LAW 410 WINTER 2022 CAN

4. Enforcement of Promises

Consideration: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." (***Currie***)

- Reciprocal promises (promise in both directions)
- Price by which you purchase the other person's promise
- In consideration of you doing X, I promise Y
- requirement for a contract to be enforceable

Forbearance to sue: agreeing/stating one won't sue

Elements of consideration:

1. Consideration is mainly about reciprocity/exchange: "something of value in the eyes of the law" must be given for a promise in order to make it enforceable as a contract.
2. "Consideration is either some detriment to the promisee (in that he may give value) or a benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view."

4.1 Exchange and Bargains (consideration necessary for a valid promise)

*The Governors of **Dalhousie** College at Halifax v the Estate of Arthur Boutilier Deceased* – one-way gift not contractually enforceable, consideration needed

R: Consideration must flow from the promisee (i.e., there must be privity of contract). Third party consideration is no consideration.
R: Reliance by the promisee can't turn a gratuitous promise into a binding one.

R: a one-way gift is not contractually enforceable – there needs to be reciprocity or exchange

F:
- In 1920, Boutilier signed a subscription card (like a pledge) promising money to Dalhousie College but then fell on hard times & couldn't pay. Died on October 29th, 1928.
- Subscription card text: "For the purpose of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and otherwise to keep pace with the growing need of its constituency and in consideration of the subscription of others, I promise to pay the Treasurer of Dalhousie College the sum of Five Thousand Dollars...."

Proc Hist:
- The Registrar of Probate thought that there was good consideration.
- Appeal to Judge of the County Court was dismissed (they agreed with the Registrar).
- Then, on appeal to the Supreme Court of Nova Scotia, they held that this was a nudum pactum – there was no consideration.

I: Is D's promise to pay a legally binding contract or not? I.e., is there consideration?

A:
Three potential sources of consideration:
(1) Dalhousie claims the subscription paper itself states that it was given in consideration of the subscription of others.
- Rebut: Judge says that the fact that others signed subscription papers for the same purpose can't count as consideration. This is because there is no privity of contract between the other people and Boutilier.
- **Privity of contract:** idea that contracts are only between the parties involved, and cannot confer rights or obligations on third parties. So even if A makes a contract with B to benefit C, C has no rights under it to sue (because they've only promised it to one another; they haven't promised it to C).

(2) Mutual Promises: Dalhousie argues that the statement in Boutilier's subscription about the purposes for which the money is a 'request' for Dalhousie to use the money that way. On this view consideration for B's promise to pay is D's promise to apply the money to the named purpose.
- Rebut: Judges says there is no express request and no agreement to do the action.
  - Express agreement to do the act would've been consideration but we can't imply that promise from a mere subscription paper.
  - It's also implausible that had he paid the money, D could've sued P if they hadn't used the $ in his recommended way.

(3) Dalhousie made increased expenditures on the strength of the subscriptions. Can this increased spending in reliance on the promise be consideration?
- Court concludes that it is **not consideration**: "To hold otherwise would be to hold that a naked, voluntary promise may be converted into a binding legal contract by the subsequent action of the promisee alone without the consent, express or implied, of the promisor." CB 165

H: There was no consideration given, and the promise to give money to Dalhousie is therefore unenforceable.

Exam tip: look first for who has made a promise and then check if the other party has given something back in return? This signifies consideration. We need an **exchange** between parties.

Brantford *General Hospital Foundation v Marquis Estate* – one-way gift not contractually enforceable, consideration needed

R: Intention cannot be treated as a binding contract in the absence of consideration.

R: a one-way gift is not contractually enforceable – there needs to be reciprocity or exchange

F: Marquis and donated a bunch to Brantford General Hospital & it named a Cardiac Unit after Jack Marquis.In

1998, Helmi Marquis made a pledge of $1,000,000 to the hospital in response to their fundraising campaign, and after several conversations with the hospital CEO, Woodcock (These conversations included discussions of retaining her late husband's name on the new wing, and adding hers —> ambiguity if she was bargaining for this or if it was a benefit but not in exchange of the money she was promising) She further left the hospital 1/5 of the residue of her estate, but died before she could pay the full million dollars she had pledged. ($800,000 was outstanding).

I: Is the pledge document signed on November 20th, 1998, a legal and binding contract? → was there consideration for her promise to give one million dollars to the hospital? Or was it a bare/gratuitous promise?

A: The hospital foundation argued that the consideration was the commitment to name the new unit after Mr & Mrs Marquis. The court does not agree with this argument.

1. Board approval was still needed for the naming of the unit, so it can't be a complete contract at the moment of signing the pledge.
2. Mrs. Marquis was so "humble and modest," it didn't appear that she sought the naming of the hospital wing. This wasn't her reason for making the pledge, or a condition of it.

The court relies on Dalhousie and says that as much as it seems to be Mrs. Marquis's intention to donate the money, it cannot treat it as a binding contract in the absence of consideration.

H: Promise w/o consideration so contract not enforceable.

Wood v Lucy – illusory consideration, business efficacy test to imply consideration

R: An implied promise may be necessary to give a transaction business efficacy.

F: Lady Lucy promises Wood that he shall have exclusive rights to place her product endorsements, subject to her approval. This exclusive right was to last a year and then to run year-to-year with the possibility of termination. In return, Lady Lucy is entitled to half of 'all profits and revenues' derived from the contracts Wood might make (but there's no promise to actually make endorsements). Lady Lucy placed an endorsement on some products without his knowledge & Wood is now suing her for breach of contract.

I: Is there a contract? Is there valid consideration from Wood to Lucy?

A:

- Lucy did promise Wood exclusive rights to license her designs, but Wood didn't promise anything current in return.
- Wood's promise to give a future promise is not sufficient for consideration → it is merely contingent. IF he makes a contract, she gets a cut.
- **Illusory consideration**: looks like there are promises on both sides, but on more careful observation it appears that one party has made no commitment whatsoever. Here, courts will find an **implicit undertaking**.

Implied Promise

- Court says the discussions b/w the parties was "instinct with an obligation" and therefore implies a promise to "use reasonable efforts to place the defendant's indorsements and market her designs."
- Wood's "promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence." (CB 170)
- We need a promise to achieve business efficacy.

H: The court finds that there is an implied promise to "use reasonable efforts to place the defendant's indorsements and market her designs. Valid consideration.

4.2 Past Consideration

Lampleigh *v Brathwait* – exception to rule that past consideration ≠ good

*criticized for not being overly helpful, kind of vague (McCamus restatement in third R)

R: Past consideration is not good consideration b/c it doesn't form part of the bargain
R: Exception: the past consideration principle does not apply if the initial benefit had been requested by the promisor I.e., Request for an act + performance of an act + promise for the act just completed = promise is binding even though it only comes after the act
R: Exception (modern, McCamus) → "where a service is provided in circumstances where there is a reasonable expectation of compensation, a binding obligation to provide compensation, enforceable in a claim for restitution, arises. A subsequent promise to provide such compensation is enforceable on the basis that it gives expression or precision to an existing and enforceable legal obligation."
F: 1. Brathwait killed Patrick Mahume 2. Brathwait, a felon, now wants a pardon from the king 3. Brathwait asks Lampleigh, a lawyer, to ride to Roiston and seek a pardon for Brathwait from the King 4. Lampleigh rides off to Roiston to try to secure the pardon 5. Upon Lampleigh's return, Brathwait agrees to pay Lampleigh 100 pounds but now refuses to pay. - (Pleads 'non assumpsit'; i.e., no promise/no consideration.)
I: Can a promise to pay after a request has been fulfilled be binding, or is it void b/c it's past consideration?
A: - If someone's already done something, a subsequent promise to remunerate is not a contract. - However, the court decides that the past consideration principle does not apply if the initial benefit had been requested by the promisor.
H: Binding contract found.

Pao On *v Lau Yiu Long* – test for when past consideration is valid

*this test is criticized b/c it can't account for situations where there is no request (i.e., no #1) but still unjust enrichment)

Is the outcome of the test best seen as creating a new promise or compensation for what was previously promised? The answer in Pao is that it's essentially both.

R: 3 Prong Test for Valid PAST Consideration: 1. The act must have been done at the promisor's request. (this follows Lampleigh) 2. The parties must have had an understanding that payment or some other benefit in exchange was expected. 3. Payment must have been legally enforceable if it had been promised in advance.
R: If the three pronged test is met, court will find an implied obligation to pay a reasonable amount for the work done (i.e., **quantum meruit** → as much as deserved)

4.3 Consideration Must be of Value in the Eyes of the Law: Peppercorn Principle

Peppercorn Principle: "In theory at least, in a bargain in which something of value is exchanged for something of even trivial value, such as a peppercorn, the exchange is enforceable." Courts generally do not inquire into the adequacy of consideration (i.e., there isn't a *certain value* that needs to be met)

Justifications for Peppercorn Principle:

1. **Autonomy of the parties** → courts just try to respect the idea that people can value different things and the courts don't get to decide what is/n't valuable
2. **Enables people to reliably use the legal device of conduct**
    - If we treat consideration somewhat formalistically, and don't inquire into the value of the consideration exchanged, then this frees people to use consideration more like a seal. It is a way to signal that they have an intention to be legally bound.

Exceptions to Peppercorn Rule

- Courts generally do not inquire into the value exchanged, but a serious discrepenancy between values will trigger a red flag.
- Red flag will trigger court to consider other types of doctrines that may undermine the validity of the contract (but won't immediately invalidate a contract)

4.4 Bona Fide Compromises of Disputed Claims

*B(DC) v **Arkin** (Zellers Case)* – exception to rule that giving up a claim is good consideration

R: General rule → giving up a claim is good consideration
R: Principles of the case: 1. CLAIMS KNOWN TO BE INVALID → promise <u>not binding</u> if the sole consideration is forbearance to enforce a claim that's invalid and known/believed by the party forbearing to be invalid 2. DOUBTFUL CLAIMS → any time a claim may or may not succeed (literally any exam problem) if a claim is doubtful in law, a promise to abandon it involves a possible detriment to the potential claimant & a benefit to the other party which means <u>it is good consideration</u>. 3. CLAIMS WRONGLY BELIEVED TO BE VALID → the r<u>ule that there is good consideration applies even if the claim is clearly invalid in law</u>, so long as it was a 'reasonable claim' which was in good faith believed by the party forbearing to have a fair chance of success. Two further considerations: a. Cannot deliberately hide facts that would allow the other party to defeat the claim. b. Party must show serious intention to pursue the claim.
F: - 14 year old son shoplifts & items recovered and returned to store. Despite this, Zellers threatens to sue the mom for $225.00 as compensation for damages Zellers says it sustained due to son's shoplifting. - Mom responds to letter by paying - The alleged consideration from Zellers supporting the mom's payment is forbearance to sue. Zellers will not sue her in exchange for the payment → Mom gives up $225.00, Zellers gives up right to sue. - Subsequently, mom realized she may not have been legally required to pay, leading to the action subject matter of this case. Mom seeks to recover the money - Zellers resists action on the basis that it provided consideration to the mom via forbearance.

I: Was the payment by DCB supported by consideration from Zellers? What has Zellers given up in exchange for $225 from mom? They argue they've given up the right to sue, but is this good consideration?

A:
Three exceptions to general principle:

1. **Claims known to be invalid**: a promise is not binding if the sole consideration for it is a forbearance to enforce (or a promise to forbear from enforcing) a claim which is invalid and which is either known by the party forbearing to be invalid or not believed by him to be invalid.
    - Here, party forbearing is Zellers.
2. **Doubtful claims**: where the claim is doubtful in law, a promise to abandon it involves a possibility of detriment to the potential claimant and of benefit to the other party. Such a promise is therefore good consideration for a counter promise given by the latter part (e.g., for one to a pay a sum of money to the party promising to abandon the claim)
    - Doubtful claims can be held as good consideration.
    - However, if it's known/believed to be invalid, then it won't count as good consideration (therefore falls under first category)
3. **Claims wrongly believed to be valid**: the same rule (i.e., that there is good consideration) applies even if the claim is clearly invalid in law, so long as it was a 'reasonable claim' which was in good faith believed by the party forbearing to have a fair chance of success.
    - Two further considerations for this rule:
        1. You cannot deliberately hide facts that would allow the other party to defeat the claim.
        2. Must show serious intention to pursue the claim.

- Court states Zellers' claim was invalid (not merely doubtful)
- "I cannot believe that Zellers seriously thought that this claim could succeed or that they seriously intended to pursue it to court if it was not paid"
- Even if we can't say they knew their claim was incalid, they have issues under the test for claims wrongly believed to be valid

H: Mom entitled to refund.

4.5 Pre-Existing Legal Duty

A problem arises when people promise to do what they are already legally required to do.

Three types of pre-existing legal duty: public duty, duty owed to a third party, and duty owed to the promisor

4.5.1 Public Duty

- **Public Duty**: anything you are obligated to do by operation of law. Since the person was already obligated, they don't really give anything up.
- **General rule**: Fulfillment of a pre-existing public duty by the promisee at the request of the promisor is generally **not** good consideration for the promisor's promise since the promissee is only doing what she is already otherwise to do
    - **Exception**: when promissee obligates herself to do more than what is legally required there can be good consideration.
- *Ward v Byham:* statutory duty case → promising to do more than what a public duty requires can be consideration.
    - mother was obligated to bear the costs of caring for her child. This happened at a time when if a child was born out of wedlock, the mother was the sole individual responsible for the child.

- Judicial approach 1: judge says there is consideration because the mother had an additional obligation: prove the child was well looked after and happy.
- Judicial approach 2: Denning is motivated to find consideration and argues that even if there was no obligation above and beyond the legal duty, there could still be consideration.

4.5.2 Duty Owed to a Third Party

- **General rule:** Fulfillment by the promisee of a pre-existing legal duty to a third party at the request of the promisor is good consideration for the promisor's promise (b/c the promisee gains a new direct obligation) (***Shadwell***)
- *Shadwell*: fulfillment by the promisee of a pre-existing legal duty to a third party at the request of the promisor is good consideration for the promisor's promise.
    - nephew was engaged which meant he had a legal obligation to marry the fiancée. Uncle promised to pay $150 per year upon the marriage
    - Court found that the promise was enforceable even though he already head a legal obligation to the fiancée. There is a suggestion that the uncle gains a benefit because he now has a *direct obligation*.

4.5.3 Duty Owed to the Promisor – Traditional Position

Two types of duty owed to the promisor:

1. Promise to vary an existing contract by **adding to the duties** owed by promisor to the promisee.
2. Promise to vary an existing contract by **subtracting from the duties** owed by the promisee to the promisor.

Promises to Pay or Provide More

In these cases, ask "who are we looking for consideration from?"

***Stilk** v Myrick* – promise to pay more not enforceable b/c it's a one-sided variation

R: all agreements involving one-sided variations of existing contract fails on the basis of the pre-existing duty rule → this result works where there is some sort of **exploitation of vulnerability** but can be overinclusive when the parties are of equal bargaining power.
R: Performance of or a promise to perform a pre-existing contractual obligation is not consideration for a new promise made by the other party (i.e., the promisor). A variation to a contract requires fresh consideration.
F: When two of the crew deserted at port, the captain promised the wages of the deserters to the remaining crew members.
I: Is the promise enforceable? I.e., is there consideration supporting the captain's promise to pay more? (i.e., did the sailors also agree to do more?)
A: - As the mariners had contractually committed to do "all that they could under all the emergencies of the voyage", they were not entitled to enforce the captain's promise to pay more. - Public policy argument raised: "agreements struck in circumstances where the crew might take advantage of the vulnerability of the captain ought not to be enforced" // when a party can take advantage of a vulnerability, agreements should not take force → note that this public policy argument doesn't seem to play on vulnerabilities and instead occurs in good faith (the sailors didn't claim that they wouldn't help the

ship or refused their duties).

H: Stilk cannot recover the extra amount promised (we don't undermine the entire agreement, just the part that doesn't fit).

Gilbert Steel Ltd v University Const Ltd

R: (pair with Stilk) A promise to pay/do more for a pre-existing obligation is not valid consideration (and hence unenforceable). A variation to a contract requires fresh consideration.

R: A variation of a contract does not necessarily render it a new contract.

R: Increased credit from a party paying more is not valid consideration.

F:

- Sept 4, 1968: Contract whereby Gilbert was to supply steel to defendant for three projects in total. P supplies steel to two of the projects at the agreed contract price.
- Oct 22, 1969: In response to increased price of steel, P approached D for a new contract with an increased price. A new contract on this date was entered into.
- March 1, 1970: Another price increase for steel is announced by mill owner and P seeks additional concessions from D.
- Parties engage in discussion and P argues that as a result of the discussion, there is a binding oral agreement to alter the price (judge finds this to be true… the problem, though, is whether this agreement is enforceable?)
- P subsequently billed D according to new price.
- D continued to accept deliveries of steel, which came with invoices listing the higher price, but did not pay that higher price.

I: There is an oral agreement to pay the increased prices. Is that agreement legally binding or does it fail for absence of consideration? I.e., is there consideration supporting D's promise to pay more? (note that the past consideration to deliver the steel doesn't count for the increased price).

A:
Plaintiff argues there is consideration in:

1. P's promise to give D a "good price" on steel in the future (note that this would still likely fail for vagueness).
    - Court argues that reference to 'a good price' was too vague. P never made a commitment to a price.
2. Mutual abandonment of the first contract and a new agreement being put in its place.
    - The only change was the price, and on the facts it does not look like the parties intended to rescind the contract (they refer to price variation, not a new contract)
    - You can only make mutual abandonment argument if that's what it looks like the parties were actually doing, but it doesn't look like they intended to rescind the contract in this case.
3. Increased access to credit which D receives as a result of the price hike
    - Increased credit is not a real, substantial benefit (as distinguished from previous cases).

Therefore, P does not succeed. The agreement was a variation on the contract and there was no fresh consideration for the variation (so the new price is not enforceable, only the old contract remains enforceable)

H: No valid consideration. D not liable.

Promises to Accept Less

On the traditional view, if one is to accept less in a way that is legally binding, accord & satisfaction are necessary

- **Accord and satisfaction**: purchase of a release from an obligation by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. (NOTE - this can never be in money (because less money can't be consideration for more money).
- **Accord**: agreement
- **Satisfaction**: exchange of some valuable consideration which is not the original money, but a new form of consideration

Foakes v Bear – Accord and Satisfaction (traditional rule)

R: "Less for more" (i.e., less for the same) agreements are not enforceable.

R: Accepting less is valid when there is accord and satisfaction (need fresh consideration that doesn't partially fulfill the original obligation)

R: Consideration, or satisfaction, has to come in a different form because less money cannot be exchanged for more money.

F:
- Beer secures judgment against Foakes in amount of 2090 pounds plus interest. Foakes is the judgment debtor of Beer.
- Beer agrees to take a lesser sum in full satisfaction of the whole (i.e., forgave interest on the judgment) & not take any further action.
- Foakes paid the down payment and made all the installments. Once paid, then Beer claim $300, the interest she was awarded under the judgment (the thing originally awarded that she later waived)
- She says agreement is unenforceable for want of consideration; now seeks interest even though Foakes fully performed his side of the agreement → legally correct because Beer is giving up the $300 but Foakes isn't giving anything up.

I: Can Beer claim interest or is she bound by prior agreement? I.e., is the agreement enforceable or not?

A:
- "Less for more" (i.e., less for the same) agreements are not enforceable (*Pinnel*)
  - Judges say it has been criticized but never overruled. Thus, it's the established law and must be applied.
- Foakes argued the agreement was an accord and the payments a satisfaction, but the court rejects this because the doctrine does not create an exception to the normal requirement of consideration, the satisfaction has to come in a different form because less money cannot be exchanged for more money.

H: Foakes loses & Beer succeeds. The original agreement in which she promises to accept less due to lack of consideration is not enforceable – she can obtain the interest.

Robichaud *c Caisse Populaire*

R: No ratio, but we see a hint that the law is shifting away from consideration/Foakes judgment.

F:
- Robichaud owed money to Caisse Populaire & Caise secures judgment for $3787 and registers it.
- Robichaud consolidates his debts with Avco.
- Caisse agrees to remove its judgment against Robichaud from the registry in return for a $1000 payment by Robichaud in full satisfaction.

- Caisse receives cheque but board refused to approve the compromise agreement. Cheque was not cashed and the judgment was not removed.
- Robichaud brings action against Caisse, Caisse claims agreement is unenforceable for want of consideration
- TJ holds agreement unenforceable, but NB CoA gets different result.

I: Is Caisse bound by its agreement with Robichaud?

A:
Decision based on promissory estoppel → not binding, just persuasive because it was decided on basis of promissory estoppel.

- Angers J would have favoured overruling Foakes. He drew on the practical benefits to the financial institution, and the full knowledge the institution had of the agreement in question (i.e., bank would rather have $1000 than nothing). Further bank knew what they were doing etc.
- **This hints at a shift in the law, a move away from consideration.**
- "A financial institution, of its own accord, and knowing all the consequences of its actions entered into an agreement in which it accepted to forego the ranking of its judgment for part payment of the debt owing to it. This agreement constituted full satisfaction. The consideration received by the Caisse was in the immediate payment which resulted in a saving of time, effort and expense. In my opinion, it is not up to the court to judge the merits of such an agreement but rather to satisfy itself that the agreement was entered into with full knowledge and agreement. It must therefore uphold the agreement"

H: Caisse bound by agreement based on promissory estoppel (i.e., discussion on consideration is not binding, just persuasive)

Foot *v Rawlings* – Accord and Satisfaction

R: Acceptance of a negotiable instrument may be in law a satisfaction of a debt of a greater amount. This stretches the meaning of "accord" from the Foakes holding.

Post-dated cheques are sufficiently different form of consideration from actual money to constitute satisfaction.

In FP, if parties are giving cheques, absolutely cite ***Foot***. But if it's not cheques, we could say "even a different thing is enough to distinguish this problem from ***Foot***."

F:

- Rawlings (Creditor) says he'd accept lower than negotiated interest rate on existing loan and lower monthly installments provided debtor gives a regular series of post-dated cheques and fulfilled the agreement faithfully.
- Foot (debtor) substantially complied with these new terms but the creditor changed his mind and sued for what is owed under the first agreement.
- Foot says Rawlings is bound by the agreement to accept a smaller sum. Rawlings says agreement is unenforceable for want of consideration.

I: Is there consideration for the creditor's agreement to accept less in full satisfaction of the debt? (Foot accepts less money for more)

A:

- post-dated cheques = consideration for the promise of release of the debt at a lower interest rate.
- Even though you can't pay a lesser amount in satisfaction of a debt of a greater amount, you can exchange something else for that debt.
- "A person may give in satisfaction a debt of $100 a horse of the value of five $, but not five $"
- "Acceptance of a negotiable instrument may be in law a satisfaction of a debt of a greater amount" → cheques treated like the horse because they are different than cash, so can be exchanged for the cash

amount.
H: Agreement is enforceable because giving post-dated cheques was consideration for the promise of release of the debt at a lower interest rate.

Judicature Act – Statute

- Legislative response to *Foakes*

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) When expressly accepted by a creditor in satisfaction, or
(b) When rendered pursuant to an agreement for that purpose though without any new consideration.

- Although this provision appears to overrule successfully the very decision in ***Foakes***, the statute is vulnerable to interpretive difficulties in fact situations that stray from that (i.e., The ***Foakes***) pattern.
- Problem 1: provision would have problems with agreements where creditor forgives a debt completely (only applies to cases where there has been part performance).
- Problem 2: part performance of part performance → not totally clear if the provision would treat an agreement to accept less as binding if it has been partially performed or whether the creditor could renege on the deal partway through the new payment scheme
    - So if you're part way through paying the newly agreed to amount, it's not clear whether you'd fit under the new statute.
    - Kind of like the flagpole problem → other party can revoke until you've fully paid/fully rendered the newly agreed to amount.
- If you bring this up on an exam note the following: If someone is not finished paying the full reduced amount, there may be scope for the other party to still renege on their agreement.

4.5.4 Duty Owed to the Promisor – Judicial Reform

Should we rethink the rule of consideration as a requirement for post-contractual variations?

- The original rule (i.e., we need consideration to form a legally enforceable contract) is still intact b/c these judicial reforms only apply to post-contractual variation.

NAV *Canada v Greater Fredricton Airport Authority Inc* - away from Stilk & toward Roffey

persuasive, not binding (b/c it wasn't decided at SCC)
In exam, make sure to figure out who is the promisor vs who is the promisee — people often mix this up in the exam. Here, the group definitely giving something is the airport (i.e., they promise to pay for the new DME) and is therefore the promisor. So now we ask if the other party, i.e., the promisee/NAV has consideration flowing

R: a variation to an existing contract (i.e., post-contractual variation), unsupported by fresh consideration may be enforceable provided that it was not procured under economic duress/policy concerns
F: - Fed gov entered into an agreement with Nav under which Greater Fred Airport was the assignee of the fed gov's duties and rights under the agreement. - Nav was responsible for air navigation services and equipment, on a monopoly basis, at Canadian airports, pursuant to the agreement (i.e., ASF). - Instrument Landing System (ILS) had to be moved, but NAV needed new DME.

- NAV suggested alternative which would include purchasing new distance measuring equipment. The cost of the DME was $223000 and under the ASF, NAV was responsible for this cost.
- However, NAV didn't want to be bound by ASF and insisted the airport pay for DME. Otherwise, NAV said, it would not relocate the ILS.
- Airport signed a letter 'under protest' agreeing to pay for the equipment. 'Under protest' = they don't think they are legally obliged to pay, and stating that they may take legal action.
- NAV relied on letter, acquired, and installed DME.
- Airport refuses to pay.

I: Was the Airport's promise (under protest) to pay for the DME legally binding? // "Whether the party seeking to enforce the post-contractual modification had agreed to do more than originally promised in return for the agreement to modify the contract"

A:

- Consideration must move from the promisee (NAV) to promisor (Authority)
- Under existing contract, NAV was required to provide navigational services at a level it determined appropriate
    - So that duty was pre-existing, and the airport's promise to pay more looks to be in return for nothing
- Pressure involved went beyond ordinary normal pressure and therefore constituted economic duress.
- NAV already had an obligation to pay for the DME, so it had promised nothing new in return for the airport's promise to pay for the new equipment.
- Court mentions *Gilbert Steel* as the authority on post-contractual modifications which says that gratuitous promises are unenforceable (classical approach), but court considers whether it should remain the standard & instead do something different.
- Court says there are 'legal fictions' to enable courts to avoid classical position, then they consider an English case that moves away from the traditional view (***Williams v Roffey Bros***)
- Court moves away from the traditional rule in *Stilk* & toward the rule in *Roffey* because:
    - Rule is under- and overinclusive
    - As a practical matter, variations of this sort are common, and we should protect the legitimate expectations that such variations are enforceable
    - The rule creates hardship for those who assume a promise is enforceable and detrimentally rely on it.
    - We shouldn't be searching for or trying to make up consideration.
    - The consideration doctrine arose for certain reasons, and we now have duress as a better way to deal with the same problems.

H: Promise by Airport was procured under economic duress and was therefore unenforceable.

Williams v ***Roffey*** *Bros*

This is not binding law in Canada, but it is an important case.
On exam: If you are trying to argue a post-contractual obligation is enforceable, you could use this case to argue that it is enforceable.

R: As long as the promise isn't made under duress & if one of the parties obtains some practical benefit, a post-contractual variation can be enforceable even if there was no consideration. **NOTE this ONLY APPLIES IF THERE IS A THIRD PARTY.

F: Carpenter was going to slowly and both parties agreed it was because the price was too low. Contractor worried about penalty so they offered a price increase to the carpenter in return for the carpenter completing the job

already agreed to (so no fresh consideration from the carpenter).
A: Court held that as long as the promise wasn't made under duress and if the contractor obtains a practical benefit, it can be enforceable - The benefit was avoiding the late penalty (which has to do with their relationship with a third party, not the carpenter).

