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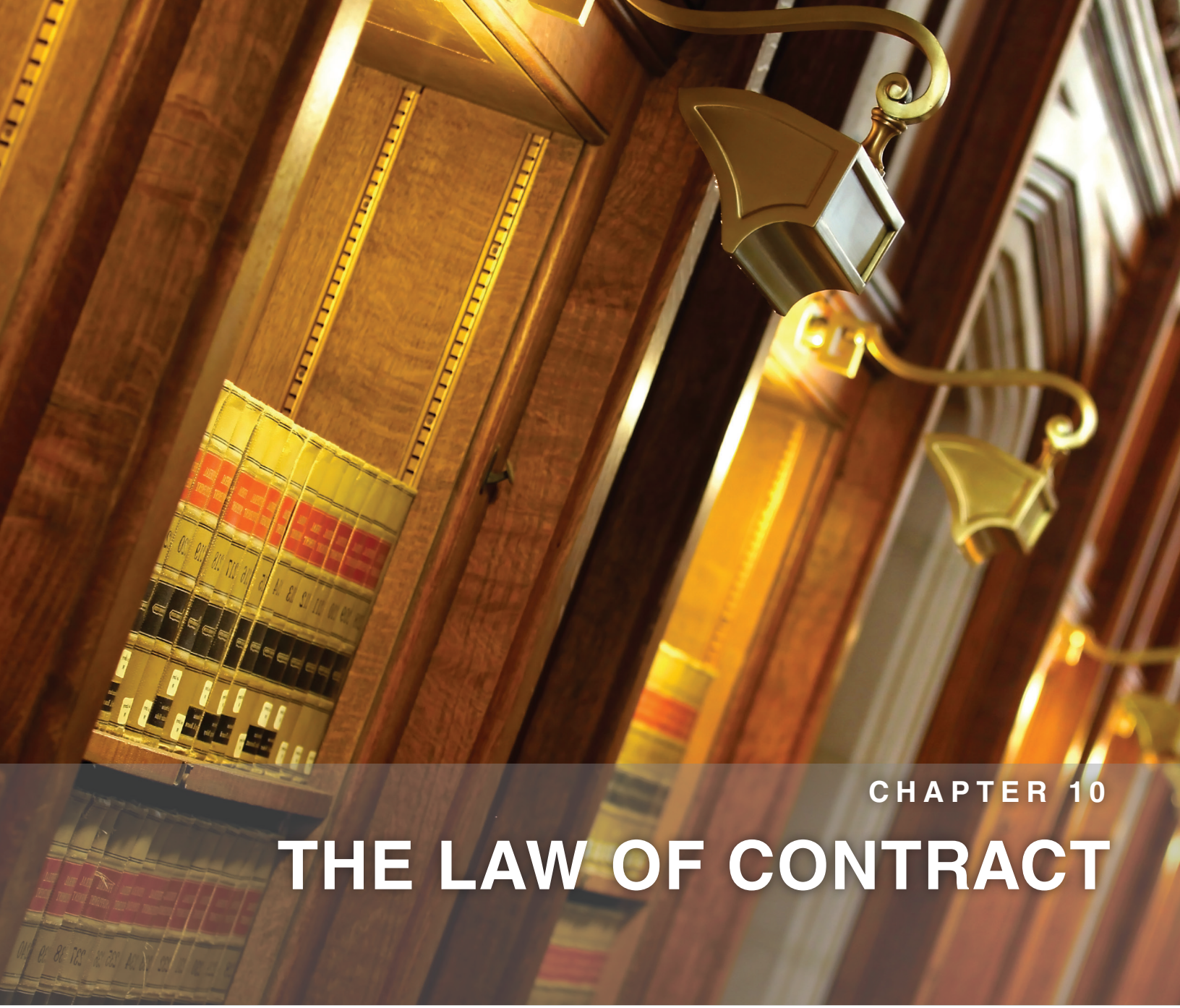

CHAPTER 10

THE LAW OF CONTRACT

Learning Objectives

After studying this chapter, a student should be able to:

- ☑ Explain the essentials for a binding contract
- ☑ Describe the vendor's and the licensee's obligations in representing premises that are for sale and the consequences of making misrepresentations
- ☑ Explain the difference between "void", "voidable", and "unenforceable" contracts
- ☑ Describe the ways in which a contract can be terminated
- ☑ Define and explain the use of conditions precedent
- ☑ Explain the doctrine of privity of contract and how it interrelates with the right of a party to assign their rights under a contract
- ☑ Describe and apply the remedies available to an innocent party where a breach of contract has occurred

PREFACE

There are general legal principles that apply to the formation and enforcement of all contracts. The purpose of this chapter and Chapter 11: "Contracts for Real Estate Transactions" is to demonstrate how these concepts apply to the contracts associated with real estate transactions.

INTRODUCTION

Usually, there are two contracts involved in a real estate transaction: an agency contract (either a listing contract or an exclusive buyer's agent contract) and the *contract of purchase and sale*. If either contract is improperly executed, and the vendor or purchaser suffers a loss, the licensee may be held responsible for such losses. Additionally, the licensee's right to a commission might also be at risk.

contract of purchase and sale
a contract of purchase or sale of land which contains the obligations of the vendor and purchaser with respect to the purchase and sale

The term "*contract*" means a promise or promises, made by one person to another, which the courts will enforce. A contract can contain any number of promises, or "terms", to be performed by either party. However, it can also be a very simple promise. For example: "I, Brown, promise to pay Jones the sum of $100.00 for his 1963 automobile", signed "John Brown" and "Jim Jones".

contract
an agreement between two or more persons which creates an obligation to do or not to do a particular thing

The person who makes the promise is called the "promissor" and the person who can enforce that promise is called the "promissee". If the contract contains several mutual promises, each party will be both a "promissor" and a "promissee". Contracts of purchase and sale of land usually contain many promises.

Example

Val Vendor agrees to sell Blackacre to Bob Buyer for $30,000. Both parties are "promissors": Vendor promised to give title, Buyer promised to pay for it. Both parties are "promissees": Vendor can enforce Buyer's promise to pay, and Buyer can enforce Vendor's promise to deliver the title.

This is an example of a "bilateral contract" because it has a mutual exchange of promises.

A contract has seven essentials. They are:

- offer;
- acceptance;
- consideration;
- legal intention;
- capacity;
- legal object; and
- genuine consent.

If any one of these requisites is lacking, a contract will not result. The form of contract may be oral, an exchange of letters or telegrams, a formal, lengthy written document, or any other exchange of communication. In each case, however, in order for the agreement to be enforceable, the essential elements of a binding contract must be present. As long as they are, the parties have enforceable rights and obligations under that contract.

Before we discuss the seven essentials necessary for the creation of a valid, enforceable contract, we should look at the different types of ineffectual contracts.

VOID, ILLEGAL, VOIDABLE AND UNENFORCEABLE CONTRACTS

Depending upon which essential element is missing, the effect on the contract will vary. Contracts can be ineffective in four different ways: they can be void, illegal, voidable or unenforceable. It is important to understand what these different forms of deficiency mean in practical terms.

Void. A *void contract* is one that has never existed at all. Even if the parties want it to exist and to have effect, it cannot. The parties are in the same position as if they had never attempted to contract. Money paid by one party to the other will be repayable and no rights can be acquired under it. For example, where parties

void contract
a contract which never had any legal existence or effect and which is not capable of being enforced

seek to make a contract in circumstances where there is a mutual or common mistake (discussed later in this chapter) the resulting contract will be void.

Illegal. An illegal contract is one (or both) which offends against public policy or against a particular statute (e.g., a contract for murder or a betting contract). Illegal contracts are also void, but the results of a finding of illegality might vary. In some cases, a person who has paid money under an illegal contract will not be able to recover the money, even though the contract is void. In other cases the effect of the finding of illegality will not be so severe. Legality of purpose is one of the essentials for creating a contract discussed below.

Voidable. A *voidable contract* is one which one (or both) of the parties has the option to rescind (cancel). Until the contract is rescinded, it is valid and binding on the parties. An example of a voidable contract would be a contract for the purchase of a car by an infant. Such a contract is voidable by the infant, but it is binding upon the other party. If it is rescinded by the infant, neither party will have any further obligations under the contract.

voidable contract
a contract which exists until repudiated by a party entitled to do so at which time it becomes void

The right to rescind may be limited where the other party has acted in such a way that it becomes inequitable to allow the contract to be cancelled.

Unenforceable. An unenforceable contract is one which has the essentials of a valid contract but it cannot be sued upon for some procedural reason; for example, section 59 of the *Law and Equity Act* (discussed in Chapter 11: "Contracts for Real Estate Transactions") requires most contracts affecting land to be in writing in order to be enforceable in court, therefore oral contracts respecting land will not be enforceable in many instances.

OFFER

Description

An *offer* is a promise made by one party to another. The person who makes the offer is called the offeror, and the person to whom it is made is the offeree. At common law, if the offer contains a promise, it can be expressed in any form: in writing, orally, or even by conduct. However, contracts for the sale of land must generally be in writing as required by section 59 of the *Law and Equity Act*. This requirement is discussed in detail in Chapter 11: "Contracts for Real Estate Transactions".

Example

Dawn Driver orally offers to sell her 1975 Buick automobile to Bob Buyer for $4,000 cash. Buyer replies, "I accept." Although the promises are oral, the contract is binding. If such an agreement ends up in court, there may be problems of proving the agreement, since it will depend upon Driver and Buyer's testimony.

offer
a proposal to do or refrain from doing some specified thing usually followed by an expected acceptance, counter offer, return promise or act. The person who makes the offer is called the offeror. The recipient of the offer is called the offeree

It is important that an offer be made in clear and unambiguous terms. If a dispute arises, the court must find that a reasonable person would feel there is only one reasonable interpretation which can be given to the "offer". If more than one meaning can be given to an offer, then neither interpretation will be followed by the courts.

Normally, an offer is made to one specific person or group of persons and only that person or group can accept it. In other words, if A makes an offer to sell a car to B, and C overhears the offer, C cannot try to accept it. Only B can accept or reject A's offer.

As a Licensee...

In most cases, the contract of purchase and sale starts as the buyer's signed offer prepared by the licensee acting for the buyer. This offer will be accepted if the seller signs the contract without changing it and while the offer is still open for acceptance. Of course, the seller may make a counter-offer to the buyer, and in that case, it would be the buyer that will have to decide whether or not to accept. Section 30 of the *Real Estate Services Rules* (the "Rules") states that, unless otherwise instructed by the licensee's client, a licensee who receives a signed offer to acquire or dispose of real estate must promptly communicate the offer to the relevant party to the trade in real estate.

Standing Offers

There is an exception to the above principle. Certain offers known as "standing" offers can be made to the public at large. These can be accepted by anyone. An example of this type of offer would be the offering of a reward to the public for providing information. Here the first person to meet the requirements of the offer and to communicate this to the offeror will be the one entitled to enforce the contract. Once a standing offer has been accepted by one person no one else can accept it unless more than one acceptance was contemplated in the offer.

