Contents

Contract - A contract is defined in Canadian law as an agreement, which is enforced, by law. A contract requires an offer by an offeror and an acceptance by an offeree (*Canadian Dyers v Burton*).

Offer - An offer is an expression, by words or conduct, **of a willingness to be legally bound** on certain terms upon acceptance by the offeree (*Cdn Dyers*).

The **test** for an offer depends on the reasonable language used in light of the circumstances (*Cdn Dyers*; *Carlill*).

Factors include: language indicating greater certainty about a willingness to be legally bound; degree of clarity and specificity about material terms; conduct or words and conduct, rather than just words; and subsequent conduct.

An offer can be made to one person, to a group of several persons, or to the world at large (*Carlill*)

An offer may **set the means** by which it is to be **accepted** (*Carlill*)

In a **unilateral contract,** the offer is to be accepted by the performance of an act by the offeree (*Carlill*)

Test for a unilateral contract → Does the offer make a promise in exchange for an act? If so, it's a unilateral contract.

The offeror bears the risk of extravagant promises (*Goldthorpe*)

No offer is valid without consideration (*Goldthorpe*)

Invitation to treat – An offer is distinguished from an invitation to negotiate or treat (*Cdn Dyers*; *Boots*); or a mere quotation of price (*Harvey v Facey*). An invitation to treat is an invitation to commence bargaining. It is typically understood as an invitation to the other part to make an offer of some kind.

Canadian Dyers – house sale. Would ordinary person looking at document think it is an offer?

- Confusing language to reasonable person (not an offer): "We would be pleased to have your very lowest price for 25 Hanna avenue. Perhaps we could get closer together than the last figure given us."
- Language (evidence of offer): "last price I gave you is the lowest"
- Conduct (evidence of offer): Draft deed sent (conduct) along with considerable correspondence (commitment and strength of agreement)

Boots – pharmacy – when does an offer take place?

- **Display of items in store is an invitation to treat**. Presentation of item by customer to cashier constitutes an offer to purchase the item.
- **Contract is completed with cashier's acceptance of the customer's offer**. Why? i) freedom of contract; (ii) control over the nature of the good; (iii) discretion in case the price is incorrect; and with respect to the purchaser, (iv) discretion in case s/he changes his/her mind about good they have picked up.

Christie – Black man refused service at bar in the Forum – freedom of contract

- when did offer take place?
- dissent looks to provincial licensing limiting freedom of contract

Carlill – epidemic of influenza purported to be preventable by use of carbolic smoke ball

- freedom of contract means you must abide by the terms of acceptance you choose (thus offer can be made to world at large)
- unilateral contract – performance is the acceptance; offer can set the terms for acceptance
- no mere puff because of the money deposited in the bank

Goldthorpe v. Logan - Woman responded to newspaper ad which guaranteed to remove hair from her face; no mention of "Results may vary"

- An advertisement constitutes an offer that can be accepted on the terms it proffered.
- Defendant did not live up to their offer and thus breached the contract.

Harvela – Sir Leonard - auction – must be either fixed or referential; bidder can participate or abstain

- respondent designed the invitation to provoke the best price each bidder was prepared to pay without knowing the rival's bid
- with fixed bidding: confidential offers – acceptance of highest bid – that Sir Leonard's referential bid did not meet the terms of the offer, only his fixed price did (which was lower than Harvela)

Ron Engineering – contractor makes mistake on tender (bid) & attempts to revoke deposit of $150,000; his bid ended up being chosen

- tender contract A is irrevocable after deadline; contract B is the terms of the actual project
- Under contract A, both parties are under an obligation to enter into contract B once tender is accepted
- Purpose of the tender deposit is to ensure the performance by the contractor of its obligations under contract A. The contractor refused to complete contract B. The deposit is not recoverable.

MJB Enterprises – hand written note added to final price though tender specs called for one price & privilege clause; implied term giving BE

- Does a privilege clause in a tender contract allow respondent to disregard lowest bid in favour of any other tender, even a non-compliant one?
- Privilege clause in a document is only compatible with a compliant bid but does allow respondent to choose a tender other than the lowest
- That bid must be compliant is an implied term (in fact) - necessary "to give business efficacy to a contract" /meeting 'officious bystander' test
- There is a great deal of work that goes into submitting a tender, therefore, it is reasonable to assume that there was an obligation on the contractor to only accept compliant bids.
- Acting in good faith, or thinking that one has interpreted the contract correctly are not valid defences to an action of breach of contract.

Communication of Offer - an offer is not effective until it is communicated to the offeree (*Blair v Western Mutual* – e.g. no evidence of a formal offer to the stenographer).

The offeree must know of the offer in order to accept it (*Williams v. Cawardine* – she must have knew of the offer because of posters; *R. v. Clarke* – knowledge does not matter as much as intention). So long as s/he has knowledge of the offer, the motive of the offeree in accepting the offer is generally irrelevant (*Williams v Cawardine* – Mary Williams gave information believing she was on her deathbed, wanting to ease her conscience, not for the reward).

Two cross-offers do not make a contract (*Tinn v. Hoffman*)

Blair v Western Mutual - stenographer – Mrs. Blair claims 2 yrs retirement she knows of unofficially

- no evidence to suggest the respondents intended to communicate their offer to the appellant and further, no evidence that her resignation made as an acceptance of the offer
- no formal communication of offer to Mrs. Blair

Williams v Carwardine – eyewitness to murder claims reward though motive for giving info not to claim reward

- if terms of acceptance met in offer, then there is a legally binding agreement, regardless of motive
- advertisement was an offer and P's info provide info for conviction of murder was acceptance (met all terms of offer)
- it is critical to point out that she had knowledge of the contract (offeree must know of the offer to accept it) since the poster of the offer was placarded all over Hereford

R v Clarke – Clarke gives evidence proving innocence and helps establish another's guilt; seeks Crown's reward

- in Clarke's case, this communication of consent was non-existent. Clarke admitted, under oath, that he had no intention of claiming the reward at the time he provided the evidence
- No contact between the Crown and Clarke – no communication – no *consensus* of mind – distinguished from *Williams* since in that case, it is suggested that the reward-seeker knew of reward (and at the very least, there was no evidence that she had no intention to claim it
- Also obiter issue on wording of reward offer ('shall lead' and 'may lead') which would have also failed Clarke

Acceptance – A contract is not formed unless there has been acceptance of the offer (*Carlill; Livingstone v Evans*). It marks a convergence of intention be legally bound. An acceptance is the **expression, by words or conduct**, of assent to the terms of the offer (*Livingstone*).

Whether language/conduct constitute an (clear and unequivocal) acceptance is a **matter of construction** of the language and conduct of the offeree (*Livingstone; Dawson*).

An acceptance must be **absolute and unequivocal**, & must **correspond with the terms** of offer (*Livingstone*; *Dawson*). [However, performance under the contract may remain conditional (*Dawson*)]

An acceptance must be in the **manner prescribed by the offer** (*ProCD*; *Carlill*; *Clarke*). An offer may invite **acceptance by conduct** and may also set **limitations** on the kind of conduct that constitutes acceptance (*ProCD; Clarke*). An offer of a unilateral contract is accepted by performance by the offeree of specified act (*Carlill*).

While an offer can prescribe the form or time for acceptance, an **offeror cannot impose a contract** by requiring the offeree to act (*Felthouse* – uncle couldn't guarantee sale of horse by nephew's silence).

SILENCE

Silence does not generally constitute an acceptance (*Felthouse*). However, silence/inaction **may constitute an acceptance** where such silence would be understood by a reasonable offeree to constitute an acceptance (*Saint John Tug Boat* – Irving Refinery knew that Saint John Tug Boat was on standby as they had been prior).

BATTLE OF FORMS

Terms of the resulting contract depend on construction of **language, conduct and circumstances**:

> In context of **battle of forms**, contract may be formed when the last of the forms is sent and received without objection being taken (*Butler Machine Tool*). Terms will often be the **last set of terms** provided without objection by the other party: the **"last shot" rule** (*Butler Machine Tool* – tear-off slip; price variation clause), but the terms may also be the **"first blow"** or depend on the forms sent by each side (*Tywood* – only last form had arbitration clause but never drawn to the attention of other party despite earlier reservations) . Factors to help assessment include: (i) was there acknowledgment of the supremacy of some set of terms or consistent and continual insistence on any particular terms? (ii) was there notice of the changed terms? (iii) how material/important were the changed terms?

Denning's Approach:

1. *Last Shot Rule* → Last form sent that the other part did not reject becomes the term of the contract
2. *First Blow Approach* → Terms on the first form prevail unless the buyer draws the seller's attention to his terms, so long as there is an agreement on the essentials
3. *Shot From Both Sides* → Glean from documents and conduct of the parties; Determine whether there was an agreement – consensus ad idem – on all material points; If there is an agreement, then construe the written and printed terms, the document as a whole, to determine the terms of the contract.

Rejection of offer **terminates** offer (*Livingstone* – 'cannot reduce price' rejected $1600 offer; *Hyde v Wrench*). The making of a **counter-offer** is a rejection of the original offer (*Livingstone*). Counter-offer should be distinguished from a **mere inquiry** as to whether offeror will modify its terms (*Livingstone*).

Livingstone – D: 'cannot reduce price' - a rejection of an offer (after P offers $1600 when D requested $1800)? (for land)

- It was an intimation that he was still willing to treat, and still willing to accept original offer

- statement that he could not reduce such price makes it clear that the original offer has been renewed.

Dawson – mineral deposits - Dawson take leave from naval reserve and Helicopter to find pilot (if staking, then 10% interest)

- Rand J: Helicopter argues unilateral K while Court recognized bilateral K – language points to bilateral K. If considered unilateral, Helicopter could have balked at any point – which is what they argue – but Courts reluctant to allow this cause it would affect offeror's ability to plan
- implied in (fact via officious bystander to business efficacy) the agreement was Helicopter would not prevent performance by Dawson –by doing so, they violated K (thus Dawson's inability to find obtain leave irrelevant)
- Estey J: acceptance, clear and unequivocal, may be found in language AND conduct of acceptor; correspond with terms offer
- A contract may contain within itself the elements of its own discharge, in the form of provisions, express, or implied, for its determination in certain circumstances (If pilot was found, Dawson would have to perform; if not, then contract would be at an end)
- Re: Dawson's silence, while silence may be evidence of repudiation, its weight must depend upon circumstances – here silence, coupled with steps taken immediately on return from Marshall Islands, sufficiently support conclusion Dawson did not intend to abandon his rights under K

ProCD – CD telephone directory; acceptance must be in the manner prescribed

- Zeidenberg argues unaware conditions because not visible (shrinkwrap) – but splashes across screen
- acceptance was not opening the shrinkwrap but upon viewing conditions and clicking to indicate acceptance
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Felthouse – horse , nephew/uncle

- silence does not generally constitute acceptance
- uncle cannot impose contract (assuming in letter that his offer of £30.15 would be accepted if he did not receive a response) requiring nephew to act because as happened in this case (he sold horse by mistake), would not make much policy sense.

Saint John Tug Boat v Irving Refinery – silence can be acceptance

- by verbal contract, Saint John agree to make tugboat available for Irving Refinery for 1 month + 2 2-week extensions
- no further extension but service continued to be employed for quite a few months; respondent seems to have continued use after July 31, 1961 (when last 2-week extension was agreed to)
- continuing acceptance as understood by a reasonable offeree (i.e. agreement implied from acquiescence)

Butler Machine Tool – last blow - price variation clause (first form), not in second w/ tear-off slip

- Butler sends third letter after signing tear-off slip saying the terms deal was made under Butler's own terms
- Butler sends machinery with an increased price (£75,535, plus £2,892) as per price variation clause. Ex-Cell-O refuses payment, and Butler commences action
- 'last blow' wins here because of tear-off slip (consensus of minds – not achieved w/subsequent letter)

Tywood – first shot - most forms without arbitration clause; last purchase order has one

- Arbitration clause not binding cause not clearly expressed in K; unclear about intention of BOTH parties to arbitrate (in fact, clause 12 of Tywood's original terms claimed that there could be no modification)
- D (St Anne) added arbitration clause without drawing attention to it, and it appears that Tywood never agreed to the supremacy of D's new terms; both parties were really concerned with the specifications and price – this highlights again the importance of the consensus/convergence of the minds with acceptance

Communication of Acceptance – **An acceptance must be communicated to the offeror** (*Holwell* – letter lost in the mail) **unless the offer permits otherwise** (*Carlill* – in a unilateral contract, waives strict communication). **Communication of acceptance must be in the form** (*ProCD* – acceptance marked by agreeing to conditions on screen) **and at the time prescribed by the offer** (*Holwell* – house sellers wanted notice within 6 months).

With respect to **instantaneous forms of acceptance**, an acceptance is made when and where the the communication is received by the offeror (*Brinkibon* – with telex, makes sense it would be accepted when received in Vienna). E-mail is not considered instantaneous – no guarantee of receipt. You can say that e-mail is more instant now (Brinkibon). u

With respect to **postal acceptance**, acceptance is complete when and where the acceptance is posted, unless the offer provides otherwise or if application would produce absurdity and inconvenience (*Holwell*; *Brinkibon*). Even if the rule appears to disfavor offeror, s/he can determine form/manner of acceptance (*Holwell*)

The acceptance of the offer by letter through post must be **expressly** or **impliedly authorized.** (*Household Insurance*)

Household Insurance Co. v. Grant D made offer for shares in P's company authorized P's company to send notice of their allotment of the shares by mail. P did allot the shares and mailed him notice of allotment but the maill never got to D.

- A contract formed by correspondence through the post is complete as soon as the letter accepting the offer is put into the post
- It is not put an end in the event of the letter never being delivered.
- The acceptance of the offer by letter through post must be **expressly** or **impliedly authorized.**

Holwell v Hughes – postal rule - letter exercising option to buy Wembley property lost in the mail – when was acceptance?

- Lawton LJ: Holwell fails for 2 reasons:
- 1. Didn't do what D (Hughes) asked for (phone call not appropriate form of acceptance): D required knowledge of offer from notice in writing
- 2. Postal rule does not apply when another form of acceptance is expressly stipulated and also when application would produce manifest inconvenience and absurdity
- Russell LJ: no notice in writing, as stipulated in contract, so telephone call is insufficient

The use of the words "notice in writing" meant that Hughes required actual notice of acceptance. The postal rule does not apply when the terms of a contract point to the necessity of actual communication, even if the post is the desired medium of communication. The recipient does not actually have to read or understand the acceptance; it must just arrive and be seen by the offeror.

Brinkibon – Buyers in UK send acceptance to Vienna by telex – where is acceptance? and opening a letter of credit – acceptance by conduct?

- With telex**, like other instantaneous forms of communication, acceptance occurs when received** (unlike postal rule) – which makes sense with telex, because party sending can tell if the message has been received (doesn't work other way)
- **Instantaneous and postal rules apply only when time/form of acceptance not stipulated**

Rudder – law students – on-line MSN contracts – improper charges - **does nature of technology change standard rules**?

- Microsoft successfully relies on 'forum selection clause' – disputes must be settled in Washington; P:didn't see clause – concerned with price
- Court rules that Ps agreed to obey terms with "I agree" and that just because all of agreement not visible on page, this does not constitute 'fine print'—scrolling is like turning page of document;
- 2 occasions for seeing terms, and at second point: "If you click 'I agree' without reading the membership agreement, you are still agreeing to be bound by all of the terms...without limitation." – standard rules apply to internet agreements – shows respect for agreements signed (however argument on whether there really was a consensus of the mind → policy discussion on new technologies)

Termination of Offer – Rejection – **An offer is terminated once it has been rejected by the offeree** (*Livingstone*). A **counter-offer is a rejection** of the offer (*Livingstone*). A rejection or counter-offer is **distinguished from a mere request for information** or inquiry as to terms of the offer (*Livingstone*).