Rosas v Toca – moves further away from *Stilk*

*persuasive, not binding (BC)

R: 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
R: Circumstances change and contractual modifications may be desirable and beneficial to both parties Consideration is a signal of intention to be bound. It doesn't need to be a central concern beyond that evidentiary role.
F: Rosa wins lottery and lends $600K to her friend Toca to buy a house with promise loan would be repaid in 1 year but Rosa grants numerous extension's at D's request. P sued on debt. **Proc Hist:** P lost at trial b/c BC law said P's action had to commence within 6 years of the debt being due. TJ said P's extensions did not move the initial due date and/or limitations period forward b/c they were gratuitous/of no contractual effect (no consideration)
I: Has the contract between the parties been varied in a binding way or does the limitation defense provide a full answer to P's claim?
A: - "In my view that is not the law, or at least not what the law should be for variations of existing contracts. The time has come to reform the doctrine of consideration as it applies in this context, and modify the pre-existing duty rule" - Court says that case law & ON Law Reform Commission have criticized the pre-existing duty rule. - The "central theoretical debate in this case [is]: on what theory should contracts be enforced and does that theory support more expansive enforcement?" - In cases where there have been reforms, two issues have been central: (1) seriousness of the parties' intentions (2) legitimate expectations of business parties - We could keep searching for consideration and we could probably find it: in the help provided by Toca to Rosas (driving her, helping in her shop). Or in the benefit to their ongoing friendship. But the court says: why go through this pretense? Upshot: - Circumstances change and contractual modifications may be desirable and beneficial to both parties - Consideration is a signal of intention to be bound. It doesn't need to be a central concern beyond that evidentiary role.
H: The modifications are enforceable, so the limitations period runs from the last extension in 2013. Since the claim was filed in 2014, it is within the limitations period. Rosas can collect on the debt.

Summary:

Promises to accept less are not binding	**Promises to pay more**	**Reform**

Foakes **–** *states the traditional position BUT this is overturned for cases that fit the AB statutory provision for debt reduction.* ***Foot*** *– benefit can be found in some as small as a cheque*	***Stilk, Gilbert*** *– promises to pay more cannot be binding in the absence of fresh consideration.*	***Rosas, NAV Canada*** *– chipping away at Stilk rule; willingness to see post-contractual variations unsupported by consideration as binding in the absence of duress or unconscionability*

What would you tell a client if they wanted to do a post-contractual variation?

- Get the promise under seal; OR,
- Provide clear consideration.

What would you tell a client if they asked for assistanve after a post-contractual variation?

1. Work through traditional common law perspective and show that it isn't (traditionally) enforceable.
2. Rely on BC and NB (i.e., ***NAV*** & ***Rosas***) cases to try to argue for our client that a similar relaxation in the doctrine of consideration is applicable here.
3. Under certain circumstances, you might be able to make a promissory estoppel argument, which we will turn to in a couple classes.

Remember that this is only wrt consideration for **post-contractual variations. The rule that consideration is required in the first place still stands**

4.6 Protection of Weaker Parties

Types of protection of weaker parties:

1. **Duress** (at CL) → pressure someone places on another
2. **Undue influence** (at equity) → relationships of dependence or trust
3. **Unconscionability** (at equity) → nature of the bargain; was there an unfair bargain struck, at least partly, because of the inequity of the parties?

*sometimes you can plead more than one of the above doctrines!

4.6.1 Law of Duress

- **Law of Duress**: The law will not enforce contracts that are made as a result of one party being threatened with physical harm or actually harmed, for example. The innocent party has been coerced.
  - However, duress is now a broader concept and includes **economic duress**
  - Economic duress often takes the form of one party placing financial pressure on the other.
    - **SO we ask if it went beyond ordinary commercial pressure**
      - Ordinary commercial pressure = acceptable
      - Going beyond ordinary commercial pressure =/= acceptable

NOTE - duress can apply anywhere, we just focused more on post-contractual variation *(however the persuasive precedents from Rosas & Toca only apply to post-contractual variations)*

Duress Test – (*Universe Tankships*) – don't apply in exam unless she states it's not in AB b/c Atilla is the binding test in AB.

1. Pressure amounting to compulsion of will of the victim; i.e., no practical alternative; AND,
2. The illegitimacy of the pressure exerted.
   - Illegitimacy can be harder to determine so we have to distinguish b/w legitimate commercial pressure and illegitimate coercion

- Illegitimacy is unclear, so in an exam you should make arguments about whether it is/n't legitimate
- If the conduct would amount to a crime or tort → illegitimate
- Threatened breaches of contract → harder to prove

Duress Test – *Attila* *think of elements 1&2 as a pair (1&3 are most important, 2&4 just kind of expand it)

1. Economic pressure can amount to duress, provided it may be characterized as illegitimate.
2. A threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented.
    a. Bargaining is fine, but where there is no good reason it's probably illegitimate
    b. Telling someone you may end up in breach (e.g., we don't have money) is different from actually breaching and different fro placing pressure on the other party
3. Whether the claimant had a "real choice" or "realistic alternative" and could, if it had wished, equally have resisted the pressure and, for example, pursued practical and effective legal redress. If there was no reasonable alternative, that may be very strong evidence in support of a conclusion that the victim of the duress was in fact influenced by the threat
4. The presence, or absence, of protest, may be of some relevance when considering whether the threat had coercive effect. But, even the total absence of protest does not mean that the payment was voluntary
    a. I.e., this arm of the test isn't determinative.

Indicia of Duress (*Attila*) – in exam, talk about them as factors that will influence whether we find Duress.

1. Whether the party protested at the time the agreement was entered into
2. Whether the party had a realistic alternative to entering into the agreement
3. Whether the party had the opportunity to speak with independent legal counsel
4. Whether, after entering into the agreement, the party took steps to avoid it within a reasonable period of time
5. If a party can show that points (1) to (4) are met, whether the pressure exerted was illegitimate.

4.6.2 Undue Influence

Undue Influence: equitable doctrine that arises when one person uses their power over another to induce them into a transaction. Exists when there is an ability to exercise exceptional power in relation to another person's choices. It is a power of persuasion that is objectionable usually because it arises out of a confidential or other special relationship between the parties.

Two types of undue influence:

1. **Actual undue influence**: P must demonstrate the actual use of the power in this situation
    - Analyze the actions of the parties in a particular transaction.
    - Harder to prove b/c you have to actually establish and demonstrate use of power.
2. **Presumptive undue influence**: P must prove that the parties have a relationship of such a nature that the court may presume that power was exercised in this case (***Duguid***).
    - Class 2A: Presumed influence in *specified* relationships: recognized relationships such as solicitor/client, doctor/patient. P has to do less to prove relationship in this category.
    - Class 2B: Presumed influence in a *particular* relationship: relationships not falling into a category, but the particular nature of the relationship gives rise to the presumption of power. P has to do more to prove relationship in this category, but once in the category we don't have to do much to prove that the power was used.

Bank of Montréal v ***Duguid*** – husband/wife = Class 2B

R: Two types of undue influence (see above)
F: Mr. Duguid & business partner apply for loan from BMO & BMO asks Mrs. D to cosign the loan & she does. BMO has policy of recommending independent legal advice to the cosigner but didn't do that in this case. The loan goes into default, Mr. D declares bankruptcy, and BMO sues Mrs. D for the outstanding amount. Mrs. D claims Mr. D exercised undue influence & BMO didn't offer her independent legal advice so Mrs. D doesn't want to pay outstanding loan.
I: Did Mrs. Duguid cosign the loan as a result of her husbands' undue influence? (and as a result, can BMO sue her?)
A: - Husband and wife is not a 2A category, so they have to fit under category 2B to make the claim. - To fit under 2B, she has to prove that she gave her husband all of the spending/financial power   - Court argues she was a real estate agent, had a background in financial experiences, etc. → she knew that Mr. D had been denied loans previously. Basically, she had enough independent knowledge for it to say that she wasn't unduly influenced by her husband. "She wasn't dominated by her husband's influence
H: No undue influence

4.6.3 Unconscionability

Unconscionability: permits courts to set aside agreements where, even in the context of bargaining by complete strangers, unfair agreements resulted from an **inequality of bargaining power**. Equitable doctrine that can also apply in situations where there is a pre-existing relationship.

NOTE - duress can apply anywhere, we just focused more on post-contractual variation *(however the persuasive precedents from Rosas & Toca only apply to post-contractual variations)*

Heller v ***Uber*** – test for unconscionability (2 part test)

R: Two factors for unconscionability (we are looking to find out if a bargain is unfair & if that can be used as evidence of unequal bargaining power)
1. **Inequality of bargaining power** exists when one party cannot adequately protect their interest in the contracting process (=procedural unfairness)
  - Inequality can = personal characteristics of the party & circumstances the party is in (e.g., differences in wealth, knowledge, experience, claimant's cognitive abilities, claimant's extreme need)
  -
2. An **improvident bargain** which duly advantages the stronger party or unduly disadvantages the more vulnerable party (=substantive unfairness)
  - Assess by looking at time of contract formation → read the terms *in light of the circumstances* (e.g, market price, commercial setting, parties' positions; no need for party to knowingly take advantage of the other)

F: Service agreement between Heller and Uber stated the law of the Netherlands would govern any disputes and such disputes had to be brought in the Netherlands (**forum selection clause**). The process would cost approx $14,500 USD, when an Uber Eats driver like P typically earns between $20-30k/year which essentially takes away any legal recourse (since arbitration is so expensive they wouldn't engage in it). **Proc Hist:** Uber tried to stay the proceedings by saying the action had to go to the Netherlands → initially got the stay, but the CoA held the agreement was unconscionable & struck forum selection clause. Appealed to SCC.

I: Is the agreement enforceable, or can Heller successfully argue unconscionability in order to avoid the application of the arbitration agreement?

A:
Two factors necessary for unconscionability (essentially a test asking whether the bargain is unfair & whether the unfair bargain may be evidence of one party being unable to bargain equally):

1. Inequality of bargaining power: "An inequality of bargaining power exists when one party cannot adequately protect their interest in the contracting process"
    - What counts as an inequality can be a matter of personal characteristics of the party, or the circumstances they are in (E.g., differences in wealth, knowledge, experience, claimant's cognitive abilities, claimant's extreme need, etc.)
    - Inequality of bargaining power is a type of procedural unfairness (because it's harder to get into fair agreement)
2. Improvident Bargain: "A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable"
    - Look to the time of **contract formation** (not a later time).
    - Read the terms of the bargain in light of circumstances, such as market price, commercial setting, parties' positions.
    - No need for the one party to *knowingly* take advantage of the other.
    - Bad bargain is more of a substantive unfairness (the first usually leads to the second where the bargain itself is bad.

- There is no strict test. When judges apply equitable concepts, they are trusted to mete out situationally and doctrinally appropriate justice.
- Court says **standard form contracts don't necessarily lead to unconscionability, but they may** (so it's not that clicking on a user agreement is always undermined by unconscionability, but they find in uber that it is **probable**)

H: Appeal dismissed – arbitration clause is unconscionable.

- First, there was inequality of bargaining power between Uber and Heller because there was no power to negotiate (given the boilerplate contract), no information about the costs of mediation was available so Heller couldn't have appreciated the implications of what he was signing.
- Second, the improvidence of the arbitration clause was also clear (requires close to his annual income in fees, not including costs of travel, legal representation, and lost wages). This modifies his other rights and essentially makes him incapable of enforcing those rights.

4.7 Promissory Estoppel and Waiver

Promissory Estoppel: Operates to enforce a promise when there is no consideration → when one party (the promisor) says that they will not enforce their legal rights, and the other party (the promisee) relies on that promise, they can use PE to hold the promisor to that promise, if it is equitable to do so. It is an **equitable doctrine** that fills the gap of pre-existing duty rule where a promise isn't enforceable for a lack of consideration.

Equitable doctrines: applied in a **discretionary fashion** (unlike ordinary legal claims which apply as a matter of right), can only be used as a **shield** (not sword), & require the person claiming to come with **clean hands**.

Estoppel: basic idea that a person is 'estopped' or prevented from doing or claiming a certain thing because of their own prior action

Doctrine of waiver leads to the doctrine of promissory estoppel. Waiver continues to exist side-by-side with promissory estoppel, but PE is a new doctrine that grew out of waiver/kind of an expansion of waiver.

Hughes *v Metropolitan Railway Company* – waiver

R: You cannot waive something and lead someone to believe the thing waived part of the contract won't be enforced and then insist the waived part of the contract should have/needs to happen.
R: A party's reliance on the other's waiver of enforcing a legal right can be protected by PE.
R: when the landlord did not responding to the tenant upon their request for the landlord to wait they entered into the course of negotiations & implicitly promised that the notice to repair would be suspended while negotiating.
F: - Under its lease, Metro had an obligation to repair the property within 6 months of the landlord's written notice. - Oct 22, 1874: landlord serves notice to repair - Nov 28, 1874: tenant offers to sell leasehold back to landlord and proposes to defer repairs pending the landlord's decision. Landlord never responds - Parties negotiate until end of Dec when communication breaks down. - April 19, 1875: 3 days before notice to repair would expire, tenant said it would now do repairs - April 28, 1875: Landlord serves tenant with writ of ejectment - June 1875: Tenant completes the repairs - Landlord wants the write enforced notwithstanding the repairs
I: when does time run against the tenant? (does it start when notice is first given, or a later point of time?)
A: Doctrine of waiver: - negotiations of the parties led the tenant to believe that the landlord was not going to enforce the time limit - Landlord waived his right to insist on strict performance of the agreement and could not now insist on doing so - You cannot waive something and then insist on the waived thing should have/needs to happen (e.g., can't waive a delivery date and then insist on goods being delivered on that date) - <u>What was waived here was the right to insist on the terms of the notice to repair</u>. In other words, the landlord can no longer insist that the repair has to be completed within 6 months of the notice being issued (<u>bc landlord led tenant to believe they wouldn't enforce</u>) - Instead, since negotiations broke down on Dec 31, the time to complete the repairs would run from that date instead. If we count the time from that date, the repairs were completed in time. - It's bc of the landlord's own actions that they find he has waived his rights. That is, **by entering into the course of negotiations, he implicitly promised that the notice to repair would be suspended while negotiating.**
H: Appeal dismissed. Landlord cannot evict Metro.

Central London Property Trust Ltd v ***High Trees*** *House Ltd* – initial picture of what PE is, what it does, and how it changes the law

R: If a promise intended to be binding, intended to be acted on, and is in fact acted on, it's binding so far as its terms properly apply (i.e., we have to honour these promises)
R: there must be pre-existing legal relationship between the parties

F:

- Landlord and tenant entered into a 99 year lease agreement in 1937 at 2,500 pounds/year Due to wartime conditions, occupancy rates were down & in 1940, landlord offered to reduce the rent to 1250 pounds.
- By 1945 the flats were fully occupied again & landlord had gone into receivership. The receiver discovered the rent reduction and demanded a return to the full agreed rent, as well as arrears (back-payment) of 7916 pounds
- Receiver is testing the legal position and only seeks arrears of the full rate for two periods: the quarter ending Sept 1945 and quarter ending Dec 1945 → not particularly important but if they get it they may try to get more

I: is the receiver/landlord prevented from seeking arrears?

A:

D's arguments:

1. Letter of Jan 3 1940 constituted an agreement that the rent should be only 1250 pounds
2. P is estopped from alleging that the rent is more than 1250 pounds
3. By failing to demand more than 1250 pounds, P waived their right to any extra rent

Traditional position:

- Entitles Ps to recover the full amount of rent for the full term → This is a variation without consideration
- Denning discusses estoppel by representation, but won't apply here b/c representation is about present facts
- Representations about the future are different: they are promises and need to be in the form of contracts

Denning's argument:

- Denning relies on earlier cases like *Hughes* to argue that the law has evolved beyond the traditional position.
- He says **we should now recognize the validity of promises of this sort.**
- "They are cases in which a promise was made which was intended to create legal relations, and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted upon. In such cases the courts have said that the promise must be honoured." → "I prefer to apply the principle that a promise intended to be binding, intended to be acted on, and in fact acted on, is binding so far as its terms properly apply"
    - Widens the scope of previous cases like Hughes, essentially creating doctrine of PE.
- Under this doctrine, the undertaking made by the landlord results in him being estopped from claiming for the full original contractual amount.

H: Lord Denning decides in favour of P company just for the final two quarters, during the time when the flats were rented, but no further back payment

4.7.1 Element 1: Legal Relationship

Legal relationship: if the parties already have a contract, they have a legal relationship (*High Trees*)

4.7.2 Element 2: The Nature of Representation

Representation: We need to establish that there was a promise which was intended to affect the legal relationship of the parties, and intended to be acted upon (*Burrows*)

*John **Burrows** Ltd v Subsurface Surveys Ltd* – friendly indulgences vs intention to change rights going forward

R: There needs to be representation that indicates an intention to change rights going forward. It does not have to be an explicit verbal statement, but it needs to be more than this kind of 'friendly indulgence'.

F: D purchased P's business, and a portion was secured by a promissory note for regular monthly payments. Contract included **acceleration clause** if there was a default of more than 10 days on any given monthly payment, then P has right to claim the entire balance. Over 18 months, D was always more than 10 days late but P never complained nor invoked acceleration clause. Parties had a falling out and when D was late with next payment, P invoked acceleration clause.

I: Does the defence of promissory estoppel apply? → turns on whether a representation (or actual promise) was made that indicated their desire to change obligations to one another?

A:

- This type of equitable defence **cannot be invoked unless there is some evidence that one of the parties entered into the course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced**
    - Burrows had just "granted friendly indulgences… while retaining his right to insist on the letter of the obligation
- So we are looking for a representation that indicates an intention to change rights going forward. It does not have to be an explicit verbal statement, but it need to be more than this kind of 'friendly indulgence'
    - It doesn't look like Burrows was committing to anything in the future → not doing anything for the past 18 months isn't saying "yes, I'm fine with this" → to be sure that promissory estoppel argument wouldn't be made, he **could've given notice** (i.e., if this happens again, I am going to invoke the acceleration clause).
- Commentary: If the courts did apply promissory estoppel, it would lead to a bad consequence that people would rely on the law in fear that if they are ever nice, courts will hold them to the thing that they did that was nice
- We can ask: Would a reasonable person in that situation have known, or should they have known, that behaving in a certain way would've changed their legal rights?

H: promissory estoppel cannot be used when Borrows tries to use his legal rights. P can sue for the entire amount.

4.7.3 Element 3: The Equities

Two relevant elements in considering what would be equitable in the circumstances

1. Conduct of representee (receives the promise, receives the benefit of the promise)
2. Conduct of the representor (Representor = party that has made the promise for the variation; what they are promising that would be good for the other party, changing their own rights)

NOTE – to make a claim in PE, the representee has to have **acted equitably**, they must come with clean hands.

D&C Builders *Ltd v Rees* – two elements of equities necessary for defence of PE

R: Two elements of *the equities* necessary for defence of PE:

1. The representee must have acted equitably to raise the defence of PE
2. It must be inequitable to allow the representor to resile

BUT promisor can terminate the effect of PE if they give **reasonable notice** to the promisee (b/c most PE = temporary)

F:

- D employed P to do work on a house. P did work and rendered account. Part of the amount was paid and no dispute about quality of work was made. Money still owing. P pressed for payment and then D started to complain about quality of work. D's wife offers 300 pounds instead of the full amount (480 pounds): "300 pounds is better than nothing." P decides to accept the 300 and see what they can get later (they were facing bankruptcy and needed the money immediately)

- In Nov., D gives P the cheque and demands a receipt saying "in completion of the account" → P had no choice otherwise they'd go bankrupt.
- Days later, P goes to lawyers who wrote to debtor saying whole amount was owed. D replies alleging bad workmanship and a binding settlement.

Proc Hist: Was there accord and satisfaction? (i.e., is there consideration supporting the creditor's promise to accept the lesser amount in full satisfaction of the whole?)

- Recall: A&S required accord (i.e., agreement) & satisfaction (i.e., something that is not monetary to satisfy the debt) (e.g., earlier payment, giving a peppercorn,etc)
- TJ said no, there was no A&S
- D appeals: says there is an accord in agreeing to accept 300 and satisfaction in the accepting of a cheque instead of cash (recall ***Foot***)
- BUT TJ said cheque was not consideration of the smaller amount, it was merely incidental arrangement (it wasn't given in consideration of the promise, just the most convenient way to enter into agreement).
- Bear in mind that this case (like many others) is critical of ***Foot***'s cheque argument

I: Is there consideration supporting the creditor's promise to accept the lesser amount in full satisfaction of the whole?
Is the creditor estopped from seeking the balance?

A:
Equity argument:

- CL arg: creditor is not bound by a promise to accept less. He can sue for the balance. This is the rule from Pinnel's case, accepted in ***Foakes***. BUT "equity has stretched out a merciful hand to help the debtor"
- Relying on ***High Trees***: "when a creditor and debtor enter on a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sume, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so"
- D is arguing that PE should prevent P from going back on their promise to accept less.
- But there was no true accord. D held the creditor to ransom. Her threat to break the contract (by paying nothing if they didn't take 300) was **undue pressure**.
- "There is also no equity in the D to warrant any departure from the due course of law. No person can insist on a settlement procured by intimidation"
- PE will not apply here because it is not inequitable for the P to go back on the promise, and bc the D, D, has not acted equitably. She did not come with clean hands.

The equities: two elements

1. The representee must have acted **equitably** to raise the defence of PE
2. It **must be inequitable to allow the representor to resile**

- If there is established a PE the effect is to hold the promisor to the promise or assurance if and as long as it is equitable to do so… Furthermore, the effect is suspensory in nature in most cases unless the equitable considerations make it necessary to give the promise permanent effect. In most cases, therefore, **the promisor can terminate the effect of the estoppel on giving reasonable notice to the promisee**.
- Suspends the right, but doesn't eliminate it.

H: Estoppel not granted. No reason why creditor should not enforce the full debt due to him.

4.7.4 Element 4: The Reliance

Guiding Q: was there reliance on the promise?

Reliance: Requires that the representee acts or relies on the representation (e.g., change their position or conduct in some way because of the promise). In PE, reliance must be detrimental (used to be debate, but *BC Trial Lawyers* have determined that the reliance must be detrimental)

Detriment: negative consequence for the promisee if the promisor is permitted to resile from being held to the promise or assurance.

BC Trial Lawyers – detrimental reliance necessary to assert PE; clarifies difference b/w detrimental reliance & waiver

R: detrimental reliance by the promisee must be shown to assert promissory estoppel. This is because, being an equitable doctrine, its goal is to address unconscionable, unjust, or unfair conduct
R: Waiver = CL doctrine; PE = equitable doctrine - Waiver requires conscious intention to give up rights but doesn't require detrimental reliance. - PE doesn't require a conscious intention but does require detrimental reliance (wider than waiver b/c you take on new rights instead of merely giving up a right)

*WJ Alan & Co v **El Nasr** Export & Import Co*

R: Now plays a limited role b/c of BC Trial Lawyers, but does assist in defining detriment.
F: - Parties in two separate contracts for purchase and sale of coffee. Contracts require purchase price in Kenyan shillings. Purchase price is to be paid pursuant to confirmed letter of credit. - Contract calls for Kenyan Shillings but letter of credit was opened in British Sterling. Sellers didn't object because two currencies were on par. - Sellers ship product due under first contract and some from the second. Sellers invoiced the bank in sterling and accept sterling. Sellers ship balance of second contract. - Seller prep invoice in Sterling but before bringing it to bank find out sterling is being devalued and it wasn't clear if Kenyan shillings would be too. Sellers accepted payment in sterling anyway. Seller learned Kenyan shilling would not be devalued (so Kenyan shilling is worth more). Sellers invoiced buyers for extra shillings to offset the devaluation. - Buyers (D) refuse to pay the extra.
I: Can the sellers insist on the terms of the contract? Or has there been an enforceable variation (i.e., was the currency of the contract varied when the letter of credit was opened in sterling?)? Are the sellers estopped from reverting back to their strict contractual rights? (i.e., from insisting on the full contract price in Kenyan shillings)
A: Megaw judgment: - contract varied, but argues offer was made and accepted. - the parties may agree to vary their contract in a way that can benefit either party. Such a variation again normally generates its own consideration… it would make no difference that the currency was later devalued in relation to the old, for at the time of the variation it could not be certain how the two currencies would move in relation to each other; hence either party might benefit from the variation. → **either could benefit from change in currency, so new consideration occurred.** Denning judgment: - Application of principle in *Hughes* & *High Trees* - Argues detriment not required (NOT the case now, detriment is required). Party who acts on the belief has conducted their affairs on the basis that they have that benefit & it would not be equitable now to deprive him of it Stephenson judgment:

- "In this case the buyer did, I think, contrary to the judge's view, act to their detriment on the sellers' waiver, if that is what it was, and the contract was varied for good consideration"
- So, he says he does not need to settle the question of whether detriment is required.

H: Estoppel operates to prevent the sellers from asserting their full legal rights and insisting on Kenyan shillings (they've made a representation that they'd accept sterling and can't go back). Denning says this is an instance of the principle we saw in ***Hughes*** and in ***High Trees***.

4.7.5 Element 5: Sword or Shield?

Combe *v Combe* – PE = shield (used as defence), PE ≠ sword (new cause of action)

R: PE does not create a <u>new</u> cause of action (can't be a sword), but it can be used as a defence (it's a shield)

F: There was an agreement, negotiated with the assistance of lawyers, that the husband would pay wife 100 pounds a year as permanent maintenance. Ex-wife's solicitor wrote to the husband for the first installment but the ex never paid anything under the agreement. The ex-wife pressed for payment privately but never instituted an action Ex-wife brings actions for arrears.
Proc Hist: in trial, wife relies on PE even though there was no consideration the promise was enforceable because it was an unequivocal acceptance liability, intended to be binding, intended to be acted on and, in fact, acted on. Received judgment due to a partially successful limitations defense. TJ held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct.

I: Is there consideration supporting the husband's promise to pay 100 pounds a year as permanent maintenance? Is the husband bound by his representation that he would be 100 pounds a year as permanent maintenance via PE?

A: PE is a shield not sword:
- PE does not create a new cause of action. Simply prevents parties from relying on their strict legal rights when to do so would be unjust in light of the parties' previous interactions.
- In short, this means that you can't commence a new cause of action using PE (this would be using a sword… but PE is a shield).
- But if someone else sues you, then you can use it as a defence.
- It doesn't work in Combe bc the wife is trying to use it as a new cause of action.
  - But it works in High Trees because the landlord is suing and the tenant is using PE to defeat that lawsuit
- Note that it's not necessarily about P v D. In some cases, P can use PE if still using it as a shield. BUT You can't start a cause of action with PE.
  - What matters is a law suit was started and now one party is trying to go back on their promise, but the other party says "no, you waived those legal rights"

H: Promissory estoppel cannot appy, as per Denning: "Much as I am inclined to favour the principle in High Trees… it is important that it should not be stretched too far, lest it should be endangered"

Robichaud *c Caisse Populaire* – exception to PE is a shield rule

R: PE can be used preemptively. PE can be used as a new cause of action ONLY IF it is inevitable that it will be used as a defense later → in this case it still must be **<u>fundamentally defensive</u>**. Even with this exception PE doesn't create new obligations, it is fundamentally defensive.

F:
- Robichaud owed money to Caisse. Caisse secured judgment against Robichaud for $3787 and registers it.

