CASES AND NOTES SUMMARY FOR CONTRACT LAW

University of Alberta, 2015
LAW 410 (Prof. Shannon O'Byrne)

Table of Contents

DEFINITIONS AND TERMS

BILATERAL CONTRACT: a contract in which the contracting parties are bound to fulfil obligations reciprocally towards the other....Contract formed by the exchange of promises in which the promise of one party is consideration supporting the promise of the other as contrasted with a unilateral contract which is formed by the exchange of a promise for an act.

UNILATERAL CONTRACT: One party makes an express engagement or undertakes a performance, without receiving in return any express engagement or promise of performance from the other....Essence of a `unilateral' contract is that neither party is bound until the promisee accepts the offer by performing the proposed act....It consists of a promise for an act, the acceptance consisting of the performance of the act requested, rather than the promise to perform it.

INVITATION TO TREAT: When one party ford not make an offer but invites the other party to do so.

OFFER: A willingness to contract of specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed.

CONSIDERATION: Anything of value promised to another when making a contract. It can take the form of money, physical objects, services, promised actions, abstinence from future actions, etc.

FORMATION OF THE AGREEMENT: OFFER + ACCEPTANCE

OFFER AND INVITATION TO TREAT

Canadian Dyers Assocatian Ltd. v Burton

(1920), 47 O.L.R. 259 (H.C.)

RATIO: **THE OBJECTIVE TEST: Would a reasonable person, in analyzing the words and actions of the parties, conclude that on balance of probabilities a contract was made, that there was an intention to be bound by the terms of the offer?**

An alleged offeror may be bound if his words or conduct are such to induce a reasonable person to believe that he intended to be bound, even though in fact he has no such intention.

FACTS: Plaintiff wrote to defendant: "With respect to property, state your lowest price." Defendant responded with: "The lowest price would be $1,650, anything less would not bring good return." Plaintiff wrote back: "We would be pleased to have your lowest price." Defendant responded: "I beg acknowledge of your receipt and the last price I offered is the lowest I am prepared to accept." Deeds and cheques were transferred, but Defendant later returned cheque with note stating there was no contract.

ISSUE: Whether, upon the correspondence discussed, a contract had been made out?

RESULT: The Defendant's actions show that he regarded his letter as an offer and the letter of the 23rd as making a contract.

REASONS: Intention to enter into contract must be evident, and determining whether it's an offer or an invitation to treat "depends on the language used and the circumstances of the particular case."

Objective test - "unless language is used to conceal thought..."; would a **reasonable person**, in analyzing the words and actions of the parties, conclude that on **balance of probabilities** a contract was made, that there was an intention to be bound by the terms of the offer?

Mere quotation of price is not an offer, but an invitation to treat, unless there is some further fact that makes it evident that an offer has been made (**Re: *Harvey v. Facey***).

Conduct post-"contract" can be informative, in showing that the parties thought a contract was made or wasn't, but can't tell us what happened at the time of the agreement (could lead to mischief, contract cannot be modified by subsequent actions)

What kind of remedy might there be for this situation? Specific performance (force the selling of the land – but not possible if already sold)? Damages (but how much? – **expectation interest**: The difference in price between replacement land and the land they are suing on)?

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.

[1953] 1 Q.B. 401, [1953] 1 All E.R. 482 (C.A.)

RATIO: **The general rule is that a display or quotation or price-marked goods in a store window or on a shelf is not an offer to sell at that price, but an invitation to treat.**

FACTS: P argued that displays of goods were an "offer" and when a shopper put the drugs into their basket, that was an "acceptance". Therefore because no pharmacist had supervised the transaction at this point (which was required under an Act), D was in breach of the Act. D argued that the sale was effected only at the till.

ISSUE: Whether the sales were effected by or under the supervision of a registered pharmacist.

RESULT: The Court held that the display of a product in a store with a price attached is not sufficient to be considered an offer, but rather is an **invitation to treat**.

REASONS: If P is right, once an article has been placed in the receptacle the customer himself is bound and he would have no right without paying for the first article to substitute an article which he saw later of the same kind and which he perhaps preferred.

It would be wrong to say the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that he can insist by saying 'I accept your offer'. If everything is an offer, the owner might have to sell to his worst enemy.

Carlill v Carbolic Smoke Ball Co.

[1893] 1 Q.B. 256 (C.A.)

RATIO: **An advertisement can constitute a unilateral contract, which can be accepted by fulfilling the conditions of the contract; no formal acceptance required. Advertisements of bilateral contracts are typically not held to be offers since further bargaining is contemplated.**

FACTS: D inserted into newspaper that 100L will be given to someone who uses the product and contracts a disease. P bought product and contracted a disease. P was granted the 100L, but D appealed.

ISSUE: Can one make a contract with the whole world? How does one interpret vague terms?

