

CONTRACTS Semester 2

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PROMISES

Promissory Estoppel [Equitable Estoppel] and Waiver

- **Estoppel:** root = stopping/preventing something that is happening → does not allow a person to enforce/sue on a promise given without consideration – focused on **preventing** something [prevent people from going back on their word]
- A preventative doctrine [not an aggressive doctrine] → does not give a cause of action
- Example of estoppel in common law [estopped from denying a representation of fact]:
 - Renting a house – landlord says gutters/drains in good shape and once renting become aware they are not in good shape; landlord says – under terms of lease is tenants job to keep them in good repair + sues tenant for failure to keep in good repair
 - Can use estoppel **if** landlord sues – that landlord cannot go back on his word [assured tenant that they were in good shape]; the response is **not** to sue the landlord in return – but to say that landlord is estopped from suing [it is a defense to fend off the landlord's claim]
 - Defense here = cannot go back on his word; legal defense = estopped from stating that tenant has to repair gutters because landlord said they would not need repair (were in good shape)
- Extends from representations of fact to promises of future action ["you cannot do this – you promised not to do so"]

Courts of Equity [Court of Chancery]

- Lord of Chancellor set up these [tribunal] courts = Court of Chancery – for people to bring a petition for seeking justice [a petition in equity]
- Idea = if did not get remedy wanted in Court of Law [Court of King/Queen's Bench] then go to Court of Equity for a remedy
- Common law courts = only gave a **judgment in damages**; Courts of Equity = [invented] **decree of specific performance**
- Another remedy available in Courts of Equity = **Remedy in injunction** [order *preventing* someone from doing something] → Rule of injunction = will not grant if it prevents defendant from earning a living
- **Principle:** if there is a clash in damages action + a specific performance action in chancery – then chancery prevails

Judicature Act (1871)

- Either court can apply remedies from the other side – a fusion of law + equity
- Example: Could sue for either specific performance or damages in same court

Hughes v Metropolitan Railway Company [1877] 2 AC 439 (HL)

Facts:

- The respondent (Railway Company/tenant) leased property from the appellant (Hughes/landlord)
- On October 22, 1872 (pursuant to its right under the lease), the landlord served notice to the tenant demanding that it repair the property within 6 months [or else lease terminated]
- On November 28, the tenant replied suggesting that the landlord buys the tenant's leasehold and proposing to defer commencing the repairs until the tenant heard from the landlord about the arrangement they suggested
- The parties then began negotiating for sale and purchase of the lease in November, but negotiations broke down on December 31. The landlord never replied to the tenant's proposal to defer the repairs
- In April, [3 days before the notice to repair was due to expire] the tenant wrote the plaintiff saying in light of the breakdown of the negotiations it would now undertake the repairs. On April 28 the landlord served a writ of ejectment on the tenant. The tenant completed the repairs in June. The landlord sued to enforce the writ.

Issues:

- Can the appellant sue to enforce ejectment?

Decision:

- No – appeal dismissed with costs

Ratio:

- **If parties enter into definite and distinct terms involving legal results (penalties/legal forfeiture), then willingly enter into negotiations leading one party to believe the rights arising under the contract will not be enforced/will be suspended/held in abeyance (implied representation), then the party who is able to enforce the rights is not able to enforce them if it would be inequitable having regard to the dealings that have taken place**

Analysis: (Lord Cairns LC)

- The effect of the letter of November 28 was to propose to the landlord to suspend the operation of that notice in order to enter upon a negotiation for the purchase and sale of the lease. This negotiation was entered upon and came to an end on December 31

- **In any Court dealing upon the principles of Equity**, the time between the October notice and the November letter should be taken as waived as part of the 6-months requirement – the time between November and December should also be waived
- On December 31, the 6-months should be taken as starting to run
- The repairs were made within the six-month period starting on December 31, and since the negotiations were broken off on Dec 31, the repairs were executed within a reasonable time
- By entering into negotiations, both parties made it inequitable that the repairs should be carried out strictly within the 6-month deadline beginning in October

Class Notes:

- Extends doctrine of common law estoppel to apply to implied representations of future conduct [limits the future action of the landlord]
- Landlord is suing + tenant is holding up the “shield of estoppel” [a defense against landlord’s action]
- **Three factors = fundamental building blocks:**
 - 1) **Parties are in an existing contractual relationship**
 - 2) **Entered into a course of negotiations leading tenant to suppose landlord would not insist on its strict right of termination**
 - 3) **Landlord will not be able to enforce its strict rights where it would be inequitable [having indicating to the tenant that it would not]**

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

Facts:

- On September 24, 1937 by a lease made under seal the plaintiffs (Central London) granted to the defendants (High Trees) a subsidiary of the plaintiff company (a tenancy of a block of flats for a 99-year term at a ground rent of 2500 pounds/year)
- War conditions = the block of flats was not fully occupied due to absence of people in London
- January 3 1940 – [new arrangement] plaintiffs wrote the defendants that the ground rent should be reduced 1250 a year – the defendants paid the reduced price from 1940 to beginning of 1945 by which time all the flats were fully let
- In September 1945, the receiver of the plaintiff company in a letter determined the rent should actually be 2500/year – he claimed the rent must be paid in full and that the defendants owed arrears
- The defendants pleaded 1) the letter of Jan 3 1940 referred to the entire term of the lease; 2) the plaintiff company were *estopped* alleging the rent exceeded 1250; and 3) by failing to demand rent in excess of 1250 before the September letter was sent the plaintiffs waived their rights of any excess rent that had accrued up to that point

Issues:

- Whether the plaintiffs are entitled to the higher rent and whether they can recover the difference for the required previous years after the flats became fully let?

Decision:

- Yes – judgment given for the plaintiff company for the amount claimed

Ratio:

- **A promise intended to be binding, intended to be acted on, and in fact acted on, is binding so far as its terms properly apply. If a promise is made and only intended to apply under certain conditions, once those conditions no longer exist, the promise is no longer binding**

Analysis: (Denning J)

- Previously → Old common law – a lease under seal cannot be varied by an agreement by parol (whether in writing or not) but only by a deed – therefore, the plaintiffs would have been entitled to recover the ground rent
- Now → Equity has stepped in – if there has been a variation of a deed by a simple contract the courts may give effect to it – however, this doctrine cannot be applied here because the variation might be said to have been made without consideration
- Estoppel → the representation made in relation to the reduction of rent was not one of an existing fact but was a representation as to the future – that the rent would not be enforced at the full rate → **this would not give rise to an estoppel because a representation as to the future must be embodied as a contract or nothing**
- In *Jordan v Money (1864) 10 ER 686* it was said that a representation as to the future must be embodied as a contract or be nothing → here, the promisor made it clear she did not intend to be legally bound
- In subsequent cases, the courts have held a promise to be binding (even if under the old common law it would be hard to find consideration for it) – the courts have not granted damages, however they have refused to allow the party making the promise to act inconsistently with it → in this sense such a promise gives rise to estoppel
- The courts now allow that a promise should be enforceable in law (by equity) even though no consideration for it has been given by the promisee. Here, the promise was that the ground rent should be reduced to 1250 a year as a temporary

expedient while the block of flats was not fully let – therefore the reduction applied throughout the years until early 1945 when it was apparent that the flats were fully let

- The conditions that prevailed at the time when the reduction in rent was made, had completed subsided by the early months of 1945 – the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made [that the flats were only partially let]
- **If the case had been one of estoppel – the estoppel may have ceased when the conditions came to an end or perhaps only upon notice**

Class Notes:

- Landlord could win on a number of grounds –
- 1) [Most narrow ratio] Landlord's promise was never enforceable [never binding] = no consideration [no enforceable promise preventing landlord from seeking full rent]
- 2) Landlord could also win because he could not go back on his promise while wartime conditions prevailed – but tenants were coming back by mid 1944
- 3) [Lord Denning's judgment] Assumes landlord could not go back on his promise – but could be ended when wartime conditions came to an end or only upon notice
- **Effect of notice** → purpose of this type of estoppel [prevent going back on promise that one has relied on] – landlord could have said that in 6 months he would be seeking full rent again – landlord says even if tenant has acted on this promise, landlord also has rights = purpose of estoppel is still fulfilled [tenant was not ambushed + has been giving time]
- Covers his tracks by his judgment in the last paragraph → 'if the case had been one of estoppel the estoppel may have ceased when the conditions came to an end or perhaps only upon notice'
- **Here, Denning wanted estoppel to go further than merely preventing someone from going back on their promise [wider doctrine of estoppel]**
- 1940 agreement [half-rent] → no consideration here, then in 1943 if landlord gives notice then he can go back on the agreement – if there was consideration he could not have gone back by notice – however, using promissory estoppel he could go back [estoppel protects reliance] – promise is not binding on the landlord; the tenant's reliance is protected

Questions – P. 211

- 1) Would the plaintiffs have recovered full rent had sued in March 1943?
 - a. No – in the absence of notice could not have recovered the full rent
 - b. Lord Denning seems to interpret the promise to have lasted until wartime conditions ended = strong hint Denning would have dismissed the landlords action
 - c. Obstacle to overcome → landlord's promise – not binding because of no consideration = Denning says *Foakes v Beer* was wrong – says the fusion of law + equity was not considered in *Foakes v Beer* = he is wrong – they did consider all merits and did say law may be improved if case was decided without consideration but they were bound by precedent → Denning tries to reverse this rule [he is a trial court judge = cannot reverse House of Lords decision] – does not change decision + makes it clear with last judgment
- 2) Had the plaintiffs given notice in March 1943 that they intended to claim full amount, could they have done so? From when?
 - a. Likely yes – provided they had given reasonable notice and sought full rent only after expiration of the period of reasonable period of notice – cannot enforce if it would be inequitable to do so
- 3) Would it make any difference if the apartments had all been fully let during the war?
 - a. Depends on the circumstances of the promise – what the conditions were → whether wartime conditions meant fully rented at full rent, etc. or whether concession continues until reasonable notice [promise was open to interpretations]
- 4) How did the defendants "act on" the promise in *High Trees*?
 - a. The tenants relied on the promise that they would only have to pay the reduced rate of rent

A) The Nature of Representation

John Burrows Ltd. v Subsurface Surveys Ltd. [1968] SCR 607, 68 DLR (2d) 354

[First time *High Trees* come to the attention of the SCC (in a big way)]

Facts:

- Subsurface Surveys (defendant) purchased a business belonging to the plaintiff for a price in excess of \$127 000. Part of the purchase price was secured by a promissory note in the amount of \$42 000 [given from the defendant to the plaintiff in March 1963]
- The note provided for payments in monthly instalments and contained an acceleration clause allowing the creditor to claim the entire amount due if there was a default of more than 10 days on any monthly payment

- (W/o this clause, if there was a default in payment then the seller/creditor could only sue for the payment that was breached [not for the entire payment owed])
- Over an 18-month period, D was consistently more than 10 days in default w/ its monthly payments, although no default had extended beyond 35 days – the creditor accepted the late payments on each occasion and did not invoke the acceleration clause [by his previous conduct]
- Following a disagreement between the president of D and P, P sued for the whole amount owing when the defendant was late with the payment due in November 1964. The D then tendered that instalment, but P rejected it

Issues:

- Does the defense of equitable estoppel or estoppel by representation apply here?

Decision:

- No – appeal allowed [finding for P/creditor]

Ratio:

[What is necessary to occur to estop a person from insisting on their strict legal rights]

- **Cannot invoke an equitable defense unless a) there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to believe the strict rights under the contract would not be enforced [using Metropolitan Railway] which implies that b) the other party must have reason to believe that the first party intended by his conduct to alter their legal relationships**

Analysis: (Ritchie J)

- This type of equitable estoppel (as expressed by Lord Cairns in *Hughes v Metropolitan*) cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced
- There must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations
- It is not enough to show that one party has taken advantage of indulgences granted to him by the other → this is not the type of conduct that would lead to an estoppel
- Here, the evidence does not warrant the inference that the appellant entered into any negotiations with the respondents which had the effect of leading them to suppose that the appellant had agreed to disregard or hold in suspense or abeyance that part of the contract
- The behavior of the P is more consistent with his having granted friendly indulgences to an old associate while retaining his right to insist on the letter of obligation

Class Notes:

- In order to be estopped – need a promise/clear representation that will not insist on strict legal rights → here, uses the wording of Metropolitan Railway
- What harm would it have done to say the creditor was estopped from the last payment [when previous payments had been accepted late]? – if would have given notice [“if you’re late again, I will invoke the acceleration clause”] then it would not have been that radical and likely would have been able to do so
- **[Often express clauses included in contracts – ex. “will not be bound by indulgences if accept late payment, can still enforce timely payments in other months”]**

B) The Equities

D&C Builders Ltd v Rees [1966] 2 QB 617, 1965 3 All ER 837 CA

Facts:

- D and C builders (plaintiffs) and Mr. Rees (defendant) has a shop where he sells builders’ materials
- In 1964 D employed P to do work at his premises. P did the work and rendered accounts in May and June which came to 746 13s 1d pounds and D paid 250 pounds. In July there was an owing to P of 482 13s 1d, D did not pay
- P wrote to the plaintiff on August 31, he did not reply; P wrote again on October 19 that the outstanding amount of 480 was well overdue and D did not reply
- D’s wife contacted P and said her husband will offer 300 in settlement. P said they would accept the 300 and give a year for D to come up with the balance. D’s wife said no, 300 is all they would offer and asked if they wanted the money by cash or cheque – [cash on Monday, cheque on Saturday]
- When P went to collect the money on Saturday, the wife insisted that on the receipt after “received sum of 300 from Mr. Rees” that “in completion of the account” was added [aka in full satisfaction]
- P were worried about the money so they said to D that they were treating the 300 as payment on the account and brought an action for the balance of the money
- D set up a defense of bad workmanship and also that there was a binding settlement – trial judge found settlement issue in favor of plaintiffs

- D's appeal defense = there was an accord and satisfaction – an accord when the plaintiffs agreed to accept 300 in settlement of the account, and satisfaction when they accepted the cheque for 300 and it was duly honored

Issues:

- Can P insist on the balance from D or would it be inequitable to do so?

Decision:

- Yes – there is no reason in law or equity why the creditor should not enforce the full amount due to him – appeal dismissed

Ratio:

- **No consideration. But, when there has been 'true accord' under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts on that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. HOWEVER, he is not bound unless there truly has been an accord between them**

Analysis: (Lord Denning)

- In law, the creditor is not bound by the settlement – he can sue the debtor for the balance [no consideration for the agreement] – however, **equity** has stretched to help the debtor
 - [Denning said in *High Trees* that the principle of promissory estoppel overrides *Foakes v Beer*]
- When a creditor and a debtor enter on a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction, then the creditor will not be allowed to enforce payment of the balance if it would be inequitable to do so
- **The creditor is only barred from his legal rights if it would be inequitable for him to insist on them**
- When there has been 'true accord' under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts on that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance
- HOWEVER, he is not bound unless there truly has been an accord between them
- Here, it seems as though there was no true accord – the debtor's wife held the creditor to ransom as she knew the creditor was in need of money to meet his own commitments – when she said "we will pay you nothing unless you accept 300 in settlement" she was putting undue pressure on the creditor – the creditor complied with the demand [the wife is guilty of inequitable conduct]
- In a case of intimidation there is generally found to be no true accord, therefore cannot use the defense of accord and satisfaction
- **Estoppel is an equitable principle – and to use estoppel must not be using inequitable conduct**
- No equity – no person can insist on a settlement procured by intimidation

Class Notes:

- Obstacle 1 in Canada → *Judicature Act* – **part performance will be enforced when expressly accepted in full satisfaction or when rendered pursuant to an agreement**
 - Representing builders – the buyers [give payment 'in full satisfaction'] – what are arguments
 - 1) Bring up an element of duress → however, the *Judicature Act* does not make mention to duress
 - 2) Focus on 'expressly accepted' = was there an express acceptance here
 - 3) Accord + satisfaction – the accord = an agreement to take less than the full amount of the debt, the satisfaction = the extra consideration you must provide
 - Can the agreement between wife be a true accord – a true 'meeting of the minds'
- Obstacle 2 in Canada → *Foot v Rawlings* – felt the agreement to take less should be binding – payment by a negotiable instrument was payment in a **different kind**
 - SCC precedent = payment by cheque can be payment in a different kind, therefore binding because there is consideration for it
 - Argument – was this payment by cheque bargained for → in *Foot v Rawlings* the creditor proposed the payment by cheque
 - In *Foot*, it was clear the payment by a negotiable instrument was at the request of the creditor and to the creditor's advantage
 - Here, was it bargained for or a benefit to the building company? = looks as though it was merely incidental [there was no advantage to the builders here by accepting payment by cheque]
- If suing for specific performance = an equitable remedy w/ all of the restrictions the Court of Equity has placed on it – petitioning the court here [can refuse if come with inequitable conduct]
- 1) *Judicature Act*, 2) Consideration [payment by cash], 3) Possibility the creditor may be estopped
- Had the debtor been free from inequitable conduct, the creditor would have been bound [Denning suggests w/o this, the creditor would have been bound by the representation that he would accept the lesser amount]

- Argument → there is no consideration here (*Foakes v Beer* is still a common law principle – was not overruled by *High Trees*)
- *Re Selectmove* – states that *Foakes v Beer* remains a fundamental principle [estoppel did not eradicate the fundamental requirement of consideration]
- Lord Denning’s judgments/comments of estoppel are dicta – also not shared by other judges

C) The Notice

Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co [1994] SCC [Waiver and reasonable notice]

Facts:

- On July 26, 1978 Maritime Life Assurance Company (appellant) issued an insurance policy on the life of Michael Fikowski Sr to Saskatchewan River Bungalows (respondent) and in 1984, ownership of the policy was transferred to the Connie Fikowski (respondent), at which time she became the beneficiary
- SRB retained the responsibility of paying the annual premiums under the policy
- In 1979 the policy lapsed after SRB failed to make the payment within the grace period, the policy was then reinstated according to the provision.
- In 1981, SRB failed again to make payment within the grace period – on this occasion, Maritime accepted late payment and did not require evidence of insurability or an application for reinstatement
- On July 24, 1984 SRB mailed a cheque for \$1316 to pay the annual premium due on July 26, 1984.
- On August 13, SRB received a premium due notice requesting payment of \$1361. SRB sent a cheque for the difference (\$45) – however, the first cheque was never received by Maritime, nor deducted from SRB’s bank
- Maritime sent a late payment offer to SRB saying it must be postmarked or if not mailed, received at the Head Office at Halifax on or before September 8 – SRB did not respond to the late payment offer
- On Nov 28, Maritime sent a letter to Connie [at SRB] saying the July payment had remained unpaid and that the policy is out of force and requiring an immediate payment of \$1361 (waiver)
- On Feb 2, Maritime sent a letter to SRB stating that the policy is retracted but could apply for reinstatement [however, the reinstatement involves proving good health of the insured (who is dying)]
 - Here, gave the reasonable notice = retraction of waiver
- SRB closed its hotel business for the winter and picked up corporate mail on an infrequent basis therefore were not aware of the late payment offer, the November letter, or the lapse notice until **April**
- It was not until **July** 1985 [3 months after got Maritime’s letters] that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium – Maritime rejected SRB’s claim for benefits under the policy on the ground that it was no longer in force
- On August 10, 1985 Michael Fikowski died – Maritime’s position was that the policy had lapsed and that the death occurred during a time when the policy was no longer in effect therefore the respondents had no right to benefits under it
- The respondents position is that Maritime [through conduct] waived its right to compel timely payment under the policy + that none of Maritime’s act were sufficient to retract its waiver of time and that the policy was still in force at the time of the death

Issues:

- Did Maritime waive its right to force timely payment therefore making the policy still in force during the death?

Decision:

- Maritime did waive its right however the waiver was not in effect at the time of the death. The policy was not in force at the time of the death – the respondents are not entitled to any of the benefits under the policy

Ratio:

- Waiver will be found only where the evidence demonstrates that the party waiving had 1) a full knowledge of rights; and 2) an unequivocal and conscious intention to abandon them
- Waiver can be **retracted if reasonable notice is given** to the party in whose favor it operates – [a notice requirement should not be imposed where reliance is not an issue]

Analysis: (Major J)

- Recent cases have noted that waiver + promissory estoppel are closely related – [principle: both parties should not be allowed to go back on a choice when it would be unfair to the other party to do so]
- Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party (waiver of a limitation period)
- Waiver will be found only where the evidence demonstrates that the party waiving had 1) a full knowledge of rights; and 2) an unequivocal and conscious intention to abandon them
- This stringent test is required because there is no consideration from the party in whose favor the waiver operates

- It is obvious that Maritime had full knowledge of its rights under R's policy; and it seems clear that the November letter alone constituted a waiver of Maritime's right to receive timely payment
 - In this letter Maritime was willing to continue coverage under the policy upon payment of the July 1984 premium with no mention of evidence of insurability or of reinstatement
- Waiver can be retracted if reasonable notice is given to the party in whose favor it operates – [a notice requirement should not be imposed where reliance is not an issue]
 - R were not aware of the November waiver until they received it in April, therefore they were not reliant on it – Maritime was not actually required to give any notice of its intention to lapse the policy
- HOWEVER, Once opening mail in April, R became clear of Maritime's intention – an informal communication of a party's intention to insist on strict compliance with the terms of a contract is sufficient notice + R did not tender a replacement cheque until 3 months later → therefore, even if reasonable notice requirement was imposed it would have been adequately met by the respondent's failure to act between April and July
- Maritime's waiver was no longer in effect when SRB sought to make payment in July 1985 – Maritime had no obligation to accept the replacement cheque and the policy lapsed

Class Notes:

- 1) How can you act on a representation if do not receive it? – Here, it was never acted upon
 - Not just enough you represent you are acting on strict legal rights – must be acted upon
- 2) Even if it had been acted upon – it was revoked by reasonable notice in February [how estoppel can be retracted]
- When get in April – do nothing until July either [had they acted on it in April, may have had a better legal position]

D) Reliance

WJ Alan & Co. v El Nasr Export & Import Co. [1972] 2 QB 189, [1972] 2 All ER 127 (CA) [Detrimental Reliance]

Facts:

- The buyers [Egyptian company trading in Tanzania] purchased 500 tons of coffee from the sellers [Kenyan coffee producers] under two separate contracts of 250 tons each at a price of 262 [Kenyan shillings]
- Payment was to be by confirmed, irrevocable letter of credit and the contract was specifically to be governed by English law
- The buyers opened a confirmed letter of credit in sterling through a bank – the sellers raised no complaint when the letter of credit was confirmed in sterling
- The first 250 tons were shipped under the first contract and 29 tons in partial fulfillment of the second one → the bank was invoiced in sterling and the payment was accepted in sterling
- The sellers shipped the remaining 221 tons and prepared an invoice for this shipping in sterling – but before documents were presented for payment, it was announced that sterling would be devalued but unknown if there would be an equal devaluation in Kenyan currency – the sellers still sent the invoice to the buyers' bank and were paid in sterling
- Subsequently it was known that Kenyan currency would not be devalued and the sellers prepared an invoice for an extra 165, 530 Kenya shillings to offset devaluation, however the buyers contended that no more was owed + the sellers brought an action for the invoice amount

Issues:

- Do the buyers owe the sellers for the Kenyan shillings to offset devaluation of the sterling payment?

Decision:

- Appeal allowed – the buyers do not owe the sellers to offset devaluation

Ratio:

- **Once the credit is established and accepted it is unalterable except with the consent of all the parties concerned**
- **Detrimental reliance is not required for promissory estoppel to apply – promissory estoppel requires that the claimant party rely on the actions of the other party and alter their position as a result**

Analysis: (Megaw LJ)

- The necessary consequence of the offer and acceptance of a sterling credit is that the original term of the contract of sale was varied from Kenyan currency to sterling
- By the sellers accepting the offer of sterling – not only did the bank become irrevocably bound by the terms of the offer – but so did the buyers
- If the buyers could not unilaterally revert to the original currency of account, once they had offered a variation, which had been accepted by conduct, neither could the sellers revert
- Once the credit is established and accepted it is unalterable except with the consent of all the parties concerned
- When the letter of credit was accepted as a transaction in sterling as the currency of account, the price under the sale contract could not remain as Kenyan currency
- The acceptance by the sellers of the sterling credit was a once-for-all acceptance – it was not a concession for a specified period of time or one which the sellers could operate as long as they chose

- Majority – finds promise is binding because of consideration [easier to rely on consideration than estoppel] – majority describes this case as a variation of contract/performance [actual performance = Kenyan shillings; varied performance = British pounds] – the parties have, by contract, varied the performance [can be described as **varied performance**]

Lord Denning MR

- A ‘conforming’ letter of credit is one that is in accordance with the stipulations in the contract of sale – here, the letter of credit does not conform
- The principle of waiver: if one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that behalf and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable of him to do so
- The one who waives his strict rights cannot afterwards insist on them – rights are suspended as long as the waiver lasts [unless maybe by giving reasonable notice or by conduct] – withdrawal may be impossible in some cases [if there would be injustice to the other party] – therefore, he is bound by the waiver
- Lord Denning = Kenyan sellers waived right its right to be paid in Kenyan shillings
- No course of negotiation in this case = and Lord Denning still assumes there can be estoppel

Stephenson LJ

- Agreed with Megaw that the contract had been varied
- Here, the buyers did act to their detriment on the sellers’ waiver – [the contract was varied for good consideration]

Class Notes:

- **Confirmed irrevocable letter of credit** = Buyer provides letter of credit to sellers’ bank for the entire purchase price – not to the seller – to the seller’s bank → [Know what it is designed for + how it is to work] The conditions are set out in the letter of credit itself
- Bill of lading = proves the coffee has been placed on the carrier on this date [entitles the buyers to the amount of money – bank gives to them from sellers account] so if the shipping documents are correct – bank must give them the money and no bank can turn down the documents if they conform to the letter of credit
- Under the requirements of the contract – the price stipulated was in Kenyans
- Technically a breach of contract = buyers opened it in pounds Sterling [seller did not care – because at the time these currencies traded at par]
- Problem = British currency devalued by 18% - but the sellers did not care, because every time in the past the British currency devalued so did the Kenyan shilling [therefore, still accept British pounds under the letter of credit]
- For the first time ever – the Kenyan shilling is not devalued [sellers ended up getting 18% less for their coffee] – sellers sue for the difference [because contract said it was supposed to be paid in Kenyan shillings] – lose this action
- **Agreed variation of the contract** – offered by the buyers when they opened the credit in British pounds, could have been rejected by the sellers but it was not – it was affirmatively accepted when they gave the shipping documents in exchange for British pounds
- Simple explanation for the case – Hawk, horse, rope → different method/kind of payment [owe money in Kenyan shillings, gives UK pounds instead – if this is accepted, then accept something different – this type of payment could be worth more or worth less] once accepted = good consideration
- Lord Denning reason they lose = 1) they are estopped from going back on their representation that they will not insist on their strict legal rights to be paid in Kenyan shillings – here if the sellers are estopped, then they are permanently estopped [only because this is a once and for all transaction]
- **This is an estoppel which effectively extinguishes their rights – because it is *impossible* to go back [unlike High Trees, when the landlord can go back on promising to take lesser rent] – here, already happened**
- Demonstrates to us how some types of estoppel can be permanent [permanently bar the party who makes the representation from going back on their strict legal rights]
- *Example: If agree to buy your car w/ delivery date of Feb. 1 but seller says need it until Feb. 10 and buyer says it is okay, then at that time rejects the car and says are 10 days late → the buyer is estopped and because Feb. 1 is passed then cannot go back*

Note p. 221

- **“Waiver” often has different meanings**
- Should not matter whether it is a variation of contract or a waiver [*High Trees* is a classic case of **waiver**; this case seems to be more like that of a **variation** of contract] – terminology should not matter – need to see whether the change was supported by consideration or by estoppel and otherwise it is gratuitous and not binding
- Binding = either must have consideration for the change, or there is estoppel preventing from going back
- If estoppel – there can be an agreement that there was not an agreement

Societeltalo-Belge Pour Le Commerce ...v Palm and Vegetable Oils (Malaysia) Sun Bhd; The Post Chaser [1982] 1 All ER 19 (QB)

Facts:

- The plaintiffs agreed to sell palm oil (purchased from Kievit) to the defendants, who contracted to sell it to sub-buyers [Conti] and then to further sub-buyers
- [In order to allow the transaction to occur – the shipper has to make a declaration of the shipment (to the buyers) as soon as possible after the shipment = buyers have a more precise idea of when they will receive the shipment]
- The terms of the contract were that ‘declaration of ship to be made to buyers in writing as soon as possible after vessel’s sailing’ – (breach of contract 1) the sellers did not give this declaration of the shipment date until more than a month after the ship sailed [all sub-buyers can at this point terminate the contract because of the breach], but on receipt of the declaration the buyers and Conti **made no protest about its lateness**, [although later the other sub-buyers did = documents are late = no good]
- On Jan 20 the **buyers sent a message requesting the sellers to hand over the documents** covering the consignment to Conti – when the sub-buyers rejected the documents two days later the buyers also rejected them and the sellers were forced to sell the oil elsewhere at a loss
- The sellers claim damages

Issues:

- Whether the buyer’s waived their right to reject the sellers’ tender of documents?
- Whether there was any sufficient reliance by the sellers on this representation for the purposes of waiver?
- Whether or not by requesting the documents, the plaintiffs + other had waived the sellers breach [whether their representation estopped them from insisting on their strict legal rights]

Decision:

- No – the court found that the delay in making the declaration of ship gave the buyers the right to reject the sellers’ tender of documents – finding for the buyers

Ratio:

- As there was no reliance interest the complete elements of estoppel are absent
- The representor will not be allowed to enforce his rights ‘where it would be inequitable having regard to the dealings which have thus taken place between the parties’

Analysis: (Robert Goff J)

- Both counsel were in agreement that the applicable principles were those of equitable estoppel
- Discussed whether the buyers’ message on the 20th constituted an unequivocal representation that they did not intend to enforce their strict legal rights to reject the sellers’ tender of documents
- **There was sufficient unequivocal representation for the purposes of waiver** – was accompanied with the buyers’ request to debit the sellers in respect of the difference between their purchase price and their sale price to Conti – this reinforced the impression that this was not intended to be a provision presentation in the hope that Conti could persuade the other sub-buyers to accept the documents but was a representation by the buyers that they were prepared to accept the documents, therefore waiving any defect in prior declaration of shipment

Whether there was any sufficient reliance (acting upon) by the sellers on this representation for the purposes of waiver?

