

Exam Approach

Step	Details	Key Details
Read the question	Use the specific terms of the question to guide reading of fact pattern /additional materials Parse any question(s) to determine what type of response is required	<input type="checkbox"/> Identify issue(s) <input type="checkbox"/> Identify required response
Read the fact pattern	Identify key terms and issues that relate to the question	<input type="checkbox"/> Key terms <input type="checkbox"/> Key issue(s)
Outline response	Identify the legal issue(s) Identify relevant legislative provisions and case law Identify relevant information from fact pattern	<input type="checkbox"/> Legal issue(s) <input type="checkbox"/> Legislative provisions <input type="checkbox"/> Case law <input type="checkbox"/> Relevant facts
Legal framework	Outline the legal framework for response Q: What type of K? Q: Which breach of K is central to the issue(s)? Q: Which test(s)/standard(s) apply to this type of breach? Q: What remedy applies to this type of K? Remedies = damages+ equitable remedies (specific performance, damages in lieu of specific performance, injunction, restitution) Q: How is the remedy measured?	<input type="checkbox"/> Type of K <input type="checkbox"/> Breach <input type="checkbox"/> Relevant tests/standards <input type="checkbox"/> Relevant remedy <input type="checkbox"/> Relevant measure of remedy
Response framework	(1) Identify issue (2) State principle of law (with case reference, not necessary to be case name) (3) Discuss how the law applies to particular situation in fact pattern (a) Identify principle (b) Contrary case(s) (c) Distinguish from either leading principle or contrary case(s) (d) You may incorporate the "other side's" arguments (4) Reach tentative conclusion on outcome	<input type="checkbox"/> Check response to outline <input type="checkbox"/> Proofread

Table of Contents

Topic	Page
Supplementary Definitions	3
Policy Considerations in Contracts	3
Policy Considerations in Remoteness	3
Introduction to Contracts	
Working Definition of "Contract"	3
Brief History of Contracts Law	4
Remedies for breach of promise	
Expectation damages	5
Restitution damages	5
Reliance damages	5
Loss of chance	5
Cost of performance	5
Economic waste (limitation of damages)	6
Lost volume	6
Remoteness	6
Intangible Injuries	6
Aggravated Damages	6
Punitive Damages	7
Damages in Employment Termination	7
Mitigation	7
Anticipatory breach of contract	7
Specific Performance	8
Specific Performance in Land Contracts	8
Damages in lieu of specific performance	8
Injunction	8
Time	9
Restitution	9
Kinds of promises legally enforced	
Bargains, offers and acceptance	9

Tests	Page
Measurement of Damages	
Expectation Damages (<i>Hawkins</i>)	5
Loss of Change (<i>Folland</i>)	5
Economic waste (<i>John Wunder</i>)	6
Remoteness and Mitigation	
General Principle (<i>Hadley</i>)	6
Aggravated Damages	
Aggravated Damages (<i>Fidler</i>)	6
Punitive Damages (<i>Whiten</i>)	7
Intangible Losses in Employment Termination (<i>Honda</i>)	7
General Principle (<i>Payzu, Asamera Oil</i>)	7
Doctrine of Election (<i>Hochester, White & Carter</i>)	7
Equitable Remedies	
Specific Performance (<i>Argyll</i>)	8
Specific Performance in Land Contract (<i>Tanebaum</i>)	8
Damages in Lieu (<i>Wroth</i>)	8
Injunction (<i>Warner Bros.</i>)	9
Measure of Time (<i>Wroth</i>)	9
Restitution (<i>Blake</i>)	9
Bargains, Offers and Acceptances	
Qualities of a commercial bargain	9

Supplementary Definitions and Policy Arguments

Term	Definition
Charterparties	part of a special body of law around mercantile shipping major principle: any deviation from the route specified in the K is considered a serious breach of K (can only accept significant risks of shipping on an agreed-upon route)
Contract without term	Implied provision that the K can be ended by either party with reasonable notice, or with cause. Common law provision for notice can be specified in the K. If not, case law determines what constitutes reasonable notice.
Fixed term contract	Termination at end of K term, or with cause.
Nonfeasance	failure to perform an act required by law
Rescission	unravel the entire K to return the parties to their original position (<i>status quo ante</i>) n.b.: not typically a remedy for a breach of K, as straight forward non-performance is typically not remedied by rescission
Warranty	a promise that has contractual force.

Policy Considerations in Contracts

Policy Consideration	Details
Predictability	Courts should enforce the sanctity of the contract to ensure predictable commercial functioning.
Unjust enrichment	Courts should not permit a defendant to breach a contract in such a fashion that the defendant benefits at the plaintiff's expense.
"Happy breach"	Likewise, courts should not permit a plaintiff to oblige a defendant to remain in a contract that is financially disadvantageous. Typically, the defendant should be able to breach the contract and pay the damages to put the plaintiff in the position as if the contract was completed (in a happy breach situation, this cost is less than the continuation of the contract.)

Policy Considerations in Remoteness

Global Idea	Plaintiff	Defendant
Policy	Reasonable expectations	Unfair surprise
Assumption of responsibility?	Experts are expected to know the usual result of breaching contract in their field (<i>Victoria Laundry</i>)	Need separate contract (<i>Horne</i>) Opportunity to accept or limit liability (<i>Horne</i> + common carriers; <i>Victoria Laundry</i>)
Type that one would assume responsibility for	Advertising (<i>Purolator</i>)	Commercial context: not the type of loss that they would have assumed responsibility for (<i>The Achilleas</i>)
Exceptionally lucrative	If there was an assumption of responsibility and communication of special circumstances (<i>Purolator</i>)	Losses outside of ordinary market fluctuations are not recoverable (<i>Achilleas</i>) Even experts cannot predict very lucrative (<i>Victoria Laundry</i>)
Communication of special circumstances		Not communicated (<i>Hadley</i>)
Likely/reasonable possibility	Not in the reasonable contemplation (<i>Hadley</i>); not necessarily but "likely so to result" (<i>Victoria Laundry</i>)	Losses not sufficiently likely (<i>Heron II</i>)
Speculative		speculative = <i>Anglia</i>

Introduction to Contracts

Working Definition of "Contract"

Contract: a promise that the law (or legal system) will enforce.

Term	Details	Key Concepts
Promise (contract formation)	What categories of promises will the law or legal system enforce? Even promises that may normally be enforceable may be vitiated by factors such as duress and lack of specificity of K	<ul style="list-style-type: none"> • Contract formation • Vitiating contract
Enforcement	What enforcement mechanisms does the law provide for broken promises?	<ul style="list-style-type: none"> • Compensation

(remedies)	Specific performance; compensatory damages Possible forms of measuring compensation : (1) Restitution (monies paid to K breaker) (2) Reliance losses (costs thrown away on reliance of promise) (3) Expectation losses (value of what Π expected to receive in the promise)	<ul style="list-style-type: none"> • Restitution • Reliance • Expectation
Brief History of Contracts Law		
Period	Developments	Key Concepts
13 th century	Limited range of enforceable promises and limited enforcement mechanisms Four types of enforcement: (1) Covenant : when a promise contained in a written document placed under seal (also called a speciality or a deed) was broken, the court could issue a writ (call by the court for Δ to answer a claim called against them) (2) Debt : specific sum of money owed to a specific person (generally required evidence of written document but limited exceptions: payment of rent of a lease, claim of wages, sale of land or chattel, loans provided that they weren't usurious) Choice of methods of trial: either wager of law (Π testifies that Δ owes him or her something, and brings 11 other people to support this oath) or trial by jury (use knowledge of the jurors to determine what happened in the case) (3) Conditional bond : written document that promised something and outlined a specified sum of money if this condition was not met (popular until as late as the 17 th century, when the equitable courts determined that this mode of enforcement was penal and therefore not enforceable) (4) Detinue : writ that allowed you to sue for a specific chattel (i.e. sue for the return of a specific item of property)	<ul style="list-style-type: none"> • Covenant • "under seal" (speciality or deed) • Writ • Debt • Wager of law • Trial by jury • Conditional bond • Detinue
15 th century	Increased sophistication of commerce Debt and detinue were thought to put right a specific wrong therefore creation of writ of trespass to provide general compensation Writ of trespass : Π proves (1) the wrong necessitated compensation AND (2) Δ owed him or her a duty. Lawyers plead circumstances that produce the duty by citing the specifics of the case (plead a " special case "). Writ of assumpsit : allowed an action when Δ had undertaken to perform some duty but performed it badly. Π proves (1) Δ assumed a duty by a previous agreement, (2) Δ performed the duty badly, AND (3) that Π was not able to bring a claim of nonfeasance Writ of deceit (Doige's Case): X promises to sell land to Y, who pays X for the land. X receives the money from Y but conveys the land to Z. However, as there was still no remedy if a promise is not performed, this writ created a perceived inequality in the law as if X conveyed the land to Y, and Y did not provide the money then X could sue for debt	<ul style="list-style-type: none"> • Writ of trespass • "Special case" • Writ of assumpsit • Nonfeasance • Writ of deceit
16 th century	Exceptions created in instances of nonfeasance where a writ of assumpsit could be brought: (1) promises to convey land, and (2) building Ks 1530: overriding principle that a writ of assumpsit applies for nonfeasance Reasons: (1) completion for financial benefits of writ (fee for bringing a writ), (2) professional competition between 2 court system, (3) perceived lacuna in the law	<ul style="list-style-type: none"> • Writ of assumpsit • Nonfeasance
17 th century	Perceived hierarchy between writ of assumpsit for nonfeasance and the four original actions (covenant, debt, conditional bond and detinue) as writ of assumpsit could only use trial by jury (and 17 th century juries used independent jurors). Increasing concern over neutrality of wager of law . Slade's Case (1602): Slade brought an action for breach to provide goods. Judges sat "en bond" (King's Bench and Exchequer Courts) and determined that Π could bring the action as either debt or assumpsit (more or less ended action of debt.) <u>Genesis of modern contract law:</u> (1) Assumpsit : an action for breach of K, and available to enforce all kinds of informal promises (2) Wrong : a failure to fulfill a promise that the law provides a remedy (compensation)	<ul style="list-style-type: none"> • Writ of assumpsit • Trial by jury • Wager of law • Slade's Case • Debt • Assumpsit • Wrong