Invitation to Treat

It is important to distinguish an offer from an "*invitation to treat*" which is something less than a legal offer. An offer, once accepted, creates a contract and can be enforced in the courts. The courts draw a line between promises that are meant to be binding if accepted and statements that are intended only as a form of invitation to the public to submit their own offers. In most cases, newspaper advertisements and store window displays are invitations to treat. For example, an advertisement in a newspaper to sell a house for $70,000 would usually be an invitation for prospective buyers to make offers. The owner may or may not accept them.

invitation to treat
a type of advertisement used by one to induce the public or some individual to submit their own offers. An invitation to treat is not an offer capable of acceptance to form a contract

Advertisers must be careful, however, because not all advertisements are considered invitations to treat. Each case will be decided on its own facts. If no reasonable person would think there was a serious intent on the part of the offeror to be bound by the terms of the advertisement, an offer has not been made.

Release or Expiry of an Offer

An offer is released or expires when any one of the following occurs:

- a time limit is specified in the offer and the offer is not accepted within the limit;
- no time limit is specified in the offer but a reasonable time has passed (example below);
- the person who made the offer communicates *revocation* before acceptance;
- either party becomes insane or dies before the offer is accepted;
- a counter-offer is made; or
- the offer is rejected.

revocation
the term for the cancellation of an offer communicated by the offeror to the offeree prior to acceptance

The reasonable time allowed for acceptance of an offer depends upon the circumstances in each case. It will be determined by the nature of the offer or of what is being sold. For example, an offer to sell perishable goods would require prompt acceptance but an offer to sell real property may be deemed to be open for a longer period. Having a time limit in the offer avoids later disagreement about what is a reasonable time for acceptance.

Assuming that a definite time is set out in the offer, must the offer be kept open for the specified period? The answer is that the offer can be revoked without waiting for the time limit to run out, as long as the offer has not yet been accepted. However, revocation must be communicated to the offeree (*Byrne & Co. v. Leon Van Tienhoven & Co.*, [1880] 5 CPD 344).

Example

Val Vendor offers her property for sale in writing to Pete Purchaser for $75,000. The offer states that it is open until 12:00 noon the following day. At 11:00 a.m. the next day, without revoking her offer, Vendor accepts an offer from Try Tobuy, another purchaser. At 11:30 a.m. of the same day, Vendor receives Pete Purchaser's acceptance in writing. What is the result? Vendor has entered into two contracts. She did not communicate a revocation of her offer to Purchaser. As a result, Vendor is liable to Purchaser for damages because she cannot convey the property as promised.

It should be noted that the revocation of a written offer does not need to be in writing. However, because the revocation might need to be proven in court, it is a wise practice to put the revocation in writing and to retain a copy for the offeror's records.

In the above example, the question arises as to who gets the property, Try Tobuy or Pete Purchaser. Although this question is not clearly answered by the cases, there is a rule of equity which states: "first in time, first in rights". In other words, because Try's contract was made one-half hour before Pete's, Try would be entitled to the property. Pete would have to be satisfied with an action for damages against Val.

As licensees, you must remember that offers can be revoked, even where they state that they will be open for acceptance during a set time period.

Example

Pete Purchaser makes an offer to purchase Whiteacre on November 21. The offer states that it is open for acceptance until 11:00 p.m. November 22. Val Vendor decides to think about it overnight because the offer is open until the next night. At noon on November 22, Purchaser advises Vendor that he has found a house he likes better, and revokes his offer. Because Vendor had not yet accepted the offer, she lost her chance to sell to Purchaser.

Option Agreement. It is possible to ensure that an offer will be kept open for the stipulated time period by using a type of contract known as an option agreement. Separate consideration is given to keep the offer open. In effect, a separate contract must be formed. "Consideration" is discussed later in the chapter; however, to understand the principle, think of consideration as a payment of money.

Example

Val Vendor gives Pete Purchaser an option to buy her property for $75,000. The option is for 30 days. In return for the promise to keep the offer open, Purchaser agrees in writing to pay $1,000 consideration. If the option is exercised (i.e., the offer accepted), the $1,000 will form part of the purchase price. If the option is not exercised, Val Vendor keeps the $1,000 as payment for keeping the offer open.

Here, Val must keep her offer open for the 30 day time period. She cannot revoke the offer, nor can she contract to sell to anybody else during the time. A sample option contract appears in Figure 10.1.

An option agreement provides one party with the right within a specified time to purchase or lease property upon certain terms and at an agreed upon price. Option agreements are intended to tie up someone's property for a period of time and are used for a variety of reasons.

The cost of an option agreement depends on many factors; for example, the sophistication of the individual vendor or vendors, the value of the property, and the length of the option.

A licensee should have a lawyer review any option agreements prepared by the licensee.

Counter-offer. A *counter-offer* is simply an offer from the offeree back to the offeror. When a change is made to the offer by the offeree, it forms a counter-offer. For example, where a purchaser offered $80,000 and the vendor insists on $85,000, this insistence is a counter-offer from the vendor to the purchaser. Legally, the counter-offer terminates the original offer. In effect, the counter-offer becomes the offer. If the counter-offer is not accepted, the offeree cannot accept the first offer because it has already terminated.

counter-offer
a statement by the recipient of the offer which has the legal effect of rejecting the offer and of proposing a new offer to the offeror (who then becomes the recipient of the "new" offer)

Example

Paula Purchaser offers Von Vendor $60,000 for his property. Von Vendor counter-offers at $70,000. If Paula Purchaser refuses this counter-offer, Von cannot attempt to accept the offer for $60,000 since it has been terminated.

A counter-offer is different from an inquiry or a request for information. Such an inquiry or request does not terminate the offer. However, it is sometimes difficult to distinguish these concepts. A good example of the fine line drawn between these two situations is set out in *Livingstone v. Evans*, summarized later in this chapter.

As a Licensee...

When dealing with an offer to purchase real property you must be very careful about altering any of the terms of an offer. Such alterations can constitute a counter-offer which terminates the original offer, making it incapable of acceptance. Make certain that the party you are advising is aware that by altering a term in the offer, they may lose the right to purchase or sell the property.

FIGURE 10.1: Option to Purchase Land

THIS AGREEMENT is made the 28th day of February, 20___

BETWEEN ZAFAR KHAN, Farmer, and JASMINE KHAN, Farmer, both of 20951-91st Street, Fort Langley, BC, as JOINT TENANTS
(hereinafter called "the Vendor")

AND DHIRENDRA SINGH, Businessman of 67 West 58th Street, Vancouver, Washington, United States of America
(hereinafter called "the Purchaser")

LEGAL DESCRIPTION of the land and premises hereby optioned, herein called the "land", is:
Parcel "C" (Reference Plan 4427)
Northwest Quarter
Section 21, Township 12
New Westminster District

WITNESSETH THAT

1. In consideration of the sum of ONE THOUSAND Dollars ($1,000) of lawful money of Canada now paid by the Purchaser to the Vendor (the receipt whereof is hereby acknowledged) the Vendor hereby grants to the Purchaser, an option, irrevocable within the time limited herein for acceptance, to purchase the Land for the purchase price of TWO HUNDRED AND EIGHTY-FIVE THOUSAND Dollars ($285,000) of lawful money of Canada, payable in the manner and on the days and times hereinafter provided.
2. THIS OPTION shall be open for exercise up to but not after the hour of Twelve o'clock noon on the 15th day of December, 20___, and shall be exercised by written notice of acceptance delivered to the Vendor at the above-mentioned address.
3. IF this option is not so exercised, it shall be null and void and the Vendor shall be entitled to retain the sum paid for the granting of the option.
4. THIS option is not assignable except with the written consent of the Vendor.
5. TIME shall be of the essence of the agreement.
6. IN the event this option is exercised:
   (i) The said purchase price shall be the sum of $285,000 payable by the Purchaser to the Vendor.
   (ii) The sale shall be completed upon acceptance for registration by the appropriate Registry of all necessary assurances within 30 days of the exercise of this option.
   (iii) The Vendor, at the expense of the Purchaser, shall convey and assure to the Purchaser the Land free from all encumbrances, charges and tenancies except the following:
   - Underground Rights registered under No. U101081C
   - Right of Way in favour of BC Hydro and Power Authority registered under No. RW104907C.

   (iv) All adjustments shall be made as of the date of completion and the Vendor shall deliver possession of the property to the Purchaser on that date.
   (v) All necessary assurances shall be in form determined by the solicitors for the Vendor.
   (vi) The property shall be at the risk of the Vendor until the completion date.
7. In this Indenture:
   (a) the singular includes the plural and vice-versa.
   (b) the masculine includes the feminine and vice-versa.
   (c) any reference to a party includes that party's heirs, executors, administrators and assigns and in the case of a corporation its successors and assigns.
   (d) any covenant, provisos, condition or agreement made by two or more persons shall be construed as several as well as joint.

continued next page

FIGURE 10.1: Option to Purchase Land, *continued*

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, or being corporations have caused their common seals to be hereunto affixed.

SIGNED, SEALED AND DELIVERED
in the presence of

Signature of Witness_____ _____
ZAFAR KHAN

Street Address _____

City or Town _____ _____
JASMINE KHAN

Occupation of Witness _____

As to all three signatures _____ _____
DHIRENDRA SINGH

Livingstone v. Evans, [1925] 4 D.L.R. 769 (Supreme Court of Alberta)

Mr. Evans, through his agent, wrote to Mr. Livingstone, offering him a property for $1,800. Upon receipt of this offer Livingstone, through his agent, wrote back to Evans saying "Send lowest cash price. Will give $1,600 cash." Evans' agent wrote back, "Cannot reduce price." Livingstone immediately wrote back, accepting the $1,800 offer. Evans then sold the land to someone else and Livingstone sued Evans for specific performance, claiming that they had a binding contract. Livingstone won his suit. The Court's reasoning can be summarized as follows:

- a counter-offer terminates the original offer, an inquiry for more information does not. Therefore, if Livingstone's first reply ("...will give $1,600") was a counter-offer, Evans' original offer was terminated and Livingstone could not accept it later. The Court found that although Livingstone's first reply did contain a minor request for information, it was, in fact, a counter-offer and therefore Evans' first offer terminated;
- since a counter-offer terminates the original offer, the original offeror can either:
  - accept the counter-offer. Evans' reply "Cannot reduce price" showed that he did not accept the counter offer;
  - reject the counter-offer and effectively end the dealings at that position; or
  - reject the counter-offer and renew the original offer; the Court found that Evans' reply "Cannot reduce price" was a renewal of the original offer. The Court reasoned that Evans' reply implied that he was still standing by his original offer. Since the original offer was renewed, Livingstone was entitled to accept it, which he did.

In addition to illustrating the law of offer and counter-offer, this case shows the importance of clarity in contractual negotiations. If Evans intended to end negotiations with Livingstone he should have stated those intentions clearly. Since Livingstone had the right to accept Evans' renewed offer and did, his rights had priority against any subsequent "acceptances" by third parties.

ACCEPTANCE

Description

The acceptance, like the offer, must be given in clear terms. It must be a positive act. For example, an offer cannot state "If I don't hear from you, I'll assume you've accepted". Doing nothing will not be considered legal acceptance.

As a Licensee...

Section 47 of the Rules states that a licensee who has obtained a signed acceptance of an offer to acquire or dispose of real estate must promptly deliver a copy of the signed acceptance to each of the parties to the trade in real estate and the related brokerage of the licensee. "Each of the parties" means that, if A accepts an offer to sell their home to B and C (who want to purchase A's property as co-owners), the licensee must deliver copies of the signed acceptance to each of B and C individually.

