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# Private Law: Contracts

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Outline for LAW 108A A01, as taught by Professor Andrew Newcombe

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## Tests for the Enforcement of Promises (Continued)

### Promissory Estoppel

- **The Rule:** A promisor is estopped from reneging on a promise "intended to be binding, intended to be acted on, and in fact acted on". *(High Trees)*
  - As a result, a promise to accept a smaller sum in lieu of a larger sum, if acted (i.e. relied) upon, is binding even without consideration.
  - Note that no damages will be awarded for the breach of such a promise.
- **Sword/Shield Distinction:** Promissory estoppel may only be used as a defence, or as a *part* of a cause of action, never as a cause of action in itself. *(Combe)*
  - This distinction has been abolished in the US (by statute) and Australia (*Waltons*)

### Privity of Contract

- **The Rule:** Only those who are party to a contract can enforce or benefit from its terms. *(Tweedle)*
- **Exceptions to the Rule:**
  - **Trust:** A beneficiary to a trust may enforce contracts concerning that trust. *(C 88)*
  - **Assignment:** A party to a contract may sell its contractual rights to a third party, enabling them to enforce the contract against other parties. *(C 88)*
  - **Agency:** A 3<sup>rd</sup> party to a contract may enforce or benefit from it where: *(NZ Shipping)*
    - Negotiating parties intended that the 3<sup>rd</sup> party benefit from the contract.
    - A contracting party was contracting as an agent of the 3<sup>rd</sup> party.
    - That contracting party had the authority to do so.
    - There was consideration moving from the 3<sup>rd</sup> party to the non-agent party.
  - **Employees:** Employees may obtain the benefit of a limitation of liability clause in a contract between their employer and a plaintiff if: *(London Drugs)*
    - There is an (express or implied) **extension of the limitation** to the employees seeking to rely on it.
      - This is satisfied unless the language "inevitably leads to the conclusion that the [employees] were not to benefit from [the clause]". A very low threshold.
      - Relevant factors include: *(Laing)*
        - ❖ **Nature of the relationship** between employees and their employer.
        - ❖ **Identity of interest** (i.e. shared interest) with respect to contract's obligations.
        - ❖ Whether the **other party knew** that the employees would be involved in performing the contract's obligations
        - ❖ Absence of "**clear indication** in the contract" that the employees are not to benefit from the clause.
    - The employees claiming the benefit must have been **acting in the course of their employment**, and performing the services provided for in the contract.
- **Notes on London Drugs:**
  - In essence, knowing that employees will be performing the services contracted for is sufficient to find an implied extension. *(Greenwood)*
  - *London Drugs* **might** apply anywhere that there is a proof of intention for a 3<sup>rd</sup> party to benefit, and that the 3<sup>rd</sup> party performed activities contemplated by the contract. *(Can-Dive)*

## Representations and Warranties

Classification	Remedy	Interest Protected
Mere Puff	None	<i>Caveat emptor</i>
Innocent Misrepresentation	Rescission <sup>1</sup>	Prevent unjust enrichment
Negligent Misrepresentation	Reliance damages	Reliance
Fraudulent Misrepresentation	Rescission and reliance damages	Reliance
Warranty	Expectation damages	Reasonable expectation
Condition	Repudiation and expectation damages	Reasonable expectation
Innominate term ( <i>HK Fir</i> )	Damages or repudiation <sup>2</sup>	Reasonable expectation

<sup>1</sup> If contract has been performed or executed, the right to rescind is limited. (*Ennis*)

<sup>2</sup> Both if the party has been “substantially deprived” of the contract’s benefit, otherwise only damages. (*HK Fir*)

