Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

What objective structures govern the problem, and what is at stake/what considerations will guide the court?

Classical Theory: O*bjective* agreements (not parties' private thoughts). Allow people to contract freely and maximize their private advantage.

Neoclassical Theory: Not all parties are equal. Some are vulnerable and can be taken advantage of. Individual ideals of classical contract v. communal standards of responsibility.

Interest	Purpose	Measure	Justice
Restitution	Prevent unjust enrichment of Δ	Benefit to Δ (usually equal to what π lost)	Corrective
Reliance	Prevent harm to π	Loss to π	Restorative
Expectation	Secure benefit to π	Expected π benefit	Distributive
Fuller & Perdue [1936] Defined 3 kinds of damages (aim is compensation, not punishment)^			

K formation viewed **objectively:** Smith v. Hughes (1871) (provable intention/action)

Offer

- **Actual offer?**
  - Invitation to treat is not offer Pharm. v. Boots (1953) (display of prices & goods is invitation, giving cashier $ is offer, taking payment is acceptance)
  - Offer existed based on interaction → K:
    - Harty v. Gooderham (1871) and Canadian Dyers v. Burton (1920)
    - Agreement to agree is not enforceable. Hillas & Co. v. Arcos LTD (1932) Contract upheld in Hillas because more was found, parties intended to agree and thought they had done so.
- Offer communicated directly?
  - Blair v. Western Mutual (1972): stenographer case
- **Intention to create legal relations**? (Animus Contrahendi can be seen as 4th component of K, along with offer, consideration, acceptance)
  - The rule is applied using factual presumptions
  - Presumption that commercial agreements are intended to create legal relations, while social, domestic and family agreements are **not** intended to create legal relations (absent clear evidence to the contrary)
    - Contract law does not exist in family relations; love & affection are not consideration (Balfour)
    - In **familial relationships** there is a presumption of fact **against** intention to create legal relationship. (test is objective) Jones v. Padavatton (1967, Eng. C.A.)
    - Commercial parties can agree that a business relationship will not give rise to legal relations (Rose & Frank v. Compton)

        - Comfort letters (issued by a parent company who does not wish to guarantee formally the debts of a subsidiary) do not impose indemnity obligations on the parent company (TD Bank v. Leigh)
    - Money deposited as preparation for K proves intent Carbolic Smoke Ball Co (1892)
- **Clear Terms? (see section on uncertainty below)**
    - Three categories of **uncertainty**
    1) **Vagueness/ambiguity** ("I will buy your eggs if good")
    2) **Incomplete terms** (3 Ps: parties property, and price – who, what and how much)
    3) **Agreements to negotiate** (courts traditionally won't enforce agreements to negotiate/agree)
- **Offer dies if:**
    - **rejected**
        - counteroffer = rejection of initial offer Livingstone v. Evans (1925)
    - **expired**, after a reasonable time (contextual)
        - If an offer contains no express provision limiting its duration, it terminates after **lapse** of a 'reasonable time' Barrick v. Clark (1951)
            - Mode of acceptance must be faster or no less advantageous than mode suggested by the offeror (though sometimes must be exact same mode). Eliason v. Henshaw (1819)
        - If offeror dies then offer dies with him/her (obiter in Dickinson v. Dodds)
    - **revoked <u>before</u>** acceptance
        - **notice may be required** (protecting reliance): Byrne v. Van Tienhoven (1880) Postal acceptance rules does not apply to revocation of offers.
        - revocation communicated to agent (indirect notice) before offer deadline, can't be accepted Dickinson v. Dodds (1876)
- Offeror can stipulate how/when accepted ("**master of the offer**") Eliason v. Henshaw (1819)
- Offer without consideration is "nudum pactum" Dickinson v. Dodds (1876)
- **Termination of Offer**
    - If not accepted within reasonable time (Barrick v. Clark)
    - If offeree does not comply with terms of offer (Eliason v. Henshaw)
    - Felthouse v. Bindley (1862): Silence ≠ acceptance

Battle of the Forms (as read through Butler Machine Tool Co. (1971))

1. First shot rule
    - 1st set of terms governs (if no disagreement) <u>if terms say "cannot be modified</u>"
2. Last form wins. COMMON LAW
    - Offer, counteroffer, counteroffer…
    - Ex. seller's form w/ delivery of goods/services would dominate
3. Third approach (Denning + U.S. Uniform Commercial Code 2-207) <u>Reconcile terms</u>
    - Dispute: court replaces/implies reasonable terms. Agreement constituted by terms common to each party's respective forms, together with implied reasonable terms.

- **Not** adopted in UK or Canada

Consideration

The "price" paid for a promise (can be lots of things – anything of value, or giving up a right/forbearance on a claim) but cannot be *illusory*

- Consideration is a *legal formality*. Serves numerous functions:
  1) Evidentiary function (evidence of the existence of a K)
  2) Cautionary function (ensure future parties deliberate before entering into a K!)
  3) Channelling function (simple, external test of enforceability)
- Offer without consideration is "nudum pactum" Dickinson v. Dodds (1876), Dalhousie
- Courts distinguish **moral** and **legal obligation** (past consideration may compel someone morally to fulfill their promise, but no legal requirement).
- **Can be:**
  - Action
  - Forbearance of action
    - forbearance or settlement can be valuable consideration at common law (if honest and serious intention to sue) and **not** where the claim is invalid (D.C. v. Arkin)
  - Exchange of something of **value in eyes of the law** (no matter how small)
    - May be **nominal** (Williams v. Roffey) courts can latch onto anything as consideration. In Nav Canada, judge argues against this "hunt and peck" theory
    - £1 Thomas v. Thomas (1842). Adequacy of consideration unimportant
    - post-dated cheques as a negotiable instrument (was new consideration) Foot v. Rawlings (1963)
    - **Mutual promises** (Woods v. Lucy, 1917)
  - "Some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other" Currie v. Misa (1875)
  - A **promise to a third party** to perform an existing contractual obligation owed to another is good consideration Pao On v. Lau Yiu Long, (1980)
  - Promise to **pay more** where it confers **benefit/obviates disbenefit** to promisor Williams v. Roffey Bros. and Nicholls Ltd. (1991)

- **Cannot be**:
  - **Past consideration**
    - Past (gratuitous promise) Eastwood v. Kenyon (1840)
    - **UNLESS** act/performance done by **request of promisor** (Lampleigh v. Brathwait (1615)) - If person A requests a service, person B performs the service, and later person A promises to pay for the service and then reneges on the promise – the doctrine rejecting past consideration won't apply.
    - K modification needs **fresh consideration** Gilbert Steel Ltd. v. University Construction Ltd. (1976)

- **Fresh consideration may be unnecessary**. Law must protect legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable Greater Fredericton Airport Authority Inc. v Nav Canada (2008)
- **Gilbert Steel or NAV??** Steel is still good law, but Nav Canada has been out for 6 years and is being cited more and more frequently – will the SCC overrule Gilbert Steel and accept Nav Canada?

- **Reliance**
  - Detrimental reliance invalid basis for enforcing gratuitous promise Combe v. Combe (1951) and Dalhousie College (1934)
- **Voluntary courtesy**
  - (unless moved by suit/request of party giving assumpsit Lampleigh v. Brathwait (1615))
- **Motive**
  - Thomas v. Thomas (1842)
- **Promise to complete pre-existing legal duty** Stilk v. Myrick [1809] UNLESS at request of promisor (Lampleigh v. Brathwait (1615)
  - or promise to complete **public duty**: Traditional view that if, in exchange for a promise, the promisee agrees to perform a public duty (e.g. cop, teacher), there is no consideration – they are simply doing their job.
  - Stilk v. Myrick has fallen out of favour with modern courts
- A **seal** does not itself "import" or provide consideration

Acceptance

- **bilateral** contract: bound by word/return promise
- **unilateral** contract: bound by performance/action
  - Reward contracts: offers accepted by performance
    - Carlill v. Carbolic Smoke Ball Co (1892) Offer accepted by performance/intent to be bound
    - Can't revoke once performance begun Baughman v. Rampart Resources (1995)
    - "Results guaranteed" (damage incurred). Puff, but binding Goldthorpe v. Logan (1943)
    - Williams v. Carwardine (1892) motive unimportant; condition of unilateral K performed, π entitled to reward
    - R. v. Clarke (1927): No intention to accept or reliance →no reward (despite fulfilling act requested by unilateral K)
    - Dawson v. Helicopter Exploration Co. (1955) bilateral K assumed in business dealings
    - Errington v. Errington and Woods (1952) & Ayerswood Development Corp. v. Hydro One Networks (2004) unilateral offer can't be revoked once performance has commenced (modern doctrinal development)

- **Intent to be bound**? (req: clear manifestation)
  - Carbolic Smoke Ball Co (1892) actions prove intent (deposit)
- **Does it match** the offer? It's a **counter-offer** otherwise → last shot rule.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- **When:** before offer **expires**/is **revoked** (exceptions: unilateral)
  - Eliason v. Henshaw (1819): Method of commun. stipulated by offeror
    - Offeror is master of terms
  - Felthouse v. Bindley (1862): Silence ≠ acceptance
- **How: Communicate** acceptance
  - Saint John Tug Boat (1964) acceptance may be implied through conduct
  - Method stipulated by offeror Eliason v. Henshaw (1819)
  - **Postal acceptance rule (an exception)**
    - **From time posted, not time received** Household Insurance Co. (1879)
      - **STILL, K can stipulate:** Holwell Securities Ltd. v. Hughes (1974) by mail, but contract had to be received, wasn't → p.a. rule doesn't apply
      - P.a. rule doesn't apply to notice of revocation of offer Byrne v. Van Tienhoven (1880)
  - **Instantaneous Communication**
    - K formed in location finalizing communication of acceptance (Brinkinbon v. Stahag (1983, U.K.)
    - Mail: sending location
    - Phone, fax, telex, emails: receipt location
  - S. BC Electronic Transactions Act
    - Unless otherwise specified:
      - Electronic info/record is **sent** when it enters a system outside the originator's control or is capable of being retrieved (if parties are in same system)
      - Info/record capable of being retrieved **is received**

Uncertainty Clear terms? Parties, property, price?

- Find meeting of the minds (*consensus ad idem*)
  - Proper legal effect for clauses understood/intended by both to have legal effect Brown v. Gould, (1971)
    1. Void if provision
       a. has no meaning
       b. has several meanings none of which can be preferred to the others
    2. If parties provided machinery which breaks down, court won't substitute it own, BUT if none provided, court may make the valuation itself.
  - Perform K in accordance w/ **reasonable expectations** created by it Mesa Operating Ltd. v. Amoco Canada Resources Ltd. (1994)
  - K enforced despite uncertainty. Parties intended to agree and thought they had. Hillas & Co. v. Arcos Ltd. [1932]
  - Courts make **every effort** to find meaning in words used by parties R. v. Cae Industries Ltd. (FCA, 1986)

➢ May & Butcher LTD. v. R [1934]: critical term undetermined → no K

➢ Foley v. Classique Coaches [1934]: term unclear but determinable → enforces K.

➢ Both are **agreements to agree**. Different facts → different rulings. Courts usually don't enforce if essential terms are absent from K.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Promises

- Can be enforceable
    1. As a contract
    2. As a deed/seal/covenant/formal contract/specialty (signed, sealed, delivered)
        - Royal Bank v. Kiska (1967, O.R. CA), Maj accepted the word "seal" written bc consideration and absence of seal was non-issue. But the dissent (Laskin) argued to preserve the formality of seals.
        - A signature in e-mail format where the sender types their name at the bottom is considered valid.
    3. Sometimes, by way of estoppel
- Common law **reluctant to enforce gift** promises (Dalhousie, Brantford)
- Gratuitous promises in post-contractual modification are unenforceable. K varied without consideration Gilbert Steel Ltd. v. University Construction Ltd. (1976) **lead decision**
- "Results guaranteed" (damage incurred) Goldthorpe v. Logan (1943)
- Detrimental reliance is an invalid basis for enforcing gratuitous promise Combe v. Combe (1951)
- Mutual promises are consideration (Woods v. Lucy, 1917)
- Return promise/performance may consist of
    a) an act other than a promise, or
    b) a forbearance, or
    c) the creation, modification, or destruction of a legal relation
- Promises to pay more
    - Cannot be enforced by estoppel
    - A promise to pay more is not usually binding, per Gilbert Steel
    - Binding with consideration (benefit/obviates disbenefit) to promisor Williams v. Roffey Bros. and Nicholls Ltd. (1991)
- Promises to accept less: (accepted <u>in satisfaction</u>):
    - Must come from proper authority Re: Selectmove Ltd, Court of Appeal (1993)
    - A promise to accept less is binding, per High Trees
    - **not revocable once entered into** Bank of Commerce v. Jenkins (1888) and Judicature Act R.S.A. 2000, c. J-2 s.13 (1)
        - **unless** The debtor hasn't commenced performance, or
        - **the** debtor *has* commenced performance but fails to continue within timeline provided for in agreement, AND it would be unreasonable in the circumstances for the creditor to give the debtor more time to remedy the default
    - Different than friendly indulgence John Burrows Ltd (1968)
    - Rescission after partial performance Judicature Act R.S.A. 2000, c. J-2 s.13
        - Needs **accord** and **satisfaction**
        - Accord is agreement to discharge obligation
        - Satisfaction (ie. nominal consideration) makes agreement operative
            - I may need to be something other than $$. I can give you $5 and my old shoes as consideration to erase a $10 debt

- Agreement to accept lesser sum in satisfaction for whole amount is not good consideration (in creditor/debtor situations) (Foakes v Beer, Re Selectmove)
- BUT a promise to accept a smaller sum in discharge of a larger sum, **if acted upon**, is binding notwithstanding the absence of consideration under promissory estoppel
- Law and Equity Act in BC: agreement to accept partial payment is enforceable if expressly accepted by creditor in satisfaction of the debt.

Common law estoppel: A party is barred from denying or alleging a certain fact or state of facts because of the party's previous conduct, allegation or denial. Representation as to **existing fact**.

Promissory estoppel/equitable estoppel/estoppel by representation: question of representation as to **future conduct** (i.e. a promise is made about future conduct): "I will not take that action".

Promissory Estoppel: Sword or Shield?