Proper Means of Acceptance

What form is required for acceptance: oral, written, by conduct? In each case the court must consider the intention of the parties at the time the offer was made. In making this determination, the nature of the offer is important, although not conclusive. If an offer is sent by mail, the court will probably decide that acceptance by mail is what the parties intended. Similarly, if an offer is made by telephone, proper acceptance is by telephone. An offer can state how the acceptance must be made. For example, A can telephone B and offer to buy B's stereo for $500, but A can tell B to mail the acceptance. A written, formal offer will often have express rules about how and where an acceptance should be made.

As a general principle, the offeree must accept in one of two ways to ensure "proper" acceptance:

- if the offer specifies how the acceptance should be made, the offeree should accept by that method; or
- if the offer says nothing about acceptance, the offeree should accept by the same method as the offer was itself made.

When Acceptance is Communicated

An acceptance has no effect until it is communicated to the offeror. Sometimes it is difficult to determine when this communication actually happens. Contracts are categorized in two types: those which can be accepted by instantaneous means, and those where the parties expect the offer to be accepted by non-instantaneous means. Instantaneous means include telephone and, probably, teletype services and fax. Non-instantaneous means include postal and telegraph services.

When an acceptance is communicated depends on the intended method of acceptance. Where acceptance of an offer is intended to be by instantaneous means, the acceptance will not be complete until it has been actually received by the offeror. For example, if A telephones B with an offer and B accepts, the acceptance is not effective unless A actually hears it. If the telephone line goes dead before A receives this communication, there is no binding contract. If, on the other hand, acceptance of an offer is intended to be by non-instantaneous means, such as by mail, then the acceptance is effective when it is put in the mailbox, not when actually received. If the letter of acceptance is lost in the mail, there is still a binding contract. Of course, the offeree must be able to prove that the acceptance was actually mailed.

There is a reason for this "postal acceptance rule". The law gives the responsibility to the offeror to specify how the offer is to be accepted. If the offeror chooses a method like the mail, they must assume the risks involved in that type of service. If the offeror wants to avoid this problem, they can specify another form of acceptance, or state that mail acceptance will only be effective once it is received by the offeror.

Improper Communication of Acceptance

What happens if acceptance is not properly communicated? It was stated above that there are two "proper" methods of communicating acceptance. The consequences of failing to follow these are similar.

The first situation occurs where the intention of the parties is that acceptance should be by instantaneous means and the offeree chooses to accept by a non-instantaneous method. In this instance, it is the offeree who assumes the risk. Acceptance must be actually communicated to be effective. If the acceptance is lost, or if the offer lapses before the acceptance reaches the offeror, no contract will result. An offer lapses if the stipulated time period expires or a reasonable time passes before communication of the acceptance.

The second situation occurs where the offeror specifies non-instantaneous acceptance, and the offeree chooses an instantaneous method. For example, the offer states that acceptance should be communicated by registered mail and the offeree chooses telephone. In this case, the offeror can probably refuse the acceptance because it was not what the offer asked for. In some cases, the difference may not be crucial – registered mail and certified mail are equivalent, for example. However, by ignoring instructions in the offer, the offeree is risking loss of the contract.

Example

Sally Seller telephones an offer to sell certain belongings to Paul Purchaser. The next day, Purchaser decides to accept and mails his acceptance to Seller. As Purchaser has used a slower method of acceptance than contemplated by the nature of the offer, it will only be effective if Seller actually receives it and if the offer has not lapsed. If the acceptance is lost in the mail, there will be no contract.

It must be noted that the rules regarding communication of an acceptance are not the same as the rule regarding revocation of an offer. There is no equivalent "postal acceptance rule" for revocation. Revocation must always be actually communicated to be effective.

CONSIDERATION

Nature

One of the seven essential elements of a contract is the presence of *consideration*. "Consideration" means "some right, benefit or profit accruing to the promissor or some forbearance, detriment, loss or responsibility suffered by the promissee". In other words, the party trying to enforce the contract must have "paid" something in return for the promise. This consideration must be of some value in the eyes of the court, but it does not have to be money. For example, in a real estate contract, the vendor promises to deliver title to the property and the purchaser promises to pay for it. The "payment" does not need to change hands to make a binding contract. The exchange of mutual promises will provide consideration for the formation of a contract.

consideration
the legal term for something of value that is bargained for, and received by, each party to a contract. Consideration may be in the form of a right, interest, profit or benefit accruing to one party. It may also be in the form of an agreement not to do something, or loss suffered by the other

The courts will not review the adequacy of the consideration (i.e., whether the price was too high or too low) unless fraud, undue influence, duress, or misrepresentation exists. A phrase frequently used is "for $1 and other good and valuable consideration". A one dollar consideration is just as effective as a one hundred thousand dollar consideration.

What is known as "past consideration" is not legally effective. In past consideration, the "payment" given by the promisee has already been made when the promissor offers to pay for it.

Example

Tom asks Jane to do him a favour and help him paint his fence. After the job has been completed, Tom states that he will pay Jane $50.00 for her work. Tom never pays Jane. Jane sues Tom for breach of contract for $50.00.

In this example, Jane cannot enforce Tom's promise to pay the $50.00 because the consideration (i.e., the act of painting the fence) had already been done when Tom made his promise to pay. It was prior to and independent of Tom's offer to pay, so no contract has been formed. Jane can only hope that Tom will feel morally obligated to live up to his promise.

This situation is different from the case where the promise to pay is made before the painting is done. Here, there is an exchange of promises in advance and a contract is formed.

Consideration has ordinarily been required to secure any modifications to the terms of a contract after the contract has been entered into. However, there is some case law suggesting that fresh consideration may no longer be required when amending contracts, as discussed later.

Seal

A contract made without consideration can still be binding if it is made under seal. Historically, the use of a seal was very important. The family name was once held in such high esteem that serious intention to be bound by an agreement could be shown by impressing the family seal onto warm wax applied to the contract document. The sealing of the contract made it binding on the parties, even though no consideration existed. Family seals are no longer used in this way. However, red "legal seals" can be purchased at almost any stationery store. If they are affixed to the contract document at the time of the signing, the contract will be binding even though no consideration has been given. Two points should be remembered. First, the parties must be aware of the legal effects of a seal to be bound by the contract. Second, a corporate seal, which is used by a company when signing a document to confirm that it has been approved by the corporation, will not fulfill the requirement for consideration.

Consideration and Amendments of a Contract

There may be times when the parties to an enforceable contract want to change or alter the terms of that contract. This process is known as amending the contract. An amendment is only possible if all of the parties to the contract agree. At law, an amendment is a contract to change an existing contract. Therefore, generally speaking, the amendment must contain all of the essential elements of a contract, including consideration.

This raises the potential problem of past consideration, mentioned earlier. In earlier court decisions, judges have stated that in order for an amendment to a contract to be enforceable, the party seeking to enforce the amendment must have given some fresh consideration in exchange for the amendment. This fresh consideration could not include anything that the party had previously done, or promised to do, under the original contract. For this reason, parties who wanted to amend a contract often exchanged nominal consideration (such as $1.00) to support the amendment. Alternatively, parties would sign the amending agreement under seal.

However, the absence of fresh consideration may no longer interfere with mutually agreed-upon changes to contracts. The British Columbia Court of Appeal, in *Rosas v Toca*, stated: "When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable."[1] Despite this case, if amending a contract, it is always safest to put any amendments into writing and to ensure that both parties provide fresh consideration (even just $1.00) or sign the amendments under seal.

Quantum Meruit

Quantum meruit is a Latin phrase which means "as much as is deserved". At law, where one person requests the contractual services of another, even though there is no mention of a specific amount, the law will imply a promise to pay a reasonable amount. Obviously it is a good idea to state specifically in each contract what the amount of the consideration is to be, rather than relying on this rule.

quantum meruit
literally, "as much as they deserve". A doctrine that no one who benefits by the labour and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labour and materials furnished, even though a specific contract price may not have been agreed to

The principle of *quantum meruit* will be applied by the courts in each of the following circumstances:

- where there was no amount specified in the contract for performance of contractual services;
- a breach of the contract has occurred and the "innocent" party has performed part, but not all of its obligations under the contract and wants to be paid for the partial performance;
- where the contract is void and there has been work performed or services rendered on the assumption that the contract was valid; and/or
- where the original contract has been replaced by a new and different contract. Such a situation may arise when one party is in breach of a contract and the party not in default accepts partial or substituted performance in place of the original contractual obligations.

In each of the above instances, the injured party can receive a reasonable sum for the work or services rendered under the *quantum meruit* principle.

As a Licensee...

You should take care to completely fill out all relevant agreements in a real estate transaction, including your agency contract. Otherwise, a court may find that it did not sufficiently reflect the actual agreement between the parties, and this failure may end in a less than satisfactory result for you. An example is *Tapestry Realty Ltd v. Power Peak Investments Inc*, 2009 BCSC 1063. In this case, a listing licensee failed to obtain the seller's initials on the first page of a Multiple Listing Contract where the licensee's commission rate was stated as 10% (see Appendix 11.1 for the standard form Multiple Listing Contract). Because of the missing initials, the licensee was unable to prove that the parties had agreed to the licensee's commission rate. Consequently, the court held that the licensee was entitled to *quantum meruit*, which was a 7% commission rate – this meant that the licensee lost approximately $30,000 of his anticipated commission.

[1] *Rosas v. Toca*, 2018 BCCA 191

LEGAL INTENTION

A person must have intended to create legal obligations in order for a contract to be formed. For instance, inviting a guest over for dinner would not normally be considered an act intended to create legal obligations. However, offering one's car for sale at a certain price to someone would usually contain the necessary intention. The law presumes that there is a serious intention to be bound in the case of an agreement between strangers or in a commercial contract. On the other hand, if the contract is between family members or very close friends, the law presumes that there is no intention to be bound. These presumptions can be reversed if evidence exists to show otherwise. It is important to remember that whether such an intention exists or not is a decision that the courts will make objectively. In other words, they will ask, "Would a reasonable person think that the parties had a serious intention to be bound?"

CAPACITY

Incapacity to make a contract can arise in a number of ways. The most common types of incapacity are infancy, insanity, drunkenness, and the lack of capacity of a corporation.

Infancy

In each province there is legislation which governs the age at which a person is considered to be an adult in society, capable of looking after their own interests. In British Columbia this age is 19 years. At law, a person younger than age nineteen is considered a minor or *infant*. Note that the legal definition of infant is unlike the common usage that denotes a young child.

infant
in British Columbia, a person under 19 years of age which, generally speaking, is the age of legal competence

Most contracts to which an infant is a party are voidable by the infant. Only a very limited number of contracts are binding. Where a contract is voidable by an infant, the infant may honour it, or ignore it. However, the adult involved does not have a similar choice. In other words, voidable contracts cannot be enforced against the infant but can always be enforced by the infant. Even where the adult does not know the other party is an infant, the contract is voidable.

Section 19(1) of the *Infants Act* provides that a contract entered into by an infant will be unenforceable against the infant (but enforceable by the infant against the adult contracting party) unless one of four exceptions applies. These exceptions in which the contract will be enforceable against an infant are:

- where another statute provides that the contract is enforceable;
- where the infant affirms the contract after turning 19;
- where the infant performs or partially performs the contract within one year of turning 19; or
- where the infant does not repudiate the contract within one year of turning 19.

The court has great discretion in terms of remedies where an infant has made a voidable contract. Among other remedies, the court can order restitution of money paid, compensation, and release from further obligation, and is required to consider any and all relevant circumstances in seeking to do equity between the parties. The set of circumstances in which the contract is enforceable against the infant is quite limited.