RESULT: Appeal dismissed. The contract was valid, and P is entitled to 100L.

REASONS: Argument that this was not a contract at all, but an offer made to the public. There was no limit on time fixed for catching disease.

How would an ordinary person construe this document? An ordinary person would interpret the document to mean that the smoke ball is effective while in use. Immunity lasts during the use of the ball. The language, "during last epidemic...*those using*" as opposed to "*who had used.*"

The advertisement says that 1000L is put away for the purpose, so the statement that 100L would be paid is not mere puff. The public would interpret this as an offer to be acted on. **The offeror can determine how acceptance of offer will be made.**

Argument that there was no notification of offer of the contract. It was held that performance of some condition is a sufficient acceptance without notification if that is intimated in the offer. How do you determine if this acceptance is implied? You must look at it from common sense. In cases of this kind, the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance. **Even if they had communicated acceptance, the acceptance is not effected until the conditions of the contract are made.**

NOTE: Consider the Pepsi Co. action. P claims that ad is an offer for a unilateral contract and relies on the Carbonic Smoke Ball Case. The court held that a reasonable person would not have construed the ad as a reality.

Goldthorpe v Logan

[1943] O.W.N. 215, [1943] 2 D.L.R. 519 (C.A.)

FACTS: P goes to a clinic to have facial hair removed. D at clinic guaranteed a result of permanent removal of hair in an advertisement, but this failed. Original claim failed in lower court and P appealed.

ISSUE: Was there a breach of contract? Was there negligence?

DECISION: The public ad was an offer, and a contract had been made. Finding for P in an amount of $100.

REASONS: There is an allusion to inequality in bargaining powers. The ad was an **offer** (**THIS IS INCORRECT, THE COURT WAS WRONG. A more conventional treatment would be regarding the ad as an invitation to treat.**) made to the public, the **acceptance** was the attendance to the office to get treatment, and the **consideration** was submitting to the procedure. However, the defendant did not live up to the terms of their offer and thus breached the contract. Perhaps they made the offer negligently, however either way they breached their contractual obligations. Laidlaw in writing the decision follows a similar approach to that in *Carlill v Carbolic Smoke Ball Co.*

This was a bilateral contract as both parties must do something to complete the contract. Most bilateral contracts start by are invitation to treats.

A rule of thumb test for contracts is if you can look at the ad and determine exactly what needs to be done, it could be a unilateral contract. In this case we are missing the cost of the treatment, the number of treatments, the level of pain involved.

Another issue with this decision is the amount of money for damages. The court found that the value of a hairless face was $100. Consider the case of *Chaplin* [1911] where women were invited to send in a photograph and the top women would get prizes. 6,000 women entered and Chaplin entered into the contract, and one of the terms was that if you were a finalist, she would be notified in time to attend auditions, but she found out too late. How do you quantify her loss? It is not a prize, but a **chance** to win a prize. There were 12 prizes and 50 finalists, so the court gave her ¼ the cost of an average prize.

In this case, there was a **total failure of consideration** (she got nothing for her money). The Plaintiff got what is called **double recovery**. She got the $13 back, but also the $100 dollars which contains an implicit additional $13.

EXAMPLE: Suppose A and B are in a contract for the purchase of a car worth $100K. A gives B $75K and B delivers the car. The car is a hunk of junk and not worth $100K. Do we give A $100K for what A expected as well as the $75K for restitution are interest? No. This would be double counting.

R v Ron Engineering & Construction (Eastern) Ltd.

[1981] 1 S.C.R. 111, 13 B.L.R. 72, 119 D.L.R. (3d) 267, 35 N.R. 40

RATIO: **An invitation to tender (tender call) is an offer of Contract 'A'. The content of Contract 'A' contains the rules governing the bidding process. Typically, Contract 'A' provides for the irrevocability of bids and forfeiture of deposit should the selected tenderer not proceed with Contract 'B'. The submission of a tender is acceptance of Contract 'A' and an irrevocable offer to enter into Contract 'B'. Contract 'B' contains the terms of the main contract.**

FACTS: A call for tenders was sent out requiring a deposit of $150,000 which would be lost if the tendered offer was withdrawn. Ron Engineering submitted an offer along with the required deposit. The submitted tenders were opened by the owner and Ron Engineering was the low bidder by a substantial margin. It was then discovered that they had made a mistake in calculating their total bid price. They informed the owner of the mistake and tried to have the offer changed (prior to acceptance). The change was refused, the contract was given to another company, and the owner kept Ron Engineering's bid deposit. Ron Engineering sued to get their deposit back. The owner counter-claimed for costs incurred as a result of having to go with a different bidder. At trial the counter-claim was dismissed but it was held that the owner was entitled to keep the deposit. The Ontario Court of Appeal reversed the trial decision and held, relying on the contractual doctrine of mistake, that Ron Engineering was entitled to get its deposit back. The owner appealed to the Supreme Court of Canada.