The principle doesn't create new causes of action where none existed before

- Modern **concept** of promissory estoppels established in Hughes v. Metro Railway
- Modern **law** of promissory estoppels est. by Lord Denning in High Trees
  - promise intended to create legal relations
    - ^ intention can be inferred from reasonable reliance by the promise. Owen Sound Pub. Library Bd. v. Mial Developments Ltd. (1979)
  - to knowledge of promisor was going to be acted on
  - and which was in fact so acted on.
    - and injustice can be avoided only by enforcing the promise.
  - ➢ In sum: A clear and unequivocal promise/representation as to future conduct which indicates that the promisor will not enforce all his rights under the existing K due to said promise. The promisee must then rely upon that promise in a way that makes it unconscionable/inequitable for promisor to revert and insist upon their full contractual rights
- Traditional, doctrinal use of promissory estoppels as a shield (a promise to accept less is binding, per High Trees, and a promise to pay more is not binding, per Gilbert Steel).
  - **Estoppel cannot be used** as a cause of action to enforce a promise to pay more – Gilbert Steel v. University Construction (1976)
  - Parties can be prevented from insisting upon strict legal rights when it would be unjust to allow enforcement, based on prev dealings bw the parties**.** Central London Property Trust Ltd v. High Trees House Ltd. (1947) K-mod to accept less was temporary. (waiver only meant to cover wartime period). Facts were opposite in Alan v. El Nasr (1972)
- Can't insist strict legal rights after waiver, when unjust bc of dealings bw parties. Can't create new causes of action where none existed before (**estoppel is not a sword**). Detrimental reliance is **not valid basis** for enforcing otherwise gratuitous promise Combe v. Combe (1951)
- Estoppel used, even though **no existing legal relationship** (pointed shield). Implied promise to complete the K was clear encouragement/inducement for Δ Waltons Stores (Interstate) Ltd. v. Maher (1988) **TEST BELOW**
- **Equitable Estoppel:** Reliance

- Promise to accept smaller sum **if acted upon** is binding even in the absence of consideration. Absence of consideration means no estoppel, equity steps in Foakes v. Beer
- If there is injurious reliance, can invoke estoppel (as long as there was an existing legal relationship Robichaud v. Caisse Populaire) (even without legal relationship Waltons Stores)
- Encouragement to assume a contract would come into existence/promise would be performed AND other party relied on that assumption to this detriment to the knowledge of the first party Attorney-General (Hong Kong) v. Humphrey's Estate (1987)
- Nature of action/inaction may be insufficient to give rise to equity. Not every case of reliance means inequitable to enforce rights. W.J. Allan v. El Nasr (1972)
- Reliance, but **promise not intended/expected to be binding** = no estoppel N.M. v. A.T.A. (BCCA, 2003) (no pre-existing legal relationship/no expectation as to a legal relationship)
    - Contract law does not exist in family relations; love & affection are not consideration (Balfour)
    - In **familial relationships** there is a presumption of fact **against** intention to create legal relationship. (test is objective) Jones v. Padavatton (1967, Eng. C.A.)

Brennan J. in Walton Stores: to establish equitable estoppel, must be proven that:

1. plaintiff assumed or expected that a particular legal relationship bw π and Δ exists or will exist between them, and in the latter case that the Δ is not free to withdraw from the expected legal relationship (distinguishing fact between Walton Stores and N.M. v. A.T.A. (BCCA, 2003))
2. Δ has induced π to adopt that assumption or expectation
3. π acts/abstains from acting in reliance on assumption/expectation
4. Δ knew or intended for π to do so
5. π's action/inaction will cause detriment if the assumption/expectation not fulfilled
6. Δ has failed to act to avoid that detriment whether by fulfilling the assumption/expectation or otherwise

Waiver - the manifestation of the broader principle of promissory estoppel.

- "If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so." - Lord Denning in Alan v. El Nasr (1972)

- **requires:**
    - Saskatchewan River Bungalows **TEST**
        - Unequivocal, conscious relinquishment of rights (Δ did not do this in Saskatchewan River Bungalows) **and**
        - full knowledge of rights.
- Friendly indulgence ≠ intent to waive strict legal rights John Borrows v. Subsurface Surveys (1968)

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- If one party **leads** other to suppose that strict K rights won't be enforced, enforcer can't enforce if it would inequitable. Hughes v. Metropolitan Railway Company (1877)
- Waiver **can be retracted** and strict legal rights reinforced if:
  - **reasonable notice** is given to the party in whose favour it operates (protecting reliance) (Saskatchewan River Bungalows, Int'l Knitwear)
    - In Alan v. El Nasr, Denning also held there is no requirement for detrimental reliance. This position has NOT been accepted. **Must prove detrimental reliance** to prevent a party reverting to its strict legal rights (Societe Italo-Belge). Detrimental reliance may be formal/informal/inferred from conduct Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (1994)
  - **or** waiving party makes it plain in their conduct that they will thereafter insist on their strict legal rights Alan v. El Nasr (1972)

Privity of Contract

Doctrine of privity: K can neither confer rights nor impose obligations on a third party.
Tweddle v. Atkinson established CL maxim of privity of K (overturned Provender v. Wood)

This **prevents two types** of people from enforcing a k:

a) Complete strangers to the K (uncontroversial)
b) Third party beneficiaries to the K (controversial – abolished elsewhere except Canada)

- 3P has no rights under K & cannot enforce K, even when purpose of the K is to benefit them

- Policy rationales: 3P not a party, no consideration, and 3P could prevent modification, since 3P rights could be seen as having crystallized. Should not be able to sue if cannot *be* sued.
  - Economic: freedom of K, encouragement of market-based concepts, supported nascent capitalism, self-reliance, minimizes liability

➢ Avoiding the Contractual Box

- **Trust** or **Assignment**: categorize 3P as beneficiary (trust) or as assignee (assignment)
- **Agency:** if K between A and B, view B as contracting agent for 3P, so that 3P is in direct contractual relationship with A
- Law and Equity Act, s.36: Allows an **absolute assignment**, ie. To pass/transfer legal right to the debt – brings assignee within K to bring action directy. You can assign your debt to someone else, but you can't assign an obligation **to someone else**

Beswick v. Beswick: Lord Denning's **failed attempt** to overrule the privity rule in Tweddle
London Drugs relaxed rule of privity of K. Creates an **exception based on intention** of parties.
Edgeworth: also looks to **intention of parties** (unlike London Drugs, here there was no intention for the exclusion of liability clause to cover the third parties)
Fraser River: **further relaxation** of privity of K (extends beyond employer-employee situations)

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

The fate of the employee: not protected in Greenwood, but protected in London Drugs. What problems continue? Employee obtains 3P benefits **only if employer has insurance**, and **even if** employer has insurance, employer might not ensure it extends to employees.

- What can employees do?
    - Self-insure, obtain indemnity from employer, ensure insurance coverage extends to employees, ensure employee benefits from waiver of subrogation.

London Drugs **TEST**:
SCC relaxes doctrine of privity in context where employee is third party beneficiary to exclusion clauses between employer and customer, provided:

a) Limitation of liability expressly or impliedly extends benefit to employee
b) The employee is acting in the course of their employment **and** providing the very services provided in the contract when the loss occurs.

Fraser River v. Can-Dive extends London Drugs test beyond employer-employee situations. 3P rights should be enforced once their rights have developed into an actual benefit.

- Further relaxation of rule of privity: if 3P was expressly given rights under K, cannot take them away so quickly. Potentially restricts freedom of K, but is worth it.
- Policy considerations: Prevent unreasonable outcomes, keep up with commercial realities

Agreement to Negotiate
Common law (generally) **doesn't enforce** agreements to negotiate

- No duty to negotiate in good faith unless K provides benchmark/standard Manpar Enterprises v. Canada (BCCA, 1999). Look to officious bystander test, or look to give business efficacy to K. Concept of a "**duty to negotiate**" is unworkable without objective benchmark/standard against which to measure the duty. Courts will not imply terms simply b/c they seem reasonable or satisfactory.
- Concept of good faith is "inherently repugnant to the adversarial position" of negotiating parties Walford v. Miles (H.L., 1992)
- No tort duty of care in commercial contractual negotiations Martel Building v. Canada (2000, SCC)
- Too subjective/uncertain to be justiciable Wellington City Council v. Body Corporate 51702 (NZCA, 2002)
    - too uncertain (what is the content of the duty?)
    - remedy? (no basis upon which to determine damages for breach)
    - inconsistent with right to pursue self-interest
- Requirement in K to negotiate in good faith = **standard for measuring efforts**, but **does not** oblige them to succeed (form contract) Empress Towers v. Bank of Nova Scotia (BCCA, 1990) (benchmark of "market rental")
- Similar to Griffin v. Martens (1988) (can't withhold satisfaction unreasonably)

Extra
Coercion/economic duress if:
Greater Fredericton Airport Authority Inc. v. Nav Canada, [2008]:

1. exercise of pressure (a demand or a threat) → promise

2. pressure was such that the coerced party had no practical alternative but to agree.

Then, to determine if coerced party legitimately consented to K, must consider:

1. was promise supported by consideration?
2. did coerced party make the promise "under protest" or "without prejudice"?
3. did the coerced party take reasonable steps to disaffirm the promise as soon as possible?

Rescission

Courts use **equitable remedy** to "set aside" K because of a defect in its formation (misrepresentation, duress, undue influence).

Distinguish rescission from:

a) The **termination** of a K by agreement of the parties, or in accordance with the terms of the K
b) The right of a party to **repudiate** when the other party breaches (i.e. is no longer bound by the K and can have an action for damages)

- **Courts rescind; parties terminate** (together or unilaterally) and **repudiate** (unilaterally, when one party breaches).
- **Expectation damages** substitute money for what *should* have happened under K, while **rescission** determines the contract ought not be enforced, thus damages are to *restore parties to their pre-contract position*

Limits to Rescission

1) In real estate contracts, **execution of a contract constitutes a bar to rescission**. Rescission must be sought *before* performance or execution of K.
2) Promisee must be able to give back what he got from promisor
    - However, Court used discretionary power to deviate from this in Kupchack v. Dayson Holdings (1965) because there was **fraud** (property couldn't be returned; court ordered $ instead)

Misrepresentation

- No rescission for innocent misrep. if π knew facts were false **or** did not rely upon them. Redgrave v. Hurd (1881)
- Those who accept false statements as true are **not deprived of remedy** merely because they **could have** found out on their own that the statements were false Redgrave v. Hurd (1881)
- Statement of opinion can be taken as a statement of material fact if speaker knows much more about the subject, implication is that listener should accept what they're being told, as the speaker knows facts which justify his opinion Smith v. Land and House Property Corp (1884) (C.A)

Innocent Misrepresentation: An erroneous, false statement, but the speaker did not know it was false, and may even have thought it was true.

- Conflicting considerations about what to do with such statements:

- **No relief?** (like mere puff, caveat emptor; if a fact is important, then it should be made an express term of the K)
    - Many statements made in K formation – can the speaker realistically guarantee them all?

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- **Relief?** (protecting unjust enrichment)
- **Remedy:** Limited to rescission → innocent party can apply to have K rescinded; **no damages**, but benefits will be transferred back (parties in pre-K position).
    - No rescission if the K is executed (too late! But can still make separate claim for damages), or restoration to original position not possible
- **Doctrinal requirements for innocent misrepresentation:**
    a) Representation of fact turned out to be false;
    b) Must be material (important);
    c) Must induce the making of K (this will be presumed);
    d) Innocent party did not know the correct facts.

Non-disclosures as misrepresentations:
General rule that a party negotiating a contract is **not subject to a duty to disclose** material facts. **Silence/non-disclosure is not usually misrepresentation.** (Hard to reconcile with Bank of BC v. Wren).
Exceptions:
- Half-truths
- Active/deliberate concealment
- Changing circumstances which affect the truth of an earlier statement
- Contracts arising out of fiduciary relationships, or contracts "of utmost good faith" (e.g. insurance contracts - active duty to disclose)

Warranties: a K term that parties *intend* to be binding (a contractual promise), the breach of which gives rise to damages (expectation damages).

Collateral contract/warranty: Courts sometimes adopt a **two-contract approach** (especially when part of the K is written and part of the K is oral)
- e.g. Sale of a horse, which is sold as a "racing horse". K1 = contract for sale of horse. K2 = if you enter into K1, I promise it is a racing horse (unilateral K, performance is entering into K1)
- A way of avoiding the "written contract rule", i.e. a way to bring oral statements into the K → if we can enforce K1, then we can enforce the oral terms as a collateral contract/warranty
- This is *collateral* to the main contract (which was put in writing). If it is made after the main contract is concluded, it is a contractual modification.
- Strict approach taken to establishing warranty/collateral contract in Heilbut
- Lambert discusses in Gallen v. Allstate Grain: This approach is for LEGAL ANALYSIS only.

Modern doctrinal test for a warranty (Dick Bentley)**:** A warranty is a representation made in the course of dealings for the purpose of inducing the other party to act, and it does induce entry into a contract (reliance), and the reliance is reasonable.

Sale of Goods Act: Once a good has been accepted and after the period of reasonable inspection, a condition may only be treated as a warranty (relevant in Leaf v. Int'l Galleries).

- Before you accept goods and you discover a breach of a condition, you can repudiate the contract. Otherwise, once you've accepted the good, such breach can only be as a warranty and you can only sue for damages (too late to repudiate)
- **Policy**: Once you've had something for a while, you can't go back and return it – only damages

Distinguishing between innocent misrepresentations and warranties:

- This is very important, because innocent misrepresentation gives rise to **rescission**, whereas warranty gives rise to **damages**

TEST (Heilbut): **objective assessment of the intentions of parties**, based on the totality of the evidence.
Did they intend the statement to be a binding promise? Consider:

1. **Timing of Statement**: The earlier the statement was made in the negotiations, the less likely that it was a warranty, or indeed even a misrepresentation (puffery in early stages is common and part of sales talk)
2. **Importance of statement**: Root of the contract? How important was the statement to the person to whom it was made – to what extent did it induce formation of the contract?
3. **Was the speaker aware** of the importance of the statement **(foreseeability of reliance)?**
4. **Relative knowledge and skills of the parties**: Does the person making the statement have a special skill or knowledge of the facts upon which the other relies? In Smith v. Land and House, a potential statement of opinion was taken as a statement of fact because of the disparity of knowledge between parties.
5. **Content of Statement**:
    a. **How specific or vague is the statement?**
    b. **Opinion or Fact**: Was the statement merely and obviously an expression of opinion, or was it offered as a statement of fact? Obvious statements of opinion are usually not warranties. (again, see Smith v. Land and House)
6. **Context**: Formal statement, or offhand/casual opinion? Central role in negotiations or not?
7. **Have the parties taken the trouble to reduce the contract to writing**? If yes, then the parties had an opportunity to incorporate the statement as a term of the contract. (Courts reluctant to add oral terms to written agreements, also the concern for using concurrent contract analysis)
8. **Disclaimers**: Did the speaker say anything as a disclaimer? Was there an exclusion clause?
9. **Price/consideration**: What does the price tell us? Does it suggest puffery? Does it provide info about reasonable expectations re: the quality of product/service provided? (e.g. buying a "gemstone" for $5.00 is different from buying the same stone for $5000).