- Robichaud decides to consolidate his debts with Avco. Avco negotiates with Robichaud's creditors and commits to lend money to Robichaud to pay his judgment creditors. Subsequently, as part of an Avco debt consolidation plan Caisse agrees to remove its judgment against Robichaud from the registry in return for a $1000 payment by Robichaud in full satisfaction.
- Caisse received its cheque from Avco but the Board refused to approve compromise agreement. The cheque was not cashed and judgment not removed. So Robichaud brings action to have his agreement with Caisse enforced and Caisse's judgment against him removed from registry.
- Caisse resists action on basis that agreement is unenforceable → inter alia, PE is a shield, not sword

I: Can Robichaud rely on PE to enforce Caisse's promise?

A:

- Recall: practical benefits can be good consideration: the bank saves time, effort, and expense in not having to pursue the debtor (***Roffey***). Angers also indicated that perhaps consideration is less important than recognizing that Caisse was a sophisticated financial actor & willingly entered into the agreement with full knowledge.

Concurring judgment from Rice J (agrees in result but coming from perspective of PE):

- Even if we don't find consideration, have to go on to ask if Caisse is estopped from acting.
    - A representation was made in the course of negotiations.
    - Appellant relied on the promises of the Caisse and other creditors. Then, in order to resolve his financial difficulties, he undertook to hire lawyers and to mortgage his matrimonial home. In my opinion, in so doing, he suffered the detriment referred to in the doctrine of PE
    - However, PE can be used only as a shield and not a sword → Right of action cannot be founded on the principle of estoppel
    - BUT Rice says **"It seems irrational to make enforceability depend on the chance of whether the promisee is plaintiff or defendant"**
        - "While it is true that in that case (Combe) the party seeking to apply the principle was the P in the action, in my opinion its application is not dependent upon which party sues the other"
- Difference bw Robichaud & Combe
    - Court argues it is against the basic principles of equity that are the foundation of the doctrine to refuse to apply PE here just bc it is not being raised as a defense.
    - PE could be raised as a defense if Caisse were to sue Robichaud.
    - Court resists judicial theatre. Sure Robichaud could wait until the bank seizes his goods, and then he could object to that at which point the bank would sue him & then he could use it as a shield… so, it's a bit arbitrary to deny PE to Robichaud right now. If the defense is ultimately available to him, let's just allow him to use it.
        - SO this still requires the doctrine's use to be fundamentally defensive
    - Contrast to *Combe* where there is no situation in which the husband would sue the wife in order to give her money → remember, **PE should not be used to create new obligations**.

H: Appeal allowed. Caisse must cancel its judgment against Robichaud.

PE Summary

High Trees: cases in which a promise was made which was intended to create legal relations, and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured.

Elements of PE per ***BC Trial Lawyers***:
Equitable defense which requires that…

1. Parties be in a legal relationship at the time of the promise or assurance.

2. The promise or assurance be intended to affect that relationship and to be acted on
3. The other party in fact relied on the promise or assurance. It is implicit that such reliance be to the promisee's detriment.

Element 1: Legal relationship
- There must be a legal relationship between the parties (sometimes called a pre-existing relationship) (see ***BC Trial Lawyers***)
- Lord Denning didn't state this element in High Trees, but it might be thought to be implicit there, because it was true in that case and in those he relied on.

Element 2: Representation
- Clear promise, assurance, or representation of intention by the representor
- This element is the core of the doctrine
- Requires words or conduct by the promisor clearly constituting a promise or an assurance to the promisee that the use of the promisor's rights or some other legal stipulation will be altered in some way
- We need to establish that there was a promise made which was intended to affect the legal relationship of the parties, and intended to be acted on.

Element 3: Detrimental Reliance
- Representee acts on/relies on the promise, assurance or representation of intention by the representor
- So the person needs to actually act or rely on the promise
- Reliance must be detrimental (*BC Trial Lawyers*)

Element 4: The Equities
- PE is an equitable doctrine such that:
    - a) representee must have acted equitably in order to raise the defense of PE; and, (come with clean hands)
    - b)it must be inequitable to allow the representor to resile
        - If there is established a PE the effect is to hold the promisor to the promise or assurance if and as long as it is equitable to do so. Even if the usual basic prerequisites of PE are established, the circumstances may make it unfair to find or give effect to the PE. Further, the effect is suspensory in nature in most cases unless the equitable considerations make it necessary to give the promise permanent effect. In most cases, therefore the promisor can terminate the effect of the estoppel on giving reasonable notice to the promisee.

Element 5: Shield not Sword
- The greatest constraint on the effect of a promissory estoppel comes from the idea that promissory estoppel cannot be used to found a cause of action. This is well established on the authorities, especially in CA.
- Note that a minority of cases contemplate using it as a sword (so long as it would eventually be available for another party to use as a shield and not a sword) (***Robichaud***)

Steps to solve contractual variation problem:

FIRST → check for common law issues
SECOND → check for statute issues
THIRD → check for equity issues
FOURTH → make a final conclusion

4.8 Intention to Create Legal Relations

Intention to create legal relations falls under the umbrella of **autonomy of parties**.

Presumption: In commercial contexts, where there is offer, acceptance, & consideration, there is a presumption that the parties intended to create legal relations. It falls to the *person disputing the intention* to dislodge the intention.

Presumption: In the domestic sphere (e.g., family & friends), there is a presumption that the parties did not intend to create legal relations. It falls to the *person alleging a contract* to prove that such an intent exists.

4.8.1 Family Arrangements

***Balfour** v Balfour* – legal intention must be proven for finding of a contract in the domestic sphere

R: while the courts had previously refused to enforce agreements where the parties had *deliberately excluded* legal sanctions, this was the first time they had denied liability simply bc the p couldn't prove that legal sanctions were intended.
R: presumption is that in the domestic sphere, legal relations are not intended. That presumption can be displaced, but it is the baseline. Note, however, that this was invented in Balfour & has potentially problematic effects/might be a weak precedent that could be argued against going forward.
F: - Mrs. B sues on Mr. B's promise to pay a monthly allowance of 30 pounds. - Mr. B resists action on basis that there was no contract bw them → bc there was no intention to be legally bound. Mr & Mrs B married in 1900, lived in Ceylon until 1915. Husband went on leave and they returned to England. When Mr. B's leave was up, Mrs. B decided to stay behind, on doctor's advice bc she had arthritis. - Prior to setting sail in Aug 1916, Mr B orally promised to pay her 30p/mth (couple was in amity at this point). A few months later Mr B says they should remain apart. Parties Divorce with Mrs. B securing an order for alimony. For about 14, Mrs. B was wo financial support (pre-Alimony) **Proc Hist:** TJ said there was a binding contract bw them. Wife's consent was sufficient consideration → it may sound insufficient. If consent to the arrangement is enough, we'd never have consideration problems. The "consent" is not just consent to receive the agreed amount, but it is also an implicit promise not to pledge her husband's credit for necessaries, which was a CL remedy at the time. She would've been entitled to do that and was agreeing to give up that right.
I: Can Mrs. B enforce Mr. B's promise?
A: - Balfour creates a new rule: while the courts had previously refused to enforce agreements where the parties had deliberately excluded legal sanctions, this was the first time they had denied liability simply bc

the p couldn't prove that legal sanctions were intended. Balfour introduced a new obstacle for P's which had not been there before

- (1) Court draws an analogy bw the agreement in this case and an agreement to take a walk.
- (2) Court argues that treating agreements of this sort as contractual would lead to disastrous outcomes/would set a bad precedent → it would imply that not only could the wife sue husband for support, but also "he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. → *but isn't budgeting within a family very different from supporting a spouse when away?*
- (3) Court argues that holding these agreements to be enforceable would result in so much litigation that the courts would be overwhelmed → *is this even realistic?*
- (4) The judge argues that there was no real intention to be bound here.
- (5) CL doesn't regulate the form of agreement bw spouses. Their promises are not sealed w seals & sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied, or renewed as performance proceeds or as disagreements develop, and the principles of the CL as to exnoeration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's write does not seek to run.
    - This is actually a bit of a legal fiction. Today, law often steps into the home (e.g., law recognizes rape bw spouses)
- In final, we can expect a few short answer questions that will delve into areas where we can argue about what the law should be/reforming the law. This is an example of an area that we may get a short-answer q (likewise, Rosas and Toca would be another good example of a short answer q)
- OR we may see a fact pattern where the ppl are family members and whether the presumption can be rebutted/dismissed → we presume they don't intend legal relations, but we can look at a number of things (e.g., did they write down agreement? What is the subject matter (a walk = Balfour, a commercial arrangement = probably a legal arrangement)?

H: Mrs. B cannot enforce the agreement.

4.8.2 Commercial Arrangements

In commercial contexts, where there is offer, acceptance, & consideration, there is a presumption that the parties intended to create legal relations

4.9 Formality: Promises under Seal

- Another way to give power to a contract without consideration
- Promises made under seal are **enforceable**. In the past this was done w real wax and a ring, but today it's just a sticker.
- Seal plays an **evidentiary role** → evidence that the parties intended to legally bind themselves.
- "**What constitutes a valid seal is a question of law, and it is a question of fact whether a document is effectively sealed**"

Royal Bank v ***Kiska*** – valid seal = gummed wafer or representation of seal made by signatory w/ intention to execute contract

R: Gummed wafer constitutes a seal when affixed or acknowledged by the party executing the doc on which it's placed. A representation of a seal made by a signatory is also sufficient so long as there is an intention to execute the contract.
R: The word "seal", printed on the doc, is not enough to constitute a seal. It is rather an instruction to affix a seal. That means the required formality has not been observed, and the doc is not under seal.
F: Kiska guaranteed his brother's loan on a debt. At the time of signing the guarantee, no wafer seal attached. Word "seal" was written on the doc next to the signature. Bank is now calling on the guarantee.
I: Is the guarantee under seal such that it is enforceable even absent consideration?
A: [DISSENT'S A – legally relevant for seal] - A gummed wafer is enough when affixed by or acknowledged by the party executing the **doc** on which it is placed. I would hold also that any representation of a seal made by a signatory will do → but here we have less than even that (we are looking for the intention of the party that is committing themselves, we need proof that it's their intention to execute the doc as under seal… maybe drawing on a seal could be sufficient, but it would be a harder method to recognize bc the wafer is a recognized formality) - "Formality serves a purpose here and some semblance of it should be preserved."   - Key: adopted by the promisor with the intention to execute the contract (it's possible something other than the seal will do the trick, it just wasn't in Kiska's case)
H: [DISSENT'S CONCLUSION – legally relevant conclusion for seal] Document not under seal. The word "seal", printed on the doc, is not enough to constitute a seal. It is rather an instruction to affix a seal. That means the required formality has not been observed, and the doc is not under seal. If there is also no consideration, then Kiska does not have to pay. Other judges held there was consideration, so Kiska actually lost, but we read this for the dissent bc it appears to be the legally correct account of seals.

4.10 Formality: The Requirement of Writing (Statute of Frauds)

Writing is a necessary condition of enforceability in <u>some</u> cases.

Statute of Frauds: Passed in 1677 by the English Parliament. S4 & S17 say that certain kinds of contracts have to be in writing to be enforceable.

Historical Rationale for Statute of Frauds: Aims to prevent people from perpetrating fraud by alleging promises that were not made (if you could just go around saying that an oral promise was made to you, it may open the door up to fraud). In part it was necessary because rules of evidence were less well developed.

Current Rationale for Statute of Frauds: Even though the evidentiary rationale that previously existed is less relevant now, the statute remains in force. Why might we want some agreements in writing? → It could signal to the parties that it is legally enforceable and therefore should be taken seriously. For contracts for land, we might want written records in part to facilitate registration systems.

Statute of Frauds in Alberta: "The province inherited the English statute and has not re-enacted it. The writing requirement in s. 4 for contracts of guarantee has been supplemented by the *Guarantees*

Acknowledgement Act, R.S.A. 2000, c. G-11, which requires additional formalities for guarantees given by individuals." (CB 259)

4.10.1 Categories of Contracts Under the ***Statute of Frauds***

Statute of Frauds s17: Writing requirement for contracts for the sale of any goods of the value of 10 pounds or more.

Exception: ***Sale of Goods Act,*** R.S.A 2000,c. S-2, s. 6

Enforcement of contract over $50

6(1) A contract for the sale of any goods of the value of $50 or more is not enforceable by action

(a) unless the buyer accepts part of the goods so sold and actually receives that part, or gives something in earnest to bind the contract or in part payment, or

(b) unless some note or memorandum in writing of the contract is made and signed by the party to be charged or the party's agent in that behalf.

- **In any case where you aren't yet receiving the goods, you need a note or memorandum in writing in order for it to be enforceable.**
- You need to either receive some part of the goods in the moment or receive a written copy of the contract.

Statute of Frauds s4 Categories:

ss	Category	Commentary
i	Contracts to Charge an Executor or Administrator on a Special Promise to Answer Damages Out of His or Her Own Estate.	- This is a specific set of circumstances that would require writing. - E.g., If you are an executor/administrator of a will, and you promise to pay damages (on behalf the deceased) from your own estate then that has to be in writing.
ii	Contracts Made upon Consideration of Marriage	Concerns the promise to transfer property/some other thing in exchange for marriage
iii	Contracts to Answer for the Debt, Default or Miscarriage of Another Person	- Supplemented by Guarantees Acknowledgement Act, "which requires additional formalities for guarantees given by individuals." CB 261 - E.g., if an individual is guaranteeing someone's loan then that needs to be in writing. There needs to be special cautionary device because the guarantor isn't benefiting from anything, so the guarantee in writing offers security.
iv	Contracts not to be Performed Within a Year *(case law has really narrowed the scope of this provision)*	- **Anything that HAS to be performed outside of a year falls under the statute.** - Rule in *Adams v. Union Cinema*: contract must only be in writing if its performance of *necessity* must last longer than 1 year. So, if it is of indefinite duration but could be performed within a year, it doesn't fall within the statute, even if it will likely last longer than a year. (See McCamus p171) - Rule in *Hanau v. Ehrlich*: If there is no mention of time and time is uncertain or indefinite, the agreement is not within the statute. - Further, "an agreement that stipulates a specified period of performance of more than one year is caught by the provision even though the contract also stipulates that the contract may be terminated within that period of time." (McCamus 171)

		- If the performance period is more than one year, it falls under the provision. - If it could be terminated shorter than a year, it's still captured bc that's not the same thing as being performed.
v	Contracts for the sale or an interest in land	Required in writing. Most important category & most likely to arise.

4.10.2 What counts as writing?

- It **must adduce the existence of the contract and not fail for uncertainty** (See McKenzie: need the **3 essential P's: parties, property, and price**). But, per Tweddell, other essential terms might exist, as here, that payment of the purchase price was to be in stages.
- The document need not be intended as a memo of the contract.
- It is sufficient if the memo comes into existence anytime before the action is commenced.
- It can be constituted by several pieces of paper.
- It must be **signed** by the party against whom the contract is being alleged.
- Mere **initialing** is okay, or **printing** the name of the party on the form **is okay**.

4.10.3 Electronic Contracts

Electronic Transactions Act, SA 2001, c E 5.5

- "It has been held that a **memorandum in an email** (or, subject to the rules relating to joinder of the documents, a series of emails) **can satisfy this writing requirement**." (CB 267)
- Main aim of the requirement is **accessibility**, so electronic record is acceptable as long as it is **enduring and accessible**. (CB 268)
- **Signatures can be in electronic form**.

4.10.4 Effects of non-compliance

- (i.e., the contract isn't in writing though it should've been)
- *Statute of Frauds* s4: "no action shall be brought" → his has been interpreted to mean not that parties have failed to create a valid contract, but rather that it is unenforceable (i.e., you can't sue but there's still a contract there)
  - Consequence: enables the **equitable doctrine of part performance** to apply.
  - **Part performance** allows one to prove that the contract exists/evidence that the obligations existed.
    - Equity steps into to make contract enforceable where it would be unjust to refuse enforcement.
    - Plaintiff has only a **procedural problem** re: enforcement of the contract but the contract itself does exist.
    - Contract can be used by way of **defence** as in Wauchope and can also be used as **consideration for a new contract**.
  - Key: contract exists, but it's in a limbo where we can't yet enforce it. Instead, we use ***part performance*** to enforce it.

4.10.5 Part Performance

- Problems arise when parties promise that land will be transferred and work is done in reliance on that promise.
- **Courts of equity developed a doctrine that exempts people from the requirements in the Statute of Frauds "in circumstances where it would be unjust to refuse enforcement of the agreement.**" (McCamus 178)
    - Contract exists but *equity steps in to make it enforceable where it would be unjust if it was unenforceable.*
- **This is the doctrine of part performance: where one party partially performs their undertaking, the agreement may still be enforced to avoid injustice, even if it is oral.** (McCamus 178)
- Exam: did the parties try to transfer land? Yes. Did they do it orally? Yes. But that's not allowed under the statute of frauds so it's unenforceable. So, does the equitable exception of part performance apply?

Maddison posits two views of part performance

1. Narrower view: The acts relied on must be referable to the **actual** contract.
    - Part performance must be 'referable to the oral agreement that is relied on' (*Chapman*)
    - This narrow view appears to have been followed in *Deglman* (S.C.C. 1954) by Rand J. while the broader view appears to have been followed by Cartwright J.
2. Broader view: the acts relied on 'must be unequivocally, and in their own nature, referable to **some such agreement** as that alleged.'
    - P "acts need not be referable to *no other title* than the one alleged. They need only 'prove the existence of some contract, and are consistent with the contract alleged.'"
    - This broader view appears to be the one followed in *Thompson*. SCC in Thompson says that its decision in Brownscombe stands for the proposition that the performance has to be plainly referable to an agreement as to the very land.

In an exam, you should just try to compare Degalman and Thompson rules and facts to come to a conclusion.

***Deglman** v Guaranty Trust Co* – unsuccessful claim in part performance (narrower view)

R: strict test for part performance according to which the acts undertaken must be unequivocally 'referable' to the agreement in question (***Maddison***)
R: ambiguity about whether to use Cartwright or Rand test, but the court does seem to think that the less strict, Cartwright, test applies (apply both tests in exam) - Cartwright (less strict) test: sufficient if the acts were "unequivocally referable in their own nature to **some** dealing with the land" - Rand (more strict) test: "we must draw the line where those acts are referable and referable only to the contract alleged"
R: quantum meruit available where a party can recover some compensation for services rendered → the respondent is entitled to recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent → You are entitled to as much as you deserve (*Braithwait*)
F: Aunt promised nephew she would leave him her house (No. 548 Besserer) if he would run errands and do various acts she might request from time to time. This agreement was never recorded in writing—just an oral promise. Acts of alleged part performance included: driving aunt around; doing odd jobs around the house.

I: The contract is not in writing. So: is it unenforceable? Or are these sufficient acts of part performance?

A:

Maddison v Alderson (leading authority on part performance)

- According to Maddison v. Alderson, there is a strict test for part performance according to which the acts undertaken must be unequivocally 'referable' to the agreement in question. But there is disagreement about what this means… → this case and the next one will help us figure it out

Rand J:

- "Here, as there, the acts of performance by themselves are wholly neutral and have no more relation to a contract connected with premises No. 548 than with those of No. 550 or than to mere expectation that his aunt would requite his solicitude in her will…" CB 271 → Driving someone around and doing odd jobs aren't referable to a contract about the transfer of a property.
- "we must draw the line where those acts are referable and referable only to the contract alleged." CB 271
    - Merely driving around/doing favours isn't referable to the contract
    - Any acts that would be refereable to the contract for the sale of the property, even acts of upkeep/repairs to the property would also be referable to a contract for something like life tenancy. Thus, it is almost impossible to prove that there were acts that were unequivocally referable to the land.
        - You'd have to distinguish acts to say "these acts are only referable to a contract for sale of the land"
        - These could include specific developments that wouldn't bear fruit until well after your lifespan → it shows you expected to inherit it and pass it on to someone else. If it was only for life tenancy, you'd only do things that would make a difference during your lifetime.

Cartwright J:

- "It is clear that none of the numerous acts done by the respondent in performance of the contract were in their own nature unequivocally referable to No. 548 Besserer Street, or to any dealing with that land." CB 272
- See CB 273, Note 2: There is ambiguity in the interpretation of *Maddison v Alderson*.
    - Quoting from Erie Sand & Gravel: "Where Rand J. would have required the conduct to be **referable** only to the specific contract that had been alleged, Cartwright J held that it was sufficient if the acts were "**unequivocally referable** in their own nature to **some** dealing with the land".
- Less strict test treated as correct there.
    - If it's only refereable to the property and *some dealing* with the land, then we only look for a connection to the land. While they may be referable to a lifetime tenancy, they could also be referable to a contract for land.
- The kinds of acts Degalman does are more similar to a handy helper agreement, not a promise to transfer the land → they don't really end up using the test.

Quantum Meruit:

- However, the nephew does get some compensation for the acts undertaken.
- He recovers some payment for the services rendered. The court uses quantum meruit to determine what he is owed.
- The services weren't given gratuitously.
- "the respondent is entitled to recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent." CB 271
- In this case, $3000. (Still much less than the house would be worth.)
    - You are entitled to as much as you deserve (Braithwaite)

H: Agreement is not enforceable. It cannot be distinguished from *Maddison*; it fails the test. The acts of part performance do not demonstrate a sufficient connection to the contract being alleged.

Thompson *v Guaranty Trust Co* – successful claim in part performance (broader view)

R: Application of broader Cartwright test.

R: Acts performed in connection to maintaining/running the land are valid part performance

F:

- Gus Thompson began working as a hired hand on Dick's farm and continued there for 48 years. Gus alleges that this work was done as consideration for Dick's promise to devise and bequeath his land to Gus. When Dick was injured or ill, Gus would nurse him back to health and care for the farm.
- Gus took a somewhat marginal farming operation, per TJ, and made it successful (built granaries; made decisions on crops, equipment purchases etc.) These show connection to the land.
- No will was found, but it seemed very clear that Dick's intention was to bequeath the farm to Gus.

I: There was clearly an oral contract. So: does the Statute of Frauds apply? Or was Gus's work over this time sufficient to count as part performance so that his agreement with Dick can be enforced?

A:
Distinguishes this case from Deglman and Maddison. The services in Deglman are very different from the ones at issue here.

- "I am personally of the opinion that practically every act of part performance as to which evidence was given…were acts which were unequivocally referable to a contract in reference to the very lands in question." (CB 279)
- A contract, lands in question, unequivocally revocable = seems to speak to the broader test.
- In sum, prof says it seems like they used the broader test (Cartwright again)
- Gus was not just a hired hand. He did many acts that were fundamentally connected to the running of the farm in question. → he made ownership decisions & the types of decisions he made suggest that his relationship to the land was similar to ownership.
- Could these acts be referable merely to a contract of employment or services? → it seems no. He gave up almost 50 years of his life and was involved in the running of the farm to that level. Seems far more referable to the land than something else

H: Therefore he has proved part performance and the application of the Statute of Frauds can be negated. Appeal allowed: Gus can have specific performance.

Practice Q:

1. Is this enforceable or does it fail under statute of frauds?
    a. This is a contract for land which is required to be under writing. This is not in writing.
2. Under equitable doctrine of part performance, we can prove a contract existed and try to make it enforceable. State broad and narrow rule (Thompson, Degalman)
3. Are the acts of part performance referable to the contract alleged?
4. Point out that everything pre-agreement isn't relevant, we are only looking to things that happened after the agreement.
5. Even if he doesn't succeed in proving that there is a contract, he would still be entitled to some compensation, likely through quantum meruit.

6. A lot of it looks referable to the land, but at least some of the work looks referable to employment as a manager to the B&B (marketing, doing the business as opposed to his substantial upgrades on the house itself)
7. Time commitment → 10 years is substantial, but not as much as 48 years.
8. Conclusion.

5. Privity of Contract

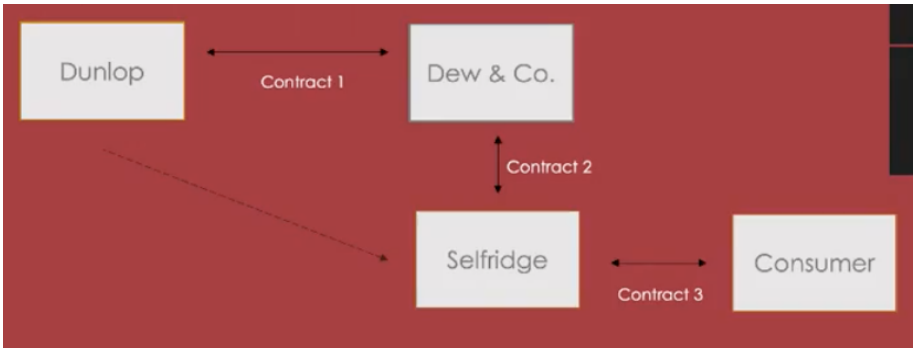
Privity of contract: a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it (only parties to agreement are bound by it, but third parties can still benefit from it). As a general proposition, someone who stands to benefit from a contract bw two parties cannot sue on the contract.

5.1 History of Doctrine of Privity & Third Party Beneficiaries

- *Provender* and *Tweddle* involve similar facts where parents of a bride and groom promise each other that they will give a certain amount of $ to the groom.
    - Promise is bw groom's father and bride's father, but the beneficiary is the groom.
- **Legal issue**: if one or both of the fathers fail to pay, can the groom successfully sue?
- ***Provender***: Yes. "The party to whom the benefit of a promise accrews may bring his action.
- ***Tweddle***: No. "It would be a monstrous proposition to say that a person was a party… for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued" → **Changes the law** & **introduces the modern idea of privity of contract**.

Dunlop *Pneumatic Tyre Co v Selfridge & Co Ltd* – modern rule of privity of contract

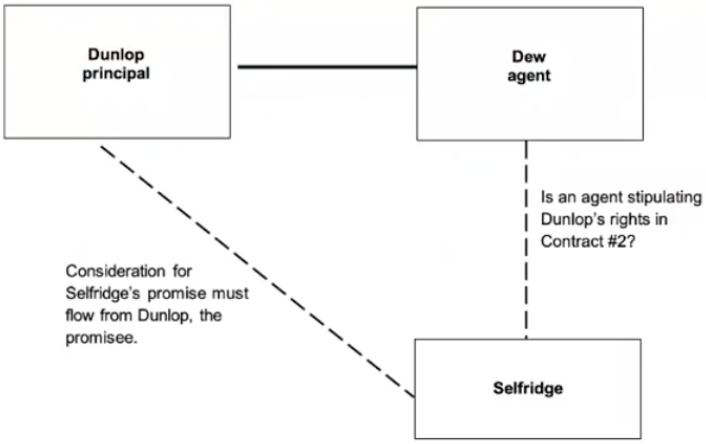
R: Third party beneficiaries are not parties to contracts and cannot sue on them.
R: Doctrine of privity: 1. Only a person who is a party to the contract can sue on it. 2. Consideration must have been given by the person seeking to sue to the promisor.
F: Dunlop = in contract 1 with Dew (wholesaler) // Dew (wholesaler) = in contract 2 with Selfridge (D) // Selfridge = in contact 3 with customer <u>Contract 1: Dunlop & Dew</u> - Contains a resale price maintenance clause (illegal now, but not at the time) → ensured retailers couldn't sell for less than manufacturer's list price. - Under Con 1, Dew can only sell below list to retailers who agree not to sell below list to their customers. - To such retailers (like Selfriedge), Dew can sell at 10% below list if they obtain that retail customer's promise to observe the list price. <u>Contract 2: Dew & Selfridge</u> - Selfridge promised Dew (1) that it would not sell below list or offer to do so AND (2) Selfridge agreed to pay Dunlop 5 pounds by way of liquidated damages if they breach <u>Contract 3: Selfridge & Final Consumer</u> - In breach of Contract 2, Selfridge sold below list to its customer under Contract 3 - SO Con 2 has been breached, but contract 2 is between Selfridge and Dew. BUT Dunlop is really the only one who gets hurt. BUT it's in a contract with Selfridge. Dunlop wants to sue Selfridge for breaking contract 2 (but they can't bc they aren't a party to Con 2)



I: Can Dunlop sue on a contract they aren't party to?

