CP that P will not waive and cannot be unilaterally waived by V
 - **Breach of fundamental promise in K**, a term is classified as a condition as opposed to a warranty
 - V cannot perform their promise to **convey good title**
 - V made **false representations and other elements of a claim** for equitable remedy of rescission are satisfied

Breach of Fundamental Promise:

Don't mention the war. I did once but I think I got away with it!

- Reasons not to close are linked to the 4 types of statements that can be made:
 - Condition Precedents
 - Promises
 - V's promise to convey good title
 - Representations and Warranties
- **Fundamental promise = conditions and warranties**
 - **Condition** – size of property, ability to use land for certain purposes
 - **Warranty** – fixable amount (number of doors and windows) or where damages are appropriate
- Will depend on individual P as to what is condition and what is warranty
- **Size Matters:** for size to matter, **it must be a material deficiency such that there is a genuine title defect** (Perell) – do own measurements if it really matters
 - If you can see bounds of property but it turns out to be smaller than advertised, **size does NOT matter** and cannot end K
 - As long as you can visually ascertain property and made offer on that basis, still bound to buy it
 - **Exception:** if cannot see entire property OR buying on per unit basis, then size matters

Failure to Convey Good Title:

You can see the sea. It's over there between the land and the sky.

What are the requirements of Good Title? Are they Met?

- **Clause 9 - Title:** V agrees to provide good title being free and clear except for subsisting conditions except as otherwise agreed to
 - Can agree to things on title in K – if not agreed to, any other charges would constitute bad title
 - **Marketable title:** title that can, at all times and under all circumstances, be forced upon an unwilling P who is not compelled to take title with defects, clouds or reasonable threat of litigation to mar peaceful possession
 - Parties can agree between themselves what is good title (Campbell)
- **Clause 11 - Documents:** all documents required to give effect to K must be delivered in registrable form and delivered to LTO by 4pm on closing (except for electronic)
- **S.23, LTA** – indefeasibility of title is subject to reservations, easements, taxes and other charges
- **S.50, LTA** – exceptions to indefeasible title are reservations and exceptions in original grant from Crown (resources, highways, statutory restrictive covenants)
- **S.20, LTA** – interest must be registered to be a valid legal interest BUT an unregistered interest that the parties agreed to can still bind them
- **S.27, LTA** – registration gives notice to everyone, part of creating legal interest
- **S.29, LTA** – Anyone taking interest in land is not affected by unregistered interests even if they had notice UNLESS there were pending registrations – exceptions:
 - Lease for less than 3 years
 - Title is void
 - Person participates in fraud
- **S.26(2), LTA** – registration of document doesn't mean that the interest is valid
 - May challenge validity of charge

- **S.221(2), LTA** – for restrictive covenants, **registration is not evidence of its enforceability**, may not be valid

What must the Parties do to fulfill the Obligations?

- **Clause 13 – Buyer Financing:** P can wait to pay purchase price until after transfer and new M documents are registered IF:
 - P has provided funds not secured by M to V
 - Fulfilled M conditions for funding
 - Made undertaking to V to pay purchase price upon registration of transfer and M documents
- **Clause 14 – Clearing Title:** if existing charge on title, **V may wait to clear them until receiving purchase price from P** – payment can be made on undertaking by lawyers
- **S.4-6, PLA** – P has obligation to prepare transfer documents and V must supply P with signed transfer instruments
- **S.3, PLA** – can apply to court to settle claim for compensation
- **S.6, PLA** – title of property must be in V's name in order to transfer
- **S.37, PLA** – court can award damages for loss of bargain against V who cannot perform K because of defect in title
- **S.185, LTA** – form of transfer must be in form approved by Director of LT, unless prescribed by another enactment – Form A transfer
- **S.186, LTA** – terms of Land Title Transfer Form Act apply to transfer document
- **Parties MUST be ready, willing and able to complete** – have purchase price or ability to clear title (*Norfolk v Aiken*)
 - Where covenants are **mutually dependent** and carried out at the same time (discharge of encumbrance and payment of purchase price) **neither party needs to actually perform obligations unless other side shows that it is able to perform** (*Seguss*)

Is the Defect in Title sufficient to allow P to refuse to close?