Termination of Offer – Lapse – **An offer may terminate because of lapse of time** (*Barrick*). **Lapse of time occurs either**: **(A)** **after a time fixed by the offer**, or (**B**) if no time is stipulated, after a **reasonable period of time** (*Barrick* – prompt reply asked for but not provided even though wife wrote – see factors). **Factors determining reasonable time include**: i) language in the contract ii) nature of the particular offer iii) subject matter of the contract iv) previous dealings of the parties v) customs of a shared trade.

Termination of Offer – Revocation – The offeror may **revoke an offer at any time prior to acceptance** (*Dickinson* – as hard as Dickinson tried, offer was revoked).

A revocation of offer is **not effective until communicated** to the offeree (*Dickinson* – Dickinson informed by agent and Dickinson himself; *Byrne*). An offeree who has reliable knowledge of revocation cannot accept even if the communication has not come from the offeror (*Dickson*). A **posted revocation** is only effective on receipt by the offeree (*Byrne*).

An offer for a **unilateral contract** may not be revoked once the offeree has unequivocally commenced performance (*Errington*).

An option contract, supported by consideration, may make an offer irrevocable by the offeror (*Ron Engineering*).

REJECTION

Livingstone – D: 'cannot reduce price' - a rejection of an offer (after P offers $1600 when D requested $1800)? (for land)

- It was an intimation that he was still willing to treat, and still willing to accept original offer
- Statement that he could not reduce such price makes it clear that the original offer has been renewed.

LAPSE

Barrick v Clark – A potential purchaser took 25 days to respond to an offer of farmland. By that time the land had been sold to someone else.

- in leter, Barrick advised Clark that deal could be closed immediately and asked for prompt reply; these words used to show that a reasonable time had lapsed
- the $2000 required for deposit would be needed by Jan 1, 1948, Barrick sends his cheque/notification in mid-Dec (another factor showing a reasonable amount of time had lapsed)
- factors for reasonable time: nature of offer, subject matter of contract, previous dealings, customs

REVOCATION

Dickinson v Dodds – P tries to accept D's offer at D's mother-in-law's and by D's agent

- with reliable knowledge that D's offer had already been revoked, P cannot accept

- goes again to the idea that two minds must be in agreement at one same time (marking acceptance)
- great freedom to revoke an offer is balanced by the condition that the offeree must know of the revocation for a reliable source (not a rumour)

Byrne – series of letters – offer sent Oct 1st; received/accepted 11th ; acceptance received 15th; 8th revocation; received 20th

- an uncommunicated revocation is no revocation at all; revocation on 8th inoperative because of binding contract on 11th (offeree had no reason to believe that offeror had revoked offer)
- Lindley J believes this makes sense since if it wasn't the case, extreme injustice and inconvenience would result if a person who sends in an acceptance has to wait to ensure that revocation had not occurred.

Errington – title to transfer from father's name to son/daughter-in-law at retirement if mortgage installments paid for

- Father bought house for son and daughter; pays mortgage, but dies before mortgage installments complete
- Father's promise is a unilateral contract: implied promise cannot be revoked since performance has commenced (paying of installments) – property will be transferred once payments complete
- Unilateral K revocation - judgment protects interest of the party who is acting on the promise of the offeror

Ron Engineering – tender/mistake – contractor attempts to claim back deposit of $150,000

- Call for tender placed with stipulation that if withdrawn after close of bidding deposit would not be returned. Tender bid placed. When noticed that it was much lower than next lowest tender, tried to withdraw submission. Trying to recover deposit
- Can a submitted tender, that conforms to the terms and conditions of the request, be revoked after the closing of bidding?
- Option contract – supported by consideration – offer irrevocable

Certainty of Terms - No contract is formed if an agreement lacks certainty with respect to material terms of the contract.

Vagueness – Where a term exists but is vague, the courts try to **find a meaning for the term**, so long as the parties **intended** to create a contract (*CAE Industries* – gov't intention to contract marked by part performance + it approached CAE; vague term can be given meaning).

Incomplete Terms – While the law is reluctant to create a contract for the parties where an agreement is silent as to a material term, the **court may attempt to imply a term** where it believes there was an **intention to contract** (*Hillas & Co* – Russian timbre-other parts of contract used; *Foley* – intention marked by performance-used petrol for 3 yrs + arbitration clause). In giving content to a term, the court will use an **objective approach** that seeks a reasonable construction of factors such as:

a) language of the relevant contractual provision b) other parts of the contract c) reference by the parties to an external standard c) reference by the parties to an external standard d) conduct of the parties under the contract, e.g. part

performance e) existing course of dealings or relations of the parties f) normal practice or custom in a trade or industry g) statue law such as the Sale of Goods Act h) machinery for 3rd party determination i) standard of reasonableness

Where the parties **expressly agree to leave a material term for future** agreement, courts may refuse to find that any contract is formed (*May and Butcher* – a vital part of K, price of army surplus tents, not agreed to). A contract will generally be found where parties **provide some formula for determining the term** or provide some binding machinery, such as arbitration, that will be able to determine the term (*Foley*). Where there is only an agreement to agree is a matter of intent as determine by language and conduct of parties; where there is **conduct** evidencing that the parties had agreed to something more definite, court may use that conduct to determine term (*Foley*).

Agreements to Negotiate

– A **bare agreement to negotiate** a material term is **not certain enough** to form a contract (*Mannpar* – an agreement to agree on renewal of permit is not certain; no benchmarks, like price). However, where more is agreed to such as some kind of benchmark, the courts may find that there is a contract with an obligation such as to negotiate in good faith and an obligation no to unreasonably withhold consent (*Empress Towers* - implied term that Empress Towers has an obligation to negotiate in good faith and not withhold agreement unreasonably from bank-tenant).

Intention? – how important to overall contract? – can we use a standard to fill in the gap? – was there ever consensus?
The test for intention is objective; does the promisee reasonably believe that a binding agreement is intended?

CAE Industries - in letter, gov't guarantees 40,000 hours and will make "best efforts" to ensure 700,000 hours

- When less work provided to CAE industries, sue for breach – issue was whether a contract intended in letter
- There was intention: terms of K partly performed, looking to surrounding circumstances (gov't approached CAE Industries as a potential buyer)
- K is not so vague/uncertain/incomplete – commitment on part of gov't to "set-aside" repair/overhaul work – and words can be given meaning i.e. 'best efforts' = gov't has broad obligation to secure work for CAE

Hillas – Russian timbre –documents exchanged include clause 9 stipulating 5% discount

- Terms of agreement including Clause 9 sufficiently clear; also, it is clear that parties intended to create K (thus legally binding)
- Clause 9 to be read in context of the entire agreement – other clauses can help inform specifications in unclear/incomplete clause (use clause referring to one set of terms to apply to 100,000 standards) – K neither uncertain nor incomplete

Foley – petrol – D sells land to adjacent buyer P on condition of purchasing petrol "at a price to be agreed by parties in writing from time to time"

- After 3 yrs of buying petrol, D attempts to buy supplies on better terms elsewhere – P wants injunction – unclear whether there is a K
- If it were true that D could buy petrol elsewhere and there was no K, it would equally be true that P could take back land sold (absurd)
- There was clear intention that both parties had a K – they acted on it for 3 yrs (conduct shows intention) AND also included arbitration clause (i.e. even if there was a lack of clarity with respect to the price of petrol, machinery was put into place to deal with it)

May & Butcher – purchase of army surplus tents – price/date of payment "shall be agreed upon from time to time" – disputes subject to arbitration

- A's arguments: even if price not agreed to, use reasonable one; if price not agreed to, arbitration clause; these don't work, they were wronged for not having opportunity to enter into further agreement when new Board came on.
- Vital part of K never agreed to: price → therefore, no K. since it has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undermined is no contract at all.
- The arbitration clause is only operative when there is a dispute on the 'agreement' – but if price never fixed, then there was no such agreement

Empress Towers – Bank of Nova Scotia tenant had right to renew for 2 consecutive 5 yr period

- Right to renew "excepting the rental for any renewal period, which shall be the market rental prevailing at the commencement of that renewal term as mutually agreed between the Landlord and the Tenant." – issue was whether renewal clause was too uncertain
- Tenant attempts to renew with a suggested retail price ($5400) which Empress do not respond to until day lease set to expire with a larger increase in price ($15,000 + $5400) – evidence that extra cost had something to do with a robbery

- Landlord should not be compelled into a renewal tenancy which is not at the accepted market value; but it is an implied term that landlord has an obligation to negotiate in good faith and not withhold agreement unreasonably (officious bystander and business efficacy principles) when there is a benchmark (highest market value) price which the tenant is willing to pay

Mannpar – Crown gives permit to P on consent of Indian reserve, along with right to renewal after 5 yrs

- Native band and Crown refused to renegotiate K after 5 yrs – P now sues for damages – what is 'right to renewal'?
- Did permit create obligation on part of D to renegotiate K? No – clause simply an "agreement to agree"; in order for the K to be binding, P must show: objective measures upon renewal (like market price as in *Empress*) in order for there to be a duty to negotiate in good faith

Consideration – Consideration is **necessary for the enforcement** of contractual promises, unless the contract is made in the form of a deed (*Dalhousie College* – Boutillier's promise was gratuitious*; Thomas*).

An express but **gratuitous promise** is not enforceable as a contractual promise (*Dalhousie College; Brantford General Hospital* - Mrs Marquis' pledge to give $1 million is unenforceable due to lack of consideration*; Dickson).*

Consideration may consist of **an act** (*Carlill*) or **forbearance** (*Callisher*), or the **promise thereof** (*Wood v Lucy, Lady Duff*), undertaken in exchange for the other party's act, forbearance or promise. It may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other (*Currie v Misa*). Consideration **must move from the promisee** (*Dalhousie College*).

Consideration must have some **value in the eye of the law** – it **need not be adequate or fair** to be sufficient consideration (*Thomas* - £1/yr is sufficient). **Moral obligation** is not good consideration (*Eastwood* – guardian who had taken out loan for infant – husband agrees to pay but doesn't; *Thomas* – even though husband wished for wife to taken care of, not an issue here).

Past consideration is not good consideration: an act done before a promise was made is generally not consideration for the promise (*Eastwood*). **Except** when: i) performance was done at the request of the promisor ii) it was understood at the time of the service that there would be payment or conferment of some other benefit, or iii) the payment or conferment of benefit would have been legally enforceable if promised in advance (*Lampleigh* – pardon + king; *Pao On*).

Dalhousie College – Boutillier (deceased) pledge to College campaign donation; financial difficulties – did not pay - gift

- On death, college claims for money promised from will; note that Boutillier wrote, signed, w/ 'I promise' (very close to but not a deed)
- Not enforceable – just a bare agreement *nudum pactum* – no consideration provided (proving rule that there must be movement from both sides)
- Dal argues there was consideration since w/ money there they allege promise to: construct buildings, keep pace with growing need of constituencies; Court responds that they may have expression of reasons but none were binding
- Dal argues reliance – but this is insufficient without consideration

Brantford General Hospital – does hospital ward named after indifferent donor constitute consideration? – **Whatever is flowing from promisee must be of value to promisor.**

- While hospital contends naming of a unit to be good consideration, Court finds that it was not of vital importance to Marquis
- Even though Court finds Mrs Marquis intended to provide financial gift, cannot be enforced without a K which requires consideration

Carlill – contracting influenza as prescribed by terms of ad = act of consideration

Callisher- In exchange for bonds from Honduras gov't, Callisher forbears suing gov't (since they owe him money) -**An example that forbearance may be good consideration**.

Wood v Lady, Lucy – fashion designer enters contract with Wood for exclusive rights – she breaches but argues original contract lacked consideration

- P claims D breached contract by endorsing goods w/o his knowledge and withheld profits from these other endorsements
- Consideration problem: contract did not explicitly say that P had to do anything in return for exclusive right (what D argues)
- Court finds P had made an undertaking to use reasonable efforts to place the D's endorsements and designs. Even though the contract does not explicitly state that promise, it can be implied from the circumstances e.g. of a promise to act as good consideration
- Court decides parties must have intended there be an obligation for P to use reasonable efforts because otherwise the transaction would lack "business efficacy" i.e. be pointless. Especially for D, the only way he profits is if he fulfills his role.
- Note difference in this case (commercial) from charity examples

Thomas – Widow sues brothers of husband for promise made that she should have a leasehold interest in one of his dwellings

- Contract agreed to between wife and brothers: (1) she paid £1/yr in rent (2) kept premises in good repair (3) did not remarry
- Contract honoured until one brother dies and the other tries to eject widow – issue becomes was there sufficient consideration?
- Respecting deceased's wish (moral obligation) is not good consideration (no value in the eyes of the law). Also deceased's wish would not be moving from the promisor (since he is dead)
- (1) £1/yr is good consideration because it is flowing to executors, not a mere landlord -- *note consideration does not have to be equal (2) Repairs might be good consideration but we don't know enough (3) [Promise to not remarry ≠ good consideration; it is a terminating condition]

PAST CONSIDERATION

Eastwood – Guardian of infant takes out loan; infant promises to pay back; she pays interest; her husband promises and then doesn't pay

- Guardians past care is not good consideration for money coming in now; past consideration is not consideration at all
- husband made commitment to repay many yrs after consideration was given; husband's commitment not supported by timely consideration, and therefore not enforceable.

Lampleigh – P gets pardon from the King for D who killed someone, but D doesn't pay up after telling P he would give him £100

- P agreed to perform labour for D and travelled at his own expense to meet King; D then promised P consideration of £100 but never delivered – issue is whether the consideration was "past" if it was coupled with a prior request
- If P had done the labour voluntarily, he could not recover; however if labour performed at request of D and if a promise of compensation follows labour, P is entitled to recover → promise made in recognition of a benefit received can be enforced

Pao On past consideration:

- Is the promise by Pao On to Lau in Contract 3 good consideration for the promise of indemnity by Lau given that Pau On had already made the same promise in the past, before the new promise of indemnity by Lau?
- Look at req's above: Pao On had been requested by the Laus to promise not to sell all of their Fu Chip shares before a certain date; there was expectation that Lau would compensate them for the promise not to sell a certain amount of Fu Chip shares (and hence Contract 2, although flawed); Contract 3 was otherwise legally enforceable

Pre-existing Legal Duty

Pre-existing Public Duty – An agreement to perform or actual performance of a public duty is **not good consideration**, unless something extra is done or promised beyond the requirement of the public duty (*Ward v Byham* – mother taking care of child is not doing/offering anything new).

Pre-existing Duty to Third Party – The performance or promise to perform a duty owed to a third party may be **good** consideration (Shadwell; Pao *On*).

Pre-existing Duty to the Promisor—The performance or promise to perform a pre-existing duty owed to a promisor is **not good** consideration for a new contractual promise (*Gilbert Steel*). If the performance or promise to perform a pre-existing duty owed to a promisor provides the promisor **practical benefits** may be good consideration (*Roffey Bros.* – needed to finish on time and would be difficult to get new contractors; *Greater Fredericton*).

Where a promise to perform a **pre-existing duty** either to a **third party or** to the **promisor** is claimed to constitute good consideration, courts will be attentive to issues of **duress or unconscionability** (*Pao On*; *Roffey*; *Greater Fredericton*).

Ward v Byham – is mother keeping illegitimate child of father well looked after an happy sufficient consideration?

- father stops payments of £1/week after mother gets married and argues that there was no consideration because mom can't give what she's already has a duty to do
- mother does have statutory obligation to keep child well looked after/happy, but judge finds consideration in here having to *prove* to the father that she is keeping child well looking after and happy.

Shadwell - Though nephew had legal obligation to marry fiancée (they were engaged), uncle's promise (£150/yr)—as a 3rd party—is legally binding

Pao On – promise by Pao On in Contract 3 is good consideration even if it's the same as promise in Contract 1 because to another party, Lau

- since promise to perform (or performance) pre-existing contractual obligation to 3rd party can be valid consideration, this is good consideration.
- Promise by Pao On in Contract 3, owed to Lau, reinforces pre-existing duty on Pao On under Contract 1 (owed to/enforceable only by Fu Chip)
- Since pre-existing duty is found to be good consideration, there must be a duress analysis i.e. Was Pao On's threat not to perform its obligations under Contract 1 such that Contract 3 should be voidable for economic duress?