Mental Incapacity

Mental illness or disability does not, in itself, prevent an individual from entering into binding contracts. However, the law recognizes that, at some point, cognitive impairments may render a person unable to understand the nature and effects of their actions. At this point, a person is said to be *mentally incapable*. Common sources of mental incapacity include dementia, Alzheimer's, mental illnesses that cause delusions or hallucinations, and substance abuse (including drugs and alcohol).

There are three parts to the common law test for mental capacity to contract:

1. a contracting party must be able to understand the terms of a contract;
2. the contracting party must be able to understand how the contract will affect their interests; and
3. the other contracting party must not have knowledge of the first party's mental incapacity.

Until proven otherwise, all adult persons are presumed capable of making decisions about their personal and financial affairs.

The law of mental capacity has important ramifications for licensees. First, if a client signs a listing contract while incapable, then that contract will likely be unenforceable. If found unenforceable, any commission agreements or benefits conferred to the licensee under the contract will almost certainly be lost. Second, if either party to a contract of purchase and sale is incapable at the time of signing, then that contract may be unenforceable and the sale could fall through. According to section 60.2 of the *Adult Guardianship Act*, a transfer of property by an incapable adult will only be upheld if one of two conditions is met:

1. the purchaser paid a full and fair price for the property; or
2. the purchaser had no reasonable way of knowing that the adult was incapable.

If a sale falls through because of one party's mental incapacity at the time of contract, licensees could be held liable for failing to act in the best interests of their clients and failing to exercise due diligence. Licensees could also find themselves subject to disciplinary proceedings.

ALERT

A licensee was fined $1,000 and suspended for 30 days for failing to act in the best interests of his 90 year-old client. The licensee, acting as a limited dual agent (at a time when dual agency was permitted), was involved in an agreement where a construction company purchased the client's house for well below its appraised value, and the client subsequently purchased a condominium unit from the same company for more than its assessed value. It was later found that the client was suffering from dementia during the negotiations and that the licensee ought to have ensured that she received independent legal advice before entering into a contract that was clearly not in her best interests.

(2011 CanLII 27679 (BC REC))

Powers of Attorney, Adult Guardianship and Representation Agreements

In many cases, issues of mental incapacity will be raised concurrently with issues relating to powers of attorney, adult guardianship, and/or representation agreements. Licensees should have a general understanding of the differences between these kinds of legal arrangements.

Powers of Attorney and Enduring Powers of Attorney

A power of attorney is a legal document that allows for the appointment of a trusted person or "attorney" to make financial or legal decisions for another person (known as the "donor"). A power of attorney document may be very specific (e.g., allowing the attorney to cash cheques) or very general (e.g., allowing the attorney to make any financial and legal decisions that the donor otherwise would have made). The *Land Title Act* has special requirements for the creation of powers of attorney that authorize the attorney to deal with real estate. Any time a power of attorney is utilized in a real estate transaction, the licensee should advise all parties to seek legal advice. According to section 29 of the *Power of Attorney Act*, powers of attorney are only valid while the donor is alive and they automatically expire if the donor becomes incapable or bankrupt. According to section 56 of the *Land Title Act*, powers of attorney dealing with real estate are only valid for three years after the date of signing.

Enduring powers of attorney have many of the same characteristics as regular powers of attorney. However, they do not expire after 3 years and will remain valid if the donor becomes incapable.

An example of a power of attorney agreement is when an elderly couple grants their son or daughter the authority to sign documents, such as a contract for purchase and sale, on their behalf.

While the power of attorney agreement will bind the donor to any agreement entered into by the attorney (if made within the scope of the attorney's authority), some licensees may choose to encourage their clients to sign their contracts for purchase and sale themselves if they are able, or at least obtain direct confirmation of

authority from the donor. Issues may arise if an attorney has acted outside the scope of their authority, or if a donor did not possess the required mental capacity to grant a power of attorney. If these issues were to arise, a deal may collapse and the licensee may not receive any commission.

As a Licensee…

In real estate transactions, the consequences of an invalid power of attorney can be significant. The British Columbia Land Title Office ("LTO") may reject a power of attorney if it fails to comply with applicable legislative or LTO practice requirements. Some common reasons why the LTO may reject a power of attorney include:

- The donor's name in the power of attorney does not exactly match the name of the registered owner;
- The power of attorney contains substantively different alternative names for the attorney, e.g., "Jane Smith aka Jane Jones";
- The power of attorney does not grant the appropriate power to deal with the land (e.g., the power of attorney deals with the wrong property, or does not authorize the attorney to mortgage or sell the property);
- A power of attorney was prepared outside of BC and lacks the required extra-jurisdictional solicitor's certificate;
- The power of attorney has expired according to its terms or section 56 of the *Land Title Act*;
- The general power of attorney is invalid due to the donor's incapacity or death; and
- The enduring power of attorney does not come into effect until a particular event occurs (e.g., the enduring power of attorney states that it only comes into effect when the donor loses their capacity to manage their own financial affairs), and that event has not yet taken place.

Licensees working with clients who may be relying upon a power of attorney should take the following steps:

- Obtain a true copy of the power of attorney and read the entire document to ensure that the client has the legal authority to deal with the property;
- Consider obtaining the client's consent to contact their family members to determine whether anyone else holds a power of attorney;
- Consider contacting lenders to confirm their policies and procedures relating to powers of attorney;
- Consult with your designated individual as to any brokerage policies or other appropriate due diligence relating to powers of attorney; and
- Advise clients to seek legal advice as soon as possible as to the validity of the power of attorney for the contemplated transaction.

Failure to exercise care when dealing with powers of attorney can result in professional discipline or other legal consequences for licensees or their clients.

Adult Guardianship and Committees

If a person becomes mentally incapable because of disease, accident, or age, and there is no enduring power of attorney agreement in place, the BC Supreme Court can appoint an adult guardian (also known as a "committee") to make important decisions on the incapable person's behalf. In most cases, family members or friends will act as committee; in other cases, the Public Guardian and Trustee (a government body) will be appointed to make decisions on behalf of the incapacitated person. Licensees may find themselves dealing with adult guardians and should be aware that, if a committee is appointed for an adult, then that adult no longer has the capacity to enter into contracts on their own behalf, even if they appear lucid or otherwise meet the common law test for capacity.

ALERT

A licensee was fined $750 and suspended for 7 days after failing to provide a copy of a listing contract to the Public Guardian and Trustee upon request. The Public Guardian and Trustee was appointed as committee for one of the owners of the property due to the owner's mental incapacity. The Guardian registered a caveat against the title to ensure the property could not be conveyed without their involvement, but the licensee failed to look into the nature of this caveat and failed to adequately involve the Guardian in the dealings with the property.

(2007 CanLII 71561 (BC REC)).

Representation Agreements and Advanced Directives

Representation agreements are planning documents that allow individuals to transfer their legal decision making power to another person. Representation agreements typically cover routine financial affairs as well as personal and healthcare decisions. Representation agreements created on or after September 1, 2011 cannot authorize representatives to purchase or sell real estate.

Advanced directives are written instructions pertaining to the delivery of healthcare services. These directives cannot authorize representatives to deal with real estate.

Practical Steps for Licensees

The law of mental capacity and its relation to real estate transactions and agreements is complex. Licensees are not expected to provide legal advice pertaining to these issues, but they are expected to identify potentially problematic situations and to respond appropriately. When faced with a client who appears to have a cognitive impairment (e.g., incoherent speech, signs of memory loss, confusion or contradictory instructions), licensees should proceed as follows:

1. Try to determine if there is a valid power of attorney, enduring power of attorney, or adult guardian that has been appointed.
2. If there is a power of attorney or guardianship arrangement, advise the parties to seek legal advice. The original document will be required to register a transfer of real estate in the land title office.
3. When dealing with attorneys or guardians, licensees should speak with their managing broker and seek legal advice to ensure that no procedural or legal errors are made when purchasing or selling real estate on behalf of an incapacitated party.
4. If there are no power of attorney or guardianship arrangements, ensure that the client obtains independent legal advice before entering into any listing agreements or real estate transactions. Also, obtain a Certificate of Independent Legal Advice from the client before proceeding.
5. Licensees should not personally accept powers of attorney designations without legal advice, as these powers carry with them substantial obligations, responsibilities and potential liabilities.

Foreigners and Illiterates

A foreigner or illiterate refers to persons who cannot read or speak English. In this context it includes a blind person. The rule is that if the foreigner or illiterate person knew the general nature of the contract, they are bound. However, if the person who read the document to the foreigner or illiterate fraudulently misrepresented what was written, there is no contract.

Foreigners or illiterates will be bound by a contract if they neglect to find out the contents of the document before signing. Therefore the illiterate or blind person must ask for the document to be read and explained. Where the contract was misrepresented, foreigners or illiterates may be able to plead non est factum, which means "that is not my deed" (*Dorsch v. Freeholders Oil Co. Ltd.*, 1965 CanLII 90 (SCC)). This concept is discussed more fully under "Mistake", later in the chapter.

Incorporated Companies

When a corporation is involved as a party to a contract, a licensee must ensure that the corporation exists. A company cannot make a contract until it is actually formed and legally recognized under the laws of the province. This is very easy to check. All companies must have an official records office. In that office, any person can look over the incorporation documents. At common law, a contract purportedly entered into by a company before the company exists cannot be ratified by the company after it has come into being. In other words, even if the company approves the contract, it is not made binding. The law has been altered by statute in BC so that it is possible for companies incorporated under the *Business Corporations Act* to ratify a pre-incorporation contract by act or conduct. The situation is complicated by the fact that some companies operating in BC are incorporated under federal or another province's legislation; therefore, different ratification rules will apply. It is prudent for a licensee to be cognizant of this issue, and to seek legal advice if it arises. A licensee is still well advised to always ensure the "company" they are dealing with actually exists.

As a Licensee...

You may encounter a situation where the owner of a property has recently passed away and the estate, or a relative of the deceased, is trying to sell the property. When contemplating such a transaction, called an estate sale, there are a number of issues to consider.

First, a licensee should confirm that there are no surviving joint tenants on title. This should be done by performing a title search of the property. If there are joint tenants, the deceased's share is transmitted to the surviving joint tenant(s), does not become part of the deceased's estate, and therefore cannot be sold by the representative of the estate. If there are no surviving joint tenants, a licensee must confirm that the person claiming authority to act for the deceased has the legal authority to act for the estate.

Authority may take one of two forms. If the deceased had a will, the named executor of the estate must apply for a Grant of Probate. Once obtained, and if the will does not gift the property to a beneficiary, a Grant of Probate gives the executor the authority to transmit the property into the name of the estate and to sell it in an estate sale. If the deceased did not have a will, a successor or another eligible person as allowed under section 130 of the *Wills, Estates and Succession Act*, may apply for Letters of Administration. Once obtained, the appointed administrator has the authority to sell the property in an estate sale. Therefore, a licensee should always confirm that the executor or administrator has obtained a Grant of Probate or Letters of Administration. If not, the executor or administrator may not have the legal authority to sign a listing agreement or a Contract of Purchase and Sale on behalf of the estate.

Authority to act is also relevant to timing with respect to a Contract of Purchase and Sale. A transfer of property cannot be completed until a Grant of Probate is obtained, which can take three to six months. Prior to obtaining the Grant of Probate, an executor may list the property provided that any Contract for Purchase and Sale entered into is subject to the executor obtaining a Grant of Probate. In these circumstances, a licensee should advise the executor to seek independent legal advice. Similarly, an application for Letters of Administration can take three to six months. However, as an administrator has no legal authority to act until obtaining the Letters of Administration, a licensee should not enter into any contracts with the administrator until that time. Licensees should also be aware of how an executor or administrator should sign a contract on behalf of the estate. The proper form is: "[Name], Executor [or Administrator] of the Estate of [name of the deceased]."