ISSUE: Is there a contract completed during the tender process? When is this contract completed? What are the conditions of the contract?

DECISION: Appeal allowed, and the owner is allowed to keep the deposit.

REASONS: Generally, calls for tenders are invitations to treat. However, in cases like this where specific language and conditions are used then it becomes an offer of a unilateral contract (**THIS IS WRONG. THE CONTRACT IS BILATERAL. THERE ARE ONGOING OBLIGATIONS AND TERMS TO WORK OUT.**). "Contract A" was accepted by the contractor when he submitted his bid in accordance with the terms, and it states that he has an obligation to enter into "Contract B" – the construction contract. Accepting Contract A binds the contractor to enter into Contract B. The deposit was to ensure the performance of the contractor of its obligations under Contract A, which it failed to live up to.

There was no question of mistake on the part of either party before the moment when contract A came into existence. The tender, despite its being the product of a mistaken calculation, could be subject to the terms and conditions of contract A so as to invoke forfeiture of the deposit. There was no error in the sense that the contractor did not intend to submit the tender in its form and substance. Then, too, there was no principle in law under which the tender was rendered incapable of acceptance by the appellant. No mistake existed which impeded the coming into being of contract A. The effect of a mistake upon the formation, enforceability or interpretation of a subsequent construction con-

tract need not be considered in this case. **The doctrine of mistake is a narrow doctrine that rarely succeeds.**

OLD LAW: The Invitation to tender was an invitation to treat. The submission of bids was an offer and could revoke their tender within the limitation period with impunity.

The weight of authority was that if the tender had a demonstrable error prior to acceptance, the owner could not go on and accept the offer.

M.J.B. Enterprises Ltd. V Defence Construction (1951) Ltd.

[1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577

RATIO: **A privilege clause is only compatible with accepting compliant bids. In the absence of a privilege clause, you are most likely to be bound to accept the lowest offer.**

FACTS: Defence tendered for construction bids according to 11 specific documents. There was an indicated privilege clause which stated "the lowest or any other tender shall not necessarily be accepted". One of the four bidders (Sorochan) submitted a bid suggesting an alternative cost (in effect qualifying their bid). The owner accepted this. MJB had the next lowest bid. The appellant brought an action stating that this alternative cost invalidated their tender and therefore MJB should have been awarded the contract.

ISSUE: In a call for tenders, does the inclusion of a privilege clause in the tender documents allow the owner to disregard the lowest bid in favour of any other tender, including a non-compliant one?

DECISION: Appeal allowed. The contract with Sorochan is not binding, however the respondent does not have to contract with M.J.B.

REASONS: The court holds that it is an implied term in tenders that only complying bids will be accepted and that Sorochan's qualified bid did not comply with the terms – therefore, it cannot be accepted. In accepting the qualified bid the owner is in a breach of Contract A (as outlined in the analysis of *Ron Engineering*) with the other bidders. Although the privilege clause does not overrule this obligation to only accept compliant bids, it does allow the owner to not simply accept the lowest bidder. Therefore, the owner was under no obligation to contract with the plaintiff. However, on the balance of probabilities the court finds that M.J.B. would have been awarded the contract and assesses damages of $398,121.27 based on an agreement of liability arranged before the case at bar.

COMMUNICATION OF OFFER

An offer cannot be effected until it is communicated to the offeree, and therefore you cannot accept an offer you do not know about. That is, there must be a "meeting of the minds," or a common understanding that a contract has been formulated. Consider the case where you see a missing dog and

you return it to the owners. Later, you learn about the reward for return, but you cannot claim the reward because you did not know about the offer.

ACCEPTANCE

Livingstone v Evans

[1925] 3 W.W.R. 453, [1925] 4 D.L.R. 769 (Alta. S.C.)

RATIO: **If a purported acceptance varies in any respect the terms of an offer, it will be treated as a proposal of new terms and classified as a counter-offer. A counter-offer constitutes a rejection. However, an offer can be renewed after a counter-offer through ambiguous language (such as "cannot reduce price").**

FACTS: D wrote to P proposing to sell a piece of land for $1,800. P wired in return "Send lowest cash price. Will give $1600 cash. Wire." D responded with "Cannot reduce price." P then wrote to accept the original offer of $1,800. D no longer wanted to sell to P, and P sued for specific performance.

ISSUE: Was the first telegram from P a counter-offer. If so, did this counter-offer constitute a rejection of D's offer and free D from it?

DECISION: Finding for P. Specific performance granted.

REASONS: Walsh held that under *Hyde v Wrench* **a counter-offer constitutes a rejection, which is very firmly established**. Because of this long standing precedent, P's first telegram ("Send lowest cash price. Will give $1600.") is a counter-offer and an inquiry and although both, the counter-offer kills original offer. **D's reply "Cannot reduce price" is, however, a renewal of the original offer which P then accepted.**

Battle of the Forms

The traditional approach is that each successive form is a counter-offer and perhaps no consensus is ever reached if only forms have been exchanged.

