22/23

Contract Law

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Table of Contents

Intention to create legal relations

- Contracts are essentially forward looking fulfilling reasonable expectations/promises
- Creation of enforceable contracts
    1. intention to create legal relations (a willingness to be bound)
    2. offer and acceptance – a meeting of the minds
    3. consideration -- an exchange of value (the bargain elements)
- No contract unless requisite *intention*
- Intention as a question of fact
    - Determined objectively not subjectively
        - "test of the reasonable person" consider the impression the parties they made on a "reasonable person"
            - What a reasonable person (in their situation) would have determined in the relevant parties' situation
    - Objective standard used in contracts because you have to be able to rely on them
- Parties' actual intention not determinative
    - Contract may or may not be recognized despite actual intention
- Plaintiff has to prove everything on a balance of probabilities (default rule in private law)

Balfour v. Balfour [1919] 2 K.B. 571

Facts: Husband and wife visited England together. Wife had to stay behind in England due to illness and when he left, the husband agreed to pay her £30/month. Agreement made when the couple was *in amity,* and with assumption they'd be reunited, but it deteriorated, and he decided they should remain apart.
Issue: Is a contractual intention presumed in a domestic context?
Ratio: No intention to create legal relationships in amicable family arrangements
Analysis (Atkin LJ):
High threshold to prove that there was contractual intent. Many agreements b/w two parties that don't result in contracts – many between spouses; mutual promises aren't contracts. These are beyond the common law; in "domestic code," and this should remain private.

Conclusion: Not a contract because neither party intended to create legal relations

Rose and Frank Co. v. J.R. Crompton and Bros. LTD. [1923] 2 KB 261 (CA)

Facts: Plaintiff were distribution agents for defendant's paper company. D supplied paper to P for many years. New "contract" w/honourable clause saying it's not a legal agreement. D stopped fulfilling orders; P sued for breach of contract.
Procedural History: Trial judge rejected honourable clause and said it was an enforceable contract. Disputed clause rejected as "repugnant" to agreement as whole.
Issue: Is contractual intention presumed in a commercial context? What is needed to rebut intention?
Ratio: In a commercial context, we presume there is an intent to create legal relations unless the defendant can prove otherwise.
Analysis: Parties free to enter *or* not enter contractual relations.
Scrutton LJ: "I see no reason why the parties shouldn't intent to rely on each other's good faith and humour, and to exclude all idea of settling disputes by any outside intervention.
Conclusion: Clause in question shows clear intention by the parties that the agreement should not affect their legal relations – not a contract.
***Dicta*:** Scrutton LJ: "legal consequences … to follow" even if no contract.

- Magic of unjust enrichment
- *But* UE ultimately not required
    - House of Lords upheld Atkin LJ view that actual deliveries created contracts
        - D need not fill orders (1913 agreement not a contract)
        - *But* contract relief available for orders that were filled

Unjust Enrichment

- Way to understand how something happened if there's no contract in *Rose and Frank,* there was no contract, so there was unjust enrichment (relief needed for paper orders that were filled)
- If you transfer something to someone and there's no reason for it
    - Have to make sense of the transfer: no contract, therefore unjust enrichment
        - Always **restitution** as remedy
- Always has the same three elements
    - Enrichment to D
    - Corresponding deprivation to P
    - Absence of juristic reason for enrichment

Toronto Dominion Bank v. Leigh Instruments Ltd. (1999 Ont CA)

Facts: Leigh Instruments is subsidiary company of larger company Plessy. Plessy provided letters of comfort to Bank on behalf of Leigh.

- Letter of comfort not a guarantee. Contained a clause: Company policy that Leigh be managed in such a way that it can always repay its debts. Leigh can't repay its debts so TD wants to go after Plessy.

Issue: Are comfort letters legally binding? Do comfort letters serve any useful purpose?
Ratio: comfort letters interpreted based on reasonable person. Not legally binding cuz no intention
Analysis: (1) Surrounding circumstances: sophisticated business parties and the purpose of document was to meliorate concerns regarding loan • (2) Plessey continually refused to give guarantee • (3) Policy: Comfort letters are practically useful without being legally enforceable (business reputation)
Conclusion: Plessey not liable for Leigh debts bc comfort letter not binding. Presumption that Plessey would be bound bc of commercial context but comfort letter enough to rebut that presumption.

CAPACITY:

- General concept not restricted to contracts; ability to create or alter legal relationship
- Not all-or-nothing: can have capacity for some relationships but not others
- Not exclusively related to mental ability; related to legal policy (<18)
- Presumption of capacity: Burden rests on person denying capacity

Exceptions:

- Corporations
  - *Business Corporations Act s 16*: same capacity as natural person
    - Capacity obtained **only if and when incorporated** – no capacity prior to incorporation
  - *Business Corporations Act s 15:* liability on company if it **ratifies** contract post-incorporation
    - If corporation has not ratified contract, liability on person signing for the company •
- Mental Incapacity (illness or intoxication)
  - Certified incapacity = **VOID**
  - Not certified = **VOIDABLE**
    - Only voidable if at the time contract was made, the other party knew or should've known (RP) that the person lacked capacity
    - Policy: don't want to infantilize seniors
- Infants (<18)
  - Presumptive rule: Contract not to infant's benefit - their choice until reasonable time after majority = **VOIDABLE**
    - *Age of Majority Act s 1*: 18 in AB
  - Necessaries of life + beneficial employment = **ENFORCEABLE**
    - Policy: want vendors to interact with children on their own
    - Employment: if terms favorable for employer, then may be **VOIDABLE**, if terms favorable for child then **ENFORCEABLE**

OFFERS

OFFER AND INVITATION TO TREAT

- **Offer:** expression of willingness to be bound to contract on certain terms
- Offeror's subjective intention to be bond is not determinative. Must be OBJECTIVE
  - "proposal" = "offer" if viewed by *reasonable person* as such
- If what constitutes an offer is too broad, then there is indeterminate liability to indeterminate number of people. contract formed immediately upon acceptance of offer by offeree
- Criteria for offers:
  - (1) Offer doesn't have to have special form – only requirement is unequivocal words or conduct that the RP would understand to be an offer
  - (2) Recognition of offer depends on totality of circumstances – prior and subsequent events help explain whether RP would interpret it as an offer or not. Precedents and presumptions play a role
- **Presumptions:**
  - No offer if "statement of intent"
  - No offer if statement is price quotation
  - No offer if "statement of inquiry"
- **Invitation to treat:** non-binding invitation to receive offers.
  - Rebuttable presumption: Items on shelves or advertisements are usually invitations to treat

Pharmaceutical Society of GB v. Boots Cash Chemists Ltd. [1953] 1 Q.B. 401

Facts:

- Pharma Society, whose duty is to take all reasonable steps to enforce the provisions of the Pharmacy/Poisons Act, sued Boots, arguing that the "self-service" nature of Boots didn't allow for the proper supervision that section 18 of the Act demanded
- In every case involving sale of a drug, the pharmacist supervises the part of the transaction that took place at the cash desks—authorized to prevent a sale at that point
- Two customers purchased a bottle each of medicine which contained small amount of poison
- Pharmaceutical Society arguing that a purchase of an item is complete when a customer takes an article from a shelft and puts it in their receptable
  - Issue with this in the society's view is that the pharmacist then has no power to say "no you can't buy that" because the "contract is already complete"
  - Argue that supervision can only be exercised at the time when the contract is completed

Issue: What are the legal implications of this layout? Is an article on a shelf an invitation to the customer?

Ratio: Item displayed on shelves is invitation to treat; contract formed at the counter when payment becomes acceptance. Rebuttable presumption that initial communications are invitations to treat

Analysis:

- In ordinary shops, like a bookstore, where goods are similarly displayed, the contract is not completed until the customer, "indicates which articles he needs", and the shopkeeper accepts the offer to buy.
- See no reason for this to be different, and therefore, if it's not different, then the purchase/completion of the offer is completed at the cash desk, under the supervision of the pharmacist and therefore under the requirements of the Act.
- If items on shelf were offers, then once a person picked up an item they would not be able to change their mind and replace items in basket

Holding: Appeal dismissed. Items on shelves are not offers, therefore the transaction is overseen by the pharmacist.

Implications:

- Proposed sale of illegal items: *FISHER V BELL* [1960] ENG CA
  - Displayed a knife for sale in window, which was illegal. Not charged because merely invitation to treat.
- Price-tag switching: *R V DAWOOD* [1976] ABCA
  - Switched the tags on items. In order to be crime, there needs to be a contract. Merely making a different price offer for the same items

Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 256

Facts:

- Carbolic Smoke Ball put ad in newspaper offering £100 to anyone who contracted influenza after using their ball 3x day for two weeks; stated that money was in a bank showing their sincerity
- Plaintiff used it, got flu, sued for money

Procedural History:

- Hawkins J held that she was entitled to the money. Defs appealed.

Issue: Was the advertisement in the newspaper an offer to enter into contract? If yes, does it matter that there was no notice of acceptance?

Ratio: Notice of acceptance is not required when an offer is broadly made, and the person making the offer expressly or impliedly intimates that performance of the condition is sufficient acceptance. Must consider if the reasonable person would consider the offer legitimate.

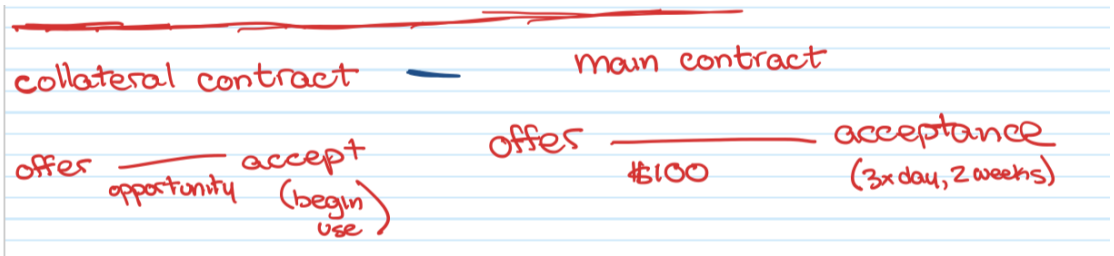
Analysis:

- Reasons that a reasonable person would consider it a real offer:
  - Money placed in bank
- Not contract made with the whole world, but *offer* made to whole world
  - Would "ripen to contract" with anyone who comes forward and performs the condition
- If the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, then performance of the condition is a sufficient acceptance without notification
  - The case here; this offer is a continuing offer – acceptance need not precede the performance

Holding: Appeal dismissed.

Class Notes:

- **Bilateral contract:** promise exchanged for promise
  - Bilateral in the sense that both parties are required to perform
  - Offer and acceptance occur prior to formation of contract
- **Unilateral contract:** act exchanged for promise
  - Offer accepted *through* performance by offeree
  - "unilateral" because only offeror's obligations remain



Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd (1985 HL)

Facts: Royal Trust Co (R) invited Harvela (A) and Sir L to make offers to purchase vendor shares—stipulated that these offers must be made by sealed tender not divulged by vendors before invitation expired, upon which point the vendors would pick highest offer. Harvela offered 2.175 mil; Sir L, 2.1 or "$101,000 in excess of any other fixed offer"
Procedural History: Peter Gibson J found for Harvela; CoA found for Sir Leonard.
Issue: Were Harvela and Sir L invited to participate in fixed bidding sale or auction sale?
Ratio: Terms of invitation to treat *may* be binding on eventual offeree
Analysis:

- HL found that the invitation created a fixed bidding sale and Sir L not entitled to submit, nor were vendors entitled to accept, a referential bid.
- Invitation contains 3 provisions only consistent with presumed intention to create a fixed bidding sale:
    - *Offers made by sealed tender, not divulged until invite expired, vendors would accept highest offer*
- Invitation to treat intended to elicit highest price each party was prepared to offer in ignorance of the other's offer
- Conclusion: Sir L failed to name any price except 2.1 mil (less than Harvela), so vendors bound to accept Harvela's offer

Holding: Appeal allowed

R. v. Ron Engineering & Construction Ltd. [1981] S.C.R. 111

Facts: Call for tenders put out with terms: specific deadline, $150,000 deposit, and cannot revoke offer once submitted. Contractor submitted a tender to build a project for $2.7 million. Employer who submits the tender discovers after the closing time that their tender is significantly lower than the next lowest. The owner submits a request to withdraw and add an amount to the tender to raise it up. The contractor maintained that it hadn't withdrawn its tender, but that "it was incapable of being accepted."
Issue: *Did the submission of the tender form a contract? Would the contractor have been entitled to withdraw its tender and recover its deposit?*
Ratio:

- **Tendering process involves 2 contracts: Contract A and B**
- **The submission of a bid accepts Contract A and is an irrevocable offer for Contract B**
- **Bids can only be recovered if they don't conform with terms/conditions of Contract A**

Analysis:

- Call for tenders can't be offer – danger of mischief around too many offers.
- But, in Estey J view, no doubt that a contract ("KA") arose upon submission of the tender; in that contract, tenderer couldn't withdraw the tender for 60 days upon opening of tenders.
    - This was a (not actually) unilateral contract because the contractor was responding to a call for tenders
- Contractor did expressly avoid phrasing that would indicate withdrawal of tender when requesting the opportunity to amend
- Normally, bilateral contract is promise/promise and unilateral is promise/act but here it is a bilateral contract with promise/act (but that act contains implicit promises – promise not to revoke, promise to build in the future)
- Crown executed KA by choosing lowest bid. Contractor required by KA to sign KB within one week. Contractor breached KA by not signing KB. Remedy for gov't under KA breach is retention of the deposit

Holding: SCC confirmed trial judge's dismissal of contractor's claim for return of the tender deposit. Appeal allowed.

MJB Enterprises Ltd. v. Defence Construction (1951) Ltd [1991] 1 SCR 619

Facts: Gov't wanted to build a structure that could have three different materials with different costs. Tender conditions included that it wanted one price and privilege clause – "lowest or any other tender shall not necessarily be accepted". Gov't chose winning tender that had different prices for different materials.
Issue: Whether the inclusion of a "privilege clause" in the tender documents allows the person calling for tenders to disregard the lowest bid in favour of any other tender, including a non-compliant one.

Ratio: Privilege clause generally effective only for "cost", not effective for non-compliant bids. Three instances where terms can be implied into contract: (1) custom, (2) legal incident for particular type of contract, (3) presumes SUBJECTIVE intentions of parties under business efficacy and officious bystander test

Analysis: general instances where terms may be implied in a contract that are not expressly written:

1. Custom or usage
2. Legal incidents of a particular class or kind of contract
3. Presumed (subjective) intention of the parties where the implied term must be necessary
    a. For "business efficacy" on "officious bystander test"
    b. Terms applied into contract if they are necessary in order to give the contract business efficacy and the "officious bystander" would say that "obviously this term is implied into the contract"
    c. When dealing with implied terms, important to focus on the ACTUAL intentions of the parties, not the intentions of REASONSABLE PARTIES

- Implied term in to consider only **compliant bids**, no implied term to accept **lowest cost** bid
    - Costs of making tender is only reasonable if KB applies to only compliant bids
    - Lowest cost often extends beyond just price (consider length of project, likelihood of success, experience of bidder)
- Privilege clause permits good faith aware to non-lowest bidder but doesn't mean they can pick JUST ANY bid (also outweighs custom)

Remedy: D breached KA by accepting non-compliant bid (not b/c they didn't pick lowest bid – they didn't have to) so P entitled to expectation damages (amount gov't paid – costs = amount they would've profited)

- They didn't abide by the rules of the process contract

COMMUNICATION OF OFFER

Blair v Western Mutual Benefit Assn, [1972] 3 WWR 284 (BC CA)

Facts: During meeting, members agreed that Blair, upon her retirement, would get two years salary. They got to her transcribe the notes – never mentioned the 'offer' to her. She retired, and they didn't give her money. No causal connection, she didn't retire because of offer. She also took no action to accept the offer.

Issue: Must the offer be communicated *as* an offer? Must offeree be *motivated by* and act *in response* to offer?

Ratio: No contract unless acceptance motivated by desire to accept offer. No offer unless statement communicated *as* offer.

Analysis:

No contract because wasn't communicated as an offer.

- Resolution communicated for stenographic purposes only; communication did not evince willingness to be bound to contract.

No contract because she wasn't motivated to retire because of the offer.

Holding: Appeal dismissed, not entitled to the 2 years of salary.

Williams v Carwardine (1833) 4 B & Ad 621 (KB)

Facts: Brother of deceased Carwardine puts out notice with reward for info about murder. Murderer knows P witness murder – P says nothing cuz she's scared. Murderer beats P almost to death. In the hospital, P tells police who the murderer was – for the sake of clearning her conscience because she thinks she's going to die. When she recovers, she suits D for the rewards $.

Issue: Must the offeree be motivated by desire to perform act of acceptance?

Ratio: Motivation irrelevant if offeree knowingly performs stipulated act.

Analysis: Doesn't matter that she wasn't motivated by offer. Motivation irrelevant. That she knew about the offer was enough (specific for unilateral contracts). RP – if you knew about offer and fulfilled act then reasonable expectation to receive reward

Holding: There's a contract, she's entitled to the money.

R v Clarke [1927] AUST HC

Facts: Police offered reward for information, terms are critically important for this case, offer said: "reward paid for anyone who provides information leading to arrest and conviction of the person(s) who committed the murderS". P saw the offer but initially refused. Later provided information (that led to conviction) for self-preservation reasons but forgot about the reward. Crown refusing to pay.
Issue: Must offeree be motivated by desire to accept offer? Must offeree have known of offer when performing act of "acceptance"?
Ratio: Offeree need not be motivated by desire to accept offer. Offeree cannot accept offer in ignorance.
Analysis: Clarke was an accessory, and his motivation was to clear his name, he had no intention to accept the offer from the Crown. Party has to know that the offer exists – can't "accept" without knowing it exists

- P didn't have offer in mind when he gave information ***no reasonable expectation of reward***
- Extra comments: unilateral contract is only complete when there is FULL and COMPLETE acceptance.
    - Didn't happen here: by the time Clarke came forward the police had already arrested one of the individuals, so Clarkes information did not lead to the ARREST AND CONVICTION of MURDERERS
    - **Good contract law, bad public policy** o
- Rebuttable presumption: if a person knows about the offer then they remember it unless there is explicit evidence to show they forgot about it (this case)

Holding: appeal allowed. No contract created. Don't have to pay Clarke

ACCEPTANCE

COUNTER OFFER

Livingstone v Evans, [1925] 2 WWR 453

Facts: D (seller) sends offer of $1800. P (buyer)- "send lowest cash price, will pay $1600". D (seller) – "cannot reduce price". P(buyer) – accepting $1800
Issue: Whether the P's counteroffer was in law a rejection of the D's offer which freed them from it
Ratio: Counteroffer is a rejection of older offer and creation of new offer. Mere inquiries are not counteroffers
Analysis:

- P offer of $1600 was counteroffer that killed the original $1800. By themselves, now that P has offered $1600, they cannot go back and accept $1800.
- D statement "cannot reduce price" is implicit counteroffer to the $1600 – rejecting counteroffer of $1800 and re-offering $1800
- P was able to only accept the third offer (the revival of the $1800)
  Holding: There is a contract.

BATTLE OF THE FORMS

Butler Machine Tool Co. v Ex-Cell-O Corp [1979] 1 WLR 401

Facts: In response to inquiry by buyers, sellers quoted a price at X; on the back of their offer were T&Cs that were to "prevail over any t&cs in the buyer's order". One of the conditions said that the sellers could charge the buyers the price prevailing at the time of delivery. Buyers replied by placing order & at foot of their order form, there was a tear-off slip that invited them to accept the t&cs stated thereon. On June 5, they did along with a letter stating that the the buyers' order was being entered in accordance with the May 23 quotation. When the delivery came, the sellers argued they were entitled to an addition sum of $.
Issue: There was a contract created, but on what grounds?
Ratio: Various means for resolving battle of the forms. Traditional – whenever there is consensus ad idem. Denning – first shot wins, last shot wins, shots construed together as a whole (DON'T FOLLOW HIS REASONS IN EXAM)
Analysis:
Traditional view: sellers made an offer and b/c the buyer gave something back with different terms and conditions (it was not exactly the same) then according to *Hyde v Wrench* this was a counteroffer that killed the original offer

- When the sellers signed and sent back the buyer's form that contained the new provisions, this constituted acceptance of the counteroffer (**parties ad idem on D's terms**)

Lord Denning – three non-traditional approaches to resolving battle of the forms:

- Strong judicial desire to find valid contract especially if contract executed:
- 1) "last shot wins"
    - If no objection to last set of terms … deemed acceptance
- 2) "first shot win"
    - Later terms irrelevant unless highlighted
- 3) "reconciling the shots" **(preferred)**
    - ***All* terms construed together**
        - if consistent … valid contract on such terms
        - if contradictory … judicially create reasonable terms

Holding: Appeal allowed; judgement for the buyers that their version of the t&cs prevailed

Tekdata Interconnections Ltd. V Amphenol Ltd, [2009] EWCA Civ 1209

Facts: ***Amphenol is the appellant***

Supply chain: Rolls Royce Goodrich Tekdata Amphenol

- Tekdata buys parts from Amphenol and then gives them to Goodrich (all part of supply chain of Rolls Royce)
- Tekdata had a contract with Goodrich that Tekdata would purchase the stuff from Amphonel at the price and specifications of Goodrich
- Goodrich also had a contract with Tekdata saying that they would send the parts to Tekdata at the price and specifications that Tekdata asked for
- Tekdata generated a "purchase order" (OFFER) to Amphenol with terms favoring things like quality control and best possible quality
- Tekdata believed that a contract was created as soon as they sent the Purchase order, but this legally can't be true and there was no evidence of such except for the fact that the parties had enjoyed a business relationship for >20 yrs
- Amphenol responded with "acknowledgement" (COUNTER-OFFER) that contains lots of terms about exclusionary clauses and insurance
- Parts get to RR and there is a problem, so they are trying to figure out who's problem

Analysis:

- Focus: commercial need for certainty of terms and predictability of results
- Orthodox analysis for battle of forms *unless intention otherwise (rare)*
- P believed contract automatically upon D receiving purchase order
    - **No contract without acceptance; no acceptance in mere receipt unless other contractual duty to accept**

At Trial:

- Dispute resolved on Tek (P)'s terms result oriented decision A has worked w/G and used T's same criteria so shouldn't be a problem
- Contract created by P's acceptance of D acknowledgement (included D terms)
- Trial *construed desirable* contract rather than *ascertaining actual* contract
    - *Bit of a stretch by judge? Contract created by P's acceptance of D acknowledgment (included D terms) and the fact that the parties exchanged goods for money (looking at the whole package suggests contract – but on A's terms)*

Holding: Appeal allowed for A – order that t&cs for A apply

ACCEPTANCE OF INCORPORATED TERMS

- General rule: offer must be accepted/rejected *in entirety at outset*
    - *Terms can't be added after contract has been formed*
        - Price reflects *original* benefits and burdens
- *Exception:* terms may be incorporated by reference
    - Terms may *exist* at *outset* even though *details* discoverable *later*
        - Eg: concert ticket prohibition on recording

        - Eg: airline ticket: limits on baggage
    - *Existence* of terms must be sufficiently disclosed at *outset*

TRW Ltd v Panasonic Industry Europe GmbH (2021 Eng CA)

Facts: TRW purchased resistors from Panasonic over many years. In 2011, at beginning of parties' relationship, Panasonic required TRW to sign "customer file document", which stipulated:
- TRW had read the document and accepted its provisions
- Any disputes would be resolved in Hamburg under German law
- No other terms would apply unless Panasonic agreed in writing

In 2015-16, TRW ordered resistors from Panasonic. On each occasions, T's order form stipulated that the sales would be conducted in accordance with T's standard terms, which were different from Panasonic's. When T later alleged that the resistors were defective, dispute arose regarding the relevant terms.
CoA held in favour of Panasonic
- By signing the "customer file document" at outset, TRW agreed to abide by P's terms *and* agreed that no other terms would govern except with P's written agreement
- ***Gets out of orthodox analysis by doing this explicitly***

Almost always have to play orthodox unless both parties agree on other terms

Century 21 v Rogers Communications (2011 BC SC)

Facts: P argues that Terms of Use displayed on website can constitute binding contract b/w owner of the website and its users. D says they are attempt to impose unilateral contract.
Issue: Whether Zoocasa's conduct formed a contract; their acts of accessing C21 website (YES as browse wrap agreement) – if and when act of accessing website constitutes acceptance
Ratio: Contract principles remain with electronic forms of offer/acceptance—manner of satisfying may evolve
Analysis:
- Law should accommodate technological advances whenever possible
    - Contract principles remain—manner of satisfying may evolve
- **Shrink wrap contracts**
    - Computer programs sold in physical form
    - *Notification* of terms on package—*terms* only when program opened
        - Acceptance communicated through use of program (opening shrink wrap of package)
- **Click wrap contracts**
    - Computer programs sold online
        - No physical product, no possibility of prior notification
        - Terms provided online: acceptance communicated through "I agree" button
            - Potential problem of notification *before* acceptance
- **Browse wrap contracts**
    - Vendors no longer rely on express acceptance
    - Terms provided; acceptance communicated through *use* of website
        - Contract created *if* sufficient notice of terms
        - Traditional *rules* persist—*application* has evolved
- *Conclusion here:* **the act of proceeding further into the website is sufficient to communicate agreement**

Holding: Contract formed

Forms of acceptance

Dawson v Helicopter Exploration Co. [1955] S.C.R. 868

Facts: Letters back and forth about staking a claim, offer from D of "if we go up together, and if we decide to stake you will get 10% of profits...however contingent on us finding a helicopter."

- P, on active duty, agreed to terms. D revoked – found helicopter but not economically good for them to buy land. P didn't answer. D staked claim with another company. P wants 10%.
- P argued they had a bilateral contract, D says they only had a unilateral contract that would've been satisfied only when the P took them to the mineral site and the found minerals •
- And b/c it wasn't the P who took D to find the minerals, there was not complete performance so there was no contract

Issue: When will an offer be classified as pertaining to a unilateral contract?

Ratio: Rebuttable presumption that contract/offer is bilateral if unclear.

Analysis:

- Presumption: offer of bilateral contract and not unilateral contract
  - If unilateral … revocable at any time prior to full acceptance
    - Protection for offeror… no protection for offeree
  - If bilateral contract … irrevocable after acceptance by promise
    - Protection for both offeror and offeree
  - Presumption said to generally accord with expectations
- Acceptance must be clear but not necessarily express
  - Estey J: P's letter on April 12 was acceptance of D's March 5 offer
  - Situation may be "instinct with obligation"
  - Acceptance may be gleaned from total circumstances
- D's offer was of bilateral contract subject to condition subsequent
  - D to pay P 10% if claim successfully exploited
  - D to use best effort to obtain flight to claim area (condition)
- **P accepted by offer of bilateral contract through promise to perform**
  - P to guide D to area of claim
- D breached contract by refusing to transport P to area
  - Damages assessed on basis that full compliance was possible

ACCEPTANCE BY SILENCE OR CONDUCT

Felthouse v Bindley (1862), 11 CB (NS) 869 (Ex Ch)

Facts: Uncle purchase horse from nephew. Original confusion to price – 30 pounds or 30 guineas. Uncle suggested splitting the difference, "if I hear no more from you, I'll consider the horse mine." Both thought contract was formed – but it wasn't because the nephew had been silent. Auctioneer sold horse and uncle sued for conversion. Court held no contract, nothing was communicated or done to bind himself.

Issue: Can silence alone serve as acceptance of an offer?

Ratio: Silence alone is not acceptance but silence can be acceptance if you previously agreed that silence can be acceptance. Subjective intentions of the parties is not determinative. Consensus ad idem determined objectively

Analysis:

- D not liable in conversion because horse didn't belong to P
  - No contract formed between nephew and P through silence (doesn't matter that they both thought it had)
- **Policy** rationale: acceptance determined on RP test
  - Irrelevant that parties believed contract existed before auction
  - Desirable that acceptance requires outward manifestation
  - **Mischief:** Ex. If silence was acceptance, then companies would give you products you didn't want and say that if you didn't respond back then this would be acceptance
  - BC & ON have laws that if companies send unsolicited goods you don't have to return them but you can use them
- **Exceptions** to general rule:
  - Contract agreement to allow subsequent silence to be acceptance (ex. Book of the month club) – if you previously agreed that silence in future can be acceptance; you agreed to allow club to send you books every month and silence would be acceptance so when they send you books, then you have to pay for them

St John Tugboat Co v Irving Refinery Ltd [1964] SCR 614 (SCC)

Facts: D used P's boats to guide tankers in. Previous contracts expired – boats wait on standby so when D needs them they can bring the tankers in to the harbor quickly. D ignored request for new contract. D used services of P, who sent invoices. P wants to be paid. Could get UE for the services provided, but not for the times waiting.
Issue: Can silent acquiescence be construed as acceptance?
Ratio: Silence can be acceptance based on reasonable person test (objective), especially if coupled with past behavior or behavior after acceptance. Positive action on the part of offeree plainly signals agreement to terms (ex. All you can eat, shoe-shine)
Reasons:

- Objective test for acceptance: if the parties' objective intentions (based on reasonable person test) showed that they consented to the terms on both sides, then there is a contract
- If silent about acceptance after receiving services, services are to be paid for at their fair value, or at offered price if that is known to offeree before acceptance
- P not unreasonable in thinking that silence from D was acceptance b/c they had a prior contract
- Acceptance reasonably construed on actual facts:
    - D knew P held tug for its use
    - D knew P expected payment
    - D took benefit of tug service

Relief without contract?

- P could claim restitution in unjust enrichment
- But … no contract protection for P under claim in unjust enrichment
    - Example: P carelessly harms D's ship during operation
        - P can claim value of services in UE
        - But no protection of "exclusion clauses" in contract

Holding: Trial judge judgement restored and damages representing charges until Feb 1962 awarded

COMMUNICATION OF ACCEPTANCE

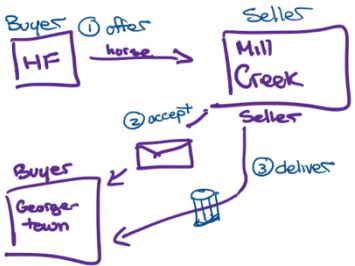
Parties must objectively agree to enter contract on the same terms – offeror and offeree must both show objective willingness to be bound on the **same terms**
Requirement of communicated acceptance protects offeror

- Generally, no contract until acceptance is communicated
- No obligations incurred until acceptance communicated
- **Practical:** Communication signals need to offeror to withdraw offer

Offeror generally master of the offer

- **General rule:** offeror entitled to stipulate mode of acceptance and usually mode of acceptance only effective in that stipulated mode
- **Exceptions:** (1) stipulated mode presumed to be more of a general guideline and not mandatory
    - (2) Requirement of communication of acceptance can be waived
        - Only the offeror is entitled to waive the requirement (the requirement exists to protect the offeror)
        - Waiver of requirement may be express or implied (*Carbolic Smoke Ball*) but is determined **objectively**
    - (3) Non-conformity to stipulated mode of acceptance may be permissible if it does not prejudice offeror •
- Any reasonable mode of acceptance is permissible if no mode is stipulated

Eliason v Henshaw [1819]



Prof: EXCELLENT judgement – applies law in common sense way that is practical.

Facts: Buyer (in Harper's Ferry) wants shipment of flour in the spring. Sent offer by wagon and requested response by way of return horse. Seller sent letter to place of business in Georgetown. Sent flour in spring, buyer says no contract, already bought flour from somewhere else
Issue: Must offeree communicate precisely as directed by offeror?
Ratio: Precise mode of acceptance is irrelevant (as long as the timing requirements are the same) but precise place of acceptance is relevant
Analysis:

- D buyer requested acceptance by return wagon but knew this was literally impossible b/c of the winter – buyer meant that they wanted a return answer in the same time frame as a wagon
    - Any mode satisfying this time frame would've been permissible
- Precise place of acceptance is relevant – buyer entitled to demand communication at specific location, because that served a specific purpose
    - Buyer would not be at the place in Georgetown until the Spring, they knew that so they asked for acceptance where they would be residing for the winter in order to ensure they received the acceptance

Holding: No contract. Acceptance by return horse means time frame (as quick as) and location (Harper's Ferry).
EXAM: The offeror can stipulate a particular mode of acceptance. Even though offeror and reasonable person believe its true, Court should go through interpretive exercise to determine exactly what the offeror had in mind when it stipulated that mode of acceptance

Carmichael v Bank of Montreal [1972] 3 WWR 175 MANQB

Facts: Cuthbert as agent and Tilley as sub-agent for seller Bank (D). D offers to sell property to Carmichael (P). D offer stipulated acceptance needed by Friday by 6 in writing. Accept 5:10, signed 5:45, phoned bank but manager gone. Left message with employee. Bank manager returned at 5:59/6:01? Too late. Also accepted by signed document at manager's house at 6:15pm
Issue: Must offeree always comply with communication requirements? Can offeror frustrate attempted communication?
Ratio: If you stipulate form of acceptance, you must facilitate it. Can't frustrate attempted communication of acceptance.
Analysis:

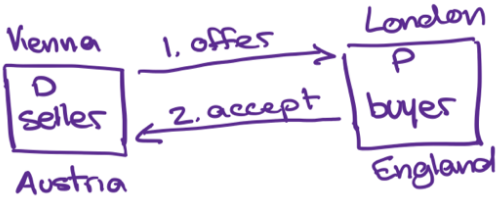
- Bank motivated to find contract bc bank trying to get out of contract and sell price to someone else for higher price
    - Broad, flexible approach to approved methods of communication.
- Acceptance established on facts.
    - D's manager received oral communication before deadline *or*
    - Oral communication to D's employee before 6pm sufficient
        - Communication need not be to *the* person in authority
    - Or if writing required: communication to C at 6:15pm sufficient
        - Offeror cannot frustrate attempted communication
        - Court holds that if you stipulate a mode of acceptance then you have an obligation that you're available to receive that acceptance
    - Offeror cannot frustrate attempted communication

Holding: they had contract and acceptance was valid. Recurring problem for Court wanting to impose obligations.
Problem: no source for these obligations because they don't have a contract

Instantaneous communication

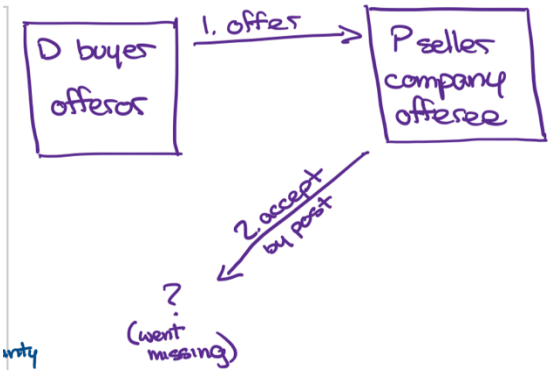
Brinkibon v Stahag [1983] 2 AC 34 (HL)

Facts: Facts: Offer from Vienna, Acceptance through telex from London to Vienna. What is the contract jurisdiction? Telex classified as instantaneous and thus contract in Austria (when and where received)
Issue: When and where does contract formation occur?
Ratio: Telex considered instantaneous communication – acceptance effective when and where received
Analysis:



general rules (subject to exception)

- contract concluded when and where acceptance becomes effective
- instantaneous communication (*eg* telephone)
    - **acceptance effective when and where received**
- non-instantaneous communication (*eg* mail) – **postal rule**
    - acceptance effective when and where sent
- telex classified as "instantaneous" communication
    - acceptance effective when and where received (Austria)
    - therefore...B unable to sue in England
        - presumably same rule for facsimiles and emails



rationale of (general) rule for instantaneous communication

- application of precedent (*Entores*) without difficulty
- no unreasonable hardship to offeree if no contract if message fails
    - offeree better able to determine if transmission fails
    - offeree can use telephone to immediately confirm
        - allocation of risk on most efficient risk avoider
        - *cf* mail (immediate confirmation impossible)
- no unreasonable hardship to offeror if contract if message works
    - reasonable offeror monitors machines for messages
    - offeror entitled to displace presumptive rules

rule for instantaneous "sound....but not necessarily universal"

- exceptions may arise in circumstances
- *eg* parties reasonably may not monitor machine
- final determination: circumstances, intentions and risk

POSTAL RULE

Household Fire & Carriage v Grant (1879) 4 Ex D 216 (CA)

Ratio: POSTAL RULE – acceptance is when and where post is sent

Facts: D gave offer/application for shares, P sent letter confirming. Added name as investor. Letter got lost in the mail and D never received it. D bankrupt, come for $100 owed. P never got acceptance, says not liable cuz not shareholder.

Issue: When and where does posted acceptance become effective? Is posted acceptance effective if lost in system?