A:

- Dunlop tried to argue that Dew was actually only acting as their agent. IF Dew is their agent, and Dunlop is the principal, then that will give Dunlop a right to sue. Then, as agent, Dew would just be stipulating Dunlop's right in Con 2, and Dunlop could sue on those rights.
- But if that's the case, then consideration for Selfridge's promise not to sell under the set price would have to flow from Dunlop to Selfridge (still have to show Consideration)
    - **There's no consideration, so no enforceable contract** (And so agency argument doesn't succeed)



H: Appeal dismissed. Dunlop loses. Dunlop is a third party beneficiary & not party to the contract that has been breached (i.e., Con 2 → they're just a beneficiary)

5.2 Ways in which a Third Party May Acquire the Benefit (how to get around privity)

There are six situations in which the privity of contract rule doesn't apply:

1. Statute
2. Specific Performance
3. Trust Relationship
4. Agency Relationship
5. Employment Relationship
6. The principled exception

5.2.1 Statute (first situation in which privity rule doesn't apply)

If a statute alters the law, then it ousts the CL.

- Insurance contracts are the clearest example of statutes intervening in the law of privity b/c when someone purchases life insurance, the benefit is assigned to a third party.
    - E.g., X purchases life insurance such that Y will be paid $ on X's death. X is in contract with company. Y is the beneficiary but has no privity of contract with the insurance company. BUT through the operation of statute, Y is allowed to sue for the money.

For life insurance contracts, the beneficiary can sue the insurer (see ON's Insurance Act)

5.2.2 Specific Performance (second situation in which privity rule doesn't apply)

Specific performance itself isn't an exception to privity, but its a vehicle for getting the promise enforced. It only works if you can sue before.

- It's just another way someone could enforce the benefit on behalf of a third party

Beswick *v Beswick (HOL)* – specific performance, privity rule doesn't apply

R: Can sue as administrator of an estate to get nominal damages. If the administrator + the harmed third party, then can sue for specific performance to gain benefit

F:

- Old Besqick → previous business owner, dead.
- Young Bes → Old's nephew, purchaser of business, D
- Mrs. Bes → wife of old bes, does the suing.
- Old sells business to young with terms:
    - old to stay on as consultant at 6 pounds per week.
    - On Old's death, Young will pay Old's widow 5 pounds per week.
- SO Young is under contract to pay wife 5 pounds a week. He only makes one payment and refuses to pay anything further (bc the contract was between young and old, not wife).
- Wife sues as administrator for specific performance of the agreement, and in her personal capacity, she claimed arrears in the sum of 175 pounds.

I: Does the privity rule prevent Mrs. B from successfully bringing this action?

A:

- She is able to sue as the administrator of the estate. That permits her to sue b/c she isn't suing as a third party beneficiary, but as the administrator of the estate.
    - Someone else could open the door to suing as well → you need someone who can sue to get it into court, but specific performance ensures that you can actually get the benefit (but you can't pass the benefit onto someone else
- However, if suing in administrator capacity, it would seem that she has suffered no damages, so the court may award only nominal damages
    - Couldn't identify damage that flows to her in that role.
    - **To get around this, the court held that she was entitled to the remedy of specific performance**. Specific performance enables the court to force the nephew to continue paying the widow on an ongoing basis.

Denning:

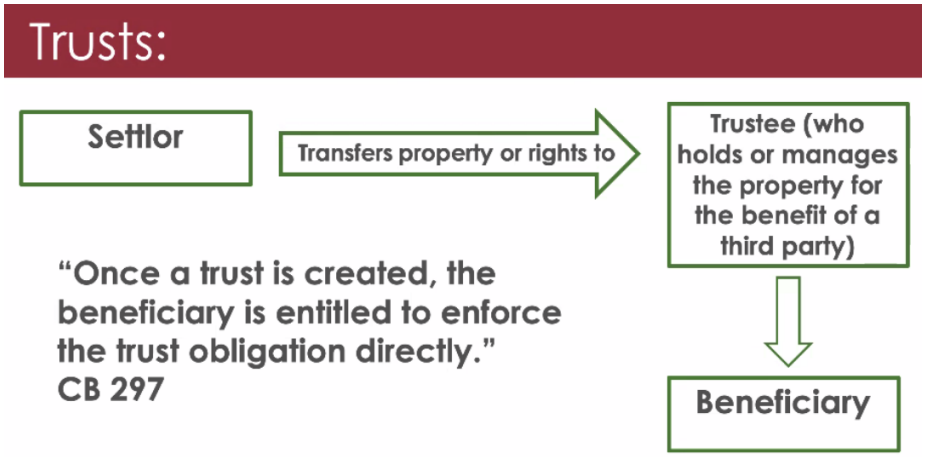
- Privity is just procedural, but does not affect the underlying right.
- He would have allowed her to succeed, in part because if she were to lose, the nephew could keep the business but not uphold his promise, and "Nothing could be more unjust…"

- Denning's procedural point was not followed. - But the subsequent judgement from Lord Reid reaches the same result on narrower grounds. She cannot sue in her personal capacity, but she can as the administrator of the estate. - Here too they rely on claims about justice.
H: no, not barred. She can sue as testatrix (but NOT in her personal capacity)

5.2.3 Trusts (third situation in which privity rule doesn't apply)

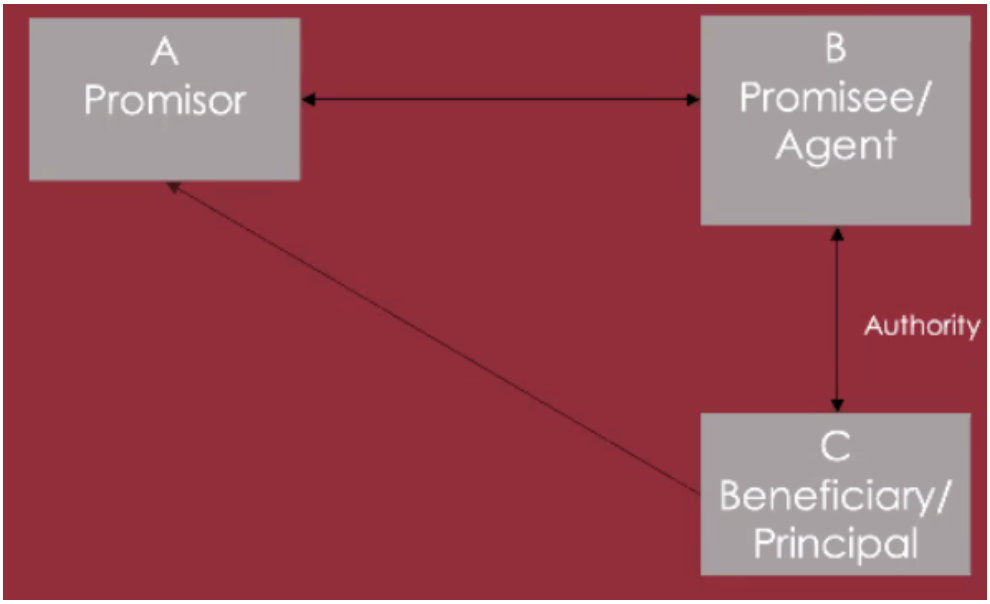
The beneficiary can sue the trustee (even it's the settlor that transfers rights to the trustee).

The thought behind privity is that there is no relationship bw the third party and the person they are trying to sue. So – one way to get around this is to show that there is a legal relationship → one kind of relationship is that of trust.



5.2.4 Agency Relationship (fourth situation in which privity rule doesn't apply)

Agency relationship rule: Under the principles of the law of agency, where a principal authorizes an agent to enter into contracts on the principal's behalf with third parties, the result of the agent's doing so is that the principal has a direct contractual relationship with the third party.



- Promisor (A) promises B to confer a benefit on C.
- C looks like a third-party beneficiary. Privity of contract means there is only a contract between A and B, and C cannot sue. BUT If promisee (B) is acting as agent on behalf of C, C "would have a direct contractual relationship with A and the third-party beneficiary rule would be avoided." (McCamus 310)
- Note: it can be an implied agency relationship (like in NZ shipping)

NZ Shipping *Co Ltd v AM Satterthwaite & Co Ltd* – implied agency relationship

R: Agency is an exception to privity & the test for whether agency is in place come from *Scruttons*:

1. The contract between the agent and the other party must make it clear that protection is intended to extend to the third party.
2. the contract must make it clear that the agent-party is in fact an agent of the third party.
3. The agent has the authority to act as agent.
4. Any issues about consideration moving from the contract are overcome → No consideration issues. If third party fulfills a unilateral performance for the non-agent party, then that is consideration to get the benefits of the protections.

R: if the argument that a unilateral contract can be used in place of consideration is to succeed, the parties will need to prove a **genuine intention** to create an agency relationship.

F:

- NZ Shipping Co: 'the stevedore'; parent to Fed Steam; under contract #2, is obligated to unload the drill.
- Federal Steam: 'the carrier'; subsidiary of NZ Shipping; hires NZ Shipping to unload the drill via contract #2.
- Ajax: 'the consignor'; shipper; maker of drill. Consignor = who ships the goods.
- Satterthwaite: 'the consignee'; holder of bill of lading and owner of drill when it was dropped due to NZ's negligence. Consignee → who gets the goods
- Consignment = shipping of goods through a carrier to one party from another.

Contract 1: a bill of lading with several exclusion of liability clauses.

- Ajax makes an expensive drill and wants to ship it to Satterthwaite, in Wellington.
- They contract with Federal Steam to be the carrier – to actually transport it to Satterthwaite.
- Contract is between Fed Steam, Ajax, and Satterthwaite.
- Note NZ shipping isn't a party to this contract.

Contract 2:

- There is then a second contract (Contract #2) between Fed Steam and NZ Shipping, according to which NZ is contracted to unload the drill.
- So this isn't about shipping it, but unloading it when it arrives
- In the course of carrying out this contract, NZ negligently drops the drill and damages it.
- NZ shipping was the parent company of Fed Steam, and NZ regularly acted as agent for Fed Steam. (The question that arises here is the opposite – is the carrier, Fed Steam, an agent of NZ?)

Further facts:

- Bill of lading is a contract bw Fed Steam & Satterthwaite, not Satterthwaite & NZ. So NZ is a third party to Contract 1. But can NZ invoke the protection from Contract 1 or does privity of contract preclude them from so doing?
- it is Satterthwaite suing and not Ajax bc at the time of the drill being dropped, property in the drill had already passed to them. If it were dropped earlier & Ajax held the bill of lading, then we would be asking the same questions but about a suit bw Ajaz and NZ rather than Satterthwaite & NZ.
- **Exclusion of liability clause**: no servant or agent of the carrier shall in any circumstances be under any liability to the shipper, consignee, or owner of the goods for any loss, damage, or delay of any kind resulting indirectly or directly for any act or omission → tries to protect any servant or agent of the carrier. So is NZ shipping an agent of Fed Steam?

I: When the consignee, Satterthwaite, sues NZ shipping, can NZ shipping 'take the benefit of the time limitation provision' in the bill of lading (since it's not a party to Contract 1)? OR is NZ shipping barred from doing so as a third party beneficiary?

A:

- The Consignee, Satterthwaite, wants to sue. They recognize that they are barred from suing the carrier, Fed Steam, by the terms of the bill of lading.
- However, they think they can sue NZ Shipping instead.
- They argue that "the stevedores could not rely, as third-party beneficiaries, on the provision of the bill of lading that appeared to be designed to protect them." (McCamus 311)
- Court relies on Lord Reid's comments in *Scruttons*. There, he sets out four criteria for agency contracts of this sort and says that NZ shipping satisfies under this test.
    1. Bill of lading makes it clear that the protection is intended to extend the stevedore.
        a. Yes, bill of lading applies exemptions to NZ Shipping.
    2. The bill of lading makes it clear that the carrier is contracting as agent for the stevedore.
        a. Yes, carrier is contracting as agent for NZ Shipping.
    3. Carrier has authority from the stevedore to act as agent.
        a. Yes, carrier has authority to act as agent.
    4. Any issues about consideration moving from the stevedore are overcome.
        a. Less clear. NZ shipping has been given a benefit in that the exclusion clause will extend to them, but for it to work as a contract there needs to be consideration flowing in both ways. We need NZ to give a benefit/promise.

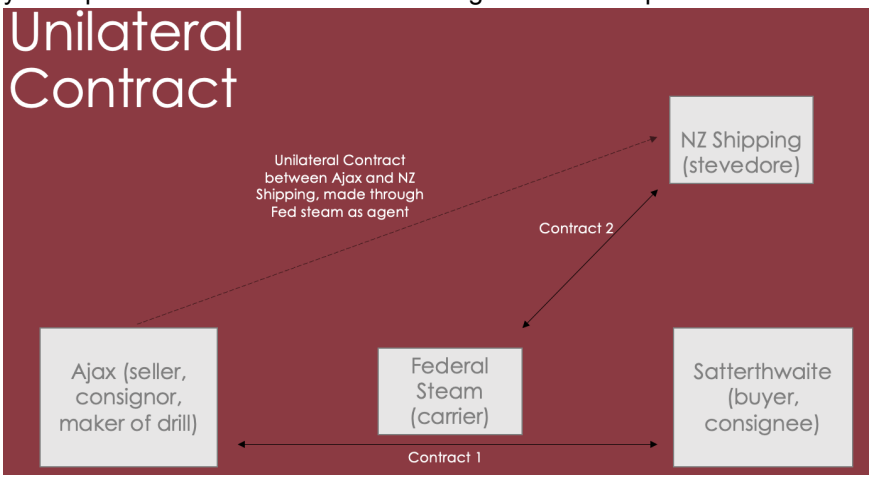
Consideration issue:

- Whole contract is commercial in nature so it doesn't make sense to think of commercial parties as making friendly, gratuitous promises to one another. Obviously meant to be a legally binding relationship.
- "By clause 1 of the bill of lading the shipper [Ajax] agrees to exempt from liability the carrier [Fed Steam], his servants and independent contractors [NZ Shipping] in respect of the performance of this contract of carriage." 307 → The exemption is meant to apply to the whole period of carriage, whoever performs the loading/unloading.
- This transaction could be analyzed in a number of ways, but they choose to analyze it as a unilateral contract

Unilateral contract (device to get around consideration issue)

- "the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper [Ajax] and the appellant [NZ], made through the carrier [Fed steam] as agent."
- NZ performed the contract by unloading the goods. That performance was the consideration for the agreement by Ajax, the shipper, to provide the exemptions to NZ.

- So: by calling NZ's performance the consideration, the consideration problem is overcome, and the court can say that all four conditions are met for the agency contract to take place. That means the problem of lacking privity is displaced and NZ can take advantage of the exemption clause.



H: Appeal allowed: NZ is successful in its argument that the agency exception to privity of contract applies, and they can take advantage of the benefit conferred on them as a third party.

5.2.5 Employment Exception (fifth situation in which privity rule doesn't apply)

New exception originating in ***London Drugs***.

London Drugs *Ltd v Kuehne & Nagel International Ltd* – employment exception test

R: Test for employment exception. Two conditions must be satisfied:
1. Limited liability clause must expressly or impliedly extend the benefit to the employee(s)
2. Employee(s) must have been acting in the course of their employment and performing the services provided for in the contract.

R: Justifications for denying privity of contract:
1. Denying extension of benefits inconsistent with parties' intentions. Places all the burden on the third party.
2. There is an "identity of interest" between employer and employee. Special relationship.
3. Employer performs contract through employees.

F:
- LD wanted to store a transformer at a K&N warehouse. Storage contract included **limitation of liability clause** limiting the liability of warehouse workers to $40/package unless a special valuation has been declared and extra fees paid. LD did not opt for the xtra coverage from K&N, though the transformer was worth a lot more than $40 (they got insurance elsewhere)
- Dennis & Hank (employees) tried to move the transformer with forklifts even though it should have been lifted from above (both parties agree this was negligent). Transformer topples with damages of $33,955.41. LD sues KN & Dennis & Hank.

Proc Hist: Successful at BC Sup Ct, COA reduced D&H's liability to $40, LD appeals.

I: Can D&H shelter under clause (b) as a defense to LD's action against them?
Note: this is a privity problem bc the limitation of liability clause was in the contract bw LD & KN, to which D&H are not parties. They are, therefore, third party beneficiaries of the contract.
Walk through why this is a privity problem & then describe the exception at play.

A:

- Applying the doctrine of privity so as to prevent a 3rd party from relying on a limitation of liability clause which was intended to benefit them frustrates sound commercial practice and justice → Inconsistent with party expectations. They have allocated risk in a certain way and it undermines this. It places all burden on the 3rd party beneficiary.
- There are no good reasons not to make this exception. It's different in that way from allowing a third party to sue on a contract → D&H can't sue (doesn't undermine privity or give 3rd parties right to sue), but acts as a protection mechanism instead.
- Employee/r relations are special. There is an "identity of interest" bw them in terms of performing the contractual obligations. Employer performs its contractual obligation through its employees.
- This exception depends on the parties' intentions. It's similar to the agency test, but a bit different:
    - Part 1: identical to the agency test → it's about making it clear.
    - Part 2 & 3 of the agency test are covered by the identity of interest bw employer & employees: employees act to carry out employer's interest
    - Part 4 (major difference from agency test): "this new exception makes no specific mention of consideration moving from the employees to the customer. But clause 2 of this test requires that the employees are performing the very services contracted for and that is similar to what has been found to be consideration in some cases.

H: Yes, D&H cans take advantage of the limitation clause, even though they aren't parties to the contract. Court says "this is both the time and the case for a judicial reconsideration of the rule regarding privity of contract as applied to employers' contractual limitation of liability clauses… Commercial reality and common sense" require this reconsideration.

Development from agency exception test to employment exception test:

	Agency Test	Employment Test
Part 1	Bill of lading makes it clear that the protection is intended to extend the stevedore.	Limited liability clause expressly or impliedly extends the benefit to the employee(s)
Part 2	The bill of lading makes it clear that the carrier is contracting as agent for the stevedore.	
Part 3	Carrier has authority from the stevedore to act as agent. .	
Part 4	Any issues about consideration moving from the stevedore are overcome	No consideration required.

5.2.6 The Principled Exception (the "catch-all")

Not constrained to any fact situation; simply applied whenever it makes sense to do so. Based on the general idea of the employment exception, but extended more generally to other situations.

Fraser *River Pile & Dredge v Can-Dive Services* – principled exception + subrogation

R: The principled approach → requires two factors to be present + considers policy:

1. Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? → parties have to **intend** to extend the benefit. Once it crystalizes into an actual benefit, then that benefit cannot be unilaterally revoked.
2. Are the activities formed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract? → If it is the exactly intended activity, then it can apply

- Policy considerations: is privity consistent with commercial reality? Is there commercial reason that could be used in defence? Should this be left to the court or the legislature?

F:

- Fraser owned a barge. It was under charter to Can-Dive and it sank (allegedly due to CD's negligence)
- **Subrogation**: insurance companies can step into the shoes of the party whom they compensate and sue any part whom the compensated party could've sued.
- Insurance contract bw the insurer & Fraser, so normally the insurer could've stepped into Fraser's shows & sued CD. BUT, the insurance contract with Fraser contained a waiver of subrogation clause – i.e., insurer waived its rights of subrogation against "any charterer." Insurer paid Fraser for its loss of the barge (bc it had insured it). Insurer secured Fraser's agreement to waive the insurer's waiver of subrogation, freeing the insurer to sue CD by way of subrogated claim. When the insurer sued CD, CD tried to rely on the waiver of subrogation

Proc Hist: At trial, CD was held liable: as a third party they couldn't enforce the waiver.

I: Can 3rd party beneficiary (CD) rely on the waiver of subrogation clause as a defense to the action against it in negligence?

A:

The principled approach: Depends on the intentions of the contracting parties & requires two factors to be present:

1. Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? *(usually fairly straightforward, more to say here bc the party tries to get rid of the waiver)*
    - Even stronger case here than in LD for saying the parties intended the benefit apply to the 3rd party. It's expressly stated to cover "charterers"
    - What about the arg that Fraser & the insurance company removed the 3rd party benefit through their agreement? Fraser wants to argue that freedom of contract means they are entitled to vary their contract.
        - The agreement took place after CD's rights had **already crystallized into an actual benefit in the form of a defence against an action in negligence by Fraser's insurers**
        - Can't unilaterally revoke that right once it has crystallized. Basically turns CD into a party to the contract for the purpose of relying on the waiver.
2. Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract?
    - At issue is whether the purported third-party beneficiary is involved in the very activity contemplated by the contract containing the provision upon which they seek to rely
    - Here, the activity was chartering the barge, which was exactly the anticipated activity.
    - Alternately, if the barge was taken on an alternate task or route, then this wouldn't be an anticipated activity

Policy Considerations — not really a third step, but needs to be considered in analysis

- Privity as applied in insurance contexts was inconsistent with commercial reality.
- Fraser has been unable to provide any commercial reason for failing to enforce a bargain entered into by sophisticated commercial actors.

- Large-scale change should be left to the leg, but this is incremental change that is part of the judicial duty.
- All this does it allow the third-party beneficiary to use the clause to defend themselves – not to found a separate claim.
- However, some argue that there is scope for saying that it could be used to enforce claims by third parties.

H: CD can rely on the waiver of subrogation clause as a defence even though it's a third party. Court extends justification relied on in *London Drugs* to cover a broader class of cases.

5.3 Privity & Contract Theory

- Some have argued that privity is a necessary element of contract law. Others have argued the opposite.
- One theory that is offered is that **contract law is about the enforcement of bargains**. If so, it might be said that a third party isn't part of the bargain.
- But we do have a bargain bw A and B. B has paid for the promise of A. The only difference is we are allowing C (the third party) to enforce the bargain. But the bargain already existed. So **if we care about the enforcement of bargains, perhaps there is no justification for the privity rule**.

6. Contingent/Conditional Agreements (same thing)

An **agreement is conditional** if its operation depends on an event which is not certain to occur.

The law in this area "has followed a strange course and has produced strange results and in so doing appears to have departed both from previously decided authority and from good sense...." → confused concepts, excessive reliance on formulas.

Contingent condition: condition as an **event** which neither party undertakes to bring about (i.e., this is what we're concerned about in this chapter). **The obligations of both parties are contingent on the happening of the specified event which may therefore be described as a contingent condition**. Contingent conditions may be **conditions precedent** or **conditions subsequent**.

Promissory condition: condition as a term (i.e., part of the contract) → this will come up later in the CAN

- E.g., contract is immediately binding on both parties, but B is not liable to pay until A has performed his promise to work. Such performance is a condition of B's liability and, as A has promised to render it, the condition may be described as promissory

Condition precedent: describes a state of affairs that must exist before one or more of the promises set out in the agreement becomes enforceable. The question of what obligations parties have when conditions precedent apply is a complicated one.

Category 1: The condition may be a condition precedent to the *creation of any contract at all*. In that case there is no binding agreement yet.

Category 2: (On the other hand) the condition may be a condition precedent to the *duty to perform* (i.e., parties have obligations to each other but don't have to perform them until the condition occurs)

Condition subsequent: prescribes a state of affairs that will bring an already enforceable and binding obligation to an end.

6.1 Intention, Certainty, and Consideration

Wiebe *v Bobsien* – conditions precedent categories

R: Categories of conditions precedent:
- Category 1: So imprecise and depend so much on a party's state of mind that they are just 'mere offers', subjective
  - One party can withdraw
- Category 2: Clear, precise, and objective conditions: a contract is created. Can be subject to subsidiary obligations (e.g., bona fide efforts, wait-and-see).
  - No unilateral withdrawal.
  - Frequent in real estate transaction where condition precedent must be brought about by purchaser
- Category 3: Combines subjective and objective elements: courts have to consider whether they can imply a term that will fix it (i.e., implied subsidiary obligations) (e.g., bona fide efforts). **think of this as starting off with Category 1 but moving the condition precedent into Category 2.

F:
- Bobsien was selling his Crescent Beach property. Wiebe wanted to buy it, but he wanted to sell his own Port Moody house first (this is a pretty typical condition). They entered into an interim agreement dated 22 June 1984, making the sale of the Crescent Beach house **subject to** Wiebe selling his own residence "on or before 18th August 1984."
  - Look for language "subject to" which indicates there may be a contingent agreement.
- On 22 July 1984, defendant purported to "cancel" the interim agreement. Wiebe did not accept this cancellation. On 18 August 1984, he sold his home, fulfilling the condition. He notified Bobsien that the "subject clause" was removed, and increased deposit by $10,000. Defendant refused to close because he thinks he canceled the agreement.

I: Is the interim agreement a binding contract? Or was Bobsien entitled to withdraw before the condition was fulfilled?
- If it's a condition precedent to the formation of any contract, then Bobsien could withdraw because there wouldn't be a contract yet.
- However, if it's a condition precedent to certain terms of the contract, then Bobsien couldn't withdraw bc he's in contract.

A:
P argues for Category 2 → they're already in contract.
D argues for Category 1 → no binding contract yet so D is entitled to withdraw.
TJ analysed the various cases under two different categories:
1. Circumstances where a condition precedent prevents the formation of a contract. CB 334 (These cases would support the defendant's argument).
2. Circumstances where a condition precedent suspends the performance of the contract. CB 336 (These cases would support the plaintiff's argument).

Category 1:
- Arises when the condition precedent is illusory, based on 'whim, fancy, or dislike'. It has no objective content & therefore can't be enforced. No binding agreement results.
- "While a purchaser must use his best efforts in doing such things as obtaining financing, getting subdivision approval or selling his own home, there is no way the law can test whether he used his best efforts in deciding if he really likes a particular piece of property or not. Therefore there can be no contract in the first instance."

Category 2:

- "[A] general rule is laid down that in a real estate transaction a condition precedent which must be performed by the purchaser will not usually prevent the formation of a contract but will simply suspend the covenant of the vendor to complete until the condition precedent is met by the purchaser." → usually Category 2 (bit could fall under Category 1). Here, performance is paused until condition takes place.
- A binding agreement results but whether the primary contractual obligations must be performed (e.g. in Wiebe: to buy and sell the Crescent Beach house) depends on whether the condition precedent is fulfilled (in Wiebe, the selling of the Port Moody house).
- Category 2 agreements can have **subsidiary obligations** breach of which is actionable. Wiebe has to make bona fide efforts to sell his house → once the Port Moody house was sold, the suspension was lifted & there was an obligation to sell the Crescent Beach house.

COA Dissent → Lambert's typology:

- Category 1: So imprecise and depend so much on a party's state of mind that they are just 'mere offers' (if it is just an offer, he'd be within his rights to disregard it), subjective
- Category 2: Clear, precise, and objective: a contract is created.
- Category 3: Combines subjective and objective elements: courts have to consider whether they can imply a subsidiary obligation that will make it into a category 2 (i.e., make it a contract)

H: COA agrees w/ TJ that it was a Category 2 condition precedent & D wasn't within rights to cancel the contract, but COA dissent gives us info on the categories.

6.2 Reciprocal Subsidiary Obligations

Dynamic Transport *Ltd v OK Detailing Ltd* – implied subsidiary obligations

R: The court can imply subsidiary obligations to bring a Category 3 (i.e., a condition precedent that's imprecise but more than a mere offer) into a Category 2 condition precedent. In Category 2, the parties have subsidiary obligations, breach of which is actionable (Wiebe)

R: The vendor typically has the obligation to carry out subdivision this term was implied to make this a type 2. Specific performance.