The previously described issues relating to an estate sale are also relevant to a licensee acting for a buyer. If a licensee knows that the owner recently passed away, they must ensure that the executor or administrator has the authority to sell the property through a Grant of Probate or Letters of Administration. The executor or administrator must be able to legally sign and execute a Contract of Purchase and Sale. Licensees acting for a buyer should be aware that when searching title, the property will likely be registered in the name of the executor or administrator, as executor or administrator of the estate of the deceased.

LEGAL OBJECT

Contracts for certain purposes may be considered illegal: for example, a contract relating to operating a bawdy house; a contract seeking to subvert justice; a contract to commit a crime or a tort; and contracts resulting in breaches of statutes, including the *Criminal Code*, *Income Tax Act*, *Customs Act*, and the *Competition Act*. In each of these examples the "contract" may be completely void and a court would not help a party to recover money or property transferred under the illegal contract if the party knew of the illegality.

Shafazand v. Whitestone Management Ltd., 2014 BCSC 21

A major issue in the *Shafazand* case was whether the parties to a residential construction contract could obtain relief from the courts in circumstances where the contract was illegal.

In *Shafazand*, the defendant, Whitestone, hired the plaintiff, Shafazand, to construct a single family residence. Under their agreement, it was the common intention of both parties that Shafazand would construct an illegal basement suite (prohibited by the applicable Vancouver bylaws), which would be concealed until after the City of Vancouver had completed its final inspection and issued an occupancy permit. Over the course of construction, problems occurred that ultimately resulted in litigation. Shafazand sued to recover the costs of the extra work performed, claiming that Whitestone had made significant amendments to the scope of work under the contract and had continually promised to compensate him for these additional tasks. Whitestone counterclaimed on the basis that Shafazand had failed to construct the residence by the contractual deadline, forcing it to incur labour and supply costs in order to complete the work. The Court found both parties' claims to be valid. Offsetting the awards against each other resulted in a balance of $42,000 in favour of Whitestone.

continued next page

However, given the illegal content of the contract (i.e., a contract to build a structure that was prohibited by Vancouver's bylaws), the Court had to decide on public policy grounds whether to permit Whitestone to actually recover the balance of its counterclaim against Shafazand. Recognizing that determining the impact of an illegal contract requires a discretionary approach, the Court decided that it would be appropriate in these circumstances to deprive Whitestone of the balance of $42,000, mainly because the company had already sold the residence and thus benefitted financially from the illegal suite. Consequently, the claims of both plaintiff and defendant were dismissed.

Shafazand demonstrates the danger of proceeding under a contract one knows is illegal, as the courts may ultimately deny relief that a party would otherwise be entitled to under contract law.

GENUINE CONSENT

Genuine consent means that the parties had a clear understanding of the substance of the contract, and lack of genuine consent can negate the contract. Genuine consent is considered under the categories of misrepresentation, mistake, duress, undue influence and unconscionable transaction.

Misrepresentation

A *misrepresentation* is a false statement of fact, usually made in the negotiations before the contract is made. The misrepresentation is sometimes included as a term of the contract itself, but does not need to be.

There are three criteria to determine misrepresentation: (1) the statement must be false; (2) it must have induced the other party to enter into the contract; and (3) it must also be one which would have induced a reasonable person to enter into the contract. If any one of these three points is not proven, the misrepresentation will not be sufficient to render the contract voidable.

misrepresentation
a false assertion of fact which, if accepted, leads one to an incorrect belief about a given situation

Example

Petra Prospect asks Von Vendor if the house for sale has a new furnace. Von states that it is only 6 months old when, in fact, it is 6 years old and in poor condition. Relying on Von's statement, Petra purchases the house. Here, Von has made an actionable misrepresentation because:

- the statement that the furnace was 6 months old is a statement of fact;
- the statement is false;
- the statement induced Petra to buy the house; and
- such a statement would induce a reasonable person to buy the house in these circumstances, (i.e., Petra was not acting unreasonably in relying on the statement in deciding to enter the contract).

It was explained above that a statement can only form the basis for an actionable misrepresentation if it is a statement of fact. For example, if a vendor said, "We replaced the roof last year", that is a statement of fact. If it were not true, it would be actionable. In contrast, if the vendor said "I don't think the roof will need replacing for two or three years", it is a statement of opinion, and cannot be an actionable misrepresentation, even if it turns out not to be correct. There is an exception to this rule: an expert's opinion is treated by the courts as a statement of fact. Therefore, if a licensee acting for the vendor made the inaccurate statement about when the roof would need replacement, the licensee would be an expert in the circumstances and it might be considered a misrepresentation.

ALERT

A representative's license was suspended for 14 days as a result of his misrepresenting to a prospective purchaser that:

- there was a double carport when in fact it was a single one; and
- the furnace was new when in fact it was not.

(see: In the matter of a Hearing before the Real Estate Council (now the British Columbia Financial Services Authority) held August 11, 1981)

The remedy available to an innocent party depends on whether the misrepresentation was made innocently or fraudulently. An innocent misrepresentation occurs when the false statement is made without knowing it is false.

In the case of innocent misrepresentation:

- the innocent party (plaintiff) can sue for rescission (the court will cancel the contract) prior to execution of the contract. With respect to a transfer of land, this means that rescission of the contract will not be available after the completion of the sale; and
- the plaintiff cannot sue for damages.

A fraudulent misrepresentation occurs when the person making the false statement knows it is false, or says it recklessly and does not care whether it is true or false.

In the case of fraudulent misrepresentation:

- the plaintiff can sue for rescission at any time; and
- the plaintiff can sue for damages (based on tort law).

Some protection from liability is usually provided to a vendor in a contract of purchase and sale by what is called an "escape clause". A typical example of such a clause is: *"There are no representations, warranties, guarantees, promises, or collateral agreements other than those contained in this written agreement"*.

What this means is that the purchaser who signs the contract agrees that the only representations concerning the property are those written into the contract. Even if this is not true, the purchaser is prohibited from giving evidence that contradicts the written contract. Therefore, the clause gives the vendor protection against innocent misrepresentations which are not included in writing in the contract of purchase and sale. However, this clause will not protect the vendor in the case of fraudulent misrepresentation. The reason for this is that the courts will allow the purchaser to contradict a written contract if fraud has occurred.

The escape clause will never protect the licensee working for the vendor. That is because the contract of purchase and sale is a contract between the vendor and the purchaser. The licensee is not a party to the contract and cannot rely on any of its terms.

ALERT

Both a listing and selling licensee were found negligent for advertising a lot as a building lot when the municipal land use bylaws would not allow a house to be built on it.

Even though the contract contained an exclusion clause which said the purchaser had not relied on any representations not contained in the written contract, the court said where a misrepresentation is of such importance as to go to the purchaser's very purpose for entering the contract, the exclusion clause will not be effective to limit the vendor's liability where the clause was not specifically brought to the purchaser's attention. The vendor was vicariously liable for the agent's negligence.

(*Betker v. Williams*, 1991 CanLII 1160 (BC CA))

Disclosure of Defects

caveat emptor
a Latin phrase translation to "let the buyer beware", and used in the real estate context to describe the obligation on the buyer of real property to conduct appropriate due diligence on a property before purchasing it

Although misrepresentation requires that a statement of fact be made, in the context of real estate transactions, silence has been recognized as a form of misrepresentation, particularly when certain defects are not disclosed by the seller or the listing licensee. A "defect" can generally be defined as a characteristic or feature of the property that materially affects the property's use or value.

The starting point of the disclosure of defects is the concept of *caveat emptor*. *Caveat emptor*, Latin for "let the buyer beware", applies to buyers of real estate and highlights the importance for buyers to perform their own due diligence before entering into purchase contracts. Essentially, the law places a substantial obligation on buyers to make appropriate inquiries and investigations in order to satisfy themselves that the property is suitable for their purposes.

The concept of *caveat emptor* applies to defects in a property known as *patent defects*, which are defects in a property that are visible or that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. Examples of potential patent defects are broken windows, stained carpets, visible water damage on the walls or ceilings, and encumbrances on title (e.g., a restrictive covenant severely limiting the height of any buildings or structures on the property).

patent defect
a defect in real property that is visible to the eye or that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property

When conducting their due diligence on a property, buyers must take note of all obvious, visible, and readily observable defects. Additionally, they are expected to understand the implications of what they are seeing (e.g., water marks on an interior wall could be an indication of mould). The inability of an inexperienced buyer to understand and recognize patent defects will not impose a duty to disclose those defects upon the seller. In this way, "reasonable inspection" and "reasonable inquiries" almost always involves consulting a qualified individual.

As a Licensee...

When acting for buyers, you should advise them that they should always retain a qualified expert to inspect the property they are considering for purchase. A property inspection will assist the buyer in understanding the condition of the property and what repairs may be necessary. You should explain the importance of why such an inspection is necessary and that licensees are typically not qualified to provide home inspection advice. If a buyer decides against an inspection, your advice to have a property inspection should be documented.

With residential properties, the starting point is the retention of a licensed home inspector. By law, anyone who engages in home inspection activities requires a licence from the Business Practices and Consumer Protection Authority (BPCPA). Depending on the unique characteristics of the property or the results of the home inspection, the buyer may want to hire additional qualified experts to examine the property. For example, home inspections will typically not include a review of any environmental issues with the property. Therefore, if the buyer is concerned about such issues, perhaps if the property once made use of an underground oil storage tank, they should be referred to an environmental consultant.

There are some exceptions to *caveat emptor,* one being in the case of known latent defects. A *latent defect* is a defect in the property that is not discoverable by a potential buyer through reasonable inspection and inquiries. Potential examples of latent defects are the presence of mould behind the walls of the building, environmental contamination of the soil of the property, and structural issues with the building.

latent defect
a defect in real property that cannot be discovered by conducting a reasonable inspection and making reasonable inquiries about the property

Not all latent defects need to be disclosed by the seller. As stated by the British Columbia Supreme Court, the defect "must carry with it a consequence of substance; that is, it must be of such a nature as to render the house uninhabitable or dangerous... Beyond that, the vendor has no obligation to disparage their own property."[2] In other words, only latent defects that render a property dangerous or unfit for habitation need to be disclosed to buyers. In addition, the seller is only required to disclose defects that they know or should have reasonably known. For example, disclosure would not be required if a seller's property was contaminated due to a hazardous substance migrating through the soil from a neighbouring property, but the seller was not aware of the contamination, and there was no way a reasonable owner could have known about the contamination. Despite this, if a seller suspects that their property suffers from a certain defect, they cannot deliberately avoid making further investigations to escape liability on the basis that they did not know of the defect. Such conduct can constitute "wilful blindness" and can result in liability for the seller for failing to disclose.

[2] *Cardwell et al v. Perthen et al,* 2006 BCSC 333 at para. 128.

Gibb v. Sprague, 2008 ABQB 298 (CanLII)

In *Sprague*, the plaintiff buyers entered into a purchase agreement with the defendant sellers after being satisfied that the house did not seem to have any material defects. However, after possession, they discovered an ant infestation in the roof, mould in the basement (which led to their son becoming ill), and a faulty electrical system in the basement.