Analysis: Thesiger LJ (majority):

- Tension of two requirements
    - Theoretical requirement of *consensus ad idem*
    - practical requirement of concluding contract through mail
- Policy considerations favouring "postal rule"
    - Impossibility of apportioning burden of inevitable hardships
    - Ability of offeror to stipulate actual receipt of acceptance
        - Stipulation may be implied from circumstances
    - Desirability of providing offeree with certainty of position
        - Offeree may be required act on belief of contract or no contract
        - Offeror similarly positioned but able to preclude postal rule
    - Prevention of fraud by offeror (but possibility of offeree fraud)
- Post office treated as agent of both parties
    - **Contract therefore concluded where and when acceptance mailed**
        - Strained rationalized of convincing policy decision

Bramwell LJ (dissent):

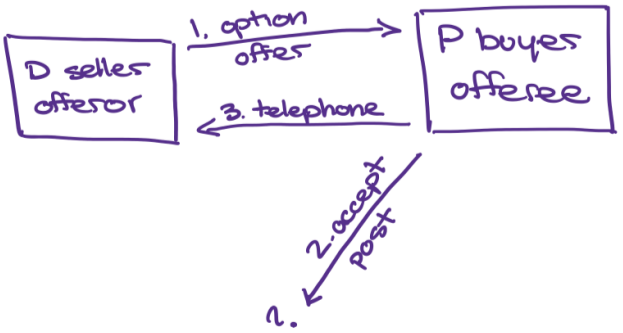
- no contract if offeree sends message by hand and message fails
    - *but* (unlike post situation) offeree would know of failure
- postal rule works to hardship of offeror if acceptance not received

    - *but* offeror able to stipulate actual receipt of communication
- posting as acceptance only if offeror agreed (not here)
    - dissent concerns *scope* of rule allowing post as acceptance
    - rule applied if offeror expressly or impliedly allowed

Holding: Contract. Postal rule applies so acceptance occurred when and where sent b/c a letter is a noninstantaneous mode of communication

Holwell Securities Ltd. v Hughes [1974] W.L.R 155

Facts: D seller sent offer as an option to P buyer. Part of offer was that offeror stipulated that acceptance had to be in writing and the D seller had to receive the acceptance. P sent letter accepting offer to purchase property. P called after to say that it was mailed. D never received the letter and D sold property to 3rd party



Ratio: D, as master of the offer, stipulated that they had to receive the acceptance. Never received the acceptance. Postal rule is a rebuttable presumption

Analysis: Offeror may permit offeree's communication by post but postal rule applicable only if reasonable in situation.

"Notice in writing" means that something has to be known by writing (objective definition based on trade practice).

- In circumstances, actual receipt of writing was required
- "Notice in writing" means two things: (1) Writing by post is acceptable, (2) Postal rule does not apply. Offeror implying no contract until they have received written copy of acceptance

Holding: No contract. Said "notice in writing", shows necessary to receive acceptance.

TERMINATION OF OFFER

Introduction to Termination

- No contract unless *consensus ad idem* through acceptance of existing offer
- Non-existing offer can't be accepted
- Means of termination of offer
    - Counter=offer by offeree
    - Revocation by offeror
    - Lapse of time
    - Occurrence of contemplated terminating condition
    - Death

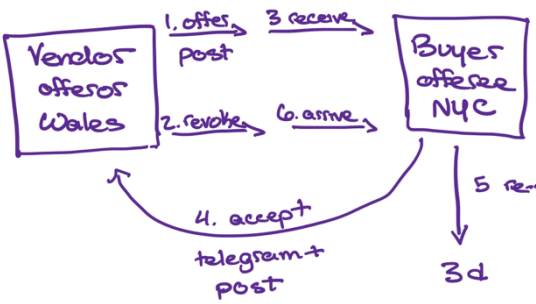
Counteroffer by Offeree

- Section I(C)(3)(a)
- Counteroffer kills offer & creates new offer
    - Counterofferee cannot unilaterally revive offer
    - *But* offeree may restate offer (*Livingstone* "cannot reduce price")
    - *Cf* "counteroffer" as mere inquiry ("will you take $500")

REVOCATION

Byrne v Van Tienhoven (1880) 5 CPD 344

Ratio: Postal rule works, but only works for acceptances, not revocations



Facts: 1 Oct: D mailed offer to sell tin plates to P. P received on 11 Oct and immediately accepted by telegram on 11 October & confirmed by letter on 15 October.

- 8 Oct, D mailed revocation of offer, which was received 20 Oct. P (on assumption they'd purchased the plates) had already sold them to third party.

Issue:

- Whether withdrawal of an offer has any effect until it's communicated to person to whom offer has been sent?
- Whether posting of letter of withdrawal is communication to the person to whom the letter is sent?

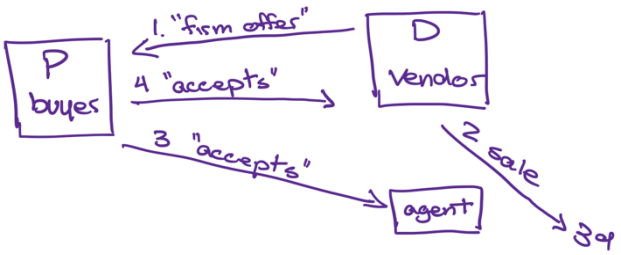
Analysis:

- For first question: "uncommunicated revocation is for all practical purposes and in law no revocation at all"
- No evidence of authority given by P to D to notify withdrawal of offer by merely posting a letter
- D's withdrawal on 8 Oct was inoperative—**complete contract binding on both parties was entered 11 October**
- If D were to prevail, no one entering agreement would know his position until he waited a period of time to find out if withdrawal was coming in the mail

Holding: judgement for the plaintiffs

Dickinson v. Dodds (1876) 2 Ch. D. 463 (CA)

Ratio: ***Mere sale of an item does not constitute revocation (can still be liable for expectation damages).*** **If you've been reliably informed that an item has been sold to 3rd party, then you can't accept and enter a new contract because you can't have reasonable expectation to buy the item. "Reliably informed" depends on the circumstances**



Facts: D gave P an offer letter to sell his house and said the offer was open til Friday, 9 am. On Thursday afternoon, P learned that D was discussing selling the place to Mr. Allan. That day he went to D's mother's house and left with her an acceptance letter, which never got to him. Friday morning, 7 am, P's agent finds D and gives him another acceptance letter, but D tells him its already sold.

Issue: If offeror bound by "firm offer?" Does knowledge of sale to a third party constitute revocation?

Analysis:

- Offeror under no obligation until contract formed.
  - Offeror generally not bound by firm offer.
- Contract formation requires *consensus ad idem*
  - Can't have this if offeree knows of sale to third party
  - Knowledge of sale to third constitutes revocation
- If you've been reliably informed that it's already been sold, then you can't enter a contract
- **Firm offer:** make offer to sell, give time frame and promise not to sell to anyone else
  - **Option:** enforceable promise (unlike "firm offer") □ separate contract ensuring offer remains for you alone

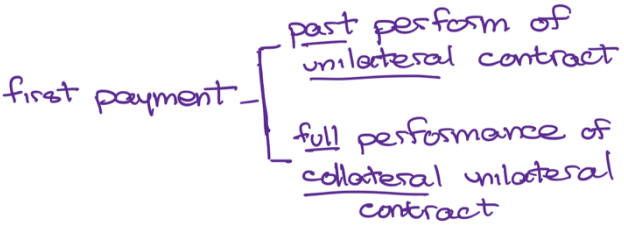
REVOCATION OF UNILATERAL OFFER

- Offer (generally) revokeable by same means of communication as offer
  - Eg: advertised offer revocable by advertisement
- Offer impliedly revoked after lapse of reasonable time

Errington v Errington and Woods [1952] 1 KB 290

Ratio: Unilateral contract not revocable after act begins—offeror must allow offeree opportunity to fully perform.

Facts: Father bought house for son/daughter-in-law to live in. Father put down £250 and borrow £500, repayable with interest by instalments. Took house in



own name, told daughter-in-law that the instalments were up to them to pay. Said that when he retired, he'd transfer it into their names. Interest was 10 shillings per week, which the couple couldn't pay and Dad said he would.
Issue: Is a unilateral contract revocable after act begins? **NO**
Analysis:

- Couple never bound themselves to pay instalments
- Father's promise was unilateral contract–promise of house in return for their act of paying the instalments; could not be revoked by him once the couple entered performance of the act
    - Cease to bind him if they left it incomplete and unperformed, which they haven't done
- If daughter-in-law continues to pay instalments, couple will be entitled to have title transferred to them when mortgage paid off.
    - If they don't, the building society would claim the instalments from father's estate & estate would have to pay them.
- Couple were not purchasers because they never bound themselves to pay the instalments but nevertheless in a position analogous to purchasers—have acted on the promise and neither the father nor his widow can eject them
- **Offeror must allow offeree opportunity to fully perform.**

Holding: appeal dismissed

LAPSE OF TIME

- Offeror may (expressly or impliedly) state duration of offer
    - Offeror (generally) able to stipulate unreasonable duration
    - Offeror (generally) free to revoke offer in interim (*Dickinson)*
- Reasonable time limit applicable if no duration indicated by offeror
    - Determination of "reasonable time" turns on circumstances
        - Subject matter of offer (eg perishable goods or volatile market)
        - Other interested parties
        - Trade practice (if any)
        - Parties' negotiations

Barrick v Clark [1951] SCR 177

Ratio: Reasonable lapse of time is very fact sensitive, depends on the circumstances of the case and the factors above. Lapse occurs based on offeror's presumed intention to revoke, NOT based on offeree's implied rejection (offeror master of the offer)
Facts: Talking about buying/selling land in Saskatchewan

- Oct 30 – P interested in buying and makes OFFER – possession in Jan/Mar, wants response by telegram (quick means of communication)
- Nov 15 – D seller makes COUNTER-OFFER, says **we could close immediately, says wants answer ASAP**. Other hand, vendor says we can't close until Jan 1 and you can't do anything until Mar b/c there is a lease on the property until then
- Nov 20 – letter reaches buyers house and wife says don't do anything but my husband is away on hunting trip and won't be back for 10 days
- Dec 3 – seller sells to 3rd party
- Dec 10 – P buyer accepts offer but D seller says too late – took too long
- Fact that property was sold is irrelevant b/c this was not communicated to D buyer so technical revocation had not happened

Issue: When and why will offer lapse if no duration stipulated?
Analysis:

- "Reasonable time" for offer to stay open is a matter of interpretation: Trial said lapse – CA said no lapse – SCC said lapse
- Factors suggesting extended duration (hadn't lapsed):
    - General non-volatility of farmland
    - Possession prior to March or farming before spring impossible

- Land on market for over one year (trying to sell for a long time)
- Factors suggesting limited duration (had lapsed):
  - Land subject of interest by several purchasers o
  - Parties communication indicated desire to move quickly – most important •
- Lapse occurs by offeror's presumed intention – Canadian rule •
  - Compare: Lapse occurs by offeree's implied rejection (Manchester) – England
  - If lapse based on implied rejection then letter to P's wife would rebut this presumption

Holding: Offer expired based on implied reasonable lapse of time presumed by offeror's intention

Termination by occurrence of contemplated event

- Existence of offer may be premised upon state of affairs
  - Condition may be implied by circumstances
    - Eg: perishable goods remain in sellable state
  - Condition may be stipulated by offeror
    - Eg: sell you my car for $5k as long as you're in school"

Death

- Offer (generally) revoked upon death of offeror or offeree
- Precise scope of rule uncertain
  - Termination may be automatic upon death of offeror
    - Acceptance perhaps possible prior to communication of news
      - Revocation usually effective upon communication
      - Offeror's estate generally liable for offeror's existing contracts
  - Termination may be automatic upon death of offeree
    - Acceptance perhaps still possible by estate of offeree
      - More likely if offer not for personal reasons
      - Eg: if offer was specifically for Tom Cruise and he dies, offer wouldn't still stand for his estate

Certainty of terms

- need **certainty of terms** □ parties need to know when each side has properly performed/also for damages

Essential Elements to formation of contract:

- Intention to create legal relations
- Offer
- Acceptance
- Certainty of terms
- Consideration

Certainty of terms: orthodox rule

- No contract formed unless terms sufficiently clear
- Courts will (theoretically) not create terms for parties

Certainty of terms and contract formation: practical judicial approach

- Courts often strive to *find (if not create)* concluded contract
- Orthodox rules tempered by judicial flexibility
  - Seemingly uncertain bargains often enforced as contracts
  - *but* uncertain as to when courts will exercise flexibility

Recurring Themes (soft factors)

1. detrimental reliance by party seeking enforcement
2. bad faith by party seeking to avoid enforcement
3. reasonable expectation of concluded contract

Situations of uncertainty (order is important – as you go down, increasing likelihood that courts can't help)

1. vague terms
2. missing terms
3. agreements to agree
4. good faith negotiations
5. anticipation of formalized agreement

VAGUENESS – *MOST LIKELY TO FIND A CONTRACT*

- no contract if (important) terms are intolerably vague unlikely fatal though
- *but* courts seldom refuse enforcement due to vagueness alone
    - courts want to find contract—especially if reliance & want to find effective meaning for parties' words
        - words inherently indeterminate and subject to manipulation
        - words generally capable of being defined from entire context
- courts may refuse enforcement if clear meaning impossible
    - *but* disputed words may be severed if unnecessary to contract

R v CAE Industries [1986] 1 FC 129 (FCA)

Facts: Negotiations b/w CAE and federal gov't to take over aircraft facility. Gov't gave them "guarantee" of man-hours and they would use "best efforts" to come up with rest of man hours for them, this would allow CAE to make profit. CAE lost money on deal, sued government for breach

Issue:

- Did parties intend to create legal relations?
- Was the contract void for uncertainty?

Ratio:

- **Presumption of intention to create legal relations**
- **Vagueness avoided by definition gleaned from circumstances**

Analysis:

Intention to Create Legal Relations

- Strong presumption of intention in **commercial matters**
- Presumption not rebutted by govt
- Clear that parties treated document as binding contract to extent it was partly performed
- Onus of proof in this kind of case is "on the person who asserts that no legal effect is intended"
- **Concludes there was intention on both parties to enter into binding legal contracts**

Certainty of terms: what does "best effort" really mean?

- **Courts strive to find certainty esp if parties have relied on contract**
    - P purchased and operated air base as maintenance site
- Issue of certainty based on substance and not form of words
    - Words interpreted in light of parties' (objective) intent
- Resolution of alleged unvertainty of terms
    - "guarantee … set aside"
        - Unequivocal obligation to provide stipulated man hours
    - "best efforts to secure additional work"
        - Certainty of term provided by entire context of usage
        - Qualified obligation to "leave no stone unturned"
            - D need not act contrary to public's interest
            - D need not breach other existing contracts
- Contract wouldn't be good if it was so vague/uncertain as to be unenforceable
    - *Not the case here*
- Is contract capable of being enforced? Loose language …
- Agree with trial judge decision that feature of the contract "obliged the govt to employ its best efforts to secure additionally work from other depts and crown corporations …"

Holding: Parties did intend to create legal relations and the terms were not so vague that a reasonable meaning could not be applied to them

Nicolene Ltd v Simmons [1953] 1 WB 543 (CA)

Vague and meaningless terms can be severed from contract if (1) what remains makes sense, (2) all the essential elements of a valid contract exist after severance, and (3) parties did not contemplate further negotiations regarding the disputed phrase

MISSING TERMS (*SECOND MOST LIKELY TO FIND A CONTRACT*)

- **No contract if (important) term is missing** (problem, looks like no *consensus ad idem* □ how to overcome)
- Missing term versus vague term
    - Vague term: question of giving meaning to existing words
        - Meeting of minds *but* intention not clearly expressed
        - Vague term likely less fatal (relatively)
    - Missing term: question of supplying new words
        - No meeting of minds *and* intention non-existent
        - Missing term relatively *more* likely fatal
- **Courts occasionally cure apparent defect of missing term**
    - 1. Court may find term by implication in circumstance
    - 2. Parties may have intended on party to supply meaning
        - No need for further agreement—decision unilaterally exercised
    - 3. Incomplete part of agreement may be severable

Hillas Ltd v Arcos Ltd

Facts: Contract: Hillas to buy 22 000 units of timber from Arcos at fair specification in 1930. 1931 agreement – Hillas to get 5% off price of 100 000 units of timber from Arcos in 1931 (no mention of fair specification – specific types of wood at certain prices, at certain ports). Arcos sells their entire supply to a 3rd party in 1931 and none for Hillas. Arcos said contract in 1930 but not 1931 b/c there was no mention of fair specification – important term was missing
Ratio: missing terms may be implied by circumstance
Analysis:

- Decision informed by maxims
    - *Verba ita sunt intelligenda ut res magis valeat quam pereat*
        - "words are interpreted so as to give force to the subject"
        - Option construed to give effect to apparent contract
    - *Id certum est quod certum redid potest*
        - "that is certain that can be made certain"
            - Specifications are certain if they can be so construed
- Nature of the 1931 option
    - Option represented part of D's consideration under 1930 contract
    - Option rendered D's offer of 1931 sale irrevocable
        - Obligation imposed immediately on D to hold offer open
    - Option gave rise to 1931 contract construed from circumstances
- No contract if content of essential terms left to further agreement
    - No *consensus ad idem* in such circumstances
- Specifications can be made certain on basis of context of contract
    - Sufficient certainty achieve through objective assessment

        - Option clause construed in context of 1930 document
        - No question of further agreement between parties
            - Option was not agreement to agree
        - Parties immediately agreed to use same terms as 1930 contract
            - "fair specification" construed applicable to option
                - Parties generally agree upon fair specficiation
                - Specifications otherwise construed by court
- Terms regarding ports and dates construed like "fair specification"
    - Alternatively settled by "reasonable" terms of *Sale of Goods Act*
- Term regarding price fixed by option clause
    - 5% less than lowest fob list price issued by D in 1931
    - Sufficiently certain as D practically required to issue list price

AGREEMENTS TO AGREE (*THIRD MOST LIKELY TO FIND A CONTRACT*)

Orthodox rule: agreement to agree does not constitute a contract (parties recognize terms aren't certain)
- *Ways to get around this though*
- No *consensus ad idem* if further agreement contemplated
- Potentially otherwise if reference to machinery or third party
- Potentially otherwise if parties silent on terms parties may be taken to accept objective reasonable price)
    - No need for further agreement

May & Butcher v R [1934] 2 KB 17 (HL 1929)

Facts: May & Butcher pay $1000 and with respect to tentage, we will agree to agree from "time to time" on price and specifics of types of tents/dates later. Includes arbitration clause. New management of tents wanted certainty
Issue: is an agreement to agree enforceable (NO)
Is this an agreement to agree (YES)
Ratio: Agreement to agree is unenforceable
Analysis:
- Agreement to agree is unenforceable
- P argued that price was to be "reasonable price" under *SGA*
    - *SGA* may imply price if parties silent
        - Parties taken to have agreed on objectively reasonable price
        - **But SGA provision applicable only if valid contract**
            - SGA provision inapplicable if agreement to agree
- P alt argument: price could be set by arbitration
    - **Arbitration clause forms part of valid contract only if contract exists already**
    - *But* arbitration clause cannot assist in *creation* of purported contract
- P alt argument: D breached by refusing to enter future contracts
    - *But* no obligation on D to enter future contracts
        - P's £1000 payment was deposit *but not* consideration for option

Foley v Classique Coaches Ltd [1934] 2 KB 1 (CA)

Facts: D agreed to purchase piece of land from P, who operated service station on adjacent premises. Sale was subject to D entering supplemental agreement to purchase all gas for their business from P – "at price to be agree by the parties in writing from time to time" – agreement contained arbitration clause. D did so for three years until they thought they could get better price for gas somewhere else; D attempted to repudiate supplemental agreement
Procedural History: Lord Chief Justice found for P
Issue: was the parties' agreement an unenforceable agreement to agree?
Ratio: agreement to agree given effect on basis of "soft factors" (the fact that they'd be operating as if they have contract for 3 year?)

Analysis:
- Parties believed they had a contract and acted as such for 3 years
- *Hillas* interpreted as interpreting *May & Butcher* flexibly
    - No invariable rule that "agreement to agree" is unenforceable
- Parties here and in *Hillas* believed contract existed
    - But surely same was true in *May & Butcher*
    - Previous agreements on similar terms in *May* were performed
- Arbitration clause allows "reasonable price" to be implied
    - But very similar clause in *May* refused efficacy

Holding: appeal fails

GOOD FAITH NEGOTIATIONS (*FOURTH MOST LIKELY TO FIND A CONTRACT*)

Agreements to Negotiate – Obligations Regarding Negotiations
- **Lots of uncertainty around these – agreement to negotiate might come to nothing at all**
- Parties *prima facie* unfettered regarding negotiations
    - Negotiation as an *adversarial process*
        - No obligation to negotiate
        - No obligation to negotiate in good faith
        - Unrestricted right to terminate negotiations at any time
- Agreement to *create* contract *prima facie* unenforceable
    - Generally no basis for judicial determination of terms
        - Difficulty in ascertaining content of putative agreement
        - Difficulty of quantifying expectation damage for breach
        - Danger of binding party to unaccepted risk
- Agreement to *negotiate* contract formation *prima facie* unenforceable
    - Generally no basis for predicting outcome of negotiations
        - Negotiations do not guarantee success
            - Difficulty in determining outcome of negotiations
    - *but* obligations of good faith elsewhere enforceable (contract validity undoubtedly affected by bad faith) – ex: agreement induced by fraud or unconscionable conduct
        - *eg* good faith satisfaction of condition precedent (*Dynamic)*
        - *eg* good faith assessment of insurable loss (*Whiten)*
        - *eg* good faith termination of employment (*Wallace)*
    - *and* contractual validty undoubtedly affected by *bad faith*
        - *eg* agreement induced by fraud or unconscionable conduct

Bad faith negotiations examples:
1. withholding info which could disabuse negotiating party of a mistake
2. bargaining with no intention of reaching an agreement
3. reneging on promise through course of negotiation
4. breach of negotiation to more attractive 3rd party

Empress Towers v Bank of Nova Scotia [1991] 1 WWR 557 (BCCA)

Facts: Parties have lease for 17 years. New lease agreement is the exact same as all the previous ones except that the price might change with the phrase "rent will be market value as agreed b/w the parties". NS sends renewal notice in advance and ET didn't respond until last minute. Send increased rent and eviction clause

Issue: Must party negotiate in good faith?
Ratio: Duty of good faith imposed in the circumstances – *anomaly case where agreement to negotiate is enforceable* – key phrase: "rent will be market value as agreed b/w the parties
Analysis:

- Impossible to imply simple agreement on objective market price
    - Option clause contemplated unsuccessful negotiations
- P cannot be compelled to enter lease unless rent agreed
- P nevertheless can be subject to negotiation obligations
    - P must negotiate in good faith
    - P cannot unreasonably withhold agreement
- What was source of obligation to negotiate in good faith? (*normally can't enforce this)*
    - Obligation desirable to give effect to option clause
    - Obligation possibly arose from prior contract
        - Implied term: officious bystander—business efficacy
            - Test: because business wouldn't have entered agreement otherwise
    - Obligation more likely reflects D's reliance and P's bad faith
        - D entered prior contract on basis of value of option
        - P's actions reflect vindictiveness (imposing $15k penalty because they were at the bank and got robbed of $30k and insurance only paid $15k)
- What relief if P refused to negotiate in good faith?
    - Damages to place P as if D properly performed
        - *But* option contemplated unsuccessful negotiations

Note: *Empress* often cited—seldom used to *impose* obligation of good faith
    - *Only because of the odd features of the case that court found obligation to good faith negotiation*
    - *Duty to negotiate even if everyone behaves, might not be successful*
        - *Have to account for this probability of success when quantifying damages*

Molson Canada v Miller Brewing [2013] ONSC

1. Bald agreement to agree/negotiate is an unenforceable obligation due to lack of certainty wrt specific obligation. Can be enforceable depending on the content
2. Content of any contractual obligation to negotiate in good faith is of critical importance
3. Feasibility of a remedy – court unable to award damages for breach
    a. Some circumstances where injunctive or other equitable relief is appropriate remedy
4. Upheld where there was sufficient certainty regarding the issue(s) to be negotiated to provide objective standard to the court regarding an alleged breach
    a. Arbitration clause presence is relevant but not necessary
5. Agreement to negotiate in good faith can be sometimes upheld bc parties have reached sufficient agreement on principal issues

Mannpar Enterprises Ltd. v Canada, (1999) 173 DLR

Facts: Agreement with Crown to extract sand on Native reserve. 5 years with an option to renew for 5 more years. Both parties expected 10 years. Crown did not renew. Mannpar said Crown had repudiated its obligation to renew
Issue: Is there a duty to negotiate in good faith?
Ratio: no obligation to negotiate in good faith. Right of renewal does not always imply duty to negotiate in good faith. No common law obligation to negotiate in good faith – must be in contract (expressly or implied) based on objective standard to measure duty
Analysis:

- Agreement to negotiate is unenforceable because it lacks the necessary certainty same does not apply to an agreement to use best endeavors

1. Distinguish *Empress Towers*—objective standard established
    a. Court provided with basis for measuring conduct and relief

i. *Eg* market rent sets limits on reasonable disagreement
b. *But* no objective standard here—no reference to market value

2. Distinguish "other cases" – mechanism within *existing* contract frustrated
   a. No persisting contract no source of obligation to negotiate in good faith
   b. Party cannot unilaterally nullify in bad faith by lack of effort
      i. Eg good faith duty to satisfy condition precedent (*Dynamic)*
3. Crown subject to fiduciary duty to Skway Band
   a. Crown requires very broad latitude in negotiations with P
      i. Crown cannot act contrary to Band's best interests Court will not imply term that places Crown into intractable dilemma
   b. Duty of good faith might intolerably conflict with fiduciary duty

Holding: no obligation to negotiate in good faith

ANTICIPATION OF FORMALIZATION *(LEAST LIKELY TO FIND CONTRACT)*

Introduction

- Letter of intent *or* memorandum of understanding
- Contemplation of formalized agreement in future—legal consequences

1. **Anticipated document may formalize *existing* contract (certainty & intention)**
   a. Have all the terms in place (certainty of terms) and they have intention
   b. Already have a contract and formalization just means it becomes one written document
2. **Anticipated document may complete *otherwise existing* contract (certainty, no intention)**
   a. No enforceable contract without document
   b. Could have a contract – all the elements are there (offer, acceptance, certainty of terms) but there is no intention
   c. This means "I will go and think about it. I don't yet know if I want to do this". Can still change my mind and walk away
3. **Anticipated document may entail further negotiations *incomplete* contract (no certainty, no intention)**
   a. No enforceable contract without document
   b. We still have lots of work to do; some pieces are in place but there are other negotiations that need to occur
   c. Still uncertainty of terms and no meeting of the minds, I can still walk away

- **Classification: question of intent *and* contractual requirements**
  - No immediate contract unless parties so intended
  - No immediate contract unless existing terms sufficiently certain
- Practical problems: performance in anticipation of contract

Bawitko Investments v Kernels Popcorn (1991) 79 DLR (4th) 97 (Ont CA)

Facts: Looking to acquire franchise. At meeting, made oral arrangement to modify Kernels standard form contract. Bawitko began making payments. Kernels sent formalized agreement but contained no modifications.
Issue: Is enforceable contract premised upon future formal document?
Ratio: No intention to create oral agreement—future document not mere formality. Oral agreement, when lacking essential terms, is not enforceable due to lack of certainty
Analysis:

- Relevance of anticipated document turns upon **parties' intentions**
  - If document to merely *formalize* arrangement—contract *may now* exist
    - Contract *will* exist *if* other essentials also satisfied (*eg* certainty)
  - If document to *create* agreement—contract *cannot yet* exist
    - No (objective) *consensus ad idem*
- No finalized contract on April 18
  - Meeting resolved *some* outstanding issues
  - Both parties anticipated further negotiations on *other* essential terms
- *If* oral contract intended: contract not defeated by *Statute of Frauds*
  - Parties' subsequent actions unequivocally referable to alleged contract

- *Even if we wanted there to be a contract, didn't have certainty of terms so no contract exists*

Holding: No contract. Meeting resolved some outstanding issues but both parties anticipated further negotiations on other essential terms (no certainty of terms).

CONSIDERATION

Consideration and the Bargain Theory of Contract

- "Consideration as originally defined
  - A reason for a promise sufficient to require enforcement
- "Consideration and 19th C judicial philosophy
  - Bargain as the touchstone of enforcement
    - Emergence of a common law paradigm
    - **Agreement enforced if contained within a bargain**
      - **"bargains" defined as exchanges of value**
  - Laissez-faire individualism and judicial non-intervention
    - No enforcement of non-bargains
    - No judicial inquiry into substantive fairness of bargain
      - Requirement of sufficiency but not adequacy
    - The serve for certainty and a hardening of the categories
      - The end of writs and the need for certainty
      - The emergence of bargain as an apparent necessity
- "consideration" as an evolving concept: back to the future?

Consideration Defined

- Something positive or negative value
  - Right, interest, benefit, or profit provided by promisor
  - Forbearance, detriment, loss or responsibility by promisor
- Something moving from promisor…but not necessarily to promisee
  - Benefits promised to third parties and the problem of privity

Adequacy and Sufficiency

- The general irrelevance of adequacy
  - "adequacy" defined as equivalence of reciprocal consideration
  - Laissez-faire individualism and the commercial paradigm
    - Individualistic parties free to enter unequal bargain
    - The **"peppercorn" theory** of consideration
      - **(unequal) bargain sufficient justification for enforcement**
      - Impracticability of ascertaining reciprocity of value
  - A modern trend toward substantive fairness
    - Gross inadequacy insufficient as grounds of impeachment
    - Gross inadequacy motivates judicial search for impropriety
      - Possible indicia of fraud, duress, unconscionability
- The general relevance of sufficiency
  - "consideration" defined as "something of value"
    - *Exchange of value required under bargain theory of contract*
  - But seeming arbitrariness in recognition of value
    - Economic value constitutes consideration
    - Non-economic value *may* constitute consideration

- The (modern) insufficiency of moral entitlements
    - The emptiness of charitable promises
- The (modern) insufficiency of love and affection
- The sufficiency of forgoing the vices of youth
- The sufficiency of a spousal promise to behave

Brantford General Hospital Foundation v Marquis Estate, [2003] OJ No. 6218

Promise of a gift is not enforceable in the absence of consideration. Presence of value on both sides is not enough without mutuality/causal connection b/w the two

Facts: Mrs. Marquis asked by the hospital to pledge $1 million in $200k installments over 5 years to the new hospital. She made the first installment of $200k before she died. Hospital claims they had a binding contract and that her estate should pay the remaining $800k. Naming rights to cardiac unit not finalized in contract

Issue: is the pledge document legally enforceable? **NO**

- When will a promise of a charitable donation be enforceable?

Analysis:

- Hospital argued that her donation was promised for naming right on new facility
    - Mrs. M adamant on desire for naming rights remaining (her husband's name was already up there)
    - She fully intended to fulfill entire promise (but died before she could)
    - *But* naming rights never received as *quid pro quo* for donation
- Two promises, yes, one on either side but not made in exchange
    - Two separate, not combined, situations
- Mrs. M clearly cared about her husband's name staying on the unit, but she didn't seem to care too much about her name being added no evidence this was a condition of making her pledge (aka no bargain)
    - No mention of this in the pledge document
- No doubt Mrs. Marquis intended to provide foundation with $1 mil gift, but court can't enforce her intention no enforceable binding contract
- Anglo-Canadian law remains more orthodox (American tendency to find ways to enforce charitable promises)
    - **Canada: mutual consideration must be established in fact**

Holding: action dismissed

Notes: what could the hospital have done to ensure enforceability?

- They would have had to *give* her something in exchange for the promise of the money needs to be an exchange in order to be enforceable
-

Mutuality of consideration

- Mere concurrent exchange of consideration insufficient
    - Commercial bargain paradigm requires mutuality of consideration
        - Consideration must be exchange *for* each other
            - Example: unilateral offer and accidental lawn care

Executory Consideration, Executed Consideration and Past Consideration

1. Executory consideration
    - A promise to act in the future (promise itself)
        - Parties under a bilateral contract or offeror under a unilateral contract
    - Sufficient consideration for enforcement of promise
        - Elements of exchange share mutuality
            - Promise given in exchange for a promise or act
2. Executed consideration
    - An act exchanged for a promise
        - Offeree under a unilateral contract

- Sufficient consideration for enforcement of promise
  - **Elements of exchange share mutuality**
    - Act performed in exchange for promise

3. Past consideration
   - An act preceding a promise
     - Offeree under apparent (not real) unilateral contract
   - **Insufficient consideration for enforcement of promise**
     - Purported elements of exchange lack mutuality
       - Act performed prior to issuance of promise

Eastwood v Kenyon (1840), 11 Ad. & E. 438

Facts: Rich orphan's guardian (P) borrowed money to pay for her first-class education. She did not ask for it.* When she grew up she promised to repay him. She got married to D and he also promised to pay him. He failed to do so and P sued.

Issue:

- Can a subsequent promise revive an earlier obligation?
- Is discharge of a moral obligation sufficient consideration?
- Is past consideration sufficient consideration?

Ratio: no consideration in past consideration or moral obligation. (1) Gratuitous promises are not sufficient to found a contract. (2) Consideration made in the past is no consideration at all. (3) Moral obligation does not constitute consideration

Analysis:

- Deliberately made promises should be enforced, but if they were this would have the effects of (1) annihilating the necessity for consideration (and it is not the role of contract law to enforce morality), and (2) floodgates would open with everyone looking to enforce contracts
- D's promise to repay was not exchanged FOR P's performance – P performed prior to D's promise and there was no reasonable expectation for that promise to be made
- Purported consideration not in relationship of mutuality

Holding: No contract found to have existed, promise can't be binding

Lampleigh v Braithwait (1615), Hobart 105, 80 ER 255 (KB)

Facts:

- D killed Patrick Mahume, then needed P to go and try to get a pardon for him from the King, which P did his best to get.
- P took his own horse, on his own time and rode to a different city to ask the King. The P secured the pardon and returned to the D. After securing the pardon, the D then promised P that he would pay him $100.

Issue: Is consideration "past" if coupled with a prior request?

Analysis:

- Mere voluntary promise is not sufficient consideration, but here, there was a prior request and then the promise to pay
  - Contract formed when D requested P's services in obtaining pardon
    - D's request for services implied promise of repayment
  - *o* D's subsequent promise was not distinct from prior contract – merely fixed *quantum meruit*
- Naked promise = not legally enforceable b/c there is no consideration
- Agreement here is not a naked promise
- Coupled with prior request, the subsequent promise to pay formed a binding contract
- *Quantum meruit* □ "what the service is worth"

Holding: judgement for P

Alt argument:

- Unjust enrichment if no initial contract
  - **o** P entitled to restitution for unjust enrichment if no contract
    - Restitutionary relief consists of reasonable price
    - D's promise provides evidence of reasonable price

In *Eastwood,* guardian acted of his own accord. Here, D asked P to do something usually in this situation, if you request something, there's an implied promise of payment ("if you get a pardon for me, I'll give you a reward" (two things are linked)
Subsequently, when someone suggests a dollar figure, that's not necessarily conclusive

Forbearance to sue

-

D(DC) v Arkin (1996), 138 DLR (4th) 309 (Man QB)

Facts: P's son was caught shoplifting from Zellers. Zellers sent her letter saying if she comped them for the shoplifting, they wouldn't sue her. She now argues that they never had valid claim against her personally.
Issue: Whether P can recover her money on the ground Zellers never had valid claim against her personally.
Ratio:
Analysis:

- Loss recovery programme of Zellers claiming against parents of children involved in thefts
    - No general rule that parents liable for the torts of their children
    - Liable only if in some way negligent etc
- D submits that P voluntarily paid $$ and in effect entered into valid and enforceable contract with Zellers
    - **Consideration moving both ways**
- P submits that, in the circumstances, law won't agree with such a contract
- Forbearance to sue is good consideration; money paid in exchange for a promise not to sue is valid and enforceable legal contract
    - *But,* not binding if sole consideration for it is a forbearance to enforce a claim which is invalid & either known by the party forbearing it to be invalid or not believed to be valid
    - *Or,* claims that are doubtful or not known to be invalid
        - But forbearance to enforce it can be good consideration
- **Invalid claim:**
    - **o** P obviously believed it was valid
    - **o** But D cannot have seriously though that this claim could succeed or that they seriously intended to pursue it to court if it wasn't paid

Holding: Appeal allowed, P's claim allowed

Duty owed to promisor (Pre-existing obligations)

- Past consideration and pre-existing obligations
    - Past consideration = action *performed* prior to reciprocal promise
        - No consideration for lack of mutuality
    - Pre-existing obligation = action *promised* prior to disputed deal
        - Consideration recognized in some circumstances

- Economic duress so highly vulnerable economically that you have to do whatever is demanded
- Mischief:
    - 1. Bargain? ask if there's consideration
    - 2. Illegitimate economic pressure/duress likely won't enforce contract

Doctrine:

- Traditional consideration
- Modern consideration? Or economic duress? (have to determine which one)

Situation 1: Pre-Existing Obligation Owed as Public Duty

- No consideration in performance or promise of pre-existing public duty
    - Example:

        - *Is there consideration? Has he promised anything new?*
            - Technically yes -- Pam is getting something great the fire being extinguished
            - Policy consideration and given the economic duress, never going to enforce we don't want extortionate public servants

- No fresh consideration for contract
    - Fire dept already obligated to extinguish fire
        - *But* performance and suit for non-performance differ
        - Does benefit not exist in assurance of actual performance?
            - *Cf* Holmes "bad man theory" of contract
- Public policy against extortionate public servants
    - Undesirable to permit contracts under duress

Situation 2: Pre-Existing Contractual Obligation Owed to Third Party

Gilbert Steel v University Construction [1976] Ont Ca

Reiteration of the same promise does not serve as consideration where parties are varying the same contract. (Where one party makes the same promise in exchange for more money, and the terms are just varied within the same contract instead of making new contract – not good consideration)

Facts: D building on campus and gets steel from P at a fixed price. P's costs go up and can't continue at that price. P reiterates promise to provide steel and D initially agrees to pay more money but then reneges.

Issue: can pre-existing contractual obligation serve as consideration?