F:

- Dynamic Transport wanted to buy land from O.K. Detailing. They entered into a contract to sell it for $53,000. The contract was made subject to condition that the land can be subdivided, but it was **not made clear who would seek the approval**.
- Present market value of the land is now $200,000. Now O.K. Detailing is trying to resist the sale on the basis that it is unenforceable because of the failure to specify who would obtain the approval.Dynamic Transport seeks an order for specific performance: to force the sale of the particular piece of land (because land is unique)

I: Is there a binding contract here? Does this fall into the category of conditions precedent where no legal relationship is created (C1), or the category of conditions precedent that merely suspend the obligations of the parties (C2)?

A:

- Obtaining the approval = condition precedent to the obligations to buy and sell → obligations are suspended (CATEGORY 2)

Implied Subsidiary Obligations (this is what we get under Category 3):

- There is a general principle that courts can imply promises to do what is necessary for performance. This is just a specific instance of that principle. → we do it based on what is typical in a particular field.

- The vendor is the one who typically has the obligation to carry out the subdivision. "The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale. I cannot accept the proposition that failure to fix responsibility for obtaining planning approval renders a contract unenforceable." CB 344
- Here the vendor is O.K. Detailing, so they are responsible for the planning application.
  - We don't want OK Detailing to have the ability to not apply for approval at all → the court requires they attempt to get the approval.
  - This makes it so that the Category 3 approach ultimately makes it Category 2 and is therefore a binding obligation.

H: The appeal was allowed: Dynamic Transport is successful in their suit for specific performance of the sale because obtaining the approval was a condition precedent to the obligations to buy and sell.
- Specific performance is an equitable remedy available at the court's discretion. "[S]pecific performance is generally not to be awarded where damages will adequately compensate the plaintiff for his or her loss and will rarely be a practical option"
- But in Dynamic Transport they awarded specific performance. There was an allowance for damages if O.K. failed to make best efforts to obtain the approval. But that award was based on the assumption that if those efforts were made, approval would be the result. That is unusual and is not guaranteed.

6.2.1 Remedies for Breach of Subsidiary Obligation

Eastwalsh *Homes Ltd v Anatol Developments Ltd* – damages for breach of subsidiary obligation (i.e., Category 2 Condition Precedent)

R: Two key principles for damages for breach of subsidiary obligation:
1. First, the plaintiff has the obligation to establish that the loss was "a reasonable and probable consequence" of the breach (on the balance of probabilities). If no loss or trivial loss shown, plaintiff can only get nominal damages. **Has to be more than "mere chance"**
2. Second, if that has been proven, but the loss is difficult to quantify, this is no reason for denying the plaintiff the award. Court must discount the value of the chance by the improbability of its occurrence.

R: Court should "discount the value of the chance [of the condition occurring] by the improbability of its occurrence". P must prove that the chance was a reasonable probability, and that the loss was of substantial value.

F: Anatal agreed to sell to Eastwalsh 147 building lots in a proposed subdivision plan. **A contractual term required Anatal to use its "best efforts"** to have the plan of subdivision registered prior to closing date. If this failed to happen, the agreement would be terminated. Anatal breached this term → they didn't have the plan of subdivision registered. Eastwalsh sued for specific performance or for damages.
TJ: Trial judge found that Anatal failed to use best efforts to register the subdivision plan *(note: the problem isn't about the term of "best efforts" – this isn't a vagueness issue. Instead, it's that they failed to use best efforts).* If they had used best efforts, he held there would have been a 50% chance of registering it within the time period that would have enabled the contract to go forward. Therefore, the award of damages was 50% of the increased market value of the lots: $2,020,780.

I: How should the plaintiff's loss be measured? (i.e., is TJ's idea the best way to do it?)

A: Two key principles:
1. First, the plaintiff has the obligation to establish that the loss was "a reasonable and probable consequence" of the breach (on the balance of probabilities). If no loss or trivial loss shown, plaintiff can only get nominal damages.

- "[P]roof of the loss of a mere chance is not enough" 349 → Plaintiff has to prove that the chance was a reasonable probability and that the lost possibility was of real substantial value.
- If there was no real value in it for you, then you would get no damages.

2. Second, if that has been proven, but the loss is difficult to quantify, this is no reason for denying the plaintiff the award.
   - It is difficult to figure out what the award should be in cases of lost chance to receive a benefit. But in such cases, "the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis." CB348
   - "In short, in assessing damages, the court must discount the value of the chance by the improbability of its occurrence." CB 348

Trial judge was right to separate the causation question from the quantification question. He was right that the cause of the loss was Anatal's breach. But on appeal they disagreed with the second step: there was not sufficient evidence of the loss of a 50% chance. Instead, they held that "notwithstanding the breach, the transaction would not have been completed within the contract period." CB 349

- Evidence indicates much more strongly that the contract wouldn't have gone through (even if D hadn't breached). Whatever percentage they land on, they'll reduce it by that amount (only 25% chance it would happen → you get only ¼ of the damages).
- Therefore, only nominal damages should be awarded.

H: Nominal damages awarded.

6.3 Unilateral Waiver

What happens if **one** party wants to waive the condition? → if you waive the condition, you want to go forward with the contract. (if both want to waive it's fine, but problems arise if there's disagreement)

Other jurisdictions: The party who benefits from the condition can waive it, as long as the other party does not also have an interest in the condition being fulfilled.

In Canada: **limitation on unilateral waivers from Turney** → if you have a true condition precedent (TCP) it can't be waved the same way as if it were a condition precedent solely for your benefit.

Turney *v Zhilka* – TCP & Unilateral Waiver

R: True condition precedent → an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side.

R: If TCP, then both parties need to agree to waive the condition, even if the condition benefits only one. Not the case for regular CPs.

R: Power to unilaterally waive might be included in the contract (making it type 2) – best practice is to draft around TCPs.

F:

- Parties entered into a contingent agreement for the purchase and sale of land.
- Condition: "Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision." CB 351 Completion date: (supposed to be) 60 days after plans are approved. HOWEVER, Neither party was tasked with seeking this approval.
- Purchaser made some efforts to secure fulfillment of the condition but it was not looking promising. Usually

it's the seller who does this (since they have more scope to apply for these types of things). Purchaser purported to simply waive fulfillment of the condition and then sued for specific performance to try to get the land.
- Seller claims that they are not bound by the agreement because the condition was not fulfilled. ("you can't simply waive it and then force me to do it!!" - Vendors)

Proc Hist:
- TJ said that the condition was for sole benefit of purchaser and so the purchaser could waive the condition. It seems like the purchaser was the sole one who benefitted from the condition, so under that rule they could just waive.
- COA affirmed.

I: Are the parties bound even in face of non-fulfillment of the annexation condition? Or can the purchaser waive the condition? (according to TJ & old view, they should be able to waive if it's solely for their benefit)

A:
- "But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party—the Village Council. This is a true condition precedent—an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. …Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished." CB 351
    - Mysterious part of passage 1: it sounds like SCC is talking about Category 1 but then also sounds kind of like Cat 3 (mix of 1&2)

H: Purchaser had no right to waive the annexation condition which was a TCP.

True Condition Precedent (TCP)

- The rule in *Turney v Zhilka*, in limiting the parties' ability to waive conditions precedent, will often lead to surprising results.
    - If parties have clarified that they *can* wave, then we know that we don't have a true condition precedent.
    - Surprising results → Parties will end up in a situation where they think they will be able to waive, but they can't
    - "The result in Turney v. Zhilka…is plainly unsatisfactory."
- However, the court has had opportunities to revisit it and has chosen not to.
- In *Barnett v. Harrison,* the court said the rule should stay in place for reasons of certainty, and also because it avoids having to settle two difficult questions:
    1. Is the CP for the benefit of just one party, or both?
    2. Is it severable from the rest of the agreement?
    - Basically, they just say it's easier to keep this rule about true CP being unwaivable.
    - Avoiding these tricky questions is a good reason to stick with the rule according to court. So it appears that the state of the law is that even if the condition is just for one party's benefit, it looks like that party cannot unilaterally waive it if it's a true condition precedent. See McCamus p 724.

Is a TCP a Category 1 or Category 2? Totally unclear from the court!

Did SCC mean that…

- Category 1: "the obligations of both parties were dependent upon fulfillment of the condition" that would mean that the purported binding agreement was of no binding effect whatsoever until the condition was fulfilled
- Category 2: "…or did he mean only that neither party could call on the other to perform (by paying the purchase price or making the transfer as the case may be) until the condition had been fulfilled?"

So which is it Cat 1 or Cat 2?

- True condition precedent sounds kind of like Category 1: there is nothing there to waive. That is what Judson's language indicates. → the strictest reading of the words in *Turney* suggest this.
    - *However*: why would an annexation clause fall into Category 1?
        - It is not subjective in the way the court indicates in *Wiebe*. (Subjective/whim test is still the determinative test in determining the difference bw Cat 1/Cat 2)
        - Annexation clauses aren't subjective or based on whim, but they're also super common.
- And some cases since *Turney* have described a condition as a TCP and yet stated that the parties could have obligations to one another.
- So: some ambiguity remains about whether a 'true condition precedent' is C1 or C2.
- Separate the two entirely.
    - We can't equate all Cat 1 conditions to TCPs, nor can be equate all Cat 2 conditions to TCPs.
    - Instead, look for TCPs as infrequently as possible (limit the application of Turney as much as possible).
    - B/c annexation clauses are so common, courts usually don't apply them.
- **The way court deals with it:**
    1. **Treat it as Cat 2 anyways (these are true obligations, so put them in Cat 2 and we don't have to deal with it)**
    2. **Distinguish Turney even if it's not that distinguishable → they just say "meh, it's different enough"**
    3. **Ignore Turney altogether**

How to get around *Turney* in drafting contracts?

- For help on this, see Davies "Some Thoughts on the Drafting of Conditions in Contracts for the Sale of Land" (1977) 14 Alta. L.R. 422. At 427, Davies suggests that drafting be done so that the condition cannot be classified as a true condition precedent.
- One way of accomplishing this is to insert a waiver clause:
    - "The purchaser may at any time, up to and including the __day of __, 199__ , waive the protection of the above clause in whole or in part by giving notice to that effect to the vendor in writing at __ (address)." [per Davies, obviously the clause would have to operate in conjunction with and be compatible with the condition itself.]
    - This allows us to articulate that the agreement, though condition, is not a TCP but a true agreement that is waivable.

Contingent Agreements Summary:

- We categorize a CP as category 1 or 2 based on whether the condition is a matter of whim or fancy (*Wiebe* → whim or fancy = Cat 1, clear, precise, & objective = Cat 2, uncertain but could be made certain & we make it so = Cat 3, i.e., Cat 1 turns into Cat 2)
    - If it looks like C1 (or C3), can it be made determinate by implying obligations? → If so, it turns into Cat 2
    - Cat 2 & Cat 3 can have implied subsidiary obligations
- And then, possibly: is it a TCP?
- When it comes to waiver, if it is a true CP, you cannot waive. If it is not a true condition precedent (i.e. not a *Turney* situation), then you can waive – if the condition is for your sole benefit.
    - If someone's trying to waive our questions are:
    - (1) is it a TCP?
    - (2) is it for their sole benefit?
    - If it's not a TCP & for their sole benefit, they can waive
- The best thing to do is draft around *Turney*. Make it clear that you are not in TCP territory. Make it clear that you have an agreement, whether it is one that is able to be waived or not.

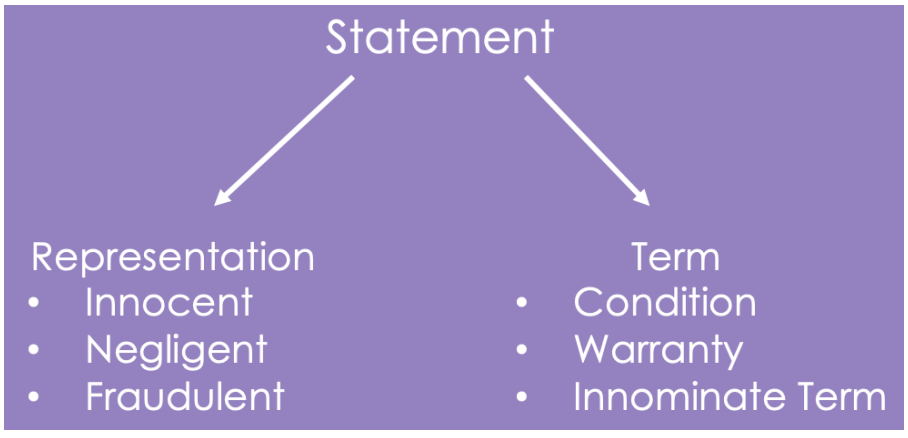
7. Representations & Terms

Central Question: How do we categorize the various statements that are made in the course of formation of a contract?

Statements can fall into three categories:

1. **Mere puffs'/'sales talk'**: statements made without intent that they form part of the contract.
2. **Mere representations**: not terms of the contract but can have some legal consequences.
3. **Actual terms of the contract**: more serious legal liability if broken.

Representation vs Term



Terms = content of the contract.

Condition = central term of contract

Warranty = peripheral term of contract

7.1 Misrepresentation and Recission

Misrepresentation: "a misstatement of some fact which is material to the making or inducement of a contract."

Principle: no relief for a misrepresentation unless it is a statement of *existing* fact

Misrepresentations are not:

- Mere puffs do not count as misrepresentations
- Statements of opinion or belief do not count as misrepresentations
- Representations as to the future do not count as misrepresentations → once you make a representation about the future, you're making a promise which isn't a statement of existing fact.

Misrepresentations can be:

1. **Innocent** (e.g., if you make a statement and that statement turns out to be false even if you didn't intend for it to be false) → test: a false statement of existing fact that is unambiguous, material, and relied on (***Redgrave***)
2. **Negligent** → test: requires a DOC (i.e., proximity & RF)
3. **Fraudulent** (i.e., reckless disregard, intentionally deceiving) → test: a false statement of existing fact that is unambiguous, material, and relied on + made with knowledge it is false or reckless disregard for its truth or falsity (***Redgrave***). NOTE that fraudulent misrep **never** stands alone (always also includes innocent misrep)

Remedy: Rescission

The usual remedy for misrepresentation is **rescission**.

Rescission: contract is rescinded or cancelled/undone. The basic idea is that the whole agreement is set aside, so we are trying to restore the parties to their position before the contract.

- Differs from the typical remedy of damages.
- Restitutionary in nature → restores the parties' prior rights.
- NOTE: Misrepresentation doesn't necessarily entitle you to a remedy for a contract b/c there isn't necessarily a contract yet (e.g., the claim was made to induce you into a contract)
- This is kind of like damages b/c there is monetary compensation; however, it isn't damages b/c damages in contracts aim to put the party in the position they would've been in had the contract not been breached. In this case, **compensation in lieu of rescission looks backward and tries to give you the money you put into the property** (thus, rescission ends up being backward looking instead of forward looking)

Redgrave *v Hurd* – elements of an actionable misrepresentation

R: Elements of an actionable misrepresentation. It must be…

1. Of an existing fact
2. False (the crucial thing is that it's false and is now known to be so, but doesn't need to be known to be false at the time it was made)
3. Unambiguous
4. Material: "it must be one which would affect the judgment of a reasonable person in deciding whether or on what terms to enter into the contract without making such inquiries as he would otherwise make." Material criteria = "the misrepresentation must relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement in question."
5. Relied upon by the representee. Inducement criteria =
    - presumption that representee was induced (perfectly reasonable to just believe what representor told representee), but if it can be proven that representee undertook their own investigation the presumption can be rebutted.
    - If a misrepresentation is of the kind that is "liable to induce the misrepresentee to enter the contract, it would be presumed against the misrepresentor that such inducement did occur."

6. [if fraudulent misrep] must be made w/ knowledge/recklessness of its falsity

R: Presumption that the falsity **induced P** to enter agreement.

F:

- Redgrave wanted to sell a share in his practice & his home to a new lawyer.
- Hurd entered negotiations for this transaction and asked for information about the practice's finances.
- Redgrave told him that it was around £300 to £400 per year.
- Papers shown only indicated £200 per year and when Hurd inquired further Redgrave gave him some additional papers and letters that he claimed made up the difference.
- Hurd did not examine these papers in detail, however, and went ahead with the sale for £1600.
- When he moved to Birmingham and looked more closely he saw that the practice was "utterly worthless", and he refused to close the deal.
- Redgrave, the elderly lawyer, sues for specific performance.
- Hurd says he has been induced to enter into the transaction by misrepresentation (the information he was given is false). He countersues for rescission, return of deposit, and damages.
- He lost at trial because the papers were available to him and he failed to examine them. It now comes up on appeal.

I: Does the plaintiff have an enforceable contract or is it impeachable via pre-contractual misrepresentation?

A:

- The crucial thing is that it a representation false and it is now *known* to be so, and therefore the person cannot be allowed to get a benefit from that false statement. CB 360
    - Once we know it's false, you can't be allowed to get a benefit from that false statement.
    - Not necessary to prove that the person making the representation knew it was false at the time they made it.

Was Hurd negligent by not looking for the truth (i.e., was there a reasonable opportunity to discover the truth?)

- This is no answer to the claim of misrepresentation. The effect of a misrepresentation does not go away because the other party was negligent. CB 361 → **we're looking at the claims of the representor**, not the representee.
    - Turn your attention to the person making the representation: did they make a false statement & now know it's false? If so, they made a misrepresentation
- "If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it…" CB 362 → In other words, we have a presumption of inducement that has to be rebutted by actual knowledge.

Elements of an actionable misrepresentation:

- The misrepresentation, as we have seen, must be of an existing fact. And of course it must be false (or it wouldn't be a misrepresentation). It must also be:
    - Unambiguous
    - Material: "it must be one which would affect the judgment of a reasonable person in deciding whether or on what terms to enter into the contract without making such inquiries as he would otherwise make." Materiality Criterion:
        - "the misrepresentation must relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement in question." McCamus 340
        - Statements made in *Redgrave* about the annual income of the firm are obviously material.
        - Compare this to cases where the income of a property was misrepresented by an amount less than 1%. This was not held to be material.
    - Relied on by the representee (inducement criterion)
        - The misrepresentation has to actually induce the person to enter the agreement.

- If they undertake their own investigation they will not be held to be relying on the misrepresentor's claims.
    - We presume the person was induced, but if it can be proven that they undertook their own investigation, they may not be held to rely on it.
    - BUT they have no duty to engage in such investigations: this is what we saw in *Redgrave v. Hurd*. → it's perfectly reasonable to rely on what the representor told you.
- If a misrepresentation is of the kind that is "liable to induce the misrepresentee to enter the contract, it would be presumed against the misrepresentor that such inducement did occur." McCamus 341.

H: Appeal allowed. Hurd wins – he can rescind the contract & have the deposit returned.

Smith *v Land and House Property* – fact vs opinion in potential misrepresentation

R: "[W]here an opinion is offered by someone who has no particular expertise in the matter in question, the statement would be considered to be one of opinion rather than one of fact. A reasonable person would not rely on such an opinion. However, one who possesses superior knowledge or expertise with respect to the opinion offered may be held to have made an implicit statement concerning the nature of the information upon which the opinion is based.

R: where both parties are equally informed of the relevant facts and one of them provides an opinion, that opinion will **not** be able to form a misrepresentation.

F: Plaintiffs wanted to sell a hotel. It was leased to Frederick Fleck – they described him as "a most desirable tenant". Defendants agreed to buy the hotel. Fleck became bankrupt. Defendants refused to complete sale.

I: Is the description of Fleck as a desirable tenant a misrepresentation? Plaintiffs argue that it is a mere expression of opinion, not a statement of fact. Recall that misrepresentations must be about existing facts.

A:

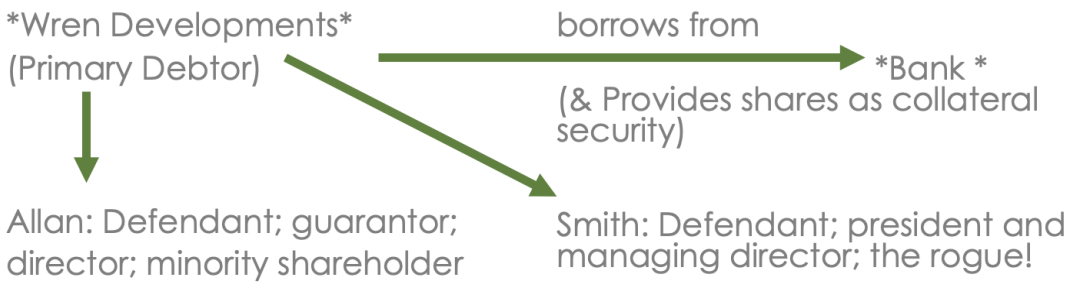
- Court draws a distinction between situations in which both parties are equally informed of the relevant facts, and one of them provides an opinion: that opinion will not be able to form a misrepresentation.
- "But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." CB 364
- Here, rent had been paid late, "by driblets under pressure"[!!], and that was enough to make him undesirable in the court's view.
- So the plaintiff had represented material facts that he knew – about the late rent payments – in the form of an opinion about his desirability as a tenant. (this sounds like an opinion but bc it's in a context where he has privileged info about the tenant, it's held to be a misrepresentation of a material fact)
    - This counts as a misrepresentation, so the defendant can get out of the sale.
    - This is an exception to the view that a statement of opinion or belief cannot count as a misrepresentation.

H: Misrepresentation by P. D can get out of the sale.

Bank of BC v ***Wren*** *Developments* – exceptions to rule that silence ≠ misrepresentation

R: "The general position taken by the common law is that silence does not constitute a misrepresentation." But there are three exceptions to this, where silence can count as a misrepresentation:

1. Half-truths: e.g., saying 'I'm not aware of any restrictive covenants on the land' when you haven't checked (trying to get away with something by not telling the whole story)
2. Active concealment of the truth: e.g., selling a house and covering up a crack in a wall with bricks
3. When circumstances change after a representation, you have a duty to tell the person about the change.



F:
- Wren (the company) took a loan from the bank and, as security for this loan, deposited with the bank some shares in a number of companies. This was done via a hypothecation agreement. Hypothecate, per Black's, means "to pledge property as security of collateral for a debt."
- Allan had also signed a guarantee for the loan.
- Over time, plaintiff released some of these shares to Smith without Allan or Wren's knowledge or consent. This negatively affected Allan's position under his guarantee.
- Allan was then told that the loan was in arrears and he needed to sign a new guarantee.
- Allan asked about the position of the shares, and the supervisor said he would look into it and report back. But Allan did not wait for an answer - he simply signed on the assumption that there had been no change.
- He felt certain the shares were still held by the bank since Smith was not entitled to release them acting alone (there was no reason that the status of the shares would've changed)
- Bank already has default judgment against Wren on the loan and summary judgment against Smith of his guarantee.

I: Does Allan have to pay $25,000 pursuant to his written guarantee?

A: "Upon the evidence I find that the defendant Allan, when he signed the second guarantee, was misled by the words, acts and conduct of the plaintiff into believing that there had been no change in the collateral securities held by the plaintiff, and otherwise he would not have signed it.
- Words, acts, and conducts was only the statement that the supervisor at the bank would look into it and report back
- Bank had a duty to disclose the position of the shares to Allan & not doing so constituted a misrepresentation.

The court held that the 'failure to disclose material facts' in Wren constituted a misrepresentation. But as McCamus says: "The Wren case cannot easily be explained within the established categories of cases requiring disclosure." p 344

H: There was a unilateral mistake on the part of the defendant Allan which was induced by the misrepresentation of the plaintiff in failing to disclose material facts to him." CB 367
Action dismissed: Allan does not have to pay the guarantee.
Probably bc the bank shouldn't have released the shares to Smith, so court is sympathetic to Allan.

Kupchak *v Dayson Holdings* – fraudulent misrep; remedy of "rescission plus"; bars to recission

R: Fraud unravels all. In cases of fraud, courts go further than they would in other circumstances to set things right – i.e., they can go further than rescission (which is normally granted to put parties back in pre-contract position).

R: In this case, the Kupchaks can't be given damages because equity cannot provide damages. But equity has the

power to do what is practically just → this can include an order for parties to pay compensation in order to effect substantial restitution under a decree for recision.

F: The Kupchaks (appellants): purchased shares in a motel company, Palms Motel Ltd, from: Dayson Holdings (respondents) As part of the sale, the Kupchaks transferred two properties to Dayson Holdings. The Kupchaks soon discovered that the statements made by Dayson Holdings about the earnings of the hotel had been false.They stopped paying the mortgage and consulted their lawyers.
Proc Hist: The trial judge found that there was **fraud** inducing them to enter the contract (i.e., a fraudulent misrepresentation). COA upheld.

I: What should the remedy be?

A:

- Normally rescission would be granted, and the aim would be to put the parties back in the pre-contract position. BUT **fraud unravels all**, so courts are willing to go further.
- One of the properties that was given in exchange for the Motel shares (the Haro St property) had been torn down and a modern apartment building had been built in its place, and they have sold a half interest in it to someone else. So it cannot be given back.
- "the respondents' dealing with the Haro St. property, which they acquired by fraud, ought not to bar rescission of the transaction unless it be impractical, or so unjust to the respondents that it ought not to be imposed upon a guilty party." CB 370
    - Here it would be too unjust because they have invested money in improving it.
- **The respondents (the Kupchaks) ask instead for its value as agreed in the transaction ($80,000)**
    - Equity cannot award damages, technically speaking, but here they say that they do have the power to order rescission, and in light of this, they can order parties to pay compensation "in order to effect substantial restitution under a decree for rescission" (CB 370)
- Equity has the "power to do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract." (CB 370)

H: "Accordingly, I would order rescission…and order the respondents to compensate the appellants for their equity in the Haro St. property based upon its value on March 31, 1960, to be ascertained by an inquiry, with interest at 5% per annum from that date…" CB372

Bars to Rescission

- **Impractical/unjust (Kupchak):** When recission is impractical/unjust, can order compensation "in order to effect substantial restitution under a decree for recission" → compensation for the value of the property at time of transfer.
    - Might occur when the goods have been destroyed or altered. More likely for fraudulent representations
- **Goods are altered**: relief will not be available if it is not possible to effect a mutual restoration of the benefits conferred by the parties → if the goods have perished/been altered, restoration won't be possible.
    - EXCEPTION: in some cases, particularly cases of fraud, courts are more willing to exercise their discretion liberally (see ***Kupchak*** where fraud had taken place → court granted rescission but instead of restoring actually property since it had been altered, it ordered compensation for the value of the property at the time of transfer).
- **Affirmation**:
    - if a party has 'affirmed' a transaction, they can no longer rescind it. This has to occur after they are aware of the misrepresentation, and aware that they have the right to rescind.