- **Warranties** may exist as independent contracts, the consideration for which is the formation of another contract (this is a “**collateral warranty**”) (*Heilbut*)
  - A statement is a warranty if it was **intended** to be a binding promise. (*Heilbut*)
    - "If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice". Considerations here include: (*Dick Bentley*)
      - **Timing of Statement** (The earlier it is, the more likely it's puff)
      - **Importance of statement** (To what degree did it induce the other party?)
      - **Was the speaker aware of that importance** (Foreseeability of reliance)
      - **Relative knowledge and skills of the parties** (Reasonableness of reliance)
      - **Content of Statement** (Specific/vague? Opinion/fact?)
      - **Context** (Formality of statement; offhand, or deliberated?)
      - **Is the contract in writing?** (If so, courts are reluctant to add terms)
      - **Disclaimers** (Was there an exclusion clause, or disclaimer statements?)
      - **Price/consideration** (Did the price reflect the value of the warranty?)
    - Making a representation that is intended to induce the other party to act on it is *prima facie* ground for inferring a warranty was intended, provided the other party was, in fact, induced. (*Dick Bentley*)
      - This inference can be rebutted by showing that it was an innocent misrepresentation (i.e. that there was no fault in the incorrect statement, and that it would be unreasonable for the speaker to be bound by it.) (*Dick Bentley*)
  - "[A] collateral warranty may not be established where it is inconsistent with or contradicts the written agreement" (*Carman*)
  - **Housing:** There is an implied warranty of fitness (for habitation) in the sale of an **incomplete** house, but not a completed house. (*Fraser-Reid*)
  - A person may be liable for breach of warranty notwithstanding that he has no contractual relationship with the other party. (*Murray*)
- **Examples:**
  - A promotional sales brochure (i.e. goes beyond merely giving specifications) is intended to induce contract formation, and is thus a warranty if relied upon. (*Murray*)
  - "We build good houses and this is a good house" is "mere trade puffery" (*Fraser-Reid*)

## Concurrent Liability: Negligent Misrepresentation

- A claimant may sue in both contract and tort. (BG Checo)
- Tort liability may be excluded by contract, though it must be done in clear terms. (BG Checo)
  - Subject to unfairness concerns; e.g. doctors can't contract out of malpractice liability
- Tort grants remedies for reliance, contracts for expectation.
  - In loss-of-opportunity cases, this often amounts to the same thing.
- A person may be liable for negligent misrepresentation (in tort) if he or she: (Esso)
  - Has special knowledge/skill (**expertise**)
  - Makes a representation without using reasonable care to ensure its validity (**negligence**)
  - With the intent of inducing another party to enter a contract (**intent to induce**)
  - Which the other party does, to their detriment (**reliance**)

## Mistake

### Rectification

- The court may order the correction of a typo or transcription error in the recording of the contract if the following requirements are met: (Performance Industries)
  - The claimant must prove the existence and content of the prior (oral) agreement (of which the written contract is merely a recording), as of the date of signing.
  - There must be "convincing proof", beyond the BoP but less than BRD.
  - The claimant must provide precise wording for replacement.
  - The claimant must show that the other party knew (or ought to have known) of the mistake in the recording, and that refusal to rectify would amount to equitable fraud or an unconscionable result.
    - **Note:** Due to the equitable nature of rectification, courts are often reluctant to order it if there isn't a smell of fraud. Indeed, in *Morely* fraud is an explicit requirement. (Morely)
- **Examples:**
  - Found: Contract uses measurements of feet instead of yards. (Performance Industries)
  - Rejected: Contract revolves around "Metropolitan City of Vancouver" (non-entity). (Morely)

### Mistaken Payments

- Where mistaken payments are made, restitution will be ordered. (Air Canada)
- **Exception:** If there has been **reliance** on the payment, causing it to be unfair to order repayment of all or part of it, then repayment of that portion will not be ordered. (Air Canada)
  - This requires more than merely spending it – there must have been some act the renders it unfair to demand repayment (e.g. paying off a debt, gifting it away) (Air Canada)
- **Example:**  $\pi$  wins \$5, computer erroneously claims he won \$800.  $\pi$  spends \$480 in celebration. Only the \$480 was relied upon;  $\Delta$  ordered to pay out that amount. (Budai)