Analysis:

- P's counsel argued that the promise of a good price on the second building was the consideration D received for agreeing to pay the increased price on the first
    - **o** TJ rejected this and found oral agreement unenforceable for want of consideration
- Morphy: argued that consideration for the oral agreement was the mutual abandonment of right under the prior agreement in writing – implied recission of the written contract and creation of a new contract that assume obligations of the oral contract **NO**
- P required to provide fresh consideration for D's fresh promise
- **First**, P alleged consideration consisted of abandonment of initial contract
    - **o** Total circumstances indicate variation and not abandonment
        - Parties did not rescind early contract and enter new contract
    - **o** But…P's argument sound in theory
        - Abandonment of contract rights constitutes sufficient detriment
- **Second,** P alleged consideration consisted of credit on increased amount
    - **o** Argument summarily dismissed as ingenious but flawed
- **Third,** P alleged consideration consisted of promise of future good terms
    - P had not sufficiently committed to such promise

Pre-Existing Contractual Obligations and Commercial Reality

Gilbert Steel criticized as striking an insensitive compromise: *Gilbert* rule properly prevents threats of non-performance. Gilbert rule improperly inhibits effective modifications: business recognizes "going transaction adjustments" and the law arguably should recognize such modifications

- tension: discouragement of duress and facilitation of modification

Means of circumventing the rule in *Gilbert Steel*

1. provide something slightly different than previously promised
2. abandon earlier contract and create new contract (*Gilbert dicta*)
3. place fresh promise under seal (considered below)
    - o can enforce even if no consideration
4. follow business and ignore the law
    - o short term litigation and long-term service to the client
5. amelioration of rigid rules of consideration: *Williams v Roffey*

Williams v Roffey Bros & Nicholls Ltd (1990 CA) [English Approach]

Reiterating the same promise for more money can be consideration if it confers a practical benefit onto the party paying more money. Practical benefit recognized as consideration in varying an existing contract

Facts: D contract with property owner for renovations, with a penalty if work completed late. D subcontracts with P for a too low price. P is taking too long; D promised to pay more to hurry P up. P does and then D doesn't pay. P stops working.
Analysis:

- practical benefit of timely completion, even though pre-existing duty is performed, can constitute good consideration. D received practical benefit of 1) avoiding P's good faith threat of breach, 2) reducing risk of being liable for penalty under main contract, 3) eliminating need to hire replacement sub-contractor

Test to understand if contract can legit be varied:

1. A has contract with B
2. Before it's done, A has reason to believe B may not be able to complete
3. A promises B more $ to finish on time
4. A "obtains in practice a benefit, or obviates a disbenefit"
5. Must be no economic duress or fraud

Nav Canada v Greater Fredericton Airport Authority Inc. [2008] NBC No. 108

Facts: Nav Canada responsible for new equipment at any airport. Nav didn't want to move existing equipment, wanted to buy new instead. Airport said okay but you need to pay; Nav says yeah sure but we won't ever pay.
Issue: whether the promise by the Airport Authority to pay for the DME was legally binding
Analysis:

- Nav Canada's pre-existing contractual obligation was to pay for the DME once it exercised its contractual right to insist on purchasing new equipment rather than relocating the old
    - NC promised nothing in return for AA's promise to pay for navigational aid that it was not contractually bound to pay for under the ASF agreement
- *Combe v Combe:* plea of detrimental reliance is not a valid basis for enforcing an otherwise gratuitous promise
- **English CoA has effectively modified the consideration doctrine by asking whether the promisor obtained a benefit or advantage from the agreement to vary, irrespective of whether the promisee agreed to do more**
- Important to consider whether the contractual variation was procured with the "consent" of the promisor"
- **Conclusion:** promise of Airport Authority procured under economic duress and unenforceable

Holding: appeal dismissed

PARTIAL PAYMENT OF A PRE-EXISTING DEBT

Foakes v Beer, [1884] UKHL

Facts: P owed D $2000 pounds – agreement for regular installments and no interest. In return for Beer not using right to sue to enforce judgement. D changed her mind and brought action for interest.
Issue: must a promise to take a lesser sum be supported by consideration?
Ratio: Promise is unenforceable without fresh consideration. No fresh consideration in mere renewed promise to pay. HL won't overrule previous precedent.
Analysis:

- Court would have liked hold that parties' agreement was enforceable
    - Desirable to enforce B's promise *if* it extended to interest
- Impossible to hold parties' agreement was enforceable
    - *Pinnel's Case* (1602) established need for fresh consideration
        - No consideration in part payment of £500
        - No consideration in payment of remaining principle
- Action allowed due to absence of P's consideration. **No new** enforceable promise. Desirable to hold parties agreement enforceable b/c it benefits both of them but Pinnel's case established precedent

- Need for fresh consideration and no consideration part payment of $500, no consideration in payment of remaining principle
- Beer's forbearance to sue was consideration but Foakes installments weren't b/c he owed the money anyway

Re Selectmove (1995 CA)

Taxpayer owes lots of money to tax man. Payer says he just doesn't have it, and bad if you push me into bankruptcy. Says he'll pay a little now and then according to a schedule. Taxman says sure then sues for the remaining money.

Court said that *Roffey Bros* simply didn't apply here only if you're promising to pay a **higher price** for the same services. Here it differed because it was an agreement to revise the terms of repayment of an existing debt. So, *Foakes v Beer* was precedent.

MWB Business Exchange Centres Ltd v Rock Advertising Ltd (2016 CA)

Recognition of practical benefit as consideration in exchange for monetary debt
Facts: Tenant fallen behind in rent $12,000. Landlord agrees to $3500 upfront and installment payments but then changes their mind

- Traditional rule is not satisfactory or acceptable. Unrealistic, unfair and contrary to commercial practice.
  - Instead of overruling attempts to distinguish from *Foakes v Beer* and *Re Selectmove*. Narrowly interpreted. Debtor merely promised to pay existing debt and no practical benefit on those occasions.
- There was a practical benefit – might get less overall but $3500 immediately and don't need to hassle Rock.

Simantob v Shavleyan, [2018] EWHC 2005

Back to traditional rule where practical benefit is not consideration in exchange for monetary debt
Facts: Debtor gave 8 cheques and continued to do business with creditor in exchange for full monetary debt
Analysis: Neither cheques nor continued business dealings constituted a practical benefit

- Judge also preferred *Selectmove* over *MWB* and said that *Roffey* only applied to goods & services
- Practical benefit doesn't apply with respect to payment of existing debt

Foot v Rawlings [1983] SCR 197

Facts: Current arrangement where debtor pays promissory notes monthly of $400 + 8% interest. Change terms to monthly cheques of $300 + 5% interest. Is this sufficient consideration? Debtor was paying and then Foot decided to sue for the rest. Can he do this.
Issue: is lesser payment by different mode sufficient consideration?
Ratio: Lesser payment by different mode is sufficient consideration. Each cheque entails its own set of rights; different rights than promissory notes
Analysis:

- New contract was formed upon exchange of sufficient consideration. Got around *Gilbert* by saying that this was a new contract instead of just varying terms
  - D promised to provide post-dated cheques
  - P promised to forbear from action on promissory notes
    - Original debt suspended but not extinguished
    - Action on original debt possible if breach of terms by D
- agreement for good consideration suspending a right of action so long as the debtor continues to perform the obligations which he has undertaken thereunder is binding
- so long as A continued to perform his obligations under the agreement, R's right to sue on the notes is suspended

Holding: appeal allowed

EXCEPTIONS TO GENERAL RULE

- agreement enforceable if under seal
  - seal signifies solemnity and acts as proxy for consideration

- creditor accepting less money in exchange for larger debit is enforceable under seal
- agreement enforceable if early payment accepted in satisfaction
  - early payment acts as sufficient (perhaps inadequate) consideration
    - $5 paid one day early accepted in satisfaction of $100k debt
    - Creditor values 1 day at 99,995
- Agreement enforceable if within *Judicature Act* RSA 2000, c J-2, s 13(1)

  Part performance of an obligation either before or after 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

Rosas v Toca 2018 BCCA 191

Facts: Rosas won millions in a lottery, she loaned $600k to Toca so they could buy a house—Toca kept saying she'd repay the loan next year, then when Rosas went to court to get the money back, Toca said the limitation period had run out.
Issue: does a variation of an ongoing contract require consideration?
Ratio: no consideration required *but* need other elements + no improper inducement
Analysis:

- Rosas argued the parties entered into multiple forbearance agreement to extend the timeline to repay the debt – each year "I'll repay you next year"
  - Request each year from Toca to forbear
- Are these extensions enforceable? If yes, obviates limitation defence
- 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
  - this way, the legitimate expectations of the parties can be protected
- inconsistent trend toward reform of consideration and variations
  - *no serious suggestion of abandoning consideration entirely*
    - issue limited to variations of ongoing transactions
    - existing contract establishes willingness to be bound
    - no risk of "unwary signor or casual promisor" [180]
- a lack of fresh consideration will no longer be determinative
  - difficult to anticipate need in long-term contracts—variation desired
  - business people often assume good faith variations enforceable
  - non-enforcement apt to create injustice

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

Holding:

- annual variations until 2012 enforceable without consideration
- breach did not occur until 10 January 2013
- Rosas claim in July 2014 within limitation period

Quach v Mitrux Services, 2020 BCCA 25

Facts: Is variation enforceable without consideration?
Issue: does a variation of *employment* contract require consideration? **YES**
Ratio: Fresh consideration is required to vary an employment contract
Analysis:

- *Rosas* (speciously) distinguished by "nuanced world" of employment (doesn't make much sense)
  - *Employment contract somehow in special category*
- *Rosas* (speciously) distinguished by "something more" in variation

    - Original contract ended and replaced with contract favourable to D
- Purported consideration: D payment $1000 for P's legal expenses
    - Fails: lack of mutuality no evidence reimbursement was actually consideration for second contract
- Aggravated damaged denied—insufficient basis on facts

Holding: second contract has no grounds; first is in operation

PROMISSORY ESTOPPEL

- **Estoppel: Rule that prevents you from going back on your word**

Estoppel: Genus and Species

estoppel generically

party precluded from denying truth of previous representation

- promissory estoppel specifically
    - party precluded from asserting legal rights (usually under contract)
        - representor enjoys particular right with representee
        - representor promises to not assert strict legal rights
        - representor intends representation to be relied upon
        - representee (detrimentally) relies on representor's promise

Promissory Estoppel and Consideration

- enforceable promise to vary contract rights generally requires consideration
    - *Gilbert Steel v University Construction*
- promissory estoppel (PE) may obviate need for consideration
    - promise enforced by estoppel rather than bargain

- promissory estoppel might be away around consideration problem
- trying to find a way around always needing consideration to make a problem enforceable

Promissory Estoppel: A State of Evolution and Flux

- orthodox view

- PE as a narrow exception to consideration requirement

- progressive view

- PE as general means of creating enforceable gratuitous promises

Central London Property Trust Ltd. v High Trees House Ltd., [1947] 1 KB 130

Facts: P Landlord and D tenant agreed on reduction of rent during the war. After war, landlord wants full amount since the building has been fully let out

Issue: Does promissory estoppel render a gratuitous promise enforceable?

Ratio: Modern PE: 1) promise intended to create legal relations; 2) promise expected to be relied upon; 3) promise actually relied upon. Usually (not always) retractable on reasonable grounds

Background:

- Traditional contractual analysis: P entitled to full rent
    - **o** No consideration for variation in terms of lease contract
- Traditional estoppel analysis: P entitled to full rent
    - **o** Representation must be to existing fact: *Jorden v Money* (1854)
        - P's representation pertained to future conduct
- Modern doctrine of promissory estoppel: P not entitled to full rent
    - criteria for application of doctrine ("promises - not estoppel")
        1. promise intended to create legal relations
        2. promise expected to be relied upon
        3. promise actually relied upon
    - generally retractable on reasonable notice not retractable if detrimental reliance is irreversible
- Landlord: even though I promised not to raise the rent, it was simply a gratuitous promise and tenant hadn't given anything by way of consideration

- Denning: can we apply an estoppel here (yes)
- In Equity, remedies are always at the discretion of the court
    - Even if promissory estoppel works (as in this case), it might only work for a particular period of time

Analysis:

- limited enforcement of promise
    - question of intention
        - promise intended to apply only under war conditions. **Full rent recoverable when war conditions pass**
            - **landlord should be able to go back to his usual rights**

Notes:

- How broad of a scope is *High Trees?*
    - Whether it not only varies existing rights but also creates new rights? (can only do the former in Canada)
    - PE works ONLY IF TWO PARTIES ALREADY HAVE EXISTING RIGHTS

Nature of the promise

Promise must be clear and unequivocal representation indicating intention.

John Burrows v Subsurface Surveys, [1968] SCR 607

Facts: Promissory note (IOU), pay in instalments, have acceleration clause that if there is a breach can demand full amount immediately. D habitually pays late, P doesn't enforce, P gets tired eventually and demand's right to full amount.
Issue: Is habitual non-enforcement a sufficient representation? Can it be implied not explicit.
Ratio: Representation must be clear and unequivocal. Representation must represent intention to vary strict rights. *Case officially accepts PE into Canada but limited doctrine. Can only be used to vary existing rights.*
Analysis:

- *Central London v High Trees* interpreted restrictively
    - doctrine does not render all promises enforceable
    - doctrine merely pertains to variation of existing contractual rights
- PE premised upon proof of requisite promise by representor
    - clear and unequivocal representation
    - representation indicating intention to suspend strict rights
    - prevents you from going back on the promise you made with someone
- Here:
    - D was trying to vary rights, but P never gave clear and unequivocal representation that they wouldn't require full payment. P merely granted friendly indulgences

Equity

D&C Builders v Rees, [1966] QBCA

Facts: Agreed to renovate house for $7500. D paid $2500, knew P in financial need and going out of business. Knowing that P was super cash strapped, D promised to pay $3000 (instead of remaining $5000) if D promises not to sue, otherwise will pay nothing and D will have to sue for full amount. P agrees, but later sues D who argues promissory estoppel.
Issue: is promissory estoppel precluded by representee's bad faith?
Ratio: PE can't operate if representee acted inequitably. PE doctrine made out on the facts (elemetns present) but unenforceable by party acting in bad faith.
Analysis:

- Reluctant affirmation of rule in *Foakes v Beer*
    - **o** Variation w/o consideration generally unenforceable
    - **o** No new consideration in cheque (*cf Foot v Rawlings)*
- Amelioration of rule in *Foakes v Beer*

- **o** Promise to forgo partial debt enforceable if subject to PE
- **D unable to invoke PE on basis of P's promise bc D was not acting equitably (taking advantage of financial situation)**
  - **o** **Because D acted in bad faith, wasn't able to use PE**

NOTICE OF RELIANCE

- promissory estoppel premised upon *some* reliance by promisee
  - o nature of requisite reliance (simple reliance, inequity, detrimental reliance)
    - **required: detrimental reliance** (*Trial Lawyers*)
      - generally required under generic estoppel
      - reliance on promise detrimental if promise revoked
    - insufficient: situation creating inequity if promise revoked
      - broad discretion exercised by court on totality of evidence
      - detrimental reliance neither necessary nor sufficient
    - insufficient: simple reliance
      - promisee merely acted on basis of promise
- promissory estoppel and the onus of proof

> occasionally suggested reliance presumed upon proof of promise
> generally suggested that promisee must positively prove reliance

Exercise #1:
Can you use promissory estoppel? □ clearly you've relied on what I've said to an extent.
Simple Reliance □ likely won't work, it's not enough
Inequity □ if you can show this, maybe, but you didn't rely on having the time off to get sick
Detrimental Reliance **(this is what we require for PE) □ only the last one would allow you to use PE in this example**

- **it's all about protecting your detrimental reliance**
- **you promised me something and I relied on that, to my detrimental reliance**

SWORD OR SHIELD?

- Seems like it means you can only use it to defend yourself

Exercise #2:
Shield:
Blunt Sword: Can't be used to create new relationship but used w/in a relationship □ can succeed in a claim for breach of contract. Can argue on basis of PE that parties had enforceably agreed to vary terms of the agreement

Exercise #3:
Can't use PE because there weren't existing rights □ can never create new rights

- analogous subjects—proprietary estoppel *or* acquiescence
  - o elements of claim
    - P mistakenly believed he had (or would acquire) interest in land
    - D (true owner) knew of her own rights
    - D knew of P's mistaken belief
    - D (actively or passively) encouraged and induced P to act
    - P acted in reliance upon that belief by improving land
  - o nature of relief
    - minimum necessary to effect justice

      eg ownership, lease, licence, remuneration

- rationale of promissory estoppel
    - protection of reliance and prevention of inequity
- unsettled role of promissory estoppel
    - the range of possibilities
        - a shield: a defence to an action in contract
        - a blunt sword: a basis of action within an existing contract
        - a sharp sword: a basis of action outside an existing contract

Combe v Combe [1975] 2 KB 215 (CA)

Facts:
Issue: Is promissory estoppel an independent cause of action?
Ratio: Promissory estoppel works only within existing contract.
Reasons:

- Retreat from breadth suggested in *High Trees*. PE merely enforces gratuitous promise to suspend rights.
- PE as a blunt sword. Cannot create new COA but can affect existing rights under contract. Available to D resisting action on contract, available to P pursuing action on contract.
- PE inapplicable on facts – D's promise did not purport to vary existing contractual rights. No pre-existing contractual rights between party.
- Detrimental reliance insufficient for consideration. P's reliance would have sufficed for PE. P refrained for years from applying to court for support.
- P's reliance could not suffice for creation of contract. Absence of relationship of mutuality. P's reliance not exchanged for D's promise.

Held: Dismissed. Promissory estoppel cannot found an independent COA.

Because of the doctrine of consideration:
Gilbert Steel: gratuitous promise to pay *more* for some goods or services unenforceable
Foakes v Beer: gratuitous promise to accept lesser sum in discharge of debt unenforceable

INTERNATIONAL PERSPECTIVES

Australia

Waltons Store v Maher (1988 HCA)

Court's reasons seem to fall along the following lines:
Promissory estoppel with arise if
i) both parties believe that a contract would come into existence,
ii) D induced P to act in reliance upon that belief, and
iii) D subsequently attempted to prevent the creation of the contract

THINK OF PE AS PART OF CONSIDERATION DISCUSSION

- WAY TO ENFORCE SOME PROBLEMS

CONTINGENT AGREEMENTS

The Paradigm of Bilateral Executory Contracts: an Overview

- Parties make binding contract and immediately have binding obligations but the performance of those obligations may be postponed depending on contract timeframe
    - Example: contract for tailoring a suit

Contingent agreements are the exception: ex: conditional sale of house (conditional on financing)

- Parties desire sale of land *if* financing available
- In most situations this is an immediately binding contract
- Performance of PRIMARY obligations suspended pending condition

    - Primary performance due *if* condition met (financing arranged)
    - The obligations exists but are suspended and they might NEVER have to be performed if the condition (financing) is not satisfied
        - Vender *might* transfer title + buyer *might* pay price
- Performance of SUBSIDIARY obligations (if any) immediately required
    - Performance activates primary obligations (arrange financing)
    - Buyer has active subsidiary obligation to use best efforts to get financing
- **Contingent condition describes an event or state of affairs that neither party to a contract has promised will come about, but the occurrence of which is a prerequisite of their obligation to perform their contractual obligations**
    - Unless the parties have stipulated otherwise, the failure of the condition simply brings the contract to an end

Condition Subsequent:
- Contract unless and until satisfied

Condition Precedent:
- Want of *consensus ad idem* □ hope/expectation to have contract
- Unsatisfied requirement □ no contract unless and until condition^{SE} satisfied

True Condition Precedent (TCP):
- Immediate contract □ primary rights suspended pending & subsidiary rights enforceable
    - If satisfied, primary rights enforceable
    - If not satisfied:
        - If no subsidiary breach, contract ends; if subsid breach: liability for subsidiary
- Obligations suspended unless and until conditions satisfied
- Always have subsidiary obligations □ ex: immediately have to go out and use best efforts to get financing

Promissory (subsidiary) Condition:
- Immediately effective obligation to effectuate TCP
- Failure of a promised performance or state of affairs to materialize that constitutes a discharging breach by the promissory

Condition:
- Important contractual term: a matter of remedies □ it's breach by one party entitles the other, not only to claim damages, but also to terminate the contract, thereby relieving both from any further obligation to perform

Warranty: trivial term of contract
- If breached, both have to continue with contract regardless

Contract or no contract?

- Conditions: a matter of suspension or creation?
- A matter of significance
    - Formed and unformed contracts: a right of withdrawal
    - Ingredient of actions: interference with contractual relations

Wiebe v Bobsein [1985] 1 WWR 644, affd [1986] 4 WWR 270 (BC CA)

If there is a contract to buy and sell land and there is a condition in play, then you almost certainly have TCP, not condition precedent. Real estate transactions presumed to be TCP and effect of TCP is dependent upon parties' objective intentions

Facts: 22 June: P contracts/agrees to buy D's house. Agree to close on 29 Aug □ "condition": P sells own house by 18 Aug, with "subsidiary" for P to use "best efforts" to do so.
- 29 July: D purports to withdraw
- 18 Aug: P sells own home □ "condition" satisfied

- 29 Aug: D refuses performance

Issue: When does a condition suspend the *formation* of a contract?

Analysis:

- D says never had contract was a "condition precedent" if true then D could walk away when wanted to in July
    - Outstanding point of agreement, therefore no *consensus ad idem*
        - Condition premised upon subjective decision
        - Either party free to withdraw from purported agreement
- P said it was TCP, pending P's ability to sell house by 18 Aug
- True condition precedent: suspended contract formed
    - Immediately binding contract with suspended obligations
        - *Consensus ad idem* on all substantive matters neither party free to withdraw from contract
    - Real estate "subject to" clause presumed TCP

Trial and Appellate Majority:

- **Parties' intentions are KEY CRUCIAL**
    - **No rule of law that says all conditions are TCP**
- **Reasonable person would think TCP in this situation in most situations, RP would think TCP**
- Effect of condition dependent upon parties' objective intentions
- Parties formed contract subject to true condition precedent
    - P satisfied condition to primary performance
    - D liable for failure to complete sale

Appellate dissent:

- Implied condition (reasonable efforts) intolerably uncertain
    - Sufficient certainty created only *after* D's withdrawal

Holding: judgement for P – TCP, enforceable. Imply terms of good faith and reasonable efforts to sell house.

- Just b/c you have contract to buy and sell land and simply b/c it has conditions attached doesn't NECESSARILY mean that parties have created TCP (but that is the likely outcome)

Reciprocal subsidiary obligations

- **TCP: primary obligations suspended pending fulfillment of condition**
    - Neither party required to perform *unless* condition met
    - No relief available on basis of non-fulfilment of condition
- **TCP: subsidiary obligations immediately operative**
    - Passive: prohibition on frustration of contract
        - Invariably imposed upon both parties to contract
        - Relief available on basis of breach
    - Active: requirement to fulfill condition
        - Often (impliedly) imposed upon one party
        - Relief available on basis of breach

Dynamic Transport v OK Dealing [1978] SCC

Facts: D owns piece of land, P wants to buy for $50000. Have an agreement on price and closing day (neither party mentions that contract cannot go through unless land has been subdivided- silent on this condition). Legislation puts onus on D vendor to apply for subdivision. Before closing date value increases 4-fold to $200 000. D does nothing about get subdivision approval, P wants to continue, D does not.

Issues:

- What is the nature of a subsidiary obligation?
- When will a subsidiary obligation be imposed?

- Upon whom is an implied subsidiary obligation imposed? ‘

Analysis:

- **Dickson J recognizes that even if not expressly mentioned, TCP (and subsidiary obligations) can be in effect)**
  - **o** D in breach of subsidiary obligations to ask city to split the land
  - **o** P entitled to specific performance of D’s subsidiary obligation D required to seek approval with “due diligence”
    - Granted full market value in damages in event of breach by D but no relief if approcal refused despite due diligence

- Implied TCP entails immediately effective subsidiary obligation
  - o Objective intention to suspend primary obligations
  - o Subsidiary obligation further implied as matter of efficacy
- Subsidiary obligation placed upon D vendor
  - o Burden determined by objective intention in circumstances
    - Statute contemplated application by D
- P entitled to specific performance of D’s subsidiary obligation

The Nature of Relief

- Implied TCP and subsidiary obligation (imposed on D)
- Relief awarded for D’s breach of subsidiary obligation
  - o Specific performance of subsidiary (*seek* planning permit)
  - o Substantial damages on breach of specific performance expectation loss under full contract

Remedies for breach of subsidiary obligations

The *Dynamic* Error

- Orthodox contractual relief: expectation damages
  - o P *prima facie* entitled to be placed as if contract performed
- Specific performance of *primary* obligation: exercising judicial waiver
  - o Exacerbating existing difficulties with waiver generally (below)
    - Expectations based on contingent fulfilment of condition
    - Waiver theoretically unavailable to parties
- Specific performance of *subsidiary* obligation: dodging the issue
  - o A question of timing: artificiality of delayed performance
    - Seeking approval in charged market (*Dynamic* 1973-1978)
  - **o Addressing the real question: damages in event of breach**
- Compensation for breach of specific performance of subsidiary burden
  - **o *Dynamic* error: presuming successful subsidiary performance**

In *Dynamic*, there was a loss of a chance of a profit lost a chance of $150k there was no guarantee approval would be obtained

Damages General Rules: - P burden: BoP - Damages all or nothing Eg: prove on BoP (51%) that you destroyed a painting have to pay full value of the painting	**Past Hypotheticals: Probabilistic Damages** - P burden – probabilistic responsibility - Damages proportionate beyond *de minimus* Eg: *Dynamic* value $200k; price $50 = $150k x 33% chance of success - Therefore, true loss is $50k this is damages

Unilateral waiver

Turney v Zhilka [1959] SCR 578

Prof: BAD DECISION. You can waive TCP if (1) It was entirely for your benefit and not the other party at all, and (2) the condition was "internal condition". Cannot waive TCP if (1) it was there for the benefit of the other party or (2) it was an "external condition"

Facts: D has land to sell and P wants to buy it, subject to planning approval (rezoning TCP). Contract created but neither party makes much effort to satisfy condition. P decides that they don't really care whether condition is satisfied – they can use land for different reason. P wants to go through and waive condition. D wants to back out and sell higher to 3rd party.

Analysis:

- PROF: "should be allowed to waive, justified if consistent with objective intentions, Free to expressly or impliedly permit waiver".
    - **Unilateral waiver permitted if for your benefit and internal** (can forgo own right and dispense other's performance)
    - **Cannot waive if condition is external** – condition forms essential part of agreement and performance truly condition on satisfaction of event
    - External: if it doesn't depend on the parties because it depends on obtaining external approval
        - What is internal… *general rule in private law: if you have a right then you can waive it*

Holding: SCC said he couldn't waive condition b/c it was external (involved getting approval from authorities). No contract

Decision improperly permitted D to escape bad bargain □ factual finding: condition for P's exclusive benefit

Beauchamp v Beauchamp [1973] ONT CA

Facts:

P agrees to buy D land for $15, 500 and they agree that they will have TCP of mortgages (two mortgages - one mortgage of $10 000 and second mortgage of $2500 and come up with other $3000 in cash. P purchaser finds bank that is willing to give him one loan for $12 000 and the P comes up with $3500 on their own. In either situation, the D vendor is getting exactly the same amount of money, but D vendor realized they undervalued the property and wants to sell it to someone else for higher price.

- D says condition wasn't satisfied b/c condition was two mortgages, and P only got 1

Issue: when can a condition be unilaterally waived?

Analysis:

- *Turney* cryptically avoided and waiver permitted on facts
    - "condition herein not such as dealth with in [*Turney*]"
        - Planning as an entirely external matter?
        - Financing as an entirely internal matter?
            - *Somehow, mortages are internal* □ **most judges try to distinguish *Turney***
- SCC upheld decision w/o argument from P
- *Barnett v Harrison:* condition met in substance (per Dickson)

Barnett v Harrison [1976] SCC

PROF: RIDICULOUS DECISION. Upholds Turney

Facts: Similar situation as Turney – contract for sale of land conditional on planning approval. Condition could not be satisfied so purchaser purported to waive it. Trial and appellate said condition couldn't be waived b/c it was external (relying on Turney).

Analysis (Dickson): affirmed Turney. Rejected possibility of waiver b/c it would create uncertainty and b/c it would require courts to determine intended beneficiary of each condition. Even said Turney should be followed b/c it fosters certainty and predictability.

- Certainty: SCC doesn't want to create a rule that is going to lead to uncertainty and they don't want decisions decided differently than in the past
    - Ridiculous b/c that is what is already happening
    - Judges ignore this case or they mention and differentiate it but don't say how it's different or they apply it and get the completely wrong result
- Contrary rule: you can waive TCP if it's for your benefit

- **SCC doesn't want this b/c that would put judges in undesirable position of having to determine whether or not a condition exists for one party or the other or both**

Dissent (Laskin): distinction b/w external and internal is meaningless and said unilateral waiver should be possible if condition is exclusively for benefit of waiving party.

PRIVITY

Privity of contract pertains to status as a contractual party. Traditional relevance – contractual rights and liabilities affect only parties to a contract. Party lacking privity cannot sue or be sued.

- Who can sue or be sued in a contract
- If you were one of the minds in the *consensus ad idem*
- You must personally have given consideration/someone on your side of the discussion promises to pay/give consideration (*the promise itself, not the actual payment*)

In Canada, privity of contract applies to prevent two types of people from enforcing a contract.

- A person who is a complete stranger to the contract has no legal right to enforce the promise of any party to that contract
- The third party beneficiary, the person identified and intended by the promisor and promisee to receive all or part of the benefit of the agreed upon performance controversial that Canada still has this

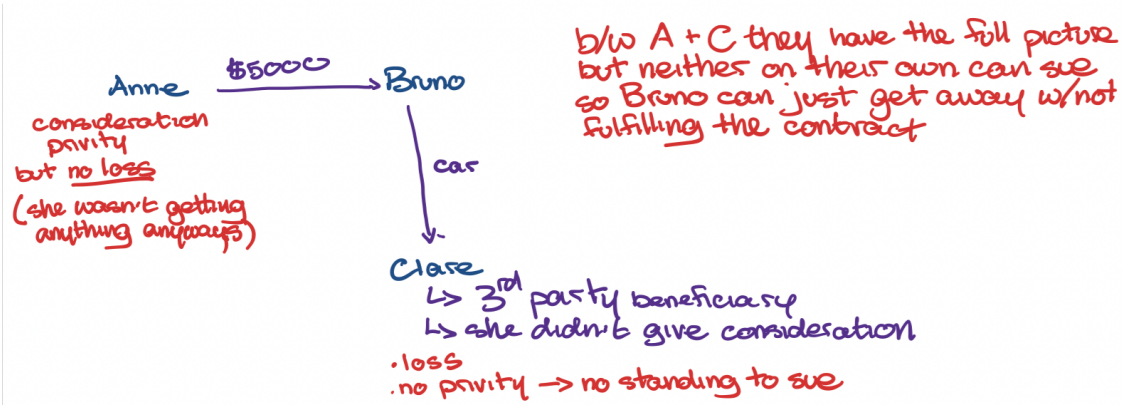
Problems of Privity

Consideration and Privity

- Synonymous: privity is defined by reference to provision of consideration, therefore the concepts are inseparable
- Distinct: jointly necessary by same party. P must prove privity and provide consideration
- Distinct: individually necessary. P merely requires privity if consideration given by some party.

Dutton v Poole said that even if you don't personally have privity, if you're a close family member to someone with privity you can enforce **no longer the case**

Exercise:



TRADITIONAL APPROACH

Tweddle v Atkinson (1861) 121 ER 762 (QB)

Person seeking enforcement must have provided consideration can't sue unless you have privity/were party to the agreement

Facts: P is John Tweddle's son

Agreement between William Guy (P's father in law) and John Tweddle on behalf of their children

- William Guy to pay £200 to P; John Tweddle to pay £100 to P
- Agreement also states that P can sue any of the said parties for the sums

Issue: can P enforce the contract formed for his benefit?

Analysis:

- "No stranger (*person lacking privity of contract*) to consideration can take advantage of a contract" even if (like in this situation) the contract was made for his benefit.
- "Natural love and affection" aren't sufficient consideration

Dunlop Pneumatic Tyre v Selfridge [1915] AC 847 (HL)

Privity and consideration are two separate things and both must be present for a person to sue. Dunlop may have had privity (with Dew acting as agent) but the consideration came out of Dew. Dunlop didn't provide any consideration to contract with Self so can't sue

Facts:

- P sold tires to Dew on condition they wouldn't sell them below a certain price except to customers legit in motor trade those ppl Dew could sell to at 10% under P's list price if **they** then observed P's list price
- D agreed to sell P's tires at below list price to a customer got the tires from Dew and signed agreement on Jan 2 that they wouldn't sell them below A's list price
- P commenced action against D

Procedural History: TJ granted injunction; CoA reversed it

Issue: can P enforce the contractual term created for its benefit?

Analysis:

Hadlane LC: need privity AND consideration – have neither

- Party can sue on an agreement if consideration was personally provided.
- P was not party to agreement between Dew and D Dew did not enter agreement with D as P's agent
- P did not give consideration to D consideration for D's promise was discount price on tires
    - *Discount moved to D from X rather than P*

Lord Dunedin:

- Privity and consideration separately necessary.
- P was party to agreement between Dew and D (differs in opinion here from Hadlane)
    - Not **direct** party **but X entered agreement with D as agent for P**
- **P did not give consideration to D (*everything hinges on this*)**
    - Consideration for D's promise was discount price on tires – discount moved to D from X rather than P
    - No consideration from P in forbearance of action against X – no breach by X therefore no basis for forebearance

Held: Claim defeated by 3rd party beneficiary rule. Undertaking had been given by D to Dew. P was 3rd party to promise can't sue

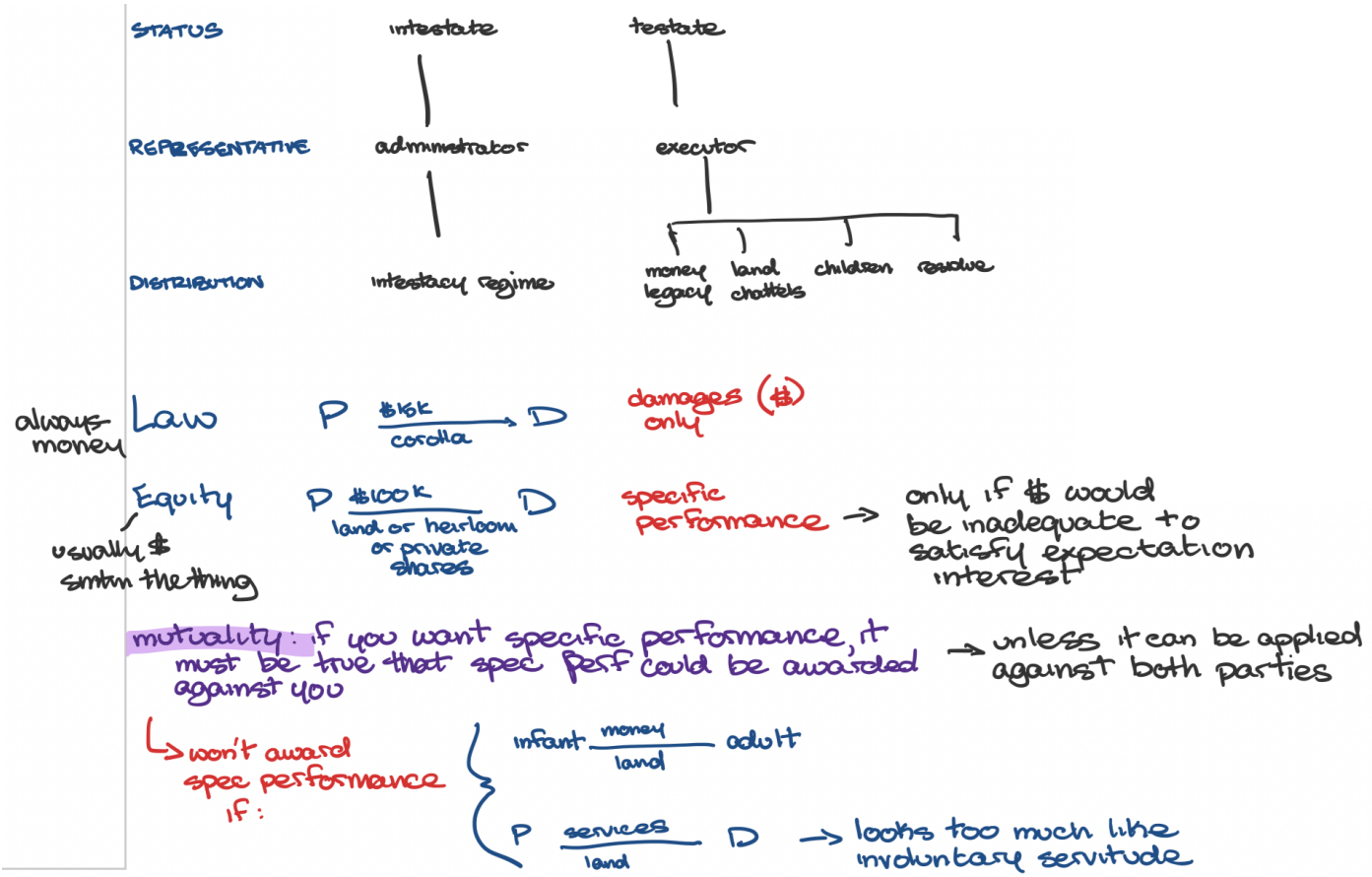
Harsh consequences and Amerliorating "Exceptions"

Apparent unfairness of precluding enforcement by stranger beneficiary

- *Dunlop v Selfridges* and Dunedin's regrets

Simple solution – abolish the privity rule or change insofar as to allow 3rd party beneficiaries to have status to sue.
Assignment, trust and agency are not true exceptions but rather a reinterpretation of the facts.
Means of amelioration

- Abolition: the Anglo-American approach
- Specific performance: *Beswick v Beswick*
- Assignment of contractual rights
- Trusts: *Vandepitte v Preferred Accident Insurance*
- Statutory Exceptions: third party insurance beneficiaries
- Agency: *McCannell v Mabee McLaren Motors*
- Employment: *London Drugs v Kuehne & Nagle*
- Subrogation: *Fraser River v Can-Dive*



Beswick v Beswick [1966] UK – SPECIFIC PERFORMANCE

Don't reach for this one on an exam it was an exceptional, very sympathetic case on the facts/desire to do justice unprincipled on the law

Facts: agreement between uncle and nephew that transferred business to nephew. Included stipulation that the nephew was to pay uncle's widow £5 per week upon uncle's death. He paid once and then refused.