Remedies for Breach of Promise

Types of Damages		
Damage	Details	Key Concepts
Expectation damages	<p>Normal measure of damages for breach of promise. Also referred to as expectancy losses, payment for the loss of your bargain.</p> <p><u>Principle of Expectation Damages:</u> “And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed” (<i>Wertheim</i>)</p> <p><u>Policy:</u> (1) Π receives expected benefit, (2) Δ only suffers the loss outlined in K, (3) damages are compensatory not punitive therefore damage award should not differentiate between completing the K or paying expectation damages</p> <p><u>Purpose:</u> improve commercial functionality by making it not profitable to break a K (therefore can rely on promises to undertake further endeavours)</p> <p><u>Calculation:</u> the difference between the position you would have been in had the K been fulfilled, and the position that you are in given the broken K</p> <p><i>General Calculation in Real Estate Contracts:</i> the difference between the value of the property at the time of sale in K, and the value of the property at the time of breach</p>	<ul style="list-style-type: none"> • Expectancy losses • Payment for the loss of your bargain • Principle: same position as if K was performed
Restitution damages	<p><u>Principle of Restitution Damages:</u> Recovery of benefits that have been transferred to Δ in the K that was broken (i.e. a paid deposit, or goods shipped without payment)</p> <p><u>Policy:</u> prevents unjust enrichment (i.e. prevents Δ benefiting from breach of K)</p> <p><u>Usage:</u> (1) area of equitable law, (2) courts are reluctant to transfer back conferred benefits if it will put Π in a better position than if the K was fulfilled (does not account for bargain/risk)</p>	<ul style="list-style-type: none"> • Principle: restoration of transferred benefits • Policy: unjust enrichment (Π and Δ)
Reliance damages	<p>Also referred to as costs thrown away.</p> <p><u>Principle of Reliance Damages:</u> Compensation of monies expended on the faith (reliance) of the K promise being fulfilled.</p> <p>If the evidence cannot support expectation damages (i.e. speculative), then reliance damages may be awarded (<i>Anglia</i>). If possible, however, the court must calculate damages -- even if difficult (<i>Carson</i>.)</p>	<ul style="list-style-type: none"> • Costs thrown away • Compensation for expenditures made in reliance • Cannot calculate expectation damages

Specific Problems in Measuring Damages

Problem	Details	Key Concepts
Loss of chance	<p>When Δ breaches K with Π and Π loses the opportunity to gain a benefit or avoid harm. Typically, damages are the value of the chance that Π did not receive.</p> <p>Ex: breach of K for failing to purchase a lottery ticket you were contracted to buy.</p> <p>Damages = what you were willing to pay for it (i.e. ticket price.)</p> <p>“Note on Lost Chance”: competing theories of damage awards (1) either Π establishes on the balance of probabilities that Π would have been successful and therefore awarded full value of chance, or no damages are awarded (2) either Π established full award, or Π received percentage of award available based on changes of winning the award.</p> <p><u>Test for loss of chances:</u> Π proves (1) but for Δ’s conduct, Π would have chance/avoid loss (on the balance of probabilities); (2) real and significant chance; (3) outcome dependant on something or someone other than the Π; (4) lost chance has practical (financial) value that can be measured/calculated (<i>Folland</i>)</p>	<ul style="list-style-type: none"> • Value of the chance • Measure of damages
Cost of performance	<p>Typically in building situations, if a defendant breaches a contract, he will be obliged to pay the cost of performance (i.e. what it would cost to provide what was contracted for.)</p>	<ul style="list-style-type: none"> • c.f. <i>John Wunder</i> and <i>Peevyhouse</i>

Economic waste	<p>Counter to cost of performance. Typically, damages are intended to compensate Π (not penalize Δ) therefore damages should be limited in instances when (1) there is no discernible difference in value between the K fulfilled and the K broken, and (2) restoring to the K fulfilled would waste investment. However, economic waste is qualified if there is "unique or personal use" in K fulfilled (despite no financial difference) (<i>John Wunder</i>).</p> <p>Ex: ugly fountain is "unique or personal use" even if it reduces property value.</p>	<ul style="list-style-type: none"> • Limit damages if no difference except wasted investment between two positions • Qualified by "unique or personal use"
Lost volume	<p>Generally, <i>Sale of Goods Act</i> (ON CB 84) provides the normal measure of damages for the sale of an item as the difference between contract price and market price.</p> <p>However, common law provisions when the measure doesn't cover the loss of volume (i.e. if a car dealer pre-sells five cars, and one buyer cancels his contract):</p> <p>(1) supply < demand: if insufficient demand to absorb unsold vehicle, damages are for loss of profits (<i>Thompson</i>).</p> <p>(2) supply > demand: if sufficient demand to absorb unsold vehicle, no damages as limited supply but clear demand/market for product (<i>Charter</i>)</p>	<ul style="list-style-type: none"> • General: difference between contract price and current market price • Loss of volume (market/demand)

Remoteness		
General Principle	Details	Key Concepts
<p>Every contract is about the management of specific risk(s) and some losses are too far removed (remote) from the contract to be compensable. Remoteness defines the point at which Δ should not be held liable.</p>	<p><u>Risks</u>: defective product, lower price, depreciation, <u>Risk Management Options</u>: K, warranty, insurance <u>Contract Risk Management</u>: K functions as a mechanism to allocate risk to each party <u>Damages</u>: the courts re-allocate the risks as they would have been if the K was completed. Risks must be known (explicitly or implicitly) at the time of K. (Reluctance to award damages for losses when it appears unreasonable for one party to bear the risk.) <u>Two-pronged test (Hadley)</u>: (1) Π is eligible to recover damages that arise naturally from the breach of K, or were reasonable supposed by both parties at the time of K, or (2) if special conditions were articulated at the time of contract, then Π may claim losses that arise from these conditions → contemporary application in <i>Purolator</i> <u>Reasonable foreseeability (Victoria Laundry)</u>: special circumstances must be (a) known, and (b) known in a fashion that permits Δ to limit/accept liability "Serious risk" (<i>Victoria Laundry</i>): loss = likely ("serious risk") not certainty</p>	<ul style="list-style-type: none"> • Risk • Remoteness • Damages as maintaining K's risk allocation • Two-pronged test for remoteness • Reasonable foreseeability • "serious risk"

Intangible Injuries		
Terms	Details	Key Concepts
Intangible losses / injuries	<p>Losses or injuries beyond financial/economic losses.</p> <p>Ex: emotional distress, peace of mind, disappointment (loss of entertainment)</p>	<ul style="list-style-type: none"> • Not financial/economic
Aggravated damages	<p>A form of compensatory damages for intangible losses / injuries. Generally augments normal compensatory damages. Intangible losses/injuries: mental distress (<i>Fidler</i>, <i>Vorvis</i>, <i>Honda</i>), loss of enjoyment (<i>Jarvis</i>)</p> <p><u>Principles for award of aggravated damages (Fidler)</u>:</p> <p>(1) object of K to secure a psychological benefit</p> <p>(2) loss of benefit reasonably foreseeable from breach of K (i.e. peace of mind or relaxation)</p> <p>(3) degree of mental suffering caused by the breach must be sufficient (serious) to warrant compensation (i.e. medical documentation)</p> <p><u>Consumer situation</u>: psychological benefit may be part of contract (i.e. wedding photos)</p>	<ul style="list-style-type: none"> • Compensatory • Principles for award (<i>Fidler</i>) • Consumer situations