- There is **no finding of any reliance by the sellers on the buyers’ representation**, aside from the fact that the documents covering the parcel on the Post Chaser were accordingly presented by Kievit to Conti
- Here, all that happened was that the sellers [through Kievit] presented the documents on the same day as the buyers made their representation and within two days the documents were rejected – although the sellers did actively rely on the buyers’ representation, and conducted their affairs with reliance on it, there is nothing that would render it inequitable for the buyers thereafter to enforce their legal right to reject the documents
- A necessary element for the application of the doctrine of estoppel is lacking – **cannot see that the sellers suffered any prejudice by reason of their reliance on the representation**

Class Notes:

- Whether plaintiff’s estoppel waived → 1) Was this representation by the defendant’s acted on by the shipping company? 2) Did they make a representation?
- D’s do not say they will forgive the breach of contract – just ask for the documents [Metropolitan Railway = was this negotiation that insisted that plaintiff’s would not use strict legal rights] and if there was a representation, did the seller’s act on it?
- Buyer’s must **act on the representation** = some cases say it must be acted on to their detriment [this is not the case – ex. High Trees (was not a detriment) – the main thing is they acted on it]
 - What type of conduct is needed (by the person who receives this representation) for this doctrine (estoppel) = equitable doctrine

- **Have they acted on it in such a way as to render it inequitable/unfair to go back on the representation?**
- The sellers clearly relied on the representation that when they requested the documents the sellers relied on them – however, does this render it inequitable to rely on their strict legal rights?
- A representation has been made (buyers said send us shipping documents), and (it has been relied upon), however here is no estoppel = no time to act on the representation before it was revoked
- 2 days later – told documents are rejected [would have brought evidence of conduct in those 2 days to show they acted on the representation – happened so quickly]
- Courts say for estoppel the type of representation that is necessary = there needs to be an unequivocal representation

E) Sword or Shield

Combe v Combe [1951] 2 KB 215 (CA)

Facts:

- The parties were married in 1915 but separated in 1939. On February 1, 1943 the wife's petition, a decree of nisi of divorce was pronounced [there was nothing that dealt with maintenance in the divorce decree]
- On February 9, 1943 the wife's solicitor wrote to the husband's solicitor 'with regard to permanent maintenance, we understand that your client is prepared to make her an allowance of 100l per year, free of income tax'
- On Feb. 19, the husband's solicitor replied that the husband had 'agreed to allow your client 100l per annum, free of tax'
- On Aug 11, the decree was made absolute – the wife's solicitor wrote asking for the first installment of 25, then set dates for the future instalments to be paid – the husband replied saying he could not be expected to pay in advance – and he never made any payment
- On July 28, 1950 the wife brought an action claiming from her husband 675 being in arrears of payment at the rate of 100 per year for 6 ¾ years [wife makes more than husband + had made no application to the Divorce Court for maintenance]
- Byrne J held there was no consideration for the husband's promise to pay his wife, but nevertheless held the promise to be enforceable based on the *High Trees* principle because it was an unequivocal acceptance of liability, intended to be binding, intended to be acted on, and in fact, acted on

Issues:

- Is the husband liable to pay the wife, in absence of any consideration, based on the *High Trees* principle?
- Was there sufficient consideration to support the promise?

Decision:

- No – there is no sufficient consideration and it is also not right for the wife [who is better off] to take no action for 7 years then come down on him for the whole amount

Ratio:

- This principle can never stand alone as a cause of action – therefore, it can never do away with the **necessity of consideration** when that is an essential part of the cause of action

Analysis: (Denning LJ)

- It is important not to stretch the principle from *High Trees* too far – the principle does not create new causes of action where none existed before – it only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties
- [Before someone can sue on a promise – there must be consideration for that promise]
- The defendant is not sued on a promise, assurance, or assertion as a cause of action in itself – he was sued for some other cause, for example – a pension or a breach of contract, and the promise, assurance, or assertion was only a supplementary role
- The principle = where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even it is not supported in point by law by any consideration but only by his word
- The wife can only enforce the promise if there was consideration for it – found there to be no consideration as – the wife may have suffered some detriment because [since she did not apply to the court for 7 years] she might not now be given leave to apply, however assuming she has suffered some detriment by her forbearance to apply to the court, this was not at the husband's request, therefore it is no consideration

Notes:

- Why can she not get the 75 pounds for the ¾ year? – Statute of the Limitation Act [used to be within 6 years from the date of breach] = **now it is 2 years** from the date a reasonable person would have known about the breach

- Argument – it is a mere arrangement; there is no consideration on the part of the wife [can only enforce the promise if were given for consideration] [however, consideration was not seriously argued in this case]
- We know the agreement was intended to be binding, and the husband knew she was to act upon it, and she did to her detriment [these are estoppel-like elements]
- Denning is taking a restrictive view of the argument he took in High Trees – promissory estoppel alone cannot be used as a cause of action [prevents someone from enforcing their right against them]
- Can a promise be enforced just because the other side relies on it [possibly to their detriment]?
 - Denning – says at common law this is not a reason to enforce a promise

Robichaud v Caisse Populaire de Pokemouche Ltee (1990) NB CA

Facts:

- The Caisse [local credit union] obtained a judgement against the plaintiff for \$3787. The Royal Bank also had obtained a judgment against the plaintiff for approximately \$10,000
- As part of a debt consolidation negotiated by a representative of Avco financial services, both agreed to remove their judgments in exchange for the payment of \$1000 to each creditor – a cheque in the amount of \$1000 was sent to Caisse
- Subsequently, the board of directors of Caisse refused to ratify the agreement [which was reached through a local manager] and the cheque was not cashed – the plaintiff sued to compel the Caisse to accept the money as agreed and remove the judgment
- [Classic *Foakes v Beer* case]

Issues:

- Was there a binding agreement to accept the \$1000 in satisfaction for releasing the judgment?

Decision:

- Yes [Angers JA] – the consideration was the immediate receipt of payment and the saving of time, effort, and expense – the implicit in the agreement to settle for 1000 is the proviso that if the lesser amount is not paid, the original debt comes into force

Analysis: (Rice JA – concurring judgment based on promissory estoppel)

- The appellant bases his argument on the principle of promissory estoppel – however, estoppel can only be invoked as a grounds of defense and not as a grounds for action – **a right of action cannot be founded on the principle of estoppel**
- This principle is invoked as a rule of evidence only against an applicant because, it would be unjust to allow him to retract a promise as a result of which the defendant had made commitments to his detriment

Notes:

- In NB – Common law is applied in tort is French
- Commercial advantage to the creditors in promising to take less than the full amount owed
 - NB does not have the equivalent in our Judicature Act – the other 2 judges do not agree with this point
- Rice – same injurious reliance argument [seen in *Combe*] – if the credit union had to sue Robichaud for the debt, they might have been estopped from doing so [R could at least raise the promissory estoppel shield] – however, they never have to sue [they already have a judgment against R – all have to do is execute the judgment against him]
- If credit union had to sue R – would have the problem of whether *Foakes v Beer* got overruled/replaced by the doctrine of estoppel [answer is almost certainly not]
- 1st judge = a promise should be binding [a bird in the hand is worth 2 in the bush]
- 2nd judge = there is a permanent estoppel
- 3rd = agree w/ result reached by the Court [do not know why]
- [Likely a wrong application of the law]

Exception to the Doctrine of Consideration – A Composition Agreement

- “It is an unexplained exception to the doctrine of consideration made out of commercial necessity”
- Happens when all creditors agree to take a % of the debt in satisfaction of the whole
- These agreements make sense to have an agreement where ‘creditors’ agree to each take less [all treated equally, do not have to make a judgement against them]
- Example –
 - A company has a lot of debt from different creditors (5) against them [each of the creditors agree to take \$0.70 on the \$1.00]
 - They each get a cheque for the agreed amount – 1 decides to sue for the entire amount
 - Common law offered 2 reasons why the ‘renegade creditor’ cannot sue for entire amount:

- 1) Every creditor gave its response/promise to take \$0.70 – and if one creditor defaults, they should be able to be sued by the other creditors [hard to see how you would define this in an action – how the actual debtor would raise this defense]
- 2) It would be a fraud on the other creditors to allow the renegade creditor to sue on the full amount [would not be sensible to allow the renegade creditor to sue the debtor for full]

M (N) v A (AT) 2003 BC CA

Facts:

- This appeal is from an order dismissing Ms. A's claim to enforce a promise by Mr. M to pay the balance outstanding on the mortgage on her home in England, if she would come to live with him in Canada with a view to marriage
- In reliance on that promise, Ms. A resigned her permanent job with the Bank of America and moved to Vancouver in July 1993
- Mr. M did not pay off her mortgage; he did however, loan her \$100 000 on a promissory note dated April 6, 1994 – Ms. A applied those funds to her mortgage – about a week later, Mr. M evicted Ms. A from his home and she has not been able to find permanent employment since
- Ms. A sues Mr. N on his promise
- The trial judge – the defendant has not established the primary requirement for the application of the doctrine of promissory estoppel – the defendant failed to establish the existence of a legal relationship between the parties at the time the promise was made

Issues:

- Whether the trial judge erred in refusing to enforce the promise on which Ms. A relied to her detriment [Can detrimental reliance be used to enforce a promise]

Decision:

- No – the promise is not binding – appeal dismissed

Ratio:

- Estoppel (detrimental reliance theory) has not yet been recognized as a cause of action – and there is no reason here to extend the doctrine

Analysis: (Huddart JA)

- Ms. A's counsel is asking the Court to extend the application of promissory estoppel to right a wrong that is otherwise being done Ms. A – as she suffered from her **reliance on Mr. M's promise** greatly to her **detriment**
- Respondent says the Court should not make such a revolutionary change to the law in circumstances where the unfulfilled promise was made at the outset of a romantic relationship that by its nature involves risk-taking and he might have said many promises; Parliament have provided statutory remedies for losses suffered on the breakdown of romantic or marriage-like relationships, among which they have not chosen to include the enforcement of unfulfilled promises
- Respondent also said – the common law for the enforcement of a promise is whether both parties intended to affect their legal relations – and points out that there is no evidence that either party thought a legal relationship had been created by the promise, their legal relations had been affected, or that the promise was legally binding
- *Waltons* = a failure to fulfil a voluntary promise does not amount to unconscionable conduct – something more is required
- *Combe v Combe* = for an estoppel [unconscionable conduct] there must be an assumption or expectation as to a legal relationship between the promisor and promisee induced by the promisor
- Counsel could not point to any evidence supporting a finding that Mr. M intended his voluntary promise to pay the balance outstanding on Ms. A's mortgage to have a binding effect – nor did they suggest Ms. A was of the view his promise was binding – she believed he would follow through on his promise and took the risk of his not doing so
- There was a lack of any reference as to when the promise was to or could be fulfilled, which suggested that the promise was made in the context of a relationship both of them thought would be permanent, and result in marriage, not that it would be fulfilled to compensate Ms. A for the detriment she would suffer from leaving her job and home
- There was also a lack of mutuality – Ms. A could be under no enforceable obligation to stay with Mr. M if he fulfilled the promise
- **Conclusion** → There is very little sign of the adoption of this type of action (detrimental reliance) to enforce a promise

Notes:

- Possibility of consideration → “if you agree to come live with me, I will pay off your mortgage”
 - Issues with this argument – may not have been the reason she was motivated to come to Canada and live w/ Mr. M; Would she have been in breach of contract had she moved to Canada, gotten her mortgage paid off, and moved back? Whether Mr. M would have had an interest in the home – it was not dealt with as a contract
- These issues are likely why she takes the ‘promissory estoppel’ action

- Some Canadian courts have suggested promissory estoppel may be extended to be used as a cause of action – only in dicta [not ever in a binding decision] but in other places (NZ) – detrimental reliance as a cause of action is more highly received

Promissory Estoppel Conclusion

- Cannot strictly sue upon a promise based on PE – can use it resist a person who wants to enforce existing legal rights against you (using it as a defense)

Intention to Create Legal Relations

A) Introduction

- Contractual obligations have traditionally been regarded as voluntary obligations – liability in contracts is thought to be voluntarily created by the parties themselves
- Traditional view = parties to a contract must have *intended* to create legal relations
- Better view = it forms a fourth, discrete criterion of **enforceability**, alongside offer, acceptance, and consideration [this is satisfied once the other three criteria are met except where social or domestic arrangements are involved]
 - Should it be enforced where there is no intention to create legal relations?
 - [Main] Areas concerned – domestic/family relationships, social relationships
 - Other areas – where parties say they do not intend it to be a legal relationship
- In social/domestic relationships, the opposite presumptions apply – closely associated parties will be presumed **not** to intend legal relations, in the absence of clear evidence to the contrary

B) Family Arrangements

- It is a factual presumption that these types of promises are not legally binding [however, there is no rule] – therefore, the presumption can be rebutted by evidence that on the facts of the case it was intended to be legally binding

Balfour v Balfour 1919 Eng. CA

Facts:

- The plaintiff sued her husband for money which she claimed to be due in respect of an agreed allowance of 30 pounds/month

Issues:

- Whether there was a contract entered by the husband with his wife?

Decision:

- The parol evidence does not establish a contract – the judgment of the Court below was wrong and the appeal should be allowed

Ratio:

- Arrangements between husband and wife generally do not constitute a contract, as the consideration is usually natural love and affection and they do not intend they should be bound by legal consequences

Analysis: [Atkin LJ]

- The husband's defence is that he did not enter into a contract with his wife
- It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law
- One of the most usual forms of agreements which do not constitute a contract seem to be the arrangements which are made between husband and wife
 - These agreements are not consistent w/ legal obligations – they are intended to be flexible by the parties, and therefore are not intended to create legal consequences
- Even if there are agreements supported by consideration, these are not contracts **as the parties did not intend** that they should be bound by legal consequences
- The promise here was not intended by either party to be attended by legal consequences – the onus was upon the plaintiff, and the plaintiff had not established any contract

Notes:

- Attitude of 1919 → spousal arrangements are of no business in the courts
- Significance of contract law to women in 1919 → affecting business relationships but not family relationships [therefore, not very useful to women at this time]
- Wife was to stay in England because of her health – and relied on the money promised by the husband [now needs to rely on others to keep herself financially stable]
- Pre-nuptial arrangements always have to be expressly stated that they are legally binding

- During separation – there is a presumption that agreements are legally binding

Note #4 (p.252):

- Family circle arrangement
 - Harvey Sr. promises to pay Harvey Jr. \$10 000/year while he is in law school – then subsequently reduces amount
 - Is this first promise legally binding?
 - This arrangement is caught by 1) absence of consideration [it is not in exchange for attending law school] and 2) it is a family circle arrangement
- Would it make any difference if Harvey offered Harvey Jr. a house to come home and give up job in Toronto and attend law school in Winnipeg?
- *Jones* – mother in London offered to provide free accommodation to daughter in Trinidad to move to London to go to law school; then, is subsequently kicked out of house
 - Daughter gives up a lot for very specific promise – factually rebut presumption of family arrangement due to the circumstances
 - However, she had been there for 7-year and not progressed in law school [must be a time-limit of some sort on the promise]

C) Commercial Arrangements

- Presumed to be legally binding, unless there is compelling evidence to the contrary
- *Rose and Frank* (p. 253) – cannot enforce the contract if parties explicitly say that the agreements are not legal relations
- P. 255 – bank lending money to a client on basis of parent company not guaranteeing the loan [but sending a ‘letter of comfort’] – bank lends 45 million to the instruments, who become insolvent [then sue parent company on basis of the ‘comfort letter’]
- Legal status of the comfort letter – policy that all subsidiaries be managed in a way to meet its commitments
 - Court says the comfort letter is empty + provides temporary comfort to the bank [but it is meaningless comfort]
- Court not tempted to give a stronger interpretation to this letter → not the intention of the parties, the bank knew that the parent company would not guarantee that the debt would be paid – parent company sends the letter not obligated them to accept it, but intending that the bank would take the risk [bank takes the risk – wants the business of the electric company]

Formality: Promises under Seal

- In the early days of common law [before consideration] the only way to render a promise enforceable was to make it under seal [Needed a way to make a promise enforceable + many people were illiterate] Therefore, anything stated in a ‘deed’ is legally enforceable
- **A deed:** is a document that is signed, sealed, and delivered
- Putting an X – w/ red wax and stamp (signant rings) in it [means there are legally formal/important obligations] = a ‘**cautionary devise**’ – because all of the formality signify this is important + are going to be bound by it
- The seal is no longer a necessary condition of enforceability – but it remains sufficient + Canadian common law continues to enforce these promises even in the absence of consideration
- **A deed poll:** cut deed in half in a pattern – one half given to one side, and other to the other [and in the event of a law suit if they matched it was a deed/binding contract]
- A deed was a substitute for consideration for 2 reasons: 1) Deed existed before consideration existed (and was enforceable as a deed); and 2) When consideration became a legal requirement – the seal replaces the need for consideration
- The presence of a seal provides clear evidence that the promisor intended to create a legal obligation; and the act of sealing a promise serves to encourage the promisor to carefully contemplate the legal consequences of his actions
- It is a question of fact whether a document is effectively sealed
- Relaxation of the seal → If party makes indication/intention that the party is supposed to be sealed – that will do [sometimes, parties would draw a seal and write seal, or S, LS]
 - General test – if Courts are convinced the person signing the contract intended to seal it
- This relaxation moved the seal from a ‘cautionary devise’ to a trap for the unwary (does not signify something of great legal magnitude)

Royal Bank v Kiska 1967 2 OR 379 (CA)

Facts:

- 2 brothers involved in separate small business (hair dressing brother operated salon under loan from bank)

- Bank calls in the 2 brothers for more security – other brother signs a guarantee saying he would guarantee the brother's debt [bank then does not take any steps to collect against the hair dressing brother, but does not say it will not] – then calls them in again saying the other brother had to pay the debt, because he signed for the debt under the seal
- The plaintiff brought an action on a guarantee which had been signed by the defendant – at the time of the signature, no wafer seal was attached to the guarantee but the word 'seal' was printed on the document, next to the space in which the defendant wrote his signature

Issues:

- Whether the guarantee was binding, and if there had been no consideration whether the word 'seal' would have sufficed to make the agreement binding

Decision (majority):

- The majority of the court found that the guarantee was binding because it was supported by consideration
- Appeal allowed – there was consideration

Dissent: (Laskin JA)

- Believed there to be no consideration and therefore the guarantee should only be enforced if it constituted a sealed instrument
- The formal contract under seal is not as formal today as it was – and there has been a recognized relaxation of the ancient common law requirement of a waxed impression [neither wax, nor an impression is obligatory any longer]
- A gummed wafer is enough when it is affixed by or acknowledged by the party executing the document on which it is placed
- Would also hold that any representation of a seal made by a signatory will do
- The question is how should the common law be developed and relax the formality and still affirm that a gratuitous promise is not to be enforced merely because it is in writing
- **Neither the words 'given under seal' nor 'signed, sealed, and delivered' will suffice even when taken collectively, to make a signatory chargeable under a sealed instrument when it has not in fact been executed under seal**
- Formality serves a purpose and should be preserved – especially since the operative act was the affixing or adoption of a seal [and that a *testimonium* or attestation clause was not required]
- Does not matter that the intention of the executing party wanted to adopt a seal as his own in order to free him from liability – and that this will bind although there is actually no seal affixed
- Do not believe that the word 'seal' preserves a sufficient amount of formality – as this is merely an invitation to place a seal in that spot [it affirms the need of formality instead of dispensing it]

Notes:

- Laskin – the relaxed seal requirements had become a trap for the unwary
- Had it been properly sealed he would have been undoubtedly responsible for the brother's debt
- Likely a caution to other institutions that there should be more to a seal than signing a printed document like any other document
- There is some division of authority in Canada
- In AB – we have an additional requirement for a contract of guarantee [*Guarantee's Acknowledgment Act*] – here, if want to get the guarantee signed would have to send guarantor to a lawyer who explains the legal consequences of the guarantee and makes sure the guarantor understands the guarantee

Note # 2 (p. 260):

Justice Bastarache [dicta]

- To intend a seal, there must be evidence of a conscious and deliberate act

FORMATION OF THE AGREEMENT: CERTAINTY OF TERMS

1. Introduction

- One of the requirements of a contract's formation is that its terms define the parties' obligations with certainty
- Determine whether the parties are truly in agreement – whether they share an unambiguous understanding of their respective rights and obligations → whether the parties have achieved '*consensus ad idem*' [if no, then parties have made an agreement – not entered a contract]
- If it is not possible to identify the terms upon which the parties have agreed, there can be no contract
- In order to grant a remedy, it must be possible to define precisely what it is that the party in breach was obliged to do under the contract
- The intention of parties to an agreement is relevant to the question of whether the terms used are sufficiently certain to support a contract in two respects:

- 1) If there is a degree of uncertainty in the terms of an agreement, the court will not attempt to resolve that uncertainty in aid of the conclusion that the agreement is a contract unless it is clear that the parties intended to contract
- 2) The exercise of determining whether the terms of the agreement define the parties' obligations w/ sufficient certainty depends upon ascertaining the parties' intention as to the meaning of the language used
- Issue is not what each party actually intended [subjective] but rather what they must reasonably be viewed as having intended given the language used and the circumstances and aim of the transaction [objective]
- 1) Imprecise/absence language
 - Ex. Plumber case
- 2) Leaving an important matter to be later agreed
 - Ex. "Quantities to be agreed" – common source of uncertainty → leave an important term/element of the contract to be determined in the future
- 3) Apparently reach an agreement but understanding the agreement will be formalized later in a formal document → parties reach an agreement (w/ elements), then say they will formalize the agreement in the future
 - Ex. Real estate purchase – agree w/ the agent [in an interim agreement] to buy the house + vendor signs the agreement [this does not convey the house] – before it is finalized/formalized, there are more agreements/nuances that need to be made/dealt with before sign transfer of land [deed of conveyance]
- 4) Incomplete terms (skeleton agreement) – but agree to negotiate the details later
 - Is there a breach if one side fails to negotiate?

2. Vagueness

R v CAE Industries Ltd. 1986 FC [Imprecise Language]

Facts:

- Negotiations took place between the gov't of Canada and the respondent about the possibility of the respondent taking over and running an aircraft maintenance base no longer required by Air Canada
- In March 1969, a letter was sent from ministers + then the respondent arranged for the purchase of the base by a subsidiary company
- In 1971, the workload at the maintenance base diminished and the respondent sued for breach of contract

Issues:

- Was a contract intended?
- Is the contract vague + uncertain or incomplete?

Decision:

- Appeal dismissed

Ratio:

- In business relationships, the courts will make every effort to apply definite meaning to vague terms in a contract so as not to render it unenforceable; this is especially true if it is obvious that the parties intended to enter into a binding relationship, or if there was part performance

Analysis: (Stone J)

Was a contract intended?

- The circumstances in which the letter was written distinguishes this case from others where it has been found that no intention to contract was present – it is clear from the evidence that the parties treated the document as a binding contract to the extent that it was partly performed
- Onus of proof here is on the person who asserts no legal effect is intended + the onus is a heavy one – there was an intention on the part of both parties to enter into a binding legal contract

Is the contract vague + uncertain or incomplete?

- The contract does not leave anything unsettled that was necessary to be settled between the parties – it is an entire contract capable of standing on its own feet
- But the language used, the parties intended that at least 40 000 direct labor man hours of 'set-aside' work would be provided = issue of whether this included over-head costs or not [agree w/ trial judge that it included costs]
- 'Best efforts' → the gov't promised to employ to secure additional work – [need to discover what the parties intended by it] – trial judge said it meant to leave no stone unturned
 - Must look at it in the light of the contract itself, the parties to it, and its overall purpose as reflected in the language it contains – this created a broad obligation to secure for the respondent aircraft repair and overhaul work up to the limit it lays down

- Agree w/ trial judge that this feature of the contract obliged the gov't to employ its best efforts to secure additional work from other departments and crown corporations

Class Notes:

- Air Canada base – important element of the city's economy – government tries to find a buyer for the maintenance base [CAE Industries agree to take on the former Air Canada base] – negotiations had gone high up [ministers in Ottawa had to sign]
- Agreed for this base to viable need 700 000 hours of work to complete base – government says they would use best efforts to cover the work [guarantee only 40-50 000 direct labor hours]
 - [Court says there is not enough content to make this enforceable]
- Government says they never intended letter to be legally binding – a political document, not a legal document [commercial arrangement – presumption that it is legally binding, therefore the onus is on the government to show that it is not a contract] – Court says there is no evidence that this agreement was intended to be a mere political arrangement + not a contract → CAE also performed all of the obligations
- 40-50 000 hours of work
 - Ordinary language would say they did commit to these hours
 - Gov't argument – commitment was too uncertain to be enforced
 - **Problem** – how much they are going to pay – an element of the contract is price [the agreement is silent on this point – there is no indication – did not talk about price at all]
 - Presumption is it will be a 'reasonable price' of the 'going-rate' – however, the government and the CAE have a different version of what the going rate should be
 - Government = work done at standard labor rates
 - CAE = not just labor cost [also labor, space, heating, billing, etc. – ALSO overhead costs]
- Court agrees w/ CAE's version → because this is what it costs – would not be economically efficient if the overhead costs were not also accounted for – Gov't interpretation of the cost is not a reasonable one
- Presumption for cost is the standard factory rate which includes the overhead costs [not just the standard labor rate]
- Gov't says for the balance of the hours – would use their best efforts to secure this work [then say they tried to secure it, but could not]
 - "Best efforts" does not guarantee the work – but it does guarantee that no stone is left unturned in trying
 - Likely left 'a few stones unturned' – this is where the damages would play a role
- Potential sources of a strong legal argument of uncertainty
 - In a set aside work – how much is going to be paid for it
 - To get that work – gov't must leave no stone unturned
- Court goes as far as they can to keep an agreement [lacking all necessary details] enforceable
- Lacking necessary details = those important details that the parties have not agreed upon

3. Incomplete Terms

- In each of these following cases, the parties left an aspect of their agreement unspecified

May & Butcher Ltd v R 1934 2 KB 17 (HL)

Facts:

- End of WWI – UK gov't had tents left over [wanted to dispose of all surplus tents – May & Butcher agreed to buy total stock of old tents]
- Prices to be paid = "shall be agreed upon from time to time by commissioner and purchasers"
 - [There is an agreement for price here]
- There is a falling out – when May & Butcher seek to enforce the contract, the government says there was no agreement

Issues:

- Whether or not the terms of the contract were sufficiently defined to constitute a legal binding contract between parties

Decision:

- The agreement is not a binding agreement – the deposit was for the purpose of securing the carrying out of the terms of the bargain when it had been made complete [such completion never took place]

Ratio:

- **Basic principle** – price is a central element, and must be 1) fixed/determinable by the contract or 2) ascertainable by a mechanism that the parties have agreed and that is bound to work
- A term yet to be agreed can mean there is no contract if it is an essential term; it is simply an agreement to agree + it is not enforceable

- **Principle of uncertainty** emerging from *May and Butcher* → parties, property, price – must be fixed by the conduct OR ascertainable by a mechanism that is bound to work
- The Court cannot read terms into an incomplete contract

Analysis: (Lord Buckmaster)

- There was never a concluded contract between the parties – an agreement between 2 parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all
- Argued that the as the fixing of a price has broken down, a reasonable price must be assumed – that depends in part on the terms of the *Sale of Goods Act*
- Same thing between allowing price to be fixed by a third party and allowing the price to be fixed by the parties in the future
 - If the agreement is to sell goods on the terms that price is to be fixed by a third party, and the third party does not make such as a valuation then the agreement is void
- “Disputes arising out of this agreement to arbitration” → Until the price is fixed, there is no agreement – therefore, an arbitrator cannot be used to make a contract, only to mediate an existing agreement
- **Only one way this price can be fixed – by the subsequent agreement [no contract if do not agree] – both sides have reserved a veto right**

Class Notes:

- M+B argue that all disputes arises out of the agreement were to be submitted to arbitration
 - Court does not buy this argument – the arbitration clause was only to apply to agreements [and until there is an agreement on the price of the tents, there is no binding legal agreement]
- Dispute here – parties have said how they are going to determine the price (say they are going to agree on the price – have not said going to pay high price or low price) and if do not agree, there is no price
 - By saying ‘we must agree’ then each party has a veto [only have to pay the price they agree on]
- P. 119 – M+B argument – know did not agree to price, should have to pay reasonable price
- Depends on Sale of Goods Act S. 8 → 1) may be left to be fixed in a manner hereby agreed; or 2) or determined by the course of dealings by the parties
 - Here, price is not left to be agreed by someone else
 - Only mechanisms here – is the parties own agreement
- S. 9 → price fixing mechanism [3rd party]
 - Contract initially valid, but if 3rd party refuses to fix price – contract is void
- Court says – here the case is analogous to the 3rd party refusing to fix price
 - When the parties failed to agree in the price, the contract became void
- **Basic principle** – price is a central element, and must be 1) fixed/determinable by the contract or 2) left to a mechanism that the parties have agreed
- Here, **the flaw in the argument is that the parties agreed to determine the price therefore no one else could determine the price for them**
 - Therefore, the arbitration clause could only come into effect once the price was determined by the party [not by any other way]
- COULD HAVE put an arbitration clause in – but made it clear it related to the fixing of the price → “if parties failed to agree, the price can be fixed by arbitration”
 - If price can be determined by arbitration or by market price – there is a **mechanism** + this saves the agreement from uncertainty [PROVIDED THAT IT WORKS]
- Here – unique product [surplus tents in various types] → more difficult to determine the market value
- If set up a mechanism + it fails = removed the right of the court to fix the price
- **Principle of uncertainty** emerging from *May and Butcher* → parties, property, price – must be fixed by the conduct OR ascertainable by a mechanism that is bound to work
- **Certum est quod certum redid potest** → “Something is uncertain which can be reduced to certainty – can be fixed by the mechanism established by the parties ”

Example:

- Agree to buy car at a price fixed by the dean [3rd person]
 - If dean does not want to fix the price – this mechanism fails
 - ALSO removed the right of the court to fix the price

Example:

- Agree to buy car at market value
 - Market value is a 3rd person mechanism
 - Parties might disagree as to what fair market value is – Court will require the best evidence of the market value + decide what the price is

Example:

- Order sets of taps from a plumber
 - Contractor by remaining silent about the price has agreed to pay the reasonable market price of the taps
 - By remaining silent, does not remove the court from having the right to determine the reasonable price

Difference:

- CAE – were silent to the price, however they clearly intended they were to be paid for the service [therefore, the court could determine the price]
- May & Butcher – once party stated it is their right to determine their own price, they have not authorized anyone else to decide the price for them

Hillas & Co v Arcos Ltd [1932] 147 LT 503 (HL)

Facts:

- Hillas [an English timber firm] brought an action against Arcos [the business representatives of the Russian gov't for breach of a contract to supply 100 000 standards of Russian timber during 1931]
- Under the agreement H agreed to buy a stipulated amount of timber 'of fair specification' on very favorable terms from A during the 1930 season
- Clause 9 [Option Clause] → "Buyers shall also have the option of entering into a contract with the sellers for the purchase of 100 000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain goods on conditions and at prices which show to them a **reduction of 5% on the fob value of the official price list at any time ruling during 1931**. Such option to be declared before the Jan 1 1931"
 - Have option to buy more timber from A at 5% lower than fob value
 - [Is this price fixing formula workable? → In theory, yes – BUT only as long as can identify the official price list, otherwise there is a mechanism but do not know where to subtract the 5% from]
- After the agreement with H, A entered into a contract w/ Central Softwood for sale of its entire limber production for shipment to the British Isles for the 1931 season

Issues:

- Was the option provision a binding agreement?