Issue:

- Can P enforce contractual right in capacity as beneficiary? **Here, yes, but shouldn't be able to**
- Can P enforce contractual right in capacity as administrator**? Yes**

Analysis:

Lord Denning:

- Action in capacity as administrator of estate. Widow is entitled to sue as deceased's representative. Entitled to full damage (confusing as did the deceased truly suffer a loss after death?). Representative holds damages for beneficiary.
- Action in personal capacity as third party beneficiary of contract. Right directly enforceable by beneficiary. ***Speciously distinguish from precedent.***

Dankerts & Salmon: Specific performance available to P qua administrator. Justified the decision on the basis that she had also sue the nephew in her capacity as admininstatrix of the husband's estate.

Beswick v Beswick [1968] UK

Lord Reid:

- Denning rebuked: 3rd party cannot directly enforce contractual right.
- Variations on the administrator's action: ieffectual claim for damages
  - Administrator entitled to be placed as if contract performed
  - No loss to deceased (estate) by non-performance damages limited to nominal damages
- Effectual claim for specific performance (an extraordinary application of specific performance)

Pearce:

- Administrator entitled to substantial damages (no apparent loss to deceased – estate)
- Administrator entitled to specific performance equity acts on D's conscience

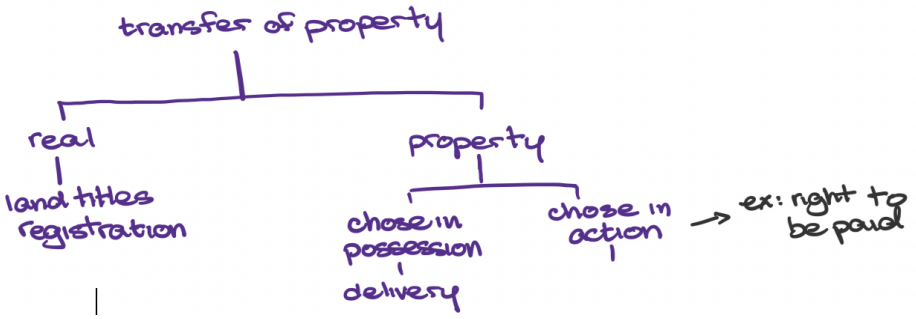
- **Damages inadequate in the circumstances**
  - Specific performance avoids multiplicity of actions
  - Specific performance reflects stipulated performance

Specific performance
- Requirements for specific performance include *mutuality* (later in course)
  - No specific performance for P *unless* same remedy available against P
    - Concerns regarding involuntary servitude
    - Concerns regarding judicial supervision of compliance

Assignment of contractual rights

Transfer of Contractual Rights
- **Contractual rights are a form of property (*chose in action*) with some exceptions these are now generally assignable**

Transfer of property



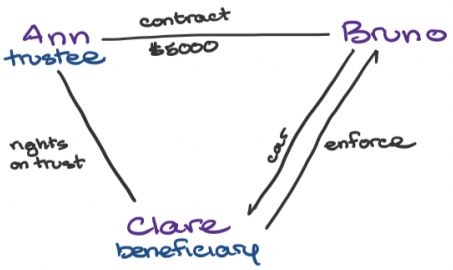
<u>Assignment to transfer something like one's right to be paid, you "assign"</u>
- Doesn't make rights/debts etc any different
- Can't get any better as it passes from assignor to assignee

Not a true solution to privity. Privity problem is that we are trying to allow 3rd party beneficiary to sue In assignment, you might not be there in person but your interests are being represented legally so it's like you were there – not really getting around privity problem

Trusts

Clear intention must be present to create trust. If created, trust directly enforceable by 3rd party against trustee
- Trust arises in circumstances where property is being held by a person, the trustee, subject to an obligation to deal with the property for the benefit of 3rd persons, the beneficiaries of the trust.
- Trust analysis will apply ONLY in circumstances where it is clear that the parties actually intended to create a trust relationship. To create a trust express words are unnecessary but clear intention is required.

Trusts differ from assignment in that B knows at the outset; C has expectations, standing to sue, and C also owns B's promise of a car



- If 3rd party of a contract can successfully claim that the promisee held the right to enforce the promise as a trustee for the beneficiary, B could enforce the promise on the bases of the principles of law of trust.
  - X enters contract with D for benefit of P. No legal link between D's promise and P. BUT.
  - D (settlor) gives promise to X (trustee) for benefit of P (beneficiary).

- Consideration: D's promise supported by exchange with X
- Privity: P holds beneficial title to promise acquired by X from D. P entitled to enforce beneficial interest in promise.
  - X (if amenable) sues on behalf of P.
  - X (if not amenable) sued as co-defendant by P.

Vandepitte v Preferred Accident Insurance [1933] AC 70 (PC)

To create a trust, must have that intention from the outset – can't use it after the fact
Facts: P was hurt in car accident with JB who had borrowed the car from her father F. F had an insurance contract. Argued that a provision in a father's car insurance policy that extended indemnity protection to persons driving the car with permission was held by the father in trust for the benefit of the daughter.
Issue: when can a trust analysis circumvent problems with privity?
Analysis:
Privity Problem 1: P is stranger to insurance contract. If assume daughter is covered under insurance – *Insurance Act* s24 provides for a privity exemption. Victim may enforce contract between insured and insurer.
Privity Issue Two: Daughter, JB, is stranger to insurance contract. No evidence JB ever thought she entered into contract of insurance

- JB privity purportedly established through agency. However, no evidence of agency intention, no authority or ratification to insured from JM, no consideration from JB as purported principle and JB not named as insured as required by Insurance Act.
- JB privity purportedly established through trust. No express evidence of trust intention by insured. No implication of trust intention by insured
  - *Motor Vehicle Amendment Act* made father liable, no necessary reason for insured to protect JB, Insurance Act required legal (not equitable) interest

Agency

One person (agent) acts on behalf of another (principle). Agency generally voluntarily arises from contract.
- Agent invariably subject to fiduciary duty toward principle

Relationship generally used for purposes of entering contracts
- Agent (A) enters contract with X on behalf of principal (P) eg: director buys computers from dealt for company

Function of an agent is to bring parties together (don't have to be **named** as agent)

General problem of privity is no agency
- A enters contract with X for benefit no legal link between P and X's promise

Privity exceptionally supplied by agency analysis
- A receives X's promise on behalf of P X's promise legally belongs to P. *cf* promise on trust *equitably* belongs to beneficiary
- P may directly enforce X's promise

McCannell v Mabee McLaren Motors Ltd. [1926] 1 DLR 282 (BC CA)

Agency argument successful b/c clear intentions at the outset (in the contract) that Studebaker was the agent for each of the representatives in each province AND each P and D gave consideration, it wasn't the agent that gave consideration
Facts: Studebaker has cars but doesn't want to sell them. Tells each province representative that they are the only ones allowed to sell car to residents in province, but they have to promise not to sell cars to residents outside their province. Also says that Studebaker is not a party to the contract and the only parties of the contract are the representatives from each province.
Issue: when can agency provide a mechanism for establishing privity?
Analysis:

- Studebaker acted as omnibus agent for disclosed principals provided means for dealers to contract with each other
  - All dealers were party to clause 20 agreement; S was **not** party to clause 20 agreements

- Consideration isn't moving from company to dealer but from one dealer to another
- *Tweddle v Atkinson* distinguished P was contracting party *and* not third party beneficiary
- *Dunlop v Selfridge* distinguished agency actually intended and established (*cf* Haldane)
  - Here, consideration given by principals *but* not agent (*cf* Dunedin)

Holding: manufacturer was an agent, each deal had entered into a contract with every other dealer concerning the matter. Privity exists

EMPLOYMENT (TRUE EXCEPTION)

London Drugs v Kuehne & Nagel [1992] 3 SCR 299 (SCC)

Facts: LD storing transformer with KN. Two contract options: (1) cheaper but can only sue for $40, (2) more expensive but you can sue. Second option is basically 3rd party insurance. LD takes first option and buys 1st party insurance. KN employees damage transformer, LD is indemnified. Insurance company is subrogated and sues KN employees

Issue: when can an employee benefit from exemption clause?

Test: criteria for exception to privity – narrowly applied

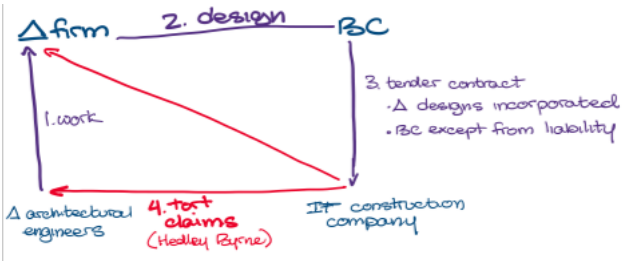
1. **D must be expressly or impliedly included in exception**
2. **D must perform the very actions contemplated under contract**
3. **Within spirit of policy considerations (vulnerable employees)**

Analysis:

- Need to consider the employer-employee relationship if there's a contract b/w customer/employer with limiting liability, no valid reason to deny benefit to employee
  - Parties expected D to fall within scope of exception
- Sound policy consideration. Exception accords with parties' allocation of risks
  - P better able to arrange insurance for own goods –P did not disclose value of good to KN
  - LD got their own insurance and aren't out any money. Respondents vulnerable, unfair to give KN option to sue them to get max money
- Incremental change – general rule retained, as that's subject to legislative reform only
- Very specific and very limited exception exception creates no right to sue under contract
  - **Exception dependent upon parties' intention and displaced by evidence of contrary intention**
- Intended to protect vulnerable people who can't otherwise protect themselves entirely intention based, had to intend that employees be under protection of exclusion clause from outset
- **Only a shield for employees to bring them under protection of exclusion clause**

Edgeworth Construction v ND Lea & Associates, 1993 SCC

Facts don't support architect firm falling under exclusion clause –they weren't vulnerable like London Drugs employees. Could've added disclaimer to design or purchased liability insurance. Exclusion clause not extended for their benefit



Facts: Province of BC wants to make highway. Architecture firm to come up with plan. BC prints call for tender – contract with exclusion clause to winner that if anything goes wrong, can't sue us. Plans horribly inept. No profit.

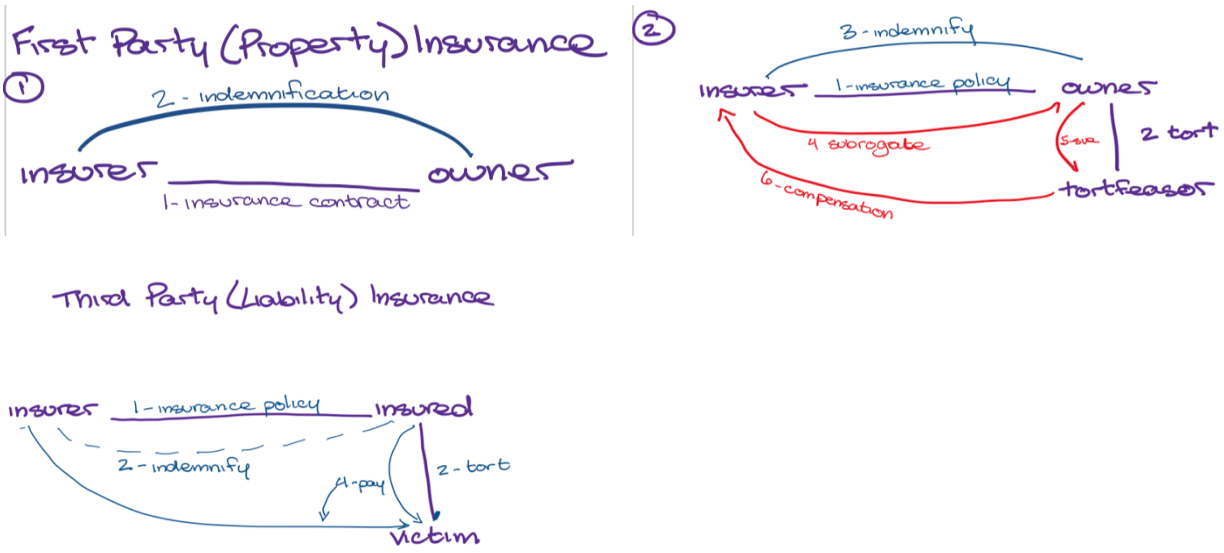
- P sues the firm and the architects for negligence (carless statements). Sues in "*Hedley Byrne*" cause of action (negligent misrepresentation)

Analysis:

- D prima facie liable to P for negligent misrepresentation (only possible defence is for firm to try to fit themselves within BC's exclusion clause)
- D claimed protection of exemption clause in provinces contract with P
  - London Drugs distinguished as parties (1) knew work would be done by employees, (2) employees were powerless to protect themselves, (3) parties implied in fact intention to protect employees.

- No similar consideration on the facts
    - Criteria 1: exclusion clause was not created for the benefit of the architects: Ministry only
    - Criteria 2: Not within spirit of *London Drugs* – architects are not powerless and vulnerable

SUBROGATION



Fraser River Pile & Dredge v Can-Dive Services (1999) 176 DLR (4th) 257 (SCC)

The right to protection under an exclusion clause is a crystallized right that materializes immediately and is not removed just because two primary parties vary contract terms. Spirit of London Drugs expanded to include protection for reasonably relying on protection in insurance policy

Facts: barge belonging to Fraser River sank at the time it was chartered by Can-Dive

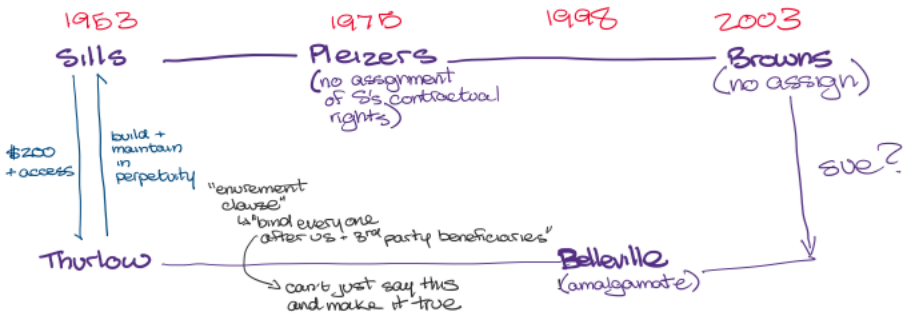
- A marine insurance policy contained a waiver of subrogation by the insurer against "any charterer" (CD). The boat covered by the policy was sunk as a result of negligence of a charterer.
- Subsequently, the owner of the boat (FR) and the insurer agreed to suspend the waiver of subrogation clause and the insurer brought a subrogated claim against the charterer.

Analysis:

- *London Drugs* exception premised on two criteria:
    - **1. Contractual parties intended to extend protection to 3rd party. Insurance coverage here expressly applied to charterers.** Stronger than implied in fact extension in London.
    - **2. 3rd party performed activities contemplated by contractual parties. Damage here arose by reason of charterer's normal activity.**
- Privity exception is not dependent upon insured's cooperation.
- Fraser and insurer unable to divest Can-Dive of crystallized right – from London Drugs, once the party is aware there is no subrogation clause, this becomes a crystallized right. Parties can vary terms but can't take away this crystallized right
- Privity exception supported by policy – Can-Dive reasonably relied on protection in insurance policy. Vandepitte denial of 3rd party benefit contrary to commercial reality.
    - Decision routinely circumvented by courts and legislatures.
- *London Drugs* applied outside of employment context. LD employees could not feasibly protect themselves which CD could protect self – insurance but reasonably thought unnecessary.

Brown v Belleville (City), 2013 ONCA

Bad analysis-not principled. London Drugs supposed to be used as a defence to protect people, but the Court here has now expanded it to compel people to take positive action, which it was never intended to do.



Facts: Under an agreement entered into in 1953 between a municipality and Sills, the municipality agreed to perpetually maintain and repair part of a storm sewer drainage system on and near Sills' lands. Sills died in 1966.

- The affected lands were sold to the Pleiziers. When the Pleiziers sought in 1980 to hold the municipality to its obligations under the agreement, the municipality unilaterally repudiated the agreement.
- As a result of a corporate amalgamation, the Corporation of the City of Belleville stepped into the shoes of the original municipality under the agreement.
- The Browns purchased the lands in 2003. They requested the City to honour its maintenance and repair obligations under the agreement. The City refused and, in December 2004, again unilaterally repudiated the agreement.
- The Browns sued the City for specific performance of the agreement or damages for its breach

Analysis:

Enurement clause: Original parties expressly intended agreement to bind successors. P is not stranger— "steps into original owner's shoes". D is not stranger: "in effect original covenantor". Enforcement fulfills reasonable expectations.

Principled exception:

- *LD* two part test: original parties intended to extend benefit. Claimant acting within expected scope of contract.
- Test satisfied on fact: agreement expressly intended to extend to successors. P and predecessors have honoured obligations. No evidence that D denied access to system.
- P enjoys standing to sue to enforce agreement. (Irrelevant that standing sought for positive purposes)
    - *LD & Fraser* were defence only

PRIORITY DISPUTES

Private Property and Personal Autonomy

- Property idea—not a contract idea *per se* □ *all* dispositions generally subject to same rules
- What's yours is yours until you *effectively* dispose of it □ eg: abandonment or destruction or gift or sale
- Effective disposition
    - Physical act—eg: delivery or documentation
    - *True* intention □ intention *not* true if impaired *or* induced

Void and Voidable

- Some defects render disposition *void* □ ineffective disposition regardless of parties' wishes
- Most defects merely render disposition *voidable*
    - *Prima facie* effective and enforceable disposition
    - *but* subject to rescission by innocent party's election

Rescission:

- appears that I intended to transfer something to you but there's some defect in the process
    - if true, then *prima facie* right of rescission: have the power, if you want, to undo the transaction, to reverse what was just done
- right of rescission is fairly weak: have to act fairly quickly – if not prompt enough, and you sell to someone else, you've lost your right to rescission

Rescission of Voidable Dispositions

- incapacity
- misrepresentation
- duress
- undue influence
- unconscionability
- *some* induced mistakes
- *cf* frustration and illegality: not improper inducement—other policy

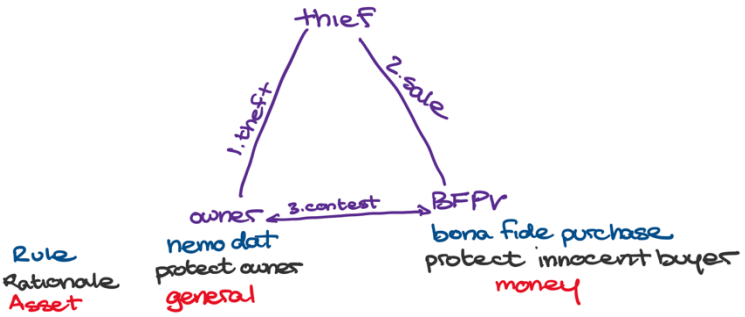
Scope of Rescission
- bars and defences: impossibility *or* third-party rights *or* affirmation *or* delay
- evolving judicial attitudes

Modes of Rescission
- **Equitable:** available for all grounds but only by judicial order
- **Legal:** available as self-help but only for legal grounds don't have to go to court, just have to announce it to the world

Relative Title:
- Chattels generally subject to *relative* title—several titleholders simultaneously
  - Eg: bailment or thief: ***Costello v Chief Constable of Derbyshire* (2001)**
    - Police apprehend obvious car thief; he asks for it back. In civil court, the judge says he has superior legal title to the car over the police. The true owner of the car has the most superior title, but they don't know who it is
- Superiority in title
  - Different people might have title to the same asset at the same time
    - Have to ask who has the superior title

Priority Dispute #1

Non-Contractual Case
- Here, thief steals the bike and sold to buyer
- Assume thief disappears or is judgement-proof
- Who wins as b/w innocents: owner and buyer?



- **Owner's argument:**
  - ***Nemo dat quod non habet****:* "you cannot sell what you do not have"
  - **Rationale:** policy choice to favour original owner
  - In operation
    - Theft does not pass superior title from owner to thief
    - Owner retained superior title despite theft
    - Thief therefore could not pass superior title to buyer
- **Buyer's argument:**
  - *Bona fide* purchase without notice of owner's interest
  - Rationale: policy choice to favour honest purchaser
  - Operation:
    - *Bona fide* purchase extinguished pre-existing interests
    - Buyer therefore received superior title from thief

Priority Rules
- ***If* thief stole non-money property from owner …**

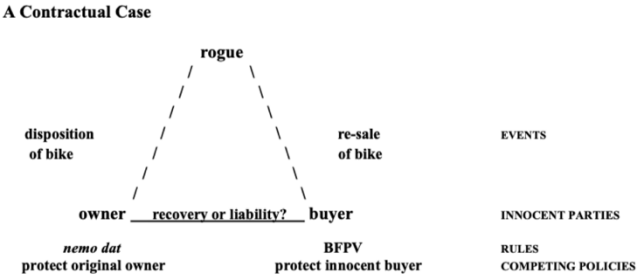
- Law chooses *nemo dat* over *bona fide* purchase
- Owner's title persists—buyer's purchase constitutes tort (conversion)

- ***if* thief stole *money* from owner…**
  - Law chooses *bona fide* purchase over *nemo dat* (as long as you didn't know about the theft)
  - Owner's title extinguished—buyer immune to liability
    - Rule necessary to ensure money freely passes through commerce

PRIORITY DISPUTE #2

Owner *vs* Rogue (persuaded owner to sell bike in exchange for "valuable" painting)

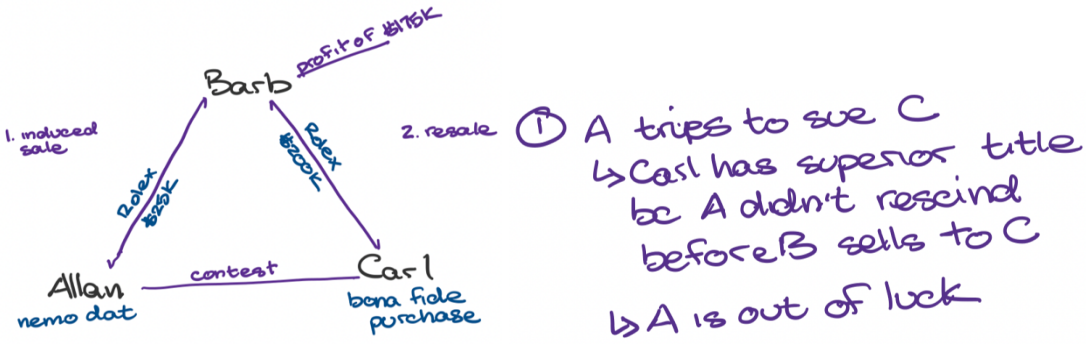
- If property still with rogue, *then* owner rescinds disposition and recovers bike
- If property no longer with rogue *then* …
  - Possible substitutionary rescission (*Kupchak*: money in lieu of Haro Street)
  - Possible alt action (tort *or* unjust enrichment)



Owner vs Buyer: Competing arguments

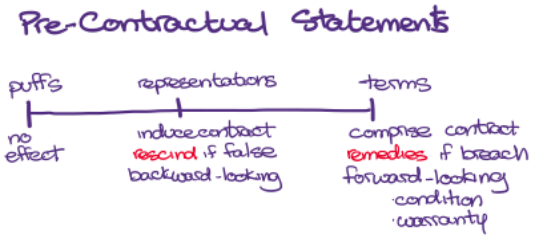
- Owner:
  - *Nemo dat quo non habet*: rogue could not give what did not have
  - Effective *if* rogue did *not* have superior title at time of resale
- Buyer:
  - *Bona fide* purchase
  - Effective *if* rogue *did* have superior title at time of resale
- **Key question: *who* had superior title at time of rogue's sale to buyer?**
  - **If owner *did* rescind before resale then** rogue could not pass superior title to buyer and buyer therefore committed tort (conversion) against owner
  - **If owner did not rescind before resale then** rogue did pass superior title to buyer and owner's rights extinguished and buyer did no wrong
  - ***Ask at the moment of the resale whether the rescission happened & who has superior title at this point in the story***
- **Why are rules different for non-contractual case and contractual case?**
  - Non-contractual: owner not purport disposition □ therefore full property rights
  - Contractual: owner purported disposition □ therefore attenuated property rights
    - Title has passed—merely *possible* to rescind—must be timely

Example:



MISREPRESENTATION

Pre-Contractual statements



Puffs: no legal effect if untrue, not terms so no contractual relief, not misrepresentations – no extra contractual relief.

- Normal RP would not put weight into statement. No legal consequences.

Terms: Important to contract that not just an inducement but term itself. Legal effect if untrue.

- Damages for these are always forward looking, because the term was something that you assured would happen – expectation damages or specific performance

Breach of one of those depends on the importance of those terms:

- Condition: discharge and damages if breach
- Warranty: damages only if breach
- Intermediate: uncertain consequences if breach

Misrepresentations: things said that induce into contract, but not part of contract itself. Possible legal effect if untrue.

- Not terms so no contractual relief, misrepresentations can result in rescission and/or tort relief possible. this is generally the only thing you can get (aka, backward looking)
- Various grounds of rescission: duress, undue influence or unconscionability

Distinguishing between Puffs, Representations, and Terms

Whether or not it's in writing is not determinative just because it's in writing doesn't mean it's a term or vice versa

This is a question of objective intention. Broad judicial discretion.

Express classification may be determinative but parties frequently misapply terminology

- Objective nature of statement purportedly is determinative
    - Mere sales talk = puff
    - Inducement to formation of contract = misrepresentation
    - Essential term of bargain = term
    - Based on what RP would think
- Nature of judicially desired result often is determinative
    - No relief = puff
    - Rescission and/or tort restoration = misrepresentation
        - Backwards looking relief
    - Fulfillment of expectations = terms
        - Forward looking relief

Elements of Misrepresentation

1) Representation: generally requires *positive misstatement* (not silence). If sit back and let mistake occur, no liability

- *Silence* exceptionally may constitute a representation (*Wren*)
    - Statement of half-truth. "The company earned 1 M (but lost 1.5M)
        - Second part is a deliberate misrepresentation
    - Failure to correct previously true statement. "It was worth 2M (but now 1M)
        - Especially true if contract over prolonged period
    - Positive duty of disclosure (very rare)
        - Relationship of *uberrimae fidei* – insurance contract must disclose all information
        - *Possibly* exclusive knowledge – vendor of unfit land

2) Representation of *Fact*

- Existing or past fact – not future fact
    - Future fact may turn on present fact (intention) – "I'll do all I can to help (but I won't be here)"

- A representation of something that will occur in the future is simply not a statement of fact. Promises are thus distinguished, if meant to be binding must meet the requirements for the enforceability of undertakings.
    - However, may be characterized as an implicit statement of fact concerning one's intention.
    - Ex above. If I already had a one-way ticket to Tahiti when I made the representation •
- Representation of fact – not opinion.
    - Opinion may turn on present fact (knowledge) (*Smith*)
        - "I think he's a good tenant (though he's an arsonist).
    - Where an opinion is offered by someone who has no particular expertise in the matter that statement would be considered to be one of opinion rather than fact. A reasonable person would not rely on such an opinion.
        - However, when somebody possesses superior knowledge opinion offered may be held to have made an implicit statement concerning the nature of the information upon which the opinion is based.
- Representation of fact – not law
    - Consequences of law may be fact
        - "You must pay key money (though the law prohibits)

3) Fraudulent Representation

- Stringent requirements for extreme results. Fraud is a high threshold
- Intentionally dishonest or reckless misrepresentation. Honest carelessness is NOT fraud. (*cf Hedley Byrne*)
- Element of moral culpability; intention/deceit
- Never allege fraud unless you can prove it because courts are super reluctant to stick a fraud charge on someone

4) Representation *Intended to Induce* Contract

- Representation ineffective if irrelevant to contract formation
    - Representation of identity presumed irrelevant
- Representation must be made by D to P

5) Representation that *actually induced* contract

- Representation must be causally related to contract formation – doesn't have to be the main cause or reason
    - Presumption of inducement (*Redgrave*). Once established that a misrepresentation is of such a nature that it is liable to induce a misreprensentee to enter a contract, it would be presumed against the misrepresentor that such inducement did occur. Presumption of causal nexus.
- Must have constituted an inducement to enter the agreement upon which the misrepresentee relied.
    - If undertake separate investigation of facts there would be no reliance.
    - Respresentee has no obligation to engage in due diligence and make such an independent investigation, even where the means of the doing so are made available by the misrepresentor.
    - Representation need not be the exclusive or even a predominant inducement for entering the agreement

Innocent misrepresentation has same elements minus fraud. Non-deceitful misrepresentation can be innocent or negligent.

REMEDIES FOR FRAUDULENT MISREPRESENTATION

Rescission term used in a variety of ways, including:

1. commonly used to denote the setting aside of a contract because of some defect affecting its formation, such as misrepresentation, duress or undue influence
2. It is also used to describe the discharge of an existing contract by subsequent agreement of the parties
3. Incorrectly but commonly used to refer to the situation in which an innocent party is discharged from having to carry out his/her obligations under the contract because of the other party's serious breach of contract or failure to perform.
    1. here, the contract is not "wiped out" but rather the innocent party is entitled to be compensated to put him or her in the position they would have been in had the contract been performed

- Equity has no inherent jurisdiction to award damages
- Equity has jurisdiction to recognize or allows rescission
    - Rescission available on court order
    - Rescission retroactively eliminates contract *ab initio* – entails process of restoration
        - Restoration *in specie*
        - Account, indemnity, compensation ***(Kupchak)*** □ courts of equity were able to achieve practice justice by coupling a degree of rescission with orders for an accounting of profits or an indemnity
            - **Account –** give up profits which are made
            - **Indemnity –** if incurred expenses while performing the contract
            - **Compensation –** sometimes cannot physically give back object

Defences to Rescission

- **1) Impossibility of restoration.** Rescission generally presumes restoration *in specie* but monetary restoration increasingly available. Especially if fraudulent. ***(Kupchak)***
- **2) Third party rights.** Impossibility of restoration ***(Redican).*** D may pass property to BFPV *prior* to rescission. Passing of property precludes restoration *in specie.*
- **3) Unexcused delay (laches).** Unreasonably delay in bringing a claim of rescission also constitutes an equitable defence, can't unreasonably delay in a way that would be prejudicial to you. No statute of limitation – "reasonable time"
    - Delay reckoned from discovery of fraud (*cf* innocent). ***(Kupchak)***
- **4) Affirmation (adoption)** ***(Kupchak)*** Act affirming validity of contract despite fraud. Delay may indicate affirmation of contract. Judicial reluctance if fraudulent (*cf* innocent)
- **Negligence of plaintiff is *not* a defence (*Redgrave*)**

Law

- Contract is voidable at P's option, not void.
- **Difference from rescission at equity:** avoidance available as self-help or on court order. Self-help effected by notice to relevant parties
- Avoidance retroactively eliminates contract *ab initio.*
- D liable for damages in tort of deceit. Tort damages monetarily restor *status quo anti.* No restoration *in specie,* no fulfilment of contractual expectations.

Combined action for relief in Equity and Law. (*Judicature Act*)

REMEDIES FOR INNOCENT MISREPRESENTATION

Innocent misrepresentation: same elements as fraudulent misrepresentation – minus fraud. Non-deceitful misrepresentation – innocent or negligent.

Equity

- Rescission for innocent or negligent representation □ generally same defences as for fraudulent
    - Less willingness to allow monetary restoration.
    - Delay reckoned from date of misrepresentation
    - Greater willingness to recognize affirmation
- Special defence for executed contract for land sale (***Redican***)
    - Unless total failure of consideration
    - Unless *error in substantialibus* □ misrepresentation that went to the very heart of the contract
        - Can't rescind unless it's this

Law

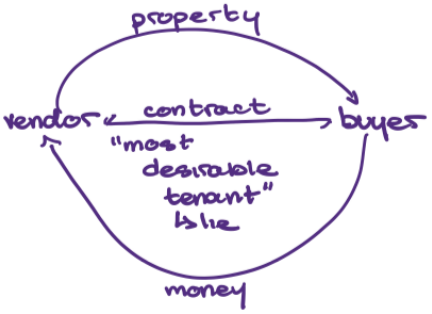
- No relief for non-negligent innocent. Relief only if misrepresentation constitutes term of contract
- Tort relief for negligent innocent (***Hedley Byrne***)

Smith v Land & House Property Corp (1884)

Nature of Representation: Fact and Opinion. If an opinion is made by party with inside knowledge, it may be interpreted as fact, especially if there is underlying implication of fact – CAN RESCIND IN THIS CASE
*Didn't matter if fraudulent or innocent because simply looking for rescission

Facts: D sells hotel. Says desirable tenant – but actually insolvent. Uber debt.

- Says "most desirable tenant" – implied representation of fact ("because he pays his rent") even though D said it was opinion



Issue: When does a statement of opinion entail a representation?

Held: Opinion is irrelevant if parties equally knowledgeable. Opinion may be relevant if parties not equally knowledgeable – representation of fact may be implicit in opinion.

- "Most desirable tenant" wrongly suggested no past problems – implicit he can pay his rent.

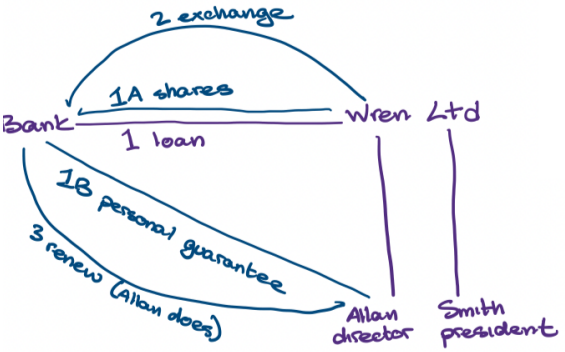
Was the statement fraudulent or innocent? Did it matter?

- *Doesn't matter because precise nature of misrepresentation is irrelevant* ***if all the buyer wants to do is rescind the contract***
- *Relevant if you want to proceed in law though*

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

Nature of Representation: Silence as Representation – Innocent. If a statement was true and became untrue one must say something. Obligation to correct statement. Failures or omissions can qualify as a misrepresentation.

Facts: Wren has president S and director A. Wants loan from the bank, bank lends to W but takes security over certain shares and A puts up a personal guarantee. S, exchanges old shares for new shares, doesn't tell anyone. Later, wants to renew, A asks if shares are still there – Bank doesn't tell A that shares have been exchanged.



W doesn't repay, security over shitty shares and bank sues on guarantee against A. A claim shouldn't have to pay as there is a positive obligation to update the information. Bank didn't look into it and correct, no intention to lie but irrelevant.

Issue:

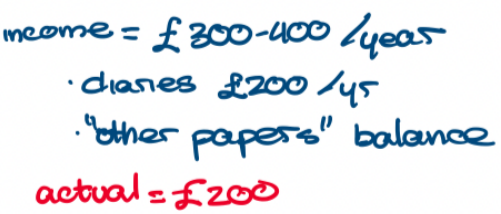
- When can silence constitute a representation?
- Is a representation effective if innocently made by D?

Analysis:

- Allan realizes that shares are different and wants to rescind his personal guarantee a situation that was true at the outset (first type of share) became not true in the end and the bank didn't say anything/alert them to the fact
  - Just silence on the surface but we see that there's an implied representation of fact (that the shares are still the same)
  - All Allan has to prove is that there's misrepresentation ****
- Silence constitutes representation in the circumstances
  - Previous truth had become untruth
  - Silence implicitly represented security had not changed
  - Onus on D to correct mistake engendered by silence
- Unilateral mistake on the part of the D Allan which was induced by the misrepresentation of the P in failing to disclose material facts to him
  - Allan merely sought rescission – no need to prove fraud

Redgrave v Hurd, 1882 UK

Representee's Negligence: Presumption of Inducement: Innocent. Threshold to deceit is high. Presumption: if intended to induce then presumption of inducement. P's negligence/carelessness not a bar to rescission.



Facts: Prospective purchaser of law practice given price of £1600 for house and share in the business. Claimed income of 300-400 pounds a year. Diaries 200/year and "other paperwork" 200. Bought and delivered much less.
Trial: Vendor sues for specific performance buyer counterclaims for rescission and tort of deceit

- TJ: Purchaser to blame because could have found error easily. Didn't look at paperwork.

Issue:

- Does negligence preclude a party from receiving rescission?
- Must a party seeking rescission prove inducement?