    - Affirmation can take place via words or conduct. It can be inferred just from lapse of time in some situations. But the fundamental question is whether the person chosen to continue with the contract.
    - In *Kupchak*, the conduct of continuing to operate the hotel was not held to be affirmation because they communicated their concerns immediately to their lawyers, and because they had no other reasonable option than continuing to run the business so as not to lose money while pursuing their claim.
- **Rights of Third Parties**:
    - If a bona fide purchaser has acquired a right for value, the original misrepresentee may not be able to get the property back.
- **Execution of the agreement**:
    - In certain contexts, once a transaction has actually closed, it cannot be rescinded for innocent misrepresentation, but it can for fraudulent misrepresentation (see *Kupchak*).
    - **In the case of land,** execution is regarded as a bar (**absent** a finding of fraud) (*Ennis*) – this is b/c the purchaser has the opportunity to discover problems in advance of the completion of the contract.
        - However, this rigid approach may have "a harsh effect in circumstances where an inspection on the premises cannot, as a practical matter, precede closing." 354 Instead he argues that we should **see execution as a relevant but not decisive factor** (usually execution is a bar, but you may be able to argue that execution isn't totally a bar and we can treat it as relevant but not decisive).
    - In the case of sale of goods, some courts have ruled that execution is a bar once there has been "the passage of a reasonable period of time for the purchaser to determine whether representations are true" (*Ennis; Leaf*). The rationale in the case of land does not apply to chattels, where there is limited or no opportunity to examine it in advance.
        - So execution may not be a bar to rescission in the context of chattels, and in *Leaf*, Denning appears to suggest that it wouldn't be an issue here. The real issue is that after execution, more than a reasonable time has passed.
- **Laches** (unreasonable delay in bringing a claim):
    - Delay alone is not enough: the delay must be such that it's interpreted as unfair to the misrepresentor (e.g. it appears misrepresentee has waived their right to the remedy).
    - In Kupchak, they reached out to their solicitors promptly.
    - In addition, after being informed of the impending claim of fraud and action for rescission, Dayson still went ahead with the sale of the Haro st. property. This indicates that they were not misled by any delay on the part of the Kupchak's. They acted with full notice of the possibility of an impending claim.

7.2 Representations and Terms

Central Question: How do we categorize the various statements that are made in the course of formation of a contract?

When someone is induced into an agreement by a representation, and it turns out to be false, there can be a number of different results (see McCamus pp 728-9)

1. If it was a **misrepresentation that induced formation of the contract, equity may award rescission**, whether it was innocent or fraudulent. (Redgrave) If it was fraudulent or negligent, there may be an additional claim in tort – more on this later.

2. If we can argue that the misrepresentation was subject to an implicit undertaking that the representation is true, then we might be able to say that that undertaking is enforceable as a **collateral contract or as a term of the contract**. In such a case, we can get damages, not just rescission.
    - It was still a statement of fact, but the party has somehow promised that it was true (which puts it in the territory of being a term of the contract). Here, it could be enforceable as collateral contract or term of the contract.
3. If the statement of fact was explicitly stated (promised) in the contract, it will then be a term, and damages will be available.
    - Difficulty: if something was said but wasn't reduced to writing, it can be tough to show that it was an implicit term of the contract. Terms aren't only what's written in the contract.

***Heilbut**, Symons & Co v Buckleton*

R: warranty, in this case, is "an undertaking or guarantee that a particular statement of fact is true or will continue to be true or will become true on a particular future occasion." It is a contract collateral to the main contract.

R: Representation made before formation become terms of a **collateral unilateral** contract →"If you enter into the main contract, I promise that the representation is true." To discern if it was a warranty or a representation, look at the intention and prove that the representation was intended as a warranty

F:

- On April 14 Buckleton called Johnston from Wright's office. There was a phone conversation in which a representation was made that the company was "a rubber company". Buckleton then agreed to purchase a large number of shares in the company.
- However, a deficiency was discovered in the rubber trees on Filisola Estate, and the shares subsequently fell in value.
- Now, Buckleton sues for fraudulent misrepresentation, or alternatively for damages for breach of warranty that the company was a rubber company.
    - If something is bad at being something, does it fail to be that thing at all?
    - Note: you can sue parallel. You won't get both remedies, but this means a higher chance that you'll get some remedy.
    - Argues there was an implicit promise that they were a rubber company

I: What is the legal status of the representation: 'This is a rubber company'?
Was it a mere misrepresentation inducing the contract?
Or was it a collateral warranty creating a binding contractual obligation?

A:
Was there a warranty made?

- A **warranty**, in this case, is "an undertaking or guarantee that a particular statement of fact is true or will continue to be true or will become true on a particular future occasion." McCamus p 5
- Note that the term has other uses. "[T]he term "warranty" is being used here in a generic sense as equivalent to "contractually binding undertaking"" McCamus p 730 → this case doesn't follow the usual definition of warranty (which usually means a less central term of the contract)
- Here, that means the question is whether there is "a contract collateral to the main contract to take shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company." CB 377

How does the collateral contract/warranty analysis work?

- The representation made before formation becomes a term of a collateral **unilateral** contract →"If you enter into the main contract, I promise that the representation is true."

- Lord Moulton: Such collateral contracts can exist, but they are rare. It would be more natural to vary the terms of the main contract, so we have to be strict about finding these contracts on the facts.

- Look at the intention and prove that the representation was intended as a warranty
  - We have to look for *animus contrahendi* – contractual intention.
  - We must prove that the representation was actually intended as a warranty.
- At common law, innocent misrepresentation does not give rise to damages.
  - (As we saw in Redgrave, innocent misrepresentation can lead to rescission in equity, but not a common law remedy.)
  - At common law, "the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation." (CB 379)
    - Can be interpreted as innocent misrep OR a warranty → when all we have is an innocent misrep, ppl often try to turn it into a term to get more damages by extending doctrine of warranty beyond its just limits.
  - The court suggests that this is what is going on in this case.

What doesn't count as a warranty?

- Lord Moulton says that some statements have been made by other courts that are too broad and sweeping.
  - e.g.: "being made in the course of dealing, and before the bargain was complete, it amounted to a warranty" CB 379
- Lord Moulton also says it's too strong to say that "if a vendor states a fact of which the buyer is ignorant, they must, as a matter of law, find the existence of a warranty" CB 380 (Oscar Chess clarifies)
- We should instead be looking to whether 'the totality of the evidence' indicates an intention that the affirmation form part of the contract. CB 380 → basically, was the intention to make a promise?

H: This does not count as a warranty → unilateral contract analysis & idea of this being a warranty is too far a stretch given the facts of the case at hand.

- "There is in the present case an entire absence of any evidence to support the existence of such a collateral contract." CB 378
- A mere statement about the nature of the company does not indicate sufficient evidence of a collateral contract/warranty.
- "In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement." CB 380

Oscar Chess

If statement intended as a promise → warranty
If statement not intended as a promise → [precontractual] misrepresentation

Dick Bentley *Productions Ltd v Harold Smith (Motors) Ltd*

R: TEST "If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice." CB 382

- Would reasonably infer that a warranty was intended = Was it intended as a promise? Did the parties commit themselves to it? Were they just trying to describe something (more likely misrepresentation) or did they actually intend to promise that the statement was true (more likely term of contract)?
- We need is **promissory intention //** If it is, on the other hand, just a statement of fact not intended to be a promise, it will more likely fall into the category of a **pre-contractual misrepresentation**.
- We look at their conduct (actions, words)

F:
- Mr. Charles Walter 'Dick' Bentley: plaintiff, wanted to purchase a Bentley
- Harold Smith Motors Ltd./Mr. Smith: defendant, vendor
- Smith told Bentley a number of things during the negotiations for the sale of the Bentley.
- In particular, he stated that the car had only done 20,000 miles since it was fitted with a replacement engine and gearbox.
- Bentley bought it for £1850, and Smith said it was guaranteed for 12 months including parts and labour.
    - Similar in exam: they'll have formation complete
- He ended up having to take it back for work numerous times, and was disappointed. He eventually brings this action for breach of warranty.

I: Is there a breach of "warranty"? (i.e., breach of actual terms of a contract) Or, more specifically, how do we categorize the statement that the car had only done 20,000 miles since the replacement engine and gearbox? Was it an innocent misrepresentation, or was it a warranty?

A:
- The question is *whether it was intended as a promise* → **"if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty."** CB 382

Distinguishing from Oscar Chess:

Oscar Chess – *innocent misrepresentation*	**Dick Bentley** – *warranty/actual promise*
Non-professional vendor	Professional vendor (or person w/ privileged access to information)
Passes on log-book which stated year of car to be 1948	Stated a fact that should have been in his own knowledge
No warranty based on reasonable bystander test	It is a warranty based on a reasonable bystander test
= Statement is an innocent misrepresentation	= Actual promise (warranty)

Intention and Promise:
- For it to be a part of the contract or a collateral contract, what we need is **promissory intention**.
- If it is, on the other hand, just a statement of fact not intended to be a promise, it will more likely fall into the category of a **pre-contractual misrepresentation**.

H: In Bentley they determined that there was a warranty. It was intended to be part of the sale.
- In effect, he was saying: "If you will enter into a contract to buy this motor car from me for £1,850, I undertake that you will be getting a motor car which has done no more than twenty thousand miles since it was fitted with a new engine and a new gearbox." CB 383 → *in exchange for you buying this car, I promise the things that I'm saying about it are true.*
- It is clear that this was what was conveyed and intended to be conveyed to Bentley.

Conditions vs Warranties

- These are distinguished according to parties' intentions. But intention can be hard to discern, so one test is **how central the term is to the contract (test for intention)**.
    - **Condition** goes to the 'very root' of the contract. Essential or very important part of the contract.

        - Breach of condition entitles the victim to **terminate** (one can also choose to affirm). Whether you affirm or terminate, **also entitled to damages**. (Treitel, s 18-042)
    - **Warranty** "concerns some less important or subsidiary element of the contract." (Treitel, s 18-044)
        - Breach of warranty entitles the victim to **damages only**.
- So distinguishing b/w conditions & warranties is important b/c it changes the available remedies.
- Under certain circumstances, **if the other party has breached, you can refuse to perform your side of the contract**, but you have to be really sure that they've breached a **condition**, not a warranty. If the court holds that it was only a warranty, then <u>you've breached</u> by trying to repudiate when you couldn't!

Distinction b/w Repudiation and Rescission

Repudiation = other party breached condition & the innocent party is entitled to repudiate & also entitled to damages.

Rescission = remedy for misrepresentation. Fully unwind and put parties in position they started in

Leaf *v International Galleries* – condition vs warranty, obiter on mistake

R: If something is a condition, one can repudiate contract AND get damages. However, even if something is a condition "the right to reject for breach of condition has always been limited by the rule that <u>once the buyer has accepted, or is deemed to have accepted, the goods in performance of the contract, he cannot thereafter reject</u>, but is relegated to his claim for damages".

R: If something is a warranty, one can have a claim in damages only (can't repudiate)

R: [OBITER] Common mistake. Test is "what are you contracting about?" (this is to determine whether the quality in question goes to the very subject-matter of the contract)
- When the quality of the thing goes to the identity of the thing, then there can be an error of mistake that goes to the very thing it is.
- When it's merely quality about how good it is, then there is no error of mistake.

R: Policy argument in favour of acceptance of art as the end of the transaction→ if people choose to buy art on the faith of a representation, then once the article is accepted, that is the end of the transaction. "[O]therwise, business dealings in these things would become hazardous, difficult, and uncertain.

F: During contractual negotiations, defendant represented the painting in question as a painting by Constable (famous artist) = statement of fact about who painted the picture. Five years later, the plaintiff wanted to sell the painting, and at that point, he was informed by Christies that it was a fake. Plaintiff now seeks rescission. He is arguing that the statement that the painting was by Constable was an innocent misrepresentation (he didn't make any claims on breach of warranty, so he didn't end up going for damages. Dr. Nye says it's best to plead both in case the court agrees with one but not the other. Even though Leaf didn't seek damages, Lord Denning talks about both anyways).
Proc Hist: Trial judge held that that representation was a term of the contract.

I: Is the plaintiff entitled to rescission? (so, was it a misrepresentation? If so, do any bars from rescission apply?)

A:
<u>Denning judgement:</u>
- Lord Denning: The plaintiff sues only for rescission in equity.
- There are two directions to go (can't be both):
    1. either it was an innocent misrepresentation inducing formation, and then rescission is available, **<u>or</u>**

2. it was a term of the contract, and damages are available

- Denning says that there was a term in the contract about the quality of the subject-matter: who the artist was *(agrees with TJ)*
  - "That term of the contract was either a condition or a warranty." CB 384
    - If a condition, he could have rejected the picture before he accepted it.
    - If a warranty, he would have had a claim in damages only.
- **Denning concludes that it was a condition (it is central to the contract)**: "the right to reject for breach of condition has always been limited by the rule that once the buyer has accepted, or is deemed to have accepted, the goods in performance of the contract, he cannot thereafter reject, but is relegated to his claim for damages".
  - So he says it's a condition & Leaf does have a right to reject. HOWEVER, that right to reject is limited by a bar. If you've accepted it or been deemed to accept it, you can no longer make the claim to reject the contract.

Did Leaf accept?

- The buyer is deemed to have accepted after retaining them for a reasonable time without complaint.
- Denning says five years is much more than a reasonable time. "It is far too late for him at the end of five years to reject this picture for breach of any condition." CB384
- After that time he can get the remedy of damages, but he didn't bring that claim (since he didn't plead for damages, the court won't give it. We only have the recision case in front of us)
- BUT, Leaf hadn't argued this in the first place. Leaf argued misrepresentation (see below)

Is there an innocent misrepresentation?

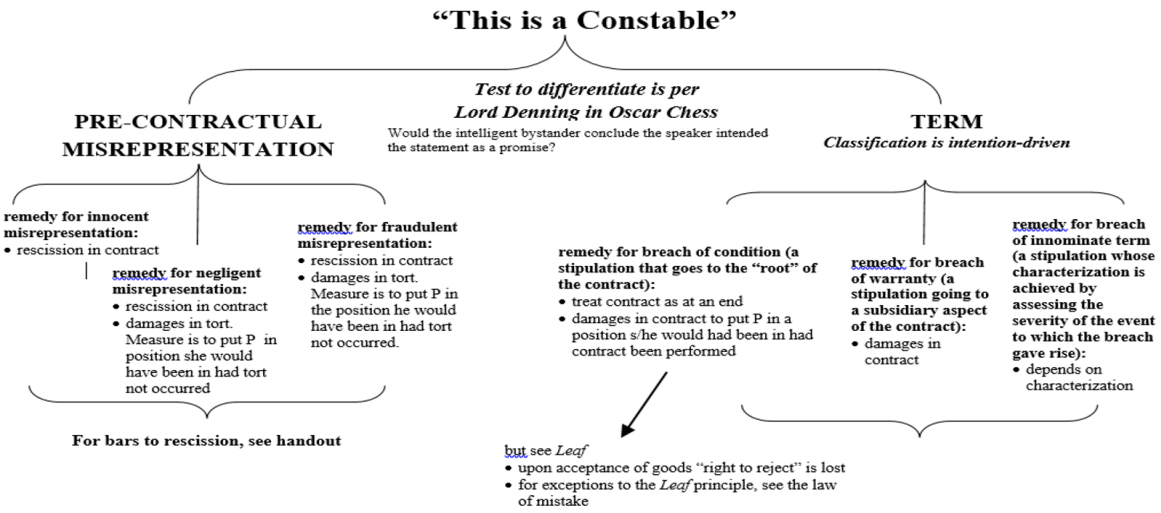
- **Denning doesn't think there is a misrepresentation**. BUT Denning says even if it were a misrepresentation "an innocent misrepresentation is much less potent than a breach of condition. A condition is a term of the contract of a most material character, and, if a claim to reject for breach of condition is barred, it seems to me a fortiori that a claim to rescission on the ground of innocent misrepresentation is also barred." CB 385
- In other words, it wouldn't make sense to allow him to do better if it is only an innocent misrepresentation than he would if it were a term of the contract.
- Therefore, he cannot now rescind, five years later. Appeal dismissed.
- PATH 1: The way Denning puts it, the **misrepresentation path is the 'weaker' path**. This is where someone has made a representation about the way things are: a statement of fact.
  - That might induce someone to enter a contract, but it isn't a promise.
- PATH 2: On the second path, we have a **promissory relationship**. So this is the **'stronger' path** to take.
- Denning's argument here seems to take the following form: Logically speaking, it wouldn't make sense to do better if you only have a misrepresentation, and are on the weaker path. So we have to examine the remedy on the stronger side to see what is available there, because that will limit what is available on the weaker side: it cannot be better than the strong side.
  - Even though Leaf is only suing on the misrepresentation side, Denning looks at the promissory relationship side to figure out the right result under the weaker misrepresentation side.
- Dr. Nye says that this strict restriction doesn't make a lot of sense, but there's a stronger argument that there's a condition (and not a misrepresentation). He's just stretching things to say that a less potent/weaker side is determined w reference to the stronger side.
  - Somebody shouldn't be more liable to you for something they just said than something they promised.
  - Denning is more concerned with preserving the role of the promissory relationship (esp. when compared to the representation relationship)

Evershed Judgment

- Determine what's most important/most central:
  - Did he contract to buy a Constable?
  - Or did he contract to buy "a specific chattel, namely, an oil painting of Salisbury Cathedral…on the faith of a representation, innocently made, that the painting had been painted by Constable"? CB 385
  - Evershed argues for the latter, and that means that he still has the article he contracted for. It is "**a difference in quality rather than in the substance of the thing itself**." CB 385
- This is addressing the question of mistake, which is also dealt with by Lord Denning:
  - "There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable, and that mistake was in one sense essential or fundamental. Such a mistake,

however, does not avoid the contract. There was no mistake about the subject-matter of the sale." CB 384
    - When the quality of the thing goes to the identity of the thing, then there can be an error of mistake that goes to the very thing it is.
    - When it's merely quality about how good it is, then there is no error of mistake.
- How do we determine that something is a mistake?
    - Generally, the law of mistake has the effect that the contract entered into is void. The mistake must be **'fundamental'**, such that **performance is impossible**: for example, if the subject matter does not actually exist.
    - Mistakes as to quality do not typically count as mistakes that will render a contract void.
        - E.g. Scott v Littledale: contract for the sale of tea was valid even though there was a mistake about the quality of the tea that decreased its value.
        - E.g., Mistake about the habitability of a house will similarly not render contract void. However, if the mistake about the quality is such that it goes to the ***identity*** of the thing, we may have a mistake that makes the contract void. (Treitel s 8-019) → if something about the quality is so fundamental as to the identity of the thing, then contract may be voided.
    - This is '**common mistake**' – both parties share the mistake
    - Treitel suggests that the test could be asking parties "what are you contracting about?": this is to determine whether the quality in question goes to the very subject-matter of the contract.
    - Remedy for mistake is more like recision → try to undo everything (void from the start). Nothing that flowed from the contract will have any force)
- The way mistake is discussed in Leaf, the suggestion seems to be that the parties would answer that they have contracted for 'a picture'.
    - But as Treitel points out, it seems much more likely that they would say 'a Constable'.
    - Treitel indicates that Leaf may be wrongly decided, but at any rate, the discussion of mistake is only dicta, as the case is decided on grounds of misrepresentation.
- Eversheds also raises a policy argument for denying relief.
    - There is disagreement about whether pieces of art are genuine or fakes, and this would result in "costly and difficult litigation" CB386
    - Better to say that if people choose to buy art on the faith of a representation, then once the article is accepted, that is the end of the transaction. "[O]therwise, business dealings in these things would become hazardous, difficult, and uncertain." CB 386 → this is kind of the policy rationale for providing a 5 year window.
- Besides, there is a common law remedy available if it is a warranty, and if so, there is no justification for bringing in equity.

H: He can't rescind five years laster. Appeal dismissed.



- If it's intended to be a promise, then it's a term (right side of diagram). If it's not, then we may have a pre-contractual misrepresentation (left side of diagram).
- If the exam asks "what is the remedy for breach of contract?", then we will start the "term analysis". However, a more broad question would start at the top of the diagram.

7.3 Statutory Reform

Proposals for ideal law reform:
Proposal 1: make representations **always** form part of the agreement so remedies for breach are always available (***the overinclusive rule*** – everything said pre-contract would then form the contract)
Proposal 2: Increase the scope for the remedy of rescission.
Proposal 3: Allow parties to choose between the two.
Proposal 4: Allow courts to choose between the two.

Consumer Protection Act, CB 391

Modifies the law only with **consumer transactions** (so it won't protect you with a contractor at your home, but it will if you buy something at Simons). Only affects the rights/remedies of consumers (i.e., commercial parties are still governed by the law we have been examining so far)

Act provides a number of protections against specific wrongs that may be done by sellers, including misrepresentations of various kinds.

s7(1) specifies that cancellation of the transaction is an available remedy, in addition to any remedy at CL.

We would apply this in an exam where someone might go into a Walmart or something similar. Facebook marketplace wouldn't count as a consumer transaction

7.4 Concurrent Liability in Contract and Tort

Central Question: When someone has made a false statement of fact/misrepresentation causing loss, **can the victim sue in tort as well as in contract**?

- The law on this has shifted over time, but the short answer is **yes**:
    - If it was **fraudulent, you might have a claim in the tort of deceit**
    - If it was **negligent or careless, you might have a claim in negligence**
- Note that you can have liability in both tort and contract but you **cannot recover twice**. One set of facts can give rise to more than one cause of action but not double recovery.
    - You put all your options of the table. Both paths of liability remain open to you & then the court decides which one you'll get but they won't give you both.

Hedley *Byrne Co v Heller,* 1964

- Landmark case where it was recognized that the tort of negligence could cover economic loss caused by negligent misstatements.
- The plaintiff asked the defendant (a bank) for advice about the creditworthiness of a customer of the bank. The bank said positive things, but disclaimed liability for accuracy.
- In reliance on this advice, the plaintiff entered into a business relationship with the customer in question. The plaintiff subsequently suffered economic loss.
- The disclaimer meant the plaintiff lost, but **the court held that if there had been no disclaimer, there could have been a claim for negligent misrepresentation**.
- **There must be a 'special relationship' between the parties for negligent misrepresentation liability to arise**.
    - **Special relationship** = something comparable to contract or where there is an assumption of responsibility.

Post-***Hedley***

- After Hedley was decided, it was theoretically possible to be liable in tort and contract for the same misrepresentation. But the **SCC seemed inclined not to go down that path**. In *J. Nunes Diamonds v Dominion Electric* (in the 70s), SCC rejected concurrent liability. The suggestion was that if a contract exists, it states the whole basis of liability between the parties. BUT Subsequent cases chipped away at this idea, leaving room for concurrent liability → see *Central & Eastern Trust Co. V.* ***Rafuse*** where SCC adopted a general principle favoring the possibility of concurrent liability in tort and contract in contractual contexts
- Liability in tort "could arise where a relationship of sufficient proximity to create a duty of care in tort is established by the contract and where the tort duty is co-extensive with an obligation also imposed by the contract itself." (CB 400)

Sodd *Corp v N Tessis* – special relationship *main takeaway

R:** Someone can be owed a duty of care if the nature of relationship is *special* – professional is relevant but not necessarily determinative. 3 routes: 1. Keep silent & decline to give info/advice (eliminates special relationship) 2. Give an answer but make it clear that you aren't accepting responsibility for it (Avoids special relationship) 3. Answer w/o qualification but accept that you're taking on responsibility (creates a special relationship)
R: a P is not negligent if they rely on the statements of a professional with special knowledge (and they don't have the time/ability to inspect the statement)
R: If something is a collateral warranty, it can be viewed as a binding promise and an exclusion clause will not apply. Exclusion clauses apply only to the **main** contract, not the collateral contract. *If a court thinks it fair, they are willing to make something a collateral warranty & therefore part of the collateral*

contract and <u>not</u> the main contract & therefore not subject to the terms of the main contract.

F:

- D was selling assets of a bankrupt party and put out a tender for the sale of the stock of the bankrupt's furniture business. P put in a tender for the stock in reliance on a representation made by the defendant.
- The representation was that **D told P to calculate the retail value of goods by doubling the wholesale costs. This was bad advice** and generated an overvaluation of about double.
- **TJ held that the misrepresentation had been negligent.**
- Contract contained an **exemption clause** (or we might call it an entire agreement clause → precludes someone from arguing that there is an implied term in the contract), as follows:
  - "Tenders are accepted on the basis that the purchaser has inspected the assets and title thereto, and no warranty or condition is expressed or can be implied as to designation, classification, quality or condition or in any manner whatsoever." → this clause precludes the argument like in *Dick Bentley* where there was a further warranty about the quality of the goods; any kind of warranty is excluded

I: Did defendant have a duty of care to plaintiff the standard of which he breached (tort route)? Is there a breach of collateral warranty (contracts route)?

A:

Did Tessis (D) owe Sodd (P) a duty of care?

- **Yes**: "the defendant as a professional accountant and trustee in bankruptcy was in a special relationship creating a duty of care to the plaintiff and was negligent in his representation concerning the retail value of the stock-in-trade." (CB 401) = **nature of the relationship i.e., special relationship**
  - Professional is relevant but not necessarily determinative. If you're in a professional situation where you give advice, it's more likely to be deemed a special relationship
- The Defendant "made negligent representations which he should have known would and did induce the plaintiff to prepare his tender in certain manner and, as a result of the that tender being accepted, the plaintiff has suffered damage."
- Further, the Plaintiff "was not negligent in relying on a licensed trustee who had caused an inventory of the stock to be taken, when the plaintiff's opportunity for inspection was, at best, limited."
- So, a duty of care is established, and the trial judge held it was breached.
- 3 routes for when a special relationship could occur:
  - Keep silent & decline to give info/advice (eliminates special relationship)
  - Give an answer but make it clear that you aren't accepting responsibility for it (Avoids special relationship)
  - Answer w/o qualification but accept that you're taking on responsibility (creates a special relationship).
  - Special relationship, then, doesn't mean you have to be in a trustee relationship but these roles do give rise to these relationships.
- The judge held that the advice was a negligent misstatement.
- "We are also unable to accept the appellant's argument that since the relationship between the parties was contractual, the *Hedley Byrne* principle does not apply" (CB 402)
  - In other words, just because they are in a contract, doesn't mean there can't be liability in tort. So, concurrent liability is upheld here.
- It is either a negligent misstatement or a collateral warranty. So, on either side, they can recover.

What about the exclusion clause?

- The court interprets the **defendant's actions as promissory**. "**The defendant's stipulation amounted, in our view, to a binding promise, depriving him of the terms of the exemption**." → D intended to promise so he can't rely on the exemption
  - They interpret it as a collateral warranty so that it can be viewed as a binding promise: "It is clear from the cases that the defendant's representation, whether characterized as a negligent misstatement or as a collateral warranty, falls outside the exemption clause…" CB 402
  - **Because it is collateral, the exclusion clause does not apply** (he steps outside of the exclusion clause to provide the advice which has a promissory intention/special relationship). It applies only to the main contract.
  - This collateral contract is a way to get around embracing the exclusion clause → courts tend to do what

they think is fair in these circumstances (here, D was taking responsibility for the role and was taking the trustee role, so it makes sense to say that he was promising the truth of the statement)
So: on the right hand side of the overall diagram from lecture 39, we have a term, and we can get damages. Alternatively, they could get damages on the left hand side for negligent misstatement.

H: It is either a negligent misstatement or a collateral warranty. So, on either side, they can recover.

Test for Negligent Misrepresentation in Tort

A prima facie duty of care exists when there is proximity and reasonable foreseeability (*Deloitte*).

- **Proximity** is established if there is a **close and direct relationship** b/w the parties.
- **Reasonable foreseeability** is established if:
  a. The **D should have reasonably foreseen that the P would rely** on their representation; **AND**
  b. Such **reliance would**, in the particular circumstances of the case, **be reasonable.**

^^use this test for negligent misstatement that we could sue for in tort

*BG **Checo** International Ltd v BC Hydro & Power Authority* – contractual interpretation, relationship b/w tort and contract

R: The various parts of the contract should be interpreted in the context of the intentions of the parties as evident from the contract as a whole → **General terms set the background but specific terms qualify/trump the general terms**.