Stilk v. Myrick - Promised to do anything needed in the voyage regardless of emergencies. After two men deserted, the captain promised the crew the wages of those two men divided between them if they fulfilled the duties of the missing crewmen as well as their own. After arriving at their homeport the captain refused to pay the crew the money he had promised to them.

- Decided that in cases where an individual was bound to do a duty under an existing contract, that duty could not be considered valid consideration for a new contract. **This is reversed in Roffey Bros. ***

Gilbert Steel – supplier makes 2 price changes to reflect increased steel costs – one established in written K, the other oral – ***TRADITIONAL RULE***

- University accepts shipments after oral agreement but only pays written K cost; Gilbert Steel sues
- Issue becomes whether the oral price change was binding -- i.e. did it lack consideration?
- Court: no consideration so University's agreement on paying increased price is not binding; the increased 'credit' Gilbert Steel offers the University not consideration of "real substance" (**contrast with *Foot v Rawlings***)

Roffey Bros. – subcontractor (Williams) is promised additional payment by contractor (Roffey) – ***MODERN RULE***

- Williams had run into financial problems because of low contract price and difficulties supervising staff; Roffey promised additional payments if Williams finished job on time, but only made 1 of the promised payments
- Issue became whether the existing obligations Williams was performing could be good consideration for modification of terms in which Williams received additional payments. Roffey argues Williams bound to perform obligations in original K
- Williams contends they did not ask for money -- stresses there was no coercion i.e. a duress analysis would be necessary if a pre-existing obligation to the promisor is used as valid consideration
- Court rules in favour of Williams citing practical benefits as good consideration (practical benefits = there would be serious detriment to Roffey if Williams had to breach i.e. have to find new contractor, time issues, cost)

Greater Fredericton – Airport Authority asks Nav to relocated instruments to extend runway

- Instead of moving to runway, Nav agreed to move only if AA paid for new equipment, which AA capitulates to doing to ensure new runway operational, but when doing so, signs letter of protest about paying for acquisition costs of equipment
- After Nav acquires/installs equipment, AA refuses to pay as promised. AA: no consideration from Nav in the agreement →thus letter unenforceable
- Robertson J critiques and rules (on this issue in Nav's favour) that post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress.

Promises to Accept Less

Part performance, or the promise thereof, does **not generally** constitute **good** consideration for a promise to discharge a party of its legal obligations (*Foakes*). E.g. payment by a debtor of a small sum in satisfaction of the larger is not consideration for a discharge of the debt (*Foakes*).

Traditionally, there is the need for new consideration such as through an **accord and satisfaction** i.e. replacement of the old agreement with a new one supported by consideration moving from each side (*Foakes; Foot*).

> Where the promises of both parties remain at least partially unperformed, the agreement to rescind the original contract may be enforceable through the mutual exchange of promises to release the other party from its remaining obligations.

A difference or change in the performance of the obligation such as **timing or method of payment may constitute good** consideration (Foot v. Rawlings).

Under statute, part performance either before or after a breach shall be held to extinguish the obligation:

- **a)** when expressly accepted by creditor in satisfaction
- **b)** when rendered pursuant to an agreement for that purpose though without any new consideration.
  E.g. Mercantile Law Amendment Act, Section 16.

A more pragmatic approach to pre-existing duty owed to the promisor as consideration may find **practical benefits from discharge for part performance** (*Robichaud v. Caisse Populaire de Pokemouche Ltee*).

Foakes v Beer – Foakes, indebted to Mrs. Beer, work out monthly payments where Beer would relinquish interest

- Foakes pays off loan but Julian Beer claims interest now; Beer argues that a promise to make party payments on a pre-existing obligation is not good consideration
- Court agrees with Beer: Foakes could not show consideration of a promise by Beer to accept less than what was due (i.e. what she was legally entitled to)

Foot v Rawlings- when A gives R a new monthly pay plan/interest rate, R gives post-dated cheques which Courts recognize

- A owes R large sum; R offers to lower amount paid per month + reduced interest rate; A agrees and gives R a series of post-dated cheques. Also agreed if any cheques bounced lower amount/interest rate would revert back to 'actual' amounts
- Even though A complies, R sues for balance of debt arguing that in reduced amount/interest rate arrangement, no consideration – Court finds different mode of payment is sufficient consideration. And since A had not defaulted on arrangement, it was still in place
- Courts show discomfort w/ traditional rule (i.e. Foakes)

Promissory Estoppel – Where a party makes a clear and unequivocal promise or representation to another party that it will not insist on its strict legal rights under a contract and the other party alters its position in reliance on the promise or representation, the first party may be estopped from asserting its strict legal rights (*High Trees* – contract to rent flats in Central London at reduced price during enforced). I'm stopping you from denying the bind of the promise.

ELEMENTS OF PROMISSORY ESTOPPEL:

a) **The Promise** – There must be a **clear and unequivocal** representation or promise by the party indicating that the promisor **intended** the promise to be taken seriously to alter the legal relations created by the contract (*John Burrows* – despite regular default, no promise that an acceleration clause in original K wouldn't be used, ; *SRB v Maritime Life*; *Italo-Belge*). The representation may be expressly made, or implied from words or conduct (*John Burrows*).

b) **The Reliance**—The promisee must have **altered its position in reliance on the promise** such that would be inequitable for the promisor to go back on its promise (*SRB v Maritime*; *Societe Italo-Belge S.A.* – only 2 days reliance between when they shipped documents and when other contracting party decided to reject shipment). Asserting strict legal rights will be most clearly inequitable where there has been **detrimental or reliance that is prejudicial** in some way to the promisee.

c) **The Notice** – A promisor can resile from its promise by giving reasonable notice to the promisee, giving the promisee a **reasonable opportunity to resume its position** (*SRB v Maritime*). A promise may be final or irrevocable if it is impossible or inequitable for the promisee to resume its position.

d) **The Equities** – Promissory estoppel may be **denied where there is found to be inequitable conduct** by the promisee such as improper pressure (*D&C Builders*).

e) **Not a Cause of Action** – A claim of promissory estoppel cannot itself provide the basis for a cause of action (*Combe*; *M.(N.) v A.(A.T.)*).

High Trees – High Tree has contract for flats with Central London – agreement to charge less during WII

- P agrees to reduce rent because understandably D does not have many tenants. P gets nothing in exchange. Eventually, by end of war, all flats fully leased. Central London claims rent from mid-1945 (when all flats are full) – onward.
- traditional analysis → no consideration so promise not enforceable [no explanation for why Denning has to go to estoppel]
- traditionally, if D wanted to modify agreement (a sealed document), they would need to: a) make another sealed agreement (deed); or b) an arrangement with consideration (they do neither)
- However, with changes to courts—"fusion of law and equity"—time for promissory estoppel to enforce a promise that was made which was intended to create legal relations, and which, to the knowledge of the person making the promise, was going to be acted on the by the person to whom it was made, and which was in fact so acted on – even without consideration.
- If a party makes a promise and the other party relies upon the promise, the original promisor cannot take back the promise at a later stage.
- Decision found in favour of plaintiff.

Promise

John Burrows v Subsurface – D regularly defaults on payments; Burrows applies acceleration clause; D claims estoppel

- D secures promissory note which provide for monthly payment and an acceleration clause permitting D to claim entire amount if default on more than 10 days on any monthly payment; D regularly defaults and creditor accepts payment
- After disagreement, next time D in default, burrows triggers acceleration clause; D claims estoppel but fails because there was no evidence of a clear and unequivocal promise on change in terms.

Reliance

Societe Italo-Belge v. Palm et al – oil seller claims estoppel when, after buyer requests documents, rejects shipment 2 days later - reliance

- K required that Italo-Belge (sellers) was to advise D (the buyers) asap after oil was shipped. It was not made until 1 month after shipping, D did not initially object. D eventually requested docs from sellers, but 2 days later, after sub-buyers had rejected shipment, D also rejected. Sellers forced to seek oil elsewhere at a loss and now claims damages
- There was an unequivocal representation that D was prepared to waive legal rights.
- Sellers also relied on representation but the representation was neither sufficiently detrimental or even prejudicial i.e. there is no inequity produced by D asserting legal right (evidence: only 2 days + no other evidence presented)

SRB v Maritime Life – P's insurance policy lapses and claims that late letter is a waiver allowing him to make late payments

- P to pay premiums on life insurance policy issued by D –lapse if premiums unpaid after 31-day grace; once lapsed, proof of insurability required
- July 1984: P mails 2 cheques, one of which is never received. Aug 26, D requests immediate payment of premium but P does not respond because he is not at address. Nov 28: D sends notice that policy technically out of force and demands immediate payment. Feb 1985: D sends notice of lapse. April 1985: P finally receives notices, but doesn't mail in cheque till July 1985, attempting to make 1984 + 1985 payments, but they are refused, because of lapse
- P now terminally ill and claims that November letter, clearly more than 31 days after unpaid premiums, was a waiver to receive timely payment under policy – but if so, was it still in effect in July 1985 when payment made?
- Although the letter sent by Maritime in November constituted a waiver to their rights for timely payment, there is sufficient notice given to SRB to "act on" the waver. SRB did not check their mail regularly, and in April of the following year, they opened the notice of policy lapse and the letter from November at the same time. There is sufficient notice to render the waiver to lapse. (Note here that estoppel argument also fails reliance element)

The Equities

D&C Builders – D does not fully pay plumber/decorator and wife, when D ill, complains about work and offers to pay £300

- Wife's offer is less than what is owed and is offered to settle, warning P that if they did not accept amount, they would not get anything; P brings action and D has 2 defences: bad workmanship and that there was a binding settlement
- Issue becomes whether settlement was legally binding – D's estoppel argument fails because P is not allowed to enforce payment of a balance when it would be inequitable to do so – which is the case here – there is no good reason why P should not enforce the full amount due to him. The inequity here is found in the improper pressure

Sword or Shield?

Combe – Divorcee claims for back payments on earlier promise using *High Trees*

- D was to pay P 100l/yr. P requested an initial payment of 25l and subsequent quarterly payments of 25l. D replied would not pay in advance and from that point on did not pay . Wife sued 7 yrs later claiming in back payments. At time P's income > D's income
- Issue: does breach of promise give cause of action? No, if there is no consideration. There was no earlier promise.

M.(N.) v A.(A.T.) - woman in England moves to Vancouver to be with M who promised to pay off her mortgage but does not

- The promise made was not a legal agreement and thus no cause of action
- Her moving to Vancouver was to be with him – not consideration on the mortgage. Even if she had a stronger claim that it was consideration, there is a lack of mutuality – she could easily leave him later.

Intention (not) to Create Legal Relations – When parties enter contractual obligations voluntarily, they **must intend to create legal intentions**. This might be viewed as a further criterion of enforceability alongside offer, acceptance and consideration though it may also be viewed as already entailed by the doctrines of offer and acceptance, and consideration.

In **family arrangements**, closely associated parties will be **presumed *not* to intend legal relations**, in the absence of clear evidence to the contrary (*Balfour*). However, in modern cases, the Courts are less likely to presume and approach intention to create legal relations case-by-case (*Merritt v Merritt*). Whatever the case, if there is a relevant statute (e.g. *Family Law Act*), that will guide any common law.

In **commercial arrangements**, parties will be **presumed to intend legal relations**, in the absence of clear evidence to the contrary (*Rose and Frank*; *CAE Industries*).

Family Arrangements

Balfour v Balfour – husband leaves to Ceylon after wife turns ill and stops paying her £30/month as they had agreed when he left

- Wife doesn't go on trip on advice of doctor, but parties expect to be reunited in a few months, however marriage deteriorates and payments stop; Wife wants to enforce this is as an oral agreement (in addition to alimony)
- Held: agreement is unenforceable on the grounds that agreements b/w spouses are presumed to not have been intended to create legal relations.
- Atikins LJ on domestic matters: "agreements such as these are outside the realm of contracts altogether" – afraid of floodgate of litgation

Commercial Arrangements

Rose and Frank –commercial arrangements – presumption towards creating legal relations

- long-time distributor (Rose and Frank) (P) and manufacturer (D) enter into agreement with an "honourable pledge clause" stating that the agreement was not to be legally binding
- manufacturer (D) later refused to fill orders placed by distributor (P) and terminated agreement to which P brought suit – P wants agreement to be enforced
- issue becomes whether an agreement whether K is legally binding when it is clear there was no intention to create such legal relations
- agreements between commercial actors are presume to have been intended to create legal relations; however, the presumption can be rebut, which it is in this case, by the use of express language. Agreement not enforceable at law.

CAE Industries - in letter, gov't guarantees 40,000 hours and will make "best efforts" to ensure 700,000 hours

- When less work provided to CAE industries, sue for breach – issue was whether a contract intended in letter
- **1**. Intention to create legal relations presumed because both parties are large and close to commercial.
- **2.** Also gov't has no evidence to the contrary
- **3**. There is evidence that there was intention to create legal relations in terms of K partly performed, looking to surrounding circumstances (gov't approached CAE Industries as a potential buyer)
- K is not so vague/uncertain/incomplete – commitment on part of gov't to "set-aside" repair/overhaul work – and words can be given meaning i.e. 'best efforts' = gov't has broad obligation to secure work for CAE

Formality: Promises Under Seal – a sufficient condition for the enforcement of a promise. Courts will look for evidence which shows **intention** to create a deed; the greater the number of elements, particularly onerous elements, the more likely the deed will be recognized (*Swan, Reiter & Bala*). Traditional elements of deeds: (always in writing), wafer seal, signature, witnesses, etc.

Royal Bank v Kiska – issue is whether a document that had 'seal', but no wafer seal, could be considered a deed

- Laskin defends the formality of deeds and rejects the use of 'seal' at eating away at this, calling it 'merely anticipatory of formality….Formality serves a purpose here and some semblance of it should be perservered'
- If 'seal' is enough, then what's the difference b/w a normal K and deed –shouldn't deed have a more onerous element?

Swan, Reiter & Bala – none of the signed/sealed/delivered are necessary for establishing a deed though their presence may help towards establishing that a deed does in fact exist

Privity – is a doctrine applied to prevent two types of person from enforcing a contract: (1) a **complete stranger** to the contract (not controversial), and (2) **third party beneficiaries** who have been identified and intended by the promisor and promisee to receive all or part of the benefit of the agreed upon performance (more controversial). Traditionally, **third parties are prevented from enforcing a contract for a lack of consideration** (*Tweddle v Atkinson*; *Dunlop* – Dunlop cannot sue Selfridge for price change on tires because they are a third party to contract b/w Selfridge and Dew).

Privity can be understood as an extension of the policy goal of freedom of contract – give consenting parties the freedom to choose whom they want to contract with.

Note that the third party bar has been eliminated in almost all common law jurisdictions –Canada holds on to the concept that a "stranger to consideration" cannot enforce a contract.

Common critiques:

1. Puts 3rd parties in **vulnerable position** of requiring one of the contracting parties to sue for them

2. There is a **damages** issue – since expectation damages usually refer to a P, if P were to bring suit, it might not necessarily follow that 3rd party beneficiary would recover.

3. **Fairness** (e.g. beneficiaries of insurance policies).

* Note that there is a way around Privity by being an 'agent' – alluded to in *Dunlop*

Policy critique: there are lots of reasons we may want to allow 3rd party to sue; ie. Insurance claims.

Provender v Wood – 3rd party can enforce K but there is consideration

- An agreement was made between the defendant (Wood, father of the bride) and the father of the plaintiff (Provendor), in which the plaintiff was the third party beneficiary. The fathers agreed to pay the plaintiff upon marriage.
- Agreement enforceable by 3rd party beneficiary but there was consideration moving from P to D – fulfillment of promise to marry D's daughter.