With respect to the roof/ant infestation defect, the Court determined that it was a latent defect because it could not have been discovered through a reasonable inspection. It could have only been discovered by removing portions of the roof of the house. Despite this, the sellers did not have any indication of the ant infestation, nor should they have had any knowledge of the situation. Therefore, the claim for damages for this defect was dismissed.

With respect to the mould in the basement, the Court determined that it was also a latent defect because it could not have been discovered through a reasonable inspection. It would have required removal of baseboards and drywall to discover the defect. The sellers knew that the basement had flooded in the past and even though they tried to rectify this problem, they did not bring this to the attention of the buyers. In fact, even when confronted with the question, the sellers gave the impression that there had never been any water issues with the house. Furthermore, they had used air fresheners in the basement to cover up its musty smell. As a result, to protect themselves from potential health hazards, the buyers were forced to seal off the basement from the rest of the house until the mould in the basement was removed. Therefore, the mould was a known latent defect that rendered the property dangerous or unfit for habitation. As such, it should have been disclosed by the sellers.

With respect to the electrical system defect, the Court determined that it was a patent defect and therefore not something that the seller was required to disclose. The buyers brought a friend with extensive electrical experience to inspect the home prior to purchase. The friend noted that the basement's electrical panel directory was not in good order and that two sub panels had been added without adequate labelling. The Court determined that this put the buyers on notice as to defects in the electrical system. Despite this, the buyers failed to take any steps to ascertain the precise state of the electrical system, either through further investigation or inquiry with the sellers. These further steps could have revealed the defect.

Finally, courts in other provinces have recognized that certain characteristics outside of the boundaries of the property can be latent defects if they are known to the seller and render the premises dangerous in themselves. For example, in *Sevidal v. Chopra*,[3] the sellers of a property were liable for failing to disclose that radioactive soil had been found in the vicinity. Furthermore, in *McGrath v. MacLean et al.*,[4] the Court acknowledged that, if known, a property being vulnerable to landslides from the neighboring property could be a latent defect that must be disclosed by its seller.

Material Latent Defects in the Rules

The previous section focused on the common law requirements that sellers have to potential buyers of their properties. However, licensees often act on behalf of sellers and make a variety of representations to potential buyers, which can lead to liability.

In addition to the common law disclosure requirements upon sellers for latent defects of their properties, licensees must also be aware of section 59 of the Rules, which places a disclosure obligation specifically upon licensees in respect of certain defects with a property. Section 59 of the Rules requires licensees providing trading services to clients disposing of real estate, to disclose to all other parties to the trade, any material latent defect in the real estate that is known to the licensee. "Material latent defect" is defined as a defect that cannot be discerned through a reasonable inspection of the property, and includes:

(a) a defect that renders the real estate

  (i) dangerous or potentially dangerous to the occupants,

  (ii) unfit for habitation, or

  (iii) unfit for the purpose for which a party is acquiring it, if

    (A) the party has made this purpose known to the licensee, or

    (B) the licensee has otherwise become aware of this purpose;

(b) a defect that would involve great expense to remedy;

[3] 1987 CanLII 4262 (ON SC).

[4] 1979 CanLII 1691 (ON CA)

(c) a circumstance that affects the real estate in respect of which a local government or other local authority has given a notice to the client or the licensee, indicating that the circumstance must or should be remedied; and

(d) a lack of appropriate municipal building and other permits respecting the real estate.

It must be noted that the definition of "material latent defect" is broader or wider than the common law definition of "latent defect" (reflected in a(i) and (ii) of the above definition), meaning that licensees may be required to disclose more about a property than would a seller. For example, the presence of an illegal basement suite, in and of itself, would very likely not constitute a latent defect at common law, as it would be simple to determine its legality by making an inquiry with the local government. Therefore, this would not have to be disclosed by a seller. However, because an illegal basement suite falls into the subsection (d) of "material latent defect" in the Rules, it would have to be disclosed by the listing licensee.

Disclosures under section 59 must be made in writing and "promptly but in any case before any agreement for the acquisition or disposition of the real estate is entered into". The disclosure cannot be made in the contract of purchase and sale itself.

Finally, section 59 also stipulates that, if a client instructs a licensee to withhold a disclosure of a material latent defect, the licensee must refuse to continue to act on behalf of that client in respect of the trade in real estate. Section 59 will be discussed in the context of disclosures in Chapter 12: "Law of Agency".

ALERT

All underground storage tanks over 2,500 litres that supply oil burning equipment on properties under provincial jurisdiction are regulated under the *BC Fire Code*. The Code provides that an owner is required to follow good engineering practices when removing, abandoning in place, or temporarily taking out of service, their residential heating oil storage tank.

In addition to the Code, local governments may also have bylaws addressing unused or abandoned oil storage tanks. For example, the City of Vancouver Fire Bylaw 8191 requires that Property owners either remove underground storage tanks that have been out of service for at least two years, or apply for a permit to abandon the underground storage tank in place.

The presence of an underground oil tank may be considered a latent defect, and licensees have added duties when they suspect that an inactive oil tank may be present on the property. Licensees must make inquiries to confirm this fact, and once a licensee has knowledge of an underground oil tank, they must disclose this fact to any potential buyer and advise that its presence may be an environmental concern.

Defects Versus Stigmas

Defects must be contrasted with stigmas. A stigmatized or psychologically impacted property is subject to a circumstance which may affect the value of the property for reasons of taste, sentiment, design, or personal preference. The significance of the stigma can be affected by a person's beliefs, values and perceptions, ethnic background, religion, gender, age, and other individual characteristics. The essential distinction between a defect and a stigma is that, while a defect's impact on a property's value can be objectively determined (through appraisals, estimates to fix the defect, etc.), a stigma's effect on property value depends on an individual's subjective considerations – some may view the stigma as a liability (with varying opinions on how much it should impact the value), while others may not care or even consider it an asset.

Summach v. Allen, 2003 BCCA 176 (CanLII)

Have you heard the saying, "one person's trash is another person's treasure"? In *Allen*, the buyers sued the sellers for failing to disclose the fact that the property was one lot away from a beach that was used in the summer as a nude beach. The buyers claimed that this was a latent defect that the sellers were required to disclose. In dismissing the claim, the judge stated, "the presence of nude bodies next door may or may not be a defect, this requires a subjective test. To allow defects to be determined by individual preferences would open the floodgates of litigation and create an impossible standard of disclosure for vendors."

Typical examples of stigmas include:

- a sexual offender or serial killer living in the neighbourhood or occupying the property at one time;
- a death having occurred on the property, whether it be by natural causes, suicide, or murder;
- the property was robbed or vandalized on a number of occasions;
- the property is alleged to be haunted or subject to other paranormal activity; and
- a former resident is suspected of being a member of organized crime.

Sellers are generally not requir-ed to disclose stigmas, as the law has determined that it would be unreasonably onerous on a seller to predict and disclose every possible stigma that could impact each individual buyer. The burden is therefore on buyers to make inquiries about the stigmas that are important to them and their ownership of a property.

As a Licensee...

If you are acting for a seller and are asked by a prospective buyer about a particular stigma, you must either answer truthfully or decline to answer. In addition, you should discuss with your seller the possible hazards of not disclosing a possibly stigmatizing feature of the property. A buyer refusing to close a deal or initiating a lawsuit, regardless of the buyer's legal merits, can be costly for the seller. Therefore, it is always safer to disclose than to withhold.

Stigmas impact different people differently. When acting for buyers, keep in mind the following tips to minimize the surprise of your clients in discovering an unwanted stigma of a property they have either purchased or agreed to purchase:

1. The only way to know whether or not a buyer is sensitive to certain stigmas is to ask them. Consider developing a list of common stigmas that you can review with your client at the outset of the relationship.
2. Ask questions about various stigmas to the seller and the listing licensee.
3. Ask questions of the neighbours of the property.
4. Perform various internet searches using the property's address. There are even some websites that have attempted to create a database of properties in Canada with certain stigmas.
5. Add a clause or clauses into the contract of purchase and sale that contain representations and warranties from the seller about the absence of certain stigmas. This will ensure a contractual remedy is available for the buyer in the event the representation is false. For example, you may include a clause such as: "The seller warrants and represents that to the best of their knowledge, information, and belief that the property was a) not the scene of a murder or suicide, b) not previously occupied by a sex offender, member of a gang or organized crime, serial killer, or other criminal, c)… d)… e)…."

The analysis of stigmas versus defects is currently a contested issue in the real estate legal community. Therefore, licensees should recommend that their clients seek legal advice if such an issue is present.

Mistake

mistake
a legal term which describes the situation where a person, under some erroneous conviction of law or fact, does, or omits to do, some act which but for the erroneous conviction, they would not have done or omitted doing

Mistake means a mistake as to an actual term of the contract itself. For a mistake to have legal significance, it must be one of fact and go to the root of the contract. Where a mistake occurs, the contract may be void or voidable.

Although there is much dispute as to the different categories of mistake recognized in law, it is helpful to draw distinctions amongst the following:

- common mistake;
- mutual mistake; and
- unilateral mistake.

Common Mistake

For our purposes, a common mistake is one where both parties to a contract have made the same mistake about a fundamental term of the contract. For example: both a buyer and a seller make a contract believing that what is being sold exists, but in fact, it has been destroyed. This fact is unknown to both parties. The existence of a common mistake means the contract is void and neither party will have any legal obligations under it.

Example

Dawn Riser offers to sell her cabin in the woods to Hal Hunter for $63,000 and Hal accepts. Although neither realized it, a huge tree had fallen on the cabin and completely destroyed it before the contract was made. Riser and Hunter are contracting under a common mistake. They are both mistaken about the same thing, namely the existence of the cabin.

Mutual Mistake

A mutual mistake occurs when both parties make a fundamental mistake about the contract but each makes a different mistake. A good example is the *Raffles v. Wichelhaus* (1864), 2 H&C 906, case where the parties made a contract for the sale of cotton sold at Bombay, India, to be shipped to England aboard a vessel named "Peerless". By coincidence, that year there were two ships with this same name sailing from Bombay. The seller thought he had contracted to sell cotton on the ship leaving in December and the buyer thought he had contracted to buy cotton on the ship leaving in October. The buyer refused the December shipment. The seller sued for breach of contract. The buyer pleaded mistake as a defence. The court held that a reasonable person could not tell which ship was intended. The parties had never reached a consensus. Each party had a different intention and the lack of agreement made the contract void. It should be noted that in the case of a mutual mistake, if one interpretation is more reasonable than the other, the court will accept it and will interpret the contract in this way. This was not the case here.

Unilateral Mistake

A unilateral mistake occurs when one party is mistaken about a fundamental term of the contract and the other party is aware of this mistake but does nothing to correct it.

Example

Ken agrees to purchase a single lot offered for sale by Bob. Bob also owns an adjacent lot, which both Bob and Ken know is not included in the sale. By mistake, the transfer documentation includes both lots. Ken notices the error prior to signing the documents but says nothing. Bob does not notice the error. This was the situation in *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.*, 1981 CanLII 576 (BCSC). The BC Supreme Court held that the purchaser had "snapped at the mistake, and now tries to hold the legal advantage he has gained." The court ordered Ken to reconvey the adjacent lot back to Bob.

A specific type of unilateral mistake is also referred to as *"non est factum"* which means "it is not my deed". This occurs when a person executes one form of document thinking that the document is something else.