THE LAST SHOT RULE: If the last form utilized is followed by conduct by the other side which amounts to acceptance, there is a contract the terms of which are contained on that last form. The party who "'fires' the last document before performance prevails." The main virtue is certainty but may promote gamesmanship. **In the typical case of a sale of goods based on conflicting forms, performance of the contract either by delivery of the goods or by the acceptance of delivery of goods may be considered to constitute the conduct amounting to acceptance.**

FIRST BLOW: Party who offers terms first prevails unless the other side draws material changes in their terms to the attention of that first party.

SHOTS FROM BOTH SIDES: "The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If the differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be

scrapped and replaced by a reasonable implication." (See *Butler* below) **Note that this approach has not been followed in Canada.**

Butler Machine Tool Co v Ex-Cell-O Corp

[1979] 1 W.L.R. 401, [1979] 1 All E.R. 965 (C.A.)

FACTS: P sent a letter to D on May 23, 1969 offering D some new machinery for £75,535. With it, was P's standard contract terms which included a price variation clause and a trumping clause. D replied on May 27 and said they would order the machinery, but on D's own standard terms. D's standard terms did not have a price variation clause. P replied on June 5 on the tear-off slip from D's terms. At the bottom of this slip it read, "We accept your order on the terms and conditions stated therein" however P added a cover letter reasserting that the deal was being made under P's ***quotation***, from the May 23 letter. A while later P delivered the machinery. They asked £2,892 according to their price variation clause. D refused to pay the extra. P sued D. The lower court held that the seller's price variation clause continued through the whole dealing and so the sellers were entitled to rely upon it.

ISSUE: On whose terms was the contract made?

DECISION: Appeal allowed, judgment for D, the buyers.

REASONS: The traditional test for the contract: **the quotation of the price was an offer subject to terms and conditions and the order by D constituted a counter-offer which P accepted**. However he also lays out a "better way" to analyze such situations applying an objective test of the conduct and language. **Generally (but not always) the last of the forms (the "last shot") is the victor** and an **analysis of all the documents** in this **case** makes it clear that the contract was on the buyer's terms. The court may either reconcile the documents, or ignore the documents and replace the terms by reasonable implications.

However, consider the idea that the cover letter sent on May 23 was a counter-offer. Lord Denning takes a very literal interpretation of **quotation** which goes to price and identity. In this context, "quotation" was probably not meant as technically as the court determined.

With respect to the "first-blow" of the trumping clause, Lord Denning decides that the documents must be considered as a whole. He says that if you read everything together, the buyers win. **THIS IS A BIT ARBITRARY.**

A better way of going about doing this is from the "shots fired on both sides" in that if the differences are irreconcilable, then the conflicting terms may be scrapped and replaced by a reasonable implication. This case could have settled.

Tywood Industries Ltd v St Anne-Nackwaic Pulp & Paper Co Ltd

(1979), 100 D.L.R. (3rd) 374 (Ont. H. C.)

FACTS: D sent a "Request for Quotation" to P for goods. On reverse side were 13 conditions none of which contained an arbitration clause. P replied with a quotation and on the reverse were their own conditions none of which contained an arbitration clause. D then sent a purchase order with new terms, one being which controversy should be dealt with in arbitration. The purchase order was not signed, but the goods were sent by P who brought an action for the price, but D requested to go to arbitration instead because of the term.

ISSUE: Under whose conditions was the contract formed?

DECISION: Application for a stay dismissed. P's terms (without arbitration) prevailed.

REASONS: P imposed non-arbitrable conditions when they quoted initial price and never acknowledged D's terms. D tried to smuggle in arbitration terms and did not complain when the purchase orders were not returned. The conduct of the parties indicates both parties were interested only in the specifications and the price and that consummation of the business deal was paramount for the parties.

Under the classical model, D's contract would hold. Similarly under either a first shot or a last shot model D would prevail. Grange, J., however, takes an interventionist track.

ProCD v Matthew Zeidenberg and Silken Mountain Web Services, Inc

86 F.3d 1447 (U.S. C.A. 7th Cir., 1996)

FACTS: D purchased a telephone directory database on a CD-ROM produced by P. P had compiled the information from over 3,000 telephone directories at a cost of more than $10 million. To recoup its costs, P discriminated based on price by charging commercial users a higher price than it did to everyday, non-commercial users. D purchased a non-commercial copy and after opening the packaging and installing the software on his personal computer, D created a website and offered the information originally on the CD to visitors for a fee that was less than what P charged its commercial customers.

The packaging of the CD-ROM stated that there was a license enclosed. D was presented with this license when he installed the software, which he accepted by clicking agreement at a suitable dialog box ("click-wrap" agreement).