Twedddle v Atkinson – provision in K allowing for 3rd party beneficiary to sue not recognized for lack of consideratoin

- Agreement made between the fathers of the bride and groom (Tweddle is P) to pay the P upon marriage. Agreement includes an express provision that 3rd party beneficiary (Tweddle) can sue for sums promised. Father-in-law died, and neither himself nor his estate has paid the P. P brought an action on the promise and attempted to enforce the agreement
- Established **doctrine of Privity: No stranger to the consideration can take advantage of a K, although made for his benefit. Consideration must move from the person entitled to sue upon the K.** Natural love and affection is not sufficient consideration.

Dunlop v Selfridge – Selfridge sells tires at price lower than agreed to in K with Dew. Dunlop, in K with Dew, sues, but fails for lack of consideration

- P (Dunlop) – tire manufacturer. Contract between P and Dew (wholesaler) that tires not to be sold below a certain value. Dew sells tires to D (Selfridge) on similar terms. D breaches by selling tires below price range. P brings actions and argues that Dew is an agent of P so that promise D made to Dew also made to P
- Court: 3rd party beneficiary cannot enforce contract unless there is consideration flowing from the principal. No agency relationship found b/w Dunlop and Dew

Protection of Weaker Parties - A contract that already meets the requirements for formation of contract may nonetheless be limited in its effects. These doctrines are developed to address defects in the contract formation process concerning protection of weaker parties. The emphasis is balancing the policy of freedom in contract formation with fairness in assessing for defects.

Duress- is **common law protection against coercion of the will** of one party so serious as to **vitiate meaningful consent** (*Pao On*). In particular coercion resulting from unlawful or illegitimate exercise of power.

Traditionally, duress was narrowly relevant to situations of actual or threatened physical harm to person ("duress to person"), or an improper refusal to release goods or wrongfully seized goods ("duress of goods").

In **modern times**, duress refers to broader threats or acts that create **unlawful or illegitimate pressure** (*Pao On*; *Universal Tankships*). This includes economic duress (*Pao On*; *Greater Fredericton*).

- **Economic duress** is found when unlawful or illegitimate pressure coerces the will so seriously, it vitiates meaningful consent (*Pao On*).
- The key issue in identifying economic duress is **distinguishing duress from mere commercial pressure** (i.e. how do we determine whether consent has been vitiated as a result of serious coercion of the will?) (*Greater Fredericton*).

Two-Pronged Assessment of Economic Duress

(mix of *Pao On*; *Universal Tankships*; *Greater Fredericton*)

1. **Coercion of the will** – especially (ii)
   (i) Was there threat or pressure
   (ii) Were there any other practical alternatives
   (iii) Other factors that reflect the quality of the promisor's consent?
      - Did they receive benefits in return, in consideration? (think about Roffey, Gilbert, Pao, GreaterFred)
      - Did they have independent advice?
      - Was any protest registered?
      - Was there any subsequent disavowal?
2. **Was the pressure legitimate**
   - Clearly not legitimate if there have been unlawful acts or threats (e.g tort or crime) (nature of pressure)
   - Otherwise, how legitimate were the concerns of the promisee (nature of the demand)
      - E.g. good faith belief in right not to perform
      - E.g. honest about difficult changed circumstances

Remedy (at common law):

- contract is **voidable** (at the option of the wronged party, a court may set aside the contract).
- In addition, when, when relevant, **restitution** (return of benefits unjustly transferred to the wrongdoer).

[add Ontario cases]

Pao On recognizes the duress/commercial pressure issue and identifies 5 factors to help make the assessment with an emphasis on the psychological state of the parties which produced the coercion of the will.

Factors to consider when determining if coercion was present such that there was no consent:

1. Fact or absence of protest.
    - Review any benefits as this may show that there may not be pressure.
    - Review any protests as they would be a good indicator of pressure.
    - Subsequent acts to avoid
    - Did they seek Independent advice

2. Effectiveness of available alternate remedies
3. The availability of independent advice
4. The benefit received
5. After entering into contract, were steps taken to avoid it

Duress issue: Was Pao On's threat not to perform its obligations under Contract 1 such that Contract 3 should be voidable for economic duress?

In *Universal Tankships*, there is a movement away from psychological states of the parties to the external, particularly whether practical alternatives were available to complainant party.

Greater Fredericton provides for a systematic analysis of duress based on *Pao On* and *Universal Tankships*, and also considers duress being found without any illegitimate pressure from the non-complainant party – Robertson J is more interested on whether duress was actually felt by the complainant—though we should continue to consider this pressure as important.

Undue Influence – is a doctrine providing **equitable** relief to protect weaker parties in 2 kinds of situations that are thought to lead to potential domination by or undue influence of the other party:

1. **Actual undue influence**
   - even where no special relationship exists, one party has an actual dominating influence over the other party's actions e.g. guarantees of debts in family context, where no independent advice
   - onus on the complaining party to show such influence
2. **Presumptive undue influence** (*Geffen v Goodman Estate*)**FOCUS ON THIS**

- there is a presumption of undue influence where there are certain relationships between parties in which one party is in position to dominate the will of the other through influence over the other
  (i) **Is their potential for domination** in the nature of the relationship? special trust, confidence and influence
    - i.e. "the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power" (Wilson J in *Geffen*)
    - e.g. professional relationships (doctor-patient, solicitor-client), trustee-beneficiary, parent-child
  (ii) May need to show **manifest disadvantage** [unfair contract]
    - Debatable among authorities (e.g. undecided after *Geffen*) whether demonstrating manifest disadvantage is required to establish presumption of UI
    - However, considerations of disadvantage are not relevant where there is a gift/bequest, but may be relevant before finding a presumptive UI where parties are engaged in a commercial transaction (*Geffen*)
  (iii) **Rebuttal of Presumption** by party in position of influence possible by showing that weaker party acted without domination (had "full, free and informed thought" *Geffen*).
    - Factors include:
      i. full information and understanding of the transaction
      ii. independent advice
      iii. magnitude of disadvantage

Equitable Remedies:

1) **Rescission or Refusal of Specific Performance**: Wronged party suffering from the defective process may seek to have the contract set aside (rescission) or to have court refuse a request for the coercive remedy of specific performance.
2) **Limits on Remedy of Rescission** – courts may limit rescission where it finds:
   a) affirmation
   b) lapse of time
   c) prejudice to rights of third parties
   d) inability to restore - now some flexibility on this
   e) possibility of damages in lieu

   *Equity courts might place limits on rescission if they believe that even after the test, the outcome wouldn't be fair
3) **Restitution:** Court may order restitution to restore parties to the status quo ante (i.e. their pre-contract situations)

Geffen v Goodman Estate – mentally ill Tzina Goodman

- **Facts:** preparation of a trust deed which went counter to the initial will set up by the deceased and often mentally ill mother. The respondent is the mother's son, while Geffen are the brothers and nephews of the mother. In between the trust deed and initial will, Goodman did see a lawyer (though at the first meeting, this was paid for by her brothers).
- **presumption of UI** because of the nature of the relationship b/w the brothers and Goodman (they were aware she trusted them to sort out her affairs, they knew she was relying upon them to help her and that they had interests of their own which did not coincide with theirs).
- There is no need to show manifest disadvantage because it would not make sense for gifts/bequests.
- Rebuttal: Successful for D since: a) little contact b/w brothers and Goodman b) Goodman wasn't relying on brothers for advice (she was relying on lawyer), and c) motivation for brothers' help was sister's welfare
- **Dissent** (La Forest J): The requirement for manifest disadvantage in commercial contexts may be a good one but it was not necessary to state here. In addition, where you stand on the extra inclusion is a matter on differing views on what the doctrine is supposed to protect: **protect against abuse or power** (focus on the process of undue influence, rather than result) **v. freedom of contract (**focus on significant and demonstrable damages in results brought about by violation of trust or confidence)
- **Controversial Quotation:** "nothing *per se* reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries"

Unconscionability was developed by courts in equity out of a concern for grossly unfair contracts where one party was taking undue advantage of inequalities of bargaining power. Beyond coercion and domination identified in doctrines of duress and undue influence, unconscionability includes:

- further situations of procedural inequality (i.e. where there is no unlawful threat or domination)
- where parties are not necessarily in relationships of trust and confidence (e.g. where a stranger take advantage of the situational disadvantage of another)

- Because unconscionability contemplates the possible relief for a broader range of procedural inequality, it is balanced by **attention to whether the contract was actually a substantively improvident bargain.**

- [procedural unfairness (i.e. inequality in position of parties) + substantive unfairness (i.e. improvident bargain)]

Approaches to Unconscionability

1. Traditionally , unconscionability is found when there is an undue exertion of substantial inequality of bargaining power which results in a substantially unfair or improvident bargain (*Marshall*; *Harry v Kreutziger* per McIntyre J).

i. Process: undue exertion of **substantial** inequality of bargaining power
   - e.g. *Marshall*: Walsh in rest home and after minor stroke

ii. Substance: **resulting** in a substantially **unfair or improvident bargain**
   - e.g. *Marshall*: 16 000 property sold for 7000
   - e.g. *Harry v. Kreutizger*: 16 000 fishing boat with valuable license sold for 4500

2. Contemporary approaches to unconscionability doctrine reflect a more general protection for differences in power.

- Under one contemporary approach, while an improvident bargain is still sought, what is critical is the "single thread" Denning MR sees running through a number of the doctrines protecting weaker parties, an "**inequality of bargaining power**" (*Lloyds Bank v Bundy* – age, lack of expertise, no independent advice, time to think over K). This inequality broadens the range of weaknesses which the doctrine will cover i.e. age, emotional vulnerability, ignorance, mental infirmity, etc. Significantly, unlike the traditional approach, neither wrongdoing nor domination are necessarily required of the "stronger" party. Factors useful for determining "inequality of bargaining power":
  - Fairness of bargain
  - Relationships of trust and confidence
  - Knowledge of weakness or infirmity
  - Conflicts of interest as between the parties
  - Other sources of power
  - Independent advice may be needed

(Critique: is this an invitation to a "no holds barred" examination of competing values of freedom of contract and procedural propriety? Or is this no different than the more traditional conceptions of unconscionability, as in *Marshall*.)

- Under another contemporary approach, unconscionability is found in a commercial transaction where the "transaction, seen as a whole, is sufficiently divergent from **community standards of commercial morality** " resulting in the rescinding of the contract, refusal of specific performance and restitution where relevant (*Harry v. Kreutziger* – Indian boat licensing)(*per* Lambert, JA). Community standards are defined by the most recent case law from relevant jurisdictions as well as through legislation that embodies those standards in the law.

(Critique: what substantive content does this leave us with?! In Lambert's judgment, references available but no discussion. Consistency issues?)

- Statute: Unconscionable Transactions Relief Act; Consumer Protection Act, 2002

Remedies: same as UI – 1) Rescission or refusal of specific performance (same limits) 2) Restitution

NB: Contemporary approaches to unconscionability are not intended to undo bargains which simply turn out badly. Court are reluctant to find unconscionability, particularly between commercial parties, because doing so would require the undoing of many transactions (and a floodgate of litigation). Also, some form of pressure is almost always present in all bargains.

Marshall v Can Permament Trust Co – application of traditional unconscionability doctrine

- P (Marshall) offered to purchase a piece of land from an elderly man (Walsh) who lived in a rest home and had suffered from brain damage from a minor stroke.
- Walsh's solicitors returned the payment after Walsh had signed documents, and D declined to deliver a transfer of the land. P brings an action for specific performance of an agreement for sale of land.
- D sought a declaration of rescission of the written agreement on traditional unconscionability grounds:
    - P proposed to pay to Walsh for the lands was grossly inadequate (improvident bargain)
    - agreement entered into between P and Walsh was not fair and reasonable, and that the P took advantage of Walsh by reason of the inequality of their positions (procedurally unfair)
- Holding: The contract was rescinded – (1) Walsh was incapable of protecting his own interests, and (2) the price agreed upon by Walsh was considerably less than the actual value of the land (sold for $7000, worth $16,000), and it therefore was an improvident transaction for him

Lloyds Bank v Bundy – modern view of unconscionability – wider net of inequalities caught (see factors above)

- **Facts:** Bundy mortgaged his only asset, a 300 year family homestead, to provide guarantee for loans for his son, whose company ran into financial difficulties. No independent legal advice was sought by Bundy – he honestly trusted the banker. A receiving order was later made against the son. In due course, the bank insisted on the sale of the house – at trial, the court held that it was a valid sale and that the bank could take all proceeds. Bundy appealed.
- No wrongdoing required from D
- Application: grossly inadequate consideration (he was indebted to bank for £11,000 even though his house wasn't even worth that much), the trust father put in Bank was failed, father's relationship to son, conflict of interest b/w bank and father (bank didn't tell father he should get independent advice)
- Even if the above considerations don't fit, case is one of undue influence

Harry v Kreutziger – introduced unconscionability into Cdn jurisprudence and also the idea of community standards

- P is an Indian who suffers from a congenital hearing defect, has grade 5 education, and not widely experienced in business matters.
- D approached the P an offered to buy his boat – each time he was declined, and each time he went back to the plaintiff's home and slipped a cheque under the door.
- A primary concern of the P was the challenge to obtain a new fishing license if he sold this one, but D assured him falsely or recklessly that there would be no problem.
- After a series of aggressive bargaining, P agreed to sell his fishing boat (with fishing license) that was worth $16,000 to the defendant for $4,500. (D was aware of the true value of the boat.) D withheld an additional $570 for the amount of license fee. The plaintiff sued to set aside the contract – dismissed at trial.
- Holding 1: unfair bargain + unequal position of power – contract rescinded
- Holding 2: circumstances of bargain reflect a marked departure from community standards

Misrepresentations –are statements of fact made by one party that are false and cause harm to another party. Misrepresentations may be mere puff or opinion (resulting in no remedy), innocent misrepresentations (in which case there is the possibility of remedy if operative misrepresentation is found), or breaches of terms (definitely providing some kind of remedy). While the concern here is generally contractual, misrepresentations may be liable by statute (*Consumer Protection Act*) or tort (*Redgrave* – lawyer selling business and home; *Heilbut* – whether being a 'rubber' business a term of K).

Remedial Alternatives for Misrepresentation

(1) **Equitable Remedies for Mere Representation:** In some situations, a misrepresentation that is neither tortuous nor a breach of a term of the contract may nonetheless lead a court to refuse to enforce a contract, through a remedy such as rescission or refusal of specific performance; e.g. Redgrave v. Hurd.

(2) **Contractual Liability: Term of the Contract**: A misrepresentation may be a breach of a term of an enforceable contract between the parties and could lead to normal contractual remedies including contractual damages; e.g. Heilbut, Symons v. Buckleton; Dick Bentley v. Harold Smith Motors.

(3) [not examinable] **Tortious Liability:** Fraud or Negligent Misrepresentation
   - e.g. tort of deceit, fraudulent misrepresentation, or negligent misrepresentation. However, more elements that must be shown, in particular requires fraud, recklessness, or negligence; e.g. Redgrave v. Hurd; Heilbut, Symons v. Buckleton.

(4) [not examinable] **Statutory Liability:** A misrepresentation might lead to statutory liability; e.g. Section 14, Consumer Protection Act, 2002.

Operative Misrepresentation – is a false statement of a material fact made by one party before or at the time of making of a contract which is addressed to the other party and which induces the other party to enter into the contract (*Redgrave* – solicitor says his business makes £400/yr). (It is less potent than a breach of condition (*Leaf*) or warranty).

TEST FOR OPERATIVE MISREPRESENTATION

1) **Is the representation a fact? (i.e. it is not a statement of opinion, puffery or salesmanship)**
   - Non-disclosure is generally not a representation of fact: i.e. there is no general duty to disclose facts to other party: caveat emptor
     However:
     -partial non-disclosure may be sufficient to amount to a representation
     -active concealment may be sufficient
     -some special contracts may require disclosure (e.g. fiduciary relationships, some insurance contracts)

2) **Is the representation false?** Note that there is no requirement that the party making the representation have either intent to deceive or knowledge of falsity.