Analysis:

- CoA agrees no deceit **high bar to reach and gotta be sure if you claim this**
  - No proof of fraud or recklessness in representation
- TJ erred in barring rescission – **carelessness does not bar rescission in Equity**
  - Equity sides with the buyer
  - **o** Courts says as matter of law: **carelessness never bar to rescission**
    - Also, not careless because there weren't' actually any other papers

Holding: Rescission available and restoration effected

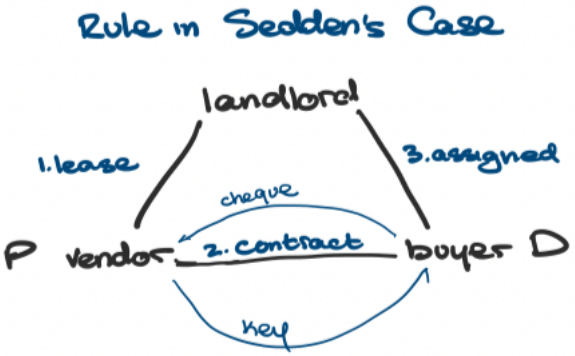
- Contract elimination *ab initio* – no specific performance for P
- P required to return deposit of 100

Redican v Nesbitt [1924] SCR 135 (SCC)

Rule in *Sedden's* Case: have to prove error in specie (got nothing of what you expected) or fraudulent misrepresentation or you can't rescind executed contract

- **Still burdened with this rule which is dumb**
- **On exam: either apply ratio and end up with unsatisfactory judgement or find way around by finding fraud.**

Execution of the contract would not constitute a bar to rescission in the case of fraudulent misrepresentation. SCC says fraud = deliberate lies, wilful blindness, recklessness. Judges have tendency to expand *in substantialibus* to get around this rule



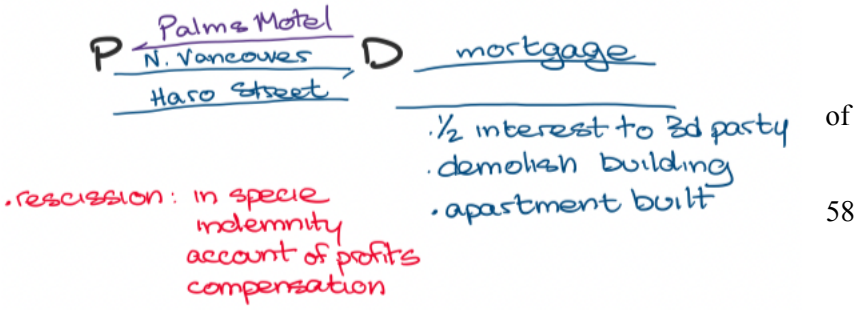
Facts: Purchase of a leasehold property. The transaction closed with the exchange of an assignment of the lease and a cheque for the purchase money. After learning the place was misdescribed (allege first opportunity to discover) purchaser stopped payment and sought rescission.
Trial: Rescission precluded by execution of contract for sale of land. Jury instructed that fraud required dishonestly and none was found.
SCC: New trial ordered on issue of fraudulent misrepresentation. Jury not instructed to consider effects of recklessness. **Held:** Failure of cheque to clear would give rise to right of action on part of vendor, the parties had intended the transaction to close and the contract was therefore executed. Rescission was therefore no longer available.

- Rescission could be precluded by impossibility of restoration. Restoration would require landlord's consent to retransfer and the court cannot compel 3rd party actions.

Kupchak v Dayson Holdings Ltd. (1965), 53 WWR 65

Shows examples of remedies and defences for fraudulent misrepresentation. Remedies: restoration *in specie* as much as possible, compensation for the rest (indemnification, account for disgorgement, compensation). Defences not available: laches, affirmation

Facts: P purchased shares of motel company from D in return for 2 properties. Took possession, operated and discovered representations regarding profitability of motel was fraudulent. Led to an exchange lawyers. D sold part of land and build of



apartment building. After learning of MR P remained in possession of and operated the business for more than a year. 1 year later P sought rescission. In defending the claim D relied on inability to restore P as jointly held premises.

Issues:

- When can monetary relief be ordered as restoration?
    - *Historically, rescission was all or nothing and needed to be a situation where nothing had happened in the contract – if couldn't give precise rescission, then courts said they wouldn't do anything*
    - *Courts have become more relaxed about providing monetary relief as rescission*
- When will affirmation or *laches* bar rescission?

Analysis:

- D argues for no rescission because there's no way to return the properties exactly as they were when the contract when executed can't return both parties back to the exact same way they were
- Judge says: we'll bend over backwards to make something work
- Instead of getting Haro Street back, P gets money
- P has to give back Palms Motel; but gets to receive indemnity/reimbursement from D for all the money he had to spend to run the motel.
    - D entitled to any profits from Motel that P made

Reasons regarding restoration:

- Equity has no inherent jurisdiction to award damages but broad powers to achieve rescission, especially if fraud.
    - Fraudulent party cannot raise own dealings as bar to relief.
    - Monetary restoration available if fair and possible.
    - D cannot resist rescission on the bases of its own dealing with property it had acquired by fraud. Granted. In lieu of restoration of effected property order D to compensate for the value of property at time of initial transfer. Court held it had the jurisdiction to order a compensation that was designed to effect substantial restitution under a degree of rescission.
- Forms of relief available in Equity (aside from damages at Law)
    - **Restoration** in specie: return of actual exchanged property.
    - **Indemnification**: reparation of necessary liabilities incurred.
    - **Account**: disgorgement of gains earned from property.
    - **Compensation:** money in lieu of *in specie* restoration.
- Reasons regarding defences:
    - **No laches** (unexcused delay creating prejudice to D). P reacted promptly to discovery no prejudice.
        - Conduct of P did not amount to affirmation. Lawyers communicated to D shortly after learning about MR – was a signal an intention to repudiate.
    - **No Affirmation** (unequivocal adherence to contract after discovery).
        - P had no practical alternative to operating motel. Immediate restoration required D's cooperation
        - Reasonable to keep operating in the circumstances

Held: Extent possible give back what you can, otherwise monetary relief (not damages).

IMPROPER INDUCEMENTS

DURESS

Introduction to Duress (Law)

- gist of claim: *vitiation* of intent — transaction was not truly product of free will
- elements: illegitimate pressure + causation + disposition

> illegitimate pressure (ex: person, property, abuse of process, economic duress)
> causation just have to persuade judge it was *a* cause (the pressure) & it has to be objectively reasonable

- *not* "overborne will"
- *not* sole cause *or* predominant cause *or* even but-for cause
- sufficient if *a* causal factor

> disposition
- *any* disposition (ideas of general application)
- a property idea—not a contract idea
- *any* property
- land, chattels, *choses in action* (*eg* executory contractual *promise*)

***can rescind even if it wasn't a disadvantageous contract**

Duress of the Person (*fairly unusual)*

- (threat of) violence or detention against plaintiff or person close to plaintiff
- threat must be believable and believed

Barton v Armstrong [1976] AC 104 (PC)

The parties became embroiled in a bitter dispute regarding control of a corporation. The defendant used the threat of murder to coerce the plaintiff into signing an agreement. The plaintiff subsequently sought a declaration that the contract was void. The Privy Council agreed on the ground that the defendant's threat was a reason that the plaintiff executed the agreement.

Duress of Goods (*sometimes justified)*

- *Is the seizure of threat of seizure justified?*
- contract induced through (threat of) wrongful detention of property
- inductive action must not be justified by law (*eg* distress for rent)
- purported requirement of "urgent and pressing necessity" (easily satisfied)

Astley v Reynolds (1731) 93 ER 939

The plaintiff pawned a £20 plate to the defendant. When he attempted to redeem it two years later, the defendant insisted that he would not return the item unless he was paid an additional £10 in interest. That amount was far in excess of the interest legally allowed. The plaintiff complied with the demand, but later sought recovery of the £10. The court allowed the claim on the grounds that (i) the plaintiff had not exercised his free will in making the payment, (ii) it was not reasonably practical for the plaintiff to litigate, rather than comply with, the demand, and (iii) the plaintiff had paid the money relying on his legal right to later recover it.

Abuse of Process

- *permissible* to threaten *civil* proceedings in *good faith* (*eg* settlement of claim)
- *impermissible* to threaten *civil* proceedings in *bad faith*
- *impermissible* to stifle criminal prosecution in exchange for benefit

Fuller v Stolze [1938] 1 DLR 635 (SCC)

The plaintiff and the defendant were officers of the same company. The defendant and two accomplices locked the plaintiff in an office and threatened to expose him to criminal proceedings unless he agreed to transfer his shares in the company to them. He complied but later sought to recover the shares. The claim was allowed on the ground that the enrichment was acquired by means of illegal extortion.

Economic Duress *(almost always this)*

- balance: illegitimate pressure *vs* hard-bargaining in commercial world
> controversial modern extension of duress
- economic pressure *prima facie* lawful (*cp* other species of duress)
- doctrine applied cautiously and less readily
- test: improper threat + lack of feasible alternative
> relief no longer premised upon high threshold of "overborne will"
- factors indicating *illegitimacy* of pressure
> pressure applied in *bad faith*

> plaintiff *could not reasonably resist* (*eg* by prompt court action)
> plaintiff *commenced proceedings promptly* after pressure relieved
> plaintiff *protested* at time of pressure (if feasible)
> plaintiff succumbed to pressure *without legal advice*

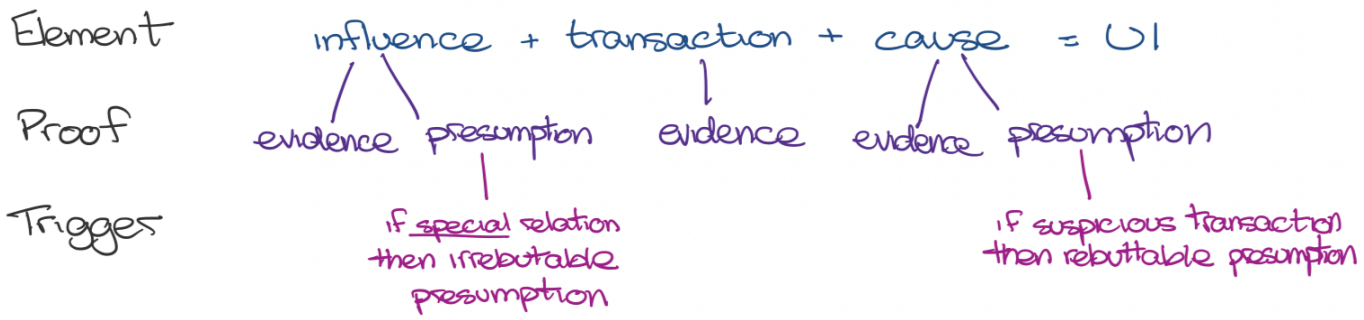
Based on *Stott v Merit Investments Inc* (1988) 48 DLR (4th) 288 (Ont CA)

Stott worked as a stockbroker for a company. Following procedures that he remembered reading in the company's official policy, he purchased $100 000 worth of shares on instructions from a client. Unfortunately, despite Stott's repeated demands, the client refused to pay for those shares. Worse yet, during that time, the value of the shares dropped by 60 percent. Eventually, the company took control of the account, sold the shares for $40 000, and threatened to sue Stott for $60 000. In the company's view, the whole fiasco was his fault. Stott denied liability, but he was worried that a lawsuit would damage his professional reputation. He was unable to find the policy document that he had relied on, and the company insisted he resolve the matter without consulting a lawyer. Consequently, he agreed to pay $50 000 in exchange for the company's promise to drop the matter. The parties' agreement subsequently was avoided on the grounds of economic duress.

Remedy

- not an independently actionable wrong — merely renders transaction *voidable*
  > incapable of supporting compensation or disgorgement
  > permits plaintiff to rescind (at Law)
    - transaction not void *ab initio*
    - transaction valid until option exercised by plaintiff

UNDUE INFLUENCE



Undue influence is primary psychological manipulation much more difficult to identify than duress, as it is primary an internal matter.

- It's **too much** influence/an overwhelming amount of influence doesn't have to be nefarious influence

* For UI, the physical act (agreement/contract/whatever) was a product of psychological manipulation, not real intention

Elements

- original instance of Equitable intervention — analogue of duress at Law
  > relief available despite absence of (threat of) violence to person or goods
- elements
  > psychological influence + causal nexus + disposition/transaction (**need to prove all three)**
  > to prove these three:
    - always option to prove by *evidence*
    - occasionally possible to prove one *or* two elements by *presumption*
  - ***once you prove these three elements, this gets you to a prima facie case of UI & you're entitled to rescind. But, the other side can still come back and resist it and say it was a product of free will to do this, you have to go to a lawyer, who goes through all the evidence and informs you that it was probably UI, but you still choose to go forward***
- influence
  > evidence indicating relationship of *significant* influence
    - not necessarily dominance and control — behavioural influence sufficient

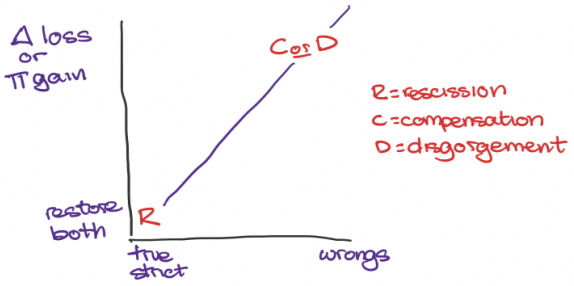
- *cf Geffen v Goodman* (1991 SCC)
  - "dominance" required *but* equated with "persuasive influence"

> *if* "special relationship" *then* irrebuttably presume one party has influence
- included: solicitor–client *or* physician–patient *or* parent–infant child
- not included: husband–wife *or* employer–employee *or* bank–customer

- causation

> transaction must be caused or induced by psychological influence
- generally *a contributing* cause—not necessarily but for causation

> *if* "suspicious transaction" *then* rebuttably presume influence exercised
- transaction is *suspicious* if no apparent reason



- don't **need** to show the following:

> *substantive unfairness* need not been established
- transaction ought not to have occurred *regardless* of consequences
- *cf* Wilson in *Geffen v Goodman*: *commercial* transactions only

> defendant's awareness not necessary: *Allcard v Skinner*

- *once* elements satisfied: burden shifts to defendant

> must prove transaction was product of plaintiff's free will
- *eg* plaintiff received full and informed independent legal advice

- complaint is that P should never have entered into the agreement because it wasn't a product of P's free will
- doesn't matter if the deal is good for you or not

Example

Dave acted as Pam's lawyer during her divorce. During their discussion, Pam indicated a desire to sell her house. Dave agreed to purchase the property. The sale price, however, was less than half of the house's market value.

Once the solicitor-client relationship ended, Pam realized that she had done a foolish thing. She consequently wanted to reverse the transaction.

Pam can easily establish undue influence:

- solicitor-client relation triggers an *irrebuttable presumption* of *influence*
- transaction was *suspicious* because of price
- suspicious sale triggers a *rebuttable presumption* of *causal* connection

Dave then bears the burden to show that the transaction nevertheless was genuinely a product of Pam's autonomy. He cannot do so.

Pam is entitled to *rescind* the transaction.

UI looks like a tort and courts sometimes treat it like one but it's **just a basis for rescission**

Remedies

-
- Rescission
- Compensation – notionally "restores" P; super hurts D
- Disgorgement (*like getting all of D's profits that were at your detriment)* – puts D back to how they were; super helps P
  - **For the 2nd and 3rd, have to prove *wrongs* (very high hurdle), whereas rescission is a low barrier (and minimal comparative gain)**

We want UI too be a low threshold

Third Party Participation

- issue #1: rescission potentially barred by third party intervention

Example

Pam sold a painting to Dave as result of his undue influence. A short time later, Dave re-sold the painting to Xavier, who had no reason to suspect any defect in Dave's title. Having sufficiently recovered her own free will, Pam then sought rescission of the contract.
The remedy was refused. Undue influence rendered the initial sale *voidable* in Equity. Dave accordingly held good legal title in the painting until such time as Pam exercised her right of rescission. He consequently could pass legal title to Xavier by way of sale. And as a *bona fide* purchaser of the legal interest without notice of Pam's pre-existing Equitable right, Xavier took clear title in the painting and extinguished Pam's Equitable power of rescission.

- issue #2: plaintiff induced by undue influence to transact with third party
  > transaction subject to relief *if* third party had sufficient notice of defect
  - constructive notice if circumstances suspicious to reasonable person

Barclays Bank v O'Brien [1994] AC 180 (HL)

A man wanted to borrow money for business purposes. A bank agreed, but only if the debt was secured by a mortgage over the matrimonial home. The man brought his wife to the bank, where she signed the documents without reading them. The bank staff did not explain to her the risks inherent in the transaction. When the man subsequently defaulted on the loan and the bank attempted to enforce its rights under the mortgage, the wife objected that she had been induced to sign by her husband's undue influence.

The House of Lords agreed. The bank should have realized that the woman was not acting of her own free will and therefore should have directed her to independent legal advice.

Wife can plead UI against the bank this is generally applicable:
Can rescind if you can demonstrate:

1. **Bank knew or should have known husband exerted undue influence over wife**
2. **And bank didn't send her away for independent legal advice**

Remedy

- Traditional rule: undue influence supports *rescission* of transaction
  - Restitutionary rescission triggered by strict liability unjust enrichment
    - Remedy merely restores parties to *status quo ante*
    - Action requires proof of vitiated intention *but not* proof of wrongdoing
- Potential development: undue influence supports *compensation* of P's loss
  - Remedial obligation to repair loss *must be* triggered by breach of obligation
    - Remedy restores P but adversely affects D
    - Adverse effect justified only by proof of wrongdoing
      - Wrong consists of D's knowledge of vitiated intent
- Potential problem: high threshold for minimal relief
  - Risk that *fault* will become *invariable requirement* of undue influence

Example

Pam and Dave were co-workers. Because of his humble and self-effacing nature, Dave was oblivious to the fact that Pam idolized him and hung on his every word. Honestly unaware it was worth $400k, Dave offered to purchase Pam's house for $200k. Pam was unable to resist. Some time later, Pam started a new job, recognized the degree to which she had been infactuated with, and influenced by, Dave, and accordingly sought rescission of the sale.

- Does Pam seek restitution or compensation?
- If the law is designed to provide compensation, will Pam be able to establish undue influence?

UNCONSCIONABILITY

Introduction to Unconscionability (Equity + statute)

- historical origins: *protection of expectant heirs*
- gist of claim: deliberate exploitation of vulnerability for unfair gain
    > incapacity, misrepresentation, duress, undue influence
        - plaintiff-sided grounds for relief
        - rescission: no true intention
            - avoid *any* transaction not attributable to free will
    > unconscionability
        - impairment *may* create vulnerability—but *not* negate autonomy
        - rescission: immoral abuse of transactional weakness
            - unimpaired intention necessitates high threshold to relief
- elements of claim
    > inequality of bargaining + substantial unfairness + knowledge
        1. nature of inequality
            - *some* inequality of bargaining ability is virtually *inevitable*
            - plaintiff must suffer from ***significant*** **disadvantage**
                - categories of disadvantage remain open
                    - *eg* depression, distress, infatuation, poverty
                    - *eg* illiteracy, lack of education, inexperience, naivety
        2. nature of substantial unfairness
            - *some* disparity in transactional outcome virtually *inevitable*
            - plaintiff must suffer *significant* detriment from transaction
                - categories of substantive unfairness remain open
                    - *eg* sale of asset at far less than market value
                    - *eg* personal guarantee without corresponding benefit
                    - *eg* improvident settlement of claim
        3. defendant's (constructive) knowledge of disadvantage *should be* required
            - operational focus on *immorality* rather than *vitiated consent*
            - deliberately took advantage idea of moral culpability
    > proof of elements raises *rebuttable presumption* of unconscionable transaction
        - defendant must prove procedural fairness *or* substantive fairness
            - independent legal advice only clear possibility

Difference is that this one is D-sided doesn't behave like other misrepresentations it's good to protect people who can be easily manipulated

Harry v Kreutziger (1978) 95 DLR (3d) 231 (BC CA)

The plaintiff was partially deaf, easily manipulated, unsophisticated and inexperienced in business. He did, however, own a fishing boat and a licence to fish for salmon. The defendant was virtually the opposite of the plaintiff: aggressive, manipulative, cynical and well versed in sharp business practices. Through persistent pressure, bordering on harassment, the defendant persuaded the plaintiff to sell his boat and licence at a price which, as the defendant knew, was well below market value. The plaintiff came to regret the sale, especially after learning that it was very difficult to obtain another licence.

The Court of Appeal held that (i) **there was a marked disparity in terms of the parties' bargaining positions,** and (ii) **the sale was very disadvantageous to the plaintiff, and therefore presumed that the transaction was unconscionable**. The defendant was unable to rebut that presumption.
There was such a gross disparity between P and D here

Uber Technologies v Heller (2020 SCC)

David Heller contracted to drive for Uber. The contract contained an Arbitration Clause that required all disputes to be resolved through arbitration in Amsterdam rather than through Canadian courts. (Simply *filing* an arbitration claim in Amsterdam costs $14,500.)
Heller became the representative plaintiff in class action against Uber. The claim alleges that Uber drivers are "employees" and consequently are entitled to employee benefits (*eg* minimum wage, vacation pay). Uber disagreed.

The trial judge upheld the arbitration clause by imposing a *stay* on the Canadian proceedings. The Ontario Court of Appeal denied the stay on the basis that the clause was unconscionable insofar as the costs of arbitration were likely to far outweigh the value of any lawsuit.
Abella and Rowe JJ, writing for the majority in the Supreme Court of Canada, upheld the finding of unconscionability. In doing so, they fundamentally altered the test.

- ***Inequality of Bargaining Power*** The majority held that the first element was satisfied because the arbitration clause was contained in a "standard form contract" that the claimant was "powerless to negotiate"; there was a "significant gulf in sophistication" between the driver and the multinational company; and the document "contain[ed] no information about the costs" of the dispute resolution mechanism (at [93]). Could much the same be said of most standard form contracts?
    - *Standard form contracts are always take it or leave it already not automatically exploitative just because they're default one-sided*
- ***Substantive Unfairness*** The majority held that the second element was satisfied because the $14,500 filing fee was "close to [the claimant's] annual income" and because the total cost of arbitration in Amsterdam was apt to be "disproportionate to the size of [any foreseeable] award" (at [94]). How do those arbitration costs compare with litigations costs in Canadian courts?
- ***Knowledge*** The majority held that since "a weaker party … is as disadvantaged by inadvertent exploitation as by deliberate exploitation" (at [85]), unconscionability "can be established without proof that the stronger party knowingly took advantage of the weaker" (at [84]). Was that a good idea? What purposes can the knowledge requirement serve?

After* Uber, *don't need knowledge anymore. Just need inequality of bargaining power and substantive unfairness

In a concurring judgment, Brown J rejected the plea of unconscionability and said that the majority's approach to the equitable doctrine was untenable. He further held, however, that the arbitration clause was unenforceable, as a matter of public policy, because it *effectively* prevented Uber drivers from *ever* suing the company.

The Nature of Unconscionability: Procedural or Substantive?

- competing positions
    > procedural: doctrine designed to ensure fairness in bargaining *process*
    > substantive: doctrine designed to ensure fairness in transactional *substance*
- orthodox view favours procedural focus but doctrine is probably *sui generis*
    > no relief *if* substantively *unfair bargain* results from *fair process*
    > no relief if substantively *fair bargain* resulting from *unfair process*

Exercise

Pam owned a valuable asset. Dave persuaded her to sell that asset to him. Pam now wants to reverse the transaction. Should she be entitled to do so?

A. What if (1) Dave paid *full* market value, (2) Pam processed information more slowly than most people and had a strong desire to please, but (3) Dave was entirely unaware of Pam's vulnerabilities?

B. What if (1) Dave paid *half* of the market value, (2) Pam did *not* suffer from any vulnerability?

C. What if (1) Dave paid *half* of the market value, (2) Pam processed information more slowly than most people and she had a strong desire to please, but (3) Dave was entirely unaware of Pam's vulnerabilities?

D. If relief was *not* appropriate in (A) and (B), what magic would warrant relief in (C)?

E. Exactly when and why should Equity set aside a disposition?

Remedy

- **after *Uber*, can rescind one bad provision out of the contract**
    > standard feature of American law
    > traditionally rejected in Anglo-Canadian law *but* allowed in *Uber*

- **occasional suggestion that unconscionability may trigger *compensation***
    - like the other doctrines, it's simply a way of getting out of a contract not a tort
        > doctrine is *not* independent cause of action *or* civil wrong
        > doctrine merely reverses defective dispositions

Statutory Unconscionability

- *Unconscionable Transactions Act* — governs unfair terms in loans agreements
- *Consumer Protection Act* s 6 — governs unfair consumer transactions
    > consumer = goods or services purchased for personal or household use
        - goods include new houses
        - services include repairs, club membership, time-share
    > supplier = someone who acts in ordinary course of business
    > illustrations of unfair trading practices (next page)
    > effects of legislation
        - rights cannot be waived or modified
        - sanctions and remedies
            - compensation, punitive damages, injunctions, restitution
            - class action available to consumer advocacy organizations

Force Majeure

- frustration = common law doctrine
    > doctrine applies even if parties did not address in contract
    > judge-made rules to overcome practical difficulty
- *force majeure* = contractual term
    > *force majeure* defined: "superior force"
    > available only if parties (expressly) addressed in contract
        - *very* commonly included in contracts
    > elements
        - contemplated performance impossible due to supervening event
        - event beyond reasonable foresight and control
    > general effect: non-performing party relieved of liability
        - rules tailored to parties' specific circumstances
            - *eg* prevention, mitigation, and notice requirements

Example

Notwithstanding anything to the contrary contained in this agreement, neither party shall be liable for any delays or failures in performance resulting from acts beyond its reasonable control including, without limitation, acts of God, acts of war or terrorism, shortage of supply, breakdowns or malfunctions, interruptions or malfunction of computer facilities, or loss of data due to power failures or mechanical difficulties with information storage or retrieval systems, labor difficulties or civil unrest. Notwithstanding the foregoing, in the event of such an occurrence, each party agrees to make a good faith effort to perform its obligations.

MISTAKES

Mistake: Introduction

- non-contractual mistakes
    > a low-threshold: restitution if but-for causation
        - few countervailing interests if not contractual
- contractual mistakes
    > a notoriously difficult area
    > contract formation requires *meeting of the minds* on *objective* basis
        - mistake may *vitiate* apparent intention and *consensus*
        - *but* relief from mistake subject to substantial *policy* considerations
            - balance: relief *vs* risk allocation
            - balance: fairness *vs* orthodoxy

- balance: subjective expectation *vs* predictability (commercial)
- balance: innocent owner *vs* innocent buyer

- *cf* misrepresentation
  > why not plead misrepresentation leading to rescission?
  - mistake may be non-induced (unilateral or shared error)
  - circumstances may require *void* rather than *voidable*

Mistakes Preventing Creation of Contracts: Mistake About Identity

- identity of contractual party *may* be important to contractual process
  > especially if unsecured credit on basis of debtor's (apparent) reputation
  > especially if identity is crucial to ability to perform
- criteria of non-enforcement
  > mistake was *known* to defendant (subject of mistaken identity)
  > mistake was *material* to creation of contract

Shogun Finance v Hudson (2004 HL)

A rogue presented himself as "Mr Patel" to the plaintiff finance company in the hope of purchasing an expensive vehicle. As the plaintiff discovered upon investigation of the information and documentation provided by the rogue, there was indeed a Mr Patel who had an excellent credit rating. The plaintiff therefore sold a vehicle to the rogue.

The rogue then re-sold the car to the defendant, who was entirely innocent of the fraud. When the plaintiff finally realized that it had been duped, and that the loan would not be repaid by "Mr Patel," it located the vehicle and tried to seize it from the defendant. Under English legislation, the plaintiff was entitled to reclaim the car only if the document that it signed with "Mr Patel" was not truly a contract.

The House of Lords was split 3-2. The majority held in favour of the plaintiff on the basis of a *material mistake of identity*. It found that there was never a meeting of the minds because (i) the rogue never intended to enter into a contract, and (ii) the plaintiff intended to enter into a contract only with the *real* Mr Patel. In reaching that conclusion, the majority emphasized the fact that the plaintiff had taken special pre-cautions to verify "Mr Patel's" identity and credit rating.

The dissenting judges believed that the initial contract was valid, and that the rogue received good title that he was able to transfer to the defendant. It reached that conclusion on the basis that, notwithstanding the mistaken identity, the plaintiff *had* intended to create a contract with the party standing before it (*ie* the rogue) regardless of his true identity.

In the course of judgment, the House of Lords also scotched the long-standing heresy that Equity has a (relatively generous) doctrine of mistake that is distinct from Law.

Mistakes Preventing Creation of Contracts: Mistake About Subject Matter

- no *consensus ad idem* if no objective agreement on terms
- (generally) no relief for unilateral mistake
  > *eg* purchaser unilaterally believes painting is a Picasso
  - *prima facie* contract because parties agreed on *that* painting
  - *cf* misrepresentation regarding identity of artist
- relief possible if mistake affects identity (not quality) of subject matter
  > no agreement on *which* item is subject to agreement

Raffles v Wichelhaus (1864 Exch)

The defendant purchased cotton to be shipped from Bombay to Liverpool aboard the *Peerless*. Unbeknownst to either party, there were two ships called *Peerless* and both were sailing from Bombay to Liverpool. The purchaser had in mind the one that was sailing in October. The vendor had in mind the one that was sailing in December.

By the time that the December *Peerless*, containing the cotton, arrived in London, the purchaser no longer had any need for it. A dispute arose as to the enforcement of the agreement. The court held that there was no contract. As a result of the mistake, there was no *consensus ad idem*, neither objectively nor subjectively.

Mistakes Rendering Contract Impossible to Perform

- mutual mistake regarding *existing* fact affecting possibility of performance

Example

In December, Pam rents her cottage to Dave for the upcoming summer. As they discover when they go to inspect the property in April, it had been destroyed by fire in November. *Prima facie* the parties have no contract because they shared a mistake pertaining to an *existing fact* that affected the possibility of performing the agreement.

The conclusion would be different, however, if the contract contained a *force majeure* (irresistible force) clause that places the burden of such a loss upon one of the parties.

If the cottage had been destroyed in January (*ie* after the contract had been created), the relevant issue would be frustration, rather than mistake.

Mistake—*Non Est Factum*

Only applies to written documents. If you signed a document and later want to get out of it. Very narrow doctrine: policy: we don't want to reward people for not reading contracts, want to protected 3rd parties and encourage predictability. Successful please = VOID

1. **Contract must be FUNDAMENTALLY or RADICALLY different than believed** (compare to misrepresentation where any difference is actionable)
2. **Difference must be attributable to a misrepresentation**.
3. **Doctrine may be barred if party failed to act reasonably**
    a. Carelessness irrelevant between immediate parties.
        i. Rescission available on basis of misrepresentation.
    b. Carelessness fatal against innocent 3rd party.

- doctrine *may be* barred if party failed to act reasonably
    > carelessness irrelevant between immediate parties
        - *cf* misrepresentation: carelessness no defence
    > carelessness fatal as against innocent third party

Saunders v Anglia Building Society (1971 HL)

Rose Gallie, a 78 year-old widow, owned a home. Her husband had passed away, but she was very close with her nephew, Walter. Walter had a business partner named William Lee. And William, unfortunately, was a rogue.

Since Rose was old, and since she intended to leave her entire estate to Walter when she died, she decided to immediately give the house to him as a gift. She understood that she would be able to continue living in the premises for the rest of her life. To create the gift to Walter, Rose would have to sign a document called a deed.

At that point, William intervened. He had a deed drafted, but he changed the recipient from Walter to himself. He then presented the document to Rose. Because her glasses were broken, she could not read, so she asked about the document's contents. William told her it was a deed—he did not tell her that it would create a gift to him rather than Walter.

Once William became the owner of the house, he used it to borrow money. A bank agreed to lend £1500. In exchange, William promised to repay and he agreed that the bank could have the house if he failed to do so.

William, of course, had no intention of repaying the loan. When he defaulted, the bank moved to enforce its rights. At that point, Rose learned that she had been duped. She argued *non est factum*. In effect, she said that the deed was ineffective—that she never *really* gave her house away—because she mistakenly believed that she signed a document that gave her house to her nephew rather than the rogue.

The House of Lords rejected Rose's argument for two reasons. (1) Although she had been mistaken, the actual document was not *radically* different than the one she thought she signed. She believed that she had signed a deed—she actually did sign a deed. The only difference was the recipient: William rather than Walter.

Marvco Color Research Ltd v Harris (1982 SCC)

The defendants, intelligent and experienced individuals, mortgaged their home in order to help their daughter's boyfriend with a business venture. He subsequently returned with a document that he claimed merely addressed a small administrative matter pertaining to the original security. The defendants signed without reading. It was only later that they learned that the disputed document created a second mortgage in favour of a new lender.

The Supreme Court of Canada allowed the lender's action for foreclosure, finding that the defendants' misfortune was a function of their own carelessness.

Rectification

- contract rectifiable in Equity if agreement improperly *recorded*
  > mistake must pertain to *written expression*—not *creation* of contract

"Courts of equity do not rectify contracts; they may and do rectify instruments."
Mackenzie v Coulson (1869)

Frederick E. Rose (London) Ltd v William H Pim Jnr & Co Ltd (1953 CA)

The parties agreed to the sale of "horsebeans," which the vendor told the purchaser was a different name for feveroles. The purchaser required feveroles for the purpose of a transaction with a third party. As later became clear, however, horsebeans are different than feveroles.

The third party sued the purchaser for breach of contract. To protect itself, the plaintiff claimed that it was entitled to rectify its agreement with the vendor and to receive genuine horsebeans from the vendor.

The court denied rectification. While the parties undoubtedly were mistaken, the error was not a function of inaccurate drafting. The written contract faithfully reflected the parties' (mistaken) desire to deal certain types of beans.

- criteria for relief
  > an objective agreement on terms at time
  > agreement persisted until time of signing
  > rectification involves clear and certain terms

- relief available in court's discretion
  > equitable bars apply (*eg laches*, affirmation)
  > carelessness is not a bar—but is a relevant factor

"[A] relaxed approach to rectification as a substitute for due diligence
at the time a document is signed would undermine the confidence
of the commercial world in written contracts."
Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd (2004 SCC)

- burden of proof often said to be elevated

"[B]eyond the sort of proof that … scrapes over the low end
of the civil 'more probable than not' standard."
Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd (2004 SCC)

- relief traditionally confined to *common* mistakes
  > relief now cautiously extended to *unilateral* mistakes

Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd (2004 SCC)

The parties orally reached an agreement regarding ownership and development of a golf course. The plaintiff was to hold an option to construct a double row of houses along the 18th fairway. That project required a strip of land approximately 110 *yards* wide.

Unfortunately, when the agreement was reduced to writing, the document referred instead to a strip of land 110 *feet* wide. From the plaintiff's perspective, the alteration permitted only a single — rather than a double — row of houses and consequently "turned a viable project into 'a waste of land.'" The defendant recognized the error immediately, but the plaintiff remained oblivious until long after the contract had been signed.

The Supreme Court of Canada upheld the plaintiff's claim for rectification. In doing so, it imposed four stringent requirements with the aim of ensuring that "the proverbial floodgates" are kept closed. Three of those requirements replicate the criteria governing common mistakes (above). The fourth element, unique to cases of unilateral mistakes, demands (4) proof that the defendant "either knew or ought to have known of the mistake in reducing the oral terms to writing."

In knowingly allowing the plaintiff to sign the inaccurate agreement, the defendant acted with "the full intention that he would in the future rely on the terms" of the document "to thwart or reduce" the plaintiff's development plans.

Rectification (cont'd)

- relief traditionally confined to *errors in drafting*—not errors in judgment
  > trend toward allowing *substantive* changes: *Canada v Juliar* (Ont CA 2000)

Canada (Attorney General) v Fairmont Hotels (2016 SCC)

Fairmont Hotels wanted to enter into a sophisticated financial arrangement, but only if it could do so without incurring tax. Several options were available, including a share redemption and a loan repayment. It chose to proceed by way of a share redemption.

Several years later, a government tax audit revealed that tax neutrality had indeed been possible, but only if Fairmont Hotels had chosen to repay a loan rather redeem shares. On the actual facts, a substantial tax had been incurred.

Fairmont Hotels then sought an order to "rectify" the arrangement by retroactively substituting a loan repayment for the share redemption. The lower courts agreed.

The Ontario Court of Appeal held that rectification merely requires "proof of a continuing specific intention to undertake a transaction … on a particular tax basis." There was no need for the applicant to further demonstrate that it had "determined the precise … means by which [its] settled intention to achieve a specific tax outcome would be realized." Accordingly, since Fairmont Hotels had intended from the beginning to proceed in a tax neutral manner, rectification was available to achieve that goal.

On further appeal to the Supreme Court of Canada, the majority returned Canadian law to the orthodox position. As Brown J explained, "Rectification is not equity's version of a mulligan." Courts of equity do not rectify *transactions*; they may and do rectify *instruments*.

Rectification consequently was unavailable to Fairmont Hotels. The documentation prepared in connection with the transaction accurately reflected the parties' original intention to undertake a share redemption. Rectification was not warranted merely because the applicant recognized, in hindsight, that it had made a poor decision at the outset.