	in <i>Wharton</i>)	
Punitive damages	<p>A form of non-compensatory damages awarded to punish Δ (no correspondence with Π's losses). Exception to compensation principle for damages.</p> <p><u>Principles for award of punitive damages (<i>Whiten</i>):</u></p> <p>(1) egregious/extreme misconduct: "malicious, oppressive and high-handed' misconduct that offends the court's sense of decency" (§36); limits award to situations that are "a marked departure from standards of decent behaviour" (§36)</p> <p>(2) "punitive damages should be resorted to only in exceptional cases and with restraint" (§69); other penalties (i.e. criminal law, etc.) will reduce the award</p> <p>(3) meets objectives: (a) retribution, (b) deterrence, and (c) denunciation ("proof of the detestation") (§43)</p> <p>(4) amount no greater than rationally needed (as award constitutes a windfall for the plaintiff); typically, moderate awards of damages that carry a stigma to the community are sufficient</p> <p>(5) an independently actionable wrong (i.e. breach duty of good faith) (§79); sufficient to be a separate breach (no longer requirement for an independently actionable tort (<i>Vorvis</i>)); however, cannot receive punitive damages when the only breach is the breach of K for which compensatory damages were awarded</p>	<ul style="list-style-type: none"> • Not compensatory • Principle for award (<i>Whiten</i>)
Damages in employment termination situations	<p><u>Historical evolution:</u></p> <p>(1) Damages for notice only when the mental distress is associated with the breach (i.e. aggravated damages must be an independently actionable tort) (<i>Vorvis</i>)</p> <p>(2) To compensate for mental distress in employment termination situations, extension of the notice damage</p> <p><u>Current standard:</u></p> <p>(1) Implied term in employment Ks that termination will be candid, honest and forthright in the matter of dismissal (<i>Wallace</i>) → duty of good faith (reasonable manner) and fair dealing (severance, reasonable notice)</p> <p>(2) Application of <i>Fidler</i> test in employment situations: aggravated damages will be awarded for (a) serious mental distress (b) that arises naturally from the breach of K (i.e. exceeds distress in legal termination)</p>	<ul style="list-style-type: none"> • Implied duties in employment terminations • Principle for award (<i>Honda</i> using <i>Fidler</i>)

Mitigation		
Term	Details	Key Concepts
Mitigation	<p>The injured party must do whatever is reasonable to reduce losses. Mitigation may include (1) working with the K breaker (if that is reasonable thing to do) or (2) negotiating a new K (<i>Payzu</i>)</p> <p>→ Π acts "reasonably in all circumstances." No duty to mitigate if the circumstances show "a substantial and legitimate interest in seeking performance" (<i>Asamera Oil</i>)</p> <p>→ Δ may raise Π's failure to mitigate as a defence (in which case Π would only be compensated for losses they could not reasonably be expected to mitigate)</p>	<ul style="list-style-type: none"> • Reduce losses • Specific performance • Defence / limitation of compensation
Anticipatory breach of contract.	<p>Doctrine of election: if one party repudiates the K, the other party can (<i>Hochester</i>):</p> <p>(1) consider the K repudiated and sue for anticipatory damages</p> <p>(2) hold the K open for performance (wait until breach occurs)</p> <p>N.B. (2) is not available when Π has "no legitimate interest, financial or otherwise, in performing the K rather than claiming damages" (majority, <i>White & Carter</i>)</p> <p>Typically held that both options are available (majority, <i>White & Carter</i>) but concern that option (2) is a backdoor for specific performance when it should not be available as a service K (dissent, <i>White & Carter</i>)</p>	<ul style="list-style-type: none"> • Doctrine of election • Anticipatory breach of contract • Legitimate interest • Policy: backdoor to specific performance

Specific Performance		
Term	Principles/Test	Key Concepts
Specific performance	<p>Specific performance was the equitable remedy for breach of contract that required the Δ to perform the contract (<i>Argyll</i>)</p> <p><u>Principles of Specific Performance:</u></p> <p>(1) exceptional remedy for breach of contract (2) damages must be inadequate as a remedy (i.e. unique requirement of the contract cannot be addressed through damages or, occasionally, if damages are impossible to estimate. (3) specific performance will not be granted if it require court supervision to ensure performance (as enforcement would be contempt proceedings, which are a quasi-criminal offence.) (4) no specific performance in personal service contracts. (5) generally specific performance will not be ordered if it will interfere with the rights of innocent third parties. (6) generally expectation of mutuality in specific performance (i.e. must pay contract price upon performance.)</p> <p><u>General principles of equity:</u></p> <p>(1) “the person who comes to equity must come with clean hands” (2) action must be prompt / <i>laches</i> (if you delay too long, equity will not help)</p>	<ul style="list-style-type: none"> • Equitable remedy • Exceptional • Inadequacy of traditional measure of damages • Minimal court supervision • Never personal service contracts • No interference with 3rd party rights • Expectation of mutuality
Specific Performance and Land Contracts	<p><u>Test for specific performance in land contracts (<i>Tanebaum</i>):</u></p> <p>(1) performance defined in contract, (2) not feasible to determine what the damages are (3) the building (performance) is part of the compensation (consideration) for the purchase of the property</p> <p>Traditionally held that land is considered unique for the purposes of specific performance without any further evidence than a contract for the sale of land. <i>Semelhago v. Paramedevan</i> (SCC 1996): court held that specific performance is available when (1) the land was unique, and (2) monetary damages were inadequate. Money damages may be adequate when land purchased for investment property (i.e. contract is only concerned with return on investment.)</p>	<ul style="list-style-type: none"> • Specific performance in land contracts • Exceptions with investment properties (<i>Semelhago</i>)
Damages in lieu of specific performance	<p><i>Lord Cairns’ Act</i>: equitable courts granted ability to award damages as a substitution for specific performance (i.e. put Π in the position as if specific performance was granted; difference between the K price and the trial price) (<i>Wroth</i>)</p>	<ul style="list-style-type: none"> • Equitable remedy • Damages in lieu of specific performance
Injunction	<p>A legal prohibition against doing something (<i>Warner Bros.</i>)</p> <p><u>Two types:</u></p> <p>(1) interlocutory injunction: ordered by the court to keep the parties in the same position that they are currently in pending full resolution of dispute (i.e. <i>Skye Petroleum</i>) (2) remedy injunction: ordered by the court as a remedy, which may be indefinite or limited in scope.</p> <p><u>Three requirements for injunction:</u></p> <p>(1) negative covenant in the contract (2) cannot resemble specific performance (3) damages must be inadequate or highly speculative → <i>Anglia</i></p> <p>Contracts in restraint of trade: courts are reluctant to enforce clauses that limit the employee’s ability to work after the end of an employment contract</p>	<ul style="list-style-type: none"> • Interlocutory injunction • Remedy injunction • Negative covenant • Resemblance to specific performance • Inadequacy of damages • Contracts in restraint of trade • Inadequate or speculative damages

Time		
Term	Details	Key Concepts
Traditional measure of time	Damages are measured on the day of the breach of K.	• Day of breach
Measure of time for damage in lieu of specific performance	Exception: damages are measured on the day of trial.	• Day of trial
Canadian measure of time	(1) As soon as Π is aware that Δ will not fulfill K, Π must mitigate. (2) If Π has reasonable claim for specific performance (i.e. unique item or circumstances), then mitigation is not required if Π holds K open for Δ	• Mitigate at time of breach, or when specific performance is no longer available

Restitution		
Term	Details	Key Concepts
Restitution	<p><u>Normal situation</u>: restoration of transferred benefit (see Restitution Damages)</p> <p><u>Who</u>: "a person who has been unjustly enriched at the expense of another is required to make restitution to the other" (CB 152)</p> <p><u>Historical background</u>:</p> <p>(1) until mid-20th century: implied term in contract (quasi-contract)</p> <p>(2) when no contract existed (i.e. invasion of rights, trespass, use of property with no financial loss), courts assessed damages for rights of user</p> <p>(3) accounting for profits (disgorgement of profits): require profit made in a situation to be paid to another party) → typically applied when courts identified a fiduciary relationship or certain contractual relationships (e.g. contracts for agency, trusts, officers and directors of corporations, lawyers and clients, partnerships)</p> <p>(4) 1930s American courts identified commonalty → a person who received a benefit with no legal reason to retain it (gathered into Law of Restitution)</p> <p><u>Canadian position on restitution</u>: discussed but not decided in SCC → acknowledgement that remedy has been awarded in UK and US; however, restitutionary measure of damages should be avoided to prevent the discouragement of efficient breach of K (i.e. generally Δ only required to compensate for the loss of the bargain, not the profits gained in the breach)</p>	<ul style="list-style-type: none"> • Unjust enrichment • Accounting for profits • Efficient breach of K

Bargains, Offers and Acceptances		
Term	Details	Key Concepts
Bargain	Intention and mutual assent to sufficiently certain terms	• Mutual assent
Qualities of a commercial bargain	(1) offer (2) acceptance	<ul style="list-style-type: none"> • Offer • Acceptance
Offer	<p>→ PPP (price, property, parties); contains all the terms necessary to form a K such that an acceptance is all that is required to complete the K (<i>Johnston Bros.</i>)</p> <p>→ Advertisements not generally offers (unilateral K / offer to world) but may be considered if contains 3 PPPs (<i>Lefkowitz</i>)</p> <p>→ self-serve items as "invitation to treat" (<i>Pharmaceutical Society</i>)</p> <p>→ Offer may be changed or withdrawn prior to acceptance (<i>Lefkowitz, Manchester Diocesan</i>)</p>	<ul style="list-style-type: none"> • PPP • Advertisements • Invitation to treat • Change / withdrawal prior to acceptance
Acceptance	<p>→ may be stipulated by offer (<i>Eliason</i>)</p> <p>→ must be communicated to person who made offer (<i>Larkin</i>)</p> <p>→ must be made in a reasonable time frame (<i>Manchester Diocesan</i>)</p>	<ul style="list-style-type: none"> • Match offer • Must be communicated • Within reasonable time frame