Example

A, the owner of Blackacre, is an old, illiterate woman. She trusts only her next door neighbour, B. One day she has B write up a will for her so that she might leave her property to her niece. B pretends to write the will and brings it to her for her signature. A places her "X" on the document. Later she discovers that B has had her sign a deed conveying Blackacre to B. If B brings an action to enforce the agreement, A can plead unilateral mistake as a defence. She would be successful, as the very nature of the document was misrepresented to her.

It should be stressed that not every mistake will result in a court setting aside a contract. Particularly in the case of written documents, the parties are presumed to have read over and accepted the terms of any document they sign.

Duress, Undue Influence and Unconscionable Transactions

Duress and *undue influence* both affect the genuine consent of one of the parties to a contract. Common law duress occurs where a person is forced to enter into a contract against their will as a result of a threat of actual physical force or by a threat of imprisonment of the person or their family or very close associates. Here the party to the contract has really been robbed of the free will to contract. As a result, the courts will find the contract voidable at the person's option. In equity, the restrictions on what amounts to duress are less, and the acts which would not entitle a person to have a contract set aside at common law will be sufficient to have a contract voided for duress in equity.

duress
a situation where a person is forced to enter into a contractual relationship against their will by the threat of imprisonment either to themselves or their family, or the threat of actual physical force

undue influence
any improper or wrongful constraint, manipulation, or persuasion whereby the will of a person is overpowered and they are induced to do or refrains from doing an act which they would not do or would do if left to act freely

While duress is a well-defined principle in law, undue influence does not yet have established boundaries. Like duress, it results in one party to the agreement losing their free will to contract. It occurs most frequently when one person is in a superior or dominant position in relation to another and uses this position to induce the other to enter a contract which they would not have otherwise made (*Morley v. Loughman*, [1893] 1 Ch 736). This superior position may be the result of a special relationship between the two parties, such as doctor-patient, lawyer-client, or priest-parishioner. If undue influence is found, the contract is voidable at the option of the innocent party.

Unconscionable transactions are another area in which equitable relief is available to rescind a contract at the instance of the weaker party. For a court to characterize a contract as unconscionable, the "material ingredients are proof of inequality in the position of the parties arising out of ignorance, need, or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger" (*Morrison v. Coast Finance Ltd.* (1965), 54 WWR 257 (BCCA)). When the issue of unconscionability arises, the party seeking to uphold the bargain must establish that the contract is fair and reasonable.

TERMINATION OF A CONTRACT

Once a contract has been made, it can be terminated or discharged in many ways. These are:

- performance;
- agreement to waive performance or substitute another agreement;
- nonfulfillment of a condition precedent;
- frustration; or
- breach of a condition of the contract which is accepted by the injured party.

Before discussing each of these items, note that some contracts for the purchase and sale of real estate in British Columbia can rescinded/cancelled under the *Real Estate Development Marketing Act* ("REMDA") or the *Property Law Act*. For contracts of purchase and sale of "development units", REDMA gives buyers two types of rescission rights: a seven day rescission right, and a rescission right for a failure by the developer to deliver a disclosure statement or an amendment to a disclosure statement. Under the *Property Law Act*, buyers of "residential real property" can rescind their contract of purchase and sale within the Home Buyer Rescission Period, which is three business days after entering into the contract. If they choose to exercise this rescission right, buyers must promptly pay the seller a fee of 0.25% of the purchase price. The rescission rights under REDMA were discussed in Chapter 2: "The *Real Estate Services Act*", and the rescission right under the *Property Law Act* will be discussed in Chapter 11: "Contracts for Real Estate Transactions".

Performance

This is the manner intended by the parties at the outset to be the proper way to terminate their contract. When the final act of performance occurs, the contract is at an end. If substantial performance is made, but one of the parties will not accept it, the party performing it will have met their obligations under the contract, and the party refusing such performance will be in breach of the contract.

Agreement

Often the parties will agree to waive full compliance with the terms of the contract. If both parties still have obligations left to perform, the mutual waiver of their obligations will be sufficient consideration to bind them. Otherwise, either new consideration will have to be given to support the variation, or the agreement to waive the balance of the contract will have to be made under seal. The same rules apply if the parties decide to substitute a new agreement for the first one.

Nonfulfillment of a Condition Precedent

A *condition precedent* is the formal term for what is usually called a "subject" clause in the real estate industry. A condition precedent is a condition in a contract which must be satisfied before the contract is to be performed. For example, a residential home may be sold under a contract of purchase and sale which contains a clause allowing for a mortgage to be arranged by the purchaser. If the other issue cannot be resolved, the contract will be terminated.

Example

Von Vendor has accepted an offer from Petra Purchaser to purchase his home. The contract of purchase and sale contains a subject to financing condition precedent which will lapse on March 31. Prior to March 31, Von Vendor would only be entitled to accept "back-up" offers. This means his acceptance would be conditional upon the agreement between himself and Petra falling through.

condition precedent
legal term for a "subject to" clause. In contract law, a condition precedent calls for the happening of some event or the performance of some act before the contract shall be binding upon the parties

In the above example, what if Petra found a way to pay for Von's house without arranging a mortgage? Given that the condition precedent is a term of the contract, could she say "Forget the mortgage. I'll buy it without one"? Where a condition is inserted in a contract solely for the benefit of one of the parties, that party can choose to proceed with the contract without performing the act required in the condition precedent. However, only the party who was intended to benefit from the term can waive it. Once the term has been waived, the balance of the contract must be performed.

Waiver of conditions precedent is covered by section 54 of the *Law and Equity Act*. That section permits a party to a contract to waive a condition precedent if:

- the condition precedent benefits only that party to the contract;
  AND
- the contract can be performed without the condition precedent being fulfilled;
  AND
- the waiver is made before any time stipulated for fulfillment of the condition precedent, or within a reasonable time if no time is stipulated.

Note that any waiver by a party to the contract is only possible if all of the above are satisfied. For example, if a condition precedent could be interpreted to benefit both parties, then both parties must consent to its waiver. When the contract of purchase and sale is being written up, the following clause should follow each condition precedent:

> *"This condition is strictly for the benefit of the purchaser and/or vendor"* as the case may be.

Conditions precedent are discussed further in Chapter 11.

Frustration

frustration
a legal doctrine that provides that where the existence of a specific thing is necessary for performance of the contract, the duty to perform is discharged if the thing, for reasons beyond anyone's control, is no longer in existence at the time for performance

After a contract has been made, but before it has been performed, it will be frustrated if events outside of the control of the parties destroy the subject matter or change it in such a way that it becomes fundamentally different from the original contract and the parties did not, by express or implied terms, make provision as to the consequences flowing from the happening of the event. For example, *frustration* would occur where a house was

destroyed by fire or lightning after a contract of purchase and sale was entered into. Unless the contract says otherwise, such events will relieve the parties of their future obligations under the contract. It is not possible for a party to frustrate a contract through their own acts. For example, a contractor cannot sell their own equipment as a way to avoid carrying out a construction contract. Such an act would be a breach of contract.

Example

After a contract of purchase and sale had been entered into but before completion, an unexpected zoning amendment completely defeated the purchaser's intended future use of the land. The purchaser claimed that the contract was frustrated and requested the return of his deposit. The vendor refused. This was the case of *Capital Quality Homes Ltd. v. Calwyn Construction Ltd.*, 1975 CanLII 726 (ONCA). The court applied the doctrine of frustration, reasoning that the purchaser should not have to perform in order to obtain land that was fundamentally different from what he had agreed to buy. The contract was ended and the vendor had to return the purchaser's deposit.

Frustration is similar to common mistake in that both deal with the destruction (or substantial alteration) of the subject matter of a contract. In common mistake, the subject matter of a contract is destroyed before the contract is made, and neither party knows about it. In frustration, the subject matter of a contract is destroyed after the contract has been made. It is essentially a difference in timing.

Termination by Breach

When a contractual promise is not performed, it is called *breach of contract*. The promissee has the right to recover any damage suffered because of that breach, but a breach does not necessarily mean that the contract is ended. The party not in breach usually must perform their contractual obligations despite the other party's breach. It is only where the breach is of a fundamental term that the injured party can claim both damages and the right to terminate. The injured party can also refuse to perform their own obligations or to accept any further performance by the other party.

breach of contract
failure, without legal excuse, to perform any promise which forms the whole or part of a contract

A breach can arise in three ways:

- by one party announcing that they will not perform although the time for performance has not yet arrived (anticipatory breach);
- by one of the parties making the performance of the contract impossible; or
- by failure of a party to perform at the time stipulated for performance.

Examples

On the first of the month, Bob Buyer agrees to purchase Blackacre from Val Vendor, the sale to be completed on the 30th of the month.

1. If Buyer announces to Vendor on the 15th of the month that he is not going to complete the deal on the 30th, Vendor has two choices. First, Vendor can accept Buyer's refusal and sue Buyer immediately for damages. Second, Val Vendor can refuse to accept the refusal, wait until the time for performance arrives, and then sue for specific performance or damages.
2. If, prior to the 30th of the month, Val Vendor sells Blackacre to another party so that she cannot perform her contract with Bob Buyer, Val Vendor is in breach of her contract. (Bob Buyer has the same two choices). However, because the property has already been sold to someone else, he will sue at once.
3. If Bob Buyer fails to complete the sale on the 30th of the month, and Val Vendor is ready, willing and able to convey, Buyer's failure to perform at the date of performance is a breach entitling Vendor to sue for specific performance or damages.

It was mentioned above that only a breach of a fundamental term of the contract will allow the innocent party to sue for damages and to terminate the contract. A promise in a contract which is fundamental is called a condition. A condition is a term which goes to the very heart or root of the contract. For example: the standard printed form of the Contract of Purchase and Sale contains the clause "time is of the essence". This phrase creates a condition. The contract must be completed by this date.

Gill v. Bal, 2017 BCSC 2015

In this case, the buyers entered into a Contract of Purchase and Sale to acquire a residential property. The contract included that "time was of the essence" and that the documents were required to be delivered and lodged for registration in the Land Title Office by 4:00 pm on the completion date. Part of the purchase price was paid through a mortgage arranged by the buyers, and the mortgagee had not yet confirmed the mortgage to the buyers' notary by 4:00 pm. By the time the buyers' notary was ready for registration at 5:36 pm, the sellers' notary refused their request to register the transfer.

The Court ruled that the buyers were in breach of a condition by failing to complete the transaction by 4:00 pm. This constituted repudiation. The contract was terminated and the sellers were awarded damages.

This case illustrates two things. First, that the use of "time is of the essence" will be strictly upheld by the courts, even if a breach of a term relating to time is minimal. Second, that licensees should understand the risks of using terms or clauses referring to a specific time of the day if performance relies on people or events outside of their clients' control.

A warranty is a promise which is not fundamental to the contract. For example, if A contracts to buy B's home and one term is that the master bedroom be painted before possession, a breach of this obligation is probably a breach of warranty.

Some promises are obvious conditions and some are obvious warranties. However, many are difficult to interpret and must be decided by the courts. In a typical real estate transaction, a refusal to complete is clearly a breach of condition. As a result, in the three examples above, the innocent party had the right to treat the contract as being at an end and to sue for damages.

The main reason for distinguishing between conditions and warranties is that different remedies are available for each type of breach. For example, where a breach of warranty occurs, the injured party can sue for damages. However, a breach of warranty does not relieve the injured party from the obligation to perform the contract. The contract continues in full force and effect subject to the claim for damages. However, where a breach of condition occurs, the injured party has three choices:

- they can choose to terminate the contract and sue for damages, and their obligations under the contract also end;
- they can choose to continue the contract and sue for damages, just as in the case of a breach of a warranty; or
- they can choose to continue the contract and sue for specific performance.