3) **Was the representation material?** The statement must have been significant enough to induce a reasonable person in the circumstances of the innocent party to enter the contract.

4) **Did the innocent party act on the representation?** The innocent party must have actually been induced to enter the contract because of the representation
   - e.g. not where the innocent party would have entered the contract in any event

5) **Was there any evidence of due diligence**?
   - the mere fact that the innocent party had the opportunity to discover the falsity of the representation through due diligence will not necessarily deprive it of the right to allege operative misrepresentation (*Redgrave v. Hurd*).
   - but in some circumstances, failure to conduct due diligence may be relevant to determinations of whether the representation was material and whether it actually induced the innocent party to enter the contract
   - in addition, if innocent party does conduct some due diligence and nonetheless enters the contract, may suggest that the representation did not induce the innocent party

6) If an inference of operative misrepresentation is established by the test above, to rebut the allegation, it must be shown that the complainant party had knowledge of the facts contrary to the representation or that he stated in terms or showed by his conduct, that he did not rely on the representation (*Redgrave v Hurd*).
7) A finding of operative misrepresentation may fail if too much time has lapsed (*Leaf*).

Equitable Remedies for Operative Misrepresentation include:

1) **Rescission**: set aside the contract
2) **Restitution** –e.g. return of deposit, return of part payment of price, part delivery of goods
3) **Refusal of specific performance:** e.g. Redgrave v. Hurd; recall also B&P page 908.

Limits on Equitable Remedies (similar to limits on equitable remedies for UI/unconscionability)

a) **Term of Contract**: cannot both claim equitable remedy and seek contractual remedies for breach of contract
b) **Affirmation**: the innocent party may act in a way or delay so long as to indicate that it was satisfied with the contract even though there was an operative misrepresentation.
c) **Delay**: if party waits too long to seek the equitable remedy a court may restrict rescission simply to encourage certainty in settling disputes and also because it may indicate to a court that the innocent party was satisfied with the contract; Leaf v. International Galleries.
d) **Impossibility of Restitution:** although there is modern tendency for greater flexibility to provide monetary adjustments even if exact restitution no longer possible

e) **Third Party Rights:** remedy should not prejudice third party rights
-rescission and restitution may not be possible where the subject of the contract has been acquired by a third party in good faith
-not as much a concern where third party acquired with notice or without giving up anything of value

*Note: Unlike if the representation was a term of the contract, the innocent party has no right to seek contractual remedies (reliance or expectation), which in some circumstances may be more beneficial (*Heilbut, Symons & Co v. Buckleton*).

Redgrave v Hurd

- **Facts:** P (Redgrave), an elderly solicitor, advertised for partner to join business and buy accompanying house. He said in an interview with D that the practice brought in £300-400/yr when it was only £200.
- P showed him evidence that he would receive £200/yr and said that rest was borne out by paper in the office that he could check (though they in fact were just diaries and letter ooks) but D did not check, until he realized the truth before the completion of the agreement
- D signed K but refused to go through. P sues for specific performance, and D counterclaims for rescission based on operative misrepresentation
- Case turns on D's failure to check the books but this not the issue – the issue is whether the representation was false
    - However, this an allegation of operative misrepresentation can only be fought by showing: either D had knowledge of the facts contrary to the representation, or that he stated in terms or showed by his conduct, that he did not rely on the representation.

Leaf – no innocent misrepresentation is found because of the lapse of time (limit on rescission); however, there may have been a strong case, otherwise

Is the representation a contractual term?

A representation not expressly stated in a contract may be a contractual term if it is implied (in fact, law or custom/trade) (*Machtinger*).

STEP 1-a: Is the term implied in law by s. 15 of *Sale of Goods Act*?

Implied conditions as to quality or fitness

15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

[i.e. **if buyer tells seller that what the purpose of the good is (he shows he's relying on buyer's judgment) + goods are what the supplier's business sells = implied condition that good will be reasonably fit for such purpose]**

2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

[i.e. if good is from seller who deals in such a good → implied condition: good will be of merchantable quality i.e. though not necessarily purpose intended]

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. R.S.O. 1990, c. S.1, s. 15.

STEP 1-b: To **determine if a term is implied in fact, a test of intention** is applied: is there evidence of intention that the statement or representation was to be included as a term of a contract and that contractual liability should attach to a false statement.

TWO APPROACHES

1) Under the **traditional approach**, there must be **strong evidence of actual intent** on the part of the parties to include the representation as a term of the contract- (*Heilbut, Symons & Co. v. Buckleton*)

- While the relative states of knowledge of the parties may be relevant, "The intention of the parties can only be deduced from the **totality of the evidence**" (*Heilbut, Symons*)
- policy concern: show intention and that part of the original contractual deal

2) Under the **more modern approach**, there is **less** emphasis on **subjective intent** and a **greater willingness to infer intention from** the **circumstances** based on an assessment of the words, conduct and circumstances of the parties (*Dick Bentley Productions* – 20,000 mileage for car is a term; implied as a term giving business efficacy by the officious bystander). Examples of factors to consider include:

- Time at which statement was made
- Relative state of knowledge of the parties
  - -e.g. one party is in special position to know the truth of representation because of past knowledge or expertise
- Ability of innocent party to verify statements
- Evidence of importance of the statement to one or both parties
- Whether a later written document was produced which excluded the term

The representation ought to give business efficacy, determined by the officious (or intelligent) bystander, to a contract (*Bentley; Machtinger*; *MJB*; *Dawson*).

Under the modern approach, the misrepresentor will attempt to show that his/her misrepresentation was innocent (*Bentley*).

STEP 2: Having determined that a representation is a term, the remedy available on breach of that terms depends on what kind of term it is.

If a term is expressly stated to be a condition, then breach would give the option of termination of contract and/or claiming of contractual damages (*Hong Kong Fir*).

However in the absence of such clarity, we apply the **substantial benefits test** (*Hong Kong Fir*):

- **Does the term's breach deprive the (non-breaching) party of substantially the whole benefit which it was the intention of the parties as expressed in the contract that s/he should obtain?**

Factors to help distinguish a substantial or minor breach (*Vernon*):

(a) The ratio of the party's obligation not performed to the obligation as a whole
(b) The seriousness of the breach to the innocent party
(c) Likelihood of repetition of the breach
(d) Seriousness of the consequences of the breach
(e) The relationship of the part of the obligation performed to the whole obligation

They are supposed to reward you with the remaining benefit of the deal (innocent party) - if the breach is really bad.

STEP 3: **Remedies:**

- If yes, the term is a condition or an intermediate term which has been substantially breached. In either case, the breach gives to the option of **termination of contract** and/or claim for **contractual (reliance or expectation) damages** (*Leaf*; *Hong Kong Fir*) . If termination is not opted for, performance of obligations under the contract remains.
- If no, the term is a warranty or an intermediate term which has not been substantially breached. In either case, the breach gives rise to **contractual (reliance or expectation) damages alone** (*Hong Kong Fir*). Performance of obligations in contract remains.

Differences of Misrepresentation as Breach of Term and as Operative Misrepresentation: why might it be better to have a representation as a term of a contract rather than as the potential basis for operative misrepresentation with equitable relief?

1) There may be other parts of the contract that are valuable and that would like to have performed
2) Contractual remedies for breach may be greater in value than having contract rescinded. For example, expectation or reliance damages
3) Different requirements must be shown: while must show intention of the parties to make a term, do not need to show the elements for operative misrepresentation (e.g. need not show materiality or reliance)

Implied Terms

Machtinger – 3 kinds of implied terms (law, fact, custom/trade) – use of officious bystander for terms implied by fact

- There are implied terms at common law (e.g. reasonable notice on employment contracts)

Term and Test of Intention Cases

Heilbut, Symons & Co v Buckleton – whether being a rubber company was a warranty – test of strong intention

- **Facts**: D were rubber merchants who were underwriting shares of what they claimed was a rubber company. P called up on of D's managers to inquire about the shares. In response, manager (Mr. Johnston) stated they were "bringing out a rubber company".
- Based on the statement, P purchased a large amount of shares which turned out not be for a rubber company at all. All shares did poorly and P sued for breach of warranty
- Issue is whether there is in fact a warranty (an implied term) – Held: No because of a lack of clear intention.
- Rule: **warranties must be proven by strong intention strictly**
- **Intention of parties can only be deduced from the totality of the evidence.**
- No evidence that a collateral/warranty existed b/w P and D with respect to the rubber company, and therefore, no warranty
    - No evidence that P viewed Mr. Johnston's comment as anything but a representation
    - Neither P nor D were asked any question or gave any evidence that show a lack of intention to create legal relations
    - If we allowed representation alone to be terms, this would compromise the avenue of innocent misrepresentation
- **Note:** The Court here was afraid of people not taking their contracts seriously; if you intended a term, it should be clearly communicated.

Dick Bentley

- **Facts**: Bentley bought car from Smith under representation that it had 20,000 miles—turned out to be much more
- Smith had also told Bentley that he could find out about the history of the care. After purchase, car had many issues which Bentley took to Smith as part of the parts/labour guarantee. Eventually he brought action for breach of warranty –in particular the mileage representation.
- **Rule**: look the to 'intent' of parties to determine whether warranty (or innocent misrepresentation) as per *Heilbut*
- **Reasoning** (Denning MR): subjective intention gives rise to difficulties
- **Intention ought to included the circumstances, conduct, words and behaviour of the parties** – what intent would look like to intelligent bystander
- prima facie ground for inferring that the representation was intended as a warranty: **representation was intended to be acted on and was in fact acted on**
- The **maker of the representation can rebut this inference if he can show that it really was an innocent** misrepresentation (innocent of fault in making it and not reasonable in the circumstance for him to be bound by it)
- Application: P did intend to act based on the mileage and did in fact act on it. D does not offer an adequate rebuttal because even though he could have got a history of the car, he did not – an intelligent bystander would have known better).

Condition/Warranty/Substantial Benefits

Leaf

- **Facts**: A gallery sold a painting representing it as being done by a famous painter. 5 yrs later, while trying to resell, purchaser found out not done by painter. Vendor honestly believed the identity of the painter to be what he represented. P sued to terminate the contract – he claims that the vendor's representation was violates a condition of the K
- **Issue**: 1. Is Leaf entitled to terminate K?
- If the term of the contract b/w P and D is a warranty, buyer can NOT reject it and is confined to claim for damages
- If the term of the contract b/w P and D is a condition, **the buyer can reject the picture for breach of condition at any time before he accepts it or is deemed to have accepted it**
- Assume in buyer's favour that term of painter is a condition → **if there is a breach of condition, buyer needs to reject the breach in proper/reasonable time**
    - Application: P took 5 yrs to reject painting which is more than a reasonable time
- If the buyer had claimed innocent misrepresentation that too would probably be denied (?) [same reason: 5 yrs?]
- **Policy** (Sir Raymond Evershed MR):
- There is much to be said for the view that on acceptance there is an end of that particular transaction, and that, if otherwise, business dealings in these matters would become hazardous (more litigation)
- **Held**: Termination is only open to P if there is a breach of term of condition; and termination must occur before acceptance

Hong Kong Fir – substantial benefits test – seaworthiness – still substantial benefits because of 17 benefits -

- **Facts:** In contract b/w P and D, P promised to (1) let the ship for 24 months in every way fitted for ordinary cargo service (2) maintain her.
- **Issue**: whether the breach of terms above qualify as a condition or warranty
- **Held:** Terms neither a condition or warranty. Referred to as "seaworthiness", their breach does NOT deprive innocent party from deriving the substantial whole benefit which was intended in the contract. Therefore, no termination. Contractual damages for breach only.

Vernon – refined substantial benefits test – provides factors for determining whether breach 'minor' or 'substantial'

- **Facts:** Vernon contracts with auctioneer company to sell assets. They set up joint account for both auction and private sales after. Auctioneer does not deposit more than $100,000 into account from auction. Vernon refuses to allow auctioneer to make further private sales after auction. Auctioneer sues.
- **Held:** Vernon entitled to terminate contract because breach by auctioneer was "substantial" not "minor" (see factors above)

Rights of the Party in Breach

Quantum meruit: applies when one party is not otherwise entitled to a remedy, but that they have provided a benefit of some value to the other party, and therefore they should receive a restitutionary payment. However, if the other party had no choice or option in retaining the benefit provided by the defaulting party, quantum meruit will not apply (*Sumpter v Hedges*).

Sumpter v Hedges

- **Facts:** P contracts to erect building for D for a lump sum , but abandons contract when work only part done—at which point he was paid only part of the lumpsum. D found unfinished work on his land and completed it himself. P now claims for the remainder of the lumpsum.
- **Held: The mere fact that a D is in possession of what he cannot help keeping, or even has done work upon it, afford no grounds for a *quantum meruit* claim.** No recovery for plaintiff.
- If P had broken his contract so as to not give D the right to treat him as having **abandoned the contract**, and D had then proceeded to finish the work himself, P might perhaps been entitled to sue on *quantum meruit* on the basis that D had taken the benefit of the work done.
- There may be an option of *quantum meruit* when a P has abandoned contract, but the circumstances must be such as **to give an option to D** to take or not to take benefit of work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract.
- However, in this case, there was no such option.

Deposits and Down Payments

When a contract that involves a **deposit** is rescinded or terminated, the **buyer does not have a right to recover** the deposit (*Howe v Smith*). There is a difference between a deposit and a part-payment – deposit not returnable, while part-payment may be. D

However, upon rescission or termination of a contract (generally for property) involving a **down payment**, when not expressed otherwise, the **buyer does have a right to recover** the down payment (*Stevenson*).

To determine if a payment is a deposit or a part payment, the Court will look at the intention of the parties in the circumstances of each case as indicated by the actual words of the contract and evidence of what was said (*Stevenson*). A court will not imply terms for the benefit for the seller when the seller chooses to use words of uncertain meaning when s/he could have removed all doubt (*Stevenson*).

Howe v Smith – a party who breaches a contract that involved a deposit has no right to recover the deposit on breach

- **Facts**: P puts down £500 deposit on a real estate purchase of £12,500. According to the agreement, if P defaulted on any future payments, D could resell and P would forfeit any costs absorbed in the transaction up until that point.
- **Issue**: Can P recover £500?
- **Rule:** Money paid as a deposit and in part payment has 2 alternatives: 1. In the event that the purchaser is in default, the money is to be forfeited and 2. In the event of the purchase being completed, the sum is to be taken in part payment. (rule based on antiquity)
- **Held:** P has lost right to recover for £500.

Stevenson v Colonial Homes – Upon rescission/termination of contract for the purchase of a home, down payments *are* recoverable by the buyer. Seller drew up the contract; down payment means part-payment.

- **Facts:** Stevenson claims for down payment ($1000) after refusing signed contract for pre-fabricated home. D claims that it was a deposit and he should retain it.
- To **determine if the payment is a deposit or a part payment** the court will look at the intention of the parties in the circumstances of each case as indicated by the actual words of the contract and evidence of what was said
    - A Court will not imply terms for the benefit of the seller when the seller chooses to use words of uncertain meaning when he could have removed all doubt. In this case, there is no authority that find "down payment" to be sufficient for imposing such payment as a deposit.
- If the payment is a deposit (money paid in advance to guarantee the performance of the K) there would be no return when the contract is set aside. **However if the money is paid as a part payment on account of the purchase price then it is recoverable.**

Interpretation of Contractual Terms

When interpreting contracts, Court attempt to give expression to the intention of the parties by generally using the **ordinary plain meaning of words** used by the parties (B&P, 466). (might be exception for trade custom)

Generally, **extrinsic evidence cannot be used** to explain the plain meaning of words, except: to show that words have acquired a special meaning as a result of some custom (*Campbell-Bennett Ltd.*) or to resolve an ambiguity (*Alampi v. Schwartz*) (B&P, 466).