P brought suit for breach of contract. A lower court found for D, which P appealed.

ISSUE: Are clickable licenses offers and does clicking OK constitute acceptance? Was there limited notice of the contract?

DECISION: Appeal allowed. Plaintiff give loss of profit. Injunction also granted.

REASONS: The first contract is between the retailer and D. This is the actual CD product subject to limits (there was indication on the box). The second contract is between the manufacturer and D limiting commercial use. The court held that D did accept the offer by clicking through. Easterbrook noted, "He had no choice, because the software splashed the li-

cense on the screen and would not let him proceed without indicating acceptance." The court stated that D could have rejected the terms of the contract and returned the software. Several examples where money is exchanged before the terms are understood by the purchaser (e.g. purchasing a ticket. You only know the terms once you read the back of the ticket that you purchased). The court, in addition, noted the ability and "the opportunity to return goods can be important" under the Uniform Commercial Code.

The UCC permits parties to structure their relations so that the buyer has a chance to make final decision after a detailed review. The customer inspected the package, tried out the software, learned of the license and did not reject the goods, which the customer could if the license was unsatisfactory. A buyer accepts, under 2-206 when after an opportunity to inspect the goods, he fails to make an effective rejection. Thus, the buyer had accepted and was bound to abide by the license.

Dawson v Helicopter Exploration Co

[1955] S.R.C. 868, [1955] 5 D.L.R. 404

RATIO: **Courts will endeavor to regard a contract as bilateral in order to protect the offeree pending complete performance.**

FACTS: P knew a potentially profitable mining area and entered into a contract with D to show them. D agreed to pay him 10% of the profits from the land if he showed it to them and they decided it was worth staking.

D decided it was not worth staking and revoked their offer to P.

However, D then did stake the land and refused to pay P for the profits from the land.

ISSUE: Could Helicopter revoke the contract and not pay Dawson the 10%?

DECISION: P was entitled to the 10% promised by D.

REASONS: **Promissory construction:** Even though the contract was worded in such a way as to make it a unilateral contract, and Helicopter had the choice not to perform its end of the contract, the court inferred a bilateral promise because Helicopter had agreed to pay Dawson if was to stake the land following Dawson's showing it to them and Helicopter did, in fact, stake the land as a result of what Dawson showed them.

"We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. A promise may be lacking and yet the whole writing may be 'instinct with and obligation' imperfectly expressed."

- Rand J, quoting Cardozo J in Wood v Lady Lucy Duff Gordon, NY, 1917

The way the contract was phrased is not important to how the parties understood the contract. Nothing is written down, but there are still obligations.

Court is saying that both parties took ongoing obligations. Not inclined to find unilateral contracts when a bilateral contract may be found. In this case the court implies a term that D must make reasonable efforts (**business efficacy**). "A promise may be lacking and yet the whole writing may be instinct with an obligations imperfectly expressed."

Unilateral contracts require that the party with the option not to perform the obligation still pay the bound party if the unbound party receives gains.

Condition Subsequent: The parties introduce a condition of an even that shall discharge either one of them or both from liabilities. (Ex. If Dawson makes the efforts to secure leave from military and does not get leave.)

Anticipatory Breach: When one side says they will not perform. You do not have to wait until the term passes, an action can be started right away. The Plaintiff may insist on performance and wait to see if you do it, or may declare contract over and sue.

EXAMPLE: I promise to sell you my car on January 1, if Uncle George dies by then. You agree to purchase my car subject to being able to borrow sufficient funds from the bank.

In this example, in traditional contracts, the parties are bound. There is no promise that the conditions will occur, but there is an implied subsidiary obligation to try. Bona fide efforts.

EXAMPLE: I'll buy your house subject to financing. Obligation to perform is postponed and subject to P securing financing. Is there any implied subsidiary obligations? The Plaintiff must make bona fide efforts to obtain financing and is obliged to wait for the term specified.

Felthouse v Bindley

(1862), 11 C.B. (N.S.) 869, 142 E.R. 1037 (Ex. Ch.)

RATIO: **Acceptance has no effect (is not complete) until it is communicated to the offeror. This is to protect the offeror so that he knows that he is in a contract. It is also to protect the offeree so that they do not have to reject every offer received.**

Assuming no prejudice to the offeree, a waiver of the communication requirement in the context of a bilateral contract can lead to acceptance. That is, silence when communication is waived is acceptance. In a unilateral contract, notice of acceptance is for the benefit of the offeror but he may expressly or impliedly allow performance of the condition as sufficient acceptance without notification.

FACTS: P wanted to buy a horse off his nephew. After a letter from the nephew about a previous discussion in buying the horse, the uncle replied saying,

"*If I hear no more about him, I consider the horse mine at £30 and 15s.*"

The nephew did not reply. He was busy at auctions on his farm. He told the man running the auctions not to sell the horse. But by accident, he did. P then sued D in the tort of conversion - using someone else's property inconsistently with their rights. But for P to show the horse was his property, he had to show there was a valid contract. D argued there was not, since the nephew had never communicated his acceptance of the uncle's offer.