## Mistake in the Formation of Contracts

- Where there is a misunderstanding regarding the transaction itself (e.g. ambiguous terms) such that a common intention between the parties cannot be objectively determined, the contract is void.
- "It is only in a case where circumstances are so ambiguous that a **reasonable bystander** could not infer a common intention that the court will hold that no contract was created." (Staiman)
  - If a reasonable bystander *would* conclude that party A assented, and party B relies on that belief, then A will be held to that term regardless of their intent to assent. (Smith)
- **Examples:**
  - Two ships named "Peerless"; contract doesn't say which, each party has a different one in mind. No *consensus ad idem*; contract void for mistake. (Raffles)
  - Knowledgeable  $\Delta$  sells land without mentioning mineral rights;  $\Delta$  means for it to be excluded,  $\pi$  presumes it's included.  $\Delta$  aware of ordinary meaning, mistake was "unreasonable and careless" – contract enforced for  $\pi$ . (Hobbs)
  - $\pi$  thinks that a certain pile of new steel is included in an auction for used steel.  $\Delta$  doesn't intend to include it. A reasonable bystander would agree with  $\Delta$  – enforced for  $\Delta$  (Staiman)
- This is a pliable test, and courts often consider a number of **policy factors**:
  - **Price of contract** (Relevant to determining reasonable expectations)
  - **Knowledge and skill of parties** (Knowledgeable people are less protected by the courts)
  - **Ease of avoidance** (Who could most easily [cheaply] have avoided the mistake?)
  - **Common usage of the trade** (Informs reasonable expectations and risk allocation)
  - **Knowledge of ambiguity** (A party that is aware of an ambiguity has a duty to clear it up)
    - This last one is very significant; if there is an "odour of fraud", where one party uses their knowledge of mistake unconscientiously, courts won't enforce. (McMaster)

## Mistaken Assumptions

- Where parties enter a contract under a common misapprehension as to the subject matter.
- A contract may be found to be void for mistake at **common law** where: (Bell)
  - The mistake may **nullify consent** (e.g. mistaken identity, *res extincta*, *res sua*); or
  - The mistake goes to a quality of the subject matter, which gives rise to a remedy if:
    - Both parties made the **same mistake**/misunderstanding, and
    - The subject matter of the contract is **essentially different** from what the parties believed it to be at the time of contract formation (affects a **fundamental term**).
- Similarly, **equity** will relieve a party of the consequences of a mistake where: (Solle)
  - The contract was entered into under a **common** and **fundamental** misapprehension,
  - The party seeking relief is **not at fault**.
  - The mistake can be **corrected without injustice** to 3<sup>rd</sup> parties, and
  - It is **unconscientious** or unreasonable for the other party to avail himself of the advantage resulting from the mistake.
- **Examples:**
  - Parties enter a contract of sale for a barren cow. Turns out to be fertile; contract found void for mistake. Subject matter is essentially different from parties' belief. (Sherwood)
  - An agreement to terminate a breached contract and an agreement to terminate an unbroken contract are not sufficiently different to ground a claim of mistake. (Bell)
  - Leasing a flat at a rate prohibited by statute, where it was believed that the flat wasn't subject to it, fails the *Bell* test, but may succeed in equity. (Solle)