Bhasin v. Hrynew, 2014 SCC 71

In *Bhasin*, the Supreme Court of Canada recognized a general principle of good faith performance in contract law. This means that parties to a contract "generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily". Although this principle of good faith performance does not impose a duty to put the other party's interests above one's own, it does require parties to be honest with each other and not knowingly mislead each other in relation to the performance of their contractual obligations. Real estate professionals should be aware of this duty of honest performance as it applies to all contracts, including contracts for agency, real estate and mortgage transactions.

As a Licensee...

Section 48 of the Rules states that a licensee must not induce any party to an agreement for a trade in real estate to break the agreement for the purpose of entering into an agreement with another party. Therefore, if Smith has agreed to buy a house from Jones, it is wrong for a licensee to persuade Smith to break that contract so that Smith can buy another house which the licensee is trying to sell.

Assignment

A person can *assign* away benefits under a contract to a third party, and the third party can sue to enforce those benefits. Generally, a person cannot assign liabilities under a contract. For example, if a person owes money, they cannot assign that obligation to pay to another party.

Example

Apple and Brown make a contract under which Apple owes Brown $1,000. Brown happens to owe Carter $1,000. To repay Carter, Brown can assign to Carter his right to receive the $1,000 from Apple. Brown is called the assignor. Carter is called the assignee. Carter must consent to the assignment, but Apple's consent is not needed. Carter can now enforce the original agreement with Apple. Apple cannot assign the debt of $1,000 to anyone because it is a liability.

assign
to transfer over to another (e.g., "I assign all right, title and interest in Blackacre to my wife, Elaine")

In Chapter 3, the doctrine of privity of contract was discussed in relation to interests in land. The doctrine of privity of contract simply says that only the parties to a contract have a right to sue or be sued under it. There are some exceptions to the doctrine. One is the exception for contracts which create an interest in land. In Chapter 3 it was explained that these contracts "run with the land" so that a new owner of property can sue or be sued on a contract even though they were not a party to it. Another exception is assignment.

There are two types of assignment – statutory and equitable. A statutory assignment is one which complies with the legal requirements set out in sections 36(1) and (2) of the *Law and Equity Act*. A statutory assignment has three essentials:

- the assignment is in writing;
- the assignment is absolute (for the whole amount) and is unconditional; and
- notice of the assignment has been given in writing to the original promissor.

If any of the above essentials are missing, the assignment might still be an equitable assignment. An equitable assignment and a statutory assignment are enforced differently. In an equitable assignment, all three parties must be named as parties in a court action to recover the amount outstanding. In a statutory assignment only the original promissor and the assignee are named as parties to the action. The assignor is not a party to the action.

Example

On February 1, Ernie entered into a contract of purchase and sale to buy Marcia's house for $500,000. The closing date (the date Ernie will become the owner of the house) is April 1. On February 15, Ernie is told by his employer that he needs to permanently relocate to Saskatchewan. At this point, Ernie would prefer not to close on the sale with Marcia because he would prefer to use his money to buy a house in Saskatchewan. Luckily, one of Ernie's co-workers, Bert, was also initially interested in buying Marcia's house. On March 1, Ernie agrees to assign the contract of purchase and sale to Bert. The two enter into an assignment agreement, whereby Bert will pay Ernie an assignment fee of $35,000. Bert is happy about this arrangement because, on March 1, Marcia's house is worth $550,000; however, Bert will only pay $535,000 for it ($500,000 to Marcia on the closing date and $35,000 to Bert as the assignment fee). Ernie is happy because he no longer needs to complete the purchase with Marcia; he can use his money to buy a house in Saskatchewan, and he made a profit of $35,000 through the assignment. Once the assignment agreement is signed, Ernie and Bert notify Marcia of the assignment. Marcia refuses to complete the sale on April 1. Result? If this assignment complies with the three requirements of section 36 of the *Law and Equity Act* (mentioned above), Bert can sue Marcia for breach of contract for her refusal to complete. Bert may obtain a court order for specific performance, which orders Marcia to transfer her land to Bert in exchange for $500,000. Please note that this example does not involve real estate licensee and does not take into consideration section 8.2 of the *Real Estate Services Regulation* (see below for more information).

Assignments in residential and commercial real estate contracts (except those sales under the *Real Estate Development Marketing Act*) are limited by section 8.2 of the *Real Estate Services Regulation*. Essentially,

all offers prepared by real estate licensees must contain the following terms relating to assignments (the "Standard Assignment Terms"), unless instructed otherwise by the buyer:

1. this contract must not be assigned without the written consent of the seller; and
2. the seller is entitled to any profit resulting from an assignment of the contract by the buyer or any subsequent assignee.

If the offer does not contain the Standard Assignment Terms, the buyer's licensee must deliver a standard form notice to the seller's licensee (or seller, if the seller is unrepresented) notifying them of the exclusion of the Standard Assignment Terms and advising the seller to obtain independent professional advice. Assignments are also discussed in the next chapter.

Vicarious performance. It was stated above that no one can assign away liabilities under a contract. However, it is legal to have obligations performed by someone else. For example, a builder can require an employee or a sub-contractor to perform its obligations under a building construction agreement. This is called vicarious performance. Vicarious performance is not assignment. It does not result in the substitution of one of the original contracting parties for another. In the example of the construction agreement, the original building contractor is still liable to the other contracting party. The sub-contractor who performs vicariously cannot be sued by the other contracting party for non-performance. The other contracting party can only sue the contractor. If the contractor is found liable, the contractor could sue the sub-contractor if the sub-contractor has breached its own contract with the contractor.

Vicarious performance is not permitted in the case of personal contracts. If A has contracted with B in reliance on B's personal skill, competency, judgment, taste, or other personal qualification, the law presumes that the contract is one of a personal nature. Vicarious performance is considered "no performance" in the eyes of the law for a personal contract. A good example of a personal contract is one where a party makes a contract with an artist to paint a portrait. Obviously, the party does not expect someone else to perform the work.

REMEDIES

The main remedies awarded by the courts in contract law are damages, specific performance, injunction, and *quantum meruit*.

Damages

Damages is the only common law remedy available for breach of contract. The other three remedies are equitable remedies. Anyone who can prove that they have suffered loss as a result of a breach of contract is entitled to be awarded damages. However, an innocent party is not automatically entitled to an equitable remedy for breach of contract. Those remedies are only granted in the court's discretion. Therefore, delay in bringing the court action or the conduct of the party not in breach can result in the court refusing equitable relief.

Damage awards are intended to put the parties in the position they would have been in if the contract had been performed. The leading case on this subject is *Hadley v. Baxendale* (1854), 156 ER 145, which established that damages which flow naturally from the breach or which must have been foreseeable by the parties at the time they entered into the contract are properly recoverable. In both cases, the damages must be the probable result of the breach.

Example

Val Vendor and Bob Buyer have entered into a binding agreement for the sale of Val Vendor's house. Buyer informs Vendor that he does not intend to complete the transaction. What damages, if any, can Vendor claim?

If she succeeds in court, Vendor could recover:

- out-of-pocket expenses incurred in reselling the house; and
- if she can prove reasonable efforts to resell, Vendor can recover the difference in the price where the second sale was for a lower price.

Such damages are said to flow naturally from the breach of contract committed by Buyer and are intended to put Val Vendor in the position she would have been in had the contract been performed. However, an injured party does have a duty to mitigate damages, i.e., they must do what any reasonable person would do to keep losses at a minimum.

Damages are not always established by the courts. Sometimes the parties agree in the contract itself on what the damages will be. When the breach occurs, this agreed amount might be higher or lower than the actual damages suffered. The courts have held that such a clause – known as a liquidated damages clause – is enforceable if it amounts to a genuine pre-estimate of the foreseeable damages if a breach should occur. Otherwise it will be regarded as a penalty and will be unenforceable.

Specific Performance

Specific performance means that the court will order the terms of the contract to be carried out instead of awarding damages. Specific performance is an equitable remedy granted at the discretion of the court. It will not be exercised when damages are considered to be an adequate remedy. As a result, specific performance is only granted in a contract for the sale of property where the property is unique to the extent that its substitute would not be readily available. With regard to personal property, this might involve goods which are rare or of unique value, such as antiques. With regard to real property, the historical common law view was that every piece of real estate was generally considered to be unique and accordingly, an innocent buyer was generally entitled to specific performance. Recently however, with the progress of modern real estate development, this may no longer be the case. The Supreme Court of Canada has observed that because residential, business and industrial properties are now mass produced in much the same way as other consumer products, specific performance should not be granted as a matter of course. Therefore, unless there is evidence that the subject property is unique – in other words, that a reasonable substitute is not readily available – an innocent purchaser may now be limited to the common law remedy of damages in situations of a seller's breach of contract.

specific performance
the court, rather than granting damages in lieu of performance, orders that the terms of the contract be carried out by the party in default

Sihota v. Soo, 2010 BCSC 886

In *Sihota*, two parties, Law and Soo (the defendants), purchased a property together; however, for tax reasons, only Law's name appeared on title. Law entered into a contract of purchase and sale for the property with the plaintiff buyers and when Soo found out, he filed a certificate of pending litigation against the property, which resulted in the sale not completing. In turn, the buyers sued for specific performance. The Court granted specific performance because it was convinced that the property was unique to the buyers for the following reasons:

- the buyers had searched for two years before making an offer on the current property and they did not have any offers on other properties;
- the buyers needed a corner lot large enough to build a house that they had already planned;
- the neighbourhood was a close-knit community, close to many amenities;
- an elementary school was located behind the property and the buyers were expecting their first child; and
- the property was within walking distance to the home of one of the buyers' parents, both of whom were ill and could not drive.

Injunction

An *injunction* can do two things:

- it can stop a party from doing something (e.g., selling property to someone else when the vendor has contracted to sell it to the plaintiff); or
- it can require a party to do something. In this case it is called a mandatory injunction.

Disobedience of an injunction could result in liability for contempt of court. Like specific performance, an injunction is a supplementary, equitable remedy and will only be granted where damages will not provide an adequate remedy.

injunction
a court order which either restrains a party from doing something or requires a party to do something

Quantum Meruit

The principle of *quantum meruit* was introduced earlier in the chapter. When a person requests the services of another in circumstances in which it is reasonable to conclude that the services would be paid for, but no price has been fixed, the law implies a promise to pay a reasonable sum. This principle also applies to goods supplied on request where no contract price is fixed. In such cases the market value of the goods would be the starting point for deciding their reasonable worth.

Example

Robert wants to sell his house. However, he does not want to give any listing in writing. He also does not want to see the house advertised in the newspapers because he does not want the unnecessary visits of people who have no interest in purchasing his home. Robert agrees to pay a commission to Elaine, a licensee, if she produces a purchaser and a sale occurs. Elaine introduces the eventual purchaser to Robert. Robert refuses to pay any commission. The Manitoba Court of Appeal was faced with a similar situation in *Banfield et al v. Hoffer,* [1977] 4 WWR 465 (MBCA). They allowed compensation on a *quantum meruit* basis.

In British Columbia, a real estate licensee might be able to rely on *quantum meruit* if similar circumstances were to occur; however, the difficulty in these cases is always with proving that the vendor said they would pay!