- **Only Material Defect entitles P to refuse to complete** (Chen)
 - **TEST:** can V convey substantially what is required by K?
 - Is the encumbrance minor on its terms to that specific P?
- Where defect would interfere with use and enjoyment of property and V shouldn't have covenanted that they could provide clear title (Price)
- **Size Matters:** for size to matter, it must be a **material deficiency such that there is a genuine title defect** (Perell) – do own measurements if it really matters
 - If you can see bounds of property but it turns out to be smaller than advertised, **size does NOT matter** and cannot end K
 - As long as you can visually ascertain property and made offer on that basis, still bound to buy it
 - **Exception:** if cannot see entire property OR buying on per unit basis, then size matters
- Title is NOT clear if registerable instrument is not produced even if it has actually been paid off (Campbell)

Was the defect in Title Cleared?

- **Clause 14 – Clearing Title:** if existing charge on title, V may wait to clear them until receiving purchase price from P – **payment can be made on undertaking by lawyers**
 - Do not have to have M fully discharged from title to deliver good title – **standard undertaking allows M to stay on title as long as it is able to be discharged by funds held in trust** (Norfolk)
- Need clear evidence that title will be discharged if discharge was not registered in order for the title to be considered clear (Chen)
- V has until the end of the closing day to clear title (Seguss)

Purchase Price: Where's Sybil? Where's... the bill?

- **Clause 12 – Time:** time is of the essence AND unless balance of purchase price is paid, V can terminate K
 - Tender is good evidence to show readiness to perform K
- Parties MUST be ready, willing and able to complete – have purchase price or ability to clear title (Norfolk v Aiken)
 - Where covenants are **mutually dependent** and carried out at the same time (discharge of encumbrance and payment of purchase price) **neither party needs to actually perform obligations unless other side shows that it is able to perform** (Seguss)

Time is of the Essence: No one is going to stone anyone until I blow this whistle!

- **Clause 12 – Time:** time is of the essence AND unless balance of purchase price is paid, V can terminate K
- **S.31, Law and Equity Act:** where K does or does not say time is of the essence, it will have the same effect as in equity
 - **If court feels it is unfair to enforce time clause, they will not**
 - **Court may refuse to give effect to clause if it would be inequitable to do so** (Grewal) – eg. where party is doing all they can but extension is refused, strict adherence requires notice
 - Assess behaviour of parties to determine if it would be unjust to enforce
- If time is of the essence, **failure of party to perform on time will constitute a breach** and give the other party the right to pursue remedies (Grewal)
- **If party by words or conduct waives strict compliance with time limits, time will no longer be of the essence** and party will have “reasonable time” to perform (Whittal)
 - Must restate that time is of the essence in order to rely on it again
- If neither party is ready, willing and able to complete, time ceases to be of the essence (Norfolk)
 - **Must give notice of reasonable time in which to perform** in order to rely on the clause again

Was Time Clause Waived?

- **Amending K or extending closing date is waiver of time clause** – upon either of these, should restate that time is of the essences
 - **Setting a new closing date waived the clause**, needed to reassert in order to rely on it (*Ambassador Industries*)
 - Effect of extension on time clause **must be determined in context of each case and looking at behaviour of parties** and whether it would be unjust to rely on the clause (*Grewal*)
 - If expressly reasserted after each amendment, NOT waived so entitled to rely on it (*Grewal*)

Was Time Clause Reinstated?

- Cannot treat failure to perform as repudiation without giving other party notice that time was of the essence (*Shaw Industries*)
 - Where clause lapsed because neither was ready, willing and able to complete, **either party can restate that time is of the essence by giving reasonable notice and setting new closing date** (*Shaw Industries*)
- In order to rely on clause against, **must bring it to attention of the other party so they know time is of the essence** – cannot rely on strict reliance on timeline if you don't tell the other party (*Ambassador*)
 - Strict reliance requires notice

Condition of the Property: My God, you're ugly, aren't you?