Cases (Interests Protected)	
<i>Wertheim v. Chicoutimi Pulp</i> (1911)	<i>Wertheim</i>
Case Details	Key Concepts
“And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. ... That is a ruling principle. It is a just principle.”	<ul style="list-style-type: none"> • Definition of expectation damages
<i>Bollenback v. Continental Casualty Co.</i> (Oregon SC 1965)	<i>Bollenback</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π paid premiums on group health policy with Δ. Π claims for hospital visit but Δ rejects claim on basis that policy lapsed due to non-payment (clerical mistake.) Π sues for rescission of contract.</p> <p><u>Decision:</u> rescission of contract after Π ceased to have peace of mind (i.e. when Δ deemed the policy lapsed).</p> <p><u>Reasons:</u> (1) application of rescission likely due to the significant relationship between the insured and the insurer (transfer of risk); (2) valuation of peace of mind = premiums (what Π was prepared to pay for peace of mind)</p> <p><u>Policy Considerations:</u> (1) use of rescission instead of compensatory damages as otherwise the Δ would have benefited (difficulty: damages for breach of contract are compensation-oriented, not punishment-oriented); (2) reasonable to allow choice to pursue alternate measure of damages if expectation damages (normal measure) are low? → in general, likely not as courts are reluctant to award more than would be received under the expectancy measure (neither Δ nor Π should not benefit from breach)</p>	<ul style="list-style-type: none"> • Rescission • Transfer of risk • Valuation of peace of mind • Policy considerations: unjust enrichment; choice of damage measure
<i>Anglia Television Ltd. v. Reed</i> (CA 1972)	<i>Anglia</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π contracted to make a film of a play and expended costs in preparation. Π hired Δ as lead actor. Δ signed contract and then backed out of contract. Π sues for reliance damages.</p> <p><u>Decision:</u> Π awarded reliance damages (incl. losses for pre-contractual expenditures)</p> <p><u>Reasons:</u> (1) when the expectation damages cannot be proven, then reliance damages can be claimed (i.e. do not know whether film would have succeeded); (2) pre-contractual expenditures are valid as Δ entered contract aware of incurred expenditures (reasonable expectation that losses would occur if contract broken)</p> <p><u>Policy Considerations:</u> Ogus in “Damages for Pre-Contract Expenditures” identifies that reliance damages place Π in better position than if the contract had not been signed (expenditures made in reliance of a contract being signed, not in reliance of the signed contract). Generally the court considers what the Π would assume as a reasonable outcome (i.e. in 2 of 3 situations—profit and breaking-even but not loss—the expenditures would have been recouped). However, Δ may enter evidence to demonstrate a different reasonable outcome.</p>	<ul style="list-style-type: none"> • Compensation for pre-contractual expenditures • Application of reliance damages when expectation damages cannot be proven • Reasonable outcome
<i>Bowlay Logging Ltd. v. Domtar Ltd.</i> (BCCA 1978)	<i>Bowlay</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π claims reliance damages for logging contract terminated by Δ.</p> <p><u>Decision:</u> Π cannot claim reliance damages as “happy breach”</p> <p><u>Reasons:</u> (1) Δ showed that completion of the contract would have resulted in a greater loss of money for the Π (at no responsibility of the Δ) therefore “happy breach”; (2) expectation damages as an “upper limits” on damage claims (even if a different measure is used)</p> <p><u>Policy Considerations:</u> (1) comparison to expectation damages to moderate claims for other damages</p>	<ul style="list-style-type: none"> • Reliance damages • “happy breach” • Expectation damages as upper limit in use of different measure
<i>Hawkins v. McGee</i> (New Hampshire SC 1929)	<i>Hawkins</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π claims that Δ guaranteed “100% perfect hand” in surgery for removal of scar tissue from palm and replacement with skin graft from chest. Π sues for breach of contract (alleged warranty of success of the operation) and negligence (dismissed at trial.)</p> <p><u>Decision:</u> Π awarded new trial as wrong measure of damages applied at trial (measure from torts)</p> <p><u>Reasons:</u> (1) warranty as a contractual promise (failing to provide as guaranteed constituted the breach of contract) (2) correct measure: value of the hand as guaranteed minus the value of hand in its present condition (plus any incidentals accrued as part of the breach)</p>	<ul style="list-style-type: none"> • Warranty • Measure of expectation damages

Cases (Specific Problems in Measuring Damages)	
<i>Carson v. Willets</i> (ONCA 1930)	<i>Carson</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π contracted Δ to bore three oil wells. Δ bored one well and refused to perform rest of contract.</p> <p><u>Decision:</u> case sent back to trial court to award the Π the value of the chance</p> <p><u>Reasons:</u> (1) while the value of the chance may be difficult to estimate, this does not restrict the Π from being compensated as such.</p> <p>Contrast with measure from <i>Sunshine Exploration Ltd. v. Dolly Varden Mines Ltd.</i> (SCC 1969): the difference between what the Π was prepared to pay to drill the wells, and what the Π would have to pay to drill the wells after the breach.</p> <p><u>Policy Considerations:</u> compensating for the loss of chance or the failure to drill the wells?</p>	<ul style="list-style-type: none"> • Value of the chance • Difficulties in estimation
<i>Groves v. John Wunder Co.</i> (Minnesota SC 1939)	<i>John Wunder</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π leased land to Δ with conditions (1) Δ removes and refines the gravel and (2) Δ uses overburden to leave property at a uniform grade at the level of the railroad. Δ paid rent, removed (good) gravel and left property ungraded. Π sued for cost to level (\$60,000). However, graded land value \$12,610 (value ungraded \$12,160).</p> <p><u>Decision:</u> new trial awarded (in favour of Π).</p> <p><u>Reasons (Majority):</u> (1) Δ wilfully breached contract to own benefit (received gravel and reduced competition); (2) Π owed what was promised (level grade); (3) correct measure: cost of remedying defect of original contract; (4) incorrect measure to consider value of land (land value was not a part of the original contract)</p> <p><u>Dissent:</u> (1) this type of award gives Π an award in excess of what the parties “had in mind or contracted for”; (2) distinction between “unique or personal use” (ugly fountain) and general principle (\$); (3) economic waste (the normal measure of damages should be limited by the value of the benefit restored) → in this case, the limit of Π’s recovery market value of the land; (4) when contract broken in bad faith/wilfully, economic waste exception does not apply</p> <p><u>Policy Considerations (Dissent):</u> Π entitled to be extravagant with resources but not at Δ’s expense</p>	<ul style="list-style-type: none"> • Measure: cost of remedying defect of original contract • Dissent: economic waste
<i>Peevyhouse v. Garland Coal and Mining Co.</i> (Oklahoma SC 1962)	<i>Peevyhouse</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π leases farm with coal deposits to Δ for (1) royalty, and (2) stipulations for land restoration, etc. Δ did not fulfill these stipulations. Land restoration would only result in land value improvement of \$300.</p> <p><u>Decision:</u> did not follow <i>Groves</i></p> <p><u>Reasons:</u> (1) purpose of the contract is significant: if a clause is essential to the contract (and not merely incidental), then cost of performance will be granted; (2) economic waste: if the diminution to the Π is out of proportion with the cost of performance, only the loss of value will be granted (no windfall)</p> <p><u>Dissent:</u> Δ did not attempt to substantially perform (bad faith in <i>John Wunder</i>)</p>	<ul style="list-style-type: none"> • Economic waste

Cases (Remoteness)	
<i>Hadley v. Baxendale</i> (Exch. Ct. 1854)	<i>Hadley</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π contracts Δ to carry broken mill shaft to manufacturer to be replicated. Δ unreasonably delayed in delivery. Π ceased operations waiting for replicated shaft and sues for loss of profits for the excessive period (period of delay) that the mill was shut down.</p> <p><u>Decision:</u> unreasonable risk to impose on carry as lost profits are not (1) or (2)</p> <p><u>Reasons:</u> two-pronged test: (1) losses that arise naturally from the breach, and were reasonably contemplated (at the time of contract formation) by the parties as arising from a breach; (2) losses that arise from special circumstances that were in the contemplation of both parties because they were communicated from one party to the other party (i.e. knowledge permits parties to better manage their risk).</p>	<ul style="list-style-type: none"> • Two-pronged test for remoteness
<i>Horne v. Midland Rwy. Co.</i> (Exch. Ct. 1873)	<i>Horne</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π (shoe manufacturer) contracts Δ to deliver shoes to London firm for lucrative contract. Π</p>	<ul style="list-style-type: none"> • Clarification of