## Frustration

- **General Principle:** Frustration is applied where the purpose of the contract is defeated by an unanticipated event (i.e. one for which the **risk is not allocated** by the contract), and holding them liable for the breach would be unfair.
- **The Historical Test:** (*Krell*)
  - What is the foundation of the contract (considering all the circumstances)?
  - Was performance prevented?
  - Was the event that prevented the performance of such a nature that it could not have been reasonably been said to be in the contemplation of the parties?
    - In the US, this can be satisfied if the parties contemplated the risk, but not the *magnitude* of the risk (*Alcoa*). This isn't the law in Canada.
    - No frustration for an increase in the cost of a contract (e.g. from fluctuating resource costs) (*Westinghouse Electric, Eastern Airlines*)
- **The Modern (?) Test:** The BCCA has relied on *Krell* and others to articulate a test that may have replaced the *Krell* test. Frustration may be claimed where: (*KBK*)
  - The event is:
    - **After** the formation of the contract
    - Not **self-induced**
    - Not **foreseeable**
  - The impact is:
    - More than merely inconvenient – must render the contract **fruitless**
    - A radical change in the contract (completely affecting its purpose/consequences)
    - A **permanent** change
- **Examples:**
  - Music hall burns down prior to the show. Frustration. (*Taylor*)
  - Δ rents room to see coronation, which is delayed due to King's illness. Frustration. (*Krell*)
  - Price escalator clause is inadequate to compensate for OPEC crisis. Frustration. (*ALCOA*)
- Frustration of contracts for sale of **land**:
  - **Historically:** Contracts for sale of land cannot be frustrated. (*Amalgamated Investment*)
  - **Today:** Frustration may be claimed in a sale of land where the above test is met, and the other party has more than "**mere knowledge**" of intent to develop. (*KBK*)
    - This test was formulated specifically in response to unanticipated rezonings.
  - **Example:** π buys land for \$8.8m, unusual rezoning bylaw drops value to \$5.4m and precludes π's plans, which were mentioned in the K for sale. Frustration met. (*KBK*)
- **Remedies** for frustration:
  - **Historically:** The contract became void at the time of frustration; no repayments, damages, *etc.* (*Appleby v. Myers*)
  - **Modern Common Law:** Courts may order recovery for unjust enrichment. (*Fibrosa*)
  - **Modern Statutory Law:** The B.C. *Frustrated Contract Act* requires that restitution payments be made (s. 5), with any net losses to be split between parties. (*Frustrated Contract Act*)
    - Note s. 6 for an exception regarding risk allocation between parties.

# Interpretation of Contracts

## Policy Considerations

- **Commercial** context: Where the market is highly competitive, parties are numerous and sophisticated, and standard clauses are on the table in the bargaining process, courts will respect that voluntary risk allocation limit themselves to enforcing provisions. (*Maratha Envoy*)
- **Consumer** context: Courts attempt to protect the weaker party's reasonable expectations. (*Scott*)
- **Note:** There is a division on the question of voluntariness of consent:
  - Classical liberals: *Caveat emptor*; economic pressure doesn't negate consent.
  - Marxist/critical thinkers: Voluntariness is a judicial construction, bargaining = coercion.
  - Feminists: Systemic inequality structures (and thus constrains) choice.

## General Rules

- The goal of contract interpretation is to advance the intent of the parties. (*Consolidated-Bathurst*)
  - Courts take the objective approach in determining the intent of the parties. (*B.C.C.I. v. Ali*)
  - Where an ambiguity exists, the more reasonable/fair one should be chosen. (*Consolidated-Bathurst*)
  - Parties are assumed to have intended the plain meaning of unambiguous terms. (*Eli Lilly*)
- **Presumption against redundancy:** Every provision should be interpreted as having a unique meaning. (*BG Checo*)
- **Admissibility of Evidence:**
  - Where terms are clear, there is no need for extrinsic evidence. (*Scott*)
  - The surrounding circumstances ("**commercial context**") are usually relevant. (*Reardon Smith*)
  - Evidence of **prior negotiations** is inadmissible (unless relevant to show the aim of the contract) (*Craighampton*)
  - Where there are two reasonable interpretations of a clause, evidence of **subsequent conduct** may be admitted if it is relevant to determining which meaning is correct (*Re CNR*)
  - Where **other agreements** are components of a larger transaction, they may be admitted.
- **Presumption of ordinary meaning:** Unless evidence is adduced to show a special or technical meaning, words are construed in their ordinary meaning.
- **Contra Proferentem:** Ambiguous provisions are construed against the interest of the drafter.