Statutory Reform

- Arguments to allow for better remedies (i.e. damages) in cases of misrepresentation, to better **protect the buyer** (innocent misrepresentation is inactionable in contract and tort law, only rescission possible, and even then only if contract not performed)

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- Arguments to remove execution of K as a bar to rescission and give court discretion to award damages in cases of rescission

Test for repudiation, established in Hong Kong Fir:

- "Does the occurrence of the event deprive the party who still has undertakings to perform of **substantially the whole benefit** which he was intended to obtain as consideration for performing his obligations?"
- When event occurs due to default of one party, that party cannot rely on this test to relieve himself of the performance of any further undertakings and the innocent party (though entitled to) need not treat the event as relieving him of the performance of his own undertakings. (a man shouldn't be able to take advantage of his own wrong)
- If event occurs as result of default of **neither** party, each is relieved of further performance, and their rights in respect of undertakings previously performed are now regulated by the Law Reform (Frustrated Contracts) Act, 1943
- The correct **test** to determine if a breach should lead to repudiation is to look at the events which have occurred as a **result of the breach** and to decide if these events deprived the party attempting to repudiate of the benefits that it expected to receive from the contract (the breach must lead to the party not being able to obtain all or a substantial proportion of the benefits that they intended to receive by entering into the contract) - if they do, then repudiation is in order, else only damages can be awarded.

Tendering:

- Leading case: R. v. Ron Engineering (SCC, 1980)
  - Contract A governs tendering process.
  - Offer = call for tenders
  - Acceptance: submission of the bid
  - Accepted bid means the bidder must enter into Contract B (actual goods/service contract)
    - Can't accept non-compliant bid
    - Often, privilege clause: no obligation to accept lowest bid
  - ➢ Court may say no Contract A: gauging interest/negotiating → simply categorized as invitations to treat

Key Cases

Pharmaceutical Soc. Of GB v. Boots Cash Chemists (1953) QB (1953) All ER

- An invitation to an offer is not an offer. Display is like an advertisement, when the customer brings goods to cashier it's an offer, acceptance is cashier taking money.

Facts: Pharmacist had to supervise sale of drugs. Supervised from cash desk. At what point in a self-serve store is there acceptance of offer? Is the customer bound to purchase once they place item in their basket?
Principle: Goods on display are *invitation to treat*, not an *offer*. Customer makes an offer when they take the goods to the register. Cashier accepts by taking money.

Carlill v. Carbolic Smoke Ball Co (1892) Offer accepted by performance/intent to be bound

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Facts: Advertisement guaranteeing smoke ball would prevent influenza, followed by offer to pay anyone money if they used smoke ball properly and still got any disease. Plaintiff used it, got influenza, and asked for the money. Defendants claimed statement was mere *puff*, thus unenforceable.
Held: Not mere puff. This was an offer which was to be acted upon. Just b/c a promise is *extravagant* doesn't mean it shouldn't be acted on or that it shouldn't bind the promisor.
Principle: This was a **unilateral k**, i.e. an offer to the world which becomes a contract when someone accepts through performance. Differentiates between mere offers to negotiate/offers to receive offers (not binding) versus a unilateral offer to the world to be completed through performance of a condition.

- Usually, notification of acceptance of offer necessary, but here offeror implied notice was not necessary

Dawson v. Helicopter Exploration Co. (1955) bilateral K assumed in business dealings
Facts: Dawson staked mineral deposit, communicated with def. to explore region. Def. said would contact Dawson (overseas on military duty) when pilot available. Pilot became available, but def. said claim didn't seem suitable for an operation and Dawson shouldn't depend on them. Dawson never responded. Def. later contracted w/ another party to develop area. Dawson learned of this & sued for breach of K.

- Respondent argued *unilateral* K to be accepted by performance (i.e. Dawson locating claims) and could therefore be revoked before performance was complete.

Issue: Was there a valid offer and acceptance to form a K?
Held: Finding for plaintiff. Bilateral K existed. Plaintiff never intended to abandon his rights under the K.
Principle: Where possible, courts will find **bilateral K** for business efficacy purposes and **policy reasons** (protect offeree's reliance/prevent offeror from revoking offer at last minute, prevent defendant from acting opportunistically by unilaterally excluding Dawson).

Dickinson v. Dodds (1876, UK)

- Revocation communicated to agent, acceptable as indirect notice under agency laws
- If offeror dies then offer dies with him/her (obiter in Dickinson v. Dodds)
- Postal acceptance rules does not apply to revocation of offers.
- revocation communicated to agent (indirect notice) before offer deadline, can't be accepted Dickinson v. Dodds (1876)
- Offer without consideration is "nudum pactum" Dickinson v. Dodds (1876)

Facts: On Wednesday, def. Dodds gave plaintiff Dickinson offer to sell house. Offer to remain open til Friday. On Thursday, Dodds discovered indirectly that Dickinson had offered house to a third party, who accepted. Dodds tried then to accept the offer to buy the house, but Dickinson said it was too late.
Issue: Was def. bound to hold offer open til date specified? Does revocation have to be directly communicated by offeror to offeree?
Held: No on both counts. Offer was revoked as soon as third party accepted offer. Dodds was not bound to hold the offer open til Friday. Too late for Dickinson to accept offer – no "meeting of the minds" b/c Dickinson knew, though indirectly, that Dodds had revoked the offer.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Principle: A promise to hold an offer open is not binding unless consideration given for the promise.

- Offeror can withdraw offer at any point until offeree has accepted it. Offeree must have knowledge of a revocation, but explicit communication is not required (offeree can learn of it indirectly).

Foley v. Classique Coaches (1934, Eng. CA) –uncertainty of terms, negotiate in good faith
court enforces provision that price tbd by parties "in writing from time to time" (reasonable market price is determinable). Plus, Δ acted opportunistically in breach after operating under K for 3 years
Facts: Def. agreed to buy land from Foley and would only buy petrol from them; price of petrol not specified (price to be agreed on "from time to time"); after 3 years defendants went elsewhere for petrol.
Issue: Does the fact that no price quoted mean the K was void for uncertainty?
Held: No. K enforceable, despite price not being specified.
Principle: Actions/intentions of parties are enough to enforce a K that is missing an essential term, like price. Parties clearly believed they had a K b/c they acted for 3 years as if they had.

- **Policy consideration**: defendants' contention "not an honest one" (opportunism), unjust enrichment
- NB: References the fact that *Hillas* and *May & Butcher* are hard to reconcile (come to opposite conclusions). Ultimately, decision must be based on the particular circumstances and context.
-

Empress Towers v. Bank of Nova Scotia (BCCA, 1990)
Requirement in K to negotiate in good faith = **standard for measuring efforts**, but **does not** oblige them to succeed (form contract)
Facts: Landlord (Empress) leased to bank with option to renew; rental rates to be market values prevailing at the start of renewal term, as mutually agreed upon. Bank exercised option to renew, proposed a price and said was willing to negotiate. Empress didn't reply, and finally said yes, but asked for $15,000 (to pay off a robbery of $30,000 – insurance only covered half).
Issue: Was the renewal clause void for uncertainty or b/c it was an agreement to agree?
Held: Renewal clause was binding. Though price not set, benchmark (market price) was given. **Implied term** that parties must act in good faith, and agreement would not be unreasonably withheld.
Principle: **The exception to the K rule that a duty to negotiate in good faith is not contractually binding.**

- If rent simply to be agreed, can't be enforced. If rent to be established by formula (market value) but no mechanism, court can supply mechanism (good faith)
- Courts try, wherever possible, to give effect to clauses which the parties intended to have legal effect

Dalhousie College v. Boutilier Estate (SCC, 1934) gift promises

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Facts: Boutilier promised to pay Dalhousie $5,000 in a campaign to raise funds to maintain/improve its teaching, etc. Boutilier fell on hard economic times and died before ever making the payment.
Issue: Was there a consideration for the promise?
Held: No consideration, so promise not enforceable.
Principle: **Reliance is not consideration.**

- There must be a *bargain* with consideration. Here, the promise to pledge to charity is unenforceable b/c there is no consideration.
- Rejects arguments from older cases (consideration arising from similar promises of other subscribers, promise not revocable once charity relies on $ and incurs expenses, subscription for a specific purpose was an implied undertaking by charity to spend money for that intended purpose)
- Here, there was no negotiation with other subscribers, no request to carry out specific works (so the $5000 wasn't attached to a specific purpose), etc

Wood v. Lucy (1917, US) - courts strive to find consideration
Facts: Lucy hired Wood to help sell her fashion. He had exclusive right to place her endorsements on designs of others; she was to get one half of all profits from any contracts he makes. Lucy breaches; Wood sues.
Issue: Did Wood make any promise in return – so was there consideration?
Held: Yes. Court found **"implied promise"** that Wood would use reasonable efforts to market designs – this constituted consideration. **mutual promises may be consideration**
Principle: A promise may be lacking, but the writing may be "instinct with obligation, imperfectly expressed."

- Courts go to great lengths to "squeeze" parties' relationships into classical bargain templates in order to enforce contracts that deserve it (here, to protect commercial agreements that project exchange into the future – important policy consideration. "Implied promise" furthered business efficacy).

Gilbert Steel v. University Const. (1976, Ontario CA) (flexible approach to consideration)
Facts: Plaintiff (GS) contracted to sell defendant steel for three projects. The price of steel jumped once, and a new K was entered into for supply of steel. Months later, there was a second increase in price. Oral conversation between parties in which defendants agreed to pay a higher price. The contract was written but never executed, and the defendant ultimately owed GS money, which led to this action.
Issue: Was the defendant's agreement to pay more legally binding, or does it fail for want of consideration?
Held: No legally binding K. **Contract modification invalid unless supported by fresh consideration, or original K terminated and new K entered into.**
Principle: The agreement to pay more was simply a variation on an earlier written contract. This was not a new agreement with new consideration, therefore was not legally binding. No *quid pro quo* for the defendant's promise to pay more – GS was simply doing what it was already contractually obliged to do.

- Plaintiff's arguments:

a) their promise to give a "good price" on the next project was consideration – court rejected this (vague statement, falls short of consideration, too uncertain to enforce)
b) Changing an essential feature like price implies the original K is deleted and new K is made – court rejects this, the change in price was clearly a *variation* and parties did not intend to enter into new K
c) Creative argument: increased price led to plaintiff affording increased *credit* to the defendant, therefore consideration – court noted the ingenuity here, but ultimately rejected the argument
d) **Estoppel:** Plaintiff argued that defendant kept accepting invoices with higher prices – therefore, they had acquiesced to the higher price and should not be allowed to repudiate it. However, court rejects this argument b/c **estoppels can never be used as a sword but only as a shield** – plaintiffs cannot found their claim in estoppels. Further, plaintiffs failed to show *detrimental reliance*

- **NB:** Could have protected themselves by adding a price escalation clause (for future price increases)

Williams v. Roffey Bros & Nichols (1990, UK)
Facts: Plaintiff hired to carry out carpentry work. He didn't charge enough and ran into financial troubles. There was an oral agreement that the defendants **pay more** to complete the remaining work.
Issue: Was there **sufficient consideration** to enforce the agreement for the defendants to pay more?
Held: Yes; good consideration, therefore promise to pay more is binding.
Principle: **A promise to complete existing contractual obligations can be good consideration if a) there is no economic duress (i.e. refused to complete work unless paid more), and b) a practical benefit to the promisor** (if promisor learns that promise may not be able to complete work, then B gets a practical benefit – or *obviates* a disbenefit – by paying more to guarantee that the promisee can complete work).

- *Refines* principle in *Stilk v. Myrick*, but doesn't contravene it (modern/flexible approach to consideration)
- **Policy considerations**: commercial advantage to both parties by plaintiff being paid more to finish work

- **Gilbert Steel or NAV??** Steel is still good law, but Nav Canada has been out for 6 years and is being cited more and more frequently – will the SCC overrule Gilbert Steel and accept Nav Canada?

Greater Fredericton Airport Authority v. NAV Canada (2008, New Brunswick CA)
(potentially removing req. of consideration for contract modification, though not adopted across Canada)

- judge argues against "hunt and peck" theory of finding consideration

- **Fresh consideration may be unnecessary**. Law must protect legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable

Facts: Fed. govt. & Nav Canada entered into an agreement, wherein Nav Canada assumed responsibility for some services at Canadian airports. Dispute re: who should pay for new equipment. Nav Canada refused to make a runway operational until GFAA agreed to pay for the equipment. So GFAA capitulated and agreed to pay – Nav Canada then acquired the equipment, but GFAA subsequently refused to make the payment.
Issue: Was GFAA's promise to reimburse Nav Canada supported by consideration?
Held: Appeal dismissed. GFAA's promise was given under economic duress and therefore unenforceable.
Principle: Court examined the traditional rule re: consideration, judiciary's unwillingness to enforce a rigid classical approach in *Stilk v. Myrick* ("finding" consideration in *Roffey Bros*, for example) and argued valid policy reasons to move away from the strict application of the rule in *Stilk v. Myrick*:

1) The rule in *Stilk v. Myrick* is unsatisfactory (overinclusive/underinclusive)
2) Often good reasons to support a gratuitous promise, even if not supported by consideration (**detrimental reliance**) – need **certainty** in finding consideration (rejects 'hunt and peck' approach)
3) Consideration evolved long before economic duress – should not be "frozen in time"

- **A post-contractual modification, unsupported by consideration, may be enforceable as long as it was not procured under coercion or economic duress.**

Central London v. High Trees (1947, UK) – Lord Denning – promissory estoppel, promise to accept less is binding, provided:

- promise intended to create legal relations
  - ^ intention can be inferred from reasonable reliance by the promise. Owen Sound Pub. Library Bd. v. Mial Developments Ltd. (1979)
- to knowledge of promisor was going to be acted on
- and which was in fact so acted on.
  - and injustice can be avoided only by enforcing the promise.

Facts: High Trees leased flats – rent cut in half (no renters, WWII) – not stipulated how long reduced rent to last. In 1945, all the flats were fully rented out. In 1947, plaintiffs argued for full rent and arrears back to 1945. Defendants argued a) lower rent to last whole lease (10 years), or b) plaintiffs be **estopped** from demanding higher rent, or c) plaintiff had waived rights to higher rent.
Principle: **Denning decision establishing promissory estoppel**; uses equity to get around strict *Foakes v. Beer* principle; **a promise intended to be binding, intended to be acted on and is in fact acted on, is binding even if there is no consideration.** Duration of promissory estoppels is determined by circumstances ; here, promise only applied during the conditions prevailing at the time, i.e. low renters – no longer in 1945

- Different from *Gilbert Steel*, where it was an agreement to pay MORE (offensive action) versus an agreement to accept LESS (defensive action) – sword versus shield

Combe v. Combe (1951, UK) promissory estoppel can't be used as cause of action in and of itself Detrimental reliance invalid basis for enforcing gratuitous promise.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Facts: Husband and wife divorce, husband says he will pay wife $100/year but never does. 6 years later she sues for backpayments.
Issue: Can estoppels be used as a cause of action? NO.
Principle: **Estoppel is a shield, not a sword (can only be a defence against a claim, not cause of action).**

- Denning cautions against stretching the principle in *High Trees* too far – cannot be used to create new legal obligations between parties where none existed before
- "The doctrine of consideration is too firmly fixed to be overthrown by a side-wind."