Caveat Emptor applies UNLESS there is EIS or express warranty in K: (Cardell v Perthen)

– **buyer beware**, complete defence for V with following exceptions

1. V fraudulently misrepresents or conceals
 2. V knows of latent defect rendering house unfit for human habitation
 3. V is reckless as to truth or falsity of statements relating to fitness of house for habitation
 4. V has breach duty to disclose latent defect that renders premises dangerous
- Types of Promises about Condition of the property:
 - **Conditions** – **fundamental or essential promises** that if breached, the innocent party can end K and claim damages
 - **Warranties** – **minor promises** that are incidental to purpose of K and if breached, damages are the remedy but must go through with K
 - Types of Defects about property:
 - **Patent Defect** – **can find on reasonable inspection** and making reasonable inquiries
 - **High onus on P to find them** – must be reasonable inspection, not casual inspection (fulfilled by getting building inspector) (Hanslo)
 - **Latent Defects** – **cannot find on reasonable inspection**
 - **If V knows of any, obligated to disclose to P** (Hanslo)
 - **Clause 8 – Viewed:** must be in substantially the same condition on possession date as when viewed (date must be noted)
 - **Clause 7 – Included Items:** any fixtures, appliances, etc. that are included in K
 - **Property Disclosure Statement:** answers as to V's knowledge of the property but does not warranty state of property
 - If incorporated in K, is there is misrepresentation, can bring action for Tort and K Claims
 - **If explicitly incorporated, treated as part of K** (Malenfant v Janzen)

Tort Claims: That does it! I'm to give you a damn good thrashing!

Tort Claim = statements in PDS that amount to negligent or fraudulent misrepresentation

- Court presumes relationship between P and V so that tort can follow
- **Misrepresentations:** may be fundamental in nature (fraudulent or negligent) OR just a warranty – **to be misrepresentation, need:**
 1. A false statement
 2. Material – type of statement that would influence P's decision to enter K
 3. The false, material statement to have induced P to enter K, AND
 4. The innocent party must object before the closing of the transaction (unless rep was fraudulent or error)

Negligent Misrepresentation

- **Test:** (Queen v Cognos)
 1. There must be a duty of care based on special relationship
 2. The representation must be untrue, inaccurate or misleading
 3. The representor must have acted negligently in making the representation
 4. The representee must have reasonably relied on negligent misrepresentation
 5. The reliance must have been detrimental to representee – damages resulted

Case Law for Negligent Misrepresentations in PDS:

- **Hanslo:** statements in PDS can amount to negligent misrepresentation instead of fraudulent if there is no overt fraud
- **Holt:** negligent but honest misrepresentation is still basis for damages because there is a duty of care owed by a person with special skills (L)
 - **Becker:** L should know basic requirements of muni bylaws and habitability of home
- **Thandi:** once P gets home inspector, **reliance and liability shifts from PDS to home inspector** – no claim then against V, ONLY against inspector
 - BUT, could rely on both inspector AND PDS in certain circumstances (Hanslo)
 - If outside inspector's expertise or deficiency outside of scope of inspection, can rely on PDS statements
 - If inspector makes negligent misrepresentation, only claim against them, not V (Scorey)

- **Aldred:** will look at standard of care for a reasonable person in making representations – would reasonable person think that repair was done properly?
 - Is it reasonable for P to rely on statements?
 - If reasonable person wouldn't have represented a certain state of affairs and reliance on that representation was reasonable = negligent
- **Bains v Bhullar:** must look to what P wanted in the property and what the representations said about that quality in the property – if V knew certain quality was important and misrepresented it, will be negligent

Fraudulent Misrepresentation

- **Test:** (*Derry v Peek*, from *Ross v Hobbs* in *Curtin*)
 1. A false representation or statement made by D
 2. Was knowingly false
 3. Was made with intention to deceive the other party
 4. Materially induced party to enter K
 5. Caused P damage

Case Law for Fraudulent Misrepresentations in PDS:

- **Curtin:** statements in PDS can amount to fraudulent misrepresentation IF they knew the state of affairs they stated were not true
 - If V believes problem is fixed and states there is no problem, not fraud
 - It is about misrepresenting the knowledge of the property
- **Sahamis v Lenz:** PDS is NOT a warranty BUT if it is made falsely or recklessly, there can be damages awarded
- **Gronau v Schlamp:** active concealment of defects is fraud and P can get rescission or damages
 - Where active concealment, caveat emptor does NOT apply

Property Disclosure Statement Incorporated

- **If explicitly incorporated, PDS treated as part of K** (Malenfant v Janzen)
 - Determine if it was part of inducement to K
- **Arsenault: PDS warrant's V's knowledge, NOT a state of affairs**
 - Wording of PDS is in present tense – aware of problem at the time of answering the PDS? (Curtin)
- **Connie v Sampson: duty to disclose in PDS is broader** than stating that no problems are occurring right now – **disclose potential of problem to occur if it hasn't been fixed**
 - **PDS in present tense** but must disclose past problems IF they could arise again – “potentially damaging”
- **Lavigne v Ellis:** if V didn't know of problem or make representations about it, then no claim

Property Disclosure Statement NOT Incorporated

- **Clause 18:** no representations other than those contained in K
 - **General exclusion clause CANNOT override specific representation** that was intended to induce parties to enter into K, UNLESS clause 18 was brought to P's attention (Bains v Bhullar)

Contract Claims: One day lad, all this will be yours! What, the curtains?

K Claim = if PDS was incorporated into K and V misrepresented something in PDS that was relied on by P

- **Clause 18 – Representations and Warranties:** there are no warranties or representations except those contained in K
 - Intention of parties to limit what parties rely on to K
 - Does not preclude action in tort (Bains)
 - Cannot rely on clause 18 unless it is brought to attention of parties and/or they are encouraged to get independent legal advice (Bains, Montex)
 - Some written claims are collateral W that will endure post closing (Montex)
 - **Exceptions:** marketing brochures, other statements
- **Clause 8 – Viewed:** must be in substantially the same condition on possession date as when viewed (date must be noted)
- **Clause 3 – PDS:** can incorporate PDS into K if included here
- **Addendum 1, Clause 10** – states that V acknowledges separate written disclosure of all known latent defects prior to entering K
- **Addendum 1, Clause 13** – PDS incorporated into K if dated here

Breach for Warranty

- **Warranty is part of K – promise of certain state of affairs (Fraser-Reid)**
 - **Is a fact of which V knows and of which P is ignorant (Montex)**
- **Cannot rely on clause 18 unless it is brought to attention of parties and/or they are encouraged to get independent legal advice (Bains, Montex)**

Breach for PDS

- **Hanslo:** if PDS incorporated and statement didn't reflect V's true knowledge, can give rise to breach of K claim – just untrue statement that caused harm
- **Connie:** must disclose any problems that have arisen in the past and weren't fully dealt with or liable for breach of K

Error In Substantialibus: This is an Ex-Parrot!!

- **Mistake must be so substantial that it affects quality of the property** (Hyrsky)
- Applies where there is an express W in K AND post closing which is not fulfilled in the quality of the property (Redican)
- Substantial error such that party is **getting something they didn't bargain for** OR a **mutual fundamental mistake** in K (Cherris Estate)
 - Court is unwilling to force parties to buy something different from what they thought they were getting
 - Where the property is something totally different than what they bargained for, there is EIS and rescission is remedy
- If V knew about or suspected latent defects but didn't disclose them, could make property totally different (Schlamp)
- **Rescission as remedy available pre and post closing**

Is there a Post-Closing Claim?