Decision:

- Appeal allowed – a binding contract existed to sell the 100 000 standards

Ratio:

- A contract to negotiate is enforceable
- The courts should intervene to determine the terms of an agreement through context and intentionality of the parties

Analysis: (Lord Wright)

- It is clear that both parties intended to make a contract and thought they had done so
- The contract here is clearly an installment contract over the season 1930 since the whole quantity could not be delivered in one shipment – it is obvious that the parties either cannot or do not desire to fix precise dates for the plurality of shipments which is contemplated – therefore, they leave a portion of these shipments over the period to be determined as circumstances require
 - First, by readiness of the goods and second, by the actions of the appellants who on receiving the declarations will be entitled to a reasonable time on each occasion in which to give the necessary shopping instructions in accordance with which the respondents will have to provide tonnage because it is a cost, insurance, and freight contract
- Price has been specifically fixed by the clauses which have reference to the respondent's new revised schedule supplemented by a further provision in cl. 8 that the appellants were to have the advantage of any beneficial terms granted to any other buyers which directly or in effect reduced the price paid or consideration given for the goods
- Cl. 9 = a binding offer which the appellants are entitled by accepting before Jan 1 to turn into a contract if other objection does not prevail
- The contract is clear and complete as to the price based on the stipulations – it was contended no official price list would be issued until 1931 – but it is practice of the respondents to issue such a list
- **The official price list is not a mere contingency but a practical certainty that the mechanism would work**

Class Notes:

- There is an official price list – no need to determine what would happen if there was not; As long as there is an official price, the mechanism is valid + will work as long as there is; Certainty of price is the easy issue here
- Political background makes it difficult:
 - Boycott on Russian timber from British buyers [1930] – Hillas breaks this boycott in 1930 (H recognizes Russia is in a difficult position + needs money for their timber)

- H is in a powerful bargaining position – no one else is buying timber
 - OPTION contract– “to buy standards in 1931” [future = issue, how much to pay?]
- NEED = the price list + what the parties **mean** by the price list
- PROBLEM → 1931 – timber boycott is over [Central Softwood made a deal to buy all of the timber] – if 1931 agreement is valid, causes A to be in breach of the agreement between H
- What is price list?
 - H position – 5% off the wholesale price [the price which A sold timber to the consortium]
 - A position – each year circulate retail price list in UK [pay 5% off retail price]
- Court says it is the retail price that they meant by the “official price list” -- Still puts H in a preferential position [still get 5% off what anyone else in UK would get]
- Parties set up mechanism – there was a practical certainty this mechanism would work + it did work because they could identify the 1931 official price list
- FOB value → “free on board” = obligation of the seller is to get the timber to the port and on board – cost of the rest is buyer
- CIF contract [international trade] = contract price includes carriage insurance + freight
 - Free of charge to the buyer until good arrive in the UK/gets to harbor [includes price of transporting the goods + getting to UK port of entry]
- 3rd P = Property – what did the buyers have the right to buy under the 1931 agreement?
 - 100 000 standards
 - How do we know what the parties mean by 100 000 standards?
 - Courts say – it is part of a larger agreement [the 1930 agreement – which applies to standards of Russian softwood timber]
 - It is only clear when look at the rest of the agreement → look at the context + intentionality of the parties
- Quality of the goods?
 - ‘Of fair specification’ – this is a party-agreed means of measuring any performance that is rendered
 - The quality of the property is not defined by the agreement – but it is possibly ascertainable [must be softwoods of fair specification] – this term is implied into the option
- A argues that ‘fair specification’ does not mean this
 - In 1930 = no trouble; 1931 = the consortium had no difficulty for negotiating fair specification of the entire crop in a few days
 - Can look at how it was applied in 1930 + how the new consortium determined it to determine what ‘fair specification’ means
- Parties past conduct tells us how these terms were applied – can apply in the same way
- Court decision based on:
 - A already received consideration in 1930 – H dealt w/ them when no one else would
 - Option clause was part of a bigger deal
 - If option clause was void – A would have gotten all they wanted, but w/ only a portion of the price/deal [H would have only gotten a portion of what they were entitled to]
- “Buyers shall also have the option of entering into a contract with the sellers for the purchase of 100 000 standards...”
 - Issue → is it an contract to enter into a contract OR an agreement to agree in the future?
 - Do not want to write a contract in a way that looks like an agreement to agree in the future – this is often not a binding contract
 - Court says → real question is whether there is a binding contract today or not?
- **Would have been better ‘buyers have the option to buy the 100 000 standards on the following terms ...’**
 - Want to make it clear the buyers have entered into a binding contract for 1931 + the terms have been agreed to

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

Facts:

- The defendants [operators of a fleet of motor coaches] agreed to purchase a piece of land from the plaintiffs, who operated a service station on adjacent premises
- The sale was made subject to the defendants entering into a supplemental agreement to purchase all the petrol required for their business from the plaintiffs ‘at a price to be agreed by the parties in writing and from time to time’
- There was also an arbitration clause → “if any dispute shall arise on this agreement the same shall be submitted to arbitration in the usual way in accordance w/ Arbitration Act”
- Land was conveyed to the defendants + for 3 years the defendants obtained all their petrol from the plaintiffs until they thought they could purchase their supplies on better terms elsewhere

- D tried to repudiate the supplemental agreement + P sought a declaration that the agreement was binding and an injunction to prevent the defendants from purchasing their petrol elsewhere
- Trial found in favor of plaintiffs

Issues:

- Does the fact that no price was quoted mean that the contract was void for uncertainty?

Decision:

- No – Appeal fails

Ratio:

- Past performance may indicate that a contract is binding

Analysis: (Scrutton LJ)

- Hillas = House of Lords said they had not laid down universal principles of construction in *May* + that each case must be decided on the construction of the particular document
- Hillas = the parties believed they had a contract
- It clear the parties believed they had a contract + acted for 3 years as if they had → there is to be implied in this contract a term that the petrol should be supplied at a reasonable price and should be of reasonable quality
- Agree w/ trial there is an effective and enforceable contract, although no definite price had been agreed with regard to the petrol

Class Notes:

- Argument – all we will pay is the price we agree upon?
 - Diminish this argument → if do not agree, must have a mechanism for determining the price
- *May and Butcher* establishes if agree to agree upon price in future – court cannot say must pay a reasonable price, because each party has reserved a veto → only way to cure the problem is to have a mechanism to determine that price
- Here the mechanism → the arbitration clause
 - Why does not arbitration clause work here and not in *May and Butcher*?
 - In *May and Butcher* – dealing with FIRST purchase of tents under the agreement, here the agreement had been going on for 3 years along w/ the purchase of land [part of a bigger agreement]
- Here –we have a mechanism + this mechanism under these circumstances allow arbitration to fix the price
- **Clause is similarly worded to *May and Butcher* BUT part of a bigger deal = for selling land gets an agreement to buy their gas [part of the consideration for their sale of land] – if other party backs out they are getting what they wanted, but do not have to pay the entire price they agreed [buying the gas from them]**
- This case deals w/ a mechanism set up in the contract to determine the price – however, not clear the arbitration clause applies to price, however Court interprets it that it does apply

4. Agreements to Negotiate

- A distinction may be drawn between 1) an agreement to perform a transaction on unspecified terms or on terms to be agreed and an agreement to negotiate in an endeavor to arrive at terms pursuant to which a transaction will be performed
 - In 1) the subject of the agreement is the transaction itself, and in 2) the subject is the process by which it is hoped a transaction will be concluded
- The view that an express or implicit agreement to negotiate may in itself constitute a contract has found few adherents among the judiciary – 1) it is impossible to determine the content of a duty to negotiate; and 2) there is no basis upon which to determine damages for breach of such duty

Empress Towers Ltd v Bank of Nova Scotia [1991] BCLR

Facts:

- The landlord, Empress Towers, brought a petition under s. 18 of the Commercial Tenancy Act against the tenant, the *Bank of Nova Scotia*, seeking to obtain a writ of possession under s. 21 of the Act
- The first lease was made in 1972, and it expired in 1984.
- A new lease was made w/ a renewal clause [renewal – rental shall be the market rental prevailing at the commencement of the renewal term as mutually agreed between landlord and tenant]
 - [Is this void for uncertainty or legally enforceable?]
 - It is void for uncertainty → both sides have a veto [if stopped after renewal term and did not include as mutually agreed between... this would enable a price fixing mechanism → the phrase at the end adds a veto on both parties]
- The 1984 lease was due to expire on August 31, 1989 – On May 25 the bank exercised its option to renew the lease for a further term of 5 years and the bank proposed a rental rate of \$5400 a month
- No written response was received from Empress

- Finally, on August 31 Empress said it would allow the bank to remain on a month-to-month basis if \$15 000 was paid and then a rent of \$5400 thereafter
 - Landlord brings an action to the bank – order for tenant to give up possession of premises
 - Defence bank raises = in order for the renewal clause to work it requires negotiation [they at least have to discuss the renewal rate – therefore, the landlord failed to negotiate in good faith]

Issues:

- Whether the renewal clause was void either for uncertainty or as an agreement to agree?

Decision:

- No – appeal dismissed

Ratio:

- The courts will try wherever possible to give proper legal effect to any clause that the parties understood and intended was to have legal effect
- There is a requirement to negotiate in good faith when reaching an agreement

Analysis: (Lambert JA)

- England – *Brown v Gould*
 - 1) Where rent is “to be agreed” = such a clause cannot be enforced
 - 2) Where rent is to be established by a stated formula but no machinery is provided for applying the formula to produce the rental rate – often the courts will supply the machinery
 - 3) Where the formula is set out but is defective and the machinery is provided for applying the formula to produce the rental rate = machinery may be used to cure the defect in the formula
- The courts will try wherever possible to give proper legal effect to any clause that the parties understood and intended was to have legal effect
- **The effect of the mutual agreement** is that the landlord cannot be compelled to enter into a renewal tendency at a rent which it has not accepted as the market rental
- BUT it also carries with it 1) an implied term that the landlord will negotiate in good faith with the tenant with the objective of reaching an agreement on the market rental rate, and 2) that agreement on a market rental will not be unreasonably withheld

Notes:

- Good faith → how do we measure on these facts whether the negotiations are in good faith or not?
- What does the court say to how we can measure good faith in this case if necessary? → by comparison of rental prices to other tenants can determine whether the landlord is negotiating in good faith – a duty to negotiate in good faith with nothing more is empty
 - Negotiating in good faith with some sort of criteria to guiding negotiations can allow us to measure the good faith
- Do not have to assess damages in this case – landlord is not suing for damages, they are suing for possession
- Easy Case:
 - 1) Case of total failure of good faith on the part of the landlord – recognizing ability of negotiations of good faith [negotiations are to be guided by criteria – not good faith in the abstract]
 - 2) No one is suing anyone for damages – merely suing for possession
- Ex. 1) Tenant wants to sub-lease to someone else
 - Tenant may sub-lease w/ consent of landlord, that shall not be reasonably withheld [needs to be refused for a certain reason – do not want premises used for X] – court is given criteria to judge this upon [merely says ‘reasonably’ however it is a workable standard]
- Ex. 2) Tenant may sublease with consent of the landlord, which may be unreasonably withheld
 - AKA – they have a veto [can refuse to accept the tenant on any grounds]
 - This is not unusual in an ‘in-demand’ location/building

Mannpar Enterprises Ltd v Canada 1999 BC CA

Facts:

- M held a permit under contract with the Crown [acting through the Department of Indian and Northern Affairs], to remove + sell sand and gravel located on an Indian reserve – permit had a 5-year initial term [Clause 7 = permittee has the right to renew the permit for a further 5-year period subject to ...]
- Crown will only do what band counsel tells it do – Crown has a fiduciary duty to act in best interests of the land [cannot act on own]
- Both sides anticipated lease would last 10 years – it legally lasted 5 years [renewal period required re-negotiation of the annual surface rental rate + royalty]
- Manpar gives notice they intend to renew permit for further period of 5 years + want to negotiate the royal and rental rate

Issues:

- Was clause 7 uncertain as found by the trial judge? Should there have been an implied term requiring the Crown to negotiate for a renewal or negotiate in good faith for a renewal?

Decision:

- No – no enforceable agreement arose out of the language of the renewal clause – appeal dismissed

Ratio:

- In order to imply a duty to negotiate in good faith, there must be an objective benchmark mentioned in the agreement in order to measure the good faith by

Analysis: (Hall JA)

- In the cases [ex. Empress Towers] the courts were implying terms into the leases that were continuing leases – here, the parties only anticipated that the arrangements may last 10 years
- In Empress, there was a benchmark [market value] + without a benchmark or standard by which to measure such a duty, the negotiation concept is unworkable
- The implication of a term can only be made if it is the case that both parties would be likely to agree that such a term should be implied = officious by-stander test
- A court will not imply a term into a contract merely because they think such a term would be reasonable or would likely be more satisfactory
- The language chosen in the agreement + in the renewal clause reflects a stated desire on the part of the Crown affording it considerable latitude in deciding whether or not to agree to any extension of the 5-year permit originally granted and in deciding on what terms might be acceptable if it were to agree to any such renewal

Class Notes:

- Band = do not want to talk about it until 1st 5-year period is over
 - Band, therefore the Crown do not discuss – failure to discuss in bad faith
 - Differs from Empress Towers: – there was a measurement (guiding criteria) to the good faith negotiation [were going to negotiate in relation to the market value rates] – here, no guiding criteria [who can measure the good faith/whether they were acting in bad faith?]
- Second reason courts were unwilling to say there was a duty to negotiate in good faith → there was no right to renew [the lease was over after 5 years – there was a possibility of renewal if negotiated, however, still ended after 5 years] – a free standing right to negotiation of good faith but not anchored in a continuing lease [no right to renew] and no measurement of criteria

Wellington City Council v Body Corporate 51702 (Wellington) 2002 NZLR CA

Facts:

- The Council wrote Alirae – “Council officers will negotiate, in good faith, sales of Council’s leasehold interests to existing lessees at not less than the current market value of those interests”
- Alirae then argued that the Council offered to negotiate in good faith, and A accepted this offer by its conduct in entering negotiations on that basis
- The W City Council appeals from a judgment holding it liable to pay Alirae damages for breach of contract
- This contract = a ‘process’ contract + it obliged the Council’s officers to negotiate in good faith w/ Alirae [lessee] for the sale of the premises
- Trial judge found that if the Council had negotiated in good faith, a contract or sale + purchase probably would have resulted – therefore, Alirae lost profit it would have achieved from developing the premises in the manner it had in mind

Issues:

- Was the ‘process’ contract enforceable in law or was it merely an agreement to agree?

Decision:

- The contract had not laid out any specific obligations of the parties, nor was there any consideration for the negotiations. – Appeal allowed + contract deemed unenforceable

Ratio:

- If a contract specifies the way in which the negotiations are to be conducted with enough precision for the Court to be able to determine what the parties are obliged to do, it will be enforceable

Analysis: (Tipping J)

- Contracts to negotiate should not be held in all circumstances to be unenforceable – enforceability will depend on their terms and on the specificity of those terms
- Whether the terms of a process contract are sufficiently specific to be enforceable is an issue separate from whether the substantive agreement is sufficiently certain to be enforceable – if it is, then the process contract will have borne fruit and no issue of breach can arise

- If the substantive agreement is not sufficiently certain to be enforceable, the negotiations will have failed to bring about an enforceable contract
- For there to be an enforceable contract, the parties must have reached a consensus on all essential terms; or at least upon objective means of sufficient certainty by which those terms may be determined
- Those objective means may be expressly agreed or may be implicit in what has been previously agreed
- There are some cases when process contracts are enforceable – ex. tender cases

Class Notes:

- Will negotiate in good faith for the sale of the premises – trial judge said that the city council failed to conduct the negotiations in good faith [had not talked about the sale in any meaningful way]
- Court of appeal refusals to agree with the argument that they had failed to negotiate in good faith → any agreement just to negotiate is unenforceable [do not know what they are going to negotiate] + merely adding that they would negotiate in good faith does not make any difference [the perception of good faith is abstract – do not know the content to measure the good faith by]
- Reason House of Lords rejected a stand-alone duty of good faith – repugnant to the adversarial position of the parties [if have an abstract duty of good faith, the problem is you cannot measure it in adversarial negotiations]
- Problem in trial judge = if had negotiated in good faith, would have agreed on the sale of the property [we do know this + cannot judge this sort of negotiation]
- Good faith negotiation w/o any criteria to guide it is an empty promise – we cannot give it content
- Occasionally good faith negotiations are enforceable [Empress Towers] = **shows they are to be guided by objective criteria [i.e. market rates] BUT also were not faced w/ the issue of the need to assess damages [this makes the issue more difficult]**

5. Anticipation of Formalization (p. 149)

Bawitko Investments Ltd v Kernels Popcorn Ltd 1991 ON CA

Facts:

- This is an appeal from a judgment declaring the appellant [Kernels] in breach of an oral contract to grant the respondent a franchise to operate a retail store at a shopping center in Hamilton [Jackson Square]
- A provided R with w/ a Kernels 'information package' – this included a copy of the 'draft' or 'standard' form of franchise agreement [50 pages long]
- After, they met and the trial judge found that A orally contracted to grant R a franchise agreement for Jackson Square = during this meeting a few portions of the standard document were amended
- R acknowledged that the parties agreed to embody their mutual obligations in a formal written document
- Passander [the sole representative of Bawitko] approached A w/ a view to acquiring franchise rights for a Kernels store in Jackson Square

Issues:

- Can the oral contract constitute a complete and legally enforceable contract or whether the oral contract was not in itself a complete + legally enforceable contract but was subject to a written, formal document being settled and approved by the parties?

Decision:

- The nature of the franchisor-franchisee relationship mandates there be express agreement on the detailed provisions set up to regulate the business relationship of the parties
- Essential terms remained open for negotiation = a contract has not been established

Ratio:

- The effect of a stipulation that an agreement is to be embodied in a written formal document depends on its purpose – must look at the parties' intentions

Analysis:

- Parties may contract to make a contract – they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document, they will have fulfilled all the requisites for the formation of a contract – the fact that a formal written document is to be prepared afterward and signed does not alter the binding validity of the original contract
- HOWEVER, if the original contract is incomplete because essential provisions have not been settled, or it is too general to be valid, or the understanding by the parties is that their legal obligations are to be deferred until a formal contract has been signed = not a contract

- The trial judge did not specify all essential terms that were to be incorporated into the intended written franchise document – he also did not find that it had been agreed at that meeting that the written franchise agreement was to be in the form of the document to govern the Jackson Square franchise
- P made it clear that the focus of the meeting was on the business aspects of the deal, namely the provisions relating to the personal guarantees – the remaining provisions were not the subject of negotiation or discussion

Class Notes:

- Information package included standard franchise agreement by Kernels Popcorn
- 4 Key terms → 1 includes the personal guarantee – company can be sued personally
- Franchise agreement was never signed
- Question – do we have a contract based on the oral agreement or is there no contract until the formal document is signed? [if all essential terms are agreed (even if orally) then can be a formal contract w/o signing]
 - Had the parties agreed to all of the essential terms?
 - Court → No, in a relationship as important as a franchise agreement need it to be signed – has many important terms + cannot take them to be agreed if the document had not been signed [if in dispute on the franchise terms – the document would not have been signed]
- If all the key terms of the contract are agreed + still do not have the formal contract signed, there can still be a contract [ex. Ron Engineering – allowed for a contract w/o signing – because the tender document had all the terms – and the parties bid based on those terms, therefore when the tender was acceptance a formal contract was made (interim agreement between the parties was binding)] – unless it is explicitly stated – may agree to all terms, but say there is to be no contract until formally signed
- Example: Real estate agreement [interim agreement]
 - AB law – make sure interim agreement is fully legally binding, and the subsequent deed of conveyance is just an aspect of the agreement
 - Unless “subject to [formal] contract” = means not bound until formal deed of conveyance [UK]
- Cannot be certain there was a contract entered into because they did not sign [therefore, agreeing to key terms + conditions] = even if had agreed to all key terms, need to be aware of cases where parties state they are not to be bound until a formal contract is signed [AKA “agreement is subject to contract”]

PROMISES

Formality: The Requirement of Writing

A) Introduction

- The ***Statute of Frauds*** [passed in 1677 by English Parliament] is one source of formal contractual requirement – it warrants special attention because it applies to important kinds of contracts (ex. contracts for an interest in land) + because either it or legislation deriving from it are in force in most Canadian provinces
- Main purpose = prevent fraudulent litigants from enforcing promise that had never been made
 - At the time – juries would decide cases based on their own opinions [regardless of the facts given]
 - Parties were also not allowed to testify [could pay witness to testify on one’s behalf]
 - Defendant could not say anything to exonerate him/herself
- **S. 4** = certain kinds of contracts had to be evidenced in writing to be enforceable
- **S. 17** = imposed a writing requirement on contracts for the sale of goods, wares, and merchandize for a price of 10 pounds or more
 - This is reflected in the *Sale of Goods Act* s. 6 in AB [for goods over \$50]
 - Contract for sale of goods of \$50 or more is not enforceable by action unless buyer accepts the goods in whole or in part, gives deposit ... or unless some document in writing or memorandum
 - Accepting the goods = performing any act in relation of the goods that recognizes a pre-existing contract of sale [ex. signing a credit card bill is likely sufficient]
- In AB – the province has not re-enacted the statute; however, the writing requirement in s. 4 for contracts of guarantee has been supplemented by the *Guarantees Acknowledgment Act* which requires **additional** formalities for guarantees given by individuals [notary explains the guarantee to the guarantor + are sufficient he/she understands it]

B) Categories of Contract Under Seal

- Section 4 of the Statute of Frauds cover 5 categories of contracts – however, the bulk of litigation concerning the Statute involves contracts for the sale or disposition of land

- No action brought upon these – unless the agreement or some memorandum or note is in writing and signed by the party to be charged or his/her agent [i.e. the defendant]
- 1) Contracts to Charge an Executor or Administrator on a Special Promise to Answer Damages Out of His Own Estate
 - This was likely popular because the administrator of an estate used to take the residual property in the estate, and since the estate was not liable for the deceased's debts or wrongs, there was a pressure felt by the administrator to compensate creditors/victims out of his own funds
 - Cannot sue executor if promise to make damages claim out of own property [unless in writing]
 - [Think of *Thomas v Thomas*] – executor is under pressure to recognize promises of the estate
 - [Subject to writing requirement in AB]
 - *Not important today – now, estate is liable to pay debts
 - 2) Contracts Made Upon Consideration of Marriage
 - This covers contracts wherein a party promises to settle property upon another in consideration of marriage [major transfers of property occurred]
 - [Ex. *Shadwell v Shadwell*] – promise made in contemplation of marriage
 - [Subject to writing in AB]
 - 3) Contracts to Answer for Debt, Default, or Miscarriage of Another Person
 - Refers to guarantees, not indemnities
 - I = an undertaking to be liable regardless of whether another person be in default [aka primary liability]
 - G = an undertaking which is conditional on the default or non-performance of someone else [aka secondary liability]
 - Ex. “If B does not pay, I will pay” – someone guarantees another person's debts
 - In AB, this has been supplemented by the Guarantees Acknowledgment Act
 - [Ex. *Royal Bank v Kiska*]
 - 4) Contracts Not to be Performed Within One Year from the Date of the Making
 - Enacted because of the frailties of memory
 - Criticized = both too narrow and too broad → too narrow since limitation on contract actions is typically 2 years; too broad since an action may be brought on a contract not to be performed within a year even very shortly after formation
 - Interpreted as an agreement that must expressly last more than 1 year has to be in writing – if it *may* not last more than 1 year, does not have to be in writing
 - Ex. If sign a contract for a ‘lifetime’ would not be caught in the Statute of Fraud because it is not expressed that it will last a full year – it *might* not last the entire year [person could die w/in a year, etc.], HOWEVER a 13-month contract would be caught within the Statute
 - [Subject to writing in AB]
 - 5) Contracts for the Sale or an Interest in Land
 - Applies to any contract or sale of lands, or an interest in or concerning them
 - This is subject to a writing requirement in all provinces but MB + PEI

C) Effects of Non-Compliance

- Non-compliance w/ the Statute only renders a contract unenforceable – it prevents a plaintiff from bringing a legal action, but does not render it void or invalid
- Ex. If have a 3-year oral lease in the house living in; and the landlord sues for possession – can raise the enforceable agreement as a defence because tenant is not bringing an action on the lease [could not sue for specific performance (would be bringing an action on the lease)]
- Unenforceable but valid contract may have legal significance:
 - 1) A party to a non-conforming contract may not bring an action on it, however may rely on it in defence of a claim
 - 2) The validity of an unenforceable contract means that evidence sufficient for a court of common law or equity to allow enforcement may arise after formation of the contract → at common law, this evidence need only be a sufficient note/memoranda; in equity this evidence must satisfy the doctrine of part performance
 - 3) A non-conforming contract can be consideration for a new contract or for a negotiable instrument

D) The Requirement of a Sufficient Note or Memoranda

Form of the Note/Memoranda

- *Either* the agreement itself must be in writing or there be a note or a memorandum evidencing the agreement [signed by whoever is being sued]
- No particular form of memorandum or writing is required + it does not need to have been written with the intent of satisfying the *Statute*

Contents of the Note/Memorandum

- The note/memorandum must contain all the essential terms
- In *McKenzie v Walsh*, the essential terms = price, property, parties
- Other terms may also be regarded as material [depending on circumstances]

Dynamic Transport Ltd. v OK Detailing SCC 1978

- Requires – a note or memo of the key terms of the contract showing the parties, property, or price
 - These can appear in separate documents as long as there is something linking these documents together
- In *Plant v Bourne SCC* – the defendant agreed to buy a property described in a memo signed by him as ‘I agree to buy 24-acres of land, freehold, at village of T in parish of D’ – it was held that there was an agreement + the agreement refers to the 24-acres of freehold = know parties, property, and price was stipulated somewhere [once have note of memorandum w/ key terms then can bring in oral evidence of what the 24-acres meant]
- In *McMurray v Spicer* – held that the parol evidence was admissible to identify the property
- *Turney v Zilka SCC* – vendor thought he owned 65-acres of land, buyer agreed to buy all of the land but not the buildings – there was not 65 acres, only 62.7 acres = memo not sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to [even though referred to property, it did not refer to it in sufficient detail]
- Summary – do not require entire contract to be in writing → only the key terms, must be signed, and can join several documents together to create the required document

The Requisite Signature

- A signature is intended to authenticate the entire document as ‘emanating from the individual so signing’
- Mere initialing has been held to be sufficient, the signature may be printed, and it is not necessary it be at the end of the document as long as it purports to govern all of it
- Does not require signatures of both parties; only the ‘**party to be charged**’ [the defendant/the person being sued] – it is therefore possible for a plaintiff who has not signed to enforce a contract against a defendant who has

Joinder of Documents

- In circumstances where all the material terms do not appear in one document, it may be possible to ‘join’ the two documents together, even if one is not signed, for the purpose of producing a sufficient memorandum = must be some connection for such a joinder to be permissible

E) Electronic Contracts

Written Memoranda in Electronic Form at Common Law

- Statute does not specify any particular form for the written memo
- It has been held that a memorandum in an email can satisfy this writing requirement

Written Memoranda in Electronic Form Under Electronic Commerce Legislation

- Each of the common law provinces have now passed electronic commerce legislation based on the *Uniform Electronic Commerce Act*
- Main function is accessibility for later reference → the provincial electronic commerce statutes provide that a legal writing requirement will be satisfied electronically if the electronic record endures and remains accessible [do not delete it]
- S.5 of the Act = a legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be usable for subsequent reference
- *Most provinces’ Act excludes agreements that create or transfer interests in land [including AB]
- AB = *Electronic Transactions Act*

Signatures in Electronic Form

- There is no difficulty in principle w/ a signature in electronic form – as long as the relevant mark was inserted w/ the evident intention of authenticating the entire electronic writing, it will count as a signature
- It has been held that an email w/ sender's name typed at bottom is 'signed' for the purposes of the Statute

F) Part Performance

- Most Courts that decided litigation in land-sale contracts were courts of Equity – more concerned w/ justice + fairness than w/ observing the Statute [i.e. Statute of Frauds]
- Early – in land sale contracts, the Courts of Equity developed an exception to the rule that no action shall be brought unless there is writing
- EXCEPTION = sufficient acts of part performance to show us what the terms of the contract were
- Problem w/ *Statute of Frauds* = prevented certain transactions that the parties clearly intended to enforce

Deglman v Guaranty Trust Co 1954 SCC

Facts:

- R was the nephew of the deceased – he lived w/ his aunt for 6 months; both that house (No. 550) + the house on the adjoining lot (No. 548) were owned by the aunt – during this time the aunt is claimed to have agreed that if the nephew be good to her + do her services as she might request during her lifetime, she would leave him the premises at No. 548 in her will
- The nephew did chores during the 6 months he lived in No. 550
- The performance consisted of taking his aunt on trips to Montreal and elsewhere, doing odd jobs in the houses, and errands/minor services for her
- She did not leave him the house in her will – he is making a claim for restitution [on the contract that if he does the services, she will leave the house]
- Estate defence = cannot bring an action if this contract was not made in writing
- Spence J held at trial that these circumstances were sufficient for disregarding the prohibition of the statute

Issues:

- What nature of part performance will allow the court to order specific performance of a contract relating to lands unenforceable at law by reason of s. 4 of the Statute of Frauds?

Decision:

- Part performance not enough to nullify the effects of the Statute – respondent entitled to recover \$3000 out of the estate

Ratio:

- When part performance is done on the footing of a contractual relationship, and the party who got something out of the performance does not complete the contract, the party who performed is entitled to recover for that performance?
- If rely on part-performance to excuse a non-production of a note or memorandum under the Statute of Frauds, then should first prove the acts relied upon, and it is only after such acts unequivocally and referable in their own nature to some dealing/agreement with the land that evidence of the oral agreement becomes admissible for the purpose of explaining those acts

Analysis: (Rand J - Minority)

- In relation to specific performance, strict pleading would require a demonstrated connection between the acts of performance and a dealing with the land before evidence of the terms of any agreement is admissible
- The respondent is entitled to recover for his services and outlays what the deceased would have paid for them on a purely business basis to any other person in that position

(Cartwright J - Majority)

- From *McNeil v Corbett* – if rely on part-performance to excuse a non-production of a note or memorandum under the *Statute of Frauds*, then should first prove the acts relied upon, and it is only after such acts unequivocally referable in their own nature to some dealing with the land that evidence of the oral agreement becomes admissible for the purpose of explaining those acts
- Here, there is nothing in the nature of the acts proved which bears any necessary relation to the interest in land said to have been the subject of the agreement in question
- He is entitled to recover the value of his services – this is a right based on an obligation imposed by law [not based on the contract]

Class Notes:

- Nephew says he fits w/in the exception – his acts of part performance were sufficient to establish a contract between the aunt and himself → Court said that this was nothing more than what would be required of a dutiful nephew
- What does the test of part performance require? [p. 273]

- *Maddison v Alderson* [leading case] – spent 20 years as a housekeeper [unpaid] on the strength of the promise that the owner would leave her his house on his death – made her a will which he gave her a life interest, but it was not properly executed
- House of Lords = if there was a contract to leave the house, it would have been inadequate part performance → this was insufficient to count as part performance
- TEST = all acts done must be referred to the actual contract, which is the test of their legal...
- P. 274 = all authorities show must be unequivocal and in their own nature demonstrate the existence of the type of contract she alleged [at this time many housekeepers worked for room + board] – Harsh test
- Lower Courts – found the acts are part performance were sufficient,
- SCC – said he does not satisfy the test because his acts were not **unequivocally and in own nature referable to the type of agreement** he alleges (because there were other explanations for them)
- Compensation for the nephew = quantum meruit → contract existed, but it was unenforceable because there was no note of memorandum – this tells us the nephew’s services were not to be gratuitous [he thought he was getting the house]; therefore, if leave him uncompensated = unjust enrichment, therefore estate must pay for the services of the nephews
- Under these circumstances, Courts will award nephew the reasonable value of his services [\$3000]
- Example of unjust enrichment of the estate, which is prevented by the action of restitution – it restores to the nephew the value of his services [this is not a contract remedy]
- Cannot imply a contract when the express contract has been rendered unenforceable – (p. 276) but the law imposes upon the aunt + therefore her estate, to pay for the services [an obligation of law – unless there is payment for the services, an unjust enrichment has occurred]
- Parliament said [by the *Statute of Frauds*] an express contract for the sale of interest of land is unenforceable unless in writing – cannot use same set of fact to create an implied contract
- HOWEVER, here unjust enrichment is not based on an implied contract, it is based on certain situations – the law imposed an obligation on the aunt [not a contract, nor an agreement] therefore, the court can say there was an unenforceable contract but there is a remedy [not because the parties agreed on a remedy] but because the law says the aunt’s estate must pay for the services they got for nothing, when they were intended to be compensated
- *Deglman* – recognized this area of law had nothing to do w/ contracts

Unjust Enrichment

Example [Used to be Called Implied Contracts/Quasi-Contracts]: Have cottage in summer, neighbors away, + notice fire started – spend day protecting the cottage from fire → is he entitled to be compensated for services?