London Drugs v. Kuehne & Nagel (1992, SCC) - privity of contract (principle of exception) relaxed rule of privity of K. Creates an **exception based on intention** of parties.
Facts: KN was storing a transformer for LD. Storage K included a limitation of liability clause, which referenced warehousemen and limited their liability to $40. Warehousemen damaged the transformer. LD brought action for damages. BCSC held the two warehousemen *personally liable* for the full amount of damages, while limiting KN's liability to $40.
Issue: To what extent can employees benefit from their employer's contractual limitation of liability clause?
Held: **Relaxation of rule regarding privity of K**.
Ratio: **Employees may benefit from limitation of liability clause if it:**

a) Expressly or impliedly extends its benefits to employees seeking to rely on it, and
b) Employees act in the course of their employment *and* perform services provided for in the contract when loss occurred.

- **Policy considerations:** Privity in this case would *frustrate commercial reality* (ignores reality of insurance coverage, assumption of risk), *common sense* (inconsistent with reasonable expectations), and *justice*
- Fraser River Pile & Dredge v. Can-Dive Services (1999, SCC) **Creates a broader exception to privity – extends rule in** London Drugs **as follows**:
  1) Did the parties in contract intend to extend benefit to third party?
  2) Were the activities performed by 3P are the very activities contemplated in the contract?

Redgrave v. Hurd (1881), 20 Ch. D. 1 (C.A.) - innocent misrepresentation – recission not damages

- No recission for innocent misrep. If π knew facts were false **or** did not rely upon them.
- Those who accept false statements as true are **not deprived of remedy** merely because they **could have** found out on their own that the statements were false

Plaintiff vendor selling his law business and house. Informs defendant purchaser that annual income from business amounted to £300-400/per year. Purchaser does not inspect all of the papers relating to the law business. Purchaser enters into written agreement to purchase house (£1,600) and pays deposit of £100. Takes possession of house - and before balance paid - discovers that practice is only £200. Buyer refuses to complete sale of house and vendor sues.
Trial: No recovery. Caveat Emptor. Could have discovered.

Appeal: Misrepresentation gives right to rescission. Recovery of deposit but no damages. …. for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shewn either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation.

- If material representation calculated to induce someone to enter into K, law infers that he/she was **induced by the representation** to enter into it and can claim to be removed from negative position UNLESS:
    - He/she had knowledge of the facts contrary to the representation, or
    - He/she stated in terms (or shown clearly by conduct) that they did not rely on the representation.

Heilbut, Symons & Co v Buckleton (1913, UK H.L.)

Facts: Sale of shares in a rubber company. Representative of Heilbut made a statement, pursuant to which Buckleton bought a large number of shares. There turned out to be a deficiency and shares fell in value.
Issue: Was the statement a warranty, i.e. a contract collateral to the primary contract?
Held: Collateral contracts are rare and must be strictly proven. No evidence that the statement was intended to be a term of the contract.
Principle: **Rejects a broad approach to collateral contracts** (a mere statement regarding the character of the company isn't enough to establish a collateral contract). This was a representation, not a warranty, and a person is not liable in damages for an innocent misrepresentation

- **Policy concerns:** maintaining certainty/predictability regarding written agreements, and not allowing verbal/collateral terms to override the written terms. If a term is so important, it should be written in the contract!

Dick Bentley v. Harold Smith Motors (1965, UK CA)

Facts: Statement on car engine (only 20,000 miles) led Bentley to buy car. Bentley bought the car, which was a considerable disappointment. Eventually brought action for breach of warranty.
Issue: Was the statement an innocent misrepresentation or a warranty?
Held: It was a warranty.
Principle: **Establishes modern test to determine warranty (the representation was meant to induce, and actually did induce, the party to enter into a K**). Doesn't consider collateral K approach.

- Objective test for determining warranty → depends on conduct of the parties

- **Rebuttal:** if the speaker can show it was an innocent misrepresentation (that he was **innocent** in making it, and it would **not be reasonable** for him to be bound by it). Not rebutted in this case.

BG Checo International v. British Columbia Hydro & Power Authority (1993) (S.CC)
concurrency (you can have coextensive/concurrent causes of action in tort and contract the extent to which tort duties are ousted depends on terms of contract, generally in exclusion/exemption of liability clauses) (don't worry about intricacies)

Checo made assumption without direct discussions bw parties concerning a certain issue
Checo sued for damages due to negligent misrepresentation or breach of contract
Hydro didn't specify standards with same degree of detail as was present in similar contracts entered into by Hydro
Hydro was aware of the problem and of the impact the problem would have on successful tenderer (failure to disclose, problem?)
Checo amends statement to include claim in fraud
contract required hydro to clear right of way. That duty was not negated by more general clauses relating to errors and misunderstandings in tendering, site conditions, and contingencies

"the right to sue in tort is not taken away by the contract in such a case, although the contract, by limiting the scope of the tort duty or waiving the right to sue in tort, may limit or negate tort liability"

where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, **except** where the contract indicates that the parties intended to limit or negative the right to sue in tort

- can sue concurrently in contract and tort even where the contract limits or contradicts the tort duty
- the tort duty must yield to the parties' superior right to arrange their rights and duties in a different way
- can sue upon any tort duty not contradicted by contract

While the tort duty may be limited by contractual terms to be no broader than the contract duty, can't say parties intended to negate all possibility of suing in tort by merely stipulating a duty in the contract

Breach of an implied term is just as serious as breach of an express term

Hong Kong Fir v. Kawasaki Kisen (1962, UK CA)
Facts: Contract to hire a ship, a "charter", between the owners of the ship and charterers for 24 months. When ship was delivered to the charterers, the engine room was understaffed and the staff incompetent. Resulted in 20 weeks of repairs in the first 6 months of the charter. Freight rates then dropped substantially and the charterers tried to repudiate the contract (since they were now paying more). At the time they tried to repudiate, the vessel was seaworthy in every respect, with 17 months left to run on the charter.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Issue: Was the term of the charter that the owner would a "seaworthy" vessel a **condition** or a **warranty**?
Held: Breach of contract (vessel not seaworthy) but charterer not entitled to repudiate contract.
Principle: Charterers not entitled to repudiate based on neither unseaworthiness nor delay. The delay was not so great as to **frustrate** the purposes of the contract.

- Differentiates between **warranties** (collateral to the main purpose of the parties) and **conditions** (mutually dependent – non-performance by one party excuses the other from performance)
- The **test for repudiation:** is the party deprived of *substantially the whole benefit* of the k? Look back on the events to determine whether the **contract was frustrated** (thereby relieving both parties from their obligations), etc.
- **Policy considerations:** charterer wanted to get out of K b/c price had fallen (opportunistic). Concern for the courts – if too easy to get out of a K, allows for opportunism, but if too hard to get out of a K, puts severe burden on contracting party and their reasonable expectations

not every term of contract can be easily classified as condition/warranty. General terms "seaworthy" – remedy that one will obtain depends not on facts of breach but on event giving rise to damages in question, characterizing that breach as fundamental such that one is entitled to get out of contractual obligations, w background policy factor – courts with long term contracts are very concerned about opportunism (is party just trying to get out of contract because they it's a bad deal/can get lower price elsewhere (maybe because of market factors/factors outside control of parties)?) courts require high threshold to fundamental/substantial deprivation test- party making long term commitment is able to get out of commitment (in very powerful position) compared to other person who is in much less powerful position without the high threshold of proof.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Attorney-General (Hong Kong) v. Humphrey's Estate (1987)
Failure to fulfill a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promise changing his position or suffering detriment, does not bring promissory estoppel into play. This case suggests the extra requirement may be found in creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to this detriment to the knowledge of the first party

B. (D.C.) v. Arkin (1996)
Δ's lawyer made threat of legal action, π paid for forbearance to sue, π realized no valid claim. Held: π was mislead by lawyer, π entitled to refund on ground of monies paid under a mistake

Carlill v. Carbolic Smoke Ball Co. (1892)
- Unilateral contracts. The offer is accepted by performance

R. v. Clarke, (1927) 40 CLR 227
Needed: intention to accept reward. Δ acting "exclusively in order to clear himself from a false charge of murder" and without reliance on reward Purpose of giving the information must be specifically to accept the reward, no contract is made otherwise ∴ the reward cannot be claimed.

Once the offeree has embarked on performance it is too late for the offeror to revoke his offer.

Combe v. Combe [1951] 2 K.B. 215

Divorce. Husband agrees to pay spousal maintenance of L100 annually. No payment. Almost 7 years later, wife sues for arrears. Promise not enforceable: Promissory estoppel can't create new causes of action where none existed before. It only prevents a party from insisting on strict legal rights, when it would be unjust, having regard to the dealings between the parties. It may be part of a cause of action, but not a cause of action in itself.

> The doctrine of consideration is too firmly fixed to be overthrown by a side wide…. **it still remains a cardinal necessity of the formation of contract, although not of its modification or discharge.**

John Burrows Ltd. v. Subsurface Surveys (SCC, 1968)
No promise to accept less, just friendly indulgence

Facts: Delay in making payment on promissory note by buyer. Vendor accepted late payment 11 times. Falling out between parties. Next payment is late and vendor claims to be entitled to accelerate payments.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Issue: Is vendor estopped from accelerating payments and seizing security without giving notice that in the future it is going to rely on its strict legal right?

Held: It is insufficient for there to be mere acts of indulgence. There must be evidence that the promisor *intended* that the legal relations between the parties would be altered. Here there was a friendly indulgence, but no specific promise or representation, other than the practice/conduct in allowing past late payments.

> Note: Owen Sound Pub. Library Bd. v. Mial Developments Ltd. (1979, Ont. C.A.) suggests that **intention can be inferred from reasonable reliance by the promise.**

Mesa Operating Ltd. v. Amoco Canada Resources Ltd. (1994)
"If those expectations are reasonable, they should be enforced because that is what the parties had in mind. They are reasonable if they were shared. Of course, those expectations must also be consistent with the express terms agreed upon. This contract should be performed in accordance with the reasonable expectations created by it." –

N.M. v. A.T.A. (BCCA, 2003)

Facts: NM promises to pay outstanding balance on ATA's mortgage if she would come to Vancouver and live with him with a view to marriage. ATA gives up her job in England and comes to Vancouver. NM refuses to honour promises and eventually loans ATA $100,000 on a promissory note. A week later NM evicts ATA from his home and he sues her on the promissory note. She counterclaims in promissory estoppel.
Held: Although NM made the promise and ATA relied on it to her detriment, not enforceable.

Trial: No pre-existing legal relationship between the parties at time the promise was made. Promissory estoppel cannot be used to found a claim where there is no existing legal relationship between the parties.

CA agrees: there must be an **expectation as to a legal relationship** between the promisor and promisee. Further, says the promise was not intended or expected to be binding and she took the risk of NM not following through

Pao On v. Lau Yiu Long, [1980] A.C 614 (P.C.)
An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise.

1. Act must have been done at the promisors' request
    a. Parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit
2. payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.

Pharmaceutical Soc. Of GB v. Boots Cash Chemists (1953) QB (1953) All ER

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- An invitation to an offer is not an offer. Display is like an advertisement, when the customer brings goods to cashier it's an offer, acceptance is cashier taking money.

Re: Selectmove Ltd, Court of Appeal (Civil Division) 1993 WL 964049
No consideration, deals have to be made by proper authority

Stilk v. Myrick [1809] EWHC KB J58
Seaman's wage. 2 men deserted. Captain told remaining men he would pay more if they did the deserters work/then refused to pay. Pre-existing duty, promise to pay more

Waltons Stores (Interstate) Ltd. v. Maher (1988, High Court of Australia)
Walton knew of ongoing demolition for them alone. Renegs, but induced/encouraged. Court enforces promise even without K. (reasonable assumption/expectation of legal relationship)

Brennan J. in Walton Stores: to establish equitable estoppel, must be proven that:

7. π assumed/expected that particular legal relationship bw π and Δ exists or will exist between them, and in the latter case that the Δ is not free to withdraw from the expected legal relationship (distinguishing factor from N.M. v. A.T.A. (BCCA, 2003))
8. Δ has induced π to adopt that assumption or expectation
9. π acts/abstains from acting in reliance on assumption/expectation
10. Δ knew or intended for π to do so
11. π's action/inaction will cause detriment if the assumption/expectation not fulfilled
12. Δ has failed to act to avoid that detriment whether by fulfilling the assumption/expectation or otherwise

Unilateral Contracts
Carlill v. Carbolic Smoke Ball Co. (1892)

- Unilateral contracts. The offer is accepted by performance

Williams v. Carwardine, [1833] EWHC KB J44.
motive is not important; she performed the condition (gave the information) and is entitled to the reward

R. v. Clarke, (1927) 40 CLR 227
Needed: intention to accept reward. Δ acting "exclusively in order to clear himself from a false charge of murder" and without reliance on reward Purpose of giving the information must be specifically to accept the reward, no contract is made otherwise ∴ the reward cannot be claimed.

Baughman v. Rampart Resources (BCCA, 1995)
Once the offeree has embarked on performance it is too late for the offeror to revoke his offer.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Goldthorpe v. Logan (1943) OWN (1943) CA

- Face cream "results guaranteed", caused burns, didn't say "results may vary" The offeror bears the risk of careless, extravagant promises.

R. v. Ron Engineering & Construction (Eastern) Ltd

- Deposit for tendering process was contract A, if chosen, contractor is bound to Contract B (the project). The deposit was to ensure the performance of the contractor of its obligations under Contract A, which it failed to live up to.

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd

- No obligation to accept lowest bid
- BUT, must deny non-compliant bids (Δ accepted a non compliant, loses)

Blair v. Western Mutual Benefit Assn.

- Party must intend to make offer for it to be capable of acceptance. Offer must be deliberately communicated to offeree, it makes no difference if the offeree knows about the offer by another means

Eliason v. Henshaw (1819), 4 Wheaton 225, 4 US (L Ed) 556
Method of acceptance/communication may be stipulated by offeror

Felthouse v. Bindley (1862), 11 CB (NS) 869, 142 ER 1037
Silence is not acceptance

Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd., [1964] SCR 614
Acceptance can be implied through conduct

Dickinson v. Dodds (1876), 2 Ch. D. 463 (C.A.)
Revocation communicated to agent, acceptable as indirect notice under agency laws

Household Insurance Co. v. Grant, Eng. C.A., 1879
Postal Acceptance Rule - An offer is accepted when the offeree puts its notice of acceptance in the mail—i.e. prior to actual receipt of notice by offeror (though manner of offer/acceptance set out in contract is supreme.