ISSUE: Can silence be considered an acceptance? Does failure to reject an offer constitute an acceptance? Can you impose an obligation on another party to say something in order to avoid acceptance.

DECISION: P cannot recover, there was no acceptance.

REASONS: The court ruled that P did not have ownership of the horse as there was no acceptance of the contract. **Acceptance must be communicated clearly and cannot be imposed due to silence of one of the parties.** The uncle had no right to impose a sale through silence whereby the contract would only fail by repudiation. Though the nephew expressed interest in completing the sale there was no communication of that intention.

THIS CASE IS PERHAPS WRONGLY DECIDED. This is waiver of acceptance in a bilateral contract as opposed to waiver of acceptance in a unilateral contract (*Carlill*).

QUESTION: Could the nephew have sued the uncle if the horse had been reserved but the uncle then changed his mind? The uncle waived acceptance.

NOTE: The problem of unsolicited goods has been dealt with by legislation. In some jurisdictions, the payment for unsolicited goods is not required, even if the recipient uses them.

Saint John Tug Boats Co v Irving Refinery Ltd

[1964] S.C.R. 614, 49 M.P.R. 284, 46 D.L.R. (2d) 1

RATIO: **Silence can constitute acceptance when combined with conduct. Acceptance can be inferred where the offeree takes the benefit of an offered performance which he has had a reasonable opportunity to reject. The plaintiff must show that (1) the circumstances show that the offeror expected to be paid, (2) the offeree took benefit of an offered performance, and (3) offeree had a reasonable opportunity to reject the benefit.**

An offeror may be precluded from denying that he received the acceptance is if was his own fault that he did not get it. An obligation exists not to remain silent if you do not wish to be bound.

FACTS: P had a deal with D to supply them the use of their tugboats for assisting incoming oil tankers to their shipyard. However, with no firm arrangements having been made, P stated that they would only have two boats available unless special arrangements were made, and advised D to look elsewhere for help. P ended up having two more tugs available, and told D that they could use them if they paid $450/day to have them "on call" until a certain date. This date passed, and P continued to keep the tugs on call and

D continued to use them for a few months. D became headed by a new president and there was no formal extension of the contract period. When billed for those months after the original end of the contract, D refused to pay. P sued for payment - they were successful at trial, however this was overturned on appeal.

ISSUE: Whether or not the respondent's conduct during the months of unpaid "stand by" constituted a continuing acceptance of these offers so as to give rise to a binding contract to pay for the "stand by" services of the tug at the rate specified in the invoices drafted by the appellant. **Can conduct, unaccompanied by a verbal or written undertaking constitute an acceptance of an offer?**

DECISION: A binding contract was formed, and P in entitled to their "stand by" costs.

REASONS: The test of whether conduct, unaccompanied by an verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract, is objective and not subjective: **If, whatever a man's real intention may be so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that believe enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.**

After the original deadline passed, P was essentially serving D a new offer every time they sent them an invoice and kept the tugs on call, and that D continued to imply acceptance by their continuation of using the service. D must have known that the tug was still standing by, and that Saint John expected to be paid for their services.

Silence can constitute acceptance when combined with conduct. "**Silence may be so deceptive** that it may become necessary for one who receives beneficial services to speak in order to escape the inference of a promise to pay for them." **The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance.**

Eliason v Henshaw

(1819), 4 Wheaton 225, 4 U.S. (L. Ed.) 556

RATIO: **The offeror is master of his or her own offer. Acceptance must be compliant with any mandatory method of acceptance specified.**

FACTS: P sent a letter asking to purchase flour from D. The letter containing the offer required an answer (acceptance/rejection) to be returned by way of wagon to a certain place. The place where letter was to be sent was an essential part of offer. D sent the letter to different place than where P said and at later date than what P said.

ISSUE: Can an offeror specify the way in which a contract can be accepted? (i.e. Can a contract exist when acceptance is given to a different place than what is stipulated by the offering party and given at a different time than what was specified?)

DECISION: Appeal rejected. There was no acceptance and no contract.

REASONS: **The offeror is the master of the terms of the contract and can specify how and when acceptance is to be delivered, and where it is to be delivered.** In this case, the contract was not accepted within the proper time, the contract was not accepted in the right place (acceptance should have been sent back to Harper's Ferry, not to Georgetown) and the contract was not accepted in the correct manner (should have been sent by wagon, but was sent by mail).

QUESTION: Could acceptance be communicated by using his own rider sent to Harper's Ferry and arrived before the wagon arrived? That is, was the wagon essential? In this case the wagon was probably not essential, and if you beat the time it is probably okay. But you always have risks if you do not strictly follow the rules of acceptance.