## The Parol Evidence Rule

- **The Rule:** Extrinsic evidence is inadmissible to alter the terms of a contract. (*Bauer*)
- **Exceptions:** There are numerous exceptions, both common law and statutory. (*C 132*)
- **Reformulation:** The Rule is a **presumption** against admitting extrinsic evidence. (*Gallen*)
  - Proper approach to applying the Rule: (*Gallen*)
    - Determine whether the oral representation is a warranty.
    - If the contract and oral warranty can be read together harmoniously, do so.
    - If they contradict, there is a strong presumption that the written contract governs.
      - **Note:** The evidence may show that the oral warranty was intended to prevail.
- If a **specific** representation regarding a **substantive** point is made to **induce** contract formation, it is only overridden by a **general** exclusion clause if that clause was drawn to the attention of the other party (otherwise, the Rule doesn't apply). (*Zippy Print*)



## Signatures and Reasonable Notice

- **Signature Rule:** Signed documents are binding; a signature is proof of consent. (*L'Estrange*)
  - **Exception:** Fraud or misrepresentation. (*L'Estrange*)
  - **Exception:** *Non est factum* (not the signer's act – involuntary, *etc.*) (*Karroll*)
- **Mellish Rule:** A person is bound by an unsigned document if they **assented**, i.e.: (*Parker*)
  - They **knew** it carried conditions, or
  - There was **reasonable notice** that it carried conditions.
    - The **test** is whether a reasonable person would believe there were conditions. (*Parker*)
    - The more onerous an exemption clause is, the more explicit the notice must be to be considered “reasonable”. (*Thornton*)
      - Some clauses are so onerous they would need to be “printed in red, with a red hand pointing at it”. (*Thornton*)
      - *Thornton* was in the context of exemption clauses, but it applies to any “particularly onerous clause in a printed set of conditions which would not be generally known to the other party.” **Use this** – easy straw man argument to construct. (*Interfoto*)

### A Possible Additional Exception to the Signature Rule

- **The Rule:** Where the party seeking to rely on the contract **knows** that the other party is **unaware** of **onerous** or stringent terms, they may not enforce those terms unless they have taken **reasonable steps** to draw the consumer's attention to those terms. (*Tilden*)
- This rule has been given **uncertain scope**:
  - *Delaney* (BCCA 1983) suggested that it only applies in cases of fraud, misrepresentation, or unconscionability. But *Karroll* (BCSC 1988) gave it a wider scope.
- The **test** is whether a reasonable person would believe that the signer was assenting. (*Karroll*)
  - **Pro:** The signer was aware that the document affects her legal rights, clauses are consistent with the purpose of the contract, a hazardous activity is involved, short and easy to read, signer has signed similar documents before.
  - **Con:** Circumstances of haste or informality, limited opportunity to read, lengthy amount of small print, or clauses inconsistent with the rest of the contract.
  - Sophisticated parties in commercial situations are presumed to have assented.

## Fundamental Breach and Exclusion Clauses Generally

- There is no longer a doctrine of fundamental breach. (*Tercon*)
- The **general approach** in determining whether an exclusion clause applies is: (*Tercon*)
  - As a matter of **interpretation**, does the exclusion clause apply?
    - This is a determination of **intent** of the parties.
  - If it applies, was the exclusion clause **unconscionable** at the time of contract formation?
    - This is a question of contract **formation** (not breach).
  - If the exclusion clause was valid and applicable, should the Court nevertheless refuse to enforce it due to an overriding **public policy** that outweighs the (very strong) public interest in contract enforcement?
    - The burden of proof is on the party alleging inapplicability.
    - E.g. Criminality, fraud, abusive conduct.
  - **Note:** This is not a comprehensive test; issues of reasonable notice (*Tilden*), *etc* still apply.