Caveat Emptor applies UNLESS there is EIS or express warranty in K: ([Cardell v Perthen](#))

– **buyer beware**, complete defence for V with following exceptions

1. V fraudulently misrepresents or conceals
2. V knows of latent defect rendering house unfit for human habitation
3. V is reckless as to truth or falsity of statements relating to fitness of house for habitation
4. V has breach duty to disclose latent defect that renders premises dangerous

Contractual Promises: Blessed are the Cheesemakers

- **Clause 18 – Representations and Warranties:** there are no warranties or representations except those contained in K
 - Intention of parties to limit what parties rely on to K
 - Does not preclude action in tort ([Bains](#))
 - **Cannot rely on clause 18 unless it is brought to attention of parties and/or they are encouraged to get independent legal advice** ([Bains](#), [Montex](#))
 - Some written claims are collateral W that will endure post closing ([Montex](#))
 - **Exceptions:** marketing brochures, other statements
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Breach of K, Warranty: I'm not the Messiah!

- **Warranty:** promise about quality of the property and guarantee truth of statements – a fact V knows but of which P is ignorant (Fraser-Reid)
 - **Express Warranty:** completed home – contained in K as to quality of property or building (clause 8)
 - **Implied Warranty:** unfinished home – for homes in progress or pre-builds, implied W that they will get completed unit as they understood
 - No implied W for completed housing (Fraser-Reid)
- Sales brochures amount to a warranty in law and part of inducement to K (Roberts v Montex)
- **Presumption of merger:** once deal closes, there is no recourse for W made after because it merges on closing
 - **NO presumption now – W survive closing**, unless express wording or clear intention in K that everything is finalized at closing (Fraser-Reid)
- Court will use equity to look beyond Clause 18 to find W if it induced party to enter into K
 - **Parole Evidence:** will look to surrounding circumstances to give effect to K, to resolve ambiguity, correct mistakes and show wrongful conduct

Is it a New Home not yet built?

- **Homeowner Protection Act:** new home warranty after leaky condos
 - **S.22 – must provide insurance within 10 years of occupancy permit for:**
 - Defects in materials and labour for at least 2 years
 - Defects in building envelope, including for water penetration, for at least 5 years
 - Structural defects for at least 10 years
 - **S.23 – if no insurance, statute protects new home** and developer is deemed to have agreed that the new home is free from defects in:
 - Material and labour for at least 2 years
 - Building envelope for 5 years
 - Structure for 10 years
- No implied W for completed home BUT there is implied W for incomplete home (Fraser-Reid)

Representation: He's not the Messiah! He's a very naughty boy!

- **Representation induces K** – dealt with pre-closing but can be pursued post-closing ([Fraser-Reid](#)) – **same tests as above**
- **Fraudulent Misrepresentation:** where active concealment, CE doesn't apply and misrepresentation will be fraudulent – to induce P to buy ([Allen v McCutcheon](#))
- **Negligent Misrepresentation:** post closing this is irrelevant EXCEPT if it leads to EIS, the property is entirely different than what you bargained for

Error In Substantialibus: Crucifixion? No, Freedom for me.

- **Mistake must be so substantial that it affects quality of the property** ([Hyrsky](#))
- Applies where there is an express W in K AND post closing which is not fulfilled in the quality of the property ([Redican](#))
- Substantial error such that party is **getting something they didn't bargain for OR a mutual fundamental mistake** in K ([Cherris Estate](#))
 - Court is unwilling to force parties to buy something different from what they thought they were getting
 - Where the property is something totally different than what they bargained for, there is EIS and rescission is remedy
- If V knew about or suspected latent defects but didn't disclose them, could make property totally different ([Schlamp](#))
- **Rescission as remedy available pre and post closing**

What are the Remedies Available?

- **S.24, Law and Equity Act** – court can relieve against all penalties and forfeiture, in granting relief can grant anything based on what is fair

What Happens Next?

Then you must cut down the mightiest tree in the forest with... A HERRING!!!

Election: From now on I want you to call me Loretta.

- Innocent party must elect to affirm or disaffirm the K:
 - **Disaffirm** = **accept the breach and agree K is terminated**
 - Seek damages
 - Walk away, deposit divided based on terms of K
 - **Affirm** = **affirmed validity of K, do not accept breach**
 - Seek SP (implies that K is still good)
- **LoPresti quote**

Anticipatory Breach: We have found a witch! May we burn her?