FRUSTRATION

Situation where things have changed so profoundly that it's impossible to perform

The Historical Position

- absolute liability
- contracts in a ruggedly individualistic society
  - voluntarily accepted obligations *must* be performed
  - impossibility of performance irrelevant
- contractual protection must be negotiated and purchased
  - party to blame for failure to protect self

Paradine v Jane (1647 KB)

Facts:

- William Jane (or Jayne) leased 17 acres of land from Robert Paradine at a rent of £21 per year for 21 years. Six years later, the property was seized by troops commanded by Prince Rupert during the English Civil War. Unable to occupy the land, let alone earn income from it, Jane predictably fell behind on the rent.
- Paradine sued for the arrears. Jane argued that he had been expelled by "a certain German prince … an alien born, enemy to the King [who] had invaded the realm with an hostile army of men" and by "force did enter upon" the leased land, with the result that Jane, being "held out of possession … could not take the profits."
  - *He couldn't prevent this …*

Holding:

- The tenant's argument was rejected. Rolle J. explained "when the party by his own contract creates a duty … he is bound to make it good … notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." For example, if a "lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." Equally, if leased premises "be surrounded … or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent."
- *It was voluntary for him to pay rent and should have protected himself, planned accordingly, carved exception for himself in contract*

Modern Doctrine: *Taylor v Caldwell* (1863 QB)

If clear from outset that performance is only subject to specific condition, and those conditions become impossible or practically impossible, contract is frustrated

COMMON LAW FRUSTRATION: USEFUL BUT LIMITED (NARROW)

- *non haec in foedera veni* = "it was not this that I promised to do"

elements/test

1. **a *supervening* event** (*ie* arose *after* contract created)
2. ***beyond reasonable contemplation***
   a. lots of wiggle room/judicial discrtion
3. causing performance to be ***radically different***
   a. small changes at the margin aren't enough

> a risk *not* allocated by contract (*cf force majeure*)

- traditional effects of frustration
  - rights and obligations *frozen* at moment of frustration
    - release from obligations that *have not* accrued due
    - enforcement of obligations that *have* accrued due

- ***contract not void or voidable if you owe money before the frustratin moment, it's still due ; anything after is not***

Cutter v Powell (1795 KB)

Entire contract frustrated thus no payment accrued due
Facts: The plaintiff's husband contractually agreed to serve as a second mate on a voyage from Jamaica to Liverpool. Payment was due on arrival. The contract was frustrated when he died en route.
The court held that the agreement was an entire contract and therefore denied the widow's claim for quantum meruit.
*Entire contract: no rights unless and until fully perform the contract.

Chandler v Webster, 1904 UK

Accrued obligations still enforceable after frustration even if performance hasn't occurred yet
Facts: The plaintiff agreed to rent a room from the defendant for the purpose of viewing the coronation of Edward VII. Under the terms of the contract, the plaintiff paid part of the price and had accrued an obligation to pay more. The contract was then frustrated when the procession was cancelled. The plaintiff was not entitled to recover his earlier payment — and the defendant was entitled to receive the outstanding installment.

- *Remedial implications are very harsh*

Fibrosa Spolka Akcjna v Fairbairn Lawson Combe & Barbour, 1943 HL

Court changed its tune. If you've paid money prior to a frustrated contract, you are entitled to restitution but only if you have a suffered a "total failure of consideration" (if you received NOTHING of what you expected to receive) introduction of nuance

An English company agreed to sell a flax hackling machine to a Polish company for £4800. After a prepayment of £1000, the contract was frustrated by the outbreak of war. The plaintiff claimed restitution of its pre-payment. The House of Lords allowed relief on the basis of a total failure of consideration.

RULES: Following Fibrosa Spolka

- *Accrued obligations* remain enforceable (*Chandler*)
- Restitution for money paid on total failure of consideration (*Fibrosa*)
- No relief for wasted expenditures (ie resources spent in reliance on contract)
- No relief for services rendered under entire contract (*Cutter)*
- *Frustrated Contracts Act* 1943
    - Model immediately adopted throughout Commonwealth
    - More sensible approach for consequences

Alberta's *Frustrated Contracts Act*

Default rules, can go outside statute either by directly stating or implicated. Needs to be clear.

- Statutory default rules subject to modification by parties [7]
- Severable portion of contract unaffected by frustration [8]
    - Party entitled to enforce payment if fully performed severable portion.
- Money paid is recoverable (*Fibrosa* extended) [3(a)]
    - *Prima facie* recoverable. Not premised on a total failure of consideration, but not an absolute right.
- Accrued monetary obligations are discharged (*Chandler* abolished) [3(b)]
- Expenditures compensable in court's discretion if money received or due [4]
    - Expenditures capped by payments received or accrued.
    - Incurred expenses reimbursement at courts discretion.
- Beneficial services recoverable in court's discretion *(Cutter* abolished) [5]

Can-Truck Transportations v Fentons' Auto Paint Shop, 1993 ONCA

Facts: The defendant's truck was badly damaged in an accident. It was taken to the plaintiff's garage, where it received $28 000 in repairs. The truck was then destroyed by a fire. The cause of the fire is unknown. The defendant

demanded delivery of the remains of the truck, but the plaintiff purportedly exercised a lien. The plaintiff also claimed relief for the value of its work.
The court reached three conclusions.

(1) The plaintiff enjoyed a statutory lien over the remains of the truck pending payment.
(2) The plaintiff did not enjoy a claim for the value of beneficial services. Since the truck was destroyed by fire, the plaintiff's services did not confer a benefit upon the defendant.
(3) The plaintiff might, however, be entitled to relief for the wasted expenditures. By the time of frustration, the plaintiff had provided services and generated an accrued right to payment. The matter was therefore remitted to the trial judge to exercise a discretion under Ontario's equivalent of section 4 of the Alberta statute.

Force Majeure

- frustration = common law doctrine

  > extraordinary supervening event beyond reasonable contemplation

  - an *un-allocated* contractual risk
  > judge-made rules to overcome practical difficulty
- *force majeure* = contractual term
  > *force majeure* defined: "superior force"
  > available only if parties (expressly) addressed in contract
  - *very* commonly included in contracts
  > general effect: non-performing party relieved of liability
  - rules tailored to parties' specific circumstances
  - *eg* prevention, mitigation, notice requirements

Sample Clause
"Notwithstanding anything to the contrary contained in this agreement, neither party shall be liable for any delays or failures in performance resulting from acts beyond its reasonable control including, without limitation, acts of God, acts of war or terrorism, shortage of supply, breakdowns or malfunctions, interruptions or malfunction of computer facilities, or loss of data due to power failures or mechanical difficulties with information storage or retrieval systems, labor difficulties or civil unrest. Notwithstanding the foregoing, in the event of such an occurrence, each party agrees to make a good faith effort to perform its obligations."

Covid-19 and Frustrated Contracts

- sources of disruption
  - Covid-19 illnesses rendered people incapable of performance
  - government-imposed restrictions precluded (full) performance
- countless contracts affected
  - clothing store recently opened—non-essential businesses closed
  - banquet hall booked for large wedding—attendance limited to 25
  - concert promotor advertises gig—health authority "encourages" isolation
  - family holiday in Hawaii booked—government strongly advises against travel
- wasted expenditures
  - business incurs expenses in preparation for performance—never occurs
  - consumers pay deposits—refunds denied

Frustration Denied

- no claims of frustration due to *Covid-19* illness or death
- many claims of frustration due to by *government restrictions*
  - Canadian governments generally *restricted* rather than *prohibited*
    - performance possible albeit disappointing
  - **supervening events *rarely* rendered performance *radically different* □ not <u>radical</u> enough to be frustration**
    - greater *expense* or *inconvenience* rarely constitutes frustration
      - *eg* debt default due to reduced income—risk inherent in contract
    - reduced *benefits* not tantamount to frustration
      - *eg* annual university parking pass (no in-person classes)

- *numbers* not essential to contractual performance
  - *eg* vastly reduced guestlist does not preclude wedding
- *time* of performance rarely essential to contract
  - *eg* banquet hall booking can be postponed or re-scheduled
- permitted *means* of performance often flexible
  - *eg* dance lessons can be delivered online

Hollander v Sedlic (2021 BC CRT)

In October 2019, the plaintiffs agreed to rent the defendant's Hawaiian condo for April 2020. On 13 March 2020, the federal government "strongly urged" against non-essential travel. The plaintiffs chose to adhere to that advice, but the defendant refused a refund. The plaintiffs claimed that the contract was frustrated. That claim failed because while travel was "unwise and inadvisable," it was not impossible.

Should the plaintiffs have been expected to defy their government, expose themselves to an increased risk of infection, and undermine public health goals?
Was the contract practically impossible to perform as expected? this isn't really accounted for in the Act now

ILLEGALITY

- illegality: a broad concept—*eg* crimes, private law wrongs, public policy

Grounds of Invalidity

(1) common law illegality
> transaction struck down for violation of *public policy*
> statutory propositions relevant *but not* determinative
> transaction invalidated by *court* on basis of *judicial* discretion
- categories evolve to reflect prevailing community values
  - non-marital cohabitation
  - purchasing public honours
  - trade with an enemy at war
  - race-based restrictive covenants
  - surrogacy contracts (*Re Baby M*: void)

(2) statutory illegality
> transaction struck down for violation of statute
- public policy *codified* in legislation
- invalidated by authority and command of *legislature*
  - no scope for judicial discretion outside of statute

(3) *Hall v Hebert:* stultification

a. Allowed to get compensation even if you are doing something illegal as long as compensation doesn't allow you

Effect of Violation

- category-dependent and fact-dependent
> sanction tailored to nature of wrong and nature of circumstances
- *eg* void and unenforceable transaction
- *eg* offending provision excised from otherwise valid agreement
- *eg* offending provision re-drafted within otherwise valid agreement

Common Law Illegality: Restraint of Trade

- covenant restricting person's ability to carry on trade, profession or business
> *eg non-competition* clause in *employment* context
- employee prohibited from working in same field
> *eg non-solicitation* clause in *employment* context
- employee prohibited from contacting clients of ex-employer
> *eg non-competition* clause in context of *sale of business*
- vendor prohibited from establishing new competition for old business

- covenant in restraint of trade *not* necessarily invalid
  > covenant valid and enforceable *if* reasonable in circumstances

Exercise *needs to be reasonable*

Pam previously worked for Dave. When she left that job, she signed a contract in exchange for the receipt of a settlement package. That settlement contract restricted her ability to earn income from new endeavours.

1. In determining whether or not the restraint of trade clause in the settlement contract is valid, a court would consider a number of factors.
2. It would balance
   (i) (a) Dave's legitimate right to protect his own business interests *vs* Pam's right to earn a living and pursue her calling, and
   (ii) (b) employers' interests in controlling competition *vs* the public's interest in access to competitive markets.

Factors:

- The clause is more likely to be enforced if it involves ***non-solicitation*** rather than ***non-competition***.
  - It is more reasonable to prevent Pam from contacting old clients, than to prevent her from working in the same field.
- A non-competition clause is more likely to be valid if it is confined to **a small *area*** (*eg* a neighbourhood or city, rather than a region or province), or a **limited *time*** (*eg* a year rather than ten years).
- A non-competition clause is more likely to be enforced if it pertains to a **specific market**, rather than an **entire trade or profession**.

Statutory Illegality

- traditional rules in regulated society
  > statute traditionally confined to serious matters — agreements invariably void
  > modern regulated society — automatic invalidity no longer apposite
  - modern society extensively governed by statutes and regulation
    - legislated requirements for *innumerable* and *disparate* reasons
    - *sanction* ought to reflect circumstances of legislation and breach
- determination of effect of legislative violation
  > legislation may *expressly* indicate appropriate sanction

Example

Dave is a real estate agent. He created a contract with Pam: If he successfully found a purchaser for her home, he would receive a 5% commission on the price. Dave introduced Pam to Xavier, who bought her house for $1,000,000. When Dave demanded his commission, however, Pam observed that he was not a *licensed* real estate agent. Section 21 of Alberta's Real Estate Act states that "No action may be brought for a commission or for other remuneration" by an *unlicensed* real estate agent.

The parties' contract is unenforceable and a claim in unjust enrichment will fail because the statute provides a juristic reason for Pam's enrichment.

> ***legislation typically silent — sanction requires judicial interpretation***
- statutory purpose + protected class + effect of breach + deterrence

***Kingshott v Bunskill* [1953] OWN 133 (CA)**

M: indefensible result because it doesn't consider the mischief underlying the legislation (consumer protection) courts didn't get involved bc of illegality. Statute was silent on remedy for breach so up to the judge. Illegality wasn't enforced.

Facts: A statute prohibited the sale of un-graded apples, but was silent on the effect of a prohibited sale. The plaintiff and the defendant were both apples farmers. The plaintiff sold un-graded apples to the defendant. The defendant graded
the apples before re-selling to the public. When the plaintiff sued for the price of the apples, the defendant resisted the action on the basis of the legislation.
Analysis: Purpose of legislation was to protect consumers from risks of un-graded apples

- Strict reading of legislation broken but not in spirit – consumers still protected b/c D graded apples after acquiring them from P

Holding: Court still took narrow view – b/c he was in breach of statute, P was barred from suing on initial sale contract

Given the more flexible and forgiving approach now employed by Canadian judges, it is difficult—but not impossible—to imagine a similar decision today.

Remedies: Blue Pencils and Notional Severance

(1) *Blue pencil* This approach allows courts to *eliminate*—but not alter or add—contractual terms in order to avoid illegality.

(2) *Notional severance* This approach allows courts to *re-write* contractual terms to bring them within the law.

New Solutions Financial v Transport North America (SCC 2004)

4 step process to determine whether notional severance or blue-pencil should be used to correct illegality

Facts: The defendant borrowed $500 000 from the plaintiff. The loan agreement required payment of various sums, in addition to repayment of the principal. As a matter of law, those various additional sums constituted interest. On the facts of the case, that interest exceeded 60% per annum and therefore constituted a "criminal rate of interest" under section 347 of the Criminal Code.

Analysis: The Supreme Court of Canada split 4-3. Writing for the majority, Arbour J reinstated the trial decision. She first addressed four issues in determining that the contract might be enforced despite the offending provision:

(i) whether severance would subvert the purpose of s 347
(ii) whether the parties created their contract with an illegal or evil intention
(iii) the parties' relative strength of bargaining power
(iv) the possibility that the defendant would enjoy a windfall under non-enforcement

1. Adopt blue pencil or notional severance approach – whichever is closest to parties intentions.
2. Here: Adopt blue pencil and getting rid of the 70% would drop interest to 30% (way below intention of 60%)
    a. Notional severance is the correct approach to comply with CC and to respect parties intentions as much as possible.

Arbour J found that the parties' intention, and Parliament's intention, were better respected by notional severance than by the blue pencil approach. The contract was re-written to impose interest at 60%.
The dissenting judges adopted the blue pencil approach, largely on the basis that a contract is better respected by entirely excising a clause than by re-writing it.

Unenforceable contracts

General Rule

- no general rule requiring contracts to be written
    > a matter of evidence and prudence—not validity or enforceability

Statute of Frauds 1677

- socio-legal conditions
  > relatively litigious society
  > contractual disputes usually heard by juries
  - jurors entitled to act on own knowledge and beliefs
  > interested parties *not* competent as witnesses
  > tenuous evidentiary sources
  - widespread illiteracy, early death,
- a pressing socio-legal problem
  > frequent fraud and perjury
  - lawsuits often improperly won and lost
- Parliamentary response: *Statute of Frauds*

Act continues to govern in Alberta

Statute of Frauds

- relevant categories today
  > contract for disposition of interest in land
  > contract not to be performed within one year
- unenforceable unless …
  > **memorandum made and signed by party being sued**
  - *contract* need not be written
  - writing must include contract's essential elements
  - multiple documents may be cobbled together
- **informal contract is *unenforceable***
  > contract neither void nor voidable
  > valid and effective *but* cannot be judicially enforced
- **Equity exception: part performance the one "out"**
  > Act overcome if acts of part performance are …
  - … by own nature are unequivocally referable to contract

Part Performance

Traditional Test

- Rationale = evidentiary
- Rule = acts unequivocally referable to alleged contract and no other arrangement
  - Extremely high threshold

Maddison v Alderson (1883 HL)

For twenty years, the plaintiff served as the defendant's housekeeper. She was not paid for her services and she gave up other opportunities in life to remain in the defendant's service. She did so because he had orally promised that she would inherit a life state his house when he died.

The defendant drafted and signed a will that left his house to the plaintiff, but since the document had not been properly witnessed, it was invalid. The property consequently passed to someone else through intestacy.

The plaintiff sued the defendant's estate for specific performance. That claim was rejected. **Because the parties' agreement was oral it did not comply with the *Statute of Frauds*.**

The court recognized the equitable doctrine of part performance, but emphasized that that doctrine insists that the acts of "part performance must be unequivocally, and in their own nature, referable" to the alleged contract "and no other." The Acts must be such that they "could be done with no other view or design than to perform that agreement."

The doctrine was not satisfied on the facts. **The plaintiff's long, unpaid service was not unequivocally referable to an agreement for a life estate in the house**. The plaintiff might, for instance "have remained with her master, in the enjoyment of some present comforts and the expectation of some future provision, though no such contract had been ever dreamt of."

Relaxed English Test - Modern

- Rationale = detrimental reliance
- Rule = acts prove on BOP – some contract and are consistent with alleged contract
    - Muuuch lower threshold

Steadman v Steadman (1976 HL)

Because the traditional rule was thought to be intolerably narrow, the House of Lords reformulated the doctrine. The resulting rule requires a judge to "take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on *a* contract: that will be proved if it is shown to be more probable than not."

Canadian Law: Traditional Test Persists

- **On exam use traditional test because it's binding**

- Can sometimes use unjust enrichment

Deglman v Guaranty Trust Co of Canada (1954 SCC)

Facts:

- A young man entered into a contract with his aunt. He promised to care for her during her remaining years; she promised to leave her house to him when she died. He dutifully performed, but was disappointed on her death to learn that her will did not contain he promised disposition.
- The young man sought specific performance of the contract. The contract, however, was unenforceable under the *Statute of Frauds* because it pertained to an interest in land but was **entirely oral.**

Analysis:

- The young man argued that his many acts of part performance warranted an exception to the Act. **The court disagreed.**
    - **"[N]one of the numerous acts done by the respondent in performance of the contract were in their own nature unequivocally referable" to the alleged contract.**
- The court held that the "**acts of performance [were] wholly neutral** and [had] no more relation to a contract connected with premises … than to mere expectation that his aunt would requite his solicitude in her will, or that they were given gratuitously or on terms that the time and outlays would be compensated in money."

The young man consequently was entitled to neither the house nor its value. Without an enforceable contract, his reasonable expectations would not be fulfilled.
The court did, however, uphold an alternative claim for the restitutionary value of his services.
That conclusion would now be expressed in terms of unjust enrichment:

1. **the aunt was *enriched* by the receipt of requested services,**
2. **the nephew suffered the *corresponding deprivation* by rendering the services, and**
3. **because the contract was unenforceable, there was an *absence of juristic reason* for the impugned transfer.**

Other Statutory Requirements in Alberta

- ***Sale of Goods Act* (originally within *Statute of Frauds*)**
  > contract for sale of goods worth more than $50
  > unenforceable unless
  - buyer accepts and receives part of goods *or*
  - buyer provides earnest or part payment *or*
  - memorandum made and signed by party being sued
- ***Guarantee Acknowledgements Act* (originally within *Statute of Frauds*)**
  > guarantee has no effect unless
  - lawyer certifies guarantor understands nature of guarantee

TERMS

Every term of a contract has to be warranty or condition

Classification determines the basis of action:

- Representation – rescission and tort damages
- Term – contract damages and perhaps discharge. 95% of time want specific performance.

Classification determines how contract is concluded:

- Representation – rescission ab initio (discretionary)
- Term- prospective discharge (condition only)

Classification determines measures of relief:

- Representation – restoration of status quo (backward looking)
- Term – fulfillment of expectations (forward looking).

Conditions: Undertakings of which every conceivable breach would deprive the party not in default of substantially the whole benefit of the contract.

- Discharge and damages. Contract still exists but obligations are discharged.
- Contract still exists after discharge – parties move down to secondary obligations

Warranties: Terms of lessor importance that no conceivable breach could have such an effect. Damages only, continue with the contract.

- The condition/warranty dichotomy appears to preclude the possibility that an undertaking could be of such a nature that some breaches should give rise to the right to disaffirm whereas others, being less severe in their impact, should not have that effect.
- P and D must still carry on with contract

Innominate (wait and see – don't have to guess at the outset whether a term is a condition or warranty): Terms that cannot be classified as either true conditions or true warranties.

- Must be examined with respect to the actual circumstances of the breach and the impact on the party not at fault. This will determine whether that party should be accorded a right to disaffirm the contract in addition to the right to pursue a claim in damages.
- Traditional Approach: emphasis on certainty. Post writ perceived need for structure and predictability. All terms classified as either warranty or condition at formation of contract.
- Question of parties' objective intentions. A term that went to the root of a contract was a condition while one that did not was a warranty. Modern Approach: emphasis on greater flexibility. Rigid classification at formation of contract is unsatisfactory. Discharge for trivial breach of condition while no discharge for serious breach of warranty. Rigidity ameliorated through innominate terms where the classification is postponed pending nature of breach.

Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 2 QB 26 (CA)

Great judgment. EXAM: Look to see what "stuff" you are dealing with. If goods Sales of Goods Act. If in doubt THIS CASE.

To repudiate a contract, the breach must lead the party to not being able to obtain all or a substantial portion of the benefits they intended to receive by entering into the contract.

- Classifying terms as innominate takes context into account and allows real life situation to play out and determine whether term was condition or warranty.
- If you and I enter into a contract, we can together decide whether a term is a condition or a warranty
    - 1) parties expressly decide themselves
    - 2) statute dictates whether a particular term in a contract is a warranty or condition
    - 3) sometimes you have to leave it up to the court **this case**
        - term here: ship would be "seaworthy" can't be a condition, it wasn't that big of a deal because the parties contemplated a situation like this (ship being out of the water for a while)

Facts: Claim by owners of a vessel for hire payable by D charters under a charter party of 24 months duration. The charter party contained an undertaking by the owner to, in effect, maintain the vessel in a state of seaworthiness. The charter party further provided that no hire would be paid for time lose for repairs in excess of 24 hrs and that such periods of time could be added to the length of the charter. D charterers refused payment on the grounds that in addition to initial period of 5 weeks required for repair of the engines, going to be another 15 weeks of repairs.

- 24 months' worth of shipping (didn't have to be consecutive)
- D realizes, while boat is being repaired, that the market has bottomed out and wants to weasel out of contract

Issue: what is the nature of the innominate term/

Held: P's breach did not support D's non-performance. Treated as a warranty – D walking away was a breach of contract.

- Right of discharge only occurs if the benefit of the contract is substantially denied
- Right of non-performance arises from:
    - Express stipulation: parties themselves decide regardless of consequences.
    - Statute: *Sale of Goods Act*.
    - Judicial recognition: judges decide based on circumstances.
- Inadequacy of dichotomy of condition and warranties.
    - Operative issue pertains to deprivation of substantial benefit.
    - Term may be classifiable at outset as condition or warranty
        - Substantial deprivation may be inevitable or impossible.
- Term often not susceptible to immediate classification
    - Substantial deprivation is neither inevitable nor impossible
    - Effect of breach is dependent upon circumstances
    - Necessity of innominate category of terms.
- Disputed terms constituted innominate terms
    - Seaworthiness terms are capable of breaches of varied effect.
        - Breach did not deprive substantial benefit of contract.
        - Clause 13 contemplated damages only in circumstances

***(First City v Triple Five*)**

- Innominate terms are not a species of classification but rather a mode of classification. All terms are either conditions or warranties but the innominate term postpones determination of class.

Krawchuk v Ulrychova (1996) 40 Alta LR (3d) 196 (PC)

Innominate terms are vague and can be classified either way depending on the circumstances. Discharge only if substantial breach

Facts: Pay $3000 to buy horse for daughter, term in contract the horse would be "sound". Horse bucks and cribs.

- Bucking does not mean unsound. But cribbing does mean unsound.

Held: A bucking horse is not a defective horse, and **cribbing is easily solved.** Term was a warranty not a condition so lady had no right of discharge.

- No express term allowing discharge in circumstances.
- Innominate term that should be treated as warranty only
    - Assessed against total circumstances. Discharge only if substantial deprivation of essence of contract.
    - Propensity to buck not subject of term and not known to vender. *Caveat emptor* (principle that the buyer alone is responsible for checking the quality and suitability of goods before the purchase is made) and no relief for bucking.
    - Cribbing renders the horse "unsounds" but not unfit for riding. Easily solved through cribbing collar and horse otherwise healthy and generally fit for riding.

Damages assessed at 1500 which M HATES. She should not have gotten any $, or at most the cost of the cribbing collar $50 □ with the collar, horse was in the exact *position that the buyer anticipated*

Insurance company is subrogated automatically in situations where there's first party insurance and a third party tortfeasor

Implied terms

Preliminary Observations: Fact sensitivity and judicial flexibility.

- Parol Evidence Rule: Parties generally cannot add to written contract but implied terms sometimes permissible.
- Implied terms cannot create a contract because no consensus, generally recognize unstated intentions.

Previous Dealings: *St John Tug Boat*

- Parties previous dealings may reveal presumed present intentions. Not all terms of prior dealings are implied into new contract. Terms must be necessary, definable and consistent with intentions parties presumed to have intended term.

Business Efficacy Rule: *Dynamic v OK Detailing* approval onus.

- Term implied to give effect to parties' agreement.
- Parties would have adopted if asked by officious bystander.
- Necessary (not merely reasonable) for business efficacy. Applied narrowly.
- Term must be precisely definable and consistent with intentions.

- Parties presumed to have intended term.

Usage and Custom: *Hillas v Arcos*
- Scope – certain, notorious, universal and consistent with intentions.
- Parties presumed to have intended term.

Statute: Statutory terms implied regardless of parties' intentions.
Inherent: *Bhasin v Hrynew*: duty of honest performance is inherent in every contract—cannot be displaced by intention

Sale of Goods Act

- codification (1893) of common law rules of sale contracts
- has to be a sale, and has to be a SALE OF GOODS doesn't include land, intangible property, and doesn't include services
- terms implied by default (subject to parties' modification)

> **title to sell**
- condition that seller has title to sell
- warranty that buyer will receive clear title

> **<u>nature of goods</u>**
- **condition that goods will *match description***
- **condition that goods will *correspond to sample***
  - *unless* defect reasonably discoverable by purchaser
  - purchaser entitled to reasonable inspection
  - *and* goods must be free of un-merchantable defects
- ****condition that goods are of *merchantable quality***

(goods have to be such that an RP would pay the price I agreed to pay, without any reduction)
  - *if* vendor normally deals in such goods
    - applies to natural and manufactured goods
  - *unless* purchaser inspected and should have discovered defect
    - but not duty to inspect
- ****condition that goods are *fit for intended purpose*** (*only if I relied upon your judgement*)
  - *if* vendor normally deals in such goods
  - *if* purchaser openly relies upon vendor's skill and judgment
  - *unless* purchaser bought on sole basis of trade name

> **delivery and payment**
- **warranty** that purchaser will pay on time
- **condition** that vendor will deliver on time
- condition that goods conform to contract

Classification of terms

Effect of breach almost always function of parties' intention. Intention is reckoned objectively through reasonable person test. Easily resolved if parties' intention is express but clouded if intention is unstated and unconsidered.

Recurring tension: adhere to actual intentions vs instrumentally reason. Commercial certainty and predictability vs flexibility and fairness.

<u>Ascertaining Classification of Term in Event of Breach</u>

1. **Is a right of discharge provided by the operation of some rule of law?**
   - *eg* statutory conditions provided by *Sale of Goods Act*
   - *eg* judicial precedent interpreting specific category of term as condition
2. **Does the contract expressly provide the right of discharge?**
   - parties free to allow discharge for *any* breach
     - right *not* limited to objectively serious breaches
     - discharge for *any* breach regardless of actual effect
3. **Does the contract impliedly provide the right of discharge?**
   - implication gleaned from total circumstances
     - *eg* terms, reason for contract, market, subject matter, parties' positions

    - judge placed in parties' mental state at time of contracting
- would parties say *any* breach supports right of discharge?

4. Has the innocent party been deprived substantially of the expected benefit? **(*Hong Kong*)**
   - term is now described as an *innominate* term
     - a new *test* rather than a new *rule*
   - right of discharge depends upon *effect* of breach on innocent party
     - best explained as parties' presumed intention
       - parties did not intend to commit themselves to pre-factual conclusion
       - parties intended rights to be dependent upon actual consequences
     - would parties say *this* breach supports right of discharge?

Parol Evidence Rule

- Generally no requirement for contracts to be evidenced in writing
- parol = spoken communication
- parol evidence rule

> written contract generally cannot be modified by external evidence
- parties cannot go beyond "four corners" of document unless it's clear on the face of the document that something has gone amiss
- rule excludes *any* external evidence (not just oral)

- scope of rule

> rule strictly applied if parties intended document to be complete
- intention best evidenced through "entire contract" or "merger" clause

> rule inapplicable if parties did not intend document to be complete
> difficulty if parties disagree on completeness of document (even if "merger")

- traditional and modern

> traditional: external evidence only if contract not complete on its face
- external evidence not admissible to prove incompleteness
- difficult to justify in principle or policy

> modern: external evidence if contract shown to be incomplete on its face
- external evidence admissible to prove incompleteness

- exceptions

> proof that contract *defective* due to fraud, undue influence, or duress
> evidence of *misrepresentation* of meaning of written term
> evidence that contract was subject to *condition precedent* (to creation)
- *but* rule apparently inapplicable to condition subsequent

> proof of subsequent agreement to *vary* or *terminate* contract
> evidence required to *rectify* mistake in written document
> evidence of existence of *collateral contract*
- separate contract standing alongside main agreement
- collateral probably cannot be inconsistent with main

> proof of *waiver* or *promissory estoppel*
> evidence required to clarify *ambiguous terms*

Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53

A commercial agreement was subject to an arbitration clause. The arbitrator resolved the parties' dispute on the basis of his interpretation of a clause in the agreement. Under the provincial Arbitration Act, an appeal was available to the British Columbia Supreme Court if, but only if, the issue raised a question of law. After several inconclusive rounds of

litigation in BC's courts, the case came before the Supreme Court of Canada. In a unanimous decision, Rothstein J changed the law on two significant points.

- Contractual interpretation historically was conceived as a question of law. That was true for a very particular reason. At the relevant time, contractual disputes routinely were decided by judge and jury, but those jurors almost invariably were illiterate. Contractual interpretation consequently was designated as a question of law so as to ensure that it would be conducted by someone who enjoyed the benefit of actually reading the document — ie the judge.

The same conditions, of course, no longer prevail. It therefore is possible to characterize contractual interpretation not as a question of law, but rather as a question of mixed fact and law.

That possibility is supported by modern modes of interpretation. Courts historically employed a textualist approach that very largely restricted contractual interpretation to the written words themselves. As is now recognized, however, there is a high risk of error if contracts are interpreted exclusively in light of the words on a page and without regard to the larger context. Words do not have clear and immutable definitions — meaning largely depends upon context. As a result, in practice if not in theory, Canadian courts began some time ago to interpret contracts in light of their surrounding circumstances.
Sattva now authorizes that approach. Contractual interpretation may take into account "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" [58].
Two propositions emerge from that analysis.

- **First, contractual interpretation is now characterized as a question of mixed fact and law.**
    - In *Sattva*, that meant that the arbitrator's decision was not properly subject to appeal because it was not a matter of law alone. More broadly, it means that a trial judge's interpretation of a contract is now entitled to deference: the standard of appeal is palpable and overriding error rather than correctness. Appellate courts have less scope for intervention.
- Sattva's second proposition pertains to the parol evidence rule. That 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.

The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. 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.
Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to. For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract" [59] – [61].

In reaching that conclusion, Sattva overruled much of what the SCC had said with respect to the parol evidence rule in Eli Lilly & Co v Novopharm Ltd (1998). The older decision nevertheless remains valid insofar as it carves out one exception to the breadth of Sattva. While Rothstein J said that a trial judge is entitled to consider "absolutely anything" as part of the interpretive exercise, evidence of a party's subjective intention remains irrelevant and hence inadmissible.

ORGANIZING PRINCIPLE OF GOOD FAITH

Historically no notion of good faith *Bhasin v Hrynew* changed that

Bhasin v Hrynew, 2014 SCC 71

Two new elements in contract law introduced: A general organizing principle of good faith and a duty of honest performance of contractual obligations.

- **Good faith:** appropriate regard to other person's contractual interests by not undermining them in bad faith.
- **Duty of honest performance:** No duty to disclose all of the facts, no fiduciary duty, and does not apply pre-contractually, can't contract out of

Facts: The defendant (Can-Am) was in the business of selling educational savings plans. It largely operated through franchise-like agreements with "enrollment directors." Each director acted somewhat independently and was encouraged to develop its own "book of business." After many long years of very hard work, the plaintiff had become one of the defendant's most successful enrolment directors. The parties' relationship nevertheless was somewhat tenuous. They were joined by a three-year contract that was subject to automatic renewal unless either party provided six months' notice to terminate.

An individual named Hrynew also served as an enrolment director for the defendant. Hrynew, however, had bigger plans. He wanted to eliminate the plaintiff and take over his business.

The defendant supported that plan. It therefore encouraged the plaintiff to accept Hrynew's proposal for a merger. When the plaintiff rejected that idea, the defendant took a more dramatic step. It appointed Hrynew to act as its "provincial trading officer" (PTO) for the purpose of auditing all of its enrolment directors. Because Hrynew would thereby gain access to the plaintiff's files and records, the plaintiff understandably refused to cooperate. In an attempt to gain the plaintiff's compliance, the defendant assured him that the audit would be absolutely confidential. It also led the plaintiff to believe that his position within the business was secure.

When the plaintiff continued to deny Hrynew access to his files, the defendant abruptly gave notice of its intention to terminate their relationship. The evidence revealed that it had intended to do so — one way or another — all along. Once the plaintiff was eliminated, the defendant gave his business to Hrynew.

Issue: The plaintiff then sued and alleged, inter alia, that the defendant had breached a duty of good faith. The claim was novel. Leaving aside specific manifestations of the general idea, Canadian law did not recognize such a concept.

The trial judge upheld the claim after finding as a fact that the defendant had acted dishonestly in concealing its intentions and in manipulating the situation so as to allow Hrynew to replace the claimant. The Alberta Court of Appeal, however, allowed the defendant's appeal on the basis that the parties' contract did not contain an obligation of good faith. The matter then appeared before the Supreme Court of Canada.

Analysis:
- defendant breached duty of dishonest performance
- deceitful acts regarding renewal and notice provisions in contract
- defendant liable for plaintiff's expectation damages
- loss limited by possibility of defendant's good faith non-renewal
- value of plaintiff's business in context = $87,000

Essence of the wrongdoing was that by stringing him along, they ultimately deprived him of his book of business

Good Faith and Honesty in the SCC
Cromwell J recognized two new elements in Canadian contract law
- a general organizing principle of good faith
- a duty of honest performance of contractual obligations

General Organizing Principle of Good Faith

- not a free-standing rule — not an independent cause of action organizing principle
- general principle manifested in various doctrines
    - good faith disclosure in insurance
    - fairness in tendering contexts
    - doctrine of unconscionability
    - promissory estoppel
- duty of honest performance obligation is mandatory: by definition, it's in every contract
    - not fiduciary obligation

"The organizing principle of good faith exemplifies the notion that, in carrying out … performance … a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While 'appropriate regard' for the other party's interests will vary depending on the context of the contractual relationship, it

… merely requires that a party not seek to undermine those interests in bad faith": Bhasin v Hrynew 2014 SCC 71 at [65]

Duty of Honest Performance only pertains to the manner in which you perform other contractual terms can't lie or deceive the other party on a matter that's directly relevant to the is of performance

- general obligation underlying in all contracts
  - cannot contract out *but* can tailor duty to circumstances as long as core idea respected
- duty limited to matters of performance of primary obligations
  - no generalized duty to disclose material information
  - no generalized duty of loyalty or fiduciary faith
  - no generalized duty to sacrifice self-interest
  - no generalized duty to forego benefits under agreement
  - inapplicable to pre-contractual negotiations (cf rules of misrepresentation)

"[The duty of honest performance] means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. … Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step": Bhasin v Hrynew 2014 SCC 71 at [73]

Outstanding Concerns

- an invitation to litigation?
  - un-recognized manifestations of the general principle of good faith
    - applications of duty of honest performance
      - when will an omission constitute a "lie"?
      - when is a lie "directly linked" to performance?
      - what further "modest, incremental steps" await the future?
- behavioural modifications
  - breach consists of manner—not existence—of non-performance
    - manner of performance normally requires evidence of motivation
    - incentive for parties to minimize communications
    - incentive for parties to avoid written internal communications

Bhasin v Hrynew Applied

Churchill Falls (Labrador) Corp v Hydro-Quebec, 2018 SCC 46

Mere fact that agreement benefitted one party over another was no reason for court to recognize duty to compel parties to renegotiate terms

Facts:

- In 1969, Newfoundland was anxious to develop a large hydro-electricity facility, but had difficulty securing finances. The defendant agreed to inject funds into the project, but only under a hard bargain — ie until 2041, the plaintiff was required to sell most of the electricity that it produced to the defendant at a fixed price. Predictably, as the market value of electricity rose, the bargain increasingly favoured the defendant. Up to 2018, the defendant's profit stood at $28 billion whereas the plaintiff's was only $2 billion.

The plaintiff repeatedly called for a re-negotiation of the contract price, but the defendant adamantly refused. The plaintiff therefore sued on an allegation that (1) the agreement contained an implied obligation to renegotiate the price in good faith, and (2) the defendant had breached its duty.

Holding: The Supreme Court of Canada, by an 8:1 majority, affirmed the lower courts' decision to dismiss the claim.

Analysis:

- Mere fact that the agreement turned out to benefit one party far more than the other was **no reason for the court to recognize a duty to compel the parties to renegotiate the terms**. He also found that the limitation period had lapsed in 2000.

Dissent: Rowe J: agreement as a relational contract—ie a contract that contemplates close cooperation over an extended period and consequently requires the parties to negotiate in good faith, from time to time, on their specific obligations.