## Ecommerce

- Governed by the *Electronic Transactions Act* (“ETA”)
- The general rules of contract apply to ecommerce transactions. (ETA s. 15)
- “Shrink-wrap” (contained inside of sealed packaging, perhaps displayed on-screen without “I Agree” button) agreements are binding
- “Click-wrap” (user clicks “I Agree” [or equivalent]) agreements are binding (Rudder v. Microsoft)
- “Browse-wrap” (website has link to terms, use implies consent) are uncertain. (Sprecht v. Netscape)
  - They are not binding in the U.S.
  - There are arguments pro and con
    - Con focuses on the concern that notice might be inadequate or acceptance ambiguous.
    - Pro relies on ETA s. 15 (“any activity in electronic form” can be acceptance), and draws an analogy to ticket cases – “terms on back” same as “click here for terms”.
- Where a contract allows for notice (e.g. of a change in terms) to be posted to a website, that is sufficient, even if the terms are several links deep.
- **Arbitration** and **amending** clauses are a common feature of such contracts.
  - Even where arbitration clauses are highly restrictive, courts tend to uphold them unless precluded by consumer protection legislation (not the case in B.C.) (Telus)
  - If an amending clause allows for notice to be posted to a website, then posting the amended agreement is sufficient, even if it is several links deep and the whole agreement – not merely the amendments – are shown. (Kanitz)

## Fairness in Contracts

### Unconscionability

- See also Consumer Protection Legislation, below.
- **The Rule:** A contract (or term) is void for unconscionability where: (Lidder)
  - One party had a weak bargaining position
    - Factors supporting this include a lack of sophistication, language barrier, absence of supporting friend (where the party is not accustomed to it), initiation of negotiations by the stronger party, initiation of negotiations at short notice, and lack of independent legal advice.
    - A **false representation** on a **material fact** that **induces** the weaker party to enter the contract is a serious exacerbating factor.
      - E.g. misrepresentations regarding affordability of a lawyer for independent legal advice are very troubling to the court. (Lidder)
  - An unfair advantage was taken of that weakness
    - This includes unfair terms or inadequate compensation. (Lloyds)
    - In the context of insurers, inadequate compensation based on vague or contradictory evidence, insufficient information, or based on the adjuster’s “general knowledge” constitutes an unfair advantage. (Lidder)
    - The stronger party may not sacrifice fairness to improve efficiency. (Lidder)

- **Recent Expansion:** Courts appear to be expanding this doctrine along **public policy** lines to compensate for the loss of the doctrine of fundamental breach. (Plas-Tex)
  - For example, a party is prohibited from relying on an exclusion clause if they: (Plas-Tex)
    - **Knew** of a possible risk associated with its product,
    - **Failed to disclose** important assumptions within its knowledge, preventing the claimant from measuring the consequences risks, and
    - **Deliberately withheld** information and induced the claimant to enter the contract on the basis that the party had "done their homework"
  - Courts have also claimed that unconscionability will receive "sparing use" (Plas-Tex)

## Duress

- The primary concern here is voluntariness of consent, not fairness of terms.
- If duress is found, the coerced party has the option of declaring the contract void (or not)
- **The Rule:** A contract is void for duress where: (Universe Tankships)
  - There was pressure amounting to **compulsion** on the will of the victim. (Gordon, aff'g Pao On)
    - Four factors in assessing coercion (not all necessary):
      - Did the victim protest?
      - Was there a (practical) alternative course open to the victim?
      - Did the victim get independent legal advice? (**most important factor**)
        - ❖ **Note:** If the advice is that there is likely no other practical course, it does not oppose a finding of compulsion.
      - After entering the contract, did the victim take steps to avoid it?
        - ❖ E.g. Commencing an action a "reasonable time" after signing or after the first payment is due (e.g. 3.5 months, 1 month, respectively) amounts to avoidance.
  - The pressure was **illegitimate**.
    - Must take into account the nature of the **pressure** (e.g. unlawful?) and the nature of the **demand** (extortionate?)
    - A demand is not illegitimate if it can't be shown that the demander didn't have a *bona fide* claim to what was demanded. (Gordon)
  - If the victim explicitly or implicitly **approved** the contract after the pressure ceased, they may not obtain relief.
    - Not complaining, making subsequent payments, and not consulting legal advice after the fact (once it is available) amounts to approbation. (Stott)
    - Taking steps of avoidance (e.g. filing a claim) shows a lack of approbation. (Gordon)
- **Examples:**
  - Tugboat demands £1000 for assistance; Court set aside as "inequitable, extortionate, and unreasonable". (Port Caledonia (UK 1903))
  - Near-bankruptcy creditor accepts payment of £300 on £480 debt. Lord Denning sets it aside – creditor was held to ransom, so there was no consent. (D & C Builders (UK 1966))