- **If one party to K, before completion date, clearly indicates an intention or inability to complete, the other party is entitled to treat them as being in default**
 - Could be evidence in statement or letters or conduct
- Where there is an anticipatory breach, **innocent party does not have to wait for closing date to sue** (Roy v Kloepper)
- Did the **breach strike at the heart of the agreement** that shows an intention not to be bound by the K? (Pavlis)
 - Must be a clear breach prior to closing that was fundamental to K – either **conduct that destroyed K or clear statement not to perform** (Pavlis)
- Must communicate the breach to the other party or K continues and party must fulfill obligations in K (Norfolk)

➔ **If one of the claims above is made out, there is anticipatory breach and can elect to affirm or disaffirm the K and pursue remedies**

Damages: Tis but a scratch!

NOTE: available pre and post closing

- **S.37, PLA** – P can get damages if there is defect in title

General Statements about Damages

- If breach of K where either party refuses to go through with K and someone suffers a loss as a result of the breach, may be compensated for loss
- Purpose is to **put innocent party in the same position as if the other party performed obligations and K was fulfilled** (Bowman)
 - Damages are compensatory to put party in same position as if K performed (Johnson v Agnew)
- **Out of pocket damages** must have been incurred as a result of V's actions (Wade)
- **Equitable Lien** – recognized where:
 - P has equitable lien on property for **amount of deposit**
 - V has **equitable M** if title transferred by haven't been paid purchase price

When are Damages Assessed?

- **No rigid rules about assessing damages** – court's discretion as to what date damages are assessed at (Ansdell)
 - Normally assessed at date of breach (Bowman) – ignore value at time of trial and look at time of breach
- **Date of Breach:** innocent party is compensated at this date and can then go into market place to find other property (Semelhago)
- **Generally assessed at time of the breach** – court may choose
 - Court will look at **overall circumstances and purpose of damages** to determine what would most fairly put innocent party in position they would have been in if K was performed (Bowman)
 - **Potential to have different time given circumstances** – falling market, V could get damages for difference between price at breach and amount actually sold for (Aldred)

Did the Party Mitigate their losses?

- Obligation of non-breaching party to mitigate losses (Hargreaves)
 - **Baud Corp**: Compensation follows from breach and duty is on P to take all reasonable steps to mitigate their losses – P cannot claim any damages that are due to their own neglect to take such steps
 - **Test to prove failure to mitigate**: (Baud Corp) – inform behaviour of reasonable person (Southcott)
1. After D breached, they failed to do something that they reasonably should have done
 - a. Party is required to pursue their available options and the onus is on D to prove that the act led to the loss (Hargreaves)
 2. If they had done that act, the loss caused, could have been avoided or reduced
 - BUT if you mitigate and get another house that is close/similar, may destroy claim to SP because it shows there is acceptable substitute (Serebrennikov)
- Sole purpose company must still mitigate losses (Southcott)

Rescission: Death awaits you all with big pointy teeth!

NOTE: available pre and post closing

- Parties are restored to original position pre-K (Redican)

Pre-Closing Rescission

- Rescission available for: (Cherris Estate)
 - **Fraudulent Misrepresentation**
 - **Negligent Misrepresentation**
 - **Error In Substantialibus**
 - If totally different than what P bargained for, rescission is available as remedy (Cherris Estate)

Post-Closing Rescission

- **Caveat Emptor applies post-closing unless there is EIS or fraud (Redican)**
- **P could rely on: (Hyrsky)**
 - **Breach of express W, breach of condition, EIS and fraudulent misrepresentation**
- Rescission available for:
 - **Fraudulent Misrepresentation**
 - **If active concealment, CE doesn't apply** and misrepresentation will be fraudulent so rescission and damages are available (Allen v McCutcheon)
 - **Error In Substantialibus** (possible to get to this where negligent misrepresentation led to EIS)
 - Fundamental mistake must be so substantial that it affects quality of the property and must be substantial element of K (Hyrsky)
 - Equity requires rescission where there is EIS
- **Can't get for all warranties – damages may be more appropriate (Redican)**
- **Can rely on Clause 18 only if it is brought to attention of the parties (Montext)**