- There is no contract between the neighbors
- In common law cases = courts frequently allowed the ‘neighbor’ to be compensated → "saving the house was an undoubted benefit to the neighbor"
- Person putting out fire = the ‘agent of necessity’

Matheson v Smiley

- Services **rendered under necessity** – attempted suicide; roommates call ambulance + surgeon operates for 4 hours – tries to sue the estate
 - No contract – no offer + acceptance
 - HOWEVER – when services are rendered out of necessity (cannot have doctors saying they will not start without proof of payment) – obligated to pay
 - Surgeon can recover fees out of Smiley’s estate – because the services were rendered out of necessity

Unjust enrichment occurs in a group of well-recognized cases:

- **A pays B money by mistake** – A never intended to give B the money, did it only because made a mistake → law has recognized in this case, the money should be paid back [the only reason for the enrichment of B, was because of the mistake of A]
- **Benefits transferred under a contract that fails** [contract never materializes]
- **Benefits that arise out of necessity** – Ex. *Eastwood v Kenyan* – minors are obliged to pay for necessities they receive [not a contractual obligation, more restitution]

Thompson v Guaranty Trust Co 1974 SCC

Facts:

- The appellant had sued for specific performance of an agreement alleged to have been entered into between him and the deceased

- The deceased agreed that in consideration of the respondent remaining with the deceased and working and operating his farm lands until death of the deceased, he would devise and bequeath to him his entire estate
- A lived w/ Dick [deceased] for 48 years and worked for him as a farm laborer
- He could not afford to pay him wages, but promised if he stayed + work the property would be his
- When Dick died his estate was worth \$200 000 + no will had been found
- Notary brings in a power of attorney to give Gus complete control of Dick's estate – however, once the owner dies [Dick] then the power of attorney also dies [what matters after death = must be stated by will], therefore was no use in giving Gus the land

Issues:

- Whether the lacking of a sufficient memorandum based on s. 4 of the Statute is vitiated by the part performance on the part of the appellant

Decision:

- The appellant has proved acts are unequivocally referable to the very lands and therefore he has adduced the evidence of part performance which takes the case out of s. 4 of the Statute

Ratio:

- Unequivocal performance in accordance with the intent of an oral contract satisfies the part performance and takes the action out of the realm of s. 4 of the Statute of Frauds

Analysis: (Spence J)

- The trial judge believed that Gus's work was directed to the contract + constitute not only part performance, as equity requires, but complete performance
- Court of Appeal = did not meet test in *Deglman v Guaranty Trust Co.*
- Present case differs from Deglman – nephew never lived in the house promised to him, the acts of assistance were more referable to the natural desire of a dutiful nephew to assist an aged aunt than a contract to leave him property in a will; nephew also had his own life away from the aunt
- From 1924 to the death of Dick, the appellant was a manager and operator of the whole farm industry owned by the deceased
- Same circumstance as in *Brownscombe* – appellant had rebuilt and renovated the house
- Here, Dick renovated the house completely [would not do this just because]
- → looking at acts that Gus had done related to the property + said that Gus renovated the house

Notes:

- Depending on who is next of kin/who would get the land if Gus got the land – if not immediate next of kin, they will be more lenient on the test for part performance

Lensen v Lensen 1984 Sask. CA

Analysis: (Tallis JA)

- There are 2 theoretical bases for the doctrine of part performance:
 - 1) **'Alternative evidence'** = acts of part performance are viewed as being sufficiently cogent to allow a court of equity to enforce the contract even though it could not be enforced at common law because of the Statute – it is necessary that the acts of part performance be adduced as a pre-condition to the introduction of parol evidence to prove the contract = issue is sufficiency of acts
 - 2) Emphasizes the acts of part performance [not so much for their evidentiary value] but as raising equities in the plaintiff's favor which render it unjust not to enforce the contract
- The English authorities take the view that the acts do not need to unequivocally refer to the contract in question but must prove the existence of some contract and be consistent with the one alleged
- Must first look to the alleged acts of part performance and see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract [*Steadman v Steadman*]
- The SCC has indicated that the acts of the alleged part performance must be referable to and must be indicative of some contract dealing with the land
- The SCC does not apply such a stringent test that the acts must of necessity be referable to either the interest in the land or the contract which is being propounded – if the acts relied upon are 'unequivocally referable in their own nature to some dealing w/ the land the requisite test is met

Notes:

- Wakeham v Mackenzie, 1968 – p. 283 → these English authorities take the view that the acts do not need to unequivocally refer to the contract in question but must prove the existence of some contract and be consistent with the one alleged
 - We were still applying the old English test – but more loosely than they would have
- The law remains in Canada as stated in *Thomas v Guaranty Trust Co*

- P. 284 – Note 2
 - Some Courts have adopted the liberal reformation of the doctrine of part performance in the English courts [Currie v Thomas (BC CA decision) refer to part-performance without even referring to the SCC decisions – only refer to English decisions]
- The doctrine of part performance was created because these real estate issues when the courts of equity [what they appeared to have in mind was the alternative evidence rule]

PRIVITY OF CONTRACT

Introduction

- The **doctrine of privity** applies in Canada to prevent two types of persons from enforcing a contract:
 - 1) A person is a complete stranger to the contract has no legal right to enforce the promise of any party to that contract
 - 2) The third party beneficiary – the person identified and intended by the promisor and promisee to receive all or part of the benefit of the agreed upon performance
 - [This third party bar has been eliminated in almost all common law jurisdictions]
- **Privity of contract:** If A + B enter into a contract, only they have contractual duties and are entitled to the benefits of the contract

The History of the Doctrine of Privity and Third Party Beneficiaries

- There are authorities stating that in the nineteenth century third party beneficiaries were allowed to sue on the contract – however there is confusion/uncertainty as to when the ban began
- There is debate over whether or not the privity rule is just another way of saying that ‘consideration must move from the promisee’

Tweddle v Atkinson (1861) England QB

Facts:

- The declaration stated that the plaintiff was the son of John Tweddle (deceased) and before the making of the agreement, the plaintiff married the daughter of William Guy (deceased)
- Before the marriage the parents of both parties orally promised to give the plaintiff a marriage portion, and after the marriage the parents entered into a written agreement
- Written agreement:
 - Between William Guy and John Tweddle – mutually agreed that William Guy will pay the sum of 200 pounds to William Tweddle [his son in law] and William’s father (John) will pay the sum of 100 pounds, each and severally the said sums on or before the 21st day of August. And it is agreed by William Guy and John Tweddle that William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified
 - [Deal is between father of bride + father of the groom]
 - Both father’s die – father of bride has never paid the promised 200 pound to son-in-law – he sues the father-in-law’s estate
- It is also alleged that both the plaintiff + his wife ratified and assented to the agreement but neither William Guy, nor his executor has paid the promised sum of 200 pounds

Issues:

- Can the third-party to a contract sue upon it when the contract is for the benefit of the third-party?

Decision:

- No – a third party cannot sue – judgment for the defendant

Ratio:

- No action can be maintained upon a promise, unless the consideration moves from the party to whom it is made – however, there is an exception: when the consideration moves from a father, and the contract is for the benefit of his son, the natural love + affection gives the son the right to sue as if the consideration had proceeded from himself [but this exception does not apply to the action of assumpsit]

Analysis:

[Wightman J]

- Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to consideration

- However, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit

[Crompton J]

- The plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit
- It is now settled that natural love and affection is not consideration for a promise upon which an action may be maintained – it is also settled that the promisee cannot bring an action unless the consideration for the promise moved from him
- The consideration must move from the party entitled to sue upon the contract
- Here, it was argued the father was agent for the son in making the contract but that would also make the son liable upon it
- By the reason of the principles that now govern the action of assumpsit, the present action is not maintainable

[Blackburn J]

- No action can be maintained upon a promise, unless the consideration moves from the party to whom it is made – however, there is an exception: when the consideration moves from a father, and the contract is for the benefit of his son, the natural love + affection gives the son the right to sue as if the consideration had proceeded from himself
- HOWEVER – this case cannot be supported on that ground – the cases show that natural love and affection are not a sufficient consideration where an action of assumpsit is to be found

Class Notes:

- Did the father-in-law intend to be bound by his promise? → Yes, he made it clear – both parents agreed the son-in-law has full power to sue the two parties of the contract – could not have made it more clear they intended this to be a legally binding contract
- Court does not find this to be binding:
 - 1) This is a contract between the two fathers – the son in law was not a party to the contract
 - It would be monstrous for the son to be able to take benefit for the benefit, but have no obligations under it [could not be liable]
 - 2) Consideration must flow from the promisee to the promisor [or someone else decided by the promisor]
 - This is just a gratuitous promise
- There was consideration for the promise – however, this consideration was provided for by the father of the groom and NOT by the son in law [the beneficiary]
- First two judges – a stranger to the contract *used to* be able to sue on the contract [Warne v Mason]
 - In the past, the common law allowed individuals to sue as strangers on the contract however this was before the law of contracts/doctrine of consideration was fully developed
- Who could sue? – if the father of the bride does not pay, then the estate of the father of the groom can sue [there is a breach of contract]
- The measure of damages = put the other party in the position he would have been in had the contract been performed – father has not suffered any loss – would not be a remedy to make him get the 100 pounds [he was never intended to get any money out of the deal]
- When suffer no financial loss – the court will order nominal damages – recognize a breach, however it has caused no loss
- [Not specific performance → need to be in a court of equity and only in certain types of cases/categories of contract]

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd (1915) AC (HL)

Facts:

- The appellants (Dunlop/tire manufacturers) sold their tires to Dew and Company, who were wholesale merchants, on the terms that Dew would not sell the tires at below Dunlop's list prices, except to customers legitimately engaged in the motor trade
- To those customers, Dew were entitled to sell at 10% below the list price if they obtained an undertaking that customers, in turn would observe the appellants' list price [not sell those tires below the list price]
- The respondents (Selfridge/a large department store) agreed to sell Dunlop tires to two customers at prices below those specified by the appellants
- On Jan. 2 they obtained the tires from Dew and signed an agreement under which they promised not to sell or offer them below list price and agreed to pay 5 pounds to the appellants by way of liquidated damages for every tire sold or offered in breach of the agreement
- The respondents delivered one tire to a customer and charged him less than list price – they later informed the second customer that he would be required to pay the full list price
- The appellants commenced an action for injunction and damages in respect of breach of the Jan. 2 agreements

Issues:

- Do these terms give the appellants any enforceable rights against the respondents?

Decision:

- No – appeal dismissed

Ratio:

- Only parties to a contract can sue – except when an agent is acting for a principal to the contract – however, must still be consideration flowing from the agent and there must be an intention to create this agency relationship

Analysis:

[Viscount Haldane]

- Certain principles are **fundamental foundational principles of the common law** –
 - 1) Being that only a person who is a party to a contract can sue on it [this contract was between Dew and Selfridge]
 - 2) Being that if a person with whom a contract not under seal has been made is to be able to enforce it then consideration must have been given by him to the promisor or to some other person at the promisor's request [consideration from promisee to promisor]
 - 3) A principle not named in the contract may sue upon it if the promisee really contracted as his agent [but must have given consideration, acting as his agent in giving it]
- Dew sold the respondents goods which they had a title to obtain from the appellants independently of this contract – the consideration by way of the discount was to come out of Dew's pocket and not out of that of the appellant's
- Even if the appellants were principals of Dew, the only consideration is one given by Dew, not as their agents, but as principals acting on their own account
- Cannot be a principal and an agent in the **same** contract – cannot contract for himself and for another

[Lord Dunedin]

- An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable
- The agreement was made between Dew and Selfridge – however, Dew was an agent of Dunlop [and Dunlop was an undisclosed principal] – in order to enforce it, there must be consideration moving from Dunlop to Selfridge
- The tires were property of Dew [not Dunlop] – so Dunlop did not do anything for Dew and he did not forbear in anything because he had no action against Dew – because Dew had fulfilled his contract with Dunlop in obtaining a contract from Selfridge in the terms prescribed

Class Notes:

- Only persons to a party can sue on it; Dunlop also has not provided any consideration for Selfridge's promise not to sell below list price
- Dunlop argument against privity → Dew was acting as their agent/Dunlop are principals
 - Ex. Buy coffee for self + B [B gives money to buy the coffee] → parties to the contract are both the coffee seller and self; and coffee seller and B – self has provided consideration
 - Intention – did buyer intend to buy coffee for self or for B at B's request [if the latter, then seller is the agent and B is the **undisclosed principal** of the contract]
 - If Buyer buys coffee that is much more expensive than B asked for [not within the scope of buyer's authority] – agent performed an unauthorized act and breached the agreement; however, B can ratify the purchase and only then is B in a contractual relationship w/ seller
- To establish agency – must determine *who* provided the consideration
- Dunlop says contract was for Dunlop's benefit – court says no, this contract was between Dew and Selfridge for Dew + Dunlop provided no consideration
 - There was no intention to set Dew up as an agent for Dunlop – nothing that shows Dunlop intended Dew to be its agent
 - AND no consideration – only consideration is from Dew acting on its own
- Cannot allege an agency w/o intention to make the agency relationship
- Does the party need to know the other party of which he is dealing?
 - No → example: real estate – often buy property through an agent [for an undisclosed principal]

Ways in Which a Third Party May Acquire the Benefit

- The privity rule may be inapplicable because there is some sort of existing relationship – either a trust or agency relationship might exist

A) Statute

- Specific exceptions to the doctrine of privity were included in the insurance legislation of most common law jurisdictions at an early date
 - Privity is inconvenient in life insurance and car insurance

- Life insurance – if X dies, then money goes to named beneficiary or to X’s estate
 - AKA – beneficiary is a third party, only the deceased can sue on the policy
 - Therefore, Insurance Acts were created → allowing beneficiaries to enforce for the beneficiary’s own benefit
 - B of the life insurance policy can enforce the policy – recognition of exception
- Car insurance – contract between driver and insurance company; accident between the two drivers
 - Auto insurance – allows party to the accident to enforce the contract against the insurance company
- Took statutory changes to allow beneficiaries to sue if the insurance companies would not pay
- Example – The Insurance Act – s. 195 [**Life Insurance**] and s. 258 [**Automobile Insurance**] –p. 293
- In Aus. And NZ legislation now provides that a third party intended to benefit from the agreement may enforce the agreement directly
- Passed in England in 1999
- Law Reform Act [Canada] – p. 294

B) Specific Performance

Beswick v Beswick (HL) 1966 England CA

Facts:

- Peter Beswick was a coal merchant – his nephew John Beswick helped in the business
- In March 1962, Peter had his leg amputated and was not in good health – John was anxious to get ahold of the business before the old man died – a solicitor drew up an agreement for them: “Business to be transferred to John, Peter would be employed as a consultant for the rest of his life at 6.10 a week and after his death John was to pay Peter’s widow 5/week out of the business”
- John paid Peter until he died – after the death, John paid the widow once and then not again
- Widow brought an action against John for the promised money – she claimed 175 in arrears and specific performance and the appointment of a receiver [her action in trial was dismissed]

Issues:

- Can the widow sue as executrix of her husband’s estate or in her personal capacity [as a third person] for specific performance?

Decision:

- Yes – appeal allowed and widow entitled to arrears of 175 and 5/week

Ratio:

- Where a contract is made for the benefit of a third person, who has legitimate interest to enforce it, it can be enforced by the third person in *the name of* the contracting party or jointly with him

Analysis: (Lord Denning MR)

- The rule that no third person can sue on a contract to which he is not a party is only a **rule of procedure**
- Where a contract is made for the benefit of a third person, who has legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him
- It is different when a third person has no legitimate interest and the agreement was not in the public interest – ex. Dunlop [seeking to enforce prices to public disadvantage] or when seeking to rely on an exemption clause to exempt himself from liability [cannot set up an exemption clause in a contract to which he was not a party]
- The widow is suing as executrix of her husband’s estate [and therefore as a contracting party] and also in her personal capacity [as a third person] – she is entitled to an order for specific performance of the agreement but ordering the defendant to pay 175 and 5/week

[Danckwerts and Salmon LJ]

- Agreed w/ Denning but did not go *as far*
- Arrived at same result on the ground that as administratrix of Peter’s estate, the widow could sue as a party to the contract between Peter and the nephew + obtain the remedy of specific performance

Class Notes:

- By suing as the estate = damages are nominal – no damages to the estate [the damages were to the widow]
- House of Lord circumvents this issue in order to do justice in this case

Beswick v Beswick [1968] England (House of Lords)

Facts:

- The widow is both the administratrix of the estate and sues in both that capacity and in her personal capacity [as a third party]

Issues:

- Can widow sue for specific performance?

Decision:

- Yes – appeal dismissed – widow entitled to specific performance

Ratio:

- The widow [in her personal capacity + therefore as third party to the contract] has no right to sue – but she has a right as administratrix of her husband's estate to require the appellant to perform his obligation under the agreement

Analysis:

[Lord Reid]

- The commonly accepted view – a third party cannot enforce the contract – is right
- The widow [in her personal capacity] has no right to sue – but she has a right as admin of her husband's estate to require the appellant to perform his obligation under the agreement
- Appellant argument = widow's only right is to sue him for damages for breach of his contract and these would be only nominal damages as the breach caused no loss to the estate of the husband – however, this would be grossly unjust
- The widow's argument is that she is entitled in her capacity of admin. to enforce the provision of the agreement for the benefit of herself in her personal capacity – and to do so must order specific performance – this would produce a just result and therefore, specific performance should be ordered

[Lord Pearce]

- Here – the court rightly decided the remedy of specific performance is appropriate
- However, if damages were to be awarded – they did not have to be nominal
- This case has all the features which led the equity courts to apply their remedy of specific performance – contract was for the sale of a business; the defendant could clearly have obtained specific performance if Beswick or admin. had defaulted, and mutuality is a ground in favor of specific performance
- The estate [not the widow personally] can enforce the condition of the payment to the widow

Class Notes:

- Outside of real estate cases – this is the first case where specific performance was issued
- Here – specific performance is the more convenient remedy → payment is weekly, would have to sue each week and was the obvious intention of the husband
- HL got around privity – allow specific performance because more convenient and gives better effect to the intention of the estate
- What if Peter had died *with* a will?
 - If appointed as executor either nephew or nephew's dad
 - Executor can say it is not in the estates interest to bring this action
 - At this point, the Court would have had to confront the doctrine of privity + how it fits w/ this case
- The fact he died w/o a will gave the Court an escape route – the widow can sue as administratrix of the estate for specific performance
- Was recommended there should be a reversal to the doctrine – this should be reformed by Parliament

C) Trust

- **The trust was designed to evade privity**
- A trust can be created in different ways:
- A person who establishes the trust (called a settlor) may gratuitously or for consideration, transfer property or rights to a trustee to be held or managed for the **sole benefit of a third party** (called the *cestui que trust* or beneficiary)
 - When transfer assets they are out of the settlor's control – decisions made by the trustee [known as a fiduciary = act in the best interest of the trust]
 - True owners of the trust are the beneficiaries – equity recognized that the beneficiaries could sue the trustee (because they are the equitable owners of the trust, therefore they can determine its terms)
 - It is an equitable exception to the doctrine of privity
- When establish a trust it is irrevocable – money is put out of the settlor's hand [now belongs to the trust]
- OR a person may declare him/herself to hold property or right as trustee for the benefit of a specified beneficiary – once a trust is created, the beneficiary is entitled to enforce the trust obligation directly
- Express words of 'trust' are not required in order to create a trust obligation – it is enough if there is some kind of evidence to establish an 'intention' to create a trust
- A promise to benefit a third person is evidence of this kind and in a number of cases a trust has been implied to give effect to such a promise

D) Agency

- If the 'promisee' is actually contracting as agent on behalf of the third party, the doctrine of privity simply has no application
- The promisor and the third party are contracting parties – they are in a direct contractual relationship

New Zealand Shipping Co Ltd. v AM Satterthwaite & Co Ltd. 1975 England PC

Facts:

- An expensive drilling machine was received on board the ship Eurymedon at Liverpool for transportation to Wellington pursuant to the terms of a bill of lading no. 1262 on June 5, 1964
- The shipper was the maker/manufacturer of the drill [Ajax Machine/'the consignor'] which enter into a contract w/ the carrier [this contract = the bill of lading → a contract to carry the goods and a document of title]
 - This contract contains limitations of liability – 1) limitation of damages to 100 pounds and 2) any action must be brought within 1 year
- The bill of lading was issued by agents for the Federal Steam Navigation [the carrier]
 - The carrier ships the goods from Liverpool to Wellington – but does not unload them (employs the stevedores to unload them)
- Consignors say that NZ cannot shelter themselves under the limitation clauses in the contract because they are not included in that contract (the contract was not with NZ)
- The consignee was AM Satterthwaite [consignee] → the customer
 - *Bill of Lading Act* = once B of L is in the hands of the consignee, then the consignee has all of the rights of the original shipper (assigns all of the rights of the shipper to the customer)
- For several years, the NZ Shipping Co [the stevedore] had carried out all stevedoring work in Wellington in respect of the ships owned by the carrier
- NZ also acted as the agent for Federal Steam Navigation and as such agent, the stevedore received the bill of lading – clause 1 of the bill was in the same terms as bills of lading usually issued by the Stevedore and its associated companies in respect of ordinary cargo carried by their ships from the UK to NZ
- The consignee [AM] became the holder of the bill of lading and owner of the drill prior to 1964 – on August 1964, the drill was damaged as a result of the stevedore [NZ] negligence during unloading
- On the first page of the Bill of Lading →
 - "In accepting this bill of lading, the shipper, consignee, and owners of the goods agree to be bound by all of its conditions..."
 - ALSO – "no servant or agent of the carrier (including any independent contractor employed) shall in any circumstances be under any liability to the shipper, consignee, or owner of the goods..."
 - Carrier is deemed to be acting as agent or trustee for all those who may be servants
- Clause 11 limited liability to \$100. The application of the bill of lading to the Carriage of Goods by Sea Act meant that the carrier and the ship were discharged from all liability in respect of damage to the drill unless suit was brought against them within 1 year of delivery – no action was commenced until April 1967 when the consignee [AM] sued the stevedore [NZ] in negligence claiming \$880 – cost of repairing the damaged drill

Issues:

- Whether the stevedore can take the benefit of the provisions in a contract to which they are not a party (contract is between shipper and carrier)
- Does the contract satisfy the propositions to allow it to apply to the third party as an agent?

Decision:

- Yes – the appeal if allowed and respondent must pay costs of the appeal

Analysis: (Lord Wilberforce)

- *Scruttons* left open a case where one of the parties contracts as agents for the third person – spelt out **4 propositions/prerequisites for the validity of such an agency contract:**
 - 1) The bill of lading makes it clear that the stevedore is intended to be **protected** by the provisions in it which limit liability
 - 2) The bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as **agent** for the stevedore that these provisions should apply to the stevedore
 - 3) The carrier has **authority** from the stevedore to do that or perhaps later ratification by the stevedore would suffice
 - 4) Any difficulties about the **consideration** moving from the stevedore were overcome
- Clause 1 of the bill → discharges the carrier from all liability for loss/damage unless suit is brought within one year after delivery – also, the carrier as an agent for independent contractors stipulates the same exceptions

- The carrier was indisputably authorized by the appellant to contract as its agent for the purpose of clause 1
- Issue here is #4 → consideration
- This became a full contract when the appellant performed its services by discharging the goods [unilateral contract] – the performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading

Class Notes:

- Traditional rule – cannot take advantage of the contract to which you are not a party if have not provided any consideration
- HOWEVER, if could prove that the carriers were in the contract as an agent for the stevedores then the stevedores could take advantage of the provisions of the contract
- Because of the provisions – they have declared an agency relationship → however, there still needs to be consideration
- Used unilateral contract analysis to determine the consideration – they said the consideration is the stevedores performing the act of unloading from the ship – in exchange for unloading the goods they get to take advantage of the limitation clause
- ISSUE = pre-existing duty? → *Shadwell v Shadwell* or *Pao On*
- If it was bilateral then the stevedore would be under a duty to unload – an enforceable duty → say it is unilateral – a promise in exchange for an act
- Court says by looking at the contract it is clear the provisions would apply to the stevedores – would defeat the arrangements the parties set out if allowed privity to get in the way of the protection of the stevedores
- Contract also stipulates that if they want more than 100 pounds of protection have to let carrier know – in that case, carriers would insure the goods – [premiums would likely be less if the insurance paid for by shippers – who ship goods less frequently than the carriers do]
- The real parties to this case were the insurance companies for each party
- Creates commercial certainty if the clause that everyone agreed to is applied → if allow doctrine of privity to get in the way, then the clause is irrelevant
- Canadian courts adopted this analysis → *ITO v Maida Electronics 1986 SCC* [note 2 p. 309]
 - This new analysis avoids the doctrine of privity to allow 3rd party to take advantage of a provisions in a contract that they were not a party to

E) Employment

- *Adler* → passenger injured on cruise – sue employees (captain + boatman) → cruise line did not injure the passenger – a negligent employee did
 - P+O Lines said that they would stand behind the employees and pay if she claims damages
 - Contract between passenger + P+O did not include employees
- P. 309 Note 2 → *Greenwich Shopping Plaza SCC 1980* [Adler applied in Canada]
 - Lawsuit initiated by owner of shopping center + lease portion of it to Canadian Tire – contract saying if there was a fire caused by CT that G would not sue them (G gets fire insurance)
 - A fire was caused by CT's employees (negligently) – G cannot sue CT so sue the employees
 - SCC says because of Adler that the employees are liable – clearly negligent
- Difference between NZ Shipping → the clause expressly extended to the stevedores

London Drugs Ltd. v Kuehne & Nagel International Ltd. 1992 SCC [Exception to the third party beneficiary bar]

Facts:

- On Aug. 31 1981 London Drugs [appellant] delivered a 7500lb transformer to Kuehne [R] for storage pursuant to the terms and conditions of a standard form contract of storage
- Transformer had been purchased from its manufacturer [Federal Pioneer] and was to be installed in the new warehouse facility being built by the appellant
- The contract of storage included a limitation of liability clause → stating that the warehouseman's liability on any one package is limited to \$40 unless the holder has declared in writing a valuation in excess of \$40 and paid the additional charge specified
- London Drugs was aware of this clause + chose not to obtain additional insurance
- 2 employees of Kuehne were to load the transformer [knew they should load by lifting it from above using brackets as it says that directly on it] however, attempted to do so by using 2 forklifts – the transformer toppled over w/ damages costing \$33 955
- London Drugs know they cannot sue K+N therefore decide to sue the 2 employees
- BC SC said the 2 employees were personally responsible for the damages, limiting Kuehne's liability to the \$40

Issues:

- The duty of care owed by employees to their employer's customers

- The extent to which employees can claim the benefit of their employer's contractual limitation of liability clause and therefore limit their liability to \$40

Decision:

- Yes – appeal dismissed
- The employees are entitled to benefit directly from the limitation of liability clause because they are third party beneficiaries w/ respect to the clause and because they were dealing in the course of their employment + performing the services contracted for when the damages occurred

Ratio:

- This relaxation to the doctrine of privity allows employees to use their employer's limitation as shields in actions brought against them, when the damage was caused in the course of employment, and while they were carrying out the very services for which the plaintiff (customer) had contracted with their employer

Analysis: [Iacobucci J]

- Agrees w/ the respondents that is the time for a relaxation of the doctrine of privity as applied to employer's contractual limitation of liability clauses
- This should be relaxed for third party beneficiaries of a contract – especially here, when used as a defence to an action
- Not suggesting that employees are a party to their employer's contracts so that they can bring an action on the contract or be sued for breach of contract
- HOWEVER, when an employer and customer enter into a contract and include a clause limiting liability for damages arising from conduct to be performed by employer's employees there is no valid reason to deny the benefit of the clause to employees who perform the contractual obligations
- The nature and scope of the limitation of liability clause in such a case coincides essentially with the nature and scope of the contractual obligations performed by the third party beneficiaries (employees)
- Employees may obtain benefits from a limitation of liability clause if the following requirements are satisfied:
 - 1) The limitation of liability clause must, either *expressly or impliedly*, extend its benefit to the employees (or employee) seeking to rely on it, and
 - [AKA the employers choose whether to allow employees into the clause]
 - 2) The employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred
- The employees were in the course of their employment duties, performing the services of the contract, and the clause does not include language that restricts the benefit solely to the employer [not expressly stated – however, implied → language was not chosen to mean the employees were not to benefit from the clause – was no clear indication to the contrary]

Class Notes:

- Exclusion applies expressly to employees – here, the contract made mention to warehousemen [the employees were warehousemen]
- Difference from Greenwich Shopping Plaza – here took a broad interpretation of warehousemen to say it includes K+N and all employees

Edgeworth Construction Ltd. v ND Lea & Associates Ltd 1993 SCC

Facts:

- The appellant (Edgeworth) is engaged in the business of building roads in BC – 1977 it successfully bid on a contract to build a section of highway in the Revelstoke area and entered into a contract w/ BC for the work
- Edgeworth lost money on the project due to errors in the specifications and construction drawings + commenced proceedings for negligent misrepresentation against the engineering firm who prepared the drawings (ND Lea) as well as the individual engineers who affixed their seals to the drawings

Issues:

- Does the contract between Edgeworth and BC negate or subsume the duty of care which would otherwise have arisen on the facts pleaded?