<p>delivered shoes to Δ in sufficient time for usual delivery standards and articulated delivery expectations. Δ delayed delivery and Π had to sell at a lower price.</p> <p><u>Decision:</u> Judgement for Δ</p> <p><u>Reasons:</u> (1) no case law to support that notice of lucrative contract sufficient to warrant exceptional damages; (2) special circumstances should be articulated as a separate contract</p> <p><u>Policy Considerations:</u> (1) effort to narrow special circumstances branch of two-pronged test; (2) railway as common courier (could not refuse to carry goods therefore could not limit liability)</p>	<p>special circumstances</p> <ul style="list-style-type: none"> • “Evolutionary dead-end” • Common courier
<i>Victoria Laundry Ltd. V. Newman Industries Ltd. (KB CA 1949)</i>	<i>Victoria Laundry</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π purchased boiler from Δ who delivered it 20 weeks after date fixed in contract. Π sued for loss of profit on basis of (1) increased business, and (2) lucrative dyeing contracts.</p> <p><u>Decision:</u> referred back to trial court to award damages for loss of profit</p> <p><u>Reasons:</u> (1) damages put Π in, as close as possible, the position if contract was fulfilled; (2) in breach of contract, Π can only recover losses reasonably foreseeable at contract formation; (3) reasonable foreseeability dependant on knowledge of parties (esp. Δ); (4) knowledge = imputed and actual (reasonable person test of what would be expected); (5) loss does not have to be a certain loss, but rather a likely loss (“serious risk”)</p> <p><u>Policy Considerations:</u> sufficient to foresee likelihood of losses resulting from breach of contract</p>	<ul style="list-style-type: none"> • Reasonable foreseeability • “serious risk”
<i>Munro Equipment v. CFP (MBCA 1961)</i>	<i>Munro Equipment</i>
Case Details	Key Concepts
<p><u>Facts:</u> Δ rented 2nd hand tractor from Π for \$1500/month for opening roads to remove wood. Tractor performed sporadically. Δ did not replace as Π advised repairable sooner than replaceable. 2 subcontractors acquired additional equipment. Tractor broke down for good. Π claims unpaid rent and freight charges. Δ counterclaims loss of profits.</p> <p><u>Decision:</u> award for Π and counterclaim dismissed.</p> <p><u>Reasons:</u> (1) Δ did not specify circumstances of removing wood (i.e. quantity, contract); (2) Δ initiated contract; (3) contract arranged very late for purported significance; (4) no guarantee of condition in contract; (5) 2nd hand equipment should not bear risk that Δ assigned</p> <p><u>Policy Considerations:</u></p>	<ul style="list-style-type: none"> • 2nd hand equipment • Dissatisfaction with reasonable foreseeability in <i>Victoria Laundry</i>
<i>Scyrup v. Economy Tractor Parts (MBCA 1963)</i>	<i>Scyrup</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π purchased attachment from Δ as Π held contract with Supercrete that required functioning equipment. Attachment missing parts. Δ replaced parts and adjusted sale price. Π lost contract with Supercrete.</p> <p><u>Decision:</u> award for repairs and lost profits</p> <p><u>Reasons (Majority):</u> (1) reasonable foreseeability part of 2-pronged test from <i>Hadley</i>; (2) reasonable foreseeability test (imputed and actual knowledge) from <i>Victoria Laundry</i>; (3) Δ should know that faulty equipment may result in loss of profit as Π</p> <p><u>Dissent:</u> (1) would not allow award for lost profits; (2) to be held liable, Δ must know (a) size of contract, (b) type of work, (c) details of performance; (d) duration of performance (in this case, insufficient information for Δ to limit liability); (3) 2nd hand equipment requires higher standard of Δ knowledge for liability)</p>	<ul style="list-style-type: none"> • Majority: reasonable foreseeability • Dissent: scope of knowledge for liability (esp. w/2nd hand equipment)
<i>The Heron II / Koufous v. C. Czarnikow (UK HL 1969)</i>	<i>The Heron II</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π had contract Δ under charter parties to bring sugar to Basra. The ship arrived 9 days late. The sugar market price dropped between the contract date of arrival and the actual date of arrival. Π sued for market value difference between two dates.</p> <p><u>Decision:</u> loss of profits recoverable (not too remote)</p> <p><u>Reasons:</u> (1) insufficient to show that Π’s loss was directly caused by breach (as in tort law), but rather must show that the loss flowed naturally from the breach, or was with the contemplation of parties at the time of breach (<i>Hadley</i>); (2) imputed knowledge sufficient as Δ was aware of sugar market, sugar cargo and that markets fluctuate (even if not knowledgeable of intention to sell or current market conditions); (3) question re: degree of foreseeability: is Δ liable for damages in breach of contract that he ought to have realized were not unlikely?</p>	<ul style="list-style-type: none"> • Remoteness • Charter parties • Damages not unlikely (as opposed to likely) • Presumption: markets fluctuate

<i>The Achilleas / Transfield Shipping Inc. v. Mercator Shipping Inc.</i> (UK HL 2009)	<i>The Achilleas</i>
Case Details	Key Concepts
<p><u>Facts:</u> Δ hired use of Π's ship with specified max. return date. Π contracted ship to a 2nd charterer at a lucrative rate (1st contract). Δ returned the ship late, which cancelled 1st contract. Π re-negotiated 2nd contract at lower rate, and claimed loss of 1st contract.</p> <p><u>Decision:</u> Loss of lucrative contract too remote.</p> <p><u>Reasons (Hoffmann):</u> (1) re-interpretation of remoteness in commercial context; (2) loss not foreseeable as it was not a loss that the parties assumed responsibility for in the contract/commercial context ; (3) normal measure of expectation damages for returning charter late would be the difference between the charter price for the charter party and the market price for the days that the ship was returned late</p> <p><u>Reasons (Rodger):</u> (1) traditional measure of remoteness; (2) neither party could have foreseen volatile market (lucrative 1st contract and low demand that created unfavourable conditions of 2nd contract) at time of contract therefore the loss was not foreseeable (<i>Hadley</i>)</p> <p><u>Policy Considerations:</u> contemporary attempt to clarify remoteness/reasonable foreseeability, but while same outcome was found there were two distinct sets of reasons</p>	<ul style="list-style-type: none"> • Remoteness • Charter parties • Hoffmann: commercial context of contract • Rodger: reasonable foreseeability

Cases (Intangible Injuries)	
<i>Addis v. Gramophone</i> (UK HL 1909)	<i>Addis</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π had contract with Δ to work as manager for salary and commission. Contract provided for 6 months' notice for termination. Δ terminated Π and immediately replaced his position so that Π was deprived of work (commissions.)</p> <p><u>Decision:</u> Award for lost wages and commission, but removed exemplary damages for "harsh and humiliating" way of dismissal.</p> <p><u>Reasons:</u> (1) in employment situations, damages are awarded for (a) lost wages, (b) lost commission, and (c) unemployment between the terminated position and the next; (2) damages are for compensation not for punishment (therefore exemplary damages not appropriate in breach of contract)</p>	<ul style="list-style-type: none"> • Purpose of damages: compensation • Exemplary damages not awarded for breach of contract
<i>Jarvis v. Swan Tours</i> (UK CA 1973)	<i>Jarvis</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π booked holiday to Switzerland with Δ based on Δ's brochure. Two week vacation where W1 was "to some extent inferior" and W2 was "very largely inferior."</p> <p><u>Decision:</u> Award of £125 (difference between vacation as paid for and vacation as received)</p> <p><u>Reasons:</u> (1) brochure statements were representatives/warranties (therefore inferior trip was breach); (2) application of <i>Misrepresentation Act 1967</i>; (3) traditional measure of damages would only acknowledge physical inconvenience; (4) traditional measure dated therefore an recover for mental distress (similar to measure of loss of amenities in personal injury cases); (5) compensation for disappointment/loss of entertainment as contract promised otherwise</p>	<ul style="list-style-type: none"> • What contract promises (i.e. entertainment) • Insufficient to limit compensation to physical inconvenience
<i>Vorvis v. Insurance Corporation of British Columbia</i> (SCC 1989)	<i>Vorvis</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π employed by Δ. New manager set new performance standards and then terminated for cause (failure to meet these standards) therefore no notice.</p> <p><u>Decision:</u> compensatory damages only for lack of notice</p> <p><u>Reasons:</u> (1) difficult to distinguish between intangible losses due to normal (non-wrongful) termination and wrongful termination; (2) in this case, intangible injuries due to supervisory process not the dismissal (therefore no causation with the breach of contract); (3) reluctance to award aggravated damages in breach of contract when damage(s) are not individually actionable tort(s)</p> <p><u>Policy Considerations:</u> (1) legal jurisdiction (torts or contracts); (2) "stiff upper lip" theory of business contracts ("rough and tumble" world); (3) issues of foreseeability and remoteness of intangible injuries; (4) economic efficiency (may be economically prudent to break contract; no additional culpability between expectation damages)</p>	<ul style="list-style-type: none"> • Distinguish intangible losses between normal and wrongful termination • Aggravated damages as individually actionable torts
<i>Wallace v. United Grain Growers</i> (SCC 1997)	<i>Wallace</i> (not read)
Case Details	Key Concepts
<p><u>Facts:</u> Action for breach of employment contract and intangible losses due to this breach.</p>	<ul style="list-style-type: none"> • Wallace damages:

<u>Decision:</u> Wallace damages (damages as an extension of the notice period) <u>Reasons:</u> (1) implied term in employment contracts of duty of good faith in terminating the contract; (2) obligation to be candid, reasonable, honest and forthright in the matter of dismissal	evolutionary dead-end in later SCC decisions • Duty of good faith in manner of dismissal
<i>Fidler v. Sun Life Assurance Company of Canada</i> (SCC 2006)	<i>Fidler</i>
Case Details	Key Concepts
<u>Facts:</u> Π purchased insurance policy from Δ. Δ denied Π's claim for long-term disability benefits. <u>Decision:</u> aggravated damages awarded as caused by breach <u>Reasons:</u> (1) implied term in insurance contracts that the insurer will act in good faith; (2) despite lack of bad faith, contract was breached; (3) as peace of mind component of insurance contracts, Π's mental distress caused by breach; (4) principles for award of aggravated damages: (a) object of contract was to secure a psychological benefit; (b) reasonably foreseeable that breaching the contract would result in loss of this benefit; (c) degree of mental suffering caused by the breach must be sufficient to warrant compensation	• Principles for award of aggravated damages
<i>Whiten v. Pilot Insurance</i> (SCC 2002)	<i>Whiten</i>
Case Details	Key Concepts
<u>Facts:</u> Π claimed for house under fire insurance policy with Δ. Δ forced allegation of arson (Π obliged to risk settlement and accrue \$320,000 in legal fees.) Denied claim in effort to oblige Π to settle at amount favourable to Δ. <u>Decision:</u> restore jury award of \$1 million in punitive damages <u>Reasons:</u> (1) punitive damages awarded (a) for egregious/extreme misconduct by Δ, and (b) in exceptional cases and with restraint; (2) difficulties with punitive damages (a) civil/criminal divide, (b) difficult to quantify, (c) Π benefits in excess of compensation required; (3) principles for punitive damages: (a) independently actionable wrong, (b) meet three objectives (punishment, deterrence, denunciation), (c) exceptional cases with restraint, (d) lowest award to serve objectives, (e) proportionate (legal reason for review at appeal)	• Principles for punitive damages • Independently actionable wrong
<i>Honda v. Keays</i> (SCC 2008)	<i>Honda</i> (not read)
Case Details	Key Concepts
<u>Facts:</u> Π (Keays) employed by Δ. After diagnosis for chronic fatigue, took leave of absence. Insurer withdrew disability benefit therefore Π returned to work under attendance program for absences due to disability. Δ perceived inconsistencies in Π's medical absences and requested independent medical assessment. Π refused and was terminated by Δ. <u>Decision:</u> dismissed damages for aggravated and punitive damages as standards were not met <u>Reasons:</u> (1) for aggravated damages, <i>Fidler</i> test applies and damages are awarded for serious emotional distress that arises naturally from the breach of contract (i.e. to be actionable, the distress must be sufficient in excess of the distress experienced in normal (legal) termination); (2) for punitive damages, <i>Whiten</i> applies and an independently actionable wrong must occur at a significant level (i.e. the breach of the implied duty of good faith in termination must be egregious)	• Re-articulation of principles of aggravated damages and punitive damages in employment contracts

Cases (Mitigation)

<i>Payzu v. Saunders</i> (KB CA 1919)	<i>Payzu</i>
Case Details	Key Concepts
<u>Facts:</u> Π had contract to purchase silk from Δ with provision for sales on credit with discount for payment at a certain time. Π's payment was delayed and Δ switched contract to cash sales (but set price). Π refused and purchased silk at higher rate at market. <u>Decision:</u> Π obligated to mitigate damages therefore award for loss of contract discount only <u>Reasons:</u> (1) while original contract was more advantageous, Π did not mitigate; (2) a reasonable person would have accepted the offer to pay cash rather than purchase on the open market	• Mitigation • Continue working with contract breaker
<i>Hochester v. De La Tour</i> (UK QB 1853)	<i>Hochester</i> (not read)
Case Details	Key Concepts
<u>Facts:</u> Δ hired Π to act in service on a trip but cancelled contract prior to departure (breach). Π brought lawsuit immediately (prior to start of the contract) for losses due to the breach.	• Anticipatory breach of contract

<p><u>Decision</u>: action for anticipatory breach of contract appropriate (doctrine of election) <u>Reasons</u>: (1) anticipatory breach of contract allows Π to bring an action when there is “clear and unequivocal” repudiation (indicators that the breach will occur); (2) difficulty of mitigation (does Π hold himself ready for employment by waiting until the start of the contract, or does Π bring an action immediately and risk Δ retracting the repudiation? → in first option, Π has not mitigated)</p>	<ul style="list-style-type: none"> • Difficulty of mitigation
<p><i>White & Carter v. McGregor</i> (HL 1962)</p>	<p><i>White & Carter</i></p>
<p>Case Details</p>	<p>Key Concepts</p>
<p><u>Facts</u>: Π made contract to place Δ’s ads on litterbins. Δ cancelled contract immediately. Π completed work (performed contract) and now sues for contract price. <u>Decision</u>: Π not obligated to accept Δ’s repudiation <u>Reasons (Majority)</u>: allow appeal as (1) general rule: Π has option to either accept Δ’s repudiation or carry on until contract is breached (i.e. Δ fails to perform); (2) exception: “if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to addle the other party with an additional burden with no benefit to himself” <u>Dissent</u>: deny appeal as (1) this action is really an action for specific performance, which cannot be required in this type of contract (Δ’s action only payment) <u>Policy Considerations</u>: (1) normal measure of damages is expectation losses (i.e. Π accepts repudiation as anticipatory breach of contract and claims expectation losses, but Π would be required to mitigate losses by seeking another contract for the advertisements); (2) in this case, Π was able to perform contract without Δ’s input (generally, Π would eventually accept repudiation as further action on part of Δ would be required)</p>	<ul style="list-style-type: none"> • Anticipatory breach of contract • Choice to accept repudiation or carry out contract?
<p><i>Finelli v. Dee</i> (ONCA 1968)</p>	<p><i>Finelli</i></p>
<p>Case Details</p>	<p>Key Concepts</p>
<p><u>Facts</u>: Π contracted to pave Δ’s driveway. \$ and other terms fixed but no completion date set. Δ cancelled contract but Π completed work while Δ on vacation. Π claimed cost of contract. <u>Decision</u>: appeal dismissed (trial judge rejected claim) <u>Reasons</u>: (1) contrast rescission (revoking an agreement) and repudiation (refusing to comply with contract’s terms); (2) approval of <i>White & Carter</i> dissent (repudiation does not require acceptance when there is no question of rescission); (3) distinguished from <i>White & Carter</i> as performance required entering Δ’s property and contract suggested notice would be given</p>	<ul style="list-style-type: none"> • Anticipatory breach of contract • Rescission vs. repudiation
<p><i>Asamera Oil Ltd.</i> (SCC 1979)</p>	<p><i>Asamera Oil</i></p>
<p>Case Details</p>	<p>Key Concepts</p>
<p><u>Facts</u>: Δ wrongfully failed to return shares (valued at 29¢) to Π. Π claimed damages as shares rose in value to \$46.50 (\$22.00 at trial). <u>Decision</u>: damages awarded for price on date Π would have reasonably purchased substitute shares (\$6.50) <u>Reasons</u>: (1) specific performance (return of the shares) was not available as Δ no longer possessed shares therefore Π was obliged to mitigate losses; (2) clarification of <i>White & Carter</i> in Canadian context → with ordinary mitigation, the Π acts “reasonably in all circumstances”; therefore, if the circumstances reveal “a substantial and legitimate interest in seeking performance as opposed to damages” the Π may not be obliged to mitigate</p>	<ul style="list-style-type: none"> • Anticipatory breach of contract • Mitigation when seeking specific performance

<p>Cases (Specific Performance)</p>	
<p><i>Tanebaum v. W.J. Bell Paper</i> (ON HC 1956)</p>	<p><i>Tanebaum</i></p>
<p>Case Details</p>	<p>Key Concepts</p>
<p><u>Facts</u>: Π sold Δ land with condition that Δ construct roadway and install pipes to access land that Π retained in sale. Road and pipes “similar” to existing avenue. Δ installed road and pipes but different than existing avenue. <u>Decision</u>: specific performance of road ordered to specification of contract <u>Reasons</u>: (1) while generally courts do not award specific performance, specific performance is appropriate when contract tied to land acquisition conditions and damages provide inadequate compensation; (2) test for specific performance in this exception: (a) performance defined in contract, (b) not feasible to determine what the damages are; (c) the building (performance) is part of the compensation (consideration) for the</p>	<ul style="list-style-type: none"> • Specific performance • Contracts for land acquisition

purchase of the property	
<i>Co-operative Insurance Society Ltd. v. Argyll Stores</i> (UK HL 1998)	<i>Argyll</i>
Case Details	Key Concepts
<p><u>Facts:</u> Δ operated supermarket in Π's shopping centre on 35-year lease. Δ announced store closure after 16 years. Π sued for specific performance.</p> <p><u>Decision:</u> no specific performance</p> <p><u>Reasons:</u> (1) specific performance as an "exceptional remedy"; (2) requirement for continual court supervision to ensure performance (only option for enforcement: quasi-criminal contempt proceedings); (3) in this case, Δ no longer found business profitable therefore specific performance would provide Π's enrichment at Δ's expense; (4) award of damages does not prolong litigation, provides just compensation and does not require an anti-public interest order to operate business at a loss</p>	<ul style="list-style-type: none"> • Specific performance • Enforcement mechanism: contempt
<i>Warner Bros. Pictures v. Nelson</i> (UK KB 1937)	<i>Warner Bros.</i>
Case Details	Key Concepts
<p><u>Facts:</u> Δ had personal service contract with Π for management of her acting career. Δ moved to UK to pursue acting career outside contract. Π sued for an injunction to enforce the negative covenant in the contract (i.e. that Δ would not work for another studio.)</p> <p><u>Decision:</u> injunction granted (limited to three years, or the duration of the contract; and limited to location of UK courts' jurisdiction)</p> <p><u>Reasons:</u> (1) while Δ may be persuaded to work (i.e. same effect as specific performance), it is not a consideration as she is employable outside the movie industry (courts reluctant to grant injunctions is the option was to be "idle and starve")</p>	<ul style="list-style-type: none"> • Remedy injunction • Backdoor access to specific performance?