Some **evidence is inadmissible** as an aid to interpretation of contracts in general and exclusion clauses in particular (B&P, 466-7):

- **Prior negotiations of the parties**, at least in the absence of ambiguity (because parties positions were probably changing)
- Evidence of **subsequent conduct** (though modern Cdn position more flexible and in favour of admitting such evidence)
- Direct evidence of a party's **subjective intentions** or purposes

Parole evidence (Gallen v. Allastate Grain co)

Approaches/Principle to Interpretation (B&P, 467)

- ****Natural/Plain Meaning** – as explained above and used by L'Heureux-Dube in *Scott v. Wawanesa Mutual insurance Co.* but La Forest disagreed and opted for surrounding context (preferred and basic starting point)
- **Interpretation in Context**- look to the rest of the contract
- **Surrounding Context** – refer to a variety of things (e.g. negotiations, shared customs, contra proferentum, etc.) – used by La Forest
- **Canon of Interpretation** –
  - *ejusdem generis* (if a list is given, the list is assumed later)
  - *contra proferentem* (if contract documented by one party, ambiguities likely to be construed against them and in other party's favour) [probably won't need to know for exam – used by La Forest]
- **Previous/Subsequent Conduct –** shouldn't be relevant but hard to avoid (especially subsequent conduct); more used in Canada and likely when there is ambiguity

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Scott v Wawanesa – 15 yr old sets fire to house – insurance policy has an exclusion clause against acts of arson

- The approach taken to interpreting terms can lead to different conclusions (L'Heureux-Dube for the majority uses natural/plain meaning; minority thinks that there is ambiguity and applies contra proferentem)
- La Forest for the minority says that insurance companies know and should make their terms more clear (though the majority responds that they don't know how much more clear it can get).

Contractual Remedies – The normal remedy for breach of contract is an award of money damages—and generally, appropriately so (Posner). The plaintiff has the burden to prove its losses (*McRae*).

When determining appropriate contractual remedies, it is useful to note a distinction between legal duties created by contract law and ethics (Holmes, *The Path of the Law*). In other words, remedies need not morally punish

Add any extra policy notes from Holmes, Posner and Fuller and Purdue

Expectation Damages – are the normal measure for money damages in contract law; they should put the plaintiff in as good a position as that s/he would have been in if the contract had been performed (*Sally Wertheim*). They can be calculated by adding direct losses to consequential and incidental losses, and subtracting from this figure avoided cost/losses and avoidable losses.

Sally Wertheim v Chicoutimi Pulp Co – expectation damages become normal measure for K damages in Cdn law

- Case laid the general operating principle in 1911 by Judicial Committee Council of the Privy Council in an appeal from Canada
- Atkinson: 'ruling principle' to be applied in awarding damages for breach of contract was to place plaintiffs in the same position they would have occupied "if the contract had been performed"

Carlill v Carbolic Smoke Ball Co

- Mrs. Carlill's receives £100 because that is what she would have received had the contract been fulfilled

Hawkins v McGee

- Hawkins was entitled to the difference between what he sought – a perfect hand, and what he received – a hairy hand.
- However, he is not entitled to pain/suffering damages since he would have had to experience such had the contract been fulfilled.

Reliance Damages – seek to put the plaintiff in as good a position as s/he was before the contract was made.

Categories of reliance damages include **direct loss** (such as wasted expenses including restitution of value conferred on defendant) and **loss of opportunities**. Reliance rewards damages that occur as a result of the breach.

Limits on recovery of reliance damages include:

- The expense must be in reliance on the contract
- Must be wasted: not have continued value
- No double recovery

Reliance damages are an alternative measure of damages to expectation damages for breach of contract.

McRae v Commonwealth Disposals Commission

Facts: Commission invited tenders for an oil tanker lying on a Reef said to contain oil. P's tender was accepted for £285. In fact there was no tanker at location (while en route to find out, one of P's own ships encountered difficulties). There is evidence that if P did not spend time/opportunity on this Reef, it would have pursued other opportunities. P sought damages for breach of contract.
Holding: Plaintiffs entitled to reliance damages. Appeal allowed.
Issue: In assessing for damages, is the reliance measure to be used (in lieu of the established expectation measure?)
Ratio: Court endorses reliance measure instead of expectation measure because the latter is too difficult to assess

Assessment of Damages:

a) Restitution – return of ship purchase price [RECOVERABLE]
b) Recovery for Expenditures – costs involved with acquiring ship used to retain tanker [RECOVERABLE]
c) Loss of Revenue – loss of profit that could have been made if ship used had not been devoted to the futile trip [RECOVERABLE]
   To prove lost opportunity, evidence presented of another contract that they turned down (in which they would have received £2500 profit) – only profits considered here (not costs); note that onus is on the innocent party to prove loss of revenue
d) Equipment purchased to retain tanker– would McRae have bought equipment, anyway?; even so, no recovery because equipment purchased has capital value [NOT RECOVERABLE]
e) Reconditioning - work done on ship used to retain tanker – not awarded because these repairs would have been done before, anyway, and go toward the whole of its capital expenditure [NOT RECOVERABLE]

Restitution and Restitution Damages – seek to restore to the plaintiff the value of any unjust enrichment s/he has provided to the defendant.

Unjust enrichment includes:

- detrimental reliance by the plaintiff,
- a resulting benefit to the defendant, and
- that the enrichment is unjust.

Equitable Remedies – are sometimes available as an alternative remedy in situations of breach of contract.

Equitable remedies are only awarded in situations of breach of contract where an award of money damages would be inadequate compensation (*s v Gray*).

Equitable remedies may be refused, even when money damages provide inadequate compensation, when…

- there are **concerns about enforceability**

  (i) where the **terms are hard to specify and monitor**
  (ii) the order would require **continuous supervision**

- an **adequate defence** for its application has been made. Adequate defences include:

  (i) where performance would cause **undue hardship** or would be **impossible** for the other party
  (ii) where the remedy would **prejudice third parties**
  (iii) where **conduct of the plaintiff** means it lacks "clean hand"
  - delay in seeking reedy
  - acquiescence by the plaintiff
  - other bad conduct: misrepresentation by plaintiff or mistake where there is element of fault on part of P

  (iv) no **mutuality** such that the remedy would be unavailable against P if it were the party in breach

Specific Performance – is an equitable remedy in which a court order **compels** the defendant to perform an obligation under a contract. It may be granted when a

- **good is of a rare or unique character** (*Falcke v Gray*)
  - is there ready substitute on market? Is there a particular/unusual value for P (e.g. not simply for sale)?

- when the contract is for **a sale of land** (*John E Dodge Holdings*)
  - evidence that there is something unique about the land (*John E Dodge Holdings*)
    - The quality of the land is particularly suitable for the plaintiff's proposed use
    - There is no reasonable duplicate available

Injunctions

A **prohibitory / negative injunction** is an equitable remedy a court may order **forbidding** the defendant from doing something (*Yashin*; *Warner Bros*).

A **mandatory injunction** is an equitable remedy a court order **compelling** the defendant to do something.

A negative injunction might be seen as less harsh than mandatory in that it doesn't tell you what must do, rather, what you can't do.

Contracts of Personal Service

Courts will rarely order specific performance of **contracts of personal service** (*Warner Bros v. Nelson*; *Yashin v. NHL*), and may grant a negative injunction in relations to such contracts (but not where in substance the injunction is compelling a servant to perform the contract) (*Warner Bros*; *Yashin*).

Posner, Economic Analysis of Law – specific performance often not required nor advantageous from an economic efficiency point of view

SPECIFIC PERFORMANCE

Falcke v Grey – Oriental jar – uniqueness, unusual distinction and curiosity

Facts: D sold unique Oriental jars to a third party after agreeing to sell them to P.
Issue: case turns on whether you can specifically enforce a contract dealing with chattels
Holding: A contract dealing with chattels can be specifically enforced
Rule: a contract dealing with chattels can be specifically enforced where there is no substitute because something is intrinsically unique (e.g. object of art), damages are not adequate as a remedy. Specific performance is a proper remedy in cases involving idiosyncratic chattels of unusual distinction and curiosity.

John E Dodge Holdings Ltd. V. 805062 Ontario Ltd. – conditions for land specific performance

- specific performance is often available for contracts for the sale of land – evidence that there is something unique about the land
    - quality of the land is particularly suitable for the plaintiff's proposed use
    - no reasonable duplicate available
- [Whether a property is unique is determined when the actionable act takes place. The wronged party must decide:
    i) Whether to keep the agreement alive by seeking specific performance, or
    ii) Accept the breach and sue for damages.
- In some cases, the date for determining the issue of whether specific performance is appropriate will be at a later date, but it cannot be before the breach has taken place.]

INJUNCTIONS/PERSONAL SERVICE

Warner Bros. Pictures Inc. v. Nelson

Facts: Bette Davis has renewable contract with Warner Bros. with clause that says in the interim of the contract she can't work for anyone else (not just a competitor, but in any capacity). She then declined to be further bound by said contract and entered into a contract with a third party.
Issue: In this kind of breach, you're dealing with something unique; but if the court gives specific performance, it will require Bette Davis to work directly under the plaintiff, if she doesn't do this work, she will be in contempt of court
Rule: In personal service contracts, P may not force specific performance on D as this would force a hostile relationship. Will enforce a negative covenant of personal service so long as this is not tantamount to enforcing the positive covenant
Holding: In this case, court grants a limited injunction against D; prevented from *acting* for others for a period of 3 years; this is not tantamount to specific performance because D can get employment in another field (so by issuing the injunction the court is not indirectly forcing D to perform the contract) Court says Davis' "temptation" to work for plaintiff under these circumstances (given that work as, say, a stenographer will be wildly less attractive than acting) is not their concern: she's not gonna starve if not working for Warner Bros. In other words, so long as she's not going to be in a situation of necessity, the court is indifferent to it
An example of planning - choosing a remedy in advance. Pay attention to page 914 for possible essay question.

Yashin v. National Hockey League

- Yashin has one year to give to Sens before free agency – at time of breach, not compelled to play for Senators, but prevented from playing in League
- Court can enforce inhibitory injunction especially since positive injunction of personal service is inappropriate (though this is what occurs, Yashin argues unsuccessfully)
- the decision on whether the compulsion amounts to a mandatory/positive injunction will have to be made on a case-by-case basis

Boundaries of Recovery: Quantification – Cost of Completion v. Difference in Value

Where there are **two measures of damages** based on cost substitute performance or based on the market value of the performance, the innocent party is **generally entitled to receive the cost of completion** (*Nu-West Homes* – After assumin termination of K w/ Nu-West, Thunderbird hires another K to finish work up to specs of original K; *Groves* – uniform grade). In other words, an owner is entitled to compensation for what he has lost (*Groves*).

However, there are factors which may limit the plaintiff to a loss of value damages reward:

- the **cost of the cure is grossly disproportionate** to the loss of value (e.g. granite in *Nu-West Homes*)
- performance **does not seem to be of unique** or particular value (dissent in *Groves*)
- evidence that the innocent party **does not intend to the cure** the defect (*Groves* – did not spend the $60,000 to change grade)
- whether **innocent party has acted reasonably** in addressing the defect (*Nu-West* – party did take steps to act reasonably)

The Court will not force a slavish following the of the precise specifications of the contract (*Nu-West*).

The wrongdoer is entitled to expect the innocent party to act reasonably, not perfectly (*Nu-West*).

*note overlap/relevance with 'Rights of the Party in Breach' – p. 33

Groves v. John Wunder Co

Facts: D agreed to remove the sand and gravel and leave the property at a uniform grade. D deliberately removed only the best gravel and surrendered the premises without attempting to leave the property at a uniform grade. To do that would have cost $60,000 because a large quantity of overburden needed to be removed. Even if that had been done. the value of the property would have only been $12,160.
Issues: Is P entitled to only the difference in value ($12, 160) or to the reasonable cost of him doing the work ($60,000) called for by the contract? (i.e. which way of calculating expectation damages should we take?)
Ratio:

- An owner is entitled to compensation for what he has lost (the work or structure which has been promised, for which he has paid, and of which he has been deprived by the contractor's breach)
- Value of the land is no proper part of any measure of damages for willful breach of a building contract
- While an argument of **unjust enrichment** might be forwarded, but this doesn't make sense because this is what was contracted for.

Policy:

- D's breach was deliberate and the Courts do not want to reward **bad faith.** To go by the value of the land would reward the faithless contractor and defeat P's right to build for the future
- Expectation damages mean that we should give the promisee, so far as money will do it, what he was promised.

Dissent:

- To award five times the property's value would have **gone beyond anything the parties contracted for**.
- Nothing showed this property to be unique, specially desirable for personal use, or of special value compared with neighboring property. The "cost of performance" rule was limited to cases where the property was unique or personal rather than governed by market values. (ugly monumental fountain)
- **The claim was for damages, not specific performance**. The parties could have stipulated the value of performance in the contract but didn't. P had a right to hold the land for future development but that didn't justify awarding more than the value the land would have had.

Notes: An owner has the right to improve the his property (for himself) even if it means that it reduces its value.

Posner, *Economic Analysis of Law:* On *Groves*:

- cost of completion is NOT **economically efficient** i.e. efficiency dictated breach
  - had it been known to D from the start, it would have made him indifferent b/w breaking his promise to level the land and performing it, whereas **efficiency dictated breach**: the $60,000 worth of labour, material that would have been used in consuming in leveling the land would have brought less than $12,000 increase in value

- True that not enforcing the D would have given D a windfall, but enforcing the contract also gave P an equal and opposite windfall
- note that in some cases we **don't know if damage reward** was even **used for the cost of completion**

Nu-West Homes Ltd. v Thunderbird Petroleums Ltd.

Facts: Nu-West (A) contracts to build a house for Thunderbird (R) for $51,219 in accordance with certain plans. R began to complain about deviation from the specifications, halted work, and after some time, treated K as terminated. R hired a third party Larwill to complete the construction. Work at issue: $16,000 (to bring up to specs Nu-West did not meet). The trial judge awarded only $4,238 to the appellant because he did not consider demolition of the basement to be necessary under the circumstances.
Issue: What falls under cost of performance? The Economic Waste Rule/Argument– **you will not be given cost of performance if breach was a very minor deviation from the contract (e.g. different pipes or different kind of granite used in foundation**)
Held: The Appeal Court concluded that the deviation was **not trivial or innocent; it was rather reasonable**. Full cost awarded ($16,000).
Ratio:

- **If the plaintiff who is victim to a breach acts reasonably in the adoption of alternative measures, the plaintiff will be able to recover full cost of performance**. Thunderbird's conduct was reasonable in respect of the defects and deficiencies, which were not trivial.

Boundaries of Recovery: Certainty – The fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his/her breach of contract; in such situations, an estimate based on evidence of the magnitude of potential gains and the probability of such gain is sufficient (*Chaplin v Hicks*) .

Chaplin v Hicks – beauty pageant; loss of chance; £100

- **Facts**: Breach of contract caused plaintiff to lose the chance to be one of 50 participants in a beauty contest where 12 would be chosen to be employed as actresses. Pay would have been far greater than her current salary.
- **Issue**: How is loss of chance calculated into damages (i.e. there is no easily calculated market value)?
- **Held**: This is a decision for the jury and it must do the best it can to calculate damages (£100 award)
- **Ratio: The fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract**

Boundaries of Recovery: Causation and Remoteness of Damage

POLICY: what should be the extent of damages that can be recoverable, especially in the situation of consequential losses.

a) complex factual causation questions
b) is it fair to burden the defendant with all damages factually caused by the breach?
c) was there a chance to contractually allocate the risk, e.g. an express term?
d) which party otherwise bore the risk of the loss?

Causation – The breach must have been the factual cause of the loss for which damages are claimed by an innocent party. To determine factual cause, the 'but for' test is applied (*Hodgkinson v Simms*). Any intervening acts?

Hodgkinson v. Simms – Hodgkinson bought stocks not realizing that Simms (his advisor) had a relationship with sellers. Loss money, claimed that "but for Simms' non-disclosure of his conflict of interest, he would not have entered into the trx.