Decision:

- No – the contract does not assist the engineering firm in preventing them from liability – appeal allowed

Analysis: [McLachlin J]

- The representations of the design became the representations of the province – but this does not establish that when the representations became those of the province they ceased to be representations of the engineers – the contractor was relying on the accuracy of the engineer's design just as much after it entered into the contract as before
- The clause protects BC from any liability for the plans – however, it does not purport to protect the engineers against liability for their representations

- Not similar to London drugs because it here it was not established in the clause that it provides protection + also the employees in LD were vulnerable/not able to protect themselves
- Seems as though the clause was intended for the protection of BC alone – cannot infer they wanted to include the engineers
- Engineering firm *could have* taken measures to protect itself from liability
- The circumstances of the case combined w/ the wording of the clause negate any inference that the contractor should be taken as having excluded its right to sue the engineers for design deficiencies by its contract with the province

Class Notes:

- A clause in the tender contract that says the province cannot be held responsible for any defective design or cost incurred by defective design provided in the tender. Edgeworth sues the designer of the highway (N.D.)
- This is not a lawsuit on the merits (at the end of the case anyone will be held liable) - it is a strike out application - Edgeworth sues the engineering company and N.D says they are bringing an application to strike out the statement of claim - allege that the statement of claim if all the facts are admitted to be true, does not disclose a good cause of action
- The SCC finds that it is possible that they can be held liable
- McLachlin - In principle could the engineers be held liable? Basic requirements of negligent misrepresentation - engineers undertook to provide information to be used - knew the purpose (contractors come up with the bid price using it) - Edgeworth relied on the information for their bid - if that information was negligently prepared and Edgeworth suffered loss as a result of the information they should be held liable
- Finds that the engineers fulfill the requirements and can theoretically be held liable, unless they are covered by a disclaimer in the contract - covered by the clause in the contract between the province and Edgeworth
- This disclaimer only absolves the ministry of liability for misinformation - it does not include the engineers - the court says that there is no hint of the engineers being included
- Is there anything the engineers could have done to protect themselves? They could have put a disclaimer on their plans to say that the engineers prepared these plans for their client (the province) and no one else may rely on them without the press written consent of the engineer - the representation was made to the province not Edgeworth - such a disclaimer would force Edgeworth to do their own checks on the plans before using them
- Edgeworth sued both N.D. Lea and the 2 employees who designed the plans - McLachlin said the individual engineers only owed a duty of care to their employer and not to Edgeworth (disposed of the action against the employees)
- Lafare said the essence of liability for negligent misrepresentation is reliance (they gave advice and it was relied upon to the detriment of Edgeworth) - but Edgeworth was not relying on the 2 specific engineers, but rather were relying on N.D. - unreasonable for them to rely on the two employees who made the design
- The circumstances for which a person can be held liable for words that cause financial loss are much less restrictive than for cases where negligent acts cause physical damage

Negligent misrepresentation is an unusual type of tort – it involves giving information/advice to someone – giving advice to clients, etc. – it always involves a communication between the person who makes the representation and the person who receives it

- Therefore, have the ability to give information/advice on certain conditions – could be “you cannot rely on it in any way and I will not be liable if you follow this loss and incur loss” – generally cannot say this or no one would hire you; could say that other people cannot rely on this information [disclaim responsibility]
- Ex. Engineer hired by municipality to design waste management site – engineer must do a good job for the client but can add a statement that “the design is solely for benefit of client + may not be relied upon by anyone else unless obtain their consent”
- Also sued the 2 employees who designed the plans + fixed their stamps to it:
 - 1) Court said the individual engineers owed a duty of care to their employer to carefully employ the design but **not** to the strangers who might use it
 - 2) The reason a person can sue for negligent legal advice is reliance – but the reliance is not on the 2 individual engineers but on ND

F) Subrogation

- Subrogation is a term denoting a legal right reserved by most insurance carriers. It is the right for an insurer to legally pursue a third party that caused an insurance loss to the insured. This is done as a means of recovering the amount of the claim paid by the insurance carrier to the insured for the loss.
- **The right of subrogation:** Relationship between insurance company and insured → In exchange for insurance companies covering the loss, the person must allow the insurance company the right to take action against the other party in the insured’s name [the insurance company has been given the right to stand in the insured’s shoes]

- Usually (in car accidents) the other party is insured as well – the insurance company for the other party will also stand in the insured’s shoes
- Ex. Can ruin relationships → *Greenwich + Canadian Tire*
 - Tenant said landlord could not sue – If get a waiver of subrogation rights [will not allow the insurer to take an action against you] – this means the tenants would not have to get insurance – because there is a blanket policy covering them

Fraser River Pile & Dredge v Can-Dive Services Ltd. 1999 SCC

Facts:

- A barge belonging to the appellant (Fraser River) sank and at the time it was under charter to Can-Dive
- Insurance companies generally have the right to step into the shoe of the insured and to sue to wrong-doer
- The contract of insurance between FR and the insurer contained a clause under which the insurer waived its right to subrogation (waiver of subrogation)
 - “The insurer waived its right to subrogation against ‘any charterer’ and extended coverage to affiliated companies and charterers”
 - [Does this means Can-Dive does not have to insure the barge – cannot be liable?]
- After barge sank insurance company goes to Fraser River w/ the money and asked to cancel the waiver of subrogation and agree in their name to commence an action against Can-Dive

Issues:

- Does this clause extend to the third-party beneficiary? Could Can-Dive take advantage of a clause in a contract to which it was not a party?

Decision:

- Yes – appeal dismissed

Analysis: [Iacobucci J]

- London Drugs factors:
 - 1) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision?
 - 2) Are the **activities performed by the third party** seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties
- Due to the wording of the clause + ‘charterers’ there is no question that the parties intended to extend the benefit in question to a class of third-party beneficiaries whose membership includes Can-Dive
- The wording here explicitly includes them with the express reference– whereas in London Drugs it would an implicit assumption
- Here the relevant activities arose in the context of the relationship of Can-Dive to Fraser River as a charterer, the very activity anticipated in the policy pursuant to the waiver of subrogation clause – second requirement has been met
- When sophisticated commercial parties enter into a contract of insurance which expressly extends the benefit of a waiver of subrogation clause to an ascertainable class of third-party beneficiary any conditions purporting to limit the extent of the benefit or the terms under which the benefit is to be available must be clearly expressed

Class Notes:

- Can-Dive was covered by the contract:
- 1) In this contract, the parties clearly intended it should cover charters – this was explicitly mentioned
- 2) Can-Dive was performing activities that were contemplated under the contract
- The case says that it is analogous to the earlier 3rd party beneficiaries because the charters were performing the activities contemplated and therefore covered by it
- What was Fraser River’s best argument against Can-Dive?
 - Just because a contract is made for the benefit of another person does not mean the parties to the contract cannot change their minds → are able to change their minds to the contract
 - Can-Dive is not a party to the contract – nothing is stopping the parties from changing their minds and cancelling the arrangements that benefited Can-Dive
 - Argue that if find Can-Dive can use the benefits as a 3rd party then reduces the autonomy of the parties
- Court said no – they could have done it before the accident, but by the time they did it the accident already occurred → by the time they cancelled the waiver, Can-Dive’s rights had crystallized (the very act contemplated by the waiver of subrogation had happened = too late to cancel) – cannot retroactively remove the waiver

- In each case, the courts are making small exceptions to the doctrine of privity – but how far can courts go in reforming privity on their own?
- If A and B contracts for benefit of C, can A and B change their minds = Canada says NO once the rights have crystalized, but yes up until that time
- Do they have to inform C if are aware C is still relying on it?
- This case leaves open these policy details – some are dealt with by legislation however legislation deals with it in different ways with a variety of solutions

Privity and Contract Theory

- It has been argued that the third party bar is inconsistent with every theory or approach that has been offered to justify either the existing or the ideal state of contract law

CONTINGENT AGREEMENTS

Introduction

- The characterization of an agreement as a contract entails a defined set of legal outcomes – the parties are *bound* to perform the obligations imposed by its terms or be liable for failure to do so
- If refuse to proceed in the manner agreed can constitute a breach supporting an award of **damages** (put innocent party in position the person would have occupied if the promise would have been performed) or **specific performance**
- “Condition” is understood to refer to a contractual term of such importance that its breach by one party entitles the other to both claim damages and to terminate the contract
- It is the failure of a promised performance or state of affairs to materialize that constitutes a discharging breach by the promisor – therefore, the condition is *promissory*
- A **contingent** condition describes an event or state of affairs that neither party to a contract has promised will come about, but the occurrence of is a prerequisite of their obligation to perform their contractual obligations
 - Since it does not embody an obligation undertaken by either party it cannot be breached
 - Unless otherwise stated – the failure of the condition simply brings the contract to an end
 - Ex. “I agree to buy your house for \$50,000 subject to obtaining a mortgage by Mar 21”
- 2 sorts of terms – 1) promises or 2) conditions
- Example conditions for buying a house → 1) finance; 2) building report
- Does this mean both parties are bound by 1) the contract on that day or 2) is there no contract until the conditions are satisfied?
 - Contract Today:
 - Cannot sell to anyone else/take advantage of rising market
 - Tied property up until conditions are satisfied
 - No Contract:
 - The person never *tries* to obtain a mortgage – here, would be no issue because no contract
- Old law terminology → “There is no contract until the condition is satisfy” = the contract is subject to a condition precedent – existence of contract depends on fulfillment of condition
 - But if other person does not make reasonable efforts to fulfill the condition, are they free from liability?
- The other approach – there is a contract but the party has a way out if conditions if fulfilled – condition subsequent
 - Ex. *Dawson v Helicopter Exploration* – classified Dawson’s getting leave as a CS [contract is not fully binding but the parties are bound + Dawson’s duty is to take *reasonable efforts* to obtain leave – if fails, the contract is off]
 - If Dawson never asks for leave, Dawson is in breach of the contract
- Example - Mortgage subject to obtaining mortgage from bank
 - CP = If mortgage is not there on Mar. 21 the contract is off
 - CS = If person takes reasonable steps to obtain mortgage and banks turns him down contract is off; otherwise it is still on
- Issue when a condition is so subjective (one party is bound, and the other has a “free-way out”)
- Example - Subject to obtaining satisfactory building report
 - Issue – if left subjective the courts will have hard time determining there is a good contract
- Example - “Subject to my inspection + approval”
 - Court tends to say that the condition is so subjective that it is not really a contract, because one party in reality has no measurable obligations
- Example – p. 337 “subject to approval of company’s president”
 - Court says there is no content to corporations promise that it will buy this land

- P. 338 – *Smallman v Smallman*
 - Agreement reached was subject to the approval in due course of the court
 - This does not mean there is no agreement at all – but the operation of it is suspended until the court approves and if court approves it is binding on the parties
 - Contractual duties – someone has to go to court and seek approval
 - Both parties clearly expected there to be a contract
 - Technically a CS – good contract (fully on and enforceable), unless once go to court and fail THEN it is unenforceable
- Must determine 1) Is there a contract on that day + 2) what is the nature of the condition – can there be objective content given to the condition?
- A **condition precedent** is a contingent condition:
 - I) It is a term of an existing contract as opposed to a term of an offer to contract,
 - II) Which describes an event or state of affairs the occurrence of which has not been promised by either party, and
 - III) Whose fulfillment is a prerequisite of the obligation of both to complete the contract
- A **condition subsequent** is a provision and the fulfillment of it shall discharge either one of the parties from further liabilities under the contract
 - Less common + less likely to raise conceptual issue
- P. 336 *Plantations Case* [no obligations until conditions are fulfilled]
 - Buyer wants to buy land but there are leases; Buyer wants to buy subject to renewal of the leases
 - *Purchase* is condition upon vendor obtaining renewal of the lease and if vendor unable the agreement shall become null and void
 - Vendor was unable to obtain renewal
 - Is there a good contract on the day they signed the deal? → PC found that given the nature of the condition there was no contract because contract was conditional upon the condition being satisfied (a condition precedent)
 - The way it was worded – as the entire purchase being conditional
- *Carlisle v The Carbolic Smoke Ball*
 - Condition – advertisement did not *ask* people to catch the flu, therefore it was a condition to catch the flu and the consideration was to use the smoke ball 3x day for 2 weeks → contract was in *suspense* while using the smoke ball + was not in full force until she caught the flu
 - Can revoke an offer unilaterally but cannot revoke a contract unilaterally
- *Dawson v Helicopter Exploration Company*
 - P. 65 → terms of contract – if you inform me if and when you obtain a pilot I will take steps to take time off work – will show where claims if get pilot, but worried about not being able to get leave [not saying he *will* obtain leave but take steps to obtain leave]
 - P. 66 → *unqualified promissory acceptance* – take into showings subject to performance to his being able to obtain the necessary leave
 - This means there is a contract (an unqualified promissory acceptance) subject to performance to his being able to obtain the necessary leave (the condition) → this condition does not apply to the whole contract but one that goes to Dawson’s performance
 - AKA he must perform the contract subject to one condition [to take steps to obtain leave] – performance is subject to a condition
 - P. 67 → condition not fulfilled [has not obtained leave] but he is still under a contractual duty
 - There is still a contract before he obtains leave – he still has contractual duties to fulfill
 - BUT Dawson does not have to perform the *major part* of the contract in one event [where his performance is excused]
 - This condition here is one of a condition subsequent – there is a contract but in the event that a certain condition happens, Dawson is not under a duty to perform
 - Also, a condition on the performance of the helicopter company as well [if cannot find a pilot]
- Sometimes it is not the contract that is conditional, but the obligation to *perform* certain duties during the contract

Intention, Certainty, and Consideration

- The question of whether a contract is created by language requiring the satisfaction of a contingency is determined in part by the intention of the parties
- The requirement of consideration and certainty of terms may also affect contract formation

- The difference between an option and a conditional offer to contract lies in the presence or absence of consideration – an option entails a present contractual obligation on the part of Bob to refrain from taking action that will preclude the eventual formation of the contemplated primary contract

Wiebe v Bobsien 1985 BC SC

Facts:

- Bobsien is a contractor and owns the property on Crescent Beach Road
- Wiebe had title to a house in Port Moody + made the offer to purchase the Crescent property
- They both signed an interim agreement (June 22 1984) → deposit price, purchase price, completion date, sale **subject to W selling Port Moody residence** (on or by Aug 18), seller retained right to sell the property to another purchaser if one could be found/gets better offer + in this event W had 72 hours to remove the condition precedent (aka to waive it)
- If W did not sell his residence by Aug. 18 he was entitled to terminate the agreement and receive back the deposit
- July 22 B decided he no longer wanted to go through with the sale and informed the plaintiff of this by telegram; W did not accept this cancellation and goes ahead to sell the Port Moody residence and on Aug 18 he was successful in obtaining a buyer (CP is satisfied; W gave the additional deposit)
- At the completion B refused to close the offer/said there was no contract
- Seller is saying it is merely an offer + he has a way out until W sold his Port Moody home

Issues:

- Is the interim agreement a form of option that could be cancelled by the defendant prior to Aug 18 or is it a binding agreement for the sale and purchase of the Crescent Beach property?

Decision:

- The agreement was binding but in suspense until the Port Moody home was sold, and when it was sold the defendant was then contractually bound to sell the property to the purchaser because the agreement was no longer in suspense – the defendant had no right to cancel the contract

Ratio:

- There is a general rule that in a real estate transaction a CP which must be performed by the purchaser will not usually prevent the formation of a contract but will suspend the covenant of the vendor to complete until the CP is met by the purchaser

Analysis: (Bouck J)

- A condition precedent either 1) prevents the creation of a contract, or it 2) merely suspends performance of some or all of the obligation set out in the contract until the condition is met
- 3) There are also CP that give problems because they are *so subjective* they cannot give any content to them (also allows buyer to say at any time he does not want to go ahead with it – gives a party a free way out)

1. Circumstances where a CP prevents the formation of a contract

- A transaction may have the appearance of an option however it is not a true option if given neither under seal nor for consideration
- A CP may be of a nature that creates no binding agreement or it may just act as an ingredient which suspends performance of an otherwise complete contract
- CP that imply a condition of whim, fancy, like or dislike constitute an illusory contract that was no agreement at all

2. Circumstances where a CP suspends the performance of the contract

- The law seems to lean in favor the concept that where there is a CP a contract is formed on signing by the parties
- A condition means there is still a binding agreement, however the operation of it is suspended until the condition is fulfilled – if the condition is not fulfilled it is not binding, but if it is it remains binding

Summary:

- 1) A real estate contract containing a CP will usually result in a binding agreement of sale + purchase and the obligation to complete the contract is merely in suspense pending the occurrence of the event constituting the CP
- 2) Sometimes, a CP may prevent formation of a contract if the agreement itself + surrounding events indicate it was never the intention of the parties to bind themselves to a contract of sale + purchase
- 3) Here, the contract + surrounding events indicate the parties intended to reach a consensus when they executed the interim agreement on June 22
- 4) Completion of the sale was suspended pending disposition of the plaintiff's Port Moody home on or before August 18, 1984 – he had a duty to take all reasonable steps to sell the house + if he failed to do so he would be in breach + liable to damages
- 5) When the Port Moody residence was sold, the defendant was then contractually bound to sell the property to the purchaser because the agreement was no longer in suspense – the defendant had no right to cancel the contract

Class Notes:

- This case is not free from doubt – not certain how aggressively he has to sell the house whether he can turn down offers?
→ is it a subjective or objective condition?
- The contract is not conditional; it is W's duty to perform that is conditional
- To what extent are there binding obligations today, before the conditions are fulfilled?
- If decide there are no obligations until W sold his Port Moody house then would have to say there is no contract, and therefore B could revoke his offer
 - They definitely did not intend this to be the case – likely they both knew they had enforceable obligations before W sold his Port Moody house
- Do they want an immediately binding contract w/ certain ways out OR no binding obligations?
 - Must look at the parties' actions

Wiebe v Bobsien 1986 BC CA

Dissent: (Lambert JA)

- Each CP case must be considered on its own facts
- 1) Some CP are so imprecise or depend entirely on the subjective state of mind that the contract process must still be regarded as at the offer stage
 - Ex. Subject to approval of the corporate purchaser
- 2) Where the CP is clear, precise, and objective a contract is completed + neither party can withdraw, but the performance of it is held in suspense until the parties know whether the CP is fulfilled
 - Ex. Subject to John Smith being elected as Mayor in the election on October 15
- 3) Conditions that are partly subjective + partly objective
 - Ex. Subject to planning department approval of the attached plan of subdivision
 - This has been dealt w/ by implying a term that the purchaser will take all reasonable steps to cause the plan to be presented to the planning department + take all reasonable steps to have it approved
 - The law in relation to implying terms into a contract is no different for CP's
- However – there will be times in this 3rd category where it will be impossible to imply a missing term and the agreement will fail for uncertainty – there, the court cannot write a contract for the parties
- Believes in this case – the CP was uncertain and could have been turned certain by the purchaser selling his house, but until then the interim agreement remained a standing offer revocable at the will of the vendor on reasonable notice to the purchaser
- Here, the standing offer was withdrawn in ample time therefore no contract of purchase and sale ever arose
- Can deal w/ this problem by stating the price + essential terms upon which the purchaser must sell his house – then the court can imply the term that the purchaser must make all reasonable efforts to sell at that price and on those terms

Notes:

- Need to have a floor pricing in condition – or else unsure to determine how to measure damages by
- Here, what has been lost is the chance to sell the house

p. 826 – *Chaplin v Hicks* [Loss of an Opportunity]

- Argument – implied term that being selected she would have a reasonable amount of time to present herself for the interview, and in doing so was a chance she would get one of the contracts
- Sues for her chance to get a price in the beauty actress competition
- How to value an opportunity she was entitled to get but loss the chance to do so – awarded damages of 100 pounds [valued her chance of the price at 100 pounds]
- She had been deprived of something of value

** Had this same type of problem w/ potential of loss in *Wiebe v Bobsien*

Reciprocal Subsidiary Obligations

- Contractual obligations that fall to be performed only upon satisfaction of a CP may be described as the parties' primary obligations – they are the obligations that relate to the ultimate objective of the contract
- In real estate the primary obligations are those that give effect to the sale – essentially, payment of the purchase price on the one hand, and delivery of title and possession on the other
- However, that a contract exists before the primary obligations become operative means that the parties are subject to other obligations in the meantime – subsidiary obligations
- These can be the obligation to refrain from withdrawing from the contract, but usually there will be an implied subsidiary obligation to take steps to bring about the state of affairs constituting fulfillment of the condition

Dynamic Transport v OK Detailing Ltd. 1978 SCC

Facts:

- This is an action for specific performance brought by Dynamic (purchaser) to enforce a contract w/ OK (vendor) for the sale of land
- The sale price was \$53,000 and the land is worth \$200,000 by the time it went to court
- Sale of the land was subject to subdivision approval
- OK says the contract is unenforceable on 2 grounds – 1) the description of the land is so vague + uncertain that identification is impossible; and 2) the contract is silent as to which party will obtain the subdivision approval required under the terms of the Planning Act

Issues:

- Is the contract unenforceable due to uncertainty of the description of the land or due to the contract being silent on which party will obtain the subdivision approval? Who has to apply for subdivision approval? [quickly answer it is the seller]
- How do we value the chance that if the other party had done what they are supposed to do, the buyer would have gotten what they wanted?

Decision:

- The appellant is entitled to a declaration that the contract between the parties is binding in accordance with its terms including the implied term that OK will seek subdivision approval
- There is no doubt the person who has to bring an application for subdivision is the owner

Ratio:

- The court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract

Analysis: (Dickson J)

- The statutory prerequisite became an implied term of the contract and the obtaining of the subdivision approval was a CP
- The parties created a binding agreement – the obligations were merely in suspense pending the occurrence of the event constituting the CP
- In a form of contract where the land is sold ‘subject to planning permission’ – a promise to obtain the permission could not be implied however, courts have implied a promise for the purchaser to use his best endeavors to obtain the permission
- This case is a specific instance of the general principle that “the court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract”
- In the purchase + sale situation, the ‘person who proposes to carry out a subdivision of land’ is the intending vendor – it is he who must divide his parcel of land for the purpose of sale
- The purchaser could only do so in the vendor’s name and as his agent
- The vendor is under duty to act in good faith and to take all reasonable steps to complete the sale

Notes:

- Range of damages depends on likelihood on the other party performing their side of the bargain and the agreement actually becoming fulfilled

Remedies for Breach of Subsidiary Obligation

- **The principal remedy** for a breach of contract is an award of damages designed to put the victim of breach in the position he or she would have been in if the contract had been performed, so far as can be done through an award of money
 - Extent of damages is whether the person would have succeeded in properly performing their end of the agreement
- Court always can award specific performance – this is generally not to be awarded where damages will adequately compensate the plaintiff for his or her loss and will rarely be a practical option
- In *Dynamic*, specific performance was awarded for breach of the respondent’s obligation to make best efforts to obtain subdivision approval + if the respondent failed the appellant was entitled to damages based on the loss of the appellant’s bargain (difference between contract price (\$53,000) and the market price of the land that was subject to the contract of sale (\$200,000)) [p. 347]
 - Unusual remedy → specific performance as ordered here would require a lot of judicial supervision
 - We also do not know whether this would occur if the respondent would have succeeded in applying for subdivision approval, they would have been refused → not sure this caliber of damages here would be appropriate then
 - *Proper/better approach* → If vendor made proper application what would have been chances of success
- What the victim of the breach has lost is the chance to realize the benefit that would have followed from fulfillment of the condition
- A plaintiff who requests specific performance may end up neither performance nor damages – faces the risk that genuine efforts made by the other party to obtain fulfillment of a condition as ordered by the court will fail

Eastwalsh Homes Ltd. v Anatal Developments Ltd. (1993) ON CA

Facts:

- The appellant, Anatal Developments Ltd., entered into an agreement to sell to the respondent, Eastwalsh Homes Ltd. ('Eastwalsh'), a builder of homes, 147 building lots outlined in a proposed plan of subdivision
- It was an expressed condition of the agreement that "Anatal would use its best efforts to have the plan of subdivision registered prior to the date fixed for closing of the sale" – and that by failing such registration the agreement would be terminated
- The plan was not registered within the requisite time period and the sale fell through [Anatal made the proper subdivision registration but it was not approved by the date]
- E brought this action against A claiming specific performance, or alternatively damages for breach of the agreement (saying A did not try hard enough)
- Trial judge – A did not use best efforts and if would have then there would have been a 50% chance that the plan of subdivision could have been registered within the contractual time-period and the transaction could have closed + awarded E 50% of the increased market value of the lots over the same price (half of the expected amount), amounting to damages of \$2 020 780 [the loss to E in being deprived of the opportunity to purchase 147 lots]
- Trial – did not award E specific performance and held E was entitled to damages only for the breach and rejected their claim for loss of profits holding that E could have reasonably mitigated its losses by buying similar lots available but took no steps to do so

Issues:

- Should E be awarded damages for the breach of contract and potential loss of opportunity?

Decision:

- Chance lost too insubstantial to justify anything more than nominal damages
- Appeal allowed

Ratio:

- In assessing damages, the court must discount the value of the chance by the improbability of its occurrence

Analysis: (Griffiths JA)

- Trial was right in principal (valuation of the loss of the chance) but wrong in *result*
- **The general rule** is that the burden is on the plaintiff to establish on the balance of probabilities that, as a reasonable and probable consequence of the breach of contract, the plaintiff suffered the damages claimed – if unable to establish a loss, or if the loss proven is trivial, the plaintiff may recover only nominal damages
- **The second fundamental principle** is that where it is clear that the breach of contract caused loss to the plaintiff, but it is very difficult to quantify that loss the difficulty in assessing damages is not basis for refusal to make an award in the plaintiff's favor
 - If plaintiff can only prove the 'chance' of receiving a benefit had the contract been performed, rather than refusing to award damages, the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis
 - Proof of loss of a mere chance is not enough – the plaintiff must prove that the chance constitutes 'some reasonable probability of realizing an advantage of some real substantial monetary value'
- This is what the trial judge did here – found that had A not breached the contract there was a 50% chance that the plan of subdivision would have been registered and transaction of sale could have closed
- BUT, do not agree w/ trial judge in result → notwithstanding the breach (even if A worked as hard as possible) the transaction would not have been completed within the contract period [must show there was a reasonable probability of receiving the advantage you contracted for]; Therefore, they never really lost the chance
- E did not satisfy the burden here by proving that if A discharged its best efforts there was a reasonable probability of registration of the plan being achieved within the time-frame of the contract – the chance E loss was too insubstantial to justify anything more than nominal damages

Class Notes:

- What date did they say damages could be calculated from?
 - Date of repudiation (date of the breach) until the date of mitigation (keep to reasonable minimum)
 - You are entitled to damages suffered from breach of contract but must take reasonable steps to mitigate (keep to a reasonable minimum) those losses
- Here, there were lots of opportunities to buy similar land – once they knew the contract had been repudiated (A said they were not going to perform it) they should have bought other land for their project
- Damages from the breach until the time that they should have been able to mitigate the losses

Unilateral Waiver

- Ex. “Subject to obtaining mortgage by May, 1” – do not obtain mortgage but going to go w/ it anyway (will pay in all cash) → can the CP be waived by either party? [this protection is here for the buyer – easy CP case]
- The bigger issue – with the subdivision approval cases → less clear this CP is here for the buyer’s benefit
 - Buyer – ‘I waive the CP of requiring subdivision approval’ → is this allowed?
- A condition characterized as a true condition precedent cannot be waived by either party regardless of whether it was intended to benefit one of them

Turney v Zhilka 1959 SCC

Facts:

- A defence pleaded was that the purchaser failed to comply with the following condition: “Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision”
- The date for completion of this sale is fixed with reference to the performance of this condition – 60 days after plans are approved
- After trouble arose over quantity and description of the land, the purchaser purported to waive this condition on the ground that it was solely for his benefit and was severable and sued for specific performance without reference to the condition and the time for performance fixed by the condition
- The trial judge found that the condition was one introduced for the sole benefit of the purchaser and he could waive it

Issues:

- Can the purchaser waive the condition?

Decision:

- No – buyer cannot waive the CP

Ratio:

- A true condition precedent cannot be unilaterally waived

Analysis: (Judson J)

- **Here there is no right to be waived – the obligations under the contract on both sides depend upon a future uncertain event – the happening on which depends on the will of a third party**
- This is a *true condition precedent* – an external condition upon which the existence of the obligation depends and until the event occurs there is no right to performance on either side [the parties have not promised it will occur]
- Until it is fulfilled – there is no contract

Notes:

- This seems to be an illogical conclusion – other cases have allowed there to be duties before the condition precedent is fulfilled and a contract is formally created
- Case in last paragraph (1976) → sale subject to planning approval and if agreement not satisfied the agreement shall be null + void
 - Purchaser says he wants to waive the condition and take the land anyway
 - SCC is forced to re-evaluate the rule in *Turney*
 - Uphold the ruling in *Turney* – when parties have drafted a contract subject to a CP and if the parties have said if this condition is not fulfilled it is null + void, then the court cannot rewrite the contract and the purchaser cannot waive the CP
 - DO NOT want purchaser to have the ability to waive the CP if the value of the land is going up, but then to sit back and do nothing if the land value is going down
 - Even if for the purchaser’s sole benefit – does not matter; it would involve the court rewriting the contract that says it is null and void
- This rule is restricted to cases of waiver
 - There are still subsidiary obligations for other contracts

Note:

- Good advisors will never end up drafting a contract that says it is subject to a CP and if that is not fulfilled the contract is null and void
- Do not put in a CP in a well-drafted contract – instead put in a CS
- “If after reasonable efforts have been made, the land is still not sub-divided, the purchaser may but need not declare they are willing to proceed with the agreement” → saying there is a contract, however there is a way to get out

Representations and Terms

Introduction

- Statements made during the course of negotiations leading up to a contract may or may not become terms of the contract – fall into 3 broad categories:
 - 1) There are statements made w/o contractual intent – ‘**mere puffs**’ or ‘sales talk’ with no liability attached to them – these do not amount to a statement of fact [*no liability*]
 - 2) Pre-contractual statements may be categorized as **mere representations** which are not terms of the contract but which can lead to *limited* legal consequences
 - 3) A statement may be construed as a **term of the contract**, leading to *more serious* legal liabilities in the event that it is broken [a promise and are willing to incur contractual liability if wrong]
 - If written into a contract – there is a *presumption* that it is a term
- Once there are statements of fact – then liabilities can be attached – a statement that induces the other side to enter into the contract [but it is not part of the contract]
- Once one has decided which statements can be classified as contractual terms, the more important terms are called ‘conditions’ and the less important terms are known as ‘warranties’
 - Warranties can also be used to refer to all terms of a contract
 - If promise or warrant something = likely a term of the contract
 - If promise something → then can be sued on those terms of the contract
- A third, hybrid term has become recognized ‘an intermediate term’
- Telling difference between representation + term – if in a contract then almost certainly a term

Misrepresentation and Rescission

- **Misrepresentation**: a mis-statement of fact that induces the contract but is not part of the contract
 - 1) How far must it induce the contract? – what if the plaintiff negligently failed to check the statement made by the vendor?
- This mis-statement of fact can be made w/ different intentions – a
 - **1) Innocent**: An honest mistake → an innocent statement of fact that induces the contract and is not fraudulent
 - Limited remedy – rescission w/ a short time limit
 - **2) Fraudulent**: A statement made with 1) knowingly, or 2) without belief in its truth, or 3) recklessly, careless, whether it is true or false something that is intended to deceive
 - Remedy – damages plus rescission
- Categories of Misrepresentations (Torts)
 - **3) Negligent misrepresentations**: fulfills the requirement of tortious misrepresentations in a contractual setting
 - Remedy: damages
- **Rescission** is an expression which is used in a variety of ways:
 - 1) To denote the *setting aside of a contract* because of some defect affecting its formation, such as misrepresentation, duress, or undue influence
 - 2) Describe the *discharge of an existing contract* by subsequent agreement of the parties
 - 3) It is incorrectly used to refer to the situation in which an innocent party is discharged from having to carry out his or her obligations under the contract because of the other party’s serious breach of contract or failure to perform
- The action for damages is an action to enforce the agreement and thus has as its object the substitution of money damages for the performance which should have been rendered under the binding agreement between the parties
- A suit for rescission is to determine that the contract is one that ought not to be enforced – any money award made upon rescission should have as its object **the restoration of parties to their pre-contractual positions**
- A remedy but w/ a short fuse on when one can exercise the remedy [innocent]

Redgrave v Hurd 1881 20 Ch. D. (CA)

Facts:

- The plaintiff (solicitor) advertised he would take as a partner an efficient lawyer and advocate about 40, who would not object to purchase advertiser’s suburban residence
- The defendant entered into negotiations w/ the plaintiff with a view to purchasing the home and a share in the practice – asked for an idea of yearly income and was advised by the plaintiff that it amounted to 300-400 a year [he took the assurance of the selling solicitor without checking]

- The defendant agreed to purchase the house and a share in the business for 1600 – the parties entered into a written agreement which referred only to the sale of the house and the D gave a 100 deposit
- On learning the practice was ‘utterly worthless’ the defendant refused to complete the sale
- The plaintiff brought suit for specific performance [also that D could have checked how much it was worth actually] – the defendant alleging he had been induced to enter into an agreement by a misrepresentation, counterclaimed for rescission, return of the deposit, and damages in deceit for the loss and trouble of the move and giving up his old practice

Issues:

- Did the trial judge err in allowing damages for the plaintiff and dismissing the counterclaim for rescission?