## Undue Influence

- **The Rule:** A claimant (C) who has been induced into a transaction under the undue influence of another (W) is entitled to set it aside as against W. (Duguid)
- **The Test:** There are two categories of undue influence: (Duguid)
  - **Actual:** C must prove that W exerted undue influence to induce C to enter the transaction

- **Presumed:** C need only show that there was a relationship of trust and confidence with W such that it is fair to assume that W abused that relationship. Two ways to show:
  - **De jure** (“class 2a”) relationships are presumed at law to carry that trust and confidence. These relationships include fiduciary relationships, trustee-beneficiary, solicitor-client, doctor-patient, and spiritual advisor-advisee.
  - **De facto** (“class 2b”) relationships, which must be shown to carry trust and confidence such that undue influence can be presumed.
    - **Marriage** is not a *de jure* relationship; to be *de facto*, C must show that:
      - ❖ C generally reposed trust/confidence in W in financial matters, and
      - ❖ Sexual and emotional ties between C and W provided a “**ready weapon**”; C’s interests were overborne by fears of damaging the relationship.
- **Where W is a 3<sup>rd</sup> party to the contract:** (Duguid)
  - C’s transaction with another party, T, may be set aside if it was obtained through W’s **undue influence** and:
    - W is the **agent** of T (this is rare), or
    - T has actual or constructive **notice** of the risk of undue influence.
      - Where C is co-signing another’s debts, **constructive notice** will be found where:
        - ❖ The transaction is not *prima facie* for C’s **benefit**, and
        - ❖ There is a **substantial risk** in this type of transaction that W has committed a legal or equitable wrong (C and W are in a relationship that raises a suspicion of undue influence, such a marriage).
  - Where the above is shown, the onus is on T to show that:
    - C received **independent legal advice**, or
    - C acted with a “free and independent mind”; relevant factors here include commercial knowledge, experience, sophistication, and independence.

## Consumer Protection Legislation

- The government interferes with the marketplace for several reasons (tie arguments to these):
  - **Economics:** Avoiding monopoly, regulating safety hazards & pollution, resolving consumers' information deficit, reducing transaction costs, and supplying public goods.
  - **Public Policy:** Paternalistic concerns for consumers and redistributive concerns (e.g. controlling interest rates, rent controls, statutory warranties, *etc.*).
- *Sale of Goods Act*: Provides implied conditions with respect to description (s. 17), quality and fitness (s. 18), and samples (s. 19). These conditions cannot be waived (s. 20).
- *Business Practices and Consumer Protection Act* (“*BPCPA*”):
  - Prohibits **deceptive acts and practices** (s. 5) and **unconscionable transactions** (s. 9). Places the burden on the supplier to disprove such acts/transactions.
    - See s. 8 for factors to consider when adjudicating unconscionable transactions.
  - Has a very broad scope with general definitions (ss. 1, 4).
    - This scope is restricted to **consumer contracts only** – business transactions are exempt.
    - Note s. 3(3)(r) – exaggerated or ambiguous statements that are misleading constitute a deceptive act. This has been met when a car salesman gave an unqualified opinion that a car was “good” when he knew that it could (but might not be) be false. (Rushak)
    - Suppliers must “refrain from any sort of potentially misleading statement”; this includes “an honestly-held opinion given in circumstances in which the supplier knows that giving the opinion without appropriate qualification may mislead” (Rushak)
  - Protections under the *BPCPA* cannot be waived (unless statutorily allowed) (s. 3).