COMMUNICATION OF ACCEPTANCE

Household Fire & Carriage Accident Insurance Co v Grant

(1879), 4 Ex. D. 216 (C.A.)

RATIO: **THE POSTAL RULE: A contract becomes binding the instant that the acceptance is put in the mail, so long as the parties have contemplated the mail as a viable means of communication in their dealings. The rationale for this is that there could be much fraud and considerable delay in commercial transactions.**

However, an offeror's notice of revocation will be effective only upon arrival. An acceptance will be effective on posting and will therefore preclude revocation of the offer when the notice of revocation eventually arrives.

FACTS: D had negotiated to purchase shares in P. His application was accepted, and his name was added to the list of registered shareholders, however, the letter informing the appellant of this never reached him and thus D never paid for the shares. His earnings from dividends were credited to his account. Eventually P went into liquidation and the liquidator applied for money from the appellant. He refused to pay on the grounds that he was not a shareholder – he had never received the notification in the mail and was not aware.

The trial judge found that the appellant implied that the respondent was to send him the notification that he had been issued the shares in the mail by requesting them by mail, and therefore they were not to be penalized for sending the notification that way. The liquidator was thus successful at recovering the money, which D appealed.

ISSUE: When do acceptances become binding when they are sent via mail?

DECISION: Appeal dismissed.

REASONS

(Majority): Thesiger and Baggallay agree with the trial judge's decision that the contract was formed when the acceptance was mailed. They discuss the pros and cons of the postal rule, and decide that the pros outweigh the cons. **They state that the offeror can always choose to make the acceptance binding only upon his receipt of the notification that it has been accepted in the original offer. However, to state that this must happen in all cases would reduce the efficiency in the business world (and would easily introduce fraud).** The contract is complete and absolutely binding upon the transmission of acceptance through the mail as long as that is a medium of communication that the parties contemplated as at the time of mailing there is a meeting of the minds.

REASONS (Dissent): The notice of acceptance must reach the party who made the offer before it can be considered binding. If the rule proposed in the majority is accepted then it must be adhered to in all instances of notices via mail. For example, if you mail money to someone in an acceptance, then you have paid even if the money never reaches the other party.

THERE IS NOTHING INHERENT ABOUT THE POSTAL RULE, IT JUST SO HAPPENED THAT THAT IS WHAT THE MAJORITY DECIDED.

Holwell Securities v Hughes

[1974] 1 W.L.R. 155, [1974] 1 All E.R. 161 (C.A.)

RATIO: **The postal rule can be excluded by the terms of the offer. The postal rule does not apply when the terms of a contract point to the necessity of actual communication, even if the post is the desired medium of communication.**

FACTS: The defendant issued a grant to sell a property at 571 High Road, Wembley. It contained a clause stipulating that there must be notice (here, receipt of the option) in writing within six months in order to exercise the option. The claimants sent a letter exercising the option. It was lost in the mail and was never received by the defendant.

ISSUE: Does the postal rule always apply?

DECISION: The postal rule does not apply in situations where a notification of acceptance has been specified.

REASONS: If the postal rule applies, then there is clearly a contract as the agent of Holwell mailed the acceptance. Here the judges say that although the parties intended to use the post as the means to communicate acceptance, they have not displaced the general rule of acceptance – that it requires communication. **The use of the words "notice in writing" meant that Hughes required actual notice of acceptance. The postal rule does not apply when the terms of a contract point to the necessity of actual communication, even if the post is the desired medium of communication.** The recipient does not actually have to read or understand the acceptance; **it must just arrive** and be seen by the offeror.

NOTE: In the case of *Sibtac Corp v Soo*, there was an offer requiring "notification" of acceptance. But the judge applied the postal rule. This was wrong, or at least goes against the common law defined in *Holwell Securities.*

Telephone, radio, telex and fax, the bulk of analysis says that the instantaneous rule applies. Email is not exactly instantaneous, but relative to mail it is instantaneous.

In analysis, consider which default rule applies (postal or instantaneous). Look at the circumstances and decide who has the risk of acceptance going astray. Who can be est catch any miscommunication of accceptance? What is the convenient or makes business sense?

Brinkibon Ltd v Stahag Stahl Und Stahlwarenhatulelsgesellschaft mbH

[1983] 2 A.C. 34, [1982] 2 W.L.R. 264, [1982] 1 All E.R. 293 (H.L.)