Decision:

- Yes – appeal allowed
- Order allowed for rescinding the contract and the deposit to be returned to D
- Defendant fails for counterclaim for damages – failed to show that fraudulent misrepresentation on the part of the seller
- Plaintiff cannot have specific performance because his mis-statement induced the contract and it is easy to rescind the contract

Ratio:

- **If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it** and in order to take away his title to be relieved from the contract on the ground that the representation was untrue it must be shown that he either had knowledge of the facts contrary to the representation or that he showed clearly by his conduct that he did not rely on the representation

Analysis: (Jessel MR)

- The counterclaim for damages fails because he has not pleaded knowledge on the part of the plaintiff that the allegations made were untrue
- The trial judge said the plaintiff had books the defendant could have looked at if he intended to rely upon the representation of business [court said this was irrelevant]
- Seller only got what he wanted because he relied on something that is false (regardless of whether he knew it was false or not) → a “moral delinquency”
- A person cannot get a benefit of anything obtained through a statement that is false – seller is getting more than he should because buyer would have paid less knowing the truth
- However, there were no books that showed the business done – it is a mistake to believe there were any books the defendant could have looked into to ascertain the correctness of the statements made by the plaintiff
- And the seller makes a material representation about these books
- If it is a material representation calculated to induce him to enter into the contract, **it is an inference of law** that he was induced by the representation to enter into it and in order to take away his title to be relieved from the contract on the ground that the representation was untrue it must be shown that he either had knowledge of the facts contrary to the representation or that he showed clearly by his conduct that he did not rely on the representation
- The statement being a material statement and being untrue is sufficient ground for rescinding the contract

Class Notes:

- Defence of plaintiff → did not check into the papers and determine for himself how much the business was actually worth
- If make a material representation, then the buyer does not have to check it out for himself – it is an inference of law that he relied on it
- **HOWEVER** → this statement is misleading – Court must always decide the purchaser relied on the mis-statement of fact – it is actually a factual question whether the purchaser relied on it
- Law is no longer as strict as it is stated here
- To examine the rights of the buyer – start with the principle of ‘**buyer beware**’/*caveat emptor* → entire risk of the transaction relies on the buyer *except* to the extent that the buyer has been misled by a factual mis-statement of the seller or if there is a term of the contract that states the seller’s obligations/governing the matter
 - The seller is under no obligation to disclose/can be silent – but once do start to disclose must be accurate in what you say
- Fraudulent misrepresentation → (p. 362) recklessly and without care whether it was true or false and not with the belief that it was true [even if the buyer had plead fraudulent misrepresentation it is a high bar to overcome]
- *Uberrimae fidei*: Disclose any fact that is relevant to the risk undertaken by the insurance company, even if not asked [relevant to insurance contracts only]

Note 3 (p. 365)

- Canadian Courts have rejected this approach
- Approach is to consider all relevant facts to consider whether a statement was relied on – there is a logical inference (not an inference of law) that the representation was relied on [without other facts]

- NOW need → mis-statement of fact, buyer relied on it, and provide evidence of the reliance [buyer needs to show this]

Example:

- Buyer does not rely on the mis-representation of the fact – can have a material misrepresentation but it does *not* induce the contract
- 1) If in writing and the buyer does not read it (never aware of it); 2) if the buyer knows but makes it clear it does not affect the buyer's judgment; 3) buyer before the contract becomes aware statement is not true but decide to go ahead anyway

Smith v Land and House Property Corp. (1884) 28 Ch. D 7 (CA)

Facts:

- The plaintiff offered for sale a hotel stating it was currently leased to Frederick Fleck 'a desirable tenant'
- The defendants agreed to buy the hotel and shortly after Fleck went into bankruptcy [in reality he only paid the rent under pressure and bit by bit]
- The defendants refused to complete the transaction and defended the plaintiff's suit for specific performance on the basis that the mis-description of Fleck's virtues amounted to a misrepresentation
- Plaintiff's said description of Fleck was *a mere expression of opinion* and not a statement of fact

Issues:

- Can the defendant defend the suit on the basis that the description of Fleck amounted to a misrepresentation?

Decision:

- Yes – the statements of opinion could be regarded as fact in this situation

Ratio:

- If the facts are not equally known to both sides then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion

Analysis: (Bowen LJ)

- If the facts are not equally known to both sides then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion
- A landlord knows the relation between him and his tenant – others either do not know them at all or do not know them equally well and if the landlord says that he considers that the relationships between himself and his tenant are satisfactory then that opinion should be rendered as reasonable
- He is asserting that the nothing has occurred in the relationship between landlord/tenant which can be considered to make the tenant an unsatisfactory one – this is not true [he was being forced to pay his rent slowly under pressure]
- [Being wrong in opinion does not necessarily amount to liability – unless know facts contrary to the assertion of opinion → does the seller know of any facts that would undermine the opinion?]

Notes:

- A statement of opinion does not amount to a mis-representation → it is not a statement of fact
- Court → Statement of opinion implies you know of no facts that would undermine that opinion
- Cannot attack the opinion – but cannot attack that the opinion must be based on some evidence [here they knew the tenant did not pay rent on time + never in full quantities]

Bank of British Columbia v Wren Developments Ltd. (1973) BC SC

Facts:

- The plaintiff claims the sum of \$25,000 against the defendant upon certain written guarantees executed and delivered by said defendant to the plaintiff as security for a loan of \$30,000 made by the plaintiff to the defendant
- As collateral security for the loan, the defendant deposited with the plaintiff 1050 shares of Dynasty Explorations and 33,400 shares of Spartan and received in exchange shares
- Ask corporate officers (Smith + Allan) to sign guarantees for the company's debt – meaning if Wren cannot pay the debt off, they will be personally liable
- Smith entered into a new loan w/ the bank – to get a new loan, bank said needed both Smith + Allan's guarantee – Allan says tell me about the collateral security/has there been any change to the collateral security you hold? → Bank responded – did not know particulars but would make investigation to look and report later; Allan signed
- Bank does not have as much security for the loan as Allan thought
- Issue → the bank teller did not lie; he did not know the particulars
- The plaintiff has not proved it did sell the securities and apply the proceeds in reduction of the loan

Issues:

- Is the defendant, Allan liable to the plaintiff upon the second personal guarantee?

Decision:

- No – he was induced by misrepresentation of the plaintiff in failing to disclose material facts to him
- Action dismissed with costs

Analysis: (Munroe J)

- Find that the defendant, Allan, was misled by the words, acts, and conduct of the plaintiff into believing there had been no change in the collateral securities held by the plaintiff – otherwise he would not have signed it
- There was a unilateral mistake on the part of Allan which was induced by the misrepresentation of the plaintiff in failing to disclose material facts to him

Class Notes:

- If there is liability on part of the bank – if the statement as made was true, the liability can only attach to the statement that he would find out and let you know [it may have been here if he realized there was less security he could have done something to preserve his own position]
- Was there an active mis-statement of fact? → Not at the time it was made
- Issue here was that there was a change in security and Allan inquired and this was not told to Allan [employee failed to come through with the second part of the statement 'I'll find out and report back']
- Lucky case → could have likely gone either way

Kupchak v Dayson Holdings Ltd. (1965) BC CA

Facts:

- The appellants (K) purchased the shares of a motel company, Palms Motel Ltd, from the respondents (D) in return for two properties conveyed to the respondents and mortgages given to the respondents by the appellants on the land and chattels owned by the motel company
- The transaction was completed on March 30th 1960 and the appellants thereupon took possession of the hotel premises and began to operate the business
- 2 months later – learning that representations made by the respondents' agent as to the past earnings of the hotel were false, the appellants stopped making payments on their mortgages and consulted their solicitors
- A's solicitors notified R of an intention to continue withholding payments until a proposed lawsuit had been determined
- R sold an undivided half interest in one of the properties conveyed to them by A, tore down the existing building and erected an apartment building
- The amount of an existing mortgage on the other property was increased and the interest rate was raised
- A year after the sale of the half interest R launched an unsuccessful foreclosure action against A and A commenced an action for rescission
- Trial judge denied rescission but awarded A damages because were induced by fraud by R (awarded \$28,000)
- Did not award rescission because they were able to restore to R the shares in the motel, R could not restore their property as they had conveyed an undivided one-half interest in it and because buildings torn down + a new apartment house erected

Issues:

- Were A induced by fraud and should they be awarded rescission or damages?

Decision:

- Would order rescission and order R to compensate A for their equity in the Haro St. property based upon its value on March 31 to be ascertained by an inquiry with interest at 5% per annum from that date

Ratio:

- Equity as an incident of its peculiar remedy of rescission or under its power to award compensation may adjust the rights of the parties by ordering either one to pay compensation to the other to make good some deficiency in perfect restitution

Analysis: (Davey JA)

- Find there to be enough evidence to supporting the finding of fraud
- A can restore the shares in the Palms Motel to R and since they have continued to operate the business there is no change in the character of the company or its shares
- However, R can return the North Van property but not the Haro St. property because of their own dealings so they can only return the remaining undivided one-half interest in it and that in a form so completely changed that its identity may have been said to be destroyed
- The R's acquired their property by fraud and ought not to bar rescission of the transaction unless it be impractical or so unjust to the respondents that it ought not to be imposed upon a guilty party
- In determining whether rescission is practical, equity's power to remove inequities resulting from rescission and deficiencies in restitution by compensation, account, or indemnity must be kept in mind

- The property has been so greatly changed by industry, planning, and expenditure of a large sum of money that it would be unjust to deprive R of the property and give to A – and A does not want this, they want the sum of \$80,000 put upon the property in the exchange
- Rescission is an equitable remedy + equity has the same power to order one to pay compensation to the other in order to effect substantial restitution under a decree for rescission as it does to order one party to pay money on account or by way of indemnity
- Equity has a power to do what is practically just and the application of remedy is discretionary and should be molded in accordance with the exigencies of the particular case
- Rescission is just as much an equitable remedy as account and indemnity, and in applying that remedy, equity may order the payment of compensation to adjust the rights of the parties' consequent upon rescission, just as it may order the payment of money upon account or by way of indemnity
- Since it is impractical and unjust to require R upon rescission to restore the Haro St. property they had acquired from the appellants by fraud, R ought to compensate A for the property R are allowed to keep
- If the entire interest had been sold at fair price the amount of compensation would be the purchase price – but here, it should be the value of the property on March 31
- The question must also be asked whether the person on whom the fraud was practiced having notice of the fraud, elected not to avoid the contract, elected to avoid it, or made no election?
- As long as he makes no election he retains the right to determine it either way

Class Notes:

- They got the Haro St. property by fraud so this should not bar rescission – this should go on forever – even if fraud → fraud unravels all
- Allow rescission even after 2 years has elapsed from the date of the contract – but when date passes from date of contract and parties taking action on it, other defenses are raised [did not take any steps to stop operating the Palms Motel – affirmed the contract knowing of the false representation]
 - Need evidence that once knew of the false representations, they *chose* to continue on with the contract → p. 374
- Defence of laches – AKA delay → equitable limitation period – basic AB rule is to commence an action within 2 years of the fraudulent misrepresentation BUT rescission is an equitable remedy, and as an equitable remedy the court says that may not get the remedy if delay unduly in seeking a court of equity's assistance, regardless of the limitation period [the time limit = acting promptly in seeking the equitable remedy]
- Would rescission be available in the case of an innocent misrepresentation? → no it would have been too long

Note 6 – p. 376

- *Nesbitt* → In real estate transactions, performance or 'execution' of the contract constitutes a bar to rescission. Here, buyer buying a house. Property held under seller under a long-term lease (buying a leasehold interest); buyer and real estate agent look at house and agent says it's lit by electricity. Buyer agrees to buy house, takes possession of the house then realizes there is no electricity
 - Two days later go back to seller and say not going ahead with this – SCC says that the representation by the real estate agent was innocent
 - Could the buyers rescind? – Court says no – because (kind of) two contracts so all of the rights become merged into the final document – the final document signed tends to be a complete contract of the entire contract
 - SCC holds that the only time you can use rescission is up to 30 days (?) before the signing of the final document (the deed of conveyance) – this is only for innocent misrepresentation → unravels for fraud

Representations and Terms

Heilbut, Symons, & Co v Buckleton 1913 AC 30 (HL)

Facts:

- The appellants (rubber merchants) underwrote a large number of shares in a company called Fisiola Rubber and Produce Estates (a company registered and promoted by other persons at that time)
- This company instructed a manager (Mr. Johnston) of their Liverpool business to obtain applications for shares in Liverpool
- Johnston (had seen a draft prospectus but had no copy of it) mentioned the company to several people in Liverpool, including Mr. Wright (a broker for the respondent)
- Respondent phoned Johnston from Wright's office – asked about the rubber company and whether he had any prospectus – Johnston said no – R asked 'if it was alright?' and J said 'we are bringing it out'
- As a result of this conversation, a large number of shares were allotted to the respondent
- At this time rubber boom was at its height and the shares of the company were at a premium – then found out there was a large deficiency in rubber trees (which said in the prospectus were on the Fisiola estate) and the shares fell in value

- R brought an action against A for fraudulent representation and alternatively for damages for breach of warranty that the company was a rubber company whose main objective was to produce rubber
- At trial – jury found no fraudulent misrepresentation but found the company could not be properly described as a rubber company and that A/J had warranted it was a rubber company

Issues:

- Was there fraudulent misrepresentation on the part of the appellants?
- Was there a contract collateral to the main one where A promised to R that it was a rubber company in consideration for R taking shares?

Decision:

- No - there is nothing which can be taken as evidence of an intention on the part of the party that there should be a contractual liability in respect of the accuracy of the statement – it is a representation as to a specific thing and nothing more

Ratio:

- A person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made
- An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so *intended*

Analysis: (Lord Moulton)

- It is not contested that in the phone conversation Johnston's reply was a representation that the company was a 'rubber company'
- Must show a warranty – a contract collateral to the main contract to take shares, whereby the defendants in consideration of the plaintiff taking shares promised the company itself was a rubber company
- Collateral contracts must be proved strictly
- Here – the whole case for the existence of the collateral contract rests on the mere fact that the statement was made as to the character of the company – if this is taken as sufficient, then would have to do this for any statement regarding the subject matter of a contract made by a contracting party prior to its execution
- This would negative the established rule that an innocent representation gives no right to damages – and say that any representation prior to a contract relating to its subject matter is sufficient to establish the existence of a collateral contract
- **In order to establish a cause of action sounding in damages for misrepresentation the statement must be fraudulent or must be made recklessly, not caring whether it be true or not**
- Holt CJ – 'an affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended'

Notes:

- Problem – if only an innocent misrepresentation → the remedy is rescission – but the company is likely be bankrupt – companies cannot be put back in their pre-contractual position
- This was more than a mere representation, it was a term of the contract
- Here – alleging a breach of *warranty* → buyer alleged the sellers warranted it was a rubber company – it was a term of the contract that we were buying shares in a rubber company
 - Cannot find any evidence in the contract of the purchase for sale that the company warranted the company was a rubber company
- Argument – it was a *collateral warranty* – a subsidiary contract – alleging the company is a rubber company was used as consideration for buying shares in the company
 - Effect of collateral contract is to increase the consideration provided in the main contract – so possibility of entering in these contracts, but these types of contracts must be proved strictly ["If I buy these shares in the company, will you warrant it is a rubber company?"]
 - Court regards this type of contract with some suspicion – wonder why it was not added into the main contract
- Test is same for main contract as for the collateral contract
- Test = was it **intended** to be a term of the contract (p. 370) → Holt CJ = 'an affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended'
 - Evidence that it is intended to be a promise = "I promise this is true and you can sue me if it is not"
- Statement of fact cannot give rise to damages unless made fraudulently
- Decisive test – not enough that it is a statement of fact leading to the contract or a statement of fact of which the vendor is ignorant – it is more than that [more than a statement of fact – must be stated in a way that the promisor assumes contractual liability if wrong]
- Here – statement of bringing out a rubber company did not amount to a warranty because a warranty is a promise that something is true
- Difference between a term and a misrepresentation – is that in a warranty (term) it is promised that it is true

- Here, the statement of it being a rubber company was not written into the contract (if it was then it is assumed to be a term) – then if not written into the contract, need to determine whether the statement was made and intended to be a term of the contract assuming contractual liability
- To claim damages – must either show there is a term of the contract or a fraudulent misrepresentation
- P. 379-338 → fraudulent misrepresentation = a careless statement is not fraudulent; to establish a cause of action for damages in misrepresentation the statement must be fraudulent or made recklessly not caring whether true or not (these are not extremely careless statements) [this was approved by the SCC 2 years ago]

Summary

Misrepresentations:

- Innocent = remedy → rescission
- Negligent [tort of negligent misrepresentation] = remedy → damages
 - [*Sodd Corp. v N Tessis*]
- Fraudulent = remedy → rescission + damages
 - [Knowing it is false or what it equivalent thereto, must be made recklessly, not caring whether it be true – *Heilbut* p. 380] – not negligent or careless statements

Terms:

- Warranties (less important terms of contract) → Damages
- Innominate (Intermediate type of term) → Damages + (sometimes) Rescission [depending on severity of consequences]
- Conditions (more important terms) → Damages + Rescission
 - A term for which the remedy is always damages plus an entitlement to rescission, for breach of a condition

Test for terms: something is a term if it is intended [*Heilbut*] – OR agreement recorded in a written document, then chances are these are terms [all terms do not have to be written in the document]

Dick Bentley Productions Ltd. v Harold Smith (Motors) Ltd. 1965 2 All ER 65 (CA)

Facts:

- Dick Bentley brings an action against Harold Smith for damages for breach of warranty on the sale of a car
- Bentley had been dealing with Smith for a couple of years and told Smith he was on the look-out for a well vetted Bentley car
- In 1960, Smith found one and bought it for 1500 from a firm in Leicester – he wrote Bentley saying ‘I purchased a Park Ward power operated hood convertible – it’s one of the nicest cars we’ve had in for quite a long time’
- [Said it was owned by a German baron = mere puffery]
- Smith told Bentley earlier he was in a position to find out history of cars – and for a car of this quality the makers keep a complete biography of it
- Bentley went to see the car – Smith told him it had been fitted w/ a replacement engine + gearbox and had done 20,000 miles only since it had been fitted (this showed on the speedometer as well)
- Smith said the price was 1850 and he would guarantee the car for 12 months including parts + labor
- B bought the car for 1850
- The car was a disappointment to B – he brought it in from time to time and eventually brought an action for breach of warranty
- Trial = found there was a warranty, it was broken, and gave 400 in damages

Issues:

- Whether the representation that the car had only done 20,000 miles was an innocent one or whether it was a warranty

Decision:

- The representation was a warranty – this is ample foundation for inference of a warranty

Ratio:

- If a representation is made in the course of dealings for a contract for the purpose of inducing the other party to act on it and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty – and a breach of it will lead to a cause of action for damages

Analysis: (Lord Denning MR)

- 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended'
- But intended – depends on the conduct of the parties – on words/behavior, rather than thoughts – if a reasonable bystander could infer that a warranty was intended, that will suffice
- If a representation is made in the course of dealings for a contract for the purpose of inducing the other party to act on it and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty – it is not necessary to speak of it as being collateral
- But, the maker can rebut this presumption if he can show that it really was an innocent misrepresentation – he was innocent in fault in making it and that it would not be reasonable in the circumstances for him to be bound by it
- Here, Smith was in the position to know, or at least find out, the history of the car – he could get it by writing the makers but he did not do so – he did later, and when the history was examined his statement turned out to be quite wrong

[Salmon LJ]

- If what Smith said was intended and understood as a legally binding promise then it was a warranty and may be part of the contract of sale or collateral to it – here, there is no doubt what was said by Smith was understood and intended to be a legally binding promise

Notes:

- Was this a term? – was it intended to be a mere statement of fact or was it intended to be a term?
 - The legal mechanism/test we use to judge the seller's intention = officious bystander test
 - Factors that the bystander would say this was a warranty – when a specialist dealer makes this type of statement; he is able to check very easily and the buyer is not able to check – a person in this position is more likely to be promising that this statement is true
- *Oscar Chess* case → seller of car says it is a 1948 model + buyer buys car on that basis, then finds out the car is 9 years older [statement of fact = because the seller had bought the car from someone and the registration stipulated the car was a 1948 model]

Leaf v International Galleries [1950] 2 KB 86 (CA)

Facts:

- The buyer bought from the sellers an oil painting of Salisbury Cathedral – on the back was a label indicating that it had been exhibited as a Constable, and during negotiations for the purchase the sellers represented it was a painting by Constable – this representation was incorporated as one of the terms of the contract
- 5 years later the buyer wanted to sell the painting and he took it to Christie's to be put into an auction where he was advised it was not a Constable – he took it back to the sellers who took it back temporarily for investigation and still adhered to the view it was a Constable
- The buyer brought a claim for rescission of the contract – that the picture had been represented to be a Constable and that he paid 85 in reliance on that representation
- It was determined this painting was not a Constable and was worth very little

Issues:

- Can the buyers rescind the contract on the account that the painting is a fake?

Decision:

- No – too much time has elapsed - the buyer had the opportunity to examine the painting and he did not
- Appeal dismissed

Ratio:

- Once the buyer has accepted the goods in performance of the contract he cannot reject them after – the only thing he can claim is damages

Analysis: [Denning LJ]

- This was a contract for the sale of goods – there was a mistake about the quality of the subject-matter because both parties believed the picture to be a Constable and that mistake was in one sense essential or fundamental
- Such a mistake does not avoid the contract – there was no mistake about the subject-matter of the sale – the parties agreed on the specific terms of the same subject matter and that is sufficient to make a contract
- The term of who painted the painting was either a condition or a warranty → if a condition = buyer could reject the picture for breach of the condition at any time before he accepted or was deemed to have accepted it; if a warranty = could not reject it but was confined to a claim for damages
- S. 11 of Sale of Goods Act = once the buyer has accepted the goods in performance of the contract he cannot reject them after
- S. 35 = the buyer is deemed to have accepted the goods when after a lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them

- The buyer had the painting for 5 years – this is far too late for him to reject this picture for breach of any condition – his remedy after this time is only for damages, and he did not bring this claim to the court

[Sir Raymond Evershed MR]

- Questions whether the court should hold to the doctrine in *Seddon v North East-ern Salt Co.* that an executed contract cannot be rescinded in cases of innocent representation. As the rule has stood for a long time and has not been changed by Parliament, he feels the court should not overturn it in this case.
- The buyer still has the article he intended to buy (a picture of the cathedral), it has just changed in quality. Further, with the great volatility of items in the art market, finding a value for restitution would be very difficult

Notes:

- Here, the remedy the buyer is seeking is rescission
- A remedy of rescission can be performed when it is a misrepresentation
 - Innocent = out of the question [5 years after the selling date]
 - Fraudulent = sellers bought it as a Constable and sold it as one – not fraudulent
- Sale of Goods Act – gives a possible argument for rescission IF it is a condition
- S. 11 = if a condition, then in proper time could have rejected the picture, but the right to reject the breach of condition has always been limited by the rule that once the buyer accepted, or is deemed to have accepted, the goods in performance of the contract he cannot reject them after but is relegated to a claim for damages
- Is the gallery owner ‘undertaking’ that this painting was the Constable? – no, the gallery owner was not in the position to make these statements
- Could this become a term of the contract? → unlikely to be a promise – the art gallery owner is likely not saying he guarantees it to be a Constable
- Assume that the buyer claiming rescission, the best possible position for the buyer – here, assume it is a breach of condition
 - How long is rescission available – even in its most powerful form [breach of condition]
- Sale of Goods Act [exists in the exact form today in AB]
 - Once the buyer accepts the goods, the buyer cannot reject them but is relegated to his claim for damages [before accept can reject the goods]
 - What does acceptance mean? → when after a lapse of reasonable time, he retains the goods without intimating to the seller that he has rejected them
 - This means it is longer than just the day the painting was received
 - BUT, 5 years is much too long after this amount stipulated by the Act
- Rescission is a time limited remedy → it is a flexible limit; but after 5 years the time limit is definitely over
- For a mere innocent representation [least powerful remedy], the time limit for rescission is even shorter than a time limit for a breach of a condition. If remedy for breach of condition is gone, then it is definitely gone for innocent representation
- Sale of Goods Act – describes terms as either conditions or warranties
 - Implied condition that the seller has the title to sell the goods
 - Implied warranty that buyer will have the security of the interest (?)
 - It is an implied term unless excluded, that the goods are reasonably fit for their intended purpose and fit to be sold of merchantable quality
- Way of dealing with disappointed buyer/seller – do not care what they said but instead look for the remedy [just because there is a mistake it does not take them to a separate area of law]

Statutory Reform

Fair Trading Act

- Applies to **consumer purchasers** (a person buying goods for self; not for resale)
- The consumer must be buying goods from a **supplier** (a person whose business it is to sell those goods; not a private seller)
- Fair Trading Act applies between consumers and suppliers
- Lists unfair practices:
 - S. 6(2)(c) – to use exaggeration, innuendo, or ambiguity as to a material fact with respect to the consumer transaction
 - S. 6(4)(b) – a supplier’s misleading statement of opinion if the consumer is likely to rely on that opinion to the consumer’s disadvantage
 - S. 6(4)(f) – a supplier’s representation that goods have or have not been used to an extent that is different from the fact
 - S. 7(1) – a consumer may cancel at no cost or penalty to the consumer a consumer transaction as a result of an unfair trading practice

- S. 7.1(1) – there is a time limit – a consumer must give notice within one year of a supplier having been found to have engaged in an unfair practice related to a consumer transaction

Concurrent Liability in Contract and Tort

Sodd Corp v N Tessis (1977) ON CA

Facts:

- Trial granted the plaintiff judgment against the defendant in \$4500 on the basis of a negligent misrepresentation on the sale by tender of certain stock-in-trade contained in a warehouse
- The defendant – a chartered accountant and licensed trustee in bankruptcy advertised for sale by tender the stock of a furniture business carried on by the bankrupt under the name and style of Riteway Furniture
- The plaintiff submitted a tender after its principal officer made a cursory examination of the stock in the warehouse – the officer testified that the defendant represented to him that the method of calculating the retail value of the goods in the warehouse (\$33,500) was by doubling the wholesale cost and that he relied upon that representation in deciding to submit the plaintiff's tender
- The trial judge found these goods were overvalued by approximately 100% in comparison with the invoices and price catalogues found in the store – she found the defendant negligent in misrepresenting the quantity and value of the items included in the assets of the bankrupt advertised for sale, and that the defendant was not entitled to rely on an exemption clause in the advertisement [...no warranty or condition is expressed or can be implied as to designation classification, quality or condition or in any manner whatsoever]
- Trial – if D did not want purchasers to rely on his representations, then he should not have made them – he made negligent representations which he should have known would and did induce the plaintiff to prepare his tender in a certain manner and as a result of that tender being accepted the plaintiff suffered damage – relied on Hedley principle
- Hedley = there could be liability in tort for a negligent misrepresentation causing pecuniary loss where a special relationship existed between the parties

Issues:

- Was the trial judge correct in finding that the plaintiff was not negligent in relying on a licensed trustee who had caused an inventory of the stock to be taken, when the plaintiff's opportunity for inspection was limited

Decisions:

- Yes - Appeal dismissed

Analysis: [Lacouriere JA]

- *Hedley* – a reasonable man knowing he was being trusted or that his skill and judgment were being relied on would have 3 courses open to him → 1) he could keep silent or decline to give information or advice sought; 2) he could give an answer with clear qualification that he accepted no responsibility for; or 3) he could simply answer without any such qualification
- Here – the defendant as a professional accountant and trustee in bankruptcy was in a special relationship creating a duty of care to the plaintiff and was negligent in his representation concerning the retail value of the stock-in-trade
- This case did involve a pre-contractual negligent misrepresentation which induced the plaintiff to submit its tender and the defendant's liability follows
- The defendant's stipulation amounted to a binding promise depriving him of the terms of the exemption
- It is clear from the cases that the defendant's representation, whether characterized as a negligent misstatement or as a collateral warranty falls outside the exemption clause

Notes:

- Tort law up to 1962 – about physical acts that caused physical damages
- Advance – extend tort law in two ways → 1) from negligent acts to negligent words; 2) to allow for recovery in the case of negligent misrepresentation for financial or economic loss
- Introduction of the tort of negligence misrepresentation

BG Checo International Ltd v British Columbia Hydro & Power Authority 1993 SCC

Facts:

- The appellant (BC Hydro) is a BC Crown corporation
- Respondent (BG Checo) is a large corporation in the business of constructing electrical transmission lines and distribution systems
- In Nov 1982, Hydro called for tenders to erect transmission towers and to string transmission lines – in Dec. 1982 prior to submitting its tender, Checo's representative inspected the area by helicopter – he noted that the right of way had been partially cleared and also noted evidence of ongoing clearing activity so the representative assumed the right of way would be furthered cleared prior to the commencement of Checo's work

- On Feb 15 the parties entered into a written contract – Checo contracted to construct 130 towers and install insulators, hardware, and conductors over 42 km of right of way in BC
- No further clearing ever took place – the ‘dirty’ condition of the right of way caused Checo a number of difficulties in completing this work and Checo sued Hydro seeking damages for negligent misrepresentation or in the alternative, breach of contract
- Documents were tendered in evidence that demonstrated Hydro was aware of the problems with the clearing and of the impact that these problems would have on the successful tenderer + as a result Checo amended its statement of claim to include a statement of fraud
- Trial found Hydro acted fraudulently in its dealings with Checo and awarded Checo 2 mil being ‘the total loss suffered as a result of being fraudulently induced to enter into this contract’
- CA rejected the finding of fraud but found there had been a negligent misrepresentation which induced Checo to enter into the contract – awarded 1 mil

Issues:

- Was there a negligent misrepresentation on the part of Hydro inducing Checo to enter into the contract?
- Can Checo sue in contract and/or tort? And what are the damages?