Byrne v. Van Tienhoven (1880), 5 C.P.D. 344
Postal acceptance rules does not apply to revocation of offers

Holwell Securities Ltd. v. Hughes (1974, C.A.)
Contract required "notice in writing." Was sent but not delivered. Postal acceptance rule doesn't apply where the express terms of the offer specify that the acceptance must reach the offeror

Brinkibon Ltd. v. Stahag Stahl et. al, [1983] 2 AC 34
Contract is made in the location where communication of acceptance received. Mailed from London to Vienna, contract formed in Vienna.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

May & Butcher LTD. v. R [1934] 2 K.B. 17 (H.L.)
Agreement to agree is not a contract. Critical part of contract undetermined. Cannot leave a vital part of a contract vague

Foley v. Classique Coaches (1934, Eng. CA)
court enforces provision that price tbd by parties "in writing from time to time" (reasonable market price is determinable). Plus, Δ acted opportunistically in breach after operating under K for 3 years

May and Foley are both agreements to agree, one enforced and one not enforced. Both stand for the rule that the court won't stand for parties and won't enforce agreement to agree, but contextual factors, different facts, show why court came to two different agreements.

Extra from Foley "a decision upon the construction of one contract is not an authority upon the construction of another contract in different words and entered into in different circumstances"

Hillas & Co. v. Arcos LTD [1932], 147 L.T. 503 (H.L.)
Agreement to agree is not enforceable. Contract upheld because more was found, parties intended to agree and thought they had done so.

Empress Towers v. Bank of Nova Scotia (BCCA, 1990):
Clause said price must be prevailing market rental as mutually agreed between the landlord and tenant. Implied term to **negotiate in good faith with an objective of reaching an agreement**

Manpar Enterprises v. Canada (BCCA, 1999)
No duty to negotiate in good faith. "…unless there is a benchmark or standard by which to measure such a duty, the negotiation concept is unworkable". Empress Towers case had benchmark of "market rental" which could be used, not the case here.

Brown v. Gould, 1971 WL 37036
Void, uncertainty. Courts supplying machinery.

1. rent simply "to be agreed" – usually can't be enforced
2. rent tbd by a stated formula, but no machinery provided for applying the formula to produce rental rate – often, courts will supply machinery
3. formula set out but defective, machinery provided for applying formula to produce rental rate – the machinery may be used to cure the defect in the formula

- ultimately, courts will try to give proper legal effect to any clause the parties understood and intended to have legal effect

R. v. Cae Industries Ltd. (FCA, 1986): Courts will generally make every effort to find a meaning in the words actually used by the parties in deciding whether and enforceable contract exists

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Mesa Operating Ltd. v. Amoco Canada Resources Ltd. (1994)
contract should be performed in accordance with the reasonable expectations created by it

Roscorla v. Thomas (1842. Eng.)
Promises after complete contract are not binding (no consideration).
Time 1: K for sale of horse
T2: Promises
Purchaser takes possession
T3: promises shown to be untrue (doesn't matter)

Enforcement of promises – policy framework
Reasonable Expectations v. Unfair Surprise

Think of 5 factors when considering whether court will enforce a promise

- Do we have sufficient evidence of promise
- Was promise entered into deliberately? (with intent to be bound?)
- Was there unjust enrichment?
- Did the promisee suffer detriment because of reliance on a promise?)
- Is this the kind of promise that we want to enforce in order to facilitate private ordering/utility of exchange (enforcement of promises in commercial relationships allows parties to plan for future, allows stability/certainty, allows exchange to occur)

Thomas v. Thomas (1842), 2 Q.B. 851, 114 E.R. 330
Gift put into form of contract in order to make gift promise enforceable, shows intent to be bound. All 5 factors fulfilled.
Motive is not the same thing as consideration.

Stilk v. Myrick (1809):
Promise by sea captain to share wages of deserted sailors among other sailors was not enforceable – no consideration because sailors were obliged under contract to bring ship to destined port anyway.

Gilbert Steel v. University Construction (1976, Ont. C.A.): Promise to pay more for steel not enforceable, no new consideration. π tries to use estoppel as a sword

ProCD v. Zeidenberg (USCA, 1996)

- Shrinkwrap terms, transaction subject to license

Exchange and Bargains

Governors of Dalhousie College at Halifax v. Boutilier Estate [1934] 3 D.L.R. 593, [1934] S.C.R. 642, 95 A.L.R. 1298
Generous individual giving large gift
Court unable to enforce intentions in the absence of enforceable binding contract
Statement of intent for gift (no consideration), not request for certain actions (would be consideration). no evidence of reciprocal promise.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Brantford General Hospital Foundation v. Marquis Estate (2003) O.J No 6218 (Ont. SCJ)
Issue of generous individual giving large gift
Court unable to enforce intentions in the absence of enforceable binding contract

Canadian Dyers Association Ltd. v. Burton (1920, Ontario Supreme Court)

Facts: Burton quoted to CDA lowest price on property, CDA accepted & sent cheque, Burton prepared a draft deed but then returned cheque and said there was no K.
Held: Finding for plaintiff (CDA). There was a K.
Reasons: This was more than a mere quotation of price. Burton's words/actions constituted an offer and an indication of a 'readiness to sell'. Instead of rejecting CDA's acceptance, he kept the cheque and prepared a draft deed (he acted like there was offer/acceptance).
Ratio: A *quote* on price can be an offer (exception to general rule).

Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953, UK)

Facts: Pharmacist had to supervise sale of drugs. Supervised from cash desk. At what point in a self-serve store is there acceptance of offer? Is the customer bound to purchase once they place item in their basket?
Principle: Goods on display are *invitation to treat*, not an *offer*. Customer makes an offer when they take the goods to the register. Cashier accepts by taking money.

Carlill v. Carbolic Smoke Ball Co. (1893, UK)

Facts: Advertisement guaranteeing smoke ball would prevent influenza, followed by offer to pay anyone money if they used smoke ball properly and still got any disease. Plaintiff used it, got influenza, and asked for the money. Defendants claimed statement was mere *puff*, thus unenforceable.
Held: Not mere puff. This was an offer which was to be acted upon. Just b/c a promise is *extravagant* doesn't mean it shouldn't be acted on or that it shouldn't bind the promisor.
Principle: This was a **unilateral k**, i.e. an offer to the world which becomes a contract when someone accepts through performance. Differentiates between mere offers to negotiate/offers to receive offers (not binding) versus a unilateral offer to the world to be completed through performance of a condition.

- Usually, notification of acceptance of offer necessary, but here offeror implied notice was not necessary

Goldthorpe v. Logan (1943, Ontario Court of Appeal)

Facts: Hair removal ad in newspaper claimed permanent hair removal with "results guaranteed". This is reiterated by nurse working for defendant. Plaintiff submitted to treatment and procedure didn't work.
Held: Yes, K did exist. Expectation damages to plaintiff.

Principle: Advertisement in this case *did* constitute an offer, esp. since verbally corroborated by nurse. Reckless/rash promises, but like Carbolic – extravagant promises can still be binding.

- Generally ads aren't offers, but here strong language constituted offer to the public, which plaintiff accepted on the terms proffered, and her acceptance was communicated by her conduct. There was consideration in the inconvenience sustained by plaintiff (not to the Court to judge the *adequacy* of consideration – simply that it existed to form a valid K)

Consumer protection policy rationale (strong cannot take advantage of weak – must be held to promise)

R. v. Ron Engineering & Construction Ltd. (1981, SCC)

Facts: Ron Engineering (contractor) submitted a tender to build project, plus a deposit cheque, as required. They learned of a mistake in costs and wanted to withdraw tender.
Issue: Was Ron Engineering entitled to withdraw tender/recover deposit? Did a contract exist during the tendering process itself?
Held: Judgment against Ron Engineering (contractor doesn't get tender deposit back).
Principle: The tendering process creates a two-part K. Contract A is a promise to fulfill Contract B. Contract A is a **unilateral K** (accepted through performance, i.e. submitting tender). Contract B is the construction contract itself. The role of the deposit was to ensure performance by the tenderer of its obligations under Contract A. Ron Engineering accepted contract A by submitting tender – too late to recover deposit.

M.J.B. Enterprises Ltd. V. Defence Construction Ltd. (1999, SCC)

Facts: Call for tenders by Defence Construction – lowest bidder (Sorochan) was non-compliant but was chosen anyway. M.J.B. had next lowest bid, and argued an **implied term** Contract A that the owner was obligated to accept the lowest valid tender. Owner argued that a **privilege clause** precluded this.
Issue: Can the owner disregard the lowest bid for any other tender, including a non-compliant one?
Principle: Court found implied term that only a compliant tender be accepted. HOWEVER, no implication that the *lowest* compliant tender be accepted. Privilege clause did

- Court finds **implied term** based on business efficacy and officious bystander tests (objective)
- The privilege clause did NOT override the implied term to accept only compliant bids

Blair v. Western Mutual Benefit Assn (1972, BCCA)

Facts: Blair was a retiring secretary. She took minutes at a meeting where Directors suggested she receive 2 years' salary as retirement pay ($8000). She retired and seeks this amount.
Issue: Was this an offer capable of acceptance?
Held: No. Appeal dismissed.
Principle: No intention by parties to create legal obligations. No promise, acceptance, or communication of offer (she simply overheard it as stenographer). No evidence that she retired *because* of the resolution.

- An offer must be *deliberately* communicated to offeree (makes no difference if they find out about it by other means)

Williams v. Carwardine (1883, UK)

Facts: Defendant offered reward for info re: brother's murder. Plaintiff, beaten up and on deathbed, volunteered info which led to her husband's conviction. After recovering, asked for reward & was denied.
Issue: Was plaintiff entitled to reward? Was there K if she was motivated by self-preservation & not reward?
Held: Yes, she is entitled to the reward.
Principle: The plaintiff's **motives** don't matter. She was aware of the offer and, through performance, accepted its terms (regardless of the fact that her motivation was to clear her conscience and not to fulfill K).

R v. Clarke (1927, Australia High Court)

Facts: Crown offered reward for info re: murder. Clarke gave info but at the time had forgotten about reward & thus had no intention of claiming it. Later tried to claim reward at the suggestion of an officer.
Issue: Was there a K between Clarke and the Crown?
Held: No K. Clarke not entitled to reward.
Principle: Clarke did not rely on reward when he gave info & did not intend to accept Crown's offer.

- There can be no *communication* of assent if there is not assent itself. You can't accept an offered contract if you do not know of the offer
- Per *Carwardine*, **the motive inducing consent may be immaterial, but consent is vital**

CASES

Livingstone v. Evans (1925, Alberta SC)

Facts: Evans offered to sell land for $1800. Livingstone responded by wire: "Send lowest price. Will give $1600." Evens responded: "Cannot reduce price." Plaintiff then accepted original offer of $1800, but defendant no longer wanted to sell.
Issue: Did the intervening telegrams end the original offer so that plaintiff could not later accept it?
Held: Finding for plaintiff. Defendant saying "cannot reduce price" was a **renewal of original offer**.
Principle: An intervening counter-offer rejects and thus terminates original offer. However, this doesn't apply here because "cannot reduce price" revived the original offer, which plaintiff then accepted.

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

Facts: Buyer and seller send forms back and forth re: price of machine. When delivery comes the seller has increased the price and there is a dispute about it.
Issue: Whose terms and conditions prevail?

Held: Jugdment for buyers – sellers accepted buyer's counter-offer, so buyer's terms prevail (**last shot rule**).
Principle: **Battle of forms** – Denning describes first shot rule, last shot rule, and "reasonable implication" rule.

Tywood Industries Ltd. V. St. Anne-Nackawic Pulp & Paper Co. (1979, Ontario HC)

Facts: Various purchase orders going back and forth, with different terms/conditions. Defendant's purchase order had an arbitration clause – plaintiff delivered goods but never filled out defendant's purchase order.
Issue: Under whose conditions was the contract formed?
Held: Finding for plaintiff.
Principle: Defendant never drew attention to arbitration term, and did not complain when plaintiff failed to fill out/return the purchase order. Conduct indicates that neither party considered this term important, so the court holds it is not a binding term. **Departure from formality/strict application** re: wording of K.

- **Policy consideration** - unconscionable bargain: unfair bargain where one party takes advantage of another (e.g. adds a term in fine print & doesn't draw attention to it)

ProCD v. Matthew Zeidenberg and Silken Mountain Web Services (1996, US Court of Appeal)

Facts: Zeidenberg purchased ProCD's product and began selling their database online at a lower price, contrary to "shrinkwrap" (enclosed) license of product.
Issue: Was shrinkwrap licence enforceable (esp. given it was not on external packaging of product)? Are 'clickwrap' licences offers and does clicking OK constitute acceptance?
Held: Finding for ProCD.
Principle: Shrinkwrap licences are enforceable. Software is accepted when buyer agrees to licence, at which point buyer is bound by license terms (and can return goods for refund if he doesn't accept licence).

- Often, exchange of money precedes communication of terms (e.g. insurance). Same applies here; ProCD proposed a K which Zeidenberg accepted (by clicking OK) and could later read the license at his leisure (& if he didn't accept, could return for refund)
- **Reasonable notice of terms:** You may not know exactly what the terms are, but you know there *are* terms, and you are bound by them if you don't return the product and thereby terminate the K

Dawson v. Helicopter Exploration Co. (1955, SCC)

Facts: Dawson staked mineral deposit, communicated with def. to explore region. Def. said would contact Dawson (overseas on military duty) when pilot available. Pilot became available, but def. said claim didn't seem suitable for an operation and Dawson shouldn't depend on them. Dawson never responded. Def. later contracted w/ another party to develop area. Dawson learned of this & sued for breach of K.

- Respondent argued *unilateral* K to be accepted by performance (i.e. Dawson locating claims) and could therefore be revoked before performance was complete.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Issue: Was there a valid offer and acceptance to form a K?
Held: Finding for plaintiff. Bilateral K existed. Plaintiff never intended to abandon his rights under the K.
Principle: Where possible, courts will find **bilateral K** for business efficacy purposes and **policy reasons** (protect offeree's reliance/prevent offeror from revoking offer at last minute, prevent defendant from acting opportunistically by unilaterally excluding Dawson).