Remoteness – The doctrine of remoteness is a limitation on the recovery of contractual damages, particularly for consequential losses (*Hadley v Baxendale* – lost profits after carrier breaches promise to deliver crankshaft). Damages should only be recoverable if they were made reasonably foreseeable as liable to result from breach of contract **at the time contract was made** (*Victoria Laundry* – lucrative dyeing K not foreseeable, but lost business was; *Scyrup* – Scyrup made clear to Economy Tractor the use of the attachment, so this special circumstance was reasonably foreseeable). There are 2 rules of remoteness damages (*Hadley*), both of which are governed by reasonable foreseeability (*Victoria Laundry*):

Rules from *Hadley v. Baxendale*:

a) First Rule: An innocent party **can recover those damages that flow from breach in the usual or ordinary course of things**
b) Second Rule: An innocent party **can recover damages resulting from special circumstances if the party in breach had sufficient knowledge of those circumstances**.

A number of factors seem to be considered in the application of the remoteness rules:

a) the amount and quality of actual knowledge of the parties (*Sycrup*; *Cornwall Gravel*)
b) the type of contract (compare carrier contract in *Haxley* to specialized supplier contract)
c) the identities of the parties and their relationship (in *Victoria Laundry* D-engineers, as evidenced by highly technical description of boiler, are able to reasonably contemplate damages a carrier might not)
d) the kind of loss: in particular, the standard may be tougher where the loss concerns a chain of consequential economic loss.
e) the likelihood/probability of the kind of loss at the time of the making of the contract
f) the magnitude of the losses and the proportionality of the loss to the anticipated benefits to the parties under the contract (In *Haxley*, compare the contract price to potential scale of consequential losses)

Hadley v Baxendale – crank shaft – 2 rules – sufficient contemplation of damages at time of K

- **Facts**: Ps were millers and the crank shaft at the mill broke, so production stopped. Had to send whole shaft to the manufacturers to serve as template for a new one. P entered into K with -carrying company, Baxendale (D). P got it there in time

and told D that the mill service had stopped and fast service was required. Because of D's delay, shaft delivered late and P experienced many days worth of lost profits which are now claimed.

- **Issue**: Does D's breach make them responsible for the loss of profits?
- **Held:** Loss of profits in this case cannot reasonably be considered as a consequence of the breach of contract as could not have been fairly and reasonably contemplated by both parties when they made the contract. Neither flowed naturally from the breach under ordinary circumstances (1) or in the special circumstances (2). P did not let D know about situation surrounding crank.
- **Note:** The 'knowledge' that is to be acquired by D sufficient for liability in special circumstances has to be knowledge that it is reasonable for them to know. In this case, the judge points to the fact that D might have thought that P had a replacement crank.

Victoria Laundry v Newman – thriving laundry business (recoverable) + lucrative dying contracts (not recoverable); reasonable foreseeability test

- **Facts:** Ps were launderers and purchased a new boiler from the D-engineering company for £2,150. Ps stressed that they needed the boiler in the shortest time possible. Ds promised to deliver by June 5, 1946, but the boiler was damaged on June 1 and had to be repaired. Not delivered until 20 weeks later. Ps lost regular business and also a lucrative dying contract because of the breach. They seek damages for all profits lost.
- **Issue:** Which lost profits are P entitled to?
- **Held:** The defendants had sufficient knowledge that the delay in delivery was likely to lead to loss of business and also to extend their business. However, the special lucrative dying contracts are a 'special circumstance' which the D would have had to know, at the time of their agreement with the P, of prospect/terms, which they did not. So partial recovery of claimed lost profits.
- The knowledge does not have to be such that D had to foresee that that a breach must necessarily result in that loss. It is enough if he could foresee it was *likely* so to result. It could be a "serious possibility" , "real danger", "on the cards"

Scyrup v Economy Tractor Parts – lost profit recovery allowed for Supercrete K – dissent provides strict test for knowledge in special circumstances

- **Facts**: P (Scyrup) entered into a contract with the D (Economy Tractor Parts Ltd.) to purchase a hydraulic dozer attachment in anticipation of another contract with a company called Supercrete. P made known to D the use of the attachment. However, the attachment supplied by D was defective and as a result of this breach of contract, P lost the contract with Supercrete.
- **Issue:** What loss of profit, if any, can Scyrup claim?
- **Held**: D is liable as claimed for lost profits
- **Ratios** (Freedman JA)**:**
- Knowledge can be either imputed or actual. Imputed knowledge is sufficient to bring into play the first rule; actual knowledge is required for the second.
- Reasonable foreseeability is the test under both rules.
- **Dissent** (Miller, CJM):
- In order to succeed for lost profits that fit into the "special circumstance" (2nd) category of *Hadley* test, it must have been clearly indicated to D at the time the equipment was purchased exactly what kind of contract was being entered into by P, the type of work that was to be done and the magnitude of operation.

Cornwall Gravel v Purolater Courier – envelope – lost profit allowed – sufficient special circumstance knowledge provided

Facts: P was submitting a tender in order to bid for a contract with the government. Bid had to be in by 3pm, Ps hired Ds to deliver. Driver who received the envelope with the tender from Cornwall was aware that it contained a tender and assured employees of Cornwall that it would be delivered by noon the following day. No discussion about value of tender. Tender arrived 17 minutes late because truck broke down. P's tender is rejected due to lateness; if they had been awared the contracte, the would have made a profit of $70,000. P sues for thisloss of profit.

Issue: Is D liable for P's loss of profits, or are they too remote? Were the special circumstances adequately communicated or are they too remote?

Held: Loss of profit was within the reasonable contemplation of the courier service. D had sufficient knowledge after P's communication at the time of contract.

Boundaries of Recovery: Mitigation – The right to expectation damages for breach of contract is limited by the **"duty" to mitigate** (as well as the principle of remoteness) (*Asamera; Payzu*). An award of contractual damages will be reduced by the amount which a court feels could have been reasonably avoided.

REASONABLE STEPS

To mitigate, the **party who has suffered from a breach must take reasonable steps to limit the damages** resulting from the breach (*Asamera*) (e.g. in sale of goods context, one can sell or buy good at time of breach; though sometimes there are no steps to mitigate such as when there is no market to buy or sell a good).

What is reasonable may depend on the nature of the contract and its subject matter (e.g. an employment contract may not require a fired employee to return to his old job if offered (*Payzu)*, but may required purchase of shares even in a somewhat volatile market (*Asamera*).

TIME/LITIGATION

Normally, **mitigation should occur at the time of breach**, but if not, within a time that is "reasonable in all the circumstances (*Asamera* – would not be 1960 when they thought the shares were safe because of injunction + not wanting to invest in such a speculative market – would be when oil was struck and they knew the shares had been sold).

A "duty" to mitigate may include prompt litigation (*Asamera* – Factors: no legal reason until 1967, the breaching party asked for no litigation, & practical desire not to create legal conflict with parties that will have to deal with one another)

What may be reasonable may include purchases, on **less favourable terms**, from the party in breach (*Payzu* – silk)

SIGNIFICANT/ADDITIONAL EXPENSES

A plaintiff need not mitigate if there is a significant expense or risk involved (will it create additional financial burdens to mitigate, or does it free up the assets?) (*Asamera*).

A plaintiff is **reimbursed for additional expenses** which can reasonably be said to be incidental to steps to mitigate damages flowing from breach (*Asamera* – e.g. brokerage/commission fees on purchase/sale of shares).

Defendant has the burden of proving that the plaintiff could reasonably have avoided some part of the loss claimed.

POLICY issue: Should the innocent party be expected to limit avoidable losses?

a) causation where inaction by the innocent party
b) unlikely to be express agreement of the parties on mitigation
c) fairness as between the parties
d) social waste

Payzu v Saunders – silk dealer – innocent party has a duty to mitigate, even if it means buying silk on unfavourable terms from same dealer

- **Facts:** P entered contract to purchase silk from D (dealer in silk). K allowed for discount off the lists price. P had to pay by cheque within 30 days of receipt of each shipment. Misunderstanding arose as to a payment that was received late. D, thinking that P would not pay for the order, refused to make another shipment unless paid full price in cash with each order and stated this in an "unfortunately worded" letter, questioning the solvency of Ps firm. P was offended by the letter and refused to deal with D further; rejected cash contract proposed. Price of

silk on the rise, P sues for damages arising from breach of contract, seeking the difference between contract price of silk and market price.
Issue: Was P obliged to mitigate by accepting the proposal to buy the goods at contract price for cash?

- **Court of Appeal**: damages are rewarded but they are limited in because of P's failure to mitigate (they were in a position to pay cash for the goods and the offer by D *was* bona fide. They allowed themselves to suffer a loss larger than a prudent/reasonable person ought to).
- **Held:** Yes, there was nothing to justify P's refusal of D's offer.
- **Reasoning** (Banks LJ):
- The only question is whether, at law, P can establish that they should not have paid cash and mitigated damages because of D's attitude
- **What is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstance of each particular case** (i.e. there may be cases where as a matter of fact it would unreasonable to expect a P to consider any offer made in view of treatment received from D e.g. being accused of theft by your employer in front of others and then being asked to take back position)
- **Reasoning** (Scrutton LJ):
- In certain cases of personal service, it may be unreasonable to expect a P to consider an offer from the other party who has grossly injured him; but in commercial contracts, it is generally reasonable to accept an offer from the party in default
- It is always a question of fact. About the law there is no difficulty.

Asamera Oil Corp v Sea Oil & General Corp – shares sold against promise; when did duty to mitigate commence if not at time of breach?

Importance: tells us when the duty to mitigate begins, because it will not always be at the time of the breach of contract.
-Mitigation costs and obligation. At what point is mitigation so expensive or onerous that it is no longer reasonable for the plaintiff to engage in it?
-Mitigation and damage costs—when we have a variance in price (as in stocks) how to we deal with that for determining such costs and damages.
Facts: 1957, plaintiff loans 125,000 Asamera shares to D, Brook (president and chief executive of Asamera) so that he can use them as collateral for a loan. Part of contract was that D would return the shares in 1960. But D sold the shares in 1958 as their value declined, and so could not return them in 1960. However, in 1960 P got a negative interim injunction, which prohibited the D from selling the shares (because they didn't know that the shares had already been sold and didn't know until 1967).
-First court action: 1966: D asked P not to inform their claim for the shares.
-1966: P started a second action: and this is the one that went to the SCC.
-1967: action 1 was dismissed.
-Second action: it is about the breach of contract—the non-return of shares that had been borrowed. They ask for specific performance: they are seeking specific performance. In the alternative, damages.
Reasoning (Estey J):

- Prima facie measure of damages in this case would be the value of shares on the date of breach (31 dec 1960). It would also include other losses (brokerage/commission fees).
- P has to take all reasonable steps to mitigate damage but not take all possible steps to reduce his loss. P argues that it could not have been expected in December, 1960, to purchase shares to mitigate loss where the value of these shares were falling, and in any case, in 1960, when P got an injuction, he would have thought the shares were not sold. Though by July 1967, when they did know the shares were sold, they could have bought shares (especially because they were improving, even though, admittedly, the market was volatile)
- In some cases, the opening up of assets because of the breach might need to be considered (i.e. if the contract fell through and you still have what you promised, what do you do with it? Or in the opposite, if you you've already performed to your detriment, then you might not have the capacity to mitigate. Though these issues aren't all that relevant to this case.
- Policy concern: the Court is afraid of allowing recovery for these lost profits from shares because it means that Ps can just sit on the breaches of contract and the let amount grow until an opportune time for legal proceedings
- In the case of breach, P must crystallize his claim either by replacement acquisition (buying the same shares) or by prompt litigation expeditiously prosecuted (i.e. **litigate or mitigate**) -> in this case, they could have been quicker to litigate (though it would still have to drag through the system; it took 18 yrs for decision)
- **Subject always to the circumstances of each case, injured party has an obligation to purchase like shares in the market on the date of breach (or knowledge thereof), or within a period thereafter which is reasonable in all the circumstances. Factors:**
    - Realities of market operations (including nature of the shares in question, strength of market, number of shares qualified for public trading.. etc.)
- **Before a P can rely on a claim to specific performance so as to insulate himself from the consequences of ailing to procure alternate property to mitigate loss, some fair, real and substantial justification for his claim to performance must be found.**

Boundaries of Recovery: Time of Measurement of Damages

Contractual damages are normally assessed at the time of breach, unless there are other circumstances indicating that the plaintiff has some substantial or legitimate interest in waiting for a later date (*Semelhago*; *Asamera* – provides exception)

SPECIFIC PERFORMANCE

Where damages are awarded in lieu of specific performance, the assessment may occur at the date of the trial (*Semelhago*). In application, the plaintiff can recover damages based on the value of the property at the time of trial, a valuable increase given the rising property since the time of breach.

However, **a claim to specific performance will not remove the obligation to mitigate** unless there is some fair, real and substantial justification for the claim to specific performance (*Asamera*; *Semelhago*)

*NB: that the SCC cautions that traditional view that specific performance is readily available as breach of contract related to land may be less true now that land is less unique given the "progress of modern real estate development" in which much land is mass produced and substitutes are "frequently, though not always, readily available". (per Sopinka J, at p.883). Recall similar approach in John Dodge Holidngs

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Semelhago v Paramadevan – award for money damages as substitute for specific performance (combo of law/equity); mortgage fees are deducted

- **Facts:** P agrees to buy house from D (vendor) for $205 000 (part cash, part by mortgaging current house). P negotiated 6-month mortgage (close the deal on new house and then sell his old one at the appropriate time in the 6 months following closing). Before closing, D reneged and in Dec 1986, title to house taken by D. P remained in old house, worth $190,000 in Fall 1986 and $300,000 at time of trial. Semelhago sues for specific performance OR damages.
- At time of trial, market value of new house: $325,000. P decided to take damages instead of specific performance – awarded $120,000 (value of property - purchase price). D appealed that assessment was "windfall" because P was benefitting not only from increase in value of new house, but also from gain in value of old house. P had cross-appeal on disallowance of legal fees at trial.
- **Court of Appeal:** deducted from award at trial (**deducted carrying costs of mortgage** that P would have had to carry had the contract been fulfilled, also **deducted interest** on the cash ($75,000) + legal costs) and also allowed cross-appeal.
- **Held:** appeal dismissed
- **Reasoning** (Sopinka J):
- The rationale for assessing the damages at the date of breach in the case of breach of contract for the sale of goods is that if the innocent purchaser is compensated on the basis of the value of the goods as of the date of breach, the purchaser can turn around and purchase identical or equivalent goods
- However, different considerations apply where that which is to be purchased is unique (e.g. change in view of real estate)
- Where the vendor reneges in anticipation of performance, the innocent party has 2 options:
    - Accept repudiation and treat agreement as being at an end. Both parties relieved of outstanding obligations and injured party can commence an action for damages
    - Injured party may decline to accept repudiation and continue to insist on performance. Contract continues in force. Neither party is relieve of their obligations under agreement. In this way specific performance has the effect of postponing the date of breach (it revives the contract).
- The appropriate date for the assessment of damages is the date of judgment i.e. the date upon which specific performance is ordered
    - If the innocent party gets more because of an increase in value seems overly generous, we should realize this approach ought only to be used for unique properties (i.e. one would have to show that the property is unique)
- P had another house that they held on to which increased in value. Should this affect calculation of damages? No. **If you had evidence that they were going to sell the first house, then maybe you would take back profit from first house.**

Boundaries of Recovery: Loss of Enjoyment

Expectation damages may include rewards for intangible injury (i.e. lack easy-to-calculate market value) including…

- **loss of enjoyment or amenity**
  -e.g. *Hawkins v. McGee:* arguably part of failure to deliver the perfect hand (p.825)
  -e.g. *Ruxley Electronics v. Forsyth*: loss of amenity for too shallow swimming pool (Note 2, p.828 and earlier Note 1, p.824)
  -e.g. *Jarvis v. Swans Tours:* disappointment and loss of enjoyment for the inferior Swiss "ski-ing" holiday with mini-skis, rubbed feet, little dry nut cakes, limited yodling, unoccupied annexe Alphutte Bar, …
- **mental distress, pain, or suffering** – ranging from nervous shock to insult to disappointment.
  -e.g. Hawkins v. McGee: pain and suffering from the surgery (although recall there, not part of expectation not because it is intangible but because the plaintiff would have experienced that in order for the contract to be performed; but could be part of reliance claim)

Contract damages are clearly available for loss of enjoyment and intangible interests when that is the **sole purpose of the contract**, such as a contract for a holiday whose very purpose is enjoyment (*Jarvis v Swan Tours*).