Decision:

- The clause required H to clear the right of way and this was not negated by the more general clauses relating to errors and misunderstandings – therefore, H breached the contract
- It was open to the plaintiff to claim for negligent misrepresentation in tort as well as breach of contract – appeal dismissed

Ratio:

- The actions in contract + tort may concurrently be pursued unless the parties by a valid contractual provision indicate that they intended otherwise – this excludes cases where the contractual limitation is invalid as by fraud, mistake, or unconscionability and a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract

Analysis: (La Forest and McLachlin JJ)

- There should be a movement away from the separation of contract and tort and allow a person who has suffered a wrong full access to all relevant legal remedies
- The tender documents said the clearing of the right of way would be done by others and formed no part of the work to be performed by Checo – also stated that it was C’s responsibility to obtain clarification before submitting the tender
- H argued it was C’s responsibility to find out what ‘cleared’ meant if there was any ambiguity to it
- It is a cardinal rule of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole – only if an interpretation cannot be found will the court rule one clause or the other ineffective
- Given the specific nature of H’s obligation to clear the right of way, the site inspection and contingencies referred to can reasonably be read as relating to matters other than clearing, which was a clearly assigned obligation and therefore not a contingency
- The clauses placing the obligation on H to clear the right of way can be reconciled with the clauses placing on Checo the consequences of errors and misunderstandings in the tender documents and the obligation to satisfy itself as to the site, the work, and contingencies
- If damages are assessed on breach of contract, then the case should be returned to trial

The Claim in Tort

- The right to sue in tort is not taken away by the contract in such a case [where there is an express term in the contract dealing with the matter of tort], although the contract, by limiting the scope of the tort duty or waiving the right to sue in tort, may limit or negate tort liability
- Where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negate the right to sue in tort – must look on *how* something is dealt with in the contract
- There are 3 situations where contract and tort are applied to the same wrong:
 - 1) Where the contract stipulates a more stringent obligation than the general law of tort would impose – the parties here are hardly likely to sue in tort, since they could not recover in tort for the higher contractual duty – the vast majority of commercial transactions fall into this case
 - 2) Where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances – this occurs when the parties by their contract indicate their intention that the usual liability imposed by the law of tort is not to bind them – the most common means by which such an intention is indicated in the inclusion of a clause of exemption or exclusion of liability in the contract – here there is usually little point

suing in tort since the duty in tort and consequently any tort liability is limited by the specific limitation to which the parties have agreed

- 3) Where the duty in contract and the common law duty in tort are co-extensive – here, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort – such as a more generous limitation period
- The case here falls into the 3rd category → the contract did not negate H's common law duty not to negligently misrepresent that it would have the right of way cleared by others – had Checo known the truth, it would have bid for a higher amount – that duty is not excluded by the contract, which confirmed H's obligation to clear the right of way, therefore C may sue in tort
- The actions in contract + tort may concurrently be pursued unless the parties by a valid contractual provision indicate that they intended otherwise – this excludes cases where the contractual limitation is invalid as by fraud, mistake, or unconscionability and a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract
- Using the express-implied distinction for determining whether there is a right to sue in tort poses a number of problems
- While the tort duty may be limited by the contractual terms so as to be no broader than the contract duty, there is no reason to suppose that merely by stipulating a duty in the contract, the parties intended to negate all possibility of suing in tort

Class Notes:

- There is one general term that applies to everything + then more specific terms [Hydro said that 'everything had been cleared' – specific term]
- Time-limit bar on a claim in contract, therefore claim in tort for negligent misrepresentation – fail to take reasonable care in making the statement about the land clearing – made statement without checking that the person who was supposed to clear the land + if would have checked, then would not have made the statement [actual evidence shows they did know the site clearing person did not clear it well – suing them]

How far can tort be used in a contract setting?

- (Diamonds SCC case – 1976) → Cannot sue in the tort of negligence where the relationship between the parties is governed by contract – the contract set out all rules of the transaction + cannot allow tort to interfere
- Sodd Corporation 1977 – prior to this Canadian courts had a hard time determining how tort fit in with the contractual relationship
- 1985 – Central Trust (SCC) → Diamonds was wrong – if elements of the tort is fulfilled then we always have a tort action against the tortfeasor – this should only cease to apply if have clearly contracted out of right to do so
- BG Checo (1993) → Iacobucci had a dissenting judgement – did not want them to use tort law in contracts [Checo could not sue in negligent misrepresentation – here, the parties have dealt w/ site conditions by contract + should not allow an action in tort where the contract addresses the problem of site conditions]
- P. 405 – The theory of concurrency – a contract made precludes a party from suing in tort where there is an express term of the contract dealing with that matter
- Majority → that is not the rule – the only thing that could prevent an action in tort is where the contract says we are not liable for an tortious conduct/misrepresentation we have made [have right to sue in tort unless limited/excluded by the terms of the contract]
- There is a claim in negligent misrepresentation as long as can prove all of the elements of the misrepresentation – 1) representation made must be one where it is reasonable for a party to rely (reasonable reliance); and 2) statement has to actually be negligent (without reasonable care); and 3) cause the alleged damage
 - If those elements are proved – have a claim in tort, unless contract says not liable

Classification of Terms

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd. 1962 1 All ER 474 (CA)

Facts:

- By a time-charter, it was mutually agreed between the owners of the vessel Hong Kong Fir and the charterers that the owners would let and that the charterers hire the vessel for 24 months from the date of delivery to the Charterers in Liverpool 'she being in every way fitted for ordinary cargo service' and that 'the owners would maintain her in a thoroughly efficient state in hull and machinery during service' – the 2 relevant terms
- [Ship had bad crew + in terrible condition]
- Hire was payable at 47s per ton

- When the vessel was delivered to the charterers at Liverpool, her engine-room was undermanned and the staff incompetent, although the owners knew that the vessel's machinery was very old and therefore required an ample and efficient engine room to maintain it
- Held up for 4 weeks and it was found the engine would take a further 15 weeks for repair before it was seaworthy [and got new crew who could run the ship]
- It became seaworthy but in mid-June there had been a steep fall in freight rates from 47s to 24s per ton and by mid-August to 13s per ton
- The charterers wrote the owners repudiating the charter [incompetent crew and terrible condition ship] and saying no longer bound by it; and in an action by the owners for *wrongful* repudiation
 - Prior to this case → Charterers correct (for right to rescind contract) if term broken was a condition of the contract – if it was a mere warranty, then can only get damages (if any)
 - If wrong, liable for stopping performing their end of the contract
- The trial judge found the owners were in breach of contract in delivering a vessel that was unseaworthy with regard to her engine room staff and also for failing to negligently maintain the vessel in an efficient state
- Trial rejected that the contract was frustrated or entitled to repudiate for breach of contract

Issues:

- Are the charterers able to make a claim for repudiation of the contract?

Decision:

- No – the learned judge took into account and gave due weight to all the relevant considerations and arrived at the right answer for the right reasons

Ratio:

- The correct test to determine if a breach should lead to repudiation is to look at the events which have occurred as a result of the breach and to decide if these events deprived the party attempting to repudiate of the benefits that it expected to receive from the contract. The breach must lead to the party being unable to obtain *all or a substantial proportion* of the benefits that they intended to receive by entering into the contract.

Analysis: [Diplock J]

- To determine whether a party will be relieved of its undertaking to do that which he has agreed but has not yet done → must ask whether the occurrence of the event deprives the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?
- Where the event occurs as a result of the default of one party, the party in default cannot rely on it as relieving himself of the performance of any further undertakings on his part and the innocent party, although entitled to, need not treat the event as relieving him of the performance of his own undertakings – a man should not be able to take advantage of his own wrong
- Where the event occurs as a result of neither party, each is relieved of the further performance of his own undertakings and their rights in respect of undertakings previously performed are now regulated by the Law Reform Act
- The question whether an event which is the result of the other party's breach of contract has this consequence cannot be answered by treating all contractual undertakings as falling into one of two separate categories – 1) "conditions" the breach of which gives rise to an event which relieves the party not in default of further performance of his obligations, and 2) "warranties" the breach of which does not give rise to such an event
- Condition = contractual undertakings of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract
- Warranties = undertakings of which it can be predicated that no breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract
- Must look at the events which had occurred as a result of the breach at the time at which the charterers purported to rescind the charter-party and to decide whether the occurrence of those events which had deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charter party that the charterers should obtain from the further performance of their own contractual undertakings
- In this case, as the charterers still get to have the boat for 20 more months, the expected benefits can still be received. Therefore, this breach should not lead to repudiation, but *only* to damages
- Here – the breach was serious, but did not deprive the parties of the whole benefit of the contract [still 20 more months of sailing to be done] and now the ship is in operating condition
- Cannot say definitely whether condition or warranties – some intermediate term

Class Notes:

- Difference between a term that is a condition vs. a term that is a warranty → **intention** – whether the parties intended that a breach of a term would give the other side the right to call the contract off – must read the contract as a whole to determine which terms the parties have singled out
- Unsettled on the verbal rule of a condition → one rule is the term must go to the root of the contract
- Hong Kong Fir – changes the traditional approach – not trying to classify the term, but are worried about the consequences of the breach and the severity of the consequences – rule → is the breach so serious as to substantially deprive the charterer of the whole benefit of the contract
- Either prove breach is a condition term OR the new rule
- Now saying classification of conditions which any breach justifies in rescission of contract; warranties = no rescission; or if neither [intermediate term] → ability to rescind depends on seriousness of breach
 - In any of these have the right of damages – limited by terms of the contract [can say under which circumstances a party can rescind a contract/discharged from performance]
 - Because the ultimate test is intention – so parties can say what can excuse them from performance of the contract
 - Test for condition/test for seriousness of breach = strict test

Wickman Machine Tool Sales Ltd. v L Schuler AG [1974] 2 All ER 39 (HL)

Facts:

- Schuler (manufacturing firm) entered into a written agreement with Wickman (English company) which granted to W the sole right to sell S products including panel presses, in a territory which included the UK
- In order to ensure that aggressive sales efforts were undertaken by W, there was an agreement stipulating the W's obligations
- W failed to comply strictly with its obligations under 7(b – p. 449) [Shall be condition of the agreement that Wickman send representatives to stores once a week and the same representative shall visit unless there are unavoidable reasons]
- W reps visited the named firms in most weeks however on a few occasions they failed to do so – S repudiated the agreement, claiming that these defaults amounted to a breach of 'condition' and therefore conferred an absolute right to terminate the agreement [the word 'condition' was used therefore any breach justifies rescission regardless of how trivial the consequences]
- [Best counter argument = just because it says condition, does not mean they're using the legal definition of condition – need to determine whether condition is used as a technical term of art or as the common meaning; how strictly did they intend to use the term]
- Trial = agreement had been lawfully terminated
- Appeal = [Denning] the use of the term 'condition' in the agreement might draw upon any one of the 3 meanings:
 - 1) **The Proper Meaning** = something demanded or required a prerequisite to the granting or performance of something else, and which is carried over into the law in this way 'in a legal instrument – a contract, a provision on which its legal force is made to depend'
 - Must be a prerequisite to the very existence of the agreement – here, was not
 - Was it a prerequisite to the right to recover on the agreement? – here, no
 - 2) **The Common Meaning** = a provision, a stipulation
 - 3) **The Term of Art** = a condition in this sense is a stipulation in a contract which carries with it the consequence that if the promisor breaks a condition in any respect, however slight, it gives the other party a right to be quit of his future obligations and sue for damages unless he by his conduct waives the condition in which case he is bound to perform his future obligations but can sue for the damages he has suffered
- Only material breaches would confer a right to determine in accordance with clause

Issues:

- Was clause 7 a condition of the contract and therefore the breach of it giving right to termination of the contract?

Decisions:

- No – appeal dismissed

Analysis: (Lord Reid)

- Clause 11 = the agreement should continue in force until the 31st – that appears to imply the corollary that the agreement shall not be determined before that date in any other way than as provided in cl 11
- If the terms of cl. 11 are wide enough to apply to breaches of cl. 7 then cl. 7 must be read subject to the provisions of cl. 11
- Cl. 11 is intended to apply to all material breaches of the agreement which are capable of being remedied [believe remedy = cure so that matters are put right for the future]
- Can the breach of s. 7 be remedied within the meaning of this agreement? →
- Must discover the intention that is disclosed by the contract as a whole – so simply calling it a 'condition' does not mean it is a condition n

- Use of 'condition' is indicative of a condition but it is not conclusive
- The contract is so obscure – S were not entitled to rescind the contract as they purported to do

Dissent: (Lord Wilberforce)

- Dissenting on the meaning of condition – the use of the word indicated that the term was one the breach of which entitled the aggrieved party to treat the contract as at an end [term of art]

Notes:

- Using the word 'condition' in the contract – from the stance of the reasonable person could have more than one meaning – likely they would interpret it as a term of the contract – but it is **ambiguous** as to its meaning
- But the parties here had another clause – cl. 11 – set out the circumstances as to how the contract can come to an end [if there has been a material breach and have given 60-days-notice in writing and the other party failed to remedy the breach]

Bhasin v Hrynew SCC 2014

1. What was the primary reason for the refusal of the Alberta Court of Appeal to imply a term of good faith into Bhasin's contract?

- Only covers certain categories of relationships
- The 'entire agreement clause' = no agreements express, implied, or statutory other than those expressly set out in the contract
- This clause makes it almost impossible to argue there was a relevant representation or term unless you can also find it in the agreement
- This clause did not work to exclude the duty of good faith – found by the SCC:
 - Good faith is a different type of implied term – this is implied by law (cannot exclude that)
 - [Most terms are implied by fact – this is so obvious that most parties would have included it]
 - The duty of good faith is like to doctrine of unconscionability – cannot exclude this/bar it by a general clause
 - Can use a general clause to bar a term implied by fact

2. Is it possible to justify a decision in favor of Bhasin by applying fraudulent misrepresentation to the case? Why does the Court consider that the duty of good faith has an advantage over civil fraud? Do these reasons sound correct in light of your knowledge of the requirements of fraudulent misrepresentation?

- Bhasin's source of discontent → Bhasin asked whether Can-AM would merge industry w Hrynew's and they equivocate and gave an answer implying they would not
 - Sounds similar to a fraudulent representation – once they embarked on saying something, they had to be full and frank – it was in their plans to merge the industries
- Court said FM was not a good way to deal with this type of problem → to establish an action in FM must prove an intention to deceive
 - But this is actually not a requirement – *do not need to intent* to make the statement fraudulently
 - Darian Peak – test for FM – requirements are a false representation, some level of knowledge of falsehood, causes plaintiff to act in certain way, resulting in loss
 - No reference to intention
- There likely was an argument for FM here – but the court says it is not a solution (because of 'intention')

3. The Court also states that the duty of honest performance is more advantageous than promissory estoppel. Why does it reach this conclusion? Can you make an argument that Can-Am was estopped from denying the representation that it was not planning to merge the businesses of Bhasin and Hrynew?

- The representation Can-Am made – that there was no plan to merge the businesses; and Bhasin relied on this by continuing to operate his business
- There is likely an argument they are estopped from denying the truth of that representation
- Court says there is a problem w/ PE because it cannot be sued as a cause of action
- Damages Bhasin got was \$87,000 – amount that his business was worth (although Can-Am had to approve any purchase of the businesses)
- If Can-Am had been estopped from going back on their representation – he would have had the same time to adjust and to capture whatever he could from his agency (essentially the amount of damages the trial court applied in this case)
- Although, these damages that were awarded are hard to justify – given the veto Can-Am had

Categories of Contract where Good faith imposed:

- Franchises, fiduciary relationships, and employment relationships during dismissal
- Bhasin was not an employment – but was similar to an employment relationship and a franchise [close enough to 2, so no harm in applying same principles]
- SCC said these categories are not exclusive, but as evidence of a wider principle of good faith

- Theory – not creating a massive expansion of good faith, but a small and incremental tweak but applying it to a category that is similar to existing categories
- Must show an analogy to an existing head of good faith
- SCC not overriding Can-Am’s ability to terminate the contract; but what the breach lies in is the failure to deal honestly + in good faith with Bhasin

Can you contract out of GF?

- No – it is a duty imposed by law
- However, can limit the duty → putting a clause into the contract [can **define** how good faith will be interpreting – ex. by saying that the parties going into the deal knowing that the landlord can be capricious and the decision can be motivated by unreasonable factors]
 - Very narrow doctrine – w/ some possibility of extension

Standard Form Contract and Exclusion Clauses

Implied Terms

Machtinger v Hoj Industries Ltd [1992] SCC

Facts:

- Appellants brought an action for wrongful dismissal

Issues:

- Court asked to decide on what grounds an employee is entitled to reasonable notice of termination
- In the absence in a contract of employment of a legally enforceable term providing for notice on termination, on what basis is a court to imply a notice period and to what extent is intention to be taken into account in fixing an implied term of reasonable notice in an employment contract?

Decision:

- Entitled to a reasonable notice of termination

Analysis: [McLachlin J]

- The intention of the contracting parties is relevant to the determination of some implied terms, but not all – intention is relevant to terms implied as a matter of **fact** [what would the parties have stipulated had their attention been drawn at the time of contracting to the matter at issue?]
- Intention is **not** relevant to terms implied as a matter of law
- Can distinguish between different types of implied terms –
 - 1) terms implied in fact;
 - 2) terms implied in law; and
 - 3) terms implied as a matter of custom or usage
- Requirements for reasonable notice in employment contracts fall into the category of terms implied by law – they do not depend on custom of usage, although it can be an element in determining the nature and scope of the legal duty imposed; do not fall into category of terms implied by fact either (where the law supplies a term which the parties overlooked but obviously assumed)
- Terms implied in contracts of employment imposing reasonable notice requirements depend on a number of factors – w/ reference to each particular case, the character of the employment, length of service, age and availability of similar employment, having regard to experience, training and qualifications – it does depend on contractual intention
- 1) Terms implied as a matter of custom or usage → there must be evidence to support an inference that the parties to the contract would have understood such a custom or usage to be applicable – terms are implied in this manner on the basis of a presumed intention
- 2) Terms implied as necessary to give business efficacy to a contract – terms which the parties to have a given contract would obviously have assumed – also implied on the basis of presumed intention + correspond to terms implied by fact
- 3) Terms implied as legal incidents of a particular class or kind of contract, the nature and content of which have been largely determined by implication – correspond w/ terms implied by law – test for implication of a term implied by law is necessity
- The test of necessity is not whether the term is ‘necessary’ for the very existence of the contract – [but perhaps more necessary in a practical sense to the fair functioning of the agreement]
- Where the law has for many years imposed a legal duty on contracting parties, as it has in implying the term that employers must give employees reasonable notice of termination, that duty has clearly been found to be ‘necessary’

- What is at issue here is not the intention of the parties, but the legal obligations of the employer, implied in law as a necessary incident of this class of contract – this duty can be displaced only by an express contrary agreement and since there is no contrary agreement here, the Act having rendered what contrary agreement there was null and void, the reasonable term of notice implied by law is not displaced and will be imposed by the court

Notes:

- Can we find a remedy by saying the courts can imply a term?
- McLachlin → There are 2 types of terms – implied in fact + those implied in law
 - Fact – based on presumed intention of the parties [ex. officious bystander test]
 - Law – 3 categories where it is important to recognize these – and implied by the motive of good faith dealings [insured/insuree, employee/employer, landlord/tenant]
- Here – Court asked to decide on what grounds an employee is entitled to reasonable notice of termination?
 - As a matter of law – an employee is entitled to reasonable notice – dependent on length of service and type of job [this is implied by law – and not because the parties so intended]
- Terms implied by law are well-recognized + are implied as an incident to that relationship
- Para 44 → even with a principle of law, it is recognized it can be displaced by an agreement expressed to the contrary [this can be changed by parties – must be expressed that it is not a reasonable period of notice, but some other period of notice]
 - Those 3 categories are *explained* by the good faith term – are not trying to extend it into these situations as a free standing principle

General Principles of Contractual Interpretation

- In interpreting contracts, the courts give expression to the intention of the parties, however that intention must be found in the words the parties have used – in construing those words the courts should prefer the ‘natural’ or ‘ordinary’ meaning they would have for a layperson, but there may be circumstances to justify construction of the words according to a special meaning developed by usage or custom
- Extrinsic evidence cannot be used to explain the plain meaning of words, but can be employed to show that words have acquired a special meaning as a result of some custom or to resolve an ambiguity [it is unnecessary to consider extrinsic evidence at all when the document is clear + unambiguous]
- Negotiations prior to the final contract are generally inadmissible – English courts have held that subsequent conduct is also not admissible as an aid to contract interpretation; the modern Canadian position is more flexible and is in favor of admitting such evidence – though weighing it carefully, where there are at least 2 reasonable interpretations of the contract in question
- Subjective intentions or purposes is inadmissible – but realize contracts are not made in a vacuum, and are willing to consider evidence as to the background circumstances surrounding the making of the contract
- If additions are made to a contract [either written typed by hand, or by hand when typed] any conflict between the basic document and the additional provisions will be resolved in favor of the latter on the assumption they more reliably express intention of the parties
- *Contra proferentem* principle – if the contract has been drafted by one party, any ambiguities are likely to be construed against that party and in favor of the other
- A word or phrase of debatable import may achieve clear meaning when the entire document is read, giving effect to all its language where that is possible or when the ‘surrounding circumstances’ are examined

Judicial Control of Standard Form Contracts and Exclusion Clauses

A) Introduction

- Should be careful to separate problems that result from the standard form contract and those that arise from the exclusion clause

1. Development and Use of the Standard Form

- 3 different types of contracts and contexts in which standard forms are used:
- 1) ‘**Ticket Cases**’ illustrate one of the earliest uses of a standardized written form. In these cases the contract is formed quickly, casually, and without discussion of the terms and a ticket is handed over which purports to set out the terms in very brief compass, or sometimes to incorporate terms which are not printed on the ticket, but which the ticket attempts to incorporate by reference [usually between entrepreneurs and their customers]
- 2) **Contractual dealings by businesses** – so many transactions that cannot afford to negotiate terms with each customer, however contract so complex that the customer could not expect to negotiate terms without a lawyer – so financial

institutions adopt a standard form of financing and lending agreements; real property or auto rental business use standard form lease agreements – and insurance business

- 3) **Transactions (often of sale)** in which the vendor may use a standard form but is largely concerned to introduce into the contract a disclaimer clause intended to limit or eliminate liability to the purchaser to which the vendor might otherwise be exposed
- Standard form is convenient/valuable for parties who are in a position to bargain for terms reasonably fair to both – but its most objectionable characteristic lies in its propensity for oppressiveness when used by a party in a dominant position who is able to dictate terms to the other contracting party
- Importance in commercial arena [*Federal Commerce & Navigation Co*] → 1) enable those making use of the market to compare one offer with another to see which is the better; and 2) they become critically interpreted by the courts so that the way in which they will apply will be understood in the same sense by both parties
- There is a need to distinguish standard form agreements made by commercial equals from those characterized by a marked disparity in the respective bargaining power of the parties [*Schroeder Music Publishing Co v Macaulay*] → when looking at the latter, the terms of these contracts have not been the subject of negotiation or approved by any organization representing the interests of the weaker party – they have been dictated by the party whose bargaining power allows him to say that if you want these goods/services, these are the only terms in which they are obtainable

Trebilcock, “The Common Law of Restraint of Trade” (1986)

- This extract uses the Schroeder case as an illustration and provides important economic insights on the general notion of inequality of bargaining power and on the use of the standard form contract
- If an agreement had to be negotiated and drafted from scratch each time a standard transaction was entered into, the costs for all parties would escalate dramatically
- The fact in cases such as (hotel registration forms, dry-cleaning agreements, insurance companies, restaurants menus/prices, etc.) products are offered on a take it or leave it basis is not evidence of market power but of recognition that neither producer nor consumer interests are served by incurring the costs involved in negotiating separately every time
- The real measure of market power is whether the consumer, if he decides to ‘leave it’ has a competitive range of alternatives available to him
- 1) Even if one assumes abuse of market power through monopolization or cartelization, a monopolist will monopolize the price, the terms of trade, but not the non-price terms
- 2) Even if market concentration exists, there will still be the intractable problem of determining whether and to what extent it has produced anti-competitive effects
- 3) The corporate structure of the defendants in Macaulay made it implausible that they had a monopoly power or were playing a dominant role in the industry
- the plaintiffs having some knowledge of the terms available from other publishers because of prior dealings with them, he and his collaborator initiated the contact with the defendants and in dealing with them, they apparently began with clear views on the terms desired

2. The Use of Exclusion Clauses

- Where the limiting or exempting clauses are a reasonable device for defining the bargain reached by freely consenting parties in a situation of relatively equivalent bargaining power, no real problem exists
- But, a problem does arise when an exemption is inserted in a standard form contract by a dominant party, or when an exclusion clause appears to relieve a contracting party of the very responsibility which the contract seemed intended to impose
- There are 3 distinct questions that may be raised in the process of deciding how to deal with a particular limiting clause that is relied on by one contracting party and is challenged by the other –
 - 1) Has the clause been effectively included as a term of the contract? [may involve an inquiry into the notice of the clause given to the party who challenges it]
 - 2) What does the clause mean? [may include a strict reading of the clause to narrow its effect]
 - 3) Is there some reason why we will simply refuse to apply the clause to a particular set of facts? [would it produce a result that is just too unjust, too unfair, too oppressive, or too unconscionable?]

B) Incorporation

1. Unsigned Document

Thornton v Shoe Lane Parking Ltd. [1971] England CA

Facts:

- At trial the defendants (Shoe Lane) were held liable for the personal injuries suffered by the plaintiff as the result of an accident which occurred in a multi-story car park of which the defendants were the occupiers
- Plaintiff, parked in car park – there was a notice on the outside which included ‘all cars parked at owners’ risk’ – he drove into the garage and took a ticket out of the machine and the car was taken up by mechanical means to the floor above – the plaintiff left his car there and 3 hours later came back
- His car was brought down and when he went to put his belongings into the boot of the car there was an accident and the plaintiff was severely injured – found it to be half his fault, and half the defendants fault
- Defendant’s do not contest they are partially responsible for the injury, but say they are protected by virtue of the exemption conditions – they rely on the ticket issued to the plaintiff by the machine saying it was a contractual document which incorporated a condition which exempts them from liability
- Below the time, there was some small print in the corner stating ‘this ticket is issued subject to the conditions of issue as displayed on the premises’
- If plaintiff had read this + looked for where the conditions were displayed, he would have had to drive his car into the garage and walked around and then found the conditions on a pillar opposite the ticket machine
- Brought an action in negligence - 50% contributory negligence
- Defendant’s said were not liable because T contracted out of what otherwise would have been his right to sue for negligent conduct
- One condition → “the defendants are not responsible ... for injury to the Customer or any other person occurring when the Customer’s motor vehicle is in the Parking Building howsoever that loss, mis-delivery, damage, or injury shall be caused”

Issues:

- Is the defendant exempt from liability by virtue of its exemption condition?

Decision:

- No – appeal dismissed

Ratio:

- When a ticket is issued by an automatic machine – the customer pays money and gets a ticket, he cannot refuse it and he cannot get his money back – the contract was concluded when he put his money into the machine
- If want the exempting conditions to work, they must explicitly be brought to the attention of the customer before the contract is concluded

Analysis: [Lord Denning]

- Ticket cases [for railways, steamships, cloakrooms] where a clerk issues tickets to a customer who took them – the ticket as regarded as an offer by the company, and if the customer took it without objection, it was regarded as acceptance
- This is distinguishable when a ticket is issued by an automatic machine – the customer pays money and gets a ticket, he cannot refuse it and he cannot get his money back – the contract was concluded when he put his money into the machine – can say offer is when the proprietor of the machine is ready to receive the money, and acceptance is putting the money into the machine – the terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money + the customer is bound by those terms so long as they have been sufficiently brought to his notice beforehand + he is not bound by conditions on the ticket if they differ from the notice because the ticket comes too late
- Here – offer was contained in the notice at the entrance ‘at owner’s risk’ i.e. risk of the owner so far as damage to the car was concerned, the offer was accepted when the plaintiff drove up to the entrance and the ticket was printed out at him – the contract was then concluded and could not be altered by any words printed on the ticket itself + could not be altered to exempt the company from liability for personal injury due to negligence
- If the automatic machine was a booking clerk so that old fashion ticket cases apply [*Parker v South Eastern Ry*] – then for customer to be bound by the terms on the ticket have to ask if 1) they knew there was writing on the ticket and that the writing contained conditions or 2) they knew there was writing on the ticket and had received reasonable notice that the writing contained conditions
- Would be more appropriate to say condition (singular) – because the only relevant condition is the exempting condition
- The customer is bound by the exempting clause if he knows that the ticket is issued or subject to it; or if the company did what was reasonably sufficient to give him notice of it
- In order to give sufficient notice, the exempting clause would need to be in red ink with an arrow pointing to it or something equivalent
- Burden is on defendants to prove that the customer knew or believed to know there was writing on the ticket – they did not do so

Class Notes:

- Did sign document? If not, must explain how entered into the contract.
- **Is the clause part of the contract in the first place?**
 - What is the offer and where is the acceptance?
 - When T first entered the parking lot – sign ‘all cars parked at owners’ risk – this term likely part of the contract; however, this clause only applies to damage to the car and not damage to the person so this does not exempt the carpark from liability
 - Car park says are not liable because the conditions were printed on the pillar and the ticket that was given says that T was subject to all conditions [and by this time there is a contract between the parties]
 - Which conditions are the parties bound by? → The terms that were present at the time → the terms that T was aware of at the time the contract was made or those of which he had reasonable notice of
 - The exempting terms were not reasonably available to the parker at the time he entered the parking lot – are not exempt from the terms in the liability clause
- Is there a written contract or is it partly oral and partly in writing?
- **Does the clause cover the events that occur?**
 - Need to interpret the words of the contract in light of what happened – do the words of the contract cover the events that happened
 - Some courts take the contra proferentem approach
- *Parker v South Eastern Ry Co.*
 - Knew ticket would be subject to conditions + by taking the ticket, agreeing to the conditions
- Case where the exempting conditions are brought to the attention of the other contracting party too late
- *Olley v Marlborough Court*
 - Hotel room – give credit card = contract is made
 - Get to hotel room later afterwards and see the exemptions on the back of the door of hotel room [after contract is made]
 - Court held that the contract was made at front desk + at this point there was no reference to contracting out of common law duties – by the time the conditions in hotel room were made, contract had already been entered into for quite awhile
 - Can only contract out of common law duties if bring them to attention during the time the contract is being formed
- If it is a little bit late – okay – if clear that it is part of the transaction, then will likely bind the person by them

A

2. Signed Documents

- The traditional view was that one party’s signature to a document containing terms established that party’s assent to those terms, in absence of fraud or misrepresentation. Tilden has qualified this position.