- (The majority had rejected that characterization because the parties had sufficiently settled all of the terms in advance. The concept of relational contracts is not well known in the common law.)

CM Callow Inc v Zollinger, 2020 SCC 45

Duty of honest performance restrains manner in which contractual rights are exercised. What constitutes dishonesty can include half-truths, lies, omissions, or silence depending on context

Facts:

- In 2012, Baycrest Condominiums entered into two separate contracts with CM Callow Inc: one for winter maintenance services and the other for summer maintenance services. The winter contract had a two year term. **It also contained Clause 9, which allowed Baycrest to terminate:** (1) if Callow's services were unsatisfactory, or (2) regardless of satisfactory performance, on ten days' notice.
- Early in 2013, Baycrest decided to terminate the winter contract for the winter of 2013-2014. It chose, however, to keep that fact to itself.
- It remained silent on point even as Callow, during the Spring and Summer of 2013, initiated discussions regarding a two-year extension to the winter contract. Believing that Baycrest was content with its services, Callow went above and beyond its summer obligations in an attempt to encourage Baycrest to sign the contractual extension.
- Finally, in September 2013, Baycrest revealed its intentions and gave notice that it was terminating the winter contract. Callow sued for breach of contract on the basis that Baycrest had acted in bad faith.

Procedural History:

- Trial: Upheld claim b/c Baycrest had withheld its intention to terminate despite knowledge of Callow's extra efforts. Silence constituted bad faith
- CA: Overturned. Extension of honest performance went too far. Deception pertains to possible future contract, not sufficiently connected to existing winter contract
- The Supreme Court of Canada (8—1) restored the result at trial.

Analysis:

- Kasirer J held that Baycrest breached its duty of honest performance by knowingly deceiving Callow into believing that the existing winter contract would not be terminated.
    - A "lack of a positive obligation of disclosure" under the duty of honest performance "does not preclude an obligation to correct the false impression created through its own actions" [38].
- *It was irrelevant that Baycrest terminated the contract in accordance with Clause 9.*
    - The "duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right. [I]nstead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest" [53].
- Breach of duty can include lies, half-truths, omissions and even silence depending on circumstances

Holding: Baycrest was liable for the profits that Callow would have earned on a contract with a third party if it had known that Baycrest intended to terminate the winter contract.

Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District, 2021 SCC 7

Bhasin doesn't mean you come out of the contract happy, just means that you come out of contract not being lied to

- Duty to exercise contractual discretion in good faith exists and is only breached if exercised unreasonably. As long as party exercising contractual right is not doing it dishonestly or for the purpose of hurting the other party, doesn't matter if other party loses some/all benefit of the contract.

Facts: In 1996, Vancouver entered into a 20-year contract with Wastech for waste disposal. That contract contained three important terms:

1. Wastech was required to transport waste to one of three facilities. Vancouver enjoyed an absolute and unfettered discretion in choosing facilities.
2. The price for Wastech's services depended on which facilities Vancouver chose—the farther away the facility, the more Wastech earned.
3. The contract did not guarantee Wastech any level of profit.

In 2011, Vancouver re-designated the facility—a closer one was chosen in place of a farther one. (*It did so for completely legit reasons*).

- Wastech's profits consequently fell well below its desired target. Wastech sued for breach of contract and alleged that Vancouver had failed its duty of good faith.

Procedural History:

- An arbitrator upheld the claim.
- British Columbia's Supreme Court disagreed on the ground that the contract gave Vancouver an unfettered discretion and did not require it to act in Wastech's best interests. The Court of Appeal agreed.
- The Supreme Court of Canada similarly dismissed the claim.

Analysis:

- "duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion" [4].
    - With respect to the duty of good faith, "the measure of fairness is what is reasonable according to the parties' own bargain" [71]. Fairness is not assessed by reference to external moral standards.

As long as a discretion is exercised in good faith—ie in accordance with its purposes—it is irrelevant that the other party 'lose[s] some or even all of its anticipated benefit under the contract" [83].

Finally, **the duty to exercise a discretion in good faith is not dependent on an implied term. That duty exists in every contract, regardless of the parties' intentions.**

Holding:

- Vancouver acted reasonably and in good faith. Exercised discretion with view to manage capacity of facilities and cost-effectiveness – was not acting to deliberately hurt Wastech

EXCLUSION CLAUSEs

contractual provisions affecting liability in event of breach
species of exclusion clauses

> **party may be *exempted* from liability**
- eg "X shall not be liable for any loss howsoever caused"
- *but* no exemption for fraud

> **liability may be *excluded* with respect to certain acts**
- eg "late delivery shall not give rise to damages"

> **liability may be *limited* with respect to recoverable damages**
- *eg* "X's liability shall be limited to $500"

We also have control over the secondary obligations in a contract as well as the primary obligations

- *Contemplate that something might go wrong and might need to pre-address that*
- *Liquidated damages clauses*

Standard Form Contracts

- **contracts concluded on basis of non-negotiated terms**

Exclusion Clauses and Standard Form Contracts

- a common — but not invariable — pairing
- nothing inherently wrong with a SFC
- sometimes exclusion clauses can cause real injustices

Benefits of Exclusion Clauses and Standard Form Contracts

- **exclusions: allocation of risk and acquisition of insurance**
    > exclusion clauses facilitate distribution of risks and can dictate acquisition of appropriate insurance
    - really a **risk allocation system who should be responsible for this (you and I'll charge you a lower price; me and I'll charge you a higher price)**
- **standardized exclusions: facilitation of efficient commercial transactions**
    > standardized terms susceptible to fixed judicial interpretation
    > standardized terms allow for simple comparison of offers
    > standardized terms obviate need for protracted negotiations

Disadvantages of Exclusion Clauses and Standard Form Contracts

- potential for imposition unreasonable or unconscionable terms

Central Issues – *sometimes they're grossly unfair*

- (when) should a party be bound by an agreement to forego damages?

- (when) should a court intervene to ensure substantive fairness?

Exclusion Clauses and Judicial Attitudes: A Restrictive Approach

- increasing trend toward non-enforcement of exclusion clauses
- specific judicial response may vary with circumstances
    - clause less acceptable if inequality of bargaining power
    - clause less acceptable if liability total excluded rather than limited

Strict Construction

- operable exclusion clauses narrowly construed against D
- ***contra proferentem*** □ **ambiguities resolved against drafter of clause**
- strict construction
    - strict construction of nature of injury or loss
    - *eg* "no warranty express or implied"
        - liability not excluded for breach of condition (*Wallis Son & Wells v Pratt & Haynes* (1911 HL) □ *how you'd read that*
    - *eg* "all cars parked at owner's risk"
        - exclusion for property damage but not personal injury (*Thornton v Shoe Lane Parking* (1971 Eng CA)
- strict construction of protected parties
    - servant may not fall under employer's exclusion clause
        - *London Drugs v Kuehne* (1992 SCC) per McLachlin J

Notice of Written Conditions

Parker v South Eastern Railway (1877 Eng CA)

Facts: Parker and Gabell checked their luggage on a train. They were given tickets with a number on one side, and small print on the other side. The small print stated that the railway would not be responsible for bags lost worth more than £10. Both respondents had received the tickets before but had never read the small print. They both lost their bags, and brought actions against South Eastern for the value of the bags and their contents – both were greater than £10.

Analysis:

Mellish LJ: notice and the reasonable person (default rules)

- **bound if written contract signed (*cf Tilden Rent-a-Car*)** □ regardless of actual knowledge of terms
- **bound if aware of existence of terms and if assent** □ regardless of actual knowledge of terms
- **otherwise generally bound if reasonable person would expect terms** □ **only to the extent that RP would think they're there**
    - regardless of actual knowledge of terms
    - bound only to *extent* that reasonable person would expect terms
        - offeror is entitled to assume that offeree is reasonable person

> resolution

- new trial: was writing sufficient notice of conditions on facts?

Particularized Notice and Substantive Fairness

Interfoto Picture v Stiletto Visual (1989 Eng CA)

Able to have outrageous clauses in document but the more outrageous they are the more that needs to be done to bring them to the other parties attention.

- **All about managing the expectations of the RP – you are only bound to the extent that the RP is bound. Ratio: Proportionality is applicable to all clauses (not just exemption clauses) the more onerous, the more notice required.**

Facts: Interfoto, at the request of Stiletto, delivered 47 photographic transparencies to Stiletto in a jiffy bag. Stiletto telephoned Interfoto saying there were one or two which they were planning to use in a presentation, but in the event

they did not. Stiletto never read Interfoto's standard terms and conditions, which were on a delivery note inside the bag.

- Condition 2 of the terms said there was a holding fee of £5 for each day over fourteen days. After approximately a month, Interfoto sent a bill for £3,783.50 and after the invoice was refused brought an action against Stiletto.
- *Liquidated damages clause more than exclusion clause but same principles*

Analysis:

Dillon LJ

- contract formed when D notified P bag had been opened
- notice of existence of general conditions or terms may be insufficient **particularly onerous terms must be drawn to offeree's attention only bound if RP would expect to find that clause in there and if RP would think they had to pay / be bound**
- exorbitant fee inapplicable as contractual term
    - P taken to be aware of general conditions in delivery note but...fee condition too unusual to be imputed to P's knowledge
    - relief awarded under contract on basis of *quantum meruit*

Bingham LJ

- common law contains no generalized principle of "good faith"
- fair dealing achieved through particularized rules
    - doctrine of sufficiency of notice
        - contractual construction *and* substantive fairness
        - is binding condition fair in the circumstances?
            - general conditions fairly binding in circumstances
            - exceptional fee not fairly binding in circumstances

Notice and Incorporation - Signed Documents

Tilden Rent-a-Car v Clendenning (1978 Ont CA)

EXAM: Possible line of argument but not binding. In the consumer sphere, sufficiency of notice and proportionality trump the Parker notion that a signature alone is binding. If a term of the contract is particularly onerous, the party looking to enforce that term **must prove the other party was aware of the term through either their reading of the specific term or through direct notification of the specific term**. level of unreasonableness has to be counteracted by level of notification of the unreasonable term

- (medium unreasonable, bolded only for example)

Facts: Clendenning rented a car from Tilden Rent-A-Car. He signed the rental agreement which contained an exclusion clause denying coverage for accidents that occur if the driver had consumed any alcohol, although he testified that he had inquired what the $2/day fee covered and was told "full nondeductible coverage". While in Vancouver, Clendenning hit a pole after having consumed alcohol. He pleaded guilty to impaired driving and tried to collect from the insurance policy to pay for the damages of his accident.

- But there's an exclusion clause hidden that said "completely negated if alcohol consumed"

Analysis:

Dubin JA (majority)

> *consensus ad idem* essential to formation of any contract

> party traditionally held to signed document regardless of knowledge

- signature (generally) conclusive manifestation of agreement (limited exceptions: fraud, duress or misrepresentation_

> *but* signature is actually non-conclusive indicia of assent to terms

- sufficient *if* supportive of reasonable expectation of assent circumstances determine generation of reasonable expectation

conclusion: P not bound by draconian terms on reverse

- D had no reasonable expectation of P's assent to terms contract intended to be concluded quickly and informally and drafted so as to discourage reading of terms
- D's clerk aware that P had not read terms

- situation required D to reasonably draw P's attention to terms

Lacourciere JA (dissent)

> reverse terms sufficiently drawn to P's attention

> reverse terms were strict but substantively fair
- reasonable basis for allocation of insurance risks
- reasonable basis for determination of competitive rental price

Tercon Contractors Ltd v British Columbia (2010 SCC)

MOST IMPORTANT CASE. Creates new test to deal with exclusion clauses: (1) interpretation (does it apply to facts), (2) unconscionability (unfair to enforce), (3) Public policy reason not to enforce

Facts:

- BC sought to design and construct a highway. Issued a call for tenders but only 6 parties allowed to join.
  - Contained an exclusion of liability clause which precluded proponents from lodging claims for compensation "of any kind whatsoever" as a result of participating.
  - This clause had the effect of preventing proponents from suing the Province for damages in the event that it breached the terms of the RFP.
  - P submit bid that should've won if BC played fairly but BC breached by awarding contract to one of the parties that wasn't one of the 6 (breached contract A)
    - If it had won, it would have won net profit of $3.5 million (damages asked for)
  - BC says they aren't liable for damages "from participating in tender" reasons

Reasons:

- "Shut the coffin on the jargon associated with 'fundamental breach'"
  - "fundamental" label unhelpful

three-stage test

- **does clause apply as matter of *interpretation*?**
- **was clause *unconscionable* at time of contract formation? ("at the moment before we form the contract)**
  a. unconscionability = serious departure from accepted behaviour
  b. i.e., manifestly unfair from the outset
- **even if clause otherwise applicable and valid, courts asks, is there …"an overriding public policy … that outweighs the very strong public interest in the enforcement of contracts"**

Application of test

- majority
  - test failed at first stage
    - exclusion only if "participating within this RFP"
    - ineligible bidder not "participating within this RFP"
- dissent
  - first stage passed: clause clearly applied to breach
  - second stage passed: no unconscionability between sophisticated parties
  - third stage passed: BC not "so abhorrent" as to forfeit exclusion protection

Assessment

> although fundamental breach doctrine "laid to rest" …
- … judicial power to disallow on overriding policy grounds "inevitable"
  > "fundamental breach" *vs* "overriding public policy"
  - semantic or substantive shift?

TERMINATION OF CONTRACT

DISCHARGE BY PERFORMANCE

- time of performance
  > time of performance *prima facie* is *not* of the essence
  - late performance supports damages but not discharge breach of a warranty not condition
  > time of performance may be made to be of the essence
  - parties' agreement at time of contract creation
  - inherent nature of agreement (*eg* quickly perishable goods)
  - intended recipient gives reasonable notice following breach
- tender of payment
  > debtor bears obligation to tender reasonable payment once

- reasonableness of tender depends upon circumstances
- need not tender if response of rejection is obvious
- if creditor improperly refuses tender
- debtor remains liable but need not seek out creditor
- creditor may be punished by award of costs

> debtor *prima facie* must provide *legal tender* (*Currency Act* s 8)
- $40 toonies + $25 loonies + $10 quarter or dimes + $5 nickels

- tender of performance

> contractual obligations *prima facie* subject to *strict liability*
- must be performed precisely as promised / have to get it **right**
- reasonable care is no excuse
- obligation may be varied by exclusion clause

> contract *not* discharged simply by being ignored by parties
> postponed payment *vs* entire contract
- a question of *accrued* rights and obligations

> substantial performance
- **virtually entire performance *but* minor defect or incompletion**
- performing party entitled to discharge agreement and payment
- recipient party entitled to damages for loss or repair

- what if neither party performs?

> contract not discharged by being ignored: *Jedfro Investments v Jacyk* (SCC 2007)

- how long does party last if terms silent on point?

> an evolving point
- traditionally: rebuttably presume perpetual
- 20th century: rebuttably presume termination on notice if commercial
- current: no presumption—invariably a function of circumstances
- *Conseil Scolaire Catholique Franco-Nord v Nipissing Ouest* (Ont CA 2021)

Discharge By Agreement

- option to terminate

> inserted into contract at outset & usually exercisable only upon notice

- condition subsequent

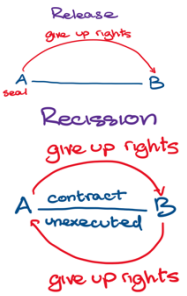
> inserted into contract at outset
> automatically comes to an end when a certain thing occurs

- release

> promise to terminate contract under seal (no need for consideration)
- **seal has to be provided** by the person who is giving something for nothing

- rescission

> agreement to terminate *executory* agreement
- neither party has performed in full each provides consideration by giving up right to performance
> *cf* rescission as remedy for wrongfully induced contract



- accord and satisfaction **peppercorn theory**

> agreement to terminate contract *fully executed* on *one side only*
- recipient of full performance has nothing to sacrifice as consideration

> new agreement (accord) supported by **fresh consideration** (satisfaction)
- *eg* parties agree to exchange contracts tutorial for $500
- tort tutorial immediately performed but price not yet paid
- parties agree that price should be $300
-promise to forgive $200 gratuitous and unenforceable
- **agree forgive $200 in exchange for $300 *plus* car wash**
- new agreement = accord
- satisfaction = car wash

Discharge by Operation of Law

- frustration **most likely to appear on exam**
  > situation rendering performance impossible or substantially different
    - ineffective if one party at fault for frustration
    - ineffective if one party contractually responsible for event (*force majeure*)
  > considered elsewhere in course
- lapse of limitation period
  > action must commence within two years of discoverability of essential facts
    - concern regarding reliability of old evidence
    - concern regarding fairness of lingering threat of liability
    - after this, you lose your right to cause of action
  > **period may be prolonged by debtor's acknowledgment of debt, then the two year clock starts again this has to happen within the first two year period**
- bankruptcy
  > bankrupt individual generally discharged from debts
    - judicial discretion turns on debtor's misfortune *vs* misconduct
  > discharge only *after* exhaustion of assets
    - trustee collects debtor's assets — debts paid *pro rata*
    - remaining debts discharged upon release from bankruptcy

Discharge for Breach of Condition

- optional discharge
  > breach of condition does not automatically discharge contract focus is then on secondary obligations
    - party in breach cannot unilaterally discharge contract
  > innocent party (generally) enjoys option to discharge contract
    - one time choice *and* election cannot subsequently be altered
- bars to affirmation of contract
  > discharge required if performance requires close cooperation – like acts of service
  > discharge perhaps required if no legitimate reason for performance
- bars to discharge of contract
  > unreasonable delay (deemed acceptance) election must occur within reasonable time
  > **affirmation** unequivocal act indicating adherence to contract
  > promissory estoppel inequitable reliance upon promise to waive breach
- discharge and rescission
  > rescission: contract retroactively void *ab initio*
    - no basis for secondary (remedial) consequences
  > discharge: contract prospectively terminated
    - performance of executory primary obligations unnecessary
    - secondary (remedial) aspects of contract remain

Discharge for Anticipatory Breach (Repudiation)

- breach and anticipatory breach
  > breach: unsatisfactory performance of *accrued* obligation
  > anticipatory breach: indication that *future* condition will not be satisfied
  - entitled to continue or discharge
- mechanics of discharge for anticipatory breach
  > innocent party may accept repudiation and discharge contract
    - contract not automatically discharged upon repudiation
- danger of discharge for repudiation
  > if no *true* repudiation *then* discharging party liable for breach problem is you don't know if a condition or warranty is breached
    - if it turns out it was just a warranty, then you're liable for the breach
    - repudiation not lightly inferred by courts
  - risk of affirmation B inability to perform in June

- **basically, there's always going to be a risk**

Avoid this by identifying whether the delivery on time is a warranty or condition □ think about how this would appear on an exam

- difficult remedial issues
  > can innocent party accumulate losses? must she mitigate? (*White & Carter*)
    - do you always have the option to affirm or discharge?
    - only if you have a legitimate reason to

DAMAGES

Triggering Events and Legal Responses
- binary analysis of private law actions
  > triggering event = factual events supporting cause of action
  > legal response = legal reaction to proof of triggering event
- alignment of triggering events and legal responses
  > limited range of legal responses to particular triggering events
    - some triggering events contain inherent logical limits
    - some triggering events attract extraneous practical limits

Illustrations
- **negligence**
  - gist of the action: P loss □ remedy has to be compensation, it's the only remedy that responds exclusively to P's loss
- **unjust enrichment**
  - there was a transfer between you and me that shouldn't have happened
  - measures: has to be restitution □ it's the only remedy that addresses both your loss and my gain
- **breach of contract**
  - gist: actionable per se (wrong in itself) □ the breach itself triggers liability □ doesn't naturally point to a conclusion at all
  - doesn't actually point towards any measure of relief
  - breach of contract supports a range of damages □ compensation (P loss) or disgorgement (D gain)
    - compensation: reliance (backwards) and expectation (forwards)
    - **never restitution □ because you can always get at least as much through compensation or disgorgement**

The Nature of Consequential Damages in Contract
- expectation damages: "Give me what I expected to get."
  > P placed in position she expected to enjoy after D performed
- reliance damages: "Give me back what I lost."
  > P compensated for losses incurred in reliance upon contract
- restitutionary (disgorgement) damages: "Give me what you gained."
  > D required to give up enrichments received at P's expense

EXPECTATION DAMAGES

- compensatory damages in tort and contract
  > tort: restoration of *status quo ante*
    - backward looking: P returned to pre-event position
  > contract: fulfillment of expectations
    - forward looking: P improved to anticipated position
      - a question of loss and compensation?
- the rationale of expectation damages
  > inherent morality of contract law
    - *cf* Holmes' *bad man theory*: performance or damages

> integrity of commercial institutions
- promise of performance valuable *if* promise enforceable

- the measure of expectation damages
> expected benefits minus expected costs
- availability of benefit premised upon incurrence of cost
- no additional recovery of expenses incurred
- deduction for expenses pre-empted by breach

EXAMPLE

Dave agrees to sell a widget to Pam for $500. Although she delivers a pre-payment of $400, he refuses to deliver the widget when he discovers that it is really worth $750 and not $500. Is Pam in the position that she expected to be in when the contract was fully executed? What measure of relief, if any, is she entitled to receive from Dave?

(price – paid)	+	X	=	expectation
(500 – 400)		+	X	= 750 (expectation interest)
100	+	X	=	750
			X	= 650

Once you enter into a contract and it's like a wager □

CALCULATION OF EXPECTATION DAMAGES

EXERCISE #1

Dave agrees to sell a widget to Pam for $1000. Pam did not pre-pay any amount. Dave refused to deliver the widget despite the fact that it was actually worth $1000. What measure of relief, if any, is she entitled to receive from Dave?

$0

EXERCISE #2

Dave agrees to sell a widget to Pam for $5000. Pam pre-paid $2500. Dave refused to deliver the widget because it was actually worth $6000. What measure of relief, if any, is she entitled to receive from Dave?

EXERCISE #3

Dave agrees to sell a widget to Pam for $7000. Pam prepaid the full amount. Dave refused to deliver the widget because it was worth $8000. What measure of relief, if any, is she entitled to receive from Dave?

EXERCISE #4

Dave agrees to sell a widget to Pam for $9000. Pam prepaid $3000. Dave refused to deliver the widget, which was worth $8000. What measure of relief, if any, is she entitled to receive from Dave?

EXERCISE #5

Dave agrees to sell a widget to Pam for $8000. Pam prepaid $1000. Dave refused to deliver the widget even though it was worth $6000. What measure of relief, if any, is she entitled to receive from Dave?

QUANTIFICATION OF DAMAGES: DIFFICULTY OF ASSESSMENT

Chaplin v Hicks [1911] 2 KB 786 (CA)

Just b/c damages are hard to calculate doesn't mean they shouldn't be done. If past fact: prove on BOP then damages are all or nothing. If dealing with future fact or past hypotheticals P awarded total loss discounted for likelihood

Facts: Beauty contest. 12 winners out of 50 contestants. P's invitation got lost or something so she doesn't know how she would've actually placed.

- Statistics: P was one of 50 contestants and had 24% change of winning an average of $624, meaning that her expectation was $150

Issue: can expectation damages compensate a loss of a chance?

Reasons:

> difficulty of assessment does not preclude damage award
- but no damages for non-assessable loss (*McRae*)

> general rules regarding damages and probability

- damages are all or nothing on a balance of probabilities as long as you can get over that 50.1% hurdle you can get all of your damages

- if issue pertains to *past fact*
  - proof required on balance of probabilities
  - loss treated as certain and P awarded total damages
- **if issue pertains to *past hypothetical* or *future fact***
  - proof not required on balance of probabilities **P awarded total loss discounted for likelihood**
    - operation of rule subject to *de minimis*
- P entitled to expectation damages discounted by probability
  - was the jury's calculation appropriate?

Holding: damages awarded £100

Reliance Damages

- compensation for losses incurred and opportunities forgone
  > exceptional backward oriented relief
- (general) incompatibility of expectation and reliance damages
  > expectation damages presume reliance expenses
  > plaintiff's power of election in *some* circumstances
    - circumstances may preclude expectation damages (*McRae*)
    - circumstances may preclude reliance damages (*Bowlay*)

McRae v Commonwealth Disposals Ltd (1951) 84 CLR 377 (HCA)

Facts: P has a ship that it has retrofitted to take goods from the mainland to this island and back. See ad from govt for an opportunity to salvage oil from a reef. Costly venture. Already retrofitted but to enter into this govt contract they have to pay the govt and get a fully new crew and equipment. Turns out it was a total fiction: no reef no oil tanker, nothing to salvage. Clearly a breach of contract because no oil or reef existed. **Impossible to calculate damages** though because no promise of actually $$ made, just promise of opportunity.

- **issues**
  > when will reliance damages be precluded?
  > upon whom does the onus of proof rest?
- **Holding:**
  - presumptive rule: either reliance damages or expectation damages get to choose. Here, expectation damages were impossible.
    > expectation damages immeasurable and hence unavailable
      - D did not stipulate tanker of any specific size or value
      - D did not stipulate cargo of any specific nature or value
      - D did not promise that anything was actually salvageable

    > P confined to reliance damages *to extent* contract not unprofitable
      - onus on D to prove that contract was unprofitable
      - D unable to discharge burden in circumstances
- reliance damages allowed under *some* heads of claim
  - **no relief for refitting and reconditioning *Gippsland***
    - expense not wasted *in reliance on* contract (inevitable + unexpended)

- **relief for expenses consumed in performance of contract**
  - travel, special crew, experts: wasted *in reliance on* contract
- **relief for lost revenue under trading contract with X opportunity loss: revenue forgone *in reliance upon* contract**

- relief for contract price expense wasted *in reliance upon* contract

Bowlay Logging v Domtar [1982] 6 WWR 528 (BCCA)

Facts: Bowlay is a logging company; enters into contract with Domtar but wants 1) trucks here in a timely way and 2) X amount of money (?). Clear pretty early that P entered into a v bad contract. Domtar doing bad job and Bowlay realized they had grossly underbid.

- D breaches contract so P discharges contract and sues for breach of contract and damages
  - Asks for expectation damages and court says lol no, count yourself lucky that D breached and you weren't in more of a financial hole.

> describe the plaintiff's expectation interest under the contract
> on what basis did P seek relief?

- issue

> when will reliance damages be precluded?
> upon whom does the onus of proof rest?

- reasons

> an exercise in judgment *and* not an exercise in accounting
> **New rule: reliance damages unavailable to *extent* contract was unprofitable not as a reflection of the bad bargain but as a reflection of the breach**

- reliance available for losses attributable to D's breach but there'll be very hard cap on what those reliance damages will actually be.
- onus on D to prove unprofitability (discharged)
  - D's breach protected P from further loss

> trial judgment assessment accurate

- loss of future contract irrecoverable as speculative
- capital costs offset by depreciation

Once you enter into contract you're entering into a wager of sorts whatever happens, you're still bound by contractual obligations

Reliance Damages and Restitution: The *Bowlay* Oversight

- election upon breach of condition

> election to continue or discharge contract

- if continuation: damages and executory performance
- if discharge: possible election of cause of action
  - action in contract for expectation or reliance damages
    - expectation damages = fulfillment of promise
    - reliance damages = compensation of losses
  - action in unjust enrichment for restitution
    - restitution = reversal of transfer

- cause of action in unjust enrichment technically this shouldn't work, but it's the law in Canada – **don't use on exam**

> elements of triggering event

- enrichment to defendant (D received P's services)
- corresponding deprivation to plaintiff (P provided services)
- no juristic reason (basis of transfer no longer enforceable)

> nature of legal response

- giving back of unjust enrichment
  - measured as lesser of D's gain and P's loss

Bush v Canfield -- Example

Pam agreed to pay $14 000 to Dave for a shipment of flour. Under the terms of the contract, Pam paid $5000 in advance and promised to pay the remainder upon delivery. Although the value of flour dropped to $11 000, Dave refused to deliver. Pam discharged the contract and sought relief. Can Pam recover from Dave? Is she entitled to expectation damages in contract? Is she entitled to reliance damages in contract? Is she entitled to restitution in unjust enrichment? Would you ever expect to see such a case in practice?

She'd be entitled to $2000 in expectation damages – prima facie she'd be entitled to $5000 under reliance damages but not to the extent that it was a bad bargain so she would only be entitled to the $2,000.

- But she'd be entitled to the full $5,000 through restitution under unjust enrichment

Question
Is *McRae* subject to the same alternative analysis as *Bowlay*?

Difference in Value or Cost of Cure?

Groves v John Wunder (1939) 286 NW 235 (Minn CA)

Expectation damages calculated AS IF contract performed. Cost of cure awarded to: (1) protect rights for uneconomical folly, (2) prevent unfair gain to D, (3) reflects balance of consideration under bargain

Facts: Defendant John Wunder Co., entered a contract with Plaintiff S.J. Groves & Sons Company, to remove sand and gravel from Plaintiff's premises and leave the property "at a uniform grade, substantially the same as the grade now existing at the roadway.

- Defendant paid Plaintiff $105,000 but willfully failed to leave the property at a uniform grade. The cost of bringing the land into compliance with the contract would be upwards of $60,000. However, if Defendant had fully performed by leaving the land at a uniform grade, it would have only been worth $12,160.

Issue: when will damages be measured as the cost of cure?

Majority

- **P entitled to expectation: placed *as if* contract performed by D**
  - P entitled to relief that would facilitate actual performance measured in terms of *cost* of actual performance not measured in terms of *loss* by non-performance
- cost of cure protects landowner's right to uneconomical folly
- market value would preclude damages for D's breach
  - cost of cure prevents unfair gain to D
- market value would allow D windfall from cynical breach
  - cost of cure reflects balance of consideration under bargain
- D's total consideration based on price *and* performance

- dissent

> P entitled to expectation: placed *as if* contract performed by D
- P entitled to loss occasioned through D's breach
- measured in terms of *loss* by non-performance
- not measured in terms of *cost* of actual performance

> P entitled to cost of cure *if* special interest in performance

- question

> how did P use the judgment money?

Canada Cost of Cure if:

- **already cured by self or**
- **likely to cure or**
- **not intolerably wasteful**

Cost of Cure and Other Measures of Relief: Striking a Balance

- P *prima facie* entitled to cost of cure
- cost of cure disallowed if intolerably wasteful

> courts presume cost of cure is *not* wasteful

> courts strongly presume *actual* cure by P was appropriate

- extending the remedial possibilities—*Ruxley v Forsyth* (1996 HL)
  > cost of cure and loss of value: all or nothing?
    - prohibitive cost of cure: negligible expectation loss
    - alternative base of compensatory relief?

Ruxley v Forsyth (1996 HL)

D agreed to build a pool for P in exchange for a price of £70 000. Although the pool was to be built to a depth of 7' 6," D mistakenly breached the contract by building to a depth of 6' instead. The difference in depth did not affect the safety of the pool and did not diminish the value of the pool. **P sued in contract and claimed the cost of cure: £22 000**. The cost of cure was high because the defect could be remedied only by entirely removing the existing pool. P frankly admitted that he would not replace the existing pool even if he was awarded the full cost of cure. The House of Lords

- rejected cost of cure as wasteful and unreasonable, but also
- believed that it would be unjust to confine the claimant to nominal relief and thereby allow the defendant to breach with impunity, and
- **recognized that loss of value damages would have the same effect.**

The court therefore held that the remedial alternatives were not confined to cost of cure, nominal damages, and loss of value. **It instead awarded £2500 under the novel head of "loss of amenity." measured by your disappointment … because sometimes something you contract for is peace of mind not the right answer but also not a wrong answer… it's just fine**

Remoteness of expectation damages

- Parties get together and allocate risks that are reasonably foreseeable.
- **Damages for breach of contract are recoverable only to the extent the type of loss that has occurred was reasonably foreseeable by the parties at the time of entering the agreement.**
- Practical necessity of limiting expectation damages on policy. (If breach causes physical injury of bodily integrity more likely to find reasonably foreseeable).
- **Remoteness depends on reasonable foreseeability of the defendant, not the plaintiff.**

- the need for a remoteness rule
  > practical necessity of limiting expectation damages on policy
    - factual causation and legal causation
      - P *prima facie* to be placed *as if* D properly performed
      - remote losses irrecoverable regardless
- the purported basis of the remoteness rule
  > reasonable contemplation of damage
    - terms of bargain reflect contemplated consequences
    - different (or no) bargain if greater liability contemplated
- **the role of the remoteness rule**
  - inherent uncertainty in objective contemplation test
    - retrospective assessment of future chances
    - assessment by fictional reasonable person
  - intuition and rationalization: reasoning backwards
    - silent significance of soft factors: relative value of damage and contract price: relative ease and practicability of insurance: nature of damage: economic loss or physical injury
  - a statement of conclusion: not a guide to analysis
    - impossibility of exhaustively definitive test
    - a broad policy question: is liability reasonable on the facts?

Hadley v Baxendale (1854) 9 Exch 341

D liable for expectation damages if reasonably contemplated. Two factors:

1. **contemplated as likely to arise in usual course of things (objective test);**
2. **contemplated as likely to arise in special circumstances (subjectified based on D's actual knowledge)**

Facts:
P was operator of a mill. Crank shaft broke – mill was stopped. Send to engineering firm to fix. Delayed and didn't get for several days. As a result, the mill was closed for a greater period then necessary. P brought action to recover profits lost as a result of the delay. Sues for breach of contract.
Issue: when will damages be irrecoverable on the basis of remoteness?
Holding:

- **D liable for expectation damages if reasonably contemplated**
  - **contemplated as *likely* to arise *in usual course of things***
    - objective test: based on D's imputed knowledge
      - D's actual knowledge irrelevant D need not actually contemplate loss
  - **contemplated as *likely* to arise in *special circumstances* things not ordinarily anticipated but would in this situation**
    - subjectified test: based on D's actual knowledge
      - D's actual knowledge required D need not actually contemplate loss
- rationale of two-part test
  - terms *always* reflect losses likely to occur in usual course
  - terms reflect exceptional losses *if* D had special knowledge
- lost profits too remote on facts
  - lost profits not likely to result in usual course of things
    - P may have alternative shaft
    - mill may have been incapacitated for other reasons
  - no knowledge by D of P's special circumstances
    - D not informed of P's economic dependence on shaft

Victoria Laundry (Windsor) Ltd v Newman Industries [1949] 2 KB (CA)

Case is good to show application of *Hadley v Baxendale*. Reasonably foreseeable losses turns on knowledge at the time of the contract – imputed knowledge (RP) and actual special knowledge AT THE TIME OF CONTRACT FORMATION. Subsequently acquired knowledge is irrelevant

Facts: P running a laundry mat. P orders a boiler from D; D delivers 20 weeks late. Sues for 2 types of loss (1) loss of profits from normal weekly business, and (2) loss of a special huge government contract.
Issue: when will damages be irrecoverable on the basis of remoteness?
Holding:

- D's breach caused both of these losses
- rules governing recovery of expectation damages
  1. P's expectation monetarily fulfilled within reason
  2. recovery of losses *reasonably foreseeable as liable to occur*
  3. reasonable foreseeability turns on knowledge at time of contract ("moment before")
  4. requisite knowledge takes two forms
     - imputed: arising in ordinary course of things
     - actual: special circumstances conveyed by P to D
  5. test of *foreseeability* — not *foresight*
     - objective reasonable person standard
  6. no requirement of foreseeability of *necessity* of loss
     - *real danger*, *serious possibility*, *liable* or *on the cards*

Application of Rules to Facts

- D liable for ordinary *but not* exceptional lost profits
  - D imputed with knowledge of ordinary course
    - coupled with special knowledge of P's business
    - coupling suggests unitary test of remoteness
      - recovery of £16 pw on ordinary contract
  - D had no actual knowledge of special circumstances
    - no recovery of £262 pw on government contract

Scyrup v Economy Tractor Parts (1963) 43 WWR 49 (Man CA)

Majority says that D is liable as long as type of loss was foreseeable even if the extent of loss wasn't foreseeable.
Policy: Problem with this is that in contracts people allocate risk and hard to allocate risk if you don't even have a ballpark figure of what you could be liable for
Still law in Canda only have to be able to foresee the TYPE and not the EXTENT of the loss

Facts: P had K with concrete supercrete (C). P needs hydraulic party. D sells to P and says it'll work, it doesn't. P loses K with C.

Issues: does *Hadley v Baxendale* contain one or two tests?
- does remoteness pertain to the type or to the extent of losses?

- Freedman JA
  - > *Hadley v Baxendale* contains *one* test of remoteness
    - single test of reasonable foreseeability
      - based on *imputed* knowledge of *ordinary* matters
      - based on *actual* knowledge of *special* matters
  - > D liable on both branches of unitary test
    - imputed knowledge: lost profits in ordinary course
    - actual knowledge: lost profits in special circumstances
  - > implicit acceptance of orthodox rule
    - remoteness inquiry pertains to *type*—not *extent*—of loss
      - but *type* of loss can be defined narrowly (*Victoria*)
- Miller CJM (dissent)
  - > remoteness inquiry requires foreseeability of *extent* of loss
    - rule intended to allow D to assess risk exposure
    - risk assessment possible *only if* D has adequate information
  - > no recovery for loss of profits on facts
    - loss not sufficiently foreseeable in ordinary course of events
      - lost profits did not flow naturally from breach
    - loss not sufficiently foreseeable as exceptional result
      - **Problem is that D was unaware of *specifics* of Supercrete contract**
        - nature, value and duration of contract

A New Approach

Transfield Shipping v Mercator Shipping (The Achilleas) (2008 HL)

D chartered a ship from P. As the end of that charter drew near, P created a new six-month charter with a third party to take effect at the end of the D's charter. D, however, returned the ship nine days late. As a result, P was required to re-negotiate the new charter with the third party. Because the market had dropped, the new charter rate was $31,500 per day instead of $39,500 per day.