Felthouse v. Bindley (1862, UK)

Facts: Plaintiff offered to buy nephew's horse, said "If I hear no more about this I will consider the horse mine." Before nephew can communicate acceptance, def. accidentally sells horse at auction.
Issue: Had the nephew accepted offer?
Held: No. Horse still belonged to nephew, therefore uncle has no claim b/c no complete bargain.
Principle: Acceptance cannot be assumed unless it is *communicated*, or implied through action. **Acceptance cannot be communicated by silence.**

Saint John Tugboat Co. v. Irving Refinery Ltd (1964, SCC)

Facts: Saint John contracts to provide Irving with tugs up to a certain date. Date passes but Irving continues to use tugs. When billed for use during months after original end of K, Irving refuses to pay. Saint John sues.
Issue: Can a party, in their actions, *imply* acceptance?
Held: Finding for Saint John – Irving must pay. Binding acceptance can be reasonably inferred b/c Irving acquiesced to continued service, knowing that Saint John expected to be paid.
Principle: Use objective test (*Smith v. Hughes*). If a party allows another party to do work in such a way that no reasonable person would assume the work was done for free, then that party is liable to pay for it. The doing of the work is the offer, the acquiescence that it is being done is the acceptance.

- So, **acceptance can be *implied*** based on parties' conduct and circumstances
- Silence can constitute acceptance, when combined with conduct.

Eliason v. Henshaw (1819, US)

Facts: Offer to buy flour included stipulated mode of acceptance. Def. accepts offer but sends acceptance in wrong mode (wrong time, place and manner). Plaintiff refuses to acknowledge acceptance & claims no K.
Issue: Was there acceptance of the offer & therefore binding K?
Held: No – acceptance was invalid b/c did not meet terms specified by offeror.
Principle: Offeror may dictate terms of acceptance which must be followed for K to exist.
CASES

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

Facts: Def. made application to buy shares in plaintiff company. Plaintiff confirms sale by letter mailed by post; letter never made it to defendant; plaintiff company goes under and plaintiff seeks payment from def.
Issue: Does posted acceptance (even if it does not arrive) constitute acceptance of the offer?
Principle: Establishes **postal acceptance rule** → once letter of acceptance is delivered to post office, acceptance is deemed to be communicated, and K is binding (even if letter is never actually received)

Holwell Securities v. Hughes (1974, UK)

Facts: Hughes sent a letter by post to exercise an option to purchase property; letter was never received. It was expressly stated in the offer that acceptance must be received in writing.
Issue: Does the postal acceptance rule always apply?
Held: No – appeal dismissed.
Principle: **Postal acceptance rule does not apply** if leads to inconvenience/absurdity, or (as in this case) if the offer explicitly states that the acceptance must actually reach the offeror.

Brinkinbon Ltd. V. Stahag (1983, UK)

Facts: Issue over sale of steel – offer (by seller in Vienna) and acceptance (by buyer in London) sent by telex.
Issue: Where was the contract formed?
Principle: General rule of K (that K is formed when acceptance is communicated by offeree to offeror) applies to instantaneous communications such as telex. Logically, this occurs *where* acceptance is communicated to the offeror. Therefore, K formed when communication of acceptance received by sellers in Vienna.

Rudder v. Microsoft Corp. (1999, Ontario SC)

Facts: Rudder filed class action lawsuit in Ontario against Microsoft. Rudder argued that the *form* of the K obscured the important clause (only a portion of Agreement was presented on the screen at any time).
Issue: Should a clause be enforceable even if a "bound" party hasn't read it?
Held: Yes – clause was enforceable.
Principle: Entire agreement readable by simply scrolling. Subscribers had to click "I agree" twice. No terms in the agreement were harder to read than others, so no specific attention had to be drawn to this clause.

CASES

Dickinson v. Dodds (1876, UK)

Facts: On Wednesday, def. Dodds gave plaintiff Dickinson offer to sell house. Offer to remain open til Friday. On Thursday, Dodds discovered indirectly that Dickinson had offered house to a third party, who accepted. Dodds tried then to accept the offer to buy the house, but Dickinson said it was too late.
Issue: Was def. bound to hold offer open til date specified? Does revocation have to be directly communicated by offeror to offeree?
Held: No on both counts. Offer was revoked as soon as third party accepted offer. Dodds was not bound to hold the offer open til Friday. Too late for Dickinson to accept offer – no

"meeting of the minds" b/c Dickinson knew, though indirectly, that Dodds had revoked the offer.
Principle: A promise to hold an offer open is not binding unless consideration given for the promise.

- Offeror can withdraw offer at any point until offeree has accepted it. Offeree must have knowledge of a revocation, but explicit communication is not required (offeree can learn of it indirectly).

Byrne v. Van Tienhoven (1880, UK)

Facts: Seller mailed an offer for tin plates, and then mailed revocation of offer. Buyers had immediately accepted offer (prior to receiving revocation) and sold plates to a third party.
Issue: Was the revocation of the offer effective?
Held: No. Judgement for the buyers.
Principle: **Uncommunicated revocation is no revocation at all.** Postal acceptance rule applies to accepting an offer, but not revoking an offer. So revocation is effective as soon as it is communicated to/received by the offeree (and not from the moment it's posted in the mail).

Errington v. Errington and Woods (1952, UK)

Facts: Father promised house for son and daughter-in-law, as long as they kept making mortgage payments. Father died and his estate sued for possession of the house.
Issue: Was the promise binding, and if so did it survive father's death?
Held: Yes – father's promise was a unilateral K, son and daughter-in-law accepted through performance of mortgage payments (policy considerations: protect reliance, prevent revocation if performance incomplete)
Principle: **A unilateral K cannot be revoked once offeree has started performing** (even if offeror dies).

- Denning's fictional 2K approach: K1 (pay mortgage and house will be yours), K2 (as long as you pay mortgage you may remain in possession – an implied promise not to revoke K1)

Barrick v. Clark (1951, SCC)

Facts: Barrick offered to sell land to Clark. Clark was away on a hunting trip; his wife received letter and asked Barrick to keep offer open. Clark returned and mailed acceptance 25 days later, but Barrick had already sold property to a third party.
Issue: What is a reasonable time period for an offer to stay open before it lapses?
Held: Finding for Barrick. Based on correspondence, Clark didn't accept offer w/in reasonable period of time (language like "immediately" and "ASAP" clearly indicated short time period for acceptance).
Principle: **If not specified how long offer is to remain open, then it is open for a "reasonable" period of time depending on words, conduct, circumstances, and nature of K.**

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- **Policy rationale**: courts cannot give legal effects to some clauses but not others – would result in commercial absurdity and chaos in the market place. Would undermine important electronic commerce.

CASES

R v. Cae Industries Ltd (1986, Canada Federal Court of Appeal – leave to SCC refused)
Facts: Crown sold Air Canada base to Cae; Crown made vague assurances about hours of work Cae could expect (would make "best efforts" for more hours); the workload diminished and Cae sued for breach.
Issue: Were the assurances binding in contract?
Held: Yes. Despite vague terms, court enforces K terms based on conduct of parties.
Principle: Court uses **objective approach** to determine party's intention to enter into K (there was a K here).

- If terms so vague as to be unenforceable then K is no good; but if court can give terms meaning based on intent of parties, then K binding on those meanings; court considers nature of legal relationship between parties, and whether there has been **partial performance**

Court will generally make every effort to find meaning in words used by parties to determine whether an enforceable K exists

CASES

May & Butcher Ltd v. R. (1934, UK)
Facts: May & Butcher to buy surplus tentage left over from WWI. Price and date of payments not determined – to be "agreed upon from time to time", plus arbitration clause. Dispute then arose.
Issue: Were the terms of the agreement sufficiently defined to constitute a legal binding K?
Held: No. Not a legally binding K – just an agreement between parties to agree, but left critical part of the agreement undetermined, therefore no concluded contract.
Principle: **All essential terms must be defined; an agreement to agree is not binding.**

- **NB:** Perhaps not good decision (very strict interpretation)

Hillas & Co v. Arcos Ltd (1932, UK)
Facts: Plaintiffs purchasing timber from Arcos. Made agreement to purchase 22,000 standards (K1) under specific condition that they would be able to enter into K2 according to "published price list". Next year, Arcos refused and Hillas brought this action.
Held: Court said K was enforceable – vague terms can be given meaning. Parties *intended* to be bound by K.
Principle: Where possible, **courts will interpret vague terms in context of whole K;** this meaning must be based on some benchmark, formula or mechanism provided in the K (here, "published list price").

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- Policy rationale: **business efficacy** – court will construe "fairly and broadly" to give effect, even if contract/language itself isn't perfect
- Softens finding i*n May & Butcher*

Foley v. Classique Coaches Ltd. (1934, UK)

Facts: Def. agreed to buy land from Foley and would only buy petrol from them; price of petrol not specified (price to be agreed on "from time to time"); after 3 years defendants went elsewhere for petrol.
Issue: Does the fact that no price quoted mean the K was void for uncertainty?
Held: No. K enforceable, despite price not being specified.
Principle: Actions/intentions of parties are enough to enforce a K that is missing an essential term, like price. Parties clearly believed they had a K b/c they acted for 3 years as if they had.

- **Policy consideration**: defendants' contention "not an honest one" (opportunism), unjust enrichment
- NB: References the fact that *Hillas* and *May & Butcher* are hard to reconcile (come to opposite conclusions). Ultimately, decision must be based on the particular circumstances and context.

CASES

Empress Towers Ltd v. Bank of Nova Scotia (1991, BCCA)

Facts: Landlord (Empress) leased to bank with option to renew; rental rates to be market values prevailing at the start of renewal term, as mutually agreed upon. Bank exercised option to renew, proposed a price and said was willing to negotiate. Empress didn't reply, and finally said yes, but asked for $15,000 (to pay off a robbery of $30,000 – insurance only covered half).
Issue: Was the renewal clause void for uncertainty or b/c it was an agreement to agree?
Held: Renewal clause was binding. Though price not set, benchmark (market price) was given. **Implied term** that parties must act in good faith, and agreement would not be unreasonably withheld.
Principle: **The exception to the K rule that a duty to negotiate in good faith is not contractually binding.**

- If rent simply to be agreed, can't be enforced. If rent to be established by formula (market value) but no mechanism, court can supply mechanism (good faith)
- Courts try, wherever possible, to give effect to clauses which the parties intended to have legal effect

Manpar Enterprises Ltd v. Canada (1999, BCCA)

Facts: Manpar contracted with Crown to remove/sell gravel from an Indian reserve. 5 year permit with a right to renew for another 5 years, subject to renegotiation of royalty rate (so, price not set). After failed renegotiation, Crown doesn't renew permit.
Issue: Is the renewal clause binding?
Held: Not binding b/c price not set.
Principle: **An agreement to agree is not binding without a formula, benchmark or objective mechanism to determine rent; good faith is of no help.**

- Duty to negotiate in good faith is a rule based on agreement of parties, not a common law obligation
- Looks to specific context of the case – officious bystander test – business efficacy concerns – can imply a term if a) both parties would likely agree the term should be implied, or b) give business efficacy to the K
- Here, Crown was aware of fiduciary duties to Band – wanted ability to refuse to renew permit (in case Band was opposed to renewal) – court therefore can't imply that the renewal clause was binding.

Wellington City Council v. Body Corporate (NZCA, 2002) – NOT IN OUR MATERIALS

- "The law regards the task of reconciling self interest with the subjective connotation of having to act in good faith as an exercise of such inherent difficulty and uncertainty as not to be justiciable. The ostensible consensus is therefore illusory."

Ratio: **No duty to negotiate in good faith**

Dalhousie College v. Boutilier Estate (SCC, 1934)

Facts: Boutilier promised to pay Dalhousie $5,000 in a campaign to raise funds to maintain/improve its teaching, etc. Boutilier fell on hard economic times and died before ever making the payment.
Issue: Was there a consideration for the promise?
Held: No consideration, so promise not enforceable.
Principle: **Reliance is not consideration.**

- There must be a *bargain* with consideration. Here, the promise to pledge to charity is unenforceable b/c there is no consideration.
- Rejects arguments from older cases (consideration arising from similar promises of other subscribers, promise not revocable once charity relies on $ and incurs expenses, subscription for a specific purpose was an implied undertaking by charity to spend money for that intended purpose)
- Here, there was no negotiation with other subscribers, no request to carry out specific works (so the $5000 wasn't attached to a specific purpose), etc

Brantford General Hospital v. Marquis Estate (Ont. SC, 2003)

Facts: Mrs. Marquis pledged to donate $1 million over 5 years to the Hospital; she died before completing the donation. Her estate refused to pay balance owing.
Issue: Was there consideration to constitute a legal and binding K?
Principle: No consideration by hospital (naming unit for her was simply a way of showing gratitude), so no K.

- **A promise to subscribe to a charity is not enforceable in the absence of a bargain**

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Wood v. Lucy (1917, US)

Facts: Lucy hired Wood to help sell her fashion. He had exclusive right to place her endorsements on designs of others; she was to get one half of all profits from any contracts he makes. Lucy breaches; Wood sues.
Issue: Did Wood make any promise in return – so was there consideration?
Held: Yes. Court found **"implied promise"** that Wood would use reasonable efforts to market designs – this constituted consideration
Principle: A promise may be lacking, but the writing may be "instinct with obligation, imperfectly expressed."

- Courts go to great lengths to "squeeze" parties' relationships into classical bargain templates in order to enforce contracts that deserve it (here, to protect commercial agreements that project exchange into the future – important policy consideration. "Implied promise" furthered business efficacy).

Eastwood v. Kenyon (1840, UK)

Facts: Man dies leaving his daughter Sarah as sole heiress. Sarah's guardian borrowed money to spend on Sarah's education. When she came of age, she promised to repay the plaintiff. She married defendant Kenyon, who also promised the plaintiff he would pay. However, he failed to pay, and the plaintiff sued.
Issue: Was there consideration to make the promise to pay binding?
Principle: No contract. **Past consideration is not good consideration**. Plaintiff acted neither at the request of the defendant, nor the wife. This was a past gift – a benefit voluntarily conferred by the plaintiff.

- Plaintiff argued for *moral consideration*, but court rejected this.
- One may be morally obliged to keep one's promise but not legally obliged.

Lampleigh v. Brathwait (1615, UK)

Facts: Brathwait killed a man & asked Lampleigh to ride to king and ask for a pardon. Brathwait later promised to pay Lampleigh. He never paid up, Lampleigh sued, and Brathwait said that because the service had been performed in the past, there was no good consideration at the time for the promise to pay.
Held: Promise to pay is binding. Consideration here is valid.
Principle: **Exception to the past consideration rule.** There was an implied understanding that a fee would be paid**.** Where a past benefit is conferred *at the beneficiary's request*, & payment would reasonably be expected, promisor is bound by promise. Only thing missing at the time of the original request was the price.