R: concurrent liability is possible where the contract creates a sufficiently proximate relationship to generate a duty of care in tort

R: Three possibilities about the relationship b/w contract & tort (note - in all cases concurrent liability doesn't go away):

1. "[W]here the contract stipulates a more stringent obligation that the general law of tort would impose."
   - Concurrent liability hasn't been extinguished, but it most cases you'll choose to sue in contract b/c it's better for you.
   - HOWEVER, it's still usually best to sue in both so that the court can pick what fits both.
2. "[W]here the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances." (CB 409)
   - Typical exclusion clauses (e.g., sign up for this workshop, you give up all right to sue liability in tort). If you've limited the tort duty, you can still sue in contract.
3. "[W]here the duty in contract and the common law duty in tort are co-extensive." (CB 410)
   - Checo is a type three situation. The contract didn't change Hydro's duty to not misrepresent the way things are. Checo can sue in tort and has reason to do so.

F:

- Nov/82: Hydro called for tenders.
- Dec/82: BG Checo inspected area by helicopter – assumed that clearing process that had begun would be completed by Hydro.
- Feb/83: BG Checo's tender was accepted whereby Checo contracted to construct 130 towers and install insulators, hardware, and conductors over 42 kilometers of right of way.
- Hydro did not complete clearing the right of way.
- "Dirty" condition of right of way caused BG's loss.
- BG Checo sues for negligent misrepresentation or, alternatively, breach of contract. It later amended its statement of claim to include fraud as it emerged.
- Hydro knew of problems with right of way clearing and how it would negatively impact the successful tenderer.

The contract:
Cl 2.03 – It shall be the Tender's responsibility to inform himself of all aspects of the work and no claim will be considered… for any misunderstanding.
Cl 404 – Contractor shall inspect and examine site… contractor shall be deemed to have satisfied himself as to correctness and sufficiency of his tender…
Cl 6.01 – Clearing of right-of-way… has been carried out by others

Proc Hist: Trial judge found that Hydro had acted fraudulently. BC Court of Appeal rejected the finding of fraud, but did find that there was a negligent misrepresentation inducing Checo to enter the contract. (CB 404)

I: Can Checo sue in <u>both</u> contract and tort?

A: The Claim in Contract
- How to reconcile seemingly inconsistent provisions in a contract? "It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole." (CB 407) → **General terms are qualified by specific ones**.
- The general term is the obligation on Checo to satisfy itself about the state of the site. The specific obligation is that Hydro has the obligation for clearing. **So, the specific obligation to clear was not negated by the general clause. And Hydro has breached this specific clause**.

Measure of Damages
- "The measure of damages is what is required to put Checo in the position it would have been in had the contract been performed as agreed." → That would have meant Hydro would have cleared the trees and Checo wouldn't have had to do it.
  - Checo would have avoided some overhead costs, and it can recover some of that, <u>but not profit on the clearing of the right of way, because that was not bargained for</u> (that would've put them in a better position than they otherwise would've been).
- (Might we object here that Checo loses the chance to do other profitable work while clearing the area?)
  - Some profit on that work may be argued as being part of their damages b/c if the contract had been performed, they wouldn't have used their time to clear the land & could've moved onto another project to make more $$$ → this just highlights that we need to be careful about the position the party would've been in **had the contract not been performed**.
  - General principle is that we try to put the person in the position they would've been in had the contract been performed → but sometimes there's ambiguity about the position they would've been in had the contract been performed (in this case, the court says that they wouldn't have paid the cost for the clearing, but wouldn't have any profit)

Claim in Tort:
- They hold that there can be concurrent liability.
- They follow *Central & Eastern Trust Co. v. Rafuse*, where the court held that concurrent liability was possible where the contract created a sufficiently proximate relationship to generate a duty of care in tort.
- In such a case, "where a given wrong prima facie supports an action in contract and in tort, the **party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort**." CB 408
  - Primary piece = intention of the parties → concurrent liability may be limited if that's the intention of the parties (but we have to really look at what they did)
- That means that the fact that parties have covered an issue in their contract doesn't mean they can't sue in tort. "It all depends on <u>how</u> they have dealt with it." CB 409

Three possibilities about the relationship b/w contract & tort (note - in all cases concurrent liability doesn't go away):
1. "[W]here the contract stipulates a more stringent obligation that the general law of tort would impose." (CB 409)
   - Concurrent liability hasn't been extinguished, but it most cases you'll choose to sue in contract b/c it's better for you.
   - HOWEVER, it's still usually best to sue in both so that the court can pick what fits both.
2. "[W]here the contract stipulates a lower duty than that which would be presumed by the law of tort in

similar circumstances." (CB 409)
    - Typical exclusion clauses (e.g., sign up for this workshop, you give up all right to sue liability in tort)
    - If you've limited the tort duty, you can still sue
3. "[W]here the duty in contract and the common law duty in tort are co-extensive." (CB 410)
    - Checo is a type three situation. The contract didn't change Hydro's duty to not misrepresent the way things are. Checo can sue in tort and has reason to do so.

Promise
- In Checo, it is a promise: A promise that they cleared the road.
- It is also negligent misrep
- That means Checo can sue on the left hand side in tort & right hand side for breach of contract.

H: "Rather than attempting to establish new barriers to tort liability in contractual contexts, the law should move towards the elimination of unjustified difference between the remedial rules applicable to the two actions, thereby reducing the significance of the existence of the two different forms of action and allowing a person who has suffered a wrong full access to all relevant legal remedies." CB 406 → argument for keeping things as open as possible so that all remedies are available to people (instead of making barriers that make things more complicated or difficult).
- This is the gist of the judgment: it confirms that concurrent liability is the law.
- This decision 'greatly simplified' the law (McCamus, 740)

7.5 the Parol Evidence Rule (PER)

- "**[T]he parol evidence rule** precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing ….The purpose of the parol evidence rule is primarily to achieve **finality** and **certainty** in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract…" (at para 59). However, the **factual matrix** is used to ensure the written **words** of the contract **are not divorced from the background context** against which the words were chosen. For this reason, **oral** or **written pre-contractual** communications may be brought forward to demonstrate the correct interpretation of the document.
    - The **surrounding circumstances** are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise."
    - Example of evidence of surrounding circumstances: industry standards, what the parties may have thought based on how existing cases have been interpreted

7.5.1 **Exceptions** to PER

1. PER does **not** apply when the contract is intended to be party oral & partly written (***Newell***)
2. PER does **not** apply to preclude evidence of surrounding circumstances when interpreting words of a written contract (***Sattva***)

7.5.2 PER in Exemption & Entire Agreement Clauses

- Entire agreement clauses can be used to prevent the reliance on any materials beyond the written agreement.
- However, courts do construe these **narrowly** and will look to see that they are a **genuine** representation of the parties' **intentions**.
- If the entire agreement clause is in a standard contract and one party may not be aware of its effect, courts are often more willing to allow the oral undertaking to have some force.

7.5.3 Clarification b/w rescission & repudiation

"The safest course, in my view, is to use the term "rescission" rather strictly to **refer only to rescission on equitable grounds**. The type of breach of contract giving rise to the innocent party's right to "terminate" the contract or treat it as "discharged" by breach is perhaps most clearly referred to as "repudiatory breach."" McCamus, p651

The term **rescission** is sometimes used for:

1. Correct use: **Equitable rescission for misrepresentation** (as we have been using it).
2. Incorrect use: The termination of an agreement for breach (this is repudiation, NOT rescission)

The term **repudiation** is sometimes used to refer to:

1. A severe breach of contract (we won't use this)
2. **The choice by the innocent party to treat the contract as terminated by the breach** and therefore opt of the contract.. (this is how we will use it)
    a. Repudiatory breach → when someone breaches the contract & other party can choose to repudiate
    b. Repudiate → when other party opts out following a repudiatory breach.

7.6 Classification of Terms

Hong Kong *Fir Shipping Co v Kawasaki*

R: Frustration (in TJ decision) = like a breach but where no one is at fault (intervening event prevents performance from happening, neither party at fault)
R: When parties did not specify the events that will relieve the other party of their duty to perform, the courts have to exercise their judgment. To determine whether the other party has been relived, the court asks: **does the occurrence of the event deprive the party of substantially the whole benefit of the contract?** With one of three potential answers: 1. Conditions → promises where <u>every breach</u> will deprive the party of the whole benefit of the contract. 2. Warranties → promises where breach will <u>never</u> deprive the party of the whole benefit. 3. Innominate terms → can't be classified as conditions or warranties. INSTEAD, breaches of these kinds of promises depend on the **nature** of the **event** to which the breach gives rise. SO the remedy one is entitled to depends on the **nature of the deprivation**: have you been deprived or the whole benefit or not?
F: - Kawasaki wanted to charter a vessel for 24 months. Hong Kong Fir Shipping was to let the vessel 'Hong Kong Fir' to Kawasaki. The contract included the following provisions: - Clause 1 specified the 24 month period and that the vessel was "in every way fitted for ordinary cargo service". (CB 448) - Clause 3: stated that the owners would maintain the ship in a "thoroughly efficient state in hull and machinery during service." (CB 448)   - "Seaworthiness term". Timeline: - FEB 13: Ship is delivered at Liverpool, complete with an undermanned and incompetent engine-room staff—despite owner's knowledge that ship's machinery was old and needed a better crew. During the voyage to Osaka, ship was off hire for approximately 5 weeks due to the need for engine repairs. - MAY 25: **Ship arrives in Osaka in very bad shape due to engine room staff incompetence**. Ship needs 15 weeks of repair to make it seaworthy.

- JUNE 6: **Charterers purported to repudiate** (i.e., electing to use their remedy of repudiation b/c the other party has engaged in a repudiatory breach).
- JUNE & AUGUST: There is a steep drop in freight rates.
- SEPT 11: Charterers again purport to repudiate (the term repudiation "is used to refer to a severe breach of contract; or, alternatively, to the election of the party not at fault to treat the contract as discharged by the breach." Charterer is using it in the second sense.)
- SEPT 15: Ship is made seaworthy and has an efficient and adequate engine room staff. Still available for 17 months at this stage.

Proc Hist: TJ held that there was breach of the seaworthiness term.However, in June, there were no reasonable grounds for concluding that the plaintiff could not make the ship seaworthy by mid-September at latest, and therefore no breach on Hong Kong Fir's part that would entitle Kawasaki to repudiate. TJ rejected the defendant's contention that it was entitled to repudiate (and the alternative contention that the contract was frustrated).

I: Is there a breach of term such that the charterers can treat the contract as repudiated? OR are the charterers themselves liable for wrongful repudiation? (so, how central was this term to the contract?)

A:

- Court says sometimes parties have specified events that will relieve the other party of the duty to perform (i.e., if the parties specify that a breach of this sort is a repudiatory breach, then there is a repudiatory breach). But when they haven't, courts have to exercise their judgment.
- The underlying question courts have to ask is: "does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?" (CB 449) = does it deprive the party of substantially the whole benefit of the contract?
- Court says it doesn't make sense to answer the question by the simple distinction between conditions and warranties (this is too simplistic to capture the range of events that could deprive you of some of your benefit. Instead, they say:
    - Some promises will be the kind where every breach will deprive the party of the whole benefit of the contract. (i.e., **Conditions**).
    - Some promises are of the sort where breach will never deprive the party of the whole benefit of the contract. (i.e., **Warranties**).
    - **Innominate terms**: But there are some that cannot be classified as either. "Of such undertakings, all that can be predicated is that some breaches will, and others will not, give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract." (CB 451)
        - Consequences of breach of these kinds of promises don't depend on whether we call it a condition or a warranty. They depend on the **nature** of the **event** to which breach gives rise →
        - With conditions & warranties, every breach will give rise to the remedy. With innominate terms, the remedy you're entitled to depends on the **nature of the deprivation** – have you been deprived of the whole benefit of the contract or not?
- Hong Kong Fir promised to provide a seaworthy ship.
- The problem of whether they breached that term is not solved by asking if the promise to provide a seaworthy ship is a *condition or a warranty*.
- It is an undertaking that falls in the third category: this means that some breaches of it will lead to an event that deprives the other party of the full benefit, and some breaches will not.
- We look at the events which happened due to the breach, and ask if those events deprived Kawasaki of the whole benefit of the contract.

H: the trial judge was right and there is no right to repudiate.

Spirent Factors – determining if there's been a breach going to the root of the contract

1. the ratio of the party's obligations not performed to the obligation as a whole; (particular attention to the part that was breached… how big is the part breached compared to the obligation as a whole?)

2. the seriousness of the breach to the innocent party;
3. the likelihood of repetition of such breach;
4. the seriousness of the consequences of the breach; and (more general analysis of the consequences of the breach and how bad those consequences were)
5. the relationship of the part of the obligation performed to the whole obligation (how much of the whole contract has been completed)? Should we give up? → how far into the contract are we and how do we compare the amount we've gotten through to the amount that's left to go)

If both parties breached and you need to determine how severe the breaches are:

1. Did Party A breach their obligations to Party B?
    a. If yes, go through Spirent factors for Party A's breach.
2. Did Party B breach their obligations to Party A?
    a. If yes, go through Spirent factors for Party B's breach.
3. Balance the two parties' Spirent factors.

Pre-*Hong Kong* Scheme

- Breach of condition would allow the innocent party to repudiate and/or seek damages. Breach of warranty would allow the innocent party only to seek damages.
- **Under the pre-Hong Kong scheme, a breach of term defined to be a condition triggers the right to repudiate, even if the event caused by the breach is minor.** This is unnecessarily rigid.
- On the old scheme, even the most minor breach of the seaworthiness term would allow for termination. This is the problem the court sets out to remedy in Hong Kong Fir. (See McCamus p 660 for discussion)

The New Approach: Innominate Terms

Hong Kong Fir mitigates potential harshness of the old scheme by introducing a third possibility, namely the innominate term. Assuming the term involved is an innominate term, the innocent party will be discharged from further performance under the contract if the answer to the following test is positive:

> Does the occurrence of the event deprive the party who has further undertakings still to perform of **substantially the whole benefit** which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

If the 'depriving' event occurs due to breach by one party, that party is in breach of contract (and it's the other party that gets to elect to repudiate or not)

Post-*Hong Kong Fir*

According to the Alberta CA in First City Trust v Triple 5 (T5), Hong Kong Fir **does not replace the warranty/condition distinction but is additional to it**.

[49] The traditional test, in my view, can be readily reconciled with the so called "third category" approach put forward in Hong Kong Fir. The approach which I believe to have been accepted by the authorities can be briefly summarized as follows: (1) the test enunciated by Bowen L.J. remains the starting point; (2) the surrounding circumstances referred to in that test must include the commercial setting; and (3) if it cannot be determined by those considerations whether the parties intended the obligation in question to be a warranty sounding only in damages or a condition, the breach of which would release the innocent party,

then the basis for seeking out that intent should be, as put forward by Hong Kong Fir, namely an assessment of the gravity of the event to which the breach gave rise (i.e., the innominate terms analysis)

Test to determine type of term and therefore type of remedy

STEP 1: apply traditional condition/warranty test as a starting point → **did their intentions indicate they wanted it to be wholly a condition or wholly a warranty (look at the factual matrix)?**

- "There is no way of deciding that question except by looking at the contract in light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition [which relieves the other party of the duty to perform]."

STEP 2: if intent thus far not determined, "then the basis for seeking out that intent should be, as put forward by Hong Kong Fir…an **assessment of the gravity of the event to which the breach gave rise**." (T5, para 49) **i.e., **innominate term analysis****

Wickman Machine Tool Sales Ltd v L Schuler AG

R: "In short, although the phrase "it is a condition of this Agreement that" will normally have the effect of creating a true condition in a formal legal document, courts will search for another plausible meaning of the phrase in circumstances where the consequences of so interpreting the phrase are absurd or unreasonable.
R: using the word condition in the contract may be enough to establish this intention but not necessarily
F: Schuler and Wickman entered into an agreement according to which: Wickman had the exclusive right to sell Schuler products in a certain area (including the UK); Wickman had a duty to undertake certain quite aggressive sales tactics, including sending representatives to six car manufacturers at least once per week to seek orders for panel presses. (clause 7). This is described as a **condition**: "It shall be a condition of this Agreement that…"; There was also a clause, clause 11, establishing how the agreement could come to end (upon proper notice or upon the commission of a material breach that has not been remedied within 60 days of being advised to do so.) Wickman failed to comply strictly with Clause 7. They sent representatives regularly, but "on a few occasions they failed to do so." (CB 456) Schuler purported to **repudiate** the agreement. They argued that Wickman had breached a condition and they therefore had the right to terminate.
I: Can Schuler repudiate the agreement?

A:
Interpretation of clauses:
- Clause 11(a)(i) provided for termination if there is a material breach that has not been remedied. So the question was **whether the parties intended that clause to apply to all material breaches** that can be remedied, including breaches of clause 7.
- Court says yes, they intended it apply to all material breaches. He then asks whether failing to make some of the required visits is a breach that can be remedied, and concluded that it could be remedied, by making a subsequent visit.
  - This meant that Clause 11(a)(i) did apply and set out the only way to terminate the agreement, even for breach of clause 7.
  - A breach of clause 7 does **not** give Schuler an immediate right to terminate, but rather, entitles Schuler to require the breach to be remedied. (CB 459)
  - This avoids the unreasonable result that missing a single visit would result in a right to terminate.
- "In short, although the phrase "it is a condition of this Agreement that" will normally have the effect of creating a true condition in a formal legal document, courts will search for another plausible meaning of

the phrase in circumstances where the consequences of so interpreting the phrase are absurd or unreasonable." (McCamus, p 676)

Intention

- Keep in mind when applying the intent tests that even where the breach of a term has produced a minor event, it can be treated as a breach of a condition. See Wickman v Schuler quoting Bettini: "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition [precedent–they just mean condition here not a contingent agreement despite saying 'precedent'], it will be one."
- BUT: We are searching for the "**intention as disclosed by the contract as a whole**." (CB 460)
- **Common sense** has a role to play. Per court in **Wickman** v Schuler, using the word condition in the contract may be enough to establish this intention but not necessarily.

H: Schuler could not repudiate the agreement because this would be an absurd/unreasonable outcome. Instead, the court found the condition in the contract was sufficient to establish an intention that the right to remedy the breach is the first step.

7.7 Performance Obligation: Principle of Good Faith & Duty of Honest Performance

Guiding question: What performance obligations arise from the various terms we have identified?

- Parties will often specify in detail the precise performance requirements. But sometimes they don't, and even if they do, there are some additional duties that courts will imply.

7.7.1 Three Ways to Imply Terms

1. **As a matter of custom/usage** → rare. Be aware of it but that's it for this course
2. **Implied in fact** → depends on presumed intention (we've encountered this already in the course).
   - Implied based on the specific facts relevant to these parties
   - We can find implied by fact through one of two tests:
     - **Business efficacy test** (i.e., must be implied for contract to be effective; OR,
     - **Officious bystander test** (i.e., would an officious bystander have found the parties intended certain terms?)
3. **Implied in law**: not based on intention but by operation of law in certain kinds of contracts. Necessity is the touchstone here.
   - **Operation of law**: means that something will be imposed b/c it is important (public policy concerns, fairness, efficiency). All courts will say that all types of X case will have Y implied term.
   - **Necessary** for contract to function fairly.

Matchinger *v HOJ Industries* – how to imply terms generally (i.e., test for necessity)

R: Requirements for reasonable notice in employment contracts fall into the category of terms implied by law. This means we aren't looking to the parties' presumed intention but rather we are concluding that **because the contract falls into a certain category, a term will be implied**.

R: test for applying terms as a matter of law → test for necessity: We ask **whether an obligation should be read into a contract because it is "necessary in a practical sense to the fair functioning of the agreement, given the relationship between the parties."** This is done by looking at the nature of the contract as well as the nature of the relationship in question

(Note that necessity does not mean that an obligation must be necessary for the very existence of the contract)

F: This is an employment law case, dealing with the question of whether there is an implied requirement of reasonable notice of termination of employment.

I: "in the absence in a contract of employment of a legally enforceable term providing for notice on termination, on what basis is a court to imply a notice period and, in particular, to what extent is intention to be taken into account in fixing an implied term of reasonable notice in an employment contract?" CB 521 → what's the basis on which we can imply a term of reasonable notice in an employment contract?

A:
Implied by law or fact?
- "Requirements for reasonable notice in employment contracts fall into the category of terms implied by law" (CB 521)
- Here we are not implying a term as a matter of fact. If we were, the question would be whether the parties clearly intended to include it but overlooked it (this would use: the officious bystander test; or, the business efficacy test).
- Here instead we are implying it as a matter of law. This means we aren't looking to the parties' presumed intention but rather we are concluding that **because the contract falls into a certain category, a term will be implied**.

Test for implying terms as a matter of law:
- Necessity is the touchstone. What does necessity mean?
- **Test for necessity: "such obligation should be read into the contract as the nature of the contract implicitly requires, no more, no less: a test, in other words, of necessity"** (Per Lord Wilberforce, CB 522)
  - Necessity does not mean it must be necessary for the very existence of the contract.
  - Instead, we ask whether it is "necessary in a practical sense to the fair functioning of the agreement, given the relationship between the parties." (CB 522)
- We are looking at the **nature of the contract as well as the nature of the relationship in question**.

Employment contracts:
- "[T]he question which courts have been asking themselves is whether in the world in which we live today it is a necessary condition of the relation…of employer and employee that there should be a contractual duty imposed on the employer to provide the employee with reasonable notice of termination." (CB 523)
  - The answer, looking at the jurisprudence, is a clear yes.
  - Answer is yes b/c what's at issue is the legal obligations of the employer. Part of these obligations aren't just what the employer agreed to, but also what the law requires.
  - They read in an obligation by operation of law.

H: The reasonable notice term is implied by law and requires notice in this situation.

7.7.2 Principle of Good Faith & Duty of Honest Performance

***Bhasin** v. Hrynew* – you have duty to carry out your obligations of good faith only once you are in a contract

In exam, look for terrible terrible behaviour during performance of a contract (not pre-contract or when it's getting formed) an FP and then good faith may apply. However, it will more likely show up in an essay question.

***Bhasin** v Hrynew* – good faith

R: Implied terms of good faith will be treated as all other terms in a contract. Breach of implied terms of good faith will result in penalties.

R: Good faith on its own is **not** a cause of action (need it to be good faith as reasonableness or good faith as honesty for possibility of action)

R: The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties **honestly and reasonably** and not capriciously or arbitrarily. This means that parties must have "appropriate regard to the legit contractual interests of the contracting partner.

R: The good faith principle has two functions:

1. it is the source of and justification for certain aspects of contract law already in place.
2. it is the foundation for the courts to devise new contract rules or elements, though this must be in a restrained, incremental, and precedent-respecting manner

R: Four types of situations which will also lead to courts implying a term pre-Bhasin.

1. Where there is an implied term of reasonableness *must be necessary & fit within the contractual interpretation
    a. By operation of law: Some contracts contain a good faith term implied by operation of law (such as insurance, employment, landlord/tenant, and franchise contracts → mostly united by the power differential. This is a general principle applied by operation of law for reasonableness in interpreting these contracts, regardless of the parties' intentions). *Bhasin* says that this is one of the manifestations of good faith.
    b. Implied in fact: The term is implied based on the presumed intentions of the parties and must be "in some sense, obvious from the circumstances
2. where the parties must cooperate in order to achieve the objects of the contract;
3. where one party exercises a discretionary power under the contract; and
4. where one party seeks to evade contractual duties

R: In Bhasin, the SCC recognizes a **new** duty of honesty which informs all contracts, arising out of the principle of good faith.

- This duty is a "simple requirement not to lie or mislead the other party about one's contractual performance" at 469 CB.
- Breach of this duty is independently actionable (unlike the principle of good faith itself) but it is not a term = principle that applies to all contracts & operates independent of the parties' intentions.
- Entire agreement clauses cannot totally exclude the duty, though parties may be entitled to relax the duty. CB 470

F: Bhasin: Plaintiff. Enrolment director (ED) for Can-Am, a company that sold educational savings plans (ESPs) // Canadian American Financial Corp (Can-Am): Other defendant. Company that sold these ESPs // Hrynew: Defendant. Another ED who had been successful and had merged with some other EDs.

Hrynew wanted to merge with or take over Bhasin's business as well. Bhasin was not interested in the merger. Hrynew asked Can-Am to make it happen. Can-Am was getting looked into by the Alberta Securities Commission, and it had to appoint someone to audit all of its EDs for compliance with securities law. Can-Am appointed Hrynew to this role. This would mean Hrynew would be in a position to look at Bhasin's confidential business records. Bhasin objected to this.

Can-Am told Bhasin (falsely) that Hrynew's work would be subject to a duty of confidentiality. Bhasin asked Can-Am whether the merger was going to happen and Can-Am 'equivocated' and didn't provide a straightforward reply (while knowing the merger would go ahead). When Bhasin continued to object to Hrynew auditing him, Can-Am exercised its right not to renew Bhasin's Enrolment Directors' Agreement.

The Enrolment Directors' Agreement contained:

(1) a non-renewal clause exercisable on 6 months notice by either side
(2) an entire agreement clause which seeks to define the scope of the parties' contract in order to preclude allegations of terms beyond what is written in the contract [there are no "representations, warranties, agreements, terms, conditions or collateral agreements…"]

Proc Hist:

Trial: Notwithstanding the entire agreement clause, TJ implied a term that the contract could only be terminated for good faith reasons (seems directly in conflict with the entire agreement clause, but sometimes judges are willing to work around these types of exclusion clauses but usually aren't this brazen about it). They held that Can-Am misled and was dishonest with Bhasin. The entire agreement clause was not a barrier to implying a good faith term because it would be unjust and inequitable to allow Can-Am to rely on it. Based on the good faith term, Can-Am's non-renewal would have to be exercised fairly. Breaches of good faith by Can-Am are connected to Bhasin's loss of his agency. Damages awarded: $380k including for loss of income and business.

COA: The Alberta Court of Appeal reversed, concluding that a good faith term could not be implied. There was no duty or term of good faith performance engaged by the contract because: (1) a court cannot imply a term that conflicts with an express term; and (2) the contract contained an entire agreement clause.

I: Is there an implied duty of good faith here that governs how Can-Am can exercise its contractual right of non-renewal of the agreement? More broadly, what is the role of good faith in Canadian Contract Law?
****Much of what follows draws on a work in progress by Hector MacQueen and Shannon O'Byrne (of this law school).****

A:
Good Faith Principle:

- The SCC in Bhasin recognises a general principle of good faith that underpins contract law.
- "The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily." CB 468
  - This means that parties must have "appropriate regard to the legitimate contractual interests of the contracting partner" CB 468.
  - This does not require the same level of duty as that of a fiduciary.
  - The good faith principle does not found a cause of action.
  - Instead, **the principle is a standard that organizes, unites, and underpins contract law**.
- The good faith principle has two functions:
  1. it is the **source of and justification for certain aspects of contract law** already in place.
  2. it is the **foundation for the courts to devise new contract rules or elements**, though this must be in a restrained, incremental, and precedent-respecting manner.

Good faith as **reasonableness**:

- One way the principle of good faith has manifested, especially pre-Bhasin, is that it has led to an implied term of reasonableness in certain contexts.
  - Some contracts contain a good faith term implied by operation of law (such as insurance, employment, landlord/tenant, and franchise contracts → mostly united by the power differential. This is a general principle applied by operation of law for reasonableness in interpreting these contracts, regardless of the parties' intentions). *Bhasin* says that this is one of the manifestations of good faith.
  - Some contracts contain a good faith term implied in fact. The term is implied based on the presumed intentions of the parties and must be "in some sense, obvious from the circumstances…." per McCamus.
  - Note that this is a limited avenue. It must be necessary and must fit with contractual interpretation.
- Beyond the types of relationships/contracts in which a good faith term will be implied, there are **three types of situations which will also lead to courts implying a term pre-Bhasin**.
  1. where the parties must cooperate in order to achieve the objects of the contract;
  2. where one party exercises a discretionary power under the contract; and
  3. where one party seeks to evade contractual duties.
  - While this list is thereby somewhat confined, it is also the case that the list "is not closed" and what it requires is always context-specific.
  - **But, remember the cause of action is breach of contract for all cases where a term is implied**.