Cases (Time)	
<i>Wroth v. Tyler</i> (UK 1974)	<i>Wroth</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π had contract with Δ for purchase of residential property when Δ's wife put caveat in place to prevent sale of property. On day 1 (i.e. the day the contract was broken), a similar property would require an additional investment of £1500. On day of trial, a similar property would require an additional £5500.</p> <p><u>Decision:</u> damages in substitution for specific performance awarded based on difference between contract price and day of trial price.</p> <p><u>Reasons:</u> (1) specific performance not appropriate due to interference with 3rd parties rights; (2) 1858 <i>Chancery Amendment Act</i> (Lord Cairns' Act) provided equity with the option to provide damages in substitution for specific performance; (3) while normal (common law) measure of damages would be awarded based on difference between contract price and day 1 price, the substitution for specific performance uses the day of trial (i.e. the day that the contract is performed through damages)</p>	<ul style="list-style-type: none"> • Damages in substitution for specific performance • Measurement of damages (time)

Cases (Restitution)	
<i>Attorney General (UK) v. Blake</i> (UK HL 2000)	<i>Blake</i>
Case Details	Key Concepts
<p><u>Facts:</u> Δ was a spy who was convicted of treason, and then escaped from prison. Δ had autobiography publishing K with British company. Δ included information gained in employment with Π and for which Δ had signed non-disclosure agreement. Π sued for account of profits (restitution to prevent unjust enrichment).</p> <p><u>Decision:</u> account of profits available in this (exceptional) case</p> <p><u>Reasons (Majority):</u> possible principles for application considered: (1) exceptional cases; (2) no other remedies are adequate; (3) no fixed rules can be prescribed; (4) useful general guide (but not exhaustive): Π has a legitimate interest in preventing Δ from making a profit from breach of K</p> <p><u>Policy Considerations:</u> (1) in this case, relationship akin to fiduciary relationship; (2) dissent: "have you all taken leave of your judicial senses?"; (3) lack of clarity in which situations account of profits is applicable; (4) dissent: uncertain consequences for commercial contracts (i.e. application of principle is unknown)</p>	<ul style="list-style-type: none"> • Restitution • Account of profits • Unjust enrichment •

Cases (Bargains, Offers and Acceptances)	
<i>Denton v. Great Northern Railway</i> (UK QB 1856)	<i>Denton</i>
Case Details	Key Concepts
<p><u>Facts:</u> Π planned travelled based on Δ's printed timetable. Train was cancelled. Two options: (1) false misrepresentation and (2) breach of K (but where was offer and acceptance?)</p> <p><u>Decision:</u> both options available to Π</p> <p><u>Reasons:</u> (1) K = offer (timetable) and acceptance (presentation at station), (2) to make functional, imply terms in contract (i.e. can only offer at capacity, on payment for ticket, etc.)</p> <p><u>Policy Considerations:</u> (1) ticket purchase as offer/acceptance?; (2) unilateral offer (offer to the world)</p>	<ul style="list-style-type: none"> • Location of offer • Unilateral contract (offer to the world)
<i>Johnston Bros. v. Rogers Bros.</i> (Ont. County. Ct. 1899)	<i>Johnston Bros.</i>
Case Details	Key Concepts
<p><u>Facts:</u> Δ sends flour prices by "We quote you" to Π and requests reply by telegram given fluctuating market; Π sends telegram to purchase at quoted price; Δ replies with higher price</p> <p><u>Decision:</u> No K</p> <p><u>Reasons:</u> (1) likely offer was Π's reply as it included the necessary information; (2) price quotation is not an offer ("offer to treat"); (3) Δ's price quotation did not specify quantity (i.e. no PPP)</p> <p><u>Policy Considerations:</u> (1) suppliers cannot be expected to accommodate everyone who received a price quote; (2) no guarantee of stock at the time of Π's reply</p>	<ul style="list-style-type: none"> • PPP • Location of offer • Price quotations
<i>Leftkowitz v. Great Minneapolis Surplus Store</i> (Minn. SC 1957)	<i>Leftkowitz</i>
Case Details	Key Concepts
<p><u>Facts:</u> Advertisements in the newspaper for items for sale.</p> <p><u>Decision:</u> K = offer (ad) + acceptance (arrival for "First Come, First Served")</p> <p><u>Reasons:</u> (1) no contract is 1st ad as terms of offer not sufficiently precise; (2) contract in 2nd ad as terms of offer were sufficiently certain (mode of acceptance specified "First Come, First Served"); (3) House Rule could not be applied after acceptance (i.e. completion of K)</p> <p><u>Policy Considerations:</u> (1) unilateral contract (offer to the world) → invitation to treat; (2) newspaper advertisements are typically just statements of price (implied term that only available to 1 person even though distributed to a large number of people)</p>	<ul style="list-style-type: none"> • Advertisements • Unilateral contract (offer to the world)
<i>Pharmaceutical Society of Great Britain v. Boots Cash Chemists</i> (UK CA 1953)	<i>Pharmaceutical Society</i>
Case Details	Key Concepts
<p><u>Facts:</u> Statute required certain products to be sold under supervision of registered pharmacist. With switch to self-serve model, question of whether sale completed under sale of pharmacist</p> <p><u>Decision:</u> K = offer (placing item at till) + acceptance (taking money from customer)</p> <p><u>Reasons:</u> (1) not other option (K = placing on shelves and placing item on basket) as would imply unacceptable consequences (could not change mind and return item to shelf, forgotten wallet)</p> <p><u>Policy Considerations:</u> (1) offer/acceptance at till to permit pharmacist to supervise purchase</p>	<ul style="list-style-type: none"> • Location of offer and acceptance
<i>Manchester Diocesan Council v. Commercial & General Instruments</i> (1970)	<i>Manchester Diocesan</i>
Case Details	Key Concepts
<p><u>Decision:</u> implied term of acceptance in a reasonable time frame; when offer is open (prior to acceptance), the person offering can change the terms (i.e. impose a time frame for acceptance, withdraw the offer, etc.)</p> <p><u>Reasons:</u> (1) consider surrounding circumstances to determine what constitutes "reasonable"; (2) two theories: (a) implicit withdrawal of original offer (i.e. self-expiry) or (b) lack of response in a reasonable time frame constitutes refusal</p>	<ul style="list-style-type: none"> • Reasonable time of acceptance • Changing offer prior to acceptance
<i>Larkin v. Gardiner</i> (Ont. Div. Ct. 1895)	<i>Larkin</i>
Case Details	Key Concepts
<p><u>Facts:</u> @ T₁ Δ made offer to purchase from Π; @ T₂ Π accepts offer but does not communicate to @ T₃ Δ withdraws offer; @ T₄ Π communicated acceptance from T₂</p> <p><u>Decision:</u> no K because the acceptance must be communicated</p> <p><u>Reasons:</u> (1) K can be withdrawn by the person offering when no acceptance has been communicated</p>	<ul style="list-style-type: none"> • Communication of acceptance • Withdrawal of offer prior to acceptance
<i>Dickinson v. Dodds</i> (1876)	<i>Dickinson</i>
Case Details	Key Concepts
<p><u>Facts:</u> @ T₁ Δ made offer left often with an expiry date for acceptance (firm offer); @ T₂ Δ accepts a</p>	<ul style="list-style-type: none"> • Consideration

<p>different offer; @ T_3 Π learns of offer at T_2 but accepts offer from T_1; @ T_4 the offer from T_1 would expire <u>Decision</u>: the firm offer was a promise to leave the offer open for a fixed period of time, but not a K (therefore not enforceable) <u>Reasons</u>: (1) contract = agreement (offer + acceptance) + each side must give something (consideration) <u>Policy Considerations</u>: (1) in other jurisdictions, firm offers are enforced; (2) in Canada and the UK, something must be given in return for the promise to be enforceable (i.e. a deposit) or the offer must be put under seal</p>	<ul style="list-style-type: none"> • Withdrawal of offer prior to acceptance
<p><i>Eliason v. Henshaw</i> (US SC 1819)</p>	<p><i>Eliason</i></p>
<p>Case Details</p>	<p>Key Concepts</p>
<p><u>Facts</u>: Π makes offer to Δ to purchase flour (included quantity, price and delivery location) and specified acceptance to be sent "by return of the wagon" (to Harper's ferry.) Δ sends acceptance to Georgetown. <u>Decision</u>: No K existed. <u>Reasons</u>: (1) generally silence cannot be imposed as the mode of acceptance; (2) must sufficiently correspond to the offer (otherwise viewed as counter-offer) <u>Policy Considerations</u>: (1) acceptance of unsolicited mailer of books on door step?</p>	<ul style="list-style-type: none"> • Acceptance