CASES

Thomas v. Thomas (1842, UK)

Facts: On his deathbed, Thomas expressed desire that his wife should have the house she used as a residence. The executors of his estate entered into an agreement with her that she would live in the house for "ground rent" of $1/year and maintain the property. Appellants later tried to eject her and said the agreement lacked consideration.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Issue: Was there sufficient consideration? Is a gift promise legally enforceable if it is formalized through a token consideration (**peppercorn promise**)?
Held: Promise binding.
Principle: **Motive is not the same thing as consideration; consideration must have value in the eyes of law.**

- Respect for the wishes of the dead husband is not good consideration, but the widow's promise to pay 1 pound yearly in rent, and to maintain property, was good consideration (though nominal).
- **Policy considerations:** this is the kind of bargain the courts want to protect (husband clearly *intended* to enter into agreement, widow clearly *relied* on it, and no good reason to not enforce it)

CASES

D.C. v. Arkin (1996, Manitoba QB)

Facts: Kid caught shoplifting in Zellers; mom pays $225 in return for not being sued; finds out there was never any valid claim against her personally and thus asks for money back.
Issue: Can the plaintiff recover her money on the ground that Zellers never had a valid claim against her?
Principle: Forbearance is not binding if the claim is invalid (but if it *is* a valid claim, then forbearance is good consideration). Zellers never would have succeeded in suing her, so forbearance isn't good consideration.

- If Zellers had reasonable grounds to believe they might succeed, then that would be okay, but judge says he doesn't believe Zellers ever thought they had a reasonable chance of success

Policy considerations: Zellers would be *unjustly enriched* otherwise

Pao On v. Lau Yiu Long (1980, Hong Kong)

Facts: Lau (def.) wanted to buy a building from plaintiff (Pao). Instead of a cash sale, they swapped shares in their companies. Pao agreed not to sell 60% of the shares for at least a year, so the price of shares would be unaffected. Pao demanded that Lau pay him if the share price fell below $2.50; the price fell, and Pao tried to enforce the agreement. Lau argued the agreement was not valid because a) there was no consideration (only in the past and under a pre-existing duty), and 2) the contract was procured under economic duress.

- **Tri-partite relationship** here: plaintiff had an obligation to corporation (A) not to sell, but also made a promise to defendant shareholders (B) not to sell. Was the promise to B good consideration, since the plaintiff had an existing contractual obligation to party A to do the same thing?

Held: Consideration was valid and there was not undue duress.
Principle: Promise to perform a pre-existing contractual obligation to a third party can be good consideration.
No economic duress – this was simply **commercial pressure** as per the nature of the market. There was no unfair use of a dominating bargaining position.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Stilk v. Myrick (1809, UK)

Facts: 2 seamen deserted on a voyage. Captain could not find new crew, so promised the rest of the crew that the extra two wages would be shared equally among everyone.
Issue: Was the consideration good enough to make this a valid contract?
Held: No. Seamen could not recover extra wages.
Principle: No consideration. Crew didn't give anything up for the promise of extra wages; simply fulfilling duties under the original K. **Performance of a pre-existing contractual duty is not sufficient consideration.**

- **NB:** if they had been at liberty to quit and had chosen NOT to quit in return for extra wages, then that would have been good consideration

Gilbert Steel v. University Const. (1976, Ontario CA)

Facts: Plaintiff (GS) contracted to sell defendant steel for three projects. The price of steel jumped once, and a new K was entered into for supply of steel. Months later, there was a second increase in price. Oral conversation between parties in which defendants agreed to pay a higher price. The contract was written but never executed, and the defendant ultimately owed GS money, which led to this action.
Issue: Was the defendant's agreement to pay more legally binding, or does it fail for want of consideration?
Held: No legally binding K. **Contract modification invalid unless supported by fresh consideration, or original K terminated and new K entered into.**
Principle: The agreement to pay more was simply a variation on an earlier written contract. This was not a new agreement with new consideration, therefore was not legally binding. No *quid pro quo* for the defendant's promise to pay more – GS was simply doing what it was already contractually obliged to do.

- Plaintiff's arguments:
  e) their promise to give a "good price" on the next project was consideration – court rejected this (vague statement, falls short of consideration, too uncertain to enforce)
  f) Changing an essential feature like price implies the original K is deleted and new K is made – court rejects this, the change in price was clearly a *variation* and parties did not intend to enter into new K
  g) Creative argument: increased price led to plaintiff affording increased *credit* to the defendant, therefore consideration – court noted the ingenuity here, but ultimately rejected the argument
  h) **Estoppel:** Plaintiff argued that defendant kept accepting invoices with higher prices – therefore, they had acquiesced to the higher price and should not be allowed to repudiate it. However, court rejects this argument b/c **estoppels can never be used as a sword but only as a shield** – plaintiffs cannot found their claim in estoppels. Further, plaintiffs failed to show *detrimental reliance*
- **NB:** Could have protected themselves by adding a price escalation clause (for future price increases)

Williams v. Roffey Bros & Nichols (1990, UK)

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Facts: Plaintiff hired to carry out carpentry work. He didn't charge enough and ran into financial troubles. There was an oral agreement that the defendants pay him more to complete the remaining work.
Issue: Was there sufficient consideration to enforce the agreement for the defendants to pay more?
Held: Yes; good consideration, therefore promise to pay more is binding.
Principle: **A promise to complete existing contractual obligations can be good consideration if a) there is no economic duress (i.e. refused to complete work unless paid more), and b) a practical benefit to the promisor** (if promisor learns that promise may not be able to complete work, then B gets a practical benefit – or *obviates* a disbenefit – by paying more to guarantee that the promisee can complete work).

- *Refines* principle in *Stilk v. Myrick*, but doesn't contravene it (modern/flexible approach to consideration)
- **Policy considerations**: commercial advantage to both parties by plaintiff being paid more to finish work

Greater Fredericton Airport Authority v. NAV Canada (2008, New Brunswick CA)

Facts: Fed. govt. & Nav Canada entered into an agreement, wherein Nav Canada assumed responsibility for some services at Canadian airports. Dispute re: who should pay for new equipment. Nav Canada refused to make a runway operational until GFAA agreed to pay for the equipment. So GFAA capitulated and agreed to pay – Nav Canada then acquired the equipment, but GFAA subsequently refused to make the payment.
Issue: Was GFAA's promise to reimburse Nav Canada supported by consideration?
Held: Appeal dismissed. GFAA's promise was given under economic duress and therefore unenforceable.
Principle: Court examined the traditional rule re: consideration, judiciary's unwillingness to enforce a rigid classical approach in *Stilk v. Myrick* ("finding" consideration in *Roffey Bros*, for example) and argued valid policy reasons to move away from the strict application of the rule in *Stilk v. Myrick*:

4) The rule in *Stilk v. Myrick* is unsatisfactory (overinclusive/underinclusive)
5) Often good reasons to support a gratuitous promise, even if not supported by consideration (**detrimental reliance**) – need **certainty** in finding consideration (rejects 'hunt and peck' approach)
6) Consideration evolved long before economic duress – should not be "frozen in time"

- **A post-contractual modification, unsupported by consideration, may be enforceable as long as it was not procured under coercion or economic duress.**

CASES

Foakes v. Beer (1884, UK)

Facts: Foakes owed Beer $; Beer promised she wouldn't sue him as long as Foakes paid in instalments. Foakes paid back full amount, but Beer sued him when he refused to pay interest.
Issue: Was Beer's promise binding?
Held: No - Foakes was already contractually bound to pay. No new consideration. Foakes to pay interest.
Principle: **Agreement to accept lesser sum in satisfaction of whole amount (including interest) is not binding.** This rule provides full protection to creditors (can get around it with promissory estoppel).

Re Selectmove Ltd (1995, UK)

Facts: Company (Selectmove) in financial trouble. Made agreement with Crown to make deduction payments as due and arrears of $1000/month. Selectmove made some payments (not all). Crown sued for payment of arrears worth much more; Selectmove argued it had a case that the Crown had accepted its earlier proposal.
Issue: Was there sufficient consideration in the partial payment of the existing debt to find a binding K?
Held: No. Unenforceable for want of consideration.
Principle: Selectmove tried to rely on *Williams v. Roffey Bros* (i.e. that Crown received "practical benefits" from accepting partial payments, and this counted as good consideration)

- Court rejected this argument and used the *Foakes v. Beer* precedent instead, i.e. **partial payment of a debt is not sufficient consideration**
- **NB:** General rule in Canada concerning pre-existing legal duty to promisor is set by *Gilbert Steel* – but be aware of English cases (if creditor/debtor situation, apply *Foakes*; if goods and services contract situation, apply *Williams v. Roffey Bros*)

Foot v. Rawlings (1963, SCC)

Facts: Rawlings owed Foot $. Parties made an agreement for monthly payments. Foot was old and wanted to access the money sooner, so agreed to accept lower interest in return for regular payments. Rawlings complied, but Foot still sued for the balance of the debt.
Issue: Was there sufficient consideration in the agreement to make it legally binding?
Held: Yes. New agreement upheld.
Principle: Forms of payment other than cash can be 'new' consideration for agreements to repay debts, even if full amount is not repaid. Here, the consideration was providing monthly post-dated cheques.

- In this way the SCC circumvented the rule in *Foakes v. Beer*

Hughes v. Metropolitan Railway (1877, UK)

Facts: Respondent railway company leased property from landlord. The landlord legitimately asked for repairs, to be completed in 6 months. Parties then entered into negotiations for the railway company to buy the property. Negotiations failed, and at the end of 6 months landlord served a writ of ejectment on tenant.
Held: The 6 month period should have been suspended until negotiations were complete.
Principle: **Establishes modern concept of promissory estoppel.**

- **Implied promise** that the 6 month period would only count after negotiations finished. This triggers estoppel; tenants relied on this promise and it would be inequitable to do otherwise.

Central London v. High Trees (1947, UK) – Lord Denning

Facts: High Trees leased flats – rent cut in half (no renters, WWII) – not stipulated how long reduced rent to last. In 1945, all the flats were fully rented out. In 1947, plaintiffs argued for full rent and arrears back to 1945. Defendants argued a) lower rent to last whole lease (10 years), or b) plaintiffs be **estopped** from demanding higher rent, or c) plaintiff had waived rights to higher rent.
Principle: **Denning decision establishing promissory estoppel**; uses equity to get around strict *Foakes v. Beer* principle; **a promise intended to be binding, intended to be acted on and is in fact acted on, is binding even if there is no consideration.** Duration of promissory estoppels is determined by circumstances ; here, promise only applied during the conditions prevailing at the time, i.e. low renters – no longer in 1945

- Different from *Gilbert Steel*, where it was an agreement to pay MORE (offensive action) versus an agreement to accept LESS (defensive action) – sword versus shield

Saskatchewan River Bungalows v. Maritime Life Assurance (1994, SCC)

Facts: SRB (plaintiff) was paying premiums, frequently late, policy frequently lapsed and then was reinstated. When policy holder died, Maritime rejected SRB's claim for benefits on grounds that policy no longer in force.
Issue: Did insurance company waive right to compel timely payment under insurance policy?
Held: No. SRB not entitled to benefits under policy.
Principle: Insurance company did waive its rights, but insured did not rely on this waiver, AND **insurance company provided reasonable notice of retraction of waiver**, so insured not entitled to now claim benefits.

International Knitwear v Kabob Investments

Facts: Landlord gave tenant discount on rent; tenant failed to make a payment and landlord gave notice for reinstatement of full rent.
Issue: Can landlord demand full payment of rent again, and if so, how much notice is required?
Principle: **Yes, landlord can revive waived rights, but must give "reasonable notice"** (the time period need not be directly specified – here, held that one month was sufficiently reasonable)

W. J. Alan v. El Nasr Export (1972, UK)

Facts: Buyer contracted with seller to buy coffee in Kenyan shillings. Payment made in English sterling instead, which seller accepted. English currency devalued, sellers lost $ and brought this action. Defendants argued **promissory estoppel** – sellers accepted sterling, so there was an implied promise not to revert to Kenyan shillings. Plaintiff argued that defendants had benefited (no detrimental reliance)
Issue: Does seller have right to enforce payment in shillings after accepting initial payment in sterling?

Held: Jmt for defendants. Plaintiffs waived right to be paid in shillings; could not now withdraw this waiver.
Principle: One who waives strict rights cannot later insist on them

- Sometimes withdrawal is *not possible* (either too late, or cannot be done w/out injustice to other party)
- No need for *detrimental* reliance – simply reliance is enough
- **NB:** NOT ACCEPTED in Canada. Must show some sort of prejudice/detrimental reliance.

Societe Italo-Belge v. Palm & Vegetable Oils (1982, UK)

Facts: Buyers rejected sale of palm oil two days after receiving documents; sellers claim buyers led them to believe that sale was okay since they did not complain right away, but accepted documents initially.
Issue: Did buyers waive their rights to reject sale by waiting two days?
Held: No – two days is not enough time to create reliance (no evidence that sellers' position was prejudiced)
Principle: **Detrimental reliance is an element of promissory estoppel.** W/out this, it won't be applied.
If there is not sufficient reliance on a promise, or it would not be inequitable to revoke promise, then the promise can be revoked

Combe v. Combe (1951, UK)

Facts: Husband and wife divorce, husband says he will pay wife $100/year but never does. 6 years later she sues for backpayments.
Issue: Can estoppels be used as a cause of action? NO.
Principle: **Estoppel is a shield, not a sword (can only be a defence against a claim, not cause of action).**

- Denning cautions against stretching the principle in *High Trees* too far – cannot be used to create new legal obligations between parties where none existed before
- "The doctrine of consideration is too firmly fixed to be overthrown by a side-wind."

Petridis v. Shabinsky (1982, Ont. High Court)

Facts: P ran a restaurant and was tenant of D; supposed to give 6 mos written notice for renewal of lease; P and D entered into negotiated renewal leading up to end of lease; landlord gave up and kicked out P.
Issue: Did landlord waive right to forgo renewal? Did he give sufficient notice to retract waiver?
Held: Landlord waived his strict rights under the lease by entering into negotiations and did not give sufficient notice to withdraw waiver. **If waiver is relied upon, then sufficient notice is required to retract waiver.**

Robichaud v. Caisse Populaire (1990, New Brunswick CA)

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Facts: Robichaud made deal to pay lesser sum of debt to local bank manager; he sent his payment but bank directors refused to accept deal; he sued to enforce his deal.
Issue: Can P use estoppel as a sword to stop bank from reverting to their original rights?
Held: Yes, principles of equity still apply whether used by plaintiff or defendant.
Principle: It is irrelevant who is plaintiff and who is defendant; estoppel can be applied as long as all the key criteria are met (i.e. there is reliance on a subsequent promise such that it is inequitable to enforce original strict rights). **Enforceability should not depend on whether the promisee is a plaintiff or a defendant.**

- ➔ **Promissory estoppel can be used as a sword if it would be equitable to so**
- ➔ This was okay because there was a **pre-existing legal relationship**

Waltons Stores v. Maher (1988, Australia)

Facts: Negotiations for lease of Maher's land, with Maher to erect a building on the land for use by new Waltons store under a long-term lease. Time is of the essence in order for construction to occur on time. Maher prepared and sent lease; Waltons said they would notify him within one day if they had any objections. Maher started to demolish and erect the new building; 3 weeks later, despite knowledge of the demolition/construction, Waltons reneged.
Issue: Can the appellant (Waltons) be estopped from denying the existence of a binding K?
Held: Judgment for respondent (Maher).
Principle: Promissory estoppel usually requires a pre-existing legal relationship, but it can be used in the absence of that relation if there is **reasonable expectation of legal relations**, and a **reliance** on that promise such that it would be inequitable not to enforce it.