## Illegality and Public Policy

- Judges' opinions on **public policy** varies:
  - Public policy is an "unruly horse". (Burrough J – *Richardson v. Mellish*)
  - A good man in the saddle can keep the horse under control. (Lord Denning – *Enderby Football*)
  - Public policy plays a role in addressing unjust contracts outside of established categories. (*Tercon*)
- The general classes of contract void for public policy are:
  - Contracts injurious to the **state** (e.g. contracts with enemies, selling public office, *etc.*)
  - Contracts injurious to the **administration of justice** (e.g. agreements not to testify)
  - Contracts involving **immorality** (e.g. lease for a carriage used by a prostitute in her work –*Pearce*)
  - Contracts affecting **marriage** (e.g. restraint of marriage, payment to divorce another)
  - Contracts in **restraint of trade** (e.g. overly broad restrictive covenants, restriction of mobility)
  - **Surrogacy** contracts (only in some places; in Canada, see *Assisted Human Reproduction Act*)
- Contracts that contravene a **common law** obligation are void (e.g. contract to commit a tort).(*Holman*)
- **Statutory Illegality:**
  - Contracts that are expressly prohibited by statute, or contrary to criminal law, are void.
  - Contracts involving administrative infractions, trivial illegality, or where the effect of non-compliance is not stated in the statute are much harder cases.
    - A court may refuse to grant relief to a party where, in all the circumstances, including regard to the objects and purposes of the statute, it would be **contrary to public policy**. If there is no overriding public policy reason to refuse relief, it will not be refused. (*Still*)
    - If refusing relief would defeat the statutory purpose, it will not be refused. (*Sidmay*)

## Penalty and forfeiture clauses

- **Penalty:** Charging amount that are extravagant or unconscionable relative to the loss.
  - **Liquidated damages** clauses are not penalties; these are fair estimates (made at contract formation) of damages; e.g. \$250/day charge for delay of construction of house for hotel costs.
- **Forfeiture:** where the forfeiture is not related to actual losses suffered, the court will provide relief.
- The Court can **relieve** against penalties and forfeitures however it wants to. (*Law and Equity Act* s. 24)

## The Duty of Good Faith

- Traditionally, there is no duty of good faith at common law, and the SCC hasn't recognized one.
  - Many jurisdictions (Quebec, US, int'l, all civil law countries) have codified such a duty.
- Good faith has been recognized as a component of specific duties:
  - Good faith imposes a duty to **cooperate in achieving the objectives** of the agreement
    - "The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale." **E.g.** if some approval is needed to complete the sale, and the contract doesn't say which party must get it, the vendor must take reasonable steps to get it. (*Dynamic Transport*)
  - Good faith **limits** the exercise of contractual **discretionary powers**
    - Where discretionary powers are conferred, it is an implied term that parties exercise them in good faith (i.e. reasonably, fairly, honestly, towards the contract's purpose) (*McKinlay Motors*)
  - Good faith has been applied to **preclude** a party from **evading contractual obligations**
    - Good faith precludes one from avoiding a restrictive covenant or right of first refusal by incorporating related corporate entities. (*MDS Health*)
- A duty of good faith has also been recognized in **particular relationships:**
  - **Insurance:** Contracts of "utmost good faith" (*uberrima fides*); full disclosure is required, *etc.*
  - **Franchisor-Franchisee:** Often also protected statutorily.
  - **Employment:** Termination is governed by principles of good faith and fair dealing.

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