Index of Cases

The interests protected

Case	CB	Short Description	Outline
Wertheim v Chicoutimi Pulp	27	Establishes expectation damages: court puts wronged party in same position as if K performed.	9
Bollenback v Continental Casualty	27	Insurance premiums paid but policy cancelled in error. Award of rescission. Valuation of peace of mind.	9
Anglia v Reed	32	Reed bails on movie. Π can claim reliance if expectation too speculative, but only "reasonable contemplation" of waste.	9
Bowlay Logging v Domtar	35	Reliance damages claimed for termination of logging K. Not awarded as "happy breach."	9
Hawkins v McGee	36	Hairy hands. Expectation damages formula here: [(what was promised) - (what he received)] + (incidental)	9

Measurement

Case	CB	Short Description	Outline
Carson v Willits	38	K to bore three oil wells, but only one completed. Awarded damages for loss of chance.	10
Groves v John Wunder	39	Gravel factory K. Δ wilfully leaves Π's land uneven (breach of K). Unless economic waste, damages = cost of fixing.	10
Peevyhouse v Garland	43	Δ mines Π's land, leaves mineshaft. Restoration clause deemed incidental. Also proportionality. Diminution in value granted.	10
Thompson v Robinson	45	Δ (dealership) refuses acceptance of Π's (supplier) car for retail due to low demand. If supply > demand, then damages are for lost profit. Lost volume problem.	4
Charter v Sullivan	46	Δ (buyer) refuses Π's (dealership) car on delivery. There is high demand for this car model; Π resells. If demand > supply, then no damages. No lost sale if mitigate by selling. Lost volume problem.	4
Chaplin v Hicks	48	Π shortlisted as 1 of 50 for 12 positions. Breach of K = lost opportunity to interview. Damages proportionate to loss of chance.	4
Folland v Reardon	48	Canadian confirmation of Chaplin v. Hicks	4

Remoteness

Case	CB	Short Description	Outline
Hadley v Baxendale	49	Π's shaft broke. Δ fails to deliver on time. Π sues for lost profits but too remote. Remoteness test: (1) "Flow naturally" & (2) "reasonably contemplated at K". Affirmed in <i>Cornwall Gravel</i> (SCC).	10
Home v Midland Rwy	54	Soldier shoes. Δ fails delivery on time. Δ not liable for exceptional profits, only normal profits. Communication insufficient for "special circumstances" (<i>Hadley</i>) → separate K.	10
Cornwall v Purolator	76	Δ fails delivery on time of bid. Π sues for losses. Bid would have won. Full value of bid given, even though exceptional damages. Contemporary application of <i>Hadley</i> .	5
Victoria Laundry v Newman	55	Π buys boiler, Δ delivers damaged and unusable. <i>Home</i> applied: no lucrative profits damages. Π (engineers) should have known risk. Reasonable foreseeability.	11
Munroe Equipment v CFP	59	Δ rents Π 2 nd hand tractor. Tractor breaks. Π sues for rental and loss of profits. Dismissed: Π did not tell Δ circumstances of intended work.	11
Scyrup v Economy Tractor	66	Π buys 2 nd hand tool from Δ. Π loses a work K b/c tool breaks. Π given damages; appeal dismissed. <i>Hadley</i> : lost profits foreseeable.	11
Heron II / Koufous v. C. Czarnikow	66	Sugar cargo. Delayed delivery. Lost profits not too remote; ship knew there was market for sugar. Loss was "sufficiently likely."	11
The Achilleas / Transfield Shipping v Mercator	68	Ship returned late, Π lost new charter K; wants entire value of this K. Overrun period damages only b/c standard business practice.	12

Intangible and Punitive Damages

Case	CB	Short Description	Outline
Addis v Gramophone	79	Terminate employment K for salary & commission. Replacement starts prior to end of notice. Historical exceptions for "no mental distress" damages: marriage, no pay on cheque, physical discomfort, vendor failure to make title	12
Jarvis v Swan Tours	82	Π disappointed at holiday. Court: enjoyment was essence of K. Mental distress damages granted.	12
Vorvis v ICBC	86	Π ridiculed, fired by Δ. Damages for notice only. Need independently actionable tort to award aggravated damages. Unlikely in wrongful termination due to likelihood of same distress for lawful termination.	12
Wallace v United Grain Growers		Court may increase termination period of "reasonable notice" if dismissal unfair or bad faith.	12
Fidler v Sun Life	88	Δ (insurance) denies Π's claim. Applies <i>Hadley</i> to mental distress: if K secures an intangible benefit, then actionable as causation reasonably foreseeable in breach of K. Awarded aggravated damages.	13
Whiten v Pilot	30	Π's house burns. Δ refuses insurance payment & activity works to deny claim. Punitive damages granted for breach of duty of good faith. Punitive damages test: (1) egregious misconduct by Δ and (2) in exceptional cases and with restraint	13
Honda v. Keays		Applies <i>Fidler</i> and <i>Whiten</i> tests. No aggravated or punitive damages. Employers have (manner and reasons) duty of good faith and fair dealing in terminating employment.	13

Mitigation

Case	CB	Short Description	Outline
Payzu v Saunders	106	Silk K breached. Π sues for lost profits. Court: Δ not liable as Π could have mitigated losses by continuing	13

		to work with Δ. Requirement for mitigation.	
Hochester v De La Tour		K for service on trip cancelled prior to start of K. Π brought lawsuit immediately as anticipatory breach of K. Anticipatory when "clear and unequivocal" repudiation. Mitigation difficulties.	13
White & Carter v McGregor	111	Trash can ads. Specific performance if Π can perform K unilaterally & if legitimate interest (not just \$).	14
Finelli v Dee	118	K for driveway paving. Δ cancels K, but Π paves anyway. This is not a unilateral K due to lack of implied notice in K (no date set) and trespass required to pave driveway.	14
Asamera Oil Ltd v Sea Oil	119	Unreturned shares. Π sued for specific performance even after Δ no longer had shares. Court specifies that must mitigate "reasonably" unless "substantial & legitimate" interest in seeking performance.	14
Specific Performance			
Case	CB	Short Description	Outline
Tanenbaum v WJ Bell Paper	128	CP 129 diagram. Road meant to be built to specific lot; building Ks may be specific performance if (a) performance defined in K, (b) not feasible to calculate damages, (c) performance part of compensation (consideration) for purchase of property.	14
Semelhago v Paramedevan		In relation to land, specific performance not available when investment property (must be unique and monetary damages inadequate.)	6
Co-operative Insurance v Argyll	133	Reasons why courts don't like specific performance: (1) requirement for court supervision, (2) expense/resources, (3) potential of waste, (4) quasi-penal enforcement, (5) possible hostilities, etc.	15
Warner Bros v Nelson	135	Δ breaches movie K with Π. Negative covenants can be enforced as long as they don't force positive (even if positive likely chosen). Injunction granted.	15
Time			
Case	CB	Short Description	Outline
Wroth v Tyler	143	Π to buy house from Δ, Δ backs out. Π claims specific performance, but not possible (wife on title). Damages in lieu of specific performance: K price and value of house at time of trial (not breach).	15
Restitution			
Case	CB	Short Description	Outline
United Kingdom (AG) v Blake	159	Traitor spy selling book of secrets. Court grants Π profits from Δ's publisher. Unfair comp.	15
Bargains			
Case	CB	Short Description	Outline
Denton v Great Northern Railway	174	Δ list time for train, but no train. Π shows up, misses appointment. Court: ad is unilateral K. Π did his part; Δ failed him. offer = timetable & acceptance = arrival at station.	16
Johnston Bros v Rogers	177	Δ sends letter with prices and instructions to purchase. Court: letter is not an offer to sell but a price quotation. Likely offer = Π's letter to purchase. Also, exaggerated claims are not terms of K.	16
Lefkowitz v Great Minneapolis	181	Δ advertises coats at \$1. Π woke up early and waited in line. Ad is legal offer since it meets the 3 Ps.	16
Pharmaceutical Society v Boots	183	Δ opens self-serve pharmacy. Court: self-serve items are invitation to treat ONLY; actual offer of sale K made at checkout.	16
Manchester Diocesan Council	189	Offer must be accepted within reasonable time of K formation. RT established in K or by court. Court can find "deemed refusal."	16
Larkin v Gardiner	191	Acceptance must be communicated for K to be formed. Otherwise, either party is free to revoke.	16
Dickinson v Dodds	192	If no consideration given, then offer can be revoked even if K specifies a time frame for offer expiry (promise to keep open / firm offer).	16
Eliason v Henshaw	199	Buyer did not send K acceptance in stipulated place and manner. No K as a result. Some leeway for interpretation in terms.	17