P claimed that D was liable for the *total* loss suffered as a result of the breach—a reduction in charter rate of $8000 per day over the *entire term* of the new contract: $1,364,584.

D admitted the breach, but argued that damages should be restricted to the difference between the amount that the defendant paid to the plaintiff under the existing contract and the amount that the plaintiff would have received from the third party if the defendant had re-delivered the vessel on time. In accordance with a special industry practice, however, the defendant further argued that damages should be limited to the overholding period only—not the entire period of the re-negotiated third party contract. That calculation came to $158,301.

Lord Rodger & Baroness Hale applied the *Hadley v Baxendale* test of reasonable foreseeability and denied recovery.

> [I]t is important not to lose sight of the basic point that, in the absence of special knowledge, a party entering into a contract can only be supposed to contemplate the losses which are likely to result from the breach in question—in other words, those losses which will generally happen in the ordinary course of things if the breach occurs. Those are the losses for which the party in breach is held

responsible—the stated rationale being that, other losses not having been in contemplation, the parties had no opportunity to provide for them.

Contrary to that reasoning, however, it seems that the *type of loss* very much *was* reasonably foreseeable.

LORDS HOFFMANN, LORD HOPE & LORD WALKER **reconceived the test of remoteness to ask whether the parties had allocated the relevant risk to the defendant.**

> The case … raises a fundamental point of principle in the law of contractual damages: is the rule that a party may recover losses which were foreseeable ("not unlikely") an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a *prima facie* assumption about what the parties may be taken to have intended, no doubt applicable in the great majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?

The new test focuses not on reasonable foreseeability, but rather on the parties' objective allocation of risk. On the facts, the industry practice revealed that the contract imposed upon D the risk of damages during the overholding (nine-day) period only, because D knew about the special rule in the shipping industry.

Ask: if I enter into this contract, what's reasonably foreseeable/worst that could happen?
And ask: what's the allocation of risk between us two parties?

EXPECTATION DAMAGES: INTANGIBLE INJURIES

- **nature of intangible injuries**
  - > disappointment, humiliation, sadness, frustration, anger
  - > compensation for the practically non-compensable
    - - loss not (easily) quantified
    - - loss not (easily) remedied through substitute performance
- traditional heads of compensatory recovery
  - > 19th century paradigm: centrality of commercial contracts
  - > economic loss and physical damage but not intangible injuries
- modern approach
  - > moving toward a new paradigm
  - > limited and inconsistent compensation for intangible losses
    - - losses must fall within *Hadley v Baxendale*
    - - generally not in purely commercial contract
    - - occasionally in social contracts
    - **- most likely if contract for peace of mind**
- illustrations of recovery
  - > *Sokolsky v Canada 3000* (2003 Ont SCJ) (articling students' ruined holiday)
  - > *Farley v Skinner* (2001 HL) (property under flight path)
  - > *Ruxley v Forsyth* (1996 HL) (shallow pool)
  - > *Newell v Canadian Pacific* (1976 Ont Co Ct) (dead dogs)
  - > *Jarvis v Swan's Tours* (1973 CA) (disappointing holiday)
- illustrations of non-recovery
  - > *Turczinski v Dupont Heating* (2004 Ont CA) (frail owner of renovated house)
  - > *McBeth v Dalhousie* (1986 NSCA) (supplemental exam refused)
  - > *Turner v Jatko* (1978 BC Co Ct) (sabbaticant's house trashed)

Fidler v Sun Life of Canada (2006) 271 DLR (4th) 1 (SCC)

- **Facts:** young man enters into contract with Sun Life and buys long term disability insurance. Has chronic fatigue syndrome, which was not recognized in the last 90s/early 10s; gets a diagnosis from physician for this and Sun Life calls bullshit, doesn't want to pay. Takes them to court until day of court when they agree to pay him for the 5 years that they were stringing him along.
- **Issue:** When are contractual damages available for mental suffering?

- **Reasons**
  - says he bought it for insurance *and* peace of mind whole point of buying insurance is partially to have the comfort of knowing you'll be taken care of if something happens

"The law's task is … to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties. … The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security."

> purpose of contract to provide "prospect of continued financial security"
- insurance purchased for benefits *and* peace of mind
> compensation for *all* reasonably foreseeable mental distress?
- many contracts aimed in part at peace of mind
- insurance, employment, residential, consumer goods
> narrowed scope: reasonable foreseeability *within* allocation of risk
- liability *if* defendant accepted relevant risk of loss
- compensation *if* plaintiff purchased peace of mind
- still considerable scope of uncertainty

Holding: trial award of $20 000 confirmed

- SCC says that type of loss never matters, all the matters is reasonable foreseeability McInnes: this can't be true, doesn't make sense because breach of contract will always encompass intangible injuries
- a conventional sum (*eg Ruxley*) or a function of actual loss?
- artificially capped (*eg* pain and suffering) or potentially unlimited?

In almost all instances, just apply *Hadley v Baxendale* but if you're dealing with breach of contract case that leads to intangible injury where P is suing for that, ask whether the risk was allocated between the parties P wanted to know/have peace of mind

EXPECTATION DAMAGES: MITIGATION

Limitation on the recovery of expectation damages that the victim of the breach cannot recover losses that the victim could have avoided by taking reasonable steps subsequent to the breach. The principle against avoidable law is applicable in all contractual setting. One cannot sit back and allow the losses to pile up. D is on the hook for loss of profits only up to the day where P could have reasonably mitigated. P can get compensation if P had to pay higher price to 3rd party. P can get compensation for the cost of going out and getting a third party.

Mitigation requires lowest reasonable price and P isn't entitled to everything if they overpay.

- compensation *prima facie* available for losses resulting from breach
  > exception: no relief if loss too *remote* (*Hadley v Baxendale*)
  > possible exception: no damages to *extent* that damages not mitigated
- the duty to mitigate
  > no duty *per se* — plaintiff need not do anything
  > damages denied for losses that could be *reasonably* avoided
- the scope of the duty to mitigate
  > claimant need not use unreasonable effort or accept unreasonable risks
  > expenses incurred in reasonable mitigation recoverable from defendant
  > not every act following breach constitutes mitigation

Example

Pam operates an equipment rental business. She rented a widget to Dave for three months. After one month, Dave returned the unit and refused to pay for the remaining period. Later the same day, Pam rented that same widget to Xavier for a two month period. Has Pam mitigated her loss under her contract with Dave?

- What if Pam has more widgets than customers?
  - *No probably can't mitigate her loss because there's still not enough customers to take up all of her widgets*

- What if Pam has more customers than widgets?
    - *If this is the situation, she has mitigated her loss stemmed all the flow of loss from Dave's refusal*

"**thin wallet**" doctrine traditionally rejected

- Comes down to remoteness. If it was reasonably foreseeable at the outset that a breach by D may be unmitigatable (due to lack of $ of P) then D will be on the hook for the whole amount.
    - - more generous view recently emerging thin wallet rule used to say that it was unreasonable to be poor … no longer the view
    - - loss from impecuniosity recoverable if *Hadley v Baxendale* satisfied

Example

Pam is an independent trucker. She brought her rig to Dave for repairs. In breach of contract, Dave destroyed the vehicle. The purchase price for a new truck was $200 000. Because she is cash poor and has a poor credit rating, however, Pam was required to rent a truck for $10 000 a month for five months, before she could finally put together the purchase price. Her total loss consequently was $250 000. How much is she entitled to recover?

- As long as the 10k for 5 months was reasonably foreseeable, then Dave would be on the hook for all of it
    - It's all about mitigation (buying the new truck) but sometimes you can roll in the other costs, like the length of time it takes to replace the truck

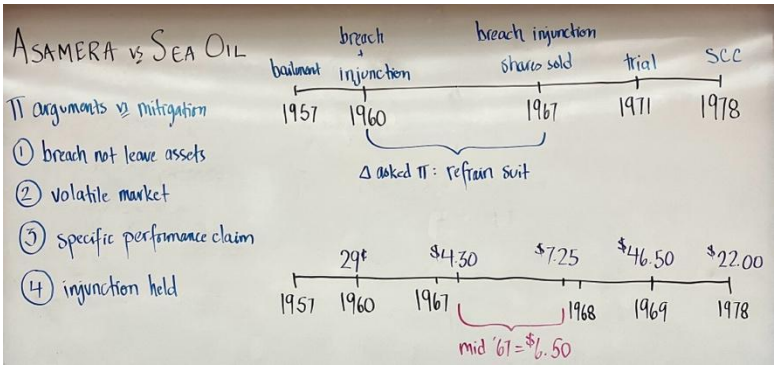
For exam: pay attention not true that anything P does after the breach is done for mitigation.

- Ask if the 2nd transcation was a substitute for the 1st one or in addition to the1st one.
- the onus of proof

> heavy burden upon defendant to establish reasonable course of avoidance

Asamera Oil v Sea Oil [1979] 1 SCR 633 (SCC)

Damages should be calculated on the day you should have mitigated no obligation *to* mitigate, but that's typically when damages will be calculated .



Facts: D was supposed to return shared in 1969. P gets injunction so D can't sell and waits til 1969 until case is settled. In 67, P found out that D had illegally sold. P didn't think he needed to mitigate. Before court in 71, prices fluctuate wildly (b/w 60-71) P asked for specific damages (wants shares back) and expectation damages in lieu of specific performance

Issue: when is duty to mitigate imposed?

Reasons:

P *prima facie* subject to mitigate at date of breach

Typically, day of breach is *prima facie* day to mitigate and also day to calculate damages

- P obviously doesn't want damages calculated in 1960 cuz they were 0.29…

- P argues circumstances removed or postponed duty

- **argument #1**: no duty as no asset created by breach
    - early cases held duty *if* breach creates *asset* in P's hands
        - creation of asset facilitates mitigative expenditure
    - duty nevertheless may arise on facts
        - availability of asset merely *a* factor supporting duty
- **argument #2**: no duty as market drop created unreasonable risk
    - need only incur reasonable risks and expenditures
    - duty nevertheless possible on facts
        - shares rose substantially in time
- **argument #3**: no duty as specific performance sought

- need not acquire substitute *and* disputed performance
- duty nevertheless possible on facts
  - specific performance *if* substantial and legitimate reason
  - no such reason established on facts *shares aren't susceptible to specific performance*

- **argument #4:** no duty as injunction obtained upon breach
  - duty nevertheless possible on facts
    - plaintiff learned of defendant's sale of actual shares (1967)
    - plaintiff not entitled to unreasonably prolong litigation

  > duty to mitigate arose on the facts
  - plaintiff required to acquire substitutes *or* litigate expeditiously
  - given complexity — plaintiff should have mitigated by 1967 **damages calculated by share value in mid 1967: $6.50**

Normally all three go together: speci

Repudiatory Breach and Mitigation of Losses

In the case of an anticipator breach (notice of a breach of future obligation) the innocent party generally has a right to either reject the repudiation and insist on performance OR discharge the contract and get damages. Is it ever reasonable for a P to reject the repudiation when they knowingly will be allowing losses to accumulate because the contract won't be performed? (ie, failing to mitigate)

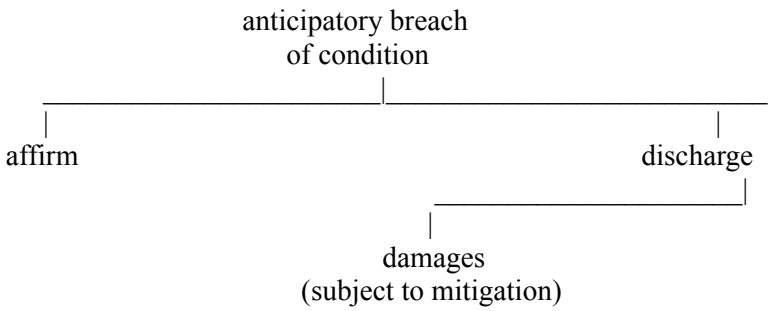
- the innocent party can elect to carry on despite accumulating expenses only in cases where there are other intangible benefits involved.
- If there are no intangible benefis there would be a duty to mitigate

- breach and anticipatory breach
  > breach: unsatisfactory performance of *accrued* obligation
  > anticipatory breach: notice of breach of *future* obligation
- option for innocent party upon anticipatory breach
  > reject repudiation and insist on performance
  > accept repudiation and discharge contract
- repudiation and mitigation
  > when can P reject breach and allow losses to accumulate?

Example

Dave enters into a contract with Pam, a pianist, for a private recital in his garden. Dave agrees to pay $1000 based on the parties' agreement that Pam should receive (i) $600 for the expense involved in transporting herself and her instrument to Dave's house, and (ii) $400 profit. One week before the date of the planned concert, Dave informs Pam that he will be out of town on the agreed date and therefore has no desire for her to perform. He offers to pay her the $400 expected profit. Pam nevertheless incurs the expense of transporting her piano to Dave's Garden and performs on the day set in the contract. She now insists on receiving the full contract price of $1000. Is she entitled to do so?

- No possible explanation for her to affirm



When are you not allowed to affirm?

White & Carter says *prima facie* entitled to

White & Carter v McGregor [1962] AC 443 (HL)

You don't have a duty to mitigate and you can continue on with performance if you have a substantial and legitimate reason for doing so (otherwise, it's reasonable to mitigate) on exam: find any reason to support a legit and substantial reason (or not)

Facts: P in business of creating ads and putting on garbage cans. D hired P for 3 years of ads. D calls and cancels entire contract.

Issue:

> when can repudiation be rejected?
> when can losses be allowed to accumulate?

Reasons:

- defendant argued discharge necessary if entirely executory obligations
  - plaintiff usually cannot perform without 's cooperation
  - ability to perform independently only fortuitous, therefore should not be *permitted* to perform and recover
    - argument rejected as devoid of principle
- defendant argued useless expenses cannot be incurred through performance
  - economic waste is contrary to public policy
    - plaintiff's expectation protected by damages of profit *alone* no rationale for allowing damages of *fresh* expenses
- argument accepted as a principle of *limited* scope
  - rule applies if no substantial and legitimate reason
    - onus on defendant to prove absence of such reason no such proof by defendant in evidence
- full damages here because substantial and legitimate reason

EXCEPTIONAL MEASURES OF RELIEF

Unjust enrichment

- 3-part cause of action
  - Enrichment + corresponding deprivation + absence of juristic reasons
- Invariable response: *restitution* no other coherent measure because there was no "wrong" by D

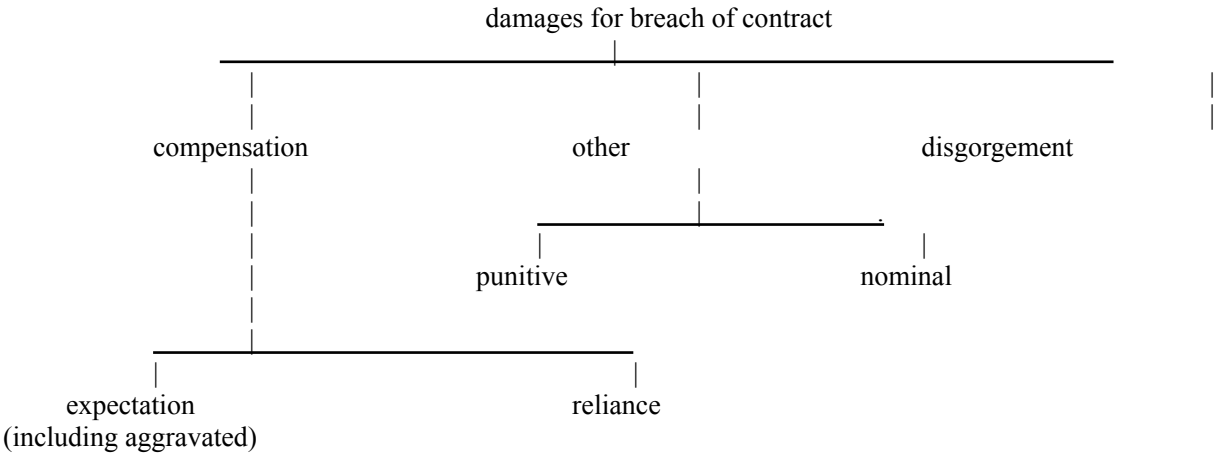
Breach of Contract

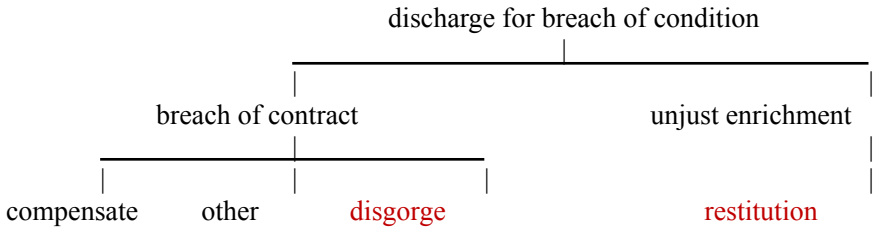
- General response: *compensation*
  - **Expectation damages (**forward looking: fulfill expectations)
  - **Reliance damages** (backward looking: restore status quo)
- **Exceptional responses**
  - (1) Nominal Damages: Damages that serve to acknowledge the wrongdoing of another party. Generally, very small (symbolic). Occur because a breach of contract is actionable per se (without damage)
  - (2) Restitutionary (disgorgement) Damages: D required to give up enrichments received at P's expense. Stripping away all the wrongful gain from the breach. P gets windfall, but justified in the most extreme cases.
  - (3) Punitive Damages: If malicious breach and independent actionable wrong.
  - (4) Liquidated Damages: I pre-established by partied + not penalty (can decide at the outset what the remedy may be).
  - (5) Specific Enforcement: If legitimate interest in performance per se. Specific performance – fulfillment of positive obligations. Injunction: Usually fulfillment of negative obligations.

Contractual Remedies

- monetary damages
  - compensation
    - expectation

        - reliance
    - disgorgement
    - other
        - punitive
        - nominal
- specific relief
    - specific performance
    - inunctions





RESTITUTION FOR UNJUST ENRICHMENT *VS* DISGORGEMENT FOR WRONGDOING

	UNJUST ENRICHMENT	
RATIONALE	Reverse Unwarranted Transfer	Strip Wrongful Gains (*courts smtm use this, wrongly)*
ACTION	Unjust Enrichment	Some Species of Civil Wrongdoing
MEASURE	Restitution (Give-Back)	"restitution", disgorgement – give up OR Others

restitution for unjust enrichment

- rationale = reverse unjustified transfers
    - liability anomalously is *strict*
    - liability triggered by unjustified transfer
    - liability *not* premised on breach of obligation (not wrongful action)
- cause of action = *always* unjust enrichment
    - enrichment to the defendant
    - corresponding deprivation to the plaintiff
    - absence of juristic reason for transfer
- remedy = *always* restitution
    - defendant must *give back* benefit to plaintiff usually personal *but* occasionally proprietary
    - remedy limited to reversing *transfer between the parties*
        a. plaintiff cannot *get back* more than she lost to defendant
        b. defendant cannot *give back* more than he got from plaintiff

disgorgement for wrongdoing

- rationale = stripping wrongful gains
    a. liability is *fault-based* □ defendant unable to profit from wrongdoing
- cause of action = something *other than* unjust enrichment
    - some species of civil wrongdoing
    - not all civil wrongs support gain-based relief
        - precedent for: trespass, nuisance, conversion
        - no precedent: negligence, battery, defamation
        - precedent against: breach of contract (until recently)
- remedy = *exceptionally* disgorgement (often called "restitution")
    - presumptive response to civil wrong = compensation
        - defendant must monetarily repair plaintiff's loss
    - extraordinary response to civil wrong = disgorgement
        - defendant must *give up* all wrongful benefit
            - transfer captures wrongful gains from third party

Attorney General v Blake [2001] 1 AC 268 (HL)

Creates new type of relief: disgorgement. Strips D of their gains.
***For exam: if you can classify case as exceptional, then P has the option of disgorgement or compensation.**

- **You should use disgorgement when you can't really quantify P's loss**
- **Make sure it doesn't fall into one of the exceptions above.**

Facts: D was an MI6 spy; signed lifelong contract to never divulge info, published book. Agrees with communists to be double agent. Early 60s, convicted and sent to prison. Escaped to Moscow. 1990s, publishes memoirs. Publisher agrees to pay $150k advance on it.

- Remedies □ can't have compensatory damages (can't put $$ on damage Blake did to the British public) □ normally no to disgorgement but this was an **exceptional circumstance**

Analysis: Lord Nicholls

- Gain based relief (disgorgement) can only be granted in the most exceptional of cases. If P has legit interest in preventing D from profiting in the wrong, they may get Disgorgement
    - limited to exceptional circumstances, no risk of intolerable commercial uncertainty
    - impossible to precisely define scope of availability
    - "Useful general guide, although not exhaustive"
        - did P have legitimate interest to prevent profit-making activity?
- Crown had legitimate interest in preventing Blake's profitable breach
    - need for absolute confidence and security in secret service
    - "Closely akin to a fiduciary obligation"
- **Rejected tests where can't use disgorgement)**
    - Skimped performance (resolved through compensation)
    - Did was promised not to do (too broad)
    - Cynical and deliberate breach (too vague)
    - Breach facilitated more profitable venture (inefficient)

Canadian Developments Since *Attorney General v Blake*

Nunavut Tunngavik Inc v Canada (AG) 2012 NUCJ 11 (Nun CJ)

Disgorgement requires special circumstances. Can accrue even when D not making a profit (when they are avoiding their obligations by not paying)

Facts: Nunavut Land Claims Agreement (NLCA) was created in 1993 between Canada and the Inuit of Nunavut. Alleged that Canada breached an obligation under the NLCA to establish an environmental and economic monitoring plan and thereby saved itself $14,800,000. The plaintiff sought that sum as disgorgement.

- Expectation damages incalculable
- Reliance not possible as no expenses occurred.
- Nominal not helpful

Held: Legitimate case for disgorgement of the gain. McInnes likes, as it is a truly exceptional case. With respect to form, the court explained that "the term restitutionary damages" ought to be avoided "to prevent the confusion that the phrase may cause with restitution as a cause of action quite distinct from breach of contract. The remedy is better referred to as 'disgorgement'" ([308]). With respect to substance, the court explained that **disgorgement requires**

proof of "exceptional circumstances" ([322]). That threshold was met. While Canada's breach "was not as egregious as" some, and while "there was no profit-making activity," the "Crown was indifferent to its obligations over many years" and its breach "undermined the confidence of … the Inuit … in the important public value behind Canadian land claims agreements. … It would be manifestly unjust to allow the Crown to benefit from its failure to fulfil its obligations." Disgorgement accordingly was awarded to "ensure that the Crown properly respects and fulfils its obligations under land claims agreements, including obligations to provide benefits that are not capable of being quantified in financial terms" ([333]).

Atlantic Lottery Corp v Babstock 2020 SCC 19

To get disgorgement, must show exceptional circumstance and some interest that inherently defied monetary compensation (impossible to calculate compensatory damages)

Facts: Atlantic Lottery Corp (ALC) operates video lottery terminals (VLTs) in the Maritime provinces. Douglas Babstock was the representative plaintiff in a class action against ALC. The class consisted of everyone who paid to play a VLT. The gist of the case was that ALC knowingly operated VLTs that were deceptive and capable of inflicting psychological injuries—eg addiction and suicide ideation. Given the difficulty in showing that all of the class members suffered such injuries, plaintiffs' counsel strategically disavowed harm-based theories of liability and sought gain-based remedies instead. The causes of action consequently included (1) unjust enrichment leading to restitution, and (2) breach of contract leading to disgorgement

Analysis:

- UE measured as transfer from P to D. Failed in this case b/c while the money in the machines constituted enrichment and corresponding deprivation in P, the games were played under contract so there was a reason for the transfer
    - **o** Disgorgement claim also failed: disgorgement available in exceptional circumstances. Court must be satisfied the contract pertained to some interest that inherently defied monetary expression
    - **o** *Compensatory damages have to be inadequate □ simply no sensible way to calculate damages*

B and Aggravated Damages

Tend to be conflated but they're different!! □ both rooted in outrageous breach of contract (only similarity between the two)

punitive damages = damages to punish and deter D

- *not* awarded for compensatory purpose
- recovery necessarily constitutes windfall for plaintiff
    - o (how) can windfall be justified?
- comparative perspectives
    - o rejected in England, Australia, New Zealand

aggravated damages = damages to *compensate* aggravation of loss (for P)

- awarded for compensatory purpose
    - o normal injury aggravated by defendant's demeaning conduct
    - o monetary reparation for emotional or psychological injury

Non-Pecuniary Damages for Breach of Contract

- traditional rule against non-pecuniary recovery **Breach of contract – can only sue for pecuniary losses. Can't sue for aggravated or punitive damages. No punitive b/c punishment is for criminal lawyers and no aggravated b/c there is no crying in business.**
    - o *Addis v Gramophone* (1909 HL)
        - ▪ harsh and humiliating dismissal from long-held job
            - recovery limited to pecuniary losses flowing from lack of notice but no recovery for humiliation, distress, embarrassment
    - o exceptions to general rule: recovery for embarrassment and shame
        - ▪ breach of promise of marriage
        - ▪ banker's breach of promise to honour customer's cheque

Justifications for Traditional Rule

- *Addis* conflation of punitive and aggravated damages □ no distinct reason for rejecting aggravated damages
- traditional commercial law paradigm □ intangible losses lie outside orthodox contractual concerns

- broad right to terminate employment contract
    - damages must flow from breach of duty to provide notice
    - distress usually flows from *manner* of dismissal — not dismissal *itself*
- uncertainty of calculation and floodgates of litigation
    - no market for hurt feelings, claims of mental distress easily fabricated

Vorvis v Insurance Corporation of British Columbia (1989 SCC)

Three step test for aggravated damages: must show (1) bad conduct from D, (2) conduct contemporaneous with breach, (3) independently actionable wrong. Punitive: (1) breach must be harsh, vindictive, malicious AND (2) D's conduct was independently actionable wrong.

Facts: P worked for D. P was a nuisance. D tried to get P to leave by humiliating him, nothing works so D fired P.
Holding: recovery denied for both punitive and aggravate damages (entitled to reasonable notice period $$)

- **aggravated damages** exceptionally available for breach of contract
    - especially if conduct is independently actionable
    - aggravating conduct must be contemporaneous with breach alleged loss otherwise not causally connected to breach
- **punitive damage**s rarely available for breach of contract
    - limited scope due to exceptional nature
        - effectively penal sanction (paid to plaintiff) in civil action
        - defendant deprived of usual safeguards against penal sanctions
            - available *only if* breach was harsh, vindictive, malicious
            - available *only if* defendant's conduct was *independently actionable wrong*
                - *eg Robitaille v Vancouver Canucks* (1981 BC CA) (negligence)

Dissent: recovery allowed
> aggravated damages for mental distress as if *Hadley v Baxendale* satisfied
- no need for independent actionability of defendant's conduct
- no need for contemporaneity of breach and aggravating act
    - but mental distress not reasonably foreseeable on facts

> punitive damages exceptionally available
- no need for independent actionability of malicious tort
- test of reprehensible conduct in the total circumstances
    - test satisfied on facts: $5000 damages

critique of aggravated (compensatory) approach to mental distress
> how is nature of defendant's conduct relevant to foreseeability of loss?
> compensation for plaintiff's distress? punishment for defendant's conduct?

Whiten v Pilot Insurance Co (2002 SCC)

Terrible case.
Facts: P has insurance on home, it burnt down. D tried to squeeze them, says P started the fire himself. Thought P was unsophisticated so could litigate to the ground. P sues D.
Issue: what is status of "independently actionable wrong" requirement?
Holding: Confirmed Vorvis prerequisites: 1st contract breach: failure to pay benefits, 2nd contract breach: failure to act in good faith.

- Req satisfied by tort OR another breach of contract
- Punitive damages aren't necessarily precluded by by criminal sanction (no double jeopardy issues)
    - punitive damages in contract *if* independently actionable wrong
    - requirement satisfied by tort *or* another breach of contract
        - *Vorvis* said "actionable *wrong*" rather than "tort"
        - *Royal Bank v W Got & Assoc* contemplated purely contractual wrongs
        - tort requirement would needlessly complicate pleadings
- punitive damages justified on facts
    - first contractual breach: failure to pay benefit
    - second contractual breach: failure to act in good faith
        - good faith anomalously required in insurance

> jury award of $1 million restored

- questions

> explain the reason and role of the "independently actionable wrong"

- tort: punitive damages possible if (*inter alia*) *one* breach
- contract: punitive damages available only if (*inter alia*) *two* breaches

***Whiten v Pilot Insurance Co* — Ten Observations on Punitive Damages**

1. relief not confined to established *categories* of wrongs (*cf AB v South West Water — Kuddus v Chief Constable of Leicestershire)*
    a. McInnes says makes sense
2. *goals*: punishment + deterrence + denunciation
    a. M says true
3. punishment confined to *criminal* law unless *exceptional* circumstances
    a. punitive not necessarily precluded by criminal sanction
4. traditional *pejorative epithets* provide insufficient guidance
    a. M says true but doesn't provide any better
5. ***rationality* requires least punitive element required to meet objectives**
6. rational to use punitive damages to compel *disgorgement*
    a. M says plain wrong, doesn't make sense
7. no *mechanical formula* or *artificial cap* (amount must flexibly reflect misconduct (rather than injury)
8. governing principle of *proportionality* (repetitive says M)
    a. total sanctions (compensation, punitive, criminal) must reflect goals and facts
    b. punitive damages *if but only if* other sanctions inadequate to satisfy goals
9. greater *guidance for juries* than traditionally given
    a. information regarding nature, purpose and assessment of punitive damages
10. measure of relief is *not at large* but rather is bound by rationality and precedent
    a. M says repetitive – don't pluck numbers out of thin air

Nominal Damages

- breach of contract is actionable *per se*
  > plaintiff is *not* required to prove that breach caused loss or gain
- nominal damages = damages in name only
  > small sum (*eg* $5) awarded to symbolically vindicate plaintiff's rights
  > a poor decision in a trivial case
  - nominal damages may be outweighed by denied costs

James Whistler was an artist famous for the work popularly known as *Whistler's Mother* (though its real title was *Arrangement in Grey and Black No. 4*).
Within legal circles, he is also famous for a poor decision.
In reviewing Whistler's painting, *Nocturne in Black and Gold: The Falling Rocket*, an art critic named John Ruskin accused the artist of "flinging a pot of paint in the public's face."
Whistler sued for the tort of defamation (or libel) and demanded damages of £1000.
The jury held Ruskin liable, but awarded Whistler nominal damages of only one farthing (a quarter of a penny). To make matters worse, the court took the unusual step of refusing to award costs in favour of the winning side.
The result bankrupted Whistler and forced him to auction off his paintings and his home.

SPECIFIC ENFORCEMENT

Court order compelling performance of contractual obligation. Non-compliance (technically) punishable by imprisonment: non-compliance alternatively sanctioned by damages

The aim of contract and the adequacy of damages

- general goal of contractual relief: fulfilment of expectations
- contract and the historical paradigm of commercial bargain
  - monetary proxy of performance usually sufficient for business
  - damages facilitate acquisition of adequate substitute for performance

The supplementary nature of Equity

- Equity able to act *in personam* to compel compliance with obligation

- o *but* Equity historically arose as an ameliorating gloss on Law
  - **Equity acted only when Law inadequately addressed an issue**
  - specific enforcement available only if damages at Law inadequate

Specific enforcement and breach

- o primary obligations and secondary obligations
  - primary obligation = duty to honour contractual undertakings
  - secondary obligation = duty to make amends for breach of primary duty

Specific performance is not a remedy for breach of contract. If presented with breach of condition, then carry on OR discharge contract and proceed with secondary obligations. If asking for specific performance, CAN'T discharge contract

Remedial Advantages

- direct fulfilment of expectation
  - > expectation damages provide *monetary proxy* of performance
    - relief inevitably imperfect
  - > specific performance provides *actual* performance
    - shortfall from delay remediable through damages
- avoidance of evidentiary difficulties associated with proof of damages
- avoidance of mitigation issues *if* specific enforcement properly sought
  - > plaintiff need not mitigate by acquiring *double* performance (*Asamera*)
  - > post-breach act clearly not mitigative of loss
- election of date of assessment in event of refusal of specific performance
  - > damages generally assessed at date of breach
  - > plaintiff enjoys election of damages awarded in lieu of specific performance
    - damages assessed at date of trial *if* value *increases* to trial
    - damages assessed at date of breach *if* value *decreases* to trial
- (possible) enforcement of contract for benefit of third party (*Beswick*)
- *Lord Cairns Act 1858*
  - > compensatory damages previously unavailable in Equity
    - compensatory damages available under Act *in lieu* of order
    - calculation on same principles in Law and Equity (*Agnew v Johnson* 1980)
  - > *prospective* compensatory damages previously unavailable in Law or Equity
    - traditionally necessary to sue in Law *after* each successive breach
    - compensation under Act for *future* wrongs if order refused

Scope of Availability

- requirement: substantial and legitimate reason + inadequacy of damages
  - > generally available if monetary award insufficient
    - *eg* heirloom, private shares, land (*cf Semelhago v Paramadevan*)
- requirement: circumstances of *mutuality*
  - > no *duty* to perform unless *right* to counter-performance
    - traditional: order if plaintiff *also* amenable to order
      - *eg* no specific performance in favour of infant
    - modern: order if plaintiff amenable to order *or* fully performed
  - > order anomalously available to vendor of land
    - monetary damages generally adequate remedy
    - *but* order available to vendor to ensure availability to buyer
- grounds for denial: *personal services*
  - > order would raise undesirable notion of slavery
  - > order would invite personal conflict
  - > order difficult to monitor for compliance
  - > *but* personal services exceptionally subject to *injunction* (below)
- grounds for denial: *impossibility*

> *eg* land transferred to *bona fide* purchaser for value without notice

- grounds for denial: contract induced by *misrepresentation*
  > Equity will not assist (even innocent) wrongdoer
- availability of order: subject to Equity's (principled) *discretion*
  > "must come to Equity with clean hands" (plaintiff's past conduct)
  > "he who seeks equity must do equity" (plaintiff's future conduct)
  > hardship to defendant or third party
  > ongoing judicial supervision
  > *acquiescence* and *laches*

Injunctions

- introduction
  > general nature: court order to act in compliance with pre-existing obligation
  > scope of availability: contract *or* tort *or* other
  > species of injunction
    - timing of order
      - *quia timet*: prevent *occurrence* of breach
      - interim or interlocutory: protect rights *pending* final resolution
      - final or permanent: conclusive *resolution* of rights
    - nature of order
      - prohibitory: *refrain* from stipulated act
      - mandatory: *perform* stipulated act
- **injunction *as* specific performance**
  > injunction may constitute specific performance *in effect*
    - *eg* mandatory injunction to perform *positive* undertaking
    - *eg* prohibitory injunction to honour *negative* undertaking
      - may *effectively* compel performance of *positive* undertaking (below)
  > rule: specific performance principles applicable *if* specific performance *in effect*
- injunction *vs* specific performance
  > injunction *generally* more readily available than specific performance
    - same *discretionary* factors (*eg* clean hands, inadequacy of damages)
    - *but* generally more flexible approach to injunctions
- requirements and prohibitions
  > courts much more willing to *prohibit* than to *require* acts
    - distinction drawn on basis of *substance* rather than *form*
    - various orders may create *requirements* depending upon circumstances
      - specific performance, mandatory injunction, prohibitory injunction
  > freedom of choice and personal servitude
    - *prohibited* act *permits* defendant to do anything else
    - *required* act *precludes* defendant from doing anything else
  > judicial supervision
    - *required* act more likely to entail ongoing judicial supervision
  > calculation of compensation *in lieu*
    - generally easier to calculate loss from *act* rather than *omission*

Warner Bros Pictures Inc v Nelson (QB 1937)

Early in her career, Bette Davis signed a contract with Warner Bros movie studio. That agreement contained positive *and* negative undertakings. Positively, Davis promised to act in the studio's films. Negatively, she promised not to act for anyone else. By 1937, however, she had enjoyed great success in *Of Human Bondage* with Leslie Howard, *The Petrified Forest* with Humphrey Bogart, and *Dangerous*, for which she won an Academy Award. She therefore decided that her contract with Warner Bros did not pay enough for someone of her stature. She wanted to work elsewhere for more money.

Warner Bros did not seek specific performance of Davis's positive promise to perform in its movies. And, indeed, the court said that such an order would not have been granted. The studio did, however, obtain an injunction with respect to the actress's negative promise not to appear in anyone else's movies. The court held that if Davis wanted to appear on film during the life of her contract with Warner Bros, she had to work for that studio. The court also held, however, that she was free to earn a living in other ways if she chose.

Page One Records Ltd v Britton (Ch D 1968)

The defendants, four young English musicians who played as *The Troggs*, had a hit song in 1966 with "Wild Thing." Several years earlier, they had signed a contract with the plaintiff. Under the terms of that agreement, the defendants gave a positive promise to employ the plaintiff as their manager and a negative promise to not employ anyone else in that capacity. Unfortunately, the relationship between the parties deteriorated, and the group decided that it could no longer work with the plaintiff. The plaintiff sought an injunction preventing *The Troggs* from hiring anyone else to act as their manager.

The court refused to grant an injunction for several reasons. Most significantly, the judge recognized that an injunction would have effectively prevented the defendants from earning a living. Bette Davis could have made money by doing things other than acting in film. *The Troggs*, in contrast, had no skills outside of music. And they could work as musicians only if they had a manager. It therefore would have been unfair to make them choose between unemployment and working with the plaintiff.