Tilden Rent-a-Car Co v Clendenning (1978) BC CA

Facts:

- C attended the office of T for the purpose of renting a car – he provided the information asked of him and said yes when asked if he desired additional coverage – a contract was submitted for his signature which he signed in the clerk’s presence
- He placed his copy of the contract in the glovebox and did not read it
- On the back of the contract in faint type to be hardly legible are a series of conditions – one stating the vehicle will not be operated by any person who has consumed any intoxicating liquor regardless of the quantity
- The vehicle was damaged by C, in trying to avoid a collision with another vehicle he hit a pole

Issues:

- Is the defendant liable for the damage caused to car while being driven by him by reason of the exclusionary provisions which appear in the contract?

Decision:

- It was not open to T to rely on the clauses – having paid the premium he was not liable for any damage to the vehicle being driven by him
- Appeal dismissed

Ratio:

- When you sign a document, it is expected that you have read the terms of it. However, only reasonable expectations will be protected. The party offering the clause must draw it to the attention of the other party if there are onerous terms that the offering party knows the other side is unaware of.

Analysis: [Dubin JA]

- The company instructions for what is to be said to customers about the conditions is that unless inquiries were made, nothing was to be said with respect to the exclusionary conditions – if inquired, employers were to say that by payment of 2.00 per day customers had complete coverage unless were intoxicated or unless committed an offence under the Criminal Code
- One who signs a written document cannot complain if the other party relies on the signature as a manifestation of assent to the contents – but only a reasonable expectation will be protected
- The clauses relied on here are inconsistent with the overall purpose for which the contract is entered into by the hirer – under such circumstances something more should be done by the party submitting the contract for signature than merely handing it over to be signed
- Many standard form print documents are signed without being read/understood – the parties know/ought to know that the contract does not represent the true intention of the signer and that the party signing is unaware of the stringent and onerous provisions which the standard form contains
- In these types of cases, the party seeking to rely on the terms should not be able to unless they have first taken reasonable measures to draw such terms to the attention of the other party and in absence of these reasonable measures it is not necessary for the party denying knowledge of the terms to prove fraud, misrepresentation, or *non est factum*
- Here – no steps were taken to bring attention to the provisions and C was unaware of the exempting provisions, therefore it was not open to Tilden to rely on those clauses

Dissent: [Lacourciere JA]

- C violated two conditions of the contract – he drove into a pole after drinking an amount of alcohol
- It is not for the court to brand the clause as being unfair, unreasonable, or oppressive – the terms of the contract are not unusual or unreasonable and are binding on C
- Would allow the appeal and substitute a judgment for amount of agreed damages + costs

Notes:

- The parties were governed by the law rule from *L'Estrange v F Graucob Ltd.* [1934] KB → when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation the party signing it is bound and it wholly immaterial whether he has read the document or not
- **Are we sure the clause in question applies to what happened?**
- Sign car rental contract + are bound by all of its terms – regardless of whether they are read or not
- When look at contract can see there is an inconsistency – front side 'in consideration for \$2/day the customer's liability is limited to NIL' [initial this side] but on the back – other circumstances where liability will be total
- Here – special circumstances → there was a hasty and informal way in which the contract was signed (it was apparent the customer had not read the contract - speed is important to the transaction); there was no real opportunity for him to read it (length and small print); the clause is stringent and unusual (inconsistent with the terms of the rest of the contract);
- Clause so wide – [using the vehicle in violation of any law] – not even relevant to the rest of the agreement; could have written this clause to be more reasonable [otherwise essentially asking for people to challenge it]
- If are unreasonable in the clause you draft [i.e. try to over-grasp to prevent any liability], then are asking for a court to interfere with it – need to determine what risk would be *reasonable* to allocate to the other party

Karroll v Silver Star Mountain Resorts Ltd. (1988) BC SC

Facts:

- Plaintiff broke a leg while participating in a skiing competition – resulted from a collision between plaintiff and another skier
- Prior to the race, the plaintiff signed a document releasing Silver Star from liability for any injuries sustained in the race
- The plaintiff contends she is not bound by the document arguing she was not given adequate notice of its content or sufficient opportunity to read and understand it
- At the top of the form it says RELEASE AND INDEMNITY – PLEASE READ CAREFULLY
- She does not recall whether she was given time to read it but said she could have read it in 1-2 minutes

Issues:

- Whether or not the written document was one that successfully excluded the risk for the ski resort? Was the plaintiff bound by the terms of the release?

Decision:

- Yes – the plaintiff was bound by the terms of the document
- Plaintiff is precluded from recovering from the defendants

Ratio:

- There is no general requirement that a party offering a document must take reasonable steps to bring the onerous terms to the attention of the signing party or to ensure he reads/understands them. It is only where the circumstances are such that

a reasonable person should have known that the party signing was not consenting to the terms in question that an obligation arises or else it would be a misrepresentation by omission.

Analysis: [McLachlin]

- There is limited application of the rule that a party proffering for signature of an exclusion of liability must take reasonable steps to bring it to the other party's attention – this is not a general principle of contract law but is only applicable in special circumstances
- There are 2 exceptions to the general rule that it is immaterial whether the party has read the terms of the contract after they have signed it: [L'Estrange]
 - 1) In circumstances which made it not her act (*non est factum*)
 - 2) Where the agreement has been induced by fraud or misrepresentation
 - 3) (approved in *Tilden*) Where the party seeking to enforce the document knew or had reason to know of other's mistake as to its terms, those terms should not be enforced; and in these circumstances the defendants failed to take reasonable steps to bring the content to attention
- In the usual commercial situation, no need for party presenting the document to bring terms to other's attention – it is safe to assume the signing party intends to be bound by its terms
- Many factors may be relevant to determine whether the duty to take reasonable steps to advise of an exclusion clause/waiver arises →
 - Effect of exclusion clause in relation to the nature of the contract (if runs contrary to normal expectations, fair to assume party does not intend to be bound by them); the length/format of the contract + time available to read and understand it
- Ms. Karroll knew she was signing a legal document affecting her rights so she is bound by the L'Estrange rule unless she can bring herself within an exception of the rule
 - There was no active misrepresentation and this is not a case of *non est factum*
 - Was this a case where a reasonable person should have known K did not intend to agree with what she signed?
 - 1) the release was consistent w/ the purposes of the contract – to allow her to engage in dangerous activity and the exclusion of legal liability
 - 2) it was short, easy to read, and headed in capital letters [no fine print]
 - 3) signing these releases was common features of this ski race + K had signed such releases on previous occasions – this was not an unusual term; it was a standard aspect here
- It was not required of S to bring these terms to her attention; and even if they were required, they did take steps to discharge themselves of any obligation to bring contents to her attention (capital letters at top)

Class Notes:

- **Does the clause apply??**
- What is the size of the exception that *Tilden* introduced into this area of the law?
- Why is the participant bound by the clause that she signed?
- There is no inconsistency, there is no clause saying you are covered fully in this event – attention is drawn to it, and have the chance to read it, and is on one page
- Clear case that looks at *Tilden*, and says it only applies in certain circumstances
- P. 505 – differences between this case + *Tilden*
 - None of the 4 special circumstances in *Tilden* were applicable here
- *Affirms *Tilden* rule of reasonable notice

Part 2 → NOW, assuming clause is part of the contract – and because it is a matter of contractual interpretation it will be valid if it covers the event that happened

3. Strict Construction

- Court's interpret contracts in their natural and ordinary meaning – not a narrow interpretation
- P. 473
- Similar principles of strict construction + *contra proferentum* apply to the interpretation of exclusion clauses generally [contract will be construed against the party who drafted it] – this will apply when one party has drafted a standard form contract and given to a party on a 'take it or leave it' basis, AND the terms in the contract are ambiguous then it will be strictly construed against the person who drafted it [classically, applies to insurance contracts]
- As a general proposition, very clear words must be employed in order for one party to protect itself from liability for negligence – so where a defendant is potentially subject to two liabilities, one strict and the other for negligence, general words of exclusion will not be construed as protecting the defendant from its liability for negligence; but where a

defendant's potential liability rests only in negligence, the general words of exclusion are capable of covering negligence since otherwise the clause would lack subject-matter

- SCC case [International Terminal Operators] – relaxed the restrictive approach (commercial context) → although a general exemption from all liability usually does not exclude itself from negligence, but in cases such as here, when the exemption clause relates only to a small part of the full, agreed performance, such a general rule is not necessarily applicable

4. Fundamental Breach

Karsales (Harrow) Ltd. v Wallis [1956] England CA

Facts:

- W inspected a second-hand Buick motor car which S was offering to sell for 600 – he found the car in excellent condition and agreed to buy it if S could arrange financing through a hire-purchase company
- K bought the car from S and sold it to Mutual Finance which let the car out to W on hire-purchase terms
- When this agreement was concluded it was still in S's possession and W had not seen it since the initial inspection
- The car had been left outside W's garage – it had been badly damaged and had evidently been towed in; the new tires had been removed and old ones put on, the wireless set was removed, chrome strips missing, the cylinder head was off, all valves were burnt, and there were 2 broken pistons
- W said he would not accept the car in this condition and was towed away to S's and never repaired
- K sue W for 10 months of installment payments under the agreement
- Defendant says that there was a duty on Mutual Finance to see that the car delivered corresponded to the one Wallis saw, and that because of the condition of the car on delivery there was a fundamental breach by MF, and that K cannot recover the instalments
- K relies on a clause of the agreement that they are not responsible for the condition of the car on delivery → **'no condition or warranty that the vehicle is roadworthy or as to its age, condition, or fitness for any purpose is given by the owner or implied herein'**

Issues:

- Can the plaintiff recover the 10 months of installment payments based on the exclusion clause in the agreement?

Decision:

- No - the breach went to the root of the contract and disentitled the lender from relying on the exempting clause
- Appeal allowed

Ratio:

- A party cannot use exempting clauses if he has breached a fundamental term/one that goes to the root of the contract

Analysis: (Denning LJ)

- When the hirer has seen the car and examined it and made an application for hire-purchase on the basis of his inspection of it, there is an obligation on the lender to deliver the car in substantially the same condition as it was seen
- It is an implied term in the agreement that pending delivery the car will be kept in suitable order and repair for the purposes of the bailment
- It is now settled that exempting clauses only avail a party when he is carrying out his contract in its essential respects – he is not allowed to use such clauses as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations – they do not avail him when he is guilty of a breach that goes to the root of the contract – must look at all express/implied terms of the contract and if he is in breach of one that goes to the root, he cannot use the exempting clauses [i.e. when he has broken a fundamental term]
- Here, the breach went to the root of the contract and disentitled the lender from relying on the exempting clause

Class Notes:

- Doctrine of fundamental breach – a variety of strict interpretation; this clause would apply to minor breaches, then the seller would not be liable for it; however, there was a fundamental obligation in the contract – to deliver a car in substantially the same condition it had been when seen by the buyer (this was the core obligation) → cannot contract out of this fundamental obligation
- This was changed → “an abuse of the natural role of judges” [cannot change what the parties have said in their contracts – no rule that one cannot rule out of liability for a fundamental breach; must give ordinary and natural meaning to the terms of the contract]
- Contracts where abuses occurred (standard form contracts) were dealt with by legislative provisions (ex. Fair Trade Act)

5. Fundamental Breach/Unconscionability Post-Hunter

Fraser Jewellers (1982) Ltd. v Dominion Electric Protection Co. (1997) ON CA

Facts:

- The plaintiff operated a jewelry store and entered into a contract with the defendant, operating under the name of ADT and ADT was to furnish a burglar alarm system and for an annual fee provide the plaintiff with a monitoring service where ADT was to notify the police if the alarm system was activated
- In the agreement there was an exclusion clause → **“ADT is not to guarantee/warranty that the system will avert or prevent occurrences of the consequences which the system or service was designed to detect/avert; and if found liable for loss, damage, injury its liability shall be limited to a sum equal to 100% of the annual service charge or \$10,000, whichever is less”** [Fundamentally saying this is not a risk that ADT assumes – not an insurer; but also does not leave the customer without a remedy either]
- Plaintiff was not aware of this exclusionary provision and it was not pointed out to him by the defendant
- 2 years after having the system installed, robbers escaped the plaintiff’s premises with \$50,000 worth of jewelry; the defendant failed to respond the plaintiff’s alarm signal for about 10 minutes and by the time ADT called the police, the robbers were gone
- Plaintiff sued to recover its loss from ADT

Issue:

- Is the defendant entitled to limit its liability to the amount of the annual monitoring charge (\$890) as in accordance with the exclusion clause?

Decision:

- Yes – appeal allowed

Ratio:

- In this commercial setting in the absence of fraud or other improper conduct inducing the plaintiff to enter the contract, the onus must rest upon the plaintiff to review the document + satisfy itself of its advantages/disadvantages before signing it
- Regardless of whether a breach is fundamental or not, an exclusionary clause of this kind should be enforced according to its *true meaning* – relief should only be granted if the clause is seen to be unconscionable, unfair, or unreasonable

Analysis: (Robins JA)

- Trial judge held that ADT was not entitled to rely on the clause/fully liable for the loss – using *Hunter Engineering* → there the Court found that while exclusionary provisions were enforceable according to their true meaning, a court was empowered in limited circumstances to grant relief against provisions of this nature
 - Found the clause to be unfair/unreasonable/unconscionable – agreement was not read, was not brought to his attention, was on a standard print form/not negotiated, was unusual in nature, and there was inequality of bargaining power
- There is no reason not to read the contract as it was written
- The defendant’s negligence in failing to respond appropriately to the alarm cannot be equated to a fundamental breach of the agreement
- However, regardless of whether a breach is fundamental or not, an exclusionary clause of this kind should be enforced according to its true meaning – relief should only be granted if the clause is seen to be unconscionable or unfair or unreasonable
- This is not a case where the clause was so obscured to make it probable it would not be seen – it was printed on essentially one sheet of paper and the limitation provision was highlighted in bold block letters
- There was no special relationship here which would impose on the defendant responsibility to bring the clause to special attention of the plaintiff; the plaintiff had all the time he wanted to read it and question ADT on its terms
- Merely having inequality of bargaining power also does not entitle a party to repudiate an agreement – the issue is whether there is an abuse of that power – here there was no abuse of power
- Clause so unusual in character or unfair as to constitute an unacceptable commercial practice? → the rationale (ADT is not an insurer and that insurance should be obtained and scope of liability is unrelated to the value of the customer’s property) underlying the exemption is apparent and makes commercial sense
- ADT has no control over the value of its customer’s inventory and can hardly be expected to insure a jeweler against negligent acts on part of its employees up to the value of the entire jewelry stock whatever the value may be
- The alarm services were provided on the understanding that the charges were based upon the ‘value of the services and the scope of the liability and not upon the value of the customer’s property

Class Notes:

- This exclusion clause was fairly drafted + not unreasonable
- *Synchrude* → [should have put exclusion clause in tendering contract] – do not generally assume a risk (i.e. 1 billion, here) for more than the reward (approx. \$300,000) that would obtain if the agreement works out

- Here, less of an *exclusion* clause and better described as a *limitation* clause → limitation clauses tend to attract less judicial attention than exclusion clauses
- Now courts tend to not interfere in consumer contracts – but do on occasion (ex. Plas-Tex)

Plas-Tex Canada Ltd. v Dow Chemical of Canada Ltd. (2004) AB CA

Facts:

- Plaintiffs (P) were affiliated companies providing pipeline systems to carry natural gas to rural co-ops – they shared common ownership, management, and goals
- Defendant (D) sold defective resin to two of the plaintiffs – D did not have a contractual relationship with the other plaintiffs
- One of the contracts contained clauses **limiting D's liability by stating that P accepted all liability for loss or damage resulting from use of the resin**
- D *knew* the resin was defective and that some plaintiffs would use it to manufacture pipe installed by other plaintiffs to carry natural gas – the pipe was dangerous and allowed gas to escape – P was forced to undertake major remedial operations and the use of the pipe was eventually prohibited
- P's reputation was damaged which caused it to lose some of its customers and be petitioned into bankruptcy

Issues:

- Can D rely on the limitation of liability clause to prevent it from being liable to P for loss and damage as a result of the knowingly defective resin it sold to them?

Decision:

- No, there can be no doubt this conduct was unconscionable – D is prevented from relying on the limitation of liability clauses in contract with the plaintiffs
- Appeal dismissed

Ratio:

- A party to a contract will not be allowed to engage in unconscionable conduct merely because it knows that no liability can be imposed on it because of an exclusionary clause

Analysis: (Picard JA)

- Trial – found there had been a fundamental breach because the plaintiff did not get what it contracted for and because the resin was completely unsuitable for use as natural gas pipeline; and D knew of the problems with the resin before it entered into the contract with P; also found there to be unequal bargaining power (D knew of the formulation of the product and knew there were significant problems with it)
- Whether a breach is a fundamental one that deprives the breaching party of the benefit of any limitation of liability clause is a question of construction – AB courts have held that contracts should generally be enforced regardless of stringency of their terms limiting liability because parties require certainty that the provisions will be legally enforceable, HOWEVER there is an exception → the court will intervene when the party desiring to enforce a limiting liability clause has engaged in unconscionable conduct [this is not a question of fact, but one of construction]
- Unconscionability might arise from unequal bargaining power – Hunter
- If a defendant a) knew of a possible risk associated with its products; b) failed to disclose important assumptions within its knowledge thereby preventing the other party from properly measuring the consequences and risks they were undertaking, c) deliberately withheld information and induced the claimant to enter the agreement on the basis that the other party had 'scientifically done their homework' this would prohibit the defendant from relying on the limited liability clauses
- Rather than disclose its knowledge of its defective resin, D chose to protect itself by inserting limiting liability clauses in its contract

Tercon Contractors Ltd v British Columbia (Ministry of Transportation and Highways) 2010 SCC

Facts:

- BC accepted a bid from a bidder who was not eligible to participate in the tender, then took steps to ensure that this fact was not disclosed
- 2-stage process – 1) selected as eligible bidder (must show resources, capacity – only select eligible/qualified bidders) – 6 companies were chosen as eligible
- BC awarded it to a bidder who was not one of the 6 eligible bidders
- Tercon said BC breached its contract by awarding bid to ineligible bidder [agreed that Tercon was the company that would have otherwise been awarded the contract]

Issues:

- Whether BC succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract?

Decision:

- No – appeal allowed

Analysis: (Cromwell J)

- The Requests for Proposal (RFP) includes an exclusion clause → ‘no proponent shall have any claim for compensation of any kind whatsoever as a result of participating in this RFP’
- Trial = this clause is ambiguous and applying *contra proferentem* she resolved the ambiguity in T’s favor and said were not barred by clause to claim damages; she also found BC’s breach was fundamental and that it was not fair/reasonable to enforce the exclusion clause in light of the nature of the Province’s breach
- It is necessary to examine the exclusion in light of its purposes and commercial context as well as of its overall terms
- Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, this claim does not fall within the terms of the exclusion clause
- In the text, it addresses claims that result from ‘participating in this RFP’ – central to this was participating in a contest among those eligible to participate
- Accepting a bid from an ineligible bidder attacks the underlying premise of the process and liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP
- Also believes it is ambiguous

Dissent [Binnie J]:

- Accept that the respondent breached the terms of its own RFP when it contracted with Brentwood – however, also agree with CA that the exclusion of compensation clause is clear and unambiguous and that no legal ground allows the court to override the freedom of the parties to contract with respect to a particular term
- The exclusion applies to must look at unconscionability → do not have unconscionability since both parties are two powerful companies and equally matched
- Are there any public policy reasons for the courts to override the clause? → no, conduct is not as bad as was in Plas-Tex Canada

Class Notes:

- Examples of unconscionability → knowingly putting out toxic baby formula; Plas-Tex case
- Minority -- It is possible to attack an exclusion clause on the grounds of only unconscionability – however, this is extremely strict
- Courts all agree – when dealing with exclusion clause, need to interpret it

MISTAKE

- The law of mistake is concerned with the circumstances under which a party to a contract may avoid liability because he or she has entered the contract on the basis of a mistake
- Ex. *Leaf v International Galleries* (p. 485) The Court refers to mistake here – “mistake about the subject matter, and that mistake was fundamental; such a mistake however does not avoid the contract so no remedy.” There is only a remedy if there is a specific representation or term about the author of the painting.
- The law of contract generally adopts an unsympathetic – better to advise a party to sue on this basis **only as a last resort**
- An argument based on mistake alone is an argument of last resort

Both Parties Mistakenly Believe They Are in Agreement

Stailmen Steel Ltd. v Commercial and Home Builders Ltd. (1976) HC [Mistake at Time of Formation]

Facts:

- P made a successful bid for steel – he understood the lot to include both building steel and used steel [“all steel in the yard”], while the defendants gave evidence the lot included used steel only
- The defendants refused to deliver any of the steel because P would not sign a waiver to the effect that the lot did not contain the building steel
- D said that there was no *consensus ad idem* and therefore no contract for any steel

Issues:

- Can there be an action for breach of contract or was there no contract at all because the parties were not in agreement regarding terms of it? What was the scope of the offer?

Decision:

- Yes – there was a contract based on reasonable interpretation of the terms for sale of the used steel and therefore D is liable for breach of contract for refusing to give the plaintiff the steel

Ratio:

- It is only a case where the circumstances are *so ambiguous* (evidence is so conflicting) that a reasonable bystander would not infer a common intention that the Court will hold that no contract was created
- When there is a mutual mistake, the court must decide whether reasonable third parties would infer there to be a contract from the words and conduct of the parties who entered into it

Analysis: (Southey J)

- The *circumstances* were such that a reasonable man would infer that the auctioneer was manifesting an intention to offer for sale the bulk lot without the building steel; and by making the highest bid the plaintiff conducted himself so that a reasonable man would believe he was assenting to purchase the lot therefore, a contract for the sale of the lot came into existence and was never repudiated
- D had the right to insist that P take delivery and pay for the bulk lot *excluding* the building steel, but D never had the right to require P to give up its claim that the contract included the building steel as well as the remainder of the bulk lot
- If P thought the bulk lot he was purchasing included the building steel and D thought that the lot they were selling did not, then this is one of mutual mistake – and then, the court must decide what reasonable third parties would infer there to be the contract from the words and conduct of the parties who entered into it
- It is only a case where the circumstances are so ambiguous (evidence is so conflicting) that a reasonable bystander would not infer a common intention that the Court will hold that no contract was created
- Here, a reasonable man would infer the existence of a contract to buy and sell the bulk lot without the building steel and therefore there was a contract to that effect binding on both parties – and by refusing to deliver any steel from the bulk lot, D clearly breached its contract for the sale of such bulk to P

Class Notes:

- **Whether a contract has been entered into in the first place. Mistake at the time of formation.**
- One cannot accept an offer he knows to be mistaken
- When there is a dispute between different assumptions as to the meanings of terms, must look at how a reasonable person would interpret the offer. Would they take it literally (to mean every piece of steel in the yard) or in a different way?
- A dispute between the meaning of offer + acceptance does not mean there is no contract. There is still a contract for the used steel, and so the defendants cannot add a new term stating that P needed to sign a waiver in order to obtain the steel.
- *Rathels v Witchelhouse* – two ships called the “Pierless” and buyer meant October one and seller meant the December one. Court applying reasonable interpretation of contract, it is impossible to tell which meaning was intended, therefore there is no contract.

Agreements Made Under Mistaken Assumptions

Common Law

- When both parties make the same false assumption concerning a matter material to the decision to enter into the contract = a ‘common mistake’

Bell v Lever Brothers Ltd. 1932 HL [Leading Decision on Mutual Mistake]

Facts:

- The Lever Brothers bought out Bell from the contract, but after finding out that Bell violated the contract (speculating in company in business on the side, had L known could have fired w/o payment), L wanted its money back
- The agreement said to be void is the agreement that B would retire from the Board and in doing so L would pay him as compensation
- Entered contract on the mistaken assumption that neither employee had engaged in conduct that would have allowed them to be fired

Issues:

- Were the compensation agreements and money paid under a mistake of fact and therefore void?

Decision:

- No – the identity of the subject-matter was not destroyed by mutual mistake
- Appeal allowed

Ratio:

- There is mistake which makes a contract void when the contract contains an erroneous assumption by both parties, and that assumption is a fundamental reason for making the contract.
- For the doctrine of mutual mistake to apply it must be shown that the subject matter of the contract has become something essentially different from what it was believed to be
- **A mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which**

makes the thing without the quality essentially different from the thing as it was believed to be

Analysis: (Lord Atkin)

- If mistake operates at all it operates so as to negative or in some cases nullify consent – the parties may be mistaken in the identity of contracting parties or in the existence of the subject-matter of the contract at the date of the contract, or in the quality of the subject-matter of the contract
- Ex. a mistaken belief by A that he is contracting with B, when he is actually contracting with C will negative consent where it is clear that the intention of A was only to contract with B
- If parties contract under a mutual mistake and misapprehension as to their relative and respective rights the result is that the agreement is liable to be set aside as having proceeded upon a common mistake
- But mistake as to the quality of a thing raises more difficult questions → in such a case, a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be
- When there is a mutual mistake, the mistake must be fundamental and a contract is void when there is 1) a mistake as to subject matter either before or at the time of contracting if the subject matter of the contract is destroyed or doesn't exist or 2) a mistake as to quality – only if the subject matter is essentially different from what they thought they were contracting for

Class Notes:

- The employees never misrepresented and said no breaches occurred. There were also no terms in the separation agreement that said no breaches had been committed. This points to *caveat emptor* (“buyer beware”) at first sight.
- Common mistake, shared by both parties. Terminated a contract that was already broken.
- **TEST: Was the contract to be terminated different *in kind* from the contract that already existed [from the contract that both parties thought to exist]. And this difference in kind test is extremely difficult to fulfill/strict test.**
- Here, the Court is firm (p. 570) that it would be wrong to decide an agreement to terminate a definite, specific contract as void is different than an agreement to terminate a contract that is already void
- [Similar to personal injury claim – buy out claim for X amount regardless of how good/bad the claim is]
- Bought out this contract good, bad, or indifferent
- P. 570 – Examples of what sound like serious common mistakes:
 - A buys B's horse + thinks horse is sound + pays price of sound horse; if B has made no representation to the soundness and has not contracted according to soundness, A is bound. [If there has been no representation or no term of the contract relating to the 'mistake' then there can be no remedy]
- Ex. *Cooper v Fibbs* – person agreed to buy something he already owned. That is a fundamental mistake. Person buys property unknowingly that he already owned the property.

McRae v Commonwealth Disposal Commission (1951) Aust. HC

Facts:

- Commission entered into a contract to sell the plaintiff one oil tanker including contents wrecked on Jourmand Reef approximately 100 miles north of Samarai for 285
- The plaintiff went on an expedition at considerable expense but found no tanker – sue for breach of contract
- The Commission was never certain about the actual existence of the tanker – say there was a mutual mistake, therefore rendering the contract void

Issues:

- Was there a contract, and if so a breach of it?

Decision:

- There was a contract and the Commission contracted that a tanker existed in the position specified, they said nothing about the quality but did warrant there was at least a tanker there and since there was no tanker there was a breach of contract entitling the plaintiffs to damages.

Ratio:

- A party cannot rely on a mutual mistake where the mistake consists of a belief which is on the one hand entertained by him without any reasonable ground, and on the other hand deliberately induced by him in the mind of the other party.
- Just because there is no subject matter of the contract does not mean there is no contract, if there was representation of the subject matter.

Analysis: (Dixon and Fullagar JJ)

- A party cannot rely on a mutual mistake where the mistake consists of a belief which is on the one hand entertained by him without any reasonable ground, and on the other hand deliberately induced by him in the mind of the other party – even if the Commission was credited with a real belief in the existence of the tanker, they were guilty of the grossest negligence – they had no reasonable grounds for such a belief

- They must have known that any tenderer would rely implicitly on their assertion of the existence of a tanker and must have known the plaintiffs would rely on their assertion of the existence of the tanker in the latitude and longitude given
- They took no steps to verify what they were asserting so any 'mistake' that existed was induced by their own culpable conduct
- The only mistake made here was that the plaintiffs believed what the Commission told them
- Here, it cannot be seen that the parties proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations
- The Commission made an assumption, but the plaintiffs did not make an assumption in the same sense
- The proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified
- If this case is to be treated as one raising a question of 'mistake' then the Commission cannot rely on any mistake to avoid the contract because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground
- Courtiere is distinguished because there both parties shared the same assumption that the corn existed, whereas here the Commission promised the tanker existed and therefore assumed the risk that it did not

Equity

- In *Solle v Butcher*, it was suggested that the cases of mistaken assumptions should be subjected to a two-stage analysis – 1) it should be asked whether a mistake had occurred which rendered the contract void at common law; 2) if the contract is valid at common law, then necessary to ask whether it was voidable on grounds of equitable mistake

Miller Paving Ltd. v B Gottardo Construction Ltd. (2007) ON CA

Facts:

- Miller contracted to provide materials to G which then used the materials for a highway extension it had contracted to build for the owner of the highway
- M + G signed an Agreement in which M acknowledged it had been paid in full for all of the materials it had supplied – after this, M sent an invoice to G after discovering deliveries for which it had not billed G
- G used the agreement to resist the claim, although it had itself been paid by the owner for most of these materials

Issues:

- Should the trial judge have applied the doctrine of mutual mistake to set aside the Agreement? Can the court apply its equitable jurisdiction to set aside the Agreement?

Decision:

- No – the Agreement precludes M from resorting to the doctrine of mutual mistake, and even if it could do so, neither the common law doctrine nor the equitable doctrine would result in the contract being set aside

Ratio:

- The doctrine of common mistake will void a contract based on a common and mistaken assumption of material fact. If, however, the contract provides that one party **bears the risk of the particular mistake**, that party cannot rely on the doctrine to have the contract set aside

Analysis: (Goudge JA)

- M + G reached an Agreement on the terms of their memorandum of release, however they shared an error with respect to an important contextual circumstances – that all material supplied by M had been paid for by G – at this time, each thought that this was so
- *Bell* = test for determining whether a contract is void for mistake at common law
- *Solle* = Lord Denning created the equitable jurisdiction to set aside as voidable, contracts that might be found enforceable at common law; courts can relieve for common mistake **when it would be unconscionable in all the circumstances** to allow a contracting party to avail itself of the legal advantage it had obtained and where this could be done without injustice to third parties
 - A contract is liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative + respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault
- *Great Peace* = HL in deciding whether to apply the doctrine of mutual mistake, in both law and equity, the court should look to the contract itself to see if the parties have provided for who bears the risk of the relevant mistake, because if they have, that will govern. No room for equitable mistake in UK.

- The Agreement here clearly provides that it is the supplier that acknowledges and agrees that payment in full has been received for the materials supplied and to then invoice for that amount – this contract clearly allocates to M the risk that payment in full has not been received, therefore the Agreement requires M to bear the consequence when that risk transpires rather than allowing it to invoke the doctrine of common mistake
- BUT, even if M can resort to doctrine – cannot succeed:
- 1) **Must show that as a result of the common mistake, the subject matter of the contract has become something essentially different from what it was believed to be (Bell)** – here, the subject matter was the release of all further claims and nothing about the mistaken assumption changes that
- 2) **To engage the equitable doctrine of common mistake – M must show it was not at fault** – but it was found that the mistake was due to unexplained errors in M's own procedures and was not in any way the responsibility of G – this doctrine cannot be used

Class Notes:

- ***In theory*** there is a doctrine of equitable mistake in Canada, applying where it would be unconscionable to allow one party to obtain an advantage through the other party's mistake. But it does not apply in this case.