- Here, **estoppel used as a sword**; can't encourage (even by silence) other party to act to their detriment based on your representation when unconscionable outcome will result
- **NB:** This precedent used in Canada but only in proprietary estoppel cases; it is persuasive but not highly so; not followed yet in England.

M. (N.) v. A. (A.T.) (2003, BCCA)

Facts: Mr. M made promise to Ms. A that he would pay her mortgage in England if she came to live with him in Canada; she did come, but relationship broke down and he did not pay mortgage.
Issue: Was the promise binding?
Held: No. Though Mr. M made the promise and Ms. A relied on it to her detriment, not enforceable b/c no pre-existing legal relations and no reasonable expectation of legal relations.
Principle: BC decision upholding Denning's view that estoppel not intended for use as a sword where no legal relations pre-exist; Court said, "**a necessary element of promissory estoppels is the promisee's assumption or expectation of a legal relationship**."

Balfour v. Balfour (1919, UK)

Facts: Plaintiff sued husband for money which she claimed to be due in respect of an agreed allowance of 30 pounds per month.
Held: No K. Finding for husband.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

Principle: **Agreements such as these (spouse, family, social) are outside the realm of contracts altogether.** A contract only exists if both parties *intend* for it to be legally binding.

Jones v. Padavatton (1967, UK) – Not in our materials!

Facts: Daughter decides to pursue legal studies on promise of support from mother (house to live in). Dispute and mother wants to evict her daughter.
Held: Despite presumption in familial relationships against intention to create legal relationship, here there was such intention. Mother made clear offer, mother's lawyer wrote to confirm arrangement. **Some familial agreements can have intentions to create legal obligations.**

Rose & Frank v. Crompton & Bros (1923, UK)

Facts: Parties sign an agreement that "shall not be subject to legal jurisdiction in the Law Courts."
Issue: Could an express clause rebut the presumption of intention to create legal relations?
Held: Yes, **Court accepts that an express intention to *not* enter into legal relations can rebut this presumption that commercial arrangements have implied legal relations.**

TD Bank v. Leigh Instruments (1999, Ont. CA)

Facts: Ongoing correspondence between TD and Leigh's parent company through comfort letters regarding Leigh's financial obligations to TD.
Issue: Is there an intention to create a legal obligation by way of comfort letters?
Held: No. Bank's action dismissed.
Principle: **Comfort letters of a parent company for a subsidiary are not considered legally binding** (though comfort letters may have commercial value, even if they don't impose legal obligations)

- Look to *intent* – there was no intention to assume legal responsibility.

Redgrave v. Hurd (1881), 20 Ch. D. 1 (C.A.)

Plaintiff vendor selling his law business and house. Informs defendant purchaser that annual income from business amounted to £300-400/per year. Purchaser does not inspect all of the papers relating to the law business. Purchaser enters into written agreement to purchase house (£1,600) and pays deposit of £100. Takes possession of house - and before balance paid - discovers that practice is only £200. Buyer refuses to complete sale of house and vendor sues.
Trial: No recovery. Caveat Emptor. Could have discovered.

Appeal: Misrepresentation gives right to rescission. Recovery of deposit but no damages. …. for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shewn either that he had knowledge of the facts

contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation.

- If material representation calculated to induce someone to enter into K, law infers that he/she was **induced by the representation** to enter into it and can claim to be removed from negative position UNLESS:
    - He/she had knowledge of the facts contrary to the representation, or
    - He/she stated in terms (or shown clearly by conduct) that they did not rely on the representation.

Provender v. Wood (1630, UK)

Facts: Wood agreed with Provender's father to pay 20 pounds to Provender after Provender and Wood's children were married. Wood did not pay and Provender brought the action.
Held: Court held that the party to whom the benefit of a promise accrues may bring the action (i.e. third party beneficiary).
Principle: This shows that early common law courts *did* allow third party beneficiaries to bring action. Reversed in *Tweddle v. Atkinson*. Privity is a more "recent" doctrinal rule.

Tweddle v. Atkinson (1861, UK)

Facts: Plaintiff is to marry Miss Guy. Father of bride and groom each promise to pay the plaintiff $ once the marriage happened. William Guy did not pay.
Issue: Can the plaintiff, a third party beneficiary, sue for enforcement of K?
Held: No. Rule in favour of defendant.
Principle: **Establishes common law maxim of privity of K**. A promisee cannot bring an action unless the consideration moved from him. Privity excludes third party beneficiaries from enforcing a K.

CASES

Beswick v. Beswick (1968, CA / HL)

Facts: Peter Beswick sold business to nephew, who agrees to pay Mrs. Beswick an allowance for her life after Peter's death. Peter dies; nephew reneges on payment to Mrs. Beswick. She sues for enforcement of K.
Denning's View (CA): Tries to overturn *Tweddle*. Says privity is only a "rule of procedure", but if K is made for 3P's benefit, and 3P has a legitimate interest to enforce the K, then they have a contractual right to enforce.
House of Lords: Don't go as far as Denning, but support on the ground that as Mrs. Beswick as administratrix of Peter's estate, she can sue as party to the contract between Peter Beswick and nephew.

- HoL says privity of K is defective, but we can't change a rule we made – leave that to Parliament.

Greenwood v. Beattie (SCC, 1980) – NOT IN OUR MATERIALS!

Facts: Fire in mall caused by employees of Canadian tire. Insurer can't sue Canadian tire, so goes after employees who cause the fire.
Held: SCC holds that, because employees were third parties to the lease, they were *personally* liable.

- NB: Scathing criticisms of this. Employees least able to bear cost/don't expect to be personally liable..
- **Policy concerns** around unfair surprise, distributive justice, disrupts risk allocation, inefficiency (requires double insurance for employees?), too formalistic (fails to consider consequences of judgment)

London Drugs v. Kuehne & Nagel (1992, SCC)

Facts: KN was storing a transformer for LD. Storage K included a limitation of liability clause, which referenced warehousemen and limited their liability to $40. Warehousemen damaged the transformer. LD brought action for damages. BCSC held the two warehousemen *personally liable* for the full amount of damages, while limiting KN's liability to $40.
Issue: To what extent can employees benefit from their employer's contractual limitation of liability clause?
Held: **Relaxation of rule regarding privity of K**.
Ratio: **Employees may benefit from limitation of liability clause if it:**

c) Expressly or impliedly extends its benefits to employees seeking to rely on it, and
d) Employees act in the course of their employment *and* perform services provided for in the contract when loss occurred.

- **Policy considerations:** Privity in this case would *frustrate commercial reality* (ignores reality of insurance coverage, assumption of risk), *common sense* (inconsistent with reasonable expectations), and *justice*

Edgeworth Construction v. N.D. Lea & Associates (1993, SCC)

Facts: Edgeworth hired Lea & Associates (engineering firm) to prepare drawings for a construction project. Edgeworth alleges financial loss due to faulty drawings (negligent misrepresentation).
Issue: Could the engineers, not parties to the contract, claim the benefit of the exclusion of liability?
Held: No. SCC rejects this argument.
Principle: Looks to **intention of parties** – there was no intention to release the engineers from liability

- Distinguishes *London Drugs* – no inference (that the clause provided protection for the engineers) can be made here – the clause protected the province alone from liability, and was neither expressly nor impliedly meant to cover the engineers as well
- Also, the engineering firm, unlike employees in *London Drugs*, could have taken steps to protect itself but did not insure itself accordingly (**policy considerations**)

Fraser River Pile & Dredge v. Can-Dive Services (1999, SCC)

Facts: A barge belonging to Fraser River sank. The barge was under charter to Can-Dive. The insurance K between Fraser River and insurer contained a clause where the insurer waived its rights to subrogation against any charter (i.e. Can-Dive). Insurer paid Fraser River,

and Fraser River made an agreement to waive any right to the waiver of subrogation. Insurer sued Can-Dive; Can-Dive appeals.
Issue: Was there an intention to extend the benefit to Can-Dive, who was seeking to rely on the provision?
Principle: **Creates a broader exception to privity – extends rule in *London Drugs* as follows**:

3) Did the parties in contract intend to extend benefit to third party?
4) Were the activities performed by 3P are the very activities contemplated in the contract?

- This applies here. Contract specifically mentions charters, clearly meant to benefit Can-Dive, and Can-Dive was doing exactly what the contract contemplated
- The agreement was made after Can-Dive's rights formed into an actual benefit – these rights cannot now be unilaterally revoked after hits. Can-Dive basically becomes a party to the initial K for this purpose.
- Infringes freedom to modify contract, but worth it. Sound policy reasons to allow Can-Dive to benefit from the clause.

Redgrave v. Hurd (1881, UK)

Facts: Plaintiff selling law business and house. Informed defendant that income was 300-400 pounds/year. D never checks books and enters into agreement. Before balance paid, D discovers practice is only 200 pounds/year. D refuses to complete sale of house claims misrepresentation/rescission.
Trial: No recovery. *Caveat emptor*. Could have discovered true value.
Appeal: **Misrepresentation gives right to rescission** (recovery of deposit, but no damages).

- False representations are *not* displaced by contributory negligence (i.e. that he could have discovered true value but failed to do so)
- **Inference of law: a material representation calculated to induce a party to enter into a K *did* induce, unless there is evidence to the contrary** (either that the party knew facts contrary to the representation, or showed clearly by his conduct that he did not rely on the representation)
- **Burden of proof** is therefore on the person who made the representation to prove that it did *not* induce the other party to enter into the contract.

Smith v. Land & House Property (1884, UK)

Facts: Plaintiff vendors offered a hotel for sale, stating it was currently leased to "a most desirable tenant". Defendants agreed to buy hotel; short after, the tenant went into bankruptcy.
Held: Courts find there was a misrepresentation. Statement of fact, not mere expression of opinion.
Principle: **If facts are *not* equally known to both sides, then a statement of opinion by the party who knows the facts best impliedly involves a statement of material fact**.

Courts (as reasonable person): (un)reasonable expectation v. unfair surprise/punishment

- **Disparity of knowledge** is an important factor (different from situation where both parties know facts equally well, and one party is simply expressing an opinion). Courts will ask, "Who knows best"?
- **Level of expertise** will often be considered in distinguishing warranty vs. opinion vs. representation

Bank of BC v. Wren Developments (1973, BCSC)

Facts: Defendant (Wren) gave plaintiff Bank shares as collateral securities on a loan. Allan (director of defendant company) is asked by Bank to sign a second guarantee, which he does without knowing some of the shares were released. Bank then claims balance owing on the loan.
Held: Allan signed the guarantee in the mistaken belief that collateral was still held by the bank. Court determines Allan believed this because he was negligently misled by words/conduct of the Bank.
Principle: **Failure to disclose material facts may be considered misrepresentation.**

- **NB**: Difficult to reconcile this case with general rule that there is no duty to disclose. May be better viewed as based on doctrine of **mistake** (unilateral mistake on the part of Allan, which was induced by the misrepresentations of the Bank in failing to disclose material facts to him)

Kupchak v. Dayson Holdings Ltd (1965, BCCA)

Facts: Kupchak purchases shares in a motel company from Dayson in return for 2 properties. Kupchak finds out there were false misrepresentations made about the hotel's earnings, and seeks rescission. D had already sold a half interest in one of the properties. Trial judge denied rescission but did award damages.
Held: **Although property could not be fully returned, rescission still granted.** Awards compensation for the one property that cannot be returned.
Principle: **Financial awards may be granted under rescission when it is impossible or inequitable to restore the original property.**

- Takes broad approach to equity and says that it can require compensation.
- **Policy considerations:** unfair for the defendant who, guilty of fraud, then prevents restitution by selling part of the property he has acquired by fraud (prevent *unjust enrichment*)

Heilbut, Symons & Co v Buckleton (1913, UK H.L.)

Facts: Sale of shares in a rubber company. Representative of Heilbut made a statement, pursuant to which Buckleton bought a large number of shares. There turned out to be a deficiency and shares fell in value.
Issue: Was the statement a warranty, i.e. a contract collateral to the primary contract?
Held: Collateral contracts are rare and must be strictly proven. No evidence that the statement was intended to be a term of the contract.
Principle: **Rejects a broad approach to collateral contracts** (a mere statement regarding the character of the company isn't enough to establish a collateral

contract). This was a representation, not a warranty, and a person is not liable in damages for an innocent misrepresentation

- **Policy concerns:** maintaining certainty/predictability regarding written agreements, and not allowing verbal/collateral terms to override the written terms. If a term is so important, it should be written in the contract!

Dick Bentley v. Harold Smith Motors (1965, UK CA)

Facts: Statement on car engine (only 20,000 miles) led Bentley to buy car. Bentley bought the car, which was a considerable disappointment. Eventually brought action for breach of warranty.
Issue: Was the statement an innocent misrepresentation or a warranty?
Held: It was a warranty.
Principle: **Establishes modern test to determine warranty (the representation was meant to induce, and actually did induce, the party to enter into a K**). Doesn't consider collateral K approach.

- Objective test for determining warranty → depends on conduct of the parties
- **Rebuttal:** if the speaker can show it was an innocent misrepresentation (that he was **innocent** in making it, and it would **not be reasonable** for him to be bound by it). Not rebutted in this case.

Leaf v. International Galleries (1950, UK CA)

Facts: Sale of painting, term of contract that the painting was a "Constable". 5 years later, buyer took painting to auction and discovered it was not a Constable. Leaf took it back to seller and asked for his money back, i.e. rescission of the K (no claim for damages for breach of condition or breach of warranty).
Held: Too late – no rescission. Should have claimed for damages.
Principle: **In a case of innocent misrepresentation, rescission is only allowed before the buyer accepts the goods. After he accepts them, it is too late and rescission is barred.**
The sale of painting as a "constable" was a **condition**, i.e. a fundamental term of the K