Canadian courts have similarly provided damages when such purposes (loss of enjoyment/mental distress) seem **an important part of the purposes of the contract, or the likely result of breach of contract.**

- E.g.: *Fidler v Sunlife* – compensation for mental distress where wrongful refusal of insurance company to provide disability benefits even where clearly supported by documentation and evidence
- this is very unlikely in a contract involving commercial parties

Estimating Damages: The Courts must estimate such intangible harms and tend to be cautious in providing the estimate given the concerns about excessive or exaggerated claims. It is easiest to estimate when there is a quantifiable sum such as cost of treatment. The estimate used in *Jarvis v Swan Tours* (of two times the package price) is arbitrary but reflects that the injury to the plaintiff was more than simply the cost of vacation; it was also lost time/opportunity (grounded probably in a reliance interest).

Limit: losses for intangible injury are subject to the normal rules on remoteness and mitigation (e.g. if P knew loss of enjoyment would kickstart a depression, he would have duty to mitigate that).

POLICY:

- recovery seems consistent with basic purposes and definitions of expectation and reliance damages, so why any boundaries on recovery?
- difficulty of quantification/assessment
  - concern about false or exaggerated claims (e.g. US style jury verdicts and floodgate of litigation)
- "hard knocks" theory of contractual parties: view that contracts are mostly about material things, and so should focus on compensation for harm like physical injury or economic loss. (contract law not about 'feelings')
- Basic Idea: Contract law permits recovery, but with boundaries on recovery

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Hawkins v McGee – pain and suffering would be calculated on reliance damage interest (though not on ED); this might reflect

Jarvis v Swans Tours – allows reward for loss of enjoyment for British solicitor who takes disappointing trip to Switzerland that is unlike as advertised (e.g. parties, other English-speaking individuals, mini-skis, cakes, yodling, bar). Reward for £125 is about 2x cost of vacation (he had only received 0.5x at trial)

Boundaries of Recovery: Punitive Damages

NOTE: this topic is essentially unexaminable this year. You have a short excerpt from a fascinating and important case, the Supreme Court of Canada decision in Whiten v. Pilot Insurance Co. This will be an area of development throughout your legal careers.

(1) The award of punitive damages for breach of contract while possible is unusual in Canadian contract law. Whiten v. Pilot Insurance Co. [contract law is *not* supposed to be about punishment – remember Holmes' distinction b/w legal duties and ethics]

(2) POLICY:

(a) Damages with the purpose of punishment deviate from the main policy purpose of contract remedies which is to compensate an innocent party for the harms suffered as a result of breach of contract.
(b) As with recovery for intangible injuries, concerns about quantification/assessment, and potentially excessive assessments, especially by juries.

(3) Punitive damages are treated as exceptional, for conduct that is "harsh, vindictive, reprehensible or malicious" (see quote from Wilson J. in Vorvis, cited at p.847 of Whiten), or, e.g. a "marked departure from ordinary standards of decent behaviour" (per Binnie J., at p.848 of Whiten)

(4) Further limit: the confusing requirement that the conduct be serious enough that it constitutes an independent "actionable wrong"

-most clear where the bad behaviour constituting the breach could also be a tort
-in Whiten clarified that could be a breach of a fiduciary duty or a contractual duty, here the additional contractual obligation of the insurer to treat insureds in good faith and with fair dealing
This has been criticized. This is behaviour so bad that it might be a tort. Many critics say that if breach is so bad, why would you create a whole new kind of damages?

(5) Further limit: oversight of the findings of, and size of, awards for punitive damages. The SCC in Whiten emphasizes:

a) charge to trier of fact must emphasize the exceptional nature of the remedy and follow guidelines set out by the SCC
-e.g. punitive damages must be reasonably proportionate to factors such as harm caused, degree of misconduct, relative vulnerability of the innocent party, and advantage or profit for the party in breach
-e.g. factor in other fines, penalties, punishment that party in breach might face
b) greater room for appellate courts to review than normal damage assessments
-and appellate courts have been active in review of such awards

*NB: Punitive damages are not really a limit on recovery nor a real contractual issue.

Whiten v Pilot Insurance

Facts: fire in addition to home – home damaged and husband suffers frost bite; after making single payment of $5000 for living expenses and a couple month's rent, Pilot stops payments and pursues hostile and confrontational policy to get Whiten to settle claim at substantially less than fair value
Held: Pilot's breach of contractual duty of good faith is an actionable wrong, which was breached by Pilo – thus punitive damage award determined by jury ($1 million) stands.

Exclusion and Limitation Liability Clauses – are contractual terms that exclude or limit all or some of the legal liability of a party.

(SEE POLICY ISSUES)

Rules on Notice Requirement: Unsigned Writings

Whether an exclusion or limitation liability clause is enforced in an unsigned contract depends on the **knowledge of the party** (i.e. the party in breach who did not create the clause) (*Thornton v Shoe Lane Parking*).

- If the party has no knowledge that there was any writing, s/he is not bound by the clause (*Shoe Lane Parking*)
- If the party has knowledge of the conditions, s/he is bound by the clause (*Shoe Lane Parking*)
- If the party has knowledge of the writing, but not of the specific condition, the **reasonable notice** test is applied:

Reasonable Notice Test

Whether or not a clause is binding depends on whether there was reasonable notice of the existence of the clause (*Thornton v Shoe Lane Parking*). Factors:

- notice must be given **at the same time as formation of the contract**
- **form or manner of notice**: number of factors
  e.g. reference on the face of the ticket to conditions on the back
  e.g. prominent lettering or colour
  e.g. employee directs attention of the other party to the clause
  i.e. 'printed in red ink with a red hand pointing to it'
- courts reluctant to find notice if **terms are contained in non-contractual documents**; (*Thornton v. Shoe Lane Parking)*
- may depend on **business practices and normal understandings** of the kind of transaction

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Thornton v Shoe Lane Parking Ltd

Facts: P suffers personal injuries in multi-story car park which D owns. There was notice outside at the bottom of which read 'ALL CARS PARKED AT OWNERS RISK'. P drove to entrance, no attendant, pressed button and got ticket, drove through and car taken up by mechanical means. When he came back and was putting something into the boot, he was injured by both his own fault and that of D.
D points to small print on ticket handed to P which read that ticket was subject to conditions on premises—this no liability. P said he knew there were words on the ticket but didn't read them. If he had, he would have driven car into garage and walked around to find printed conditions on a panel.

Reasoning (Denning MR):

- This case is unlike normal ticket cases where P can accept a ticket offered by a clerk or refuse it; here, that it is offered by a machine, is significant. In this case acceptance is when the acceptance puts money in the slot where terms of offer placed near machine
- The customer is bound by those terms so long as they are sufficiently brought to his notice beforehand. He is not bound by the terms printed on the ticket if they differ from this notice, because the ticket comes too late. Ticket is no more than voucher – offer and acceptance have already been made.
- Sign at entrance was only 'at owner's risk' with respect to the car; not personal injury – the offer was accepted by P when he drove up after reading

Rules on Notice Requirement: Signed Writings

Traditionally, a signature on a document containing terms establishes the assent of the signatory to those terms, absent fraud or misrepresentation: L'Estragne v. F. Graucob Ltd (referred to in *Tilden* at p.494)

Contemporary view: Where a party who seeks to rely on terms in a standard form of a contract knows or had reason to know that the **signature does not represent the intention** of the other party with respect to those terms, then they must **take reasonable measures** to draw such terms to the attention of the party signing (*Tilden Rent-A-Car v. Clendenning*).

Factors in assessing whether clause will be enforced,

- What is the nature of the clause: how **onerous** (total exclusion or partial limit) and how **unusual**
- Is the clause consistent with the overall purpose and expectations concerning the contract?
  -e.g. In *Tilden*, Clendenning was signing up for additional coverage (and for the most clerks told customer they would be covered entirely
- What were the **circumstances of formation**: was the **signature hurriedly obtained**? Informal?
  -e.g. In *Tilden*, the signature was hurriedly obtained, Clendenning did not read the terms and it was reasonably clear to the clerk that the customer did not read it
  -e.g. Also in *Tilden*, while exclusion clause was generally visible, the actual reference to intoxication was 'hardly legible' on Clendenning's copy of the K

Tilden Rent-a-Car v Clendenning

Facts: P rents car as he has done frequently, requesting additional coverage. He signs K in front of clerk but does not read terms and this fact is readily apparent to clerk. P gets into an accident after having a drink – he was intoxication; this fact triggers the exclusion clause. [note that while the exclusion clause is signed and initialed by P, the conditions of the clause appear elsewhere 'hardly legible']. Also note that he was told that his additional coverage provided "full non-deductable coverage". Clerk also testified that nothing usually said about conditions unless asked.
Issue: Is D liable for the damage caused to the car while being driven by an intoxicated P by reason of exclusionary provisions which appear in K.?
Reasoning:
- apply contemporary test above re: whether offering parties knows whether accepting parties has assented to conditions
- Tilden took no reasonable measures to alert P of onerous provisions and they must have known, as well, that he didn't know them, anyway.

Strict Construction

Strict construction is another way for courts to control use of exclusion clauses, especially in standard form contracts [Ben-Ishai & Percy, pp.503-505; see e.g. Scott v. Wawanesa Mutual Insurance pp.468-470 (per La Forest J., dissenting)]

a) *contra proferentum* rule: where contract drafted by one of the parties, any ambiguities are likely to be construed against that party
b) restrictive interpretation - courts frequently find "ambiguities" in exclusion clauses so as to find them not applicable to the case
c) very restrictive interpretation of clauses limiting liability for tort

Doctrine of Fundamental Breach or Unconscionability – A party cannot rely upon an exclusion clause where it had as committed a fundamental breach of contract (B&P, 505).

APPROACH 1

Step 1 – Was there a fundamental breach?

Definitions:
A fundamental breach is a particularly serious breach "going to the root of the contract" or which results in "performance totally different from what the parties had in contemplation"

Wilson, *Hunter*: any breach which "deprives the innocent party of substantially the whole benefit which was intended that it should obtain from the contract" [sounds a lot like *Hong Kong Fir*) – (thus, in this case because gearboxes were only part of $4.1 million contract, use of the clause did not deprive substantially the whole benefit of the contract)

Step 2 – If yes, apply construction approach

Exclusion clauses can still be effective even if a fundamental breach has been found. In order to determine whether they can be enforced, the Courts must assess whether "in the context of the particular breach which had occurred", would it be "unfair and unreasonable" to provide relief from the clause. (*Hunter*)

While some favour an unconscionability approach in lieu of doctrine of fundamental breach, Wilson J points out how it would be relevant (should it be?) in cases where fundamental breach has occurred between parties of equal bargaining power: "Remove the inequality and we must ask, where lies the unconscionability?"

APPROACH 2

Apply doctrine of unconscionability. Hold parties to their agreement providing it was is not unconscionable.

Dickson CJC would reject doctrine of fundamental breach

- Courts should not disturb, by assessing the fairness and reasonability, the bargain parties have struck;
- He cites Wilson J's test as being too difficult to enforce – each side will emphasize different parts of the contract to show that the breach went to the root (or robbed substantial benefit).

In application, both judges agree that, whatever the extent of the doctrine related to exclusion clauses, the exclusion clause here is fair and reasonable, or not unconscionable, and can be enforced and liability limited.

Hunter Engineering v Syncrude

Facts: Syncrude purchased gearboxes from Hunter, who sold defective gearboxes with 2-year warranty. Syncrude sued after the two year warranty period.
Held: Exclusionary clauses upheld. Wilson*:* Commercial parties are free to allocate risk but once that risk has materialized, courts have residual discretion to assess the reasonableness of the clause. You must look at K ex-poste even though you've already done so ex ante. Trebilcock thinks this is dumb. Dickson: There is nothing unconscionable here, and the parties are sophisticated and of roughly equal bargaining power, so the court should respect the allocation of risk made and set out in the contract. SCC expressly followed *Photo Production* in replacing the doctrine of fundamental breach with that of unconscionability
Rule: Dickson: "Fundamental breach" is too difficult to apply, crude, and uncertain with commercial transactions with sophisticated parties who may allocate risk in different manners. Only where the contract is *unconscionable*, as might arise from situations of unequal bargaining power in consumer contexts, ought the courts interfere with free negotiations. More likely to be applied in consumer than in commercial context. But, what does unconscionability mean? Inequality of bargaining power and unreasonableness are not self-defining

Liquidated Damages – are terms stating the amount of damages to be paid by a party in breach in the event of breach of a term(s).

Rules (*Shatilla v Feinstein*):

- Courts will enforce liquidated damages clauses, but will not enforce penalty clauses
- **Test**: A liquidated damages clause is enforceable when it reflects **a genuine pre-estimate at the time of the formation of the contract** of the potential damage of breach
    - *Shatilla v Feinstein* – not considered genuine pre-estimate because it effected lump sum fine for minor breach ; even if he sold a something small as a cashier (here it was a hosiery business), it would trigger $10,000 fine – such variance reflects the $10,000 as an non-genuine lump sum penalty
- Considerations:
    1) language and labels are not determinative (doesn't matter if you call it 'liquid')
    2) where single breach: is sum fixed in excess of any actual damage which can possibly arise from the breach of contract
    3) more difficult where potential multiple breaches:
       (i) if losses similar regardless of breach, then compare to contract estimate
       (ii) if loss varies according to particular breach and a single measure is used, then may be penalty unless can show that parties had considered this potential range of losses and decided on this measure
    4) was the sum suggested by the party in breach

POLICY

- Benefits
    - private party allocation of risks and costs of breach
    - useful to estimate damages for losses that otherwise difficult to calculate
    - **increases certainty and predictability: parties can plan on this basis**
    - parties' intention: both sides often understand and intend the liquidated damages clause to clarify their obligations
    - liquidated damages clause is part of the bargained "price" of the contract: no different than any other term of the contract -- part of the overall bargain
        - if clause were not there, other party might have to pay a higher price or offer other concessions
- Problems
    - information problems: exclusion clauses are frequently not fully noticed or understood by both parties
    - unequal positions of the parties: one dominant party may take advantage of power or threat
    - unfair results: consequences out of line with any conceivably fair arrangement of the parties: form of paternalism where the clause seems to defeat the purpose or value of the contract for one of the parties

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Shatilla v Feinstein

Facts: D sold his business to P with a restrictive covenant (non-competition clause) providing for $10,000 in "liquidated damages" if D conducted the same business in vicinity in the next 5 years. D became director of similar company. P sued to recover. **Issue:** liquidated damages or penalty? **Held:** Amount of the "liquidated damages" clause is not enforced (D could still apply to the court for actual damages). It is a penalty clause, not a genuine pre-estimate of damages; it is excessive in geographic scope, duration, and it is inflexible. Breach could be as minor as working in a far away competing business on a small level, and as major as opening up next door. Clause did not take variation into account.
Rule: Where a liquidated damages clause is so expansive so as not to relate to intent of the original contract and catch "trivial" breaches, the "liquidated damages" clause will be held null as punitive. A clause providing for damages on breach of a number of stipulations of various degrees of importance is presumed to be a "penalty." This presumption can be rebutted if it is shown that the parties have taken into consideration the different amounts of damages that might occur in determining the amount.
Problem: D engaged in behavior that was exactly type that clause was intended to address. Didn't the parties do this