Specific Performance:

We want... a SHRUBBERY! One that looks nice. And NOT too expensive

NOTE: only available pre closing

- **What is SP?**
 - Equitable remedy – courts prefer to award damages so SP is only available where damages are insufficient so SP depends on uniqueness of the property (Semelhago)
 - If seeking SP and damages, must be able to tender at all times
- **NOTE:** equitable remedy unique to real estate – damages should be sufficient but here, can order to go through with K

Can Party meet the Test to Get SP?

- **Party must show that they are ready, willing and able to complete transaction at all relevant times** – tender is evidence of readiness to perform (Semelhago)
 - a. Can show the other party is NOT ready, willing and able to complete

➔ If ready, willing and able to complete...

Is the Property Unique?

- **Uniqueness must be proven** (Semelhago, Serebrennikov)
- **Requirements to get:** onus on party seeking SP to prove (John E. Dodge)
 1. **Damages are insufficient** – courts would prefer to give damages
 2. **Property is unique** and there are no other acceptable substitutes
 3. **Innocent party mitigated their losses**
- **Additional considerations:** (696966 BC Ltd)
 1. Is there evidence that the **land is especially suitable for P?**
 2. Is there evidence that a **substitute is not readily available?**
 3. Are **damages comparatively inadequate** to do justice?
- **Party seeking SP MUST be ready, willing and able to complete on closing** – have purchase price or ability to clear title (Norfolk v Aiken)

Specific Case Law Considerations:

- **Cormack:** Desires of P and how they intend to use the land can be enough – intention to raise horses so size of property was sufficient to be unique
- Land is unique to get SP, construction of house is NOT unique (Tropiano) – got SP for land but damages for breach of agreement to build house
- **Rostrum Developments:** Commercial properties will generally not be unique enough – residential properties are easier to prove uniqueness
- Commercial Context – uniqueness will be found in land and financial circumstances or arrangements of P (0771252 BC Ltd.)
 - Generally not considered unique but can still prove it depending on the circumstances

Did the Innocent Party Mitigate their damages?

- **Duty to look for adequate substitute**
 - BUT if you mitigate and get another house that is close/similar, may destroy claim to SP because it shows there is acceptable substitute (Serebrennikov)
 - **Test to prove failure to mitigate:** (Baud Corp)
 1. After D breached, failed to do something that they reasonably should have done
 2. If they had done that act, the lost caused, could have been avoided or reduced
 - P must take all reasonable steps to mitigate loss arising from breach (Baud Corporation, Toronto School Board)
 - Must have fair, real and substantial justification for claim to SP in order to not take steps to mitigate
 - May convert SP to an action for damages at any time up to trial (Semelhago)
- ➔ If entitled to SP, consider if party can get abatement OR damages in addition to SP
- ➔ If cannot get SP, consider if party can get damages in lieu of SP

Entitled to Damages in addition to SP?

- Out of Pocket expenses **incurred by P arising from lack of performance by V** (Wade)
 - Damages must have been incurred as a result of V's performance (additional moving costs, rent) (Wade v Chilko Ranch)
- Discretionary Award

Entitled to Damages in Lieu of SP?

- Awarded to someone who **would be entitled to SP but is unable to get SP due to circumstances beyond their control** (V sold property to bona fide P for value without notice)
 - Equitable principle
- Assessment at date of breach BUT, if K kept alive until trial, then may make sense to assess damages at date of trial instead of breach (Semelhago)

Abatement: Oh let me have just a little bit of peril?

NOTE: only available pre closing

- Party wants to go through with K but there is problem with property so seek **reduction in purchase price to the extent of the damages**
 - Compensation for the problem by a reduction in the purchase price by the amount of damages
- Better than damages because do not have to collect the amount
- Can only get pre-closing so that amount comes off purchase price before paid and reflects decrease in value because of defect (Serebrennikov)