Example of "Situation 2": discretionary power in a contract

- Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada, Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada,

1995 CanLII 87 SCC. (See Bhasin para 50)

- The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor." → they have to look at the fair market value and figure out what a reasonable price would be.
    - Good faith comes in here to more or less fix problems of vagueness → while "good faith" is a little vague, courts are willing to grapple with this & see themselves as being capable of interpreting.
- The SCC in Mitsui stated as follows: "[c]learly, the lessor is not in a position… to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option."

Good faith as **honesty**:

- Generally good faith as honesty **cannot** be contracted out of, but other types of good faith are sometimes able to be contracted out as
- In Bhasin, the SCC recognizes a **new** duty of honesty which informs all contracts, arising out of the principle of good faith.
    - This duty is a "simple requirement not to lie or mislead the other party about one's contractual performance" at 469 CB.
    - Breach of this duty is independently actionable (unlike the principle of good faith itself) but it is not a term = principle that applies to all contracts & operates independent of the parties' intentions.
    - Entire agreement clauses cannot totally exclude the duty, though parties may be entitled to relax the duty. CB 470

General:

- The good faith principle does not change contract law fundamentals. Rather, it explains those fundamentals and moors them. The good faith principle is not a free-standing rule or otherwise independently actionable – at least so far.
- In relation to its reasonableness arm, the principle underpins common law rules which, in certain types of relationships and certain types of situations, recognize obligations of good faith contractual performance.
- In relation to its honesty arm, the principle is responsible for generating the duty of honesty in contractual performance: This is what is newly recognized in Bhasin.

Result in Bhasin:

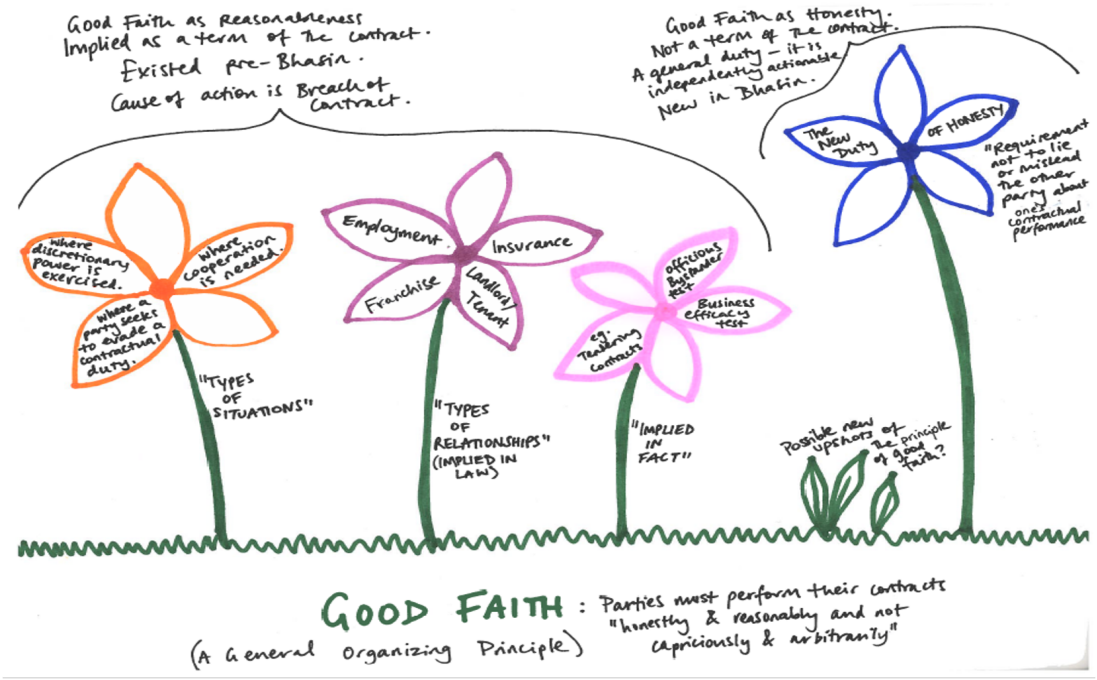
- SCC rejects analysis by TJ whereby she implied a term of good faith in Can-Am and Bhasin's contract because it falls outside of existing relationships (eg: insurance and franchise) and types of situations (ie: the three identified by McCamus and discussed above).
- SCC also rejects implying a good faith term due to operation of the entire agreement clause.
- They then reverse the COA decision based on applying the new duty of honesty (they get the same result as if they had used the implied terms analysis but instead use the duty of honesty).
- Can-Am breached the duty of honesty. Had Can-Am been honest in contractual performance, Bhasin would have sought to sell or otherwise monetize his agency before Can-Am triggered its decision not to renew.

H: Hrynew liable. The Supreme Court held that there is a general principle of good faith that underpins contract law as a whole. But, good faith on its own is not a cause of action, it merely underpins contract law.

Bhasin's significance:

- Provide a new explanation for the source and justification of a number of pre-existing doctrines. It tells us that they all arise out of the general principle of good faith.
- It also tells us that a new duty, the **duty of honesty**, arises out of the good faith principle.
- Bhasin relates to good faith in the performance of contractual obligations (not negotiation or precontractual interactions).
- We have yet to see whether good faith will generate a duty in other contexts, such as formation, or what other effects it might have.

Good Faith Illustration/Diagram



8. Standard Form Contracts & Exclusion Clauses

The General Problem

- Standard form contracts are a valuable tool to reduce transaction costs, and make it easier to engage in contractual relationships.
- However, **a problem arises when those contracts <u>exclude liability</u> for certain harms/wrongs, especially when they are signed in circumstances where the <u>parties were not of equal bargaining power and/or had no real choice or alternative</u>**.

Key Questions:

1. Has the clause been effectively included as a term of the contract?
    a. Two key categories:
        i. Contracts that have been signed
        ii. Contracts that have not been signed (like putting up a sign or warning)
2. What does the clause mean? (interpretive questions about what's excluded)
3. Is there some reason for refusing to apply the clause in this context? (courts have broad discretion to not apply, CB 493-94)

8.1 Incorporation

8.1.1 Unsigned Documents

Unsigned documents raise different issues: it is harder to demonstrate that the party really assented to the terms.

But even signed documents leave some room for ambiguity about whether the terms are really part of the agreement, properly understood.

Thornton *v Shoe Lane Parking* – exemption clauses in unsigned contracts

R: Exemption clauses that come only <u>after</u> acceptance are not really part of the contract/parties will not be bound by it. Exemption clauses must have notice, i.e., come *before* acceptance.

The more onerous the exemption clause, the more the party creating the clause is required to do to bring the clause to the other party's attention.

if you're trying to take away someone's rights, you need to make them aware of that in an explicit and direct way

F: D owns multi-storey car park which uses an automatic machine to issue tickets. Thornton parked his car in the parkade, and when he came back to collect it, he was seriously injured by a malfunction in the garage.

Proc Hist: At trial they held that it was half his own fault but half due to the fault/negligence of Shoe Lane Parking. On appeal, the defendants do not contest their fault, but they argue that due to exemption clause, they are not liable. **Exempting condition was displayed on a sign <u>not visible</u> when entering**.

Exemption clause: Defendants "shall not be responsible or liable for any loss or misdelivery of or damage of whatever kind to the Customer's motor vehicle… or *injury to the Customer or any other person occurring when the Customer's motor vehicle is in the Parking Building howsoever that loss, misdelivery, damage or injury shall be caused…*"

I: Are the exempting conditions posted on the sign part of the contract?

A:
Approach A: Ticket is delivered by an attendant (**<u>traditional analysis</u>**)
- <u>Offer</u>: made by proprietor by issuing ticket via attendant
- <u>Acceptance</u>: given by customer retaining ticket without objection
- "The Customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or if the company did what was reasonably sufficient to give him notice of it."
    - D did not do what was sufficient. Sign was <u>on a pillar too far away from the moment of entering</u> the contract.

Approach B: Ticket is delivered by an automatic machine
- <u>Offer</u>: made by proprietor who holds out the machine as ready to receive money
- <u>Acceptance</u>: given by customer when the customer puts his or her money into the slot
- "The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The <u>customer is bound by those terms as long as they are sufficiently brought to his notice beforehand, but not otherwise</u>. He is <u>not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late</u>." (CB 496)

Which approach applies here? → Approach B (machine)
- Denning says <u>offer was made at the entrance</u>, where the sign detailed the charges and said 'at owner's risk'. That is understood to refer to damage to the car.
- **The <u>offer was accepted by the plaintiff driving to the entrance and taking the ticket</u>.**
- At that point, **the contract was concluded, and "it could not be altered by any words printed on the ticket itself. In particular, it could not be altered so as to exempt the company from liability for personal injury due to their negligence."** (CB 496)
- He then goes through the alternative analysis, assuming "that an automatic machine is a booking clerk in disguise." (CB 496)
    - In that case, we apply the three questions from ***Parker***.
    - "Telescoping the three questions, they come to this: the customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or, if the company did what was reasonably sufficient to give him notice of it." (CB 497)

- D did not do what is reasonably sufficient to give notice: this was admitted.
  - What would that require? "All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way…In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it – or something equally startling." CB 497 → if you're trying to take away someone's rights, you need to make them aware of that in an explicit and direct way

Reasonableness:
- "That which is reasonable notice for one class of customers may not be reasonable for another class."
  - Different standards for, eg, commercial parties with experience shipping goods, familiar with standard bills of ladings, than we would expect for contracts with an ordinary person off the street.
- What will it mean to provide reasonable notice? This will be highly fact-specific.
  - "Where the person receiving the document might reasonably assume that the document has some purpose other than communicating contractual terms, courts incline to the view that reasonable notice has not been given." (McCamus, p 188)
    - So, this will often be the case in carpark cases of this sort: the ticket can reasonably be understood to be a receipt or voucher the purpose of which is to demonstrate ownership of the car.
  - Signage can be helpful but it must be visible at the time of signing.
  - Tickets that are designed to hide the limitation (e.g. with very small print) may not fulfill the requirement.
  - Notice requirements will escalate in proportion to the harshness of the terms in question.

H: "The whole question is whether the exempting condition formed part of the contract. I do not think it did. **The plaintiff did not know of the condition, and the defendants did not do what was reasonably sufficient to give him notice of it**."
- The defendants cannot use the exempting condition to escape liability.
- Appeal dismissed.
- The ticket cases, where the contract was made with a person, held that the notice was sufficient because the person could withdraw. But here in *Thornton* they held that the ticket cases do **not** apply to **machine** issued tickets because the notice comes too late (we still require notice to determine whether you have a contract or not, but what counts as notice is different because you don't get the notice until after you've purchased it).

8.1.2 Signed Documents

- The **classic/traditional rule** is the rule in L'Estrange v. F. Graucob Ltd. is as follows:
  - "**When a document containing contractual terms is signed, then, in the absence of fraud, or I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.**" (CB 510)
- This means that it is the responsibility of the signing party to read the document. Signing is an affirmative act and you are undertaking that you accept the terms, so it is on your shoulders if you signed and didn't read.
- Agreement is proved simply by proving that it is your signature.
- However: the worry that arises in the case of unsigned documents, that of insufficient notice of problematic or unfair terms, can also arise with respect to signed documents.

Tilden *Rent-A-Car Co v Clendenning* – exception to traditional rule of signed docs

R: When there's an extremely onerous clause & there's reason to believe the other party is unaware of it, you have an obligation to draw it to their attention.

F:
- Mr. Clendenning: defendant; signed insurance contract without reading it.
- Tilden Rent-A-Car Co: plaintiff; wants to rely on exclusions to make defendant liable for collision damages.
- Clendenning had operated the car while (mildly) intoxicated (within the legal limit), and a provision of the contract limited liability in such situations.
- Clause said: "the vehicle will not be operated… by any person who has drunk or consumed any intoxicating

liquor, **whatever be the quantity**"
    - This is a very *strict* requirement. Clendenning's understanding was that he would be covered as long as he was not "so intoxicated as to be incapable of the proper control of the vehicle"
- Court says a signature "is only one way of manifesting assent to contractual terms." (CB 510) What we have to ask is "whether the other party entered into the contract in the belief that Mr. Clendenning was assenting to all such terms." (CB 510)

I: Has Clendenning assented to the terms, including the exclusion clause? (obviously he's signed it, so by the traditional rule we'd say he was bound)

A:
- Court says a signature 'is only one way of manifesting assent to contractual terms' → we have to also ask 'whether the other party entered into the contract in the belief that Mr. Clendenning was assenting to all such terms'
    - A signature is not enough to demonstrate agreement to "unusual and onerous terms which are inconsistent with the true object of the contract" (CB 511)
- In such situations, the party seeking to enforce such terms must take reasonable measures to draw the term(s) to the attention of the other party.
- In this case, no effort was made to draw the attention of Clendenning to the onerous provisions in question.
- Therefore Tilden cannot rely on those clauses, and Clendenning is not liable for the damage to the vehicle.

H: Clendenning not liable for damage because Tilden made no effort to draw the onerous terms to the attention of Clendenning.

Karroll *v Silver Star Mountain Resorts Ltd* – alterns Tilden rule ("even if we were negligent, we're not liable")

R: If you are excluding negligence, the contract needs to explicitly state that it will exclude negligence.

R: To determine if plaintiff is bound by terms of a contract:
Step 1: start with L'Estrange v Graucob: where a party signs a document which he knowns affects his legal rights, the party is bound by the document in the absence of fraud or misrepresentation, even though the party may not have read or understood the document".

Step 2: ask if any of the exceptions apply:
1. *Non est factum*: the signature is not representative of the signer's genuine act (e.g., someone physically grabs the pen & forces you to write it, you're told the document you signed is a different document than you signed).
2. Fraud or Misrepresentation (fraud = party actively lies to you; misrepresentation = misleading about the effect e.g., 'oh don't worry this isn't that important/these rights don't matter)
3. Tilden exception:
    a. a reasonable person would have known she did not intend to agree to these terms, and
    b. the defendants failed to take reasonable steps to bring it to her attention. *(Tilden; Karoll)*
        - If the circumstances suggest that the signing party does not intend to be bound by a term, then the party benefiting from the clause has a duty to take reasonable measures to bring it to the signing party's attention (*Tilden; Karoll)*.
        - Factors that may be relevant in determining whether there must be reasonable measures to advise:
            - **Effect of the clause** in relation to the nature of the contract (whether the clause is what you'd expect in the context of the contract; is the clause related to the nature of the contract?)
            - **Length and format of the contract** (long contract weighs toward bringing the clause to the party's attention)
            - **Time available** for reading and understanding it

- (Not an exhaustive list)

F:
- Karroll: plaintiff; broke her leg while in a downhill skiing competition
- Silver Star Mountain Resorts Ltd: defendant; relies on terms of release as a defense
- Karroll wanted to compete in a ski competition put on by Silver Star Mountain Resorts & signed a document releasing them from liability. Note that she had previously competed in this same race, and signed the same liability form. Karoll was subsequently involved in a collision with another skier, and broke her leg. She alleges negligence on the part of Silver Star Mountain Resorts b/c they didn't clear the course of other skiers before allowing her to ski.
- Exclusion clause: RELEASE AND INDEMNITY – PLEASE READ CAREFULLY
  - "I agree to: RELEASE, SAVE HARMLESS; and INDEMNIFY Resorts and/or its Agents from and against all claims, actions, costs and expenses and demands in respect to death, injury, loss or damage to my person or property, wheresoever and howsoever caused, arising out of, or in connection with, my taking part in the Event… (including, without limitation, negligence)"
  - It explicitly included acts caused by the negligence of Silver Star Mountain Resorts.
  - B/c you're giving up some kind of important right, you have to be very explicit about it. You would need to say "including negligence"

I: Is the plaintiff bound by terms of the release? Is the clause part of the contract or not?

A: Karoll argues that she didn't have time to read & understand the clause.

Two lines of authority:
1. Traditional line: *L'Estrange* → "where a party signs a document which he knowns affects his legal rights, the party is bound by the document in the absence of fraud or misrepresentation, even though the party may not have read or understood the document". (CB 514)
2. Line deriving from *Tilden* → "the party seeking to rely on an exclusion of liability which the signing party has not read, must show that he has made a reasonable attempt to bring the signing party's attention to the terms contained on the form if he wishes to rely on the release". (CB 514)

Reconciling two lines of authority:
- The key is to see the **limited scope of the line from *Tilden***. It is not a general principle of contract law, but rather applies only in special circumstances.
- Follow steps in ratio above!!

Result:
- Karroll signed the release with knowledge that it would affect her rights.
- Step 1:start with L'Estrange v Graucob
- Step 2: ask whether the exceptions apply.
  - Non est factum does not apply. There was no misrepresentation or fraud.
  - Therefore she is bound unless this is a situation that falls under the third exception: one in which 1) a reasonable person would have known she did not intend to agree to these terms, and 2) the defendants failed to take reasonable steps to bring it to her attention.
    - Here, she does not fall into the exception.
      - 1. The release was consistent with the purpose of the contract; it enabled her to engage in a risky activity that she wanted to engage in. Excluding liability makes sense for that purpose.
      - 2. The release was short, clear, easy to read. There was no fine print. It made the aim clear.
      - 3. Signing such releases was common in this kind of race and Karroll had signed such releases before.

H: "These facts negate the inference that a reasonable person in the defendant Silver Star's position would conclude that Miss Karroll was not agreeing to the terms of the release. In these circumstances it was not

incumbent on Silver Star to take reasonable steps to bring the contents of the release to her attention or ensure that she read it fully." (CB 516-517)
Further - in the alternative, if this conclusion is wrong, they state that "Silver Star took reasonable steps to discharge any obligation to bring the contents of the release to the attention of Miss Karroll." (CB 517)

8.2 Principles of Contractual Interpretation

PRINCIPLES

Implied Terms

- Bhasin, Machtinger
- Earlier in the course:
    - Implied by statute
    - Implied by law
    - Implied by fact (officious bystander & business efficacy tests)
    - Implied by custom/usage

Ambiguity

- *Contra proferentem* principle: if there is ambiguity in a clause, it will be interpreted against the interest of the party who drafted it (rationale: drafting party had the chance to protect their interests & they only get to protect those interests to the extent that they clearly communicated that to the other party).
    - This is most relevant for our purposes in the context of standard form contracts: any ambiguity will be interpreted in the favour of the non-drafting party. Courts are more likely to apply the rule in contexts where there is an inequality of bargaining power and/or a 'take-it-or-leave' it bargaining situation.

Strict construction

- Related to idea of *contra proferentem*
- Courts will often apply a principle of strict construction to exclusion clauses generally.
    - In particular, clauses excluding liability for negligence are likely to be interpreted strictly.
    - "As a general proposition, very clear words must be employed in order for one party to protect itself from liability for negligence: Canada Steamship Lines Ltd. v. R." (CB 534)
        - General words won't be enough to preclude liability for negligence.
- But this principle has been **relaxed** somewhat in ***Miida*** *Electronics v. Mitsui*. They took into account that it was a contract between commercial parties, and they applied the principle of interpreting the contract as a whole.

Factual Matrix & Surrounding Circumstances (these labels are used interchangeably)

- Old view: evidence of parties' prior negotiations is not admissible. It is really only the final document we should look at because that is the only document that is authoritative as to the parties' intentions.
- New view: "**the modern Canadian position is more flexible and is in favour of admitting such evidence [of parties' prior negotiations], though weighing it carefully, where there are at least two reasonable interpretations of the contract in question.**" (CB 528)
- Evidence of subjective intentions is still not admissible, however. We are looking for the intention of the parties as seen **objectively**.
- In *Sattva*, the goal of contractual interpretation is to "understand the mutual and objective intentions of the parties expressed in the words of the contract" at para 57.
    - This involves the plain meaning rule and the contract's factual matrix.
    - The interpreter must "read the contract as a whole, giving the words used their ordinary and grammatical meaning [**plain meaning rule**] with the **surrounding circumstances**

known to the parties at the time of the formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning."

8.2.1 The Factual Matrix

IFP *Tech v EnCana Midstream and Marketing* – defining scope of factual matrix

R: Contractual interpretation is a circumstantial activity and the factual matrix can be used to help us understand what the parties *actually intended* (*Sattva & IFP* show that we can look at many different elements for the factual matrix)
F: This case concerned the interpretation of a clause in a contract. At issue was the meaning of the phrase "working interest" wrt oil & gas leases.
I: What is the relevance of the factual matrix absent ambiguity? What is properly included within the factual matrix?
A: - "The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made" - "Considering the surrounding circumstances of a contract does not offend the parol evidence rule" at para 81 → parol generally excludes turning to external evidence, but if we are interpreting the factual matrix then it doesn't offend the parol evidence rule. - The factual matrix **must** be considered even absent ambiguity at para 82. - At para 83: "As to what is meant by surrounding circumstances, this consists of "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": Sattva, supra at para 58." - At para 83 continued: "Examples of relevant background facts include: 1. the genesis, aim or purpose of the contract; 2. the nature of the relationship created by the contract; and 3. the nature or custom of the market or industry in which the contract was executed: Sattva, supra at paras 47-48… - Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": Sattva, supra at para 58, citing Lord Hoffman in Investors Compensation Scheme Ltd. v West Bromwich Building Society, [1998] 1 WLR 896 at 913 (UKHL)." → we can pull on information outside of the contract to assist in the interpretation of the contract. - Prior agreements such as MOUs (memoranda of understanding) can be appealed to as evidence of the background circumstances/factual matrix. (at para 84) - This is the case even if there is an entire agreement clause: evidence of prior negotiations and MOUs are still admissible.

8.3 Doctrine of Fundamental Breach

- Fundamental breach is no longer law in CA (***Tercon*** makes this so).
- The doctrine of 'fundamental breach' was a somewhat problematic doctrine that held that "a party could not rely upon an exclusion clause, however widely expressed, where it had committed a fundamental breach of contract." (CB 535) This led to predictable problems of determining what counted as a fundamental breach.

Tercon Contractors Ltd v BC – public policy test

R: Steps to approach exclusion clauses: (we don't have fundamental breach anymore, so we use this process)

1. Is there a **breach** of contract?
2. If yes, **is the exclusion clause at issue part of the contrac**t? (*Thornton*) Was the clause incorporated either by signature or notice? (*Tilden/ Karroll*)
3. If yes, does the exclusion clause **apply** to the circumstances **as a matter of interpretation**? (depends on parties' intentions)
    - What's the meaning of the words in the exclusion clause and do they apply here?
    - Majority says that exclusion clause doesn't apply to these facts b/c on interpretation of the words they were not participating in the RFP b/c the gov picked from outside of the RFP., while Binnie says yes the exclusion clause does.
4. If yes, is the exclusion clause **unconscionable** at the time the contract was made (versus at time of breach)
    - This requires situations of **unequal bargaining power** and **improvident bargain**.
5. Assuming validity, is there any **overriding public policy reason [weighed at time of breach]** that would justify the court's refusal to enforce it? (*Tercon,* compare to *Dow*)
    - Dow was "so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court"

R: we should not read any provision in isolation: provisions must "be considered in harmony with the rest of the contract and in light of its purposes and commercial context."

F:

- Tercon: plaintiff; responded to a Request for Proposals ("RFP")
- Province of BC: defendant; accepted a non-compliant tender from Brentwood
- Brentwood (the third party) Lacking drilling & blasting expertise, so it entered into a pre-bidding agreement (joint venture) with a company ("EAC") that did have the expertise but who was not a qualified bidder.
    - Submitted a non-compliant bid (Joint ventures were ineligible); misdescribed EAC as a 'major member' of the team instead of a joint-venturer.
    - BC accepted this non-compliant bid and tried to conceal this from the other bidders.
- The RFP contemplated that proposals would be evaluated according to specific criteria including that bids from those in a joint venture were not eligible.
- Contract A's exclusion clause (the 'no claims clause') stated as follows:
    - "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim."
- Recall from first semester: by submitting a bid, Tercon has entered into Contract A with the province of BC. Contract B would be for the actual building of the highway.
    - We are concerned with Contract A in this case.

TJ: At trial, the judge found that the exclusion clause was ambiguous and therefore *contra proferentem* would apply, meaning the clause should be interpreted in Tercon's favour. She also found that there was a fundamental breach and concluded that the exclusion clause would not apply.

I: Can Tercon succeed in an action based on breach of Contract "A" or does the no claims clause prevent them from doing that? (Tercon is seeking compensation equivalent to the profit it expected to earn had it been awarded Contract "B" which was millions)

A:

Majority says liability under Contract A → no claims clause doesn't provide a defence; dissent says liability under Contract A but ministry misconduct was not so egregious as to generate public policy reasons depriving the Ministry of protection of the no claims clause to which Tercon freely agreed ***note that the dissent is how we do these analyses; court is in agreement on this process.***

Majority:

- We should do away with the doctrine of fundamental breach.
- Instead, clause should be construed clause narrowly.What happened here does not count as "participating in the RFP" because the province's choice of a non-conforming bidder took them outside of that process.
  - Participating in RFP means participating in the contest among eligible bidders.
  - The exclusion clause only protects them from damages arising out of participation in the RFP, and so they hold it does not apply because this was not properly understood as participating in the RFP.
- Interpretive point: we should not read any provision in isolation: must "be considered in harmony with the rest of the contract and in light of its purposes and commercial context." (CB 539)
- Since the parties had the right to cancel in restart, then participating in this RFP means doing so in accordance with its rules & only with eligible bidders.
  - Court says the Province had the right to cancel the RFP and propose a new one with different eligible parties → There would be no need for this if they were protected from consequences for choosing an ineligible party.
- "In short, **I cannot accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so**." CB 540
  - Look to intention of the parties → not plausible that parties thought that despite all of these rules anything goes
- Alternative conclusion: If wrong on the interpretation point, court would hold that the language is ambiguous, and therefore we apply *contra proferentem*: interpret in Tercon's favour, therefore province barred from using the exclusion clause.
- Therefore: appeal allowed: Tercon can get damages.

Binnie's dissent:

- Legal issue: when will an exclusion clause apply or not apply?
- Binnie agrees w/ majority that we should reject the doctrine of fundamental breach.
- Instead, the test is whether there is some overriding consideration of public policy that is sufficient to defeat the value of freedom of contract. If not, then the exclusion clause applies.
- Relying on a previous case, *Hunter*, he points out that we should look to doctrines we already have, such as unconscionability. (CB 542-3)

What counts as a **public policy argument** that will trump freedom of contract?

- Binnie raises examples of egregious criminal or fraudulent conduct as obvious examples where the contract should not be enforced. However, "the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse." (CB 544)
  - Example on far end of egregious criminal or fradulent conduct: Dow knowingly supplied a defective product to a customer, leading to pipeline leaks, causing property damage and health issues. Held that "Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court." (*Plas-Tex Canada v Dow Chemical*)
- If we have conduct approaching serious criminality or egregious fraud (like in *Dow*), that will be incontestable cases of public policy overriding freedom of contract. But beyond that, harder to know where to draw the line.
  - How does this compare to *Dow*? How serious & egregious (thinking about knowledge, circumstances generally)? Would it still fall into the area Binnie says is still a public policy concern?
- Binnie argues that the exclusion clause does cover the conduct in question. He thinks it is a strained interpretation to say that the process stopped being the RFP process due to the province's choice of an ineligible party.
  - Public policy question → Tercon is a major commercial party. No imbalance of bargaining power.
  - The conduct of the province was in breach of Contract A. However, it was not so egregious as to lead to the result that public policy requires us to to not enforce the exclusion clause.
  - Therefore Tercon cannot recover: the exclusion clause bars damages claim.

H: appeal allowed: Tercon can get damages.