RATIO: **The postal rule does not apply to acceptances made by some instantaneous mode of communication, e.g. by telephone or by telex. Such acceptances are therefore governed by the general rule that they must have been communicated to the offeror. The reason why the [postal] rule does not apply in such cases is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that it is up to him to make a proper communication. Fax messages seem to occupy an intermediate position. The sender will know at once if his message has not been received at all and where this is the position, the message should not amount to an effective acceptance. But if the message is received in such a form that it is wholly or partly illegible, the sender is unlikely to know this at once and it is suggested that an acceptance sent by fax might be effective in such circumstances. The same principles should apply to other forms of electronic communication such as email…here again the effects of unsuccessful attempts to communicate should depend on whether the sender of the message knows (or has the means of knowing) at once of any failure in communication**

FACTS: Brinkibon, located in London, telexed their acceptance of a contract offer to purchase steel from Stahag Stahl in Vienna. Brinkibon, alleging breach, wanted to serve the respondent with a writ claiming damages for breach of contract in England, but Stahag Stahl claimed they were not under British jurisdiction. The lower courts found for Stahag Stahl, saying the contract was created in Austria and thus the claim had to go through Austrian courts.

ISSUE: Where is a contract breached when it is created between parties in two jurisdictions by instant communication?

DECISION: There is no universal rule of acceptance, but in this case the contract was complete when the offeror received word in Austria. Not applying the postal rule, but the RULE OF INSTANTANEOUS COMMUNICATION.

REASONS: This case follows the similar case of *Entores Ltd. v Miles Far East Corp.* which found that **in cases of instantaneous communication, the contract is only complete when the ac-**

ceptance is received by the offeror, and the contract is made at the place where the acceptance is received. In this case, the acceptance was delivered to the offeror in Vienna, thus Austria has jurisdiction over the issue. Lord Wilberforce goes on to discuss the implications of the rules of instantaneous communication at length. He states that no universal rule of acceptance can cover all cases of instantaneous communication – they must be resolved with references to the intentions of the parties, and the specific circumstances of the case.

There was a backup argument that there was acceptance by conduct of the buyers in LONDON when they instructed their bank to open a letter of credit. The problem with this argument is that conduct between you and your bank does not extend to notification to the seller. Instead, the acceptance is communicated when the bank in Vienna, after being notified from Bank in England, notifies the seller, which occurs in Austria.

Consider a situation where an offeree sends their acceptance, but it is not received by the offeror because the offeror's fax had no paper, or their computer was broken. In this case, the courts might be more inclined to apply the postal rule, rather than the instantaneous communication rule.

NOTE: How do you approach an acceptance problem. First, look for the default rule applies. Next, ask if there is any reason to deviate from these rules. Perhaps a situation where an email does not reach the offeror, who has the risk. Courts will also look at who can best catch the miscommunication (failed fax for example). Then, have to look at what is convenient on the facts.

EXAMPLE: Acceptance email sent, but officers were closed. When was the contract formed? When it was sent/received? When the office opened in the morning? When the offeror actually read the email? Within a reasonable time from office opening and reading email?

Rudder v Microsoft Corp

(1999), 2 C.P.R. (4th) 474, 40 C.P.C. (4th) 394 (Ont. S.C.J.)

FACTS: Rudder brought a class action on behalf of MSN subscribers in Canada for improperly charging MSN subscriber's credit cards violating the terms of the contract. Microsoft filed to dismiss the class action on the grounds of forum non conveniens. They argued that the contract between them and the subscribers contained a forum selection clause which gave exclusive jurisdiction to Washington State to resolve any disputes.

Rudder argued that the particular clause was not valid as it was not adequately brought to the attention of the user. The provision was sufficiently important that it required special notice.

ISSUE: Do the parts of the contract which are not present on the screen at one time (need to scroll to see them) constitute fine print? And should the fact that the plaintiff (and the rest of the class) did not read the specified clauses allow for the unenforceability of those clauses?

DECISION: In concluding, Winkler held that "click-wrap" agreements in general should be "afforded the sanctity that must be given to any agreement in writing."

REASONS: Justice Warren Winkler found in favour of Microsoft and held that the clause was enforceable. Winkler rejected Rudder's argument, stating that "Admittedly, the entire Agreement cannot be displayed at once on the computer screen, but this is not materially different from a multi-page written document which requires a party to turn the pages."

Winkler observed that users were required to click on the "I agree" button to accept the terms, and that the impugned clause was no harder to read than any of the others. The sign-up procedure itself required users to click "I agree" twice, where the second time the user was told that they would still be bound to the terms even if they do not read them all. Winkler did not find it reasonable for Rudder to argue for the enforcement of all the other terms of the contract except for the forum clause. A finding in favour of the plaintiff, said Winkler, would not advance the goals of commercial certainty.

TERMINATION OF OFFER

Dickinson v Dodds

(1876), 2 Ch. D. 463 (C.A.)

RATIO: **An open offer to sell terminates when the offeree learns that the offeror has already agreed to sell to someone else. Hence, communication need not come from the offeror, but it must come from someone RELIABLE.**

A mere promise to hold an offer open for a period of time is not binding and an offeror is free to withdraw the offer.

FACTS: Dodds delivered offer to sell house to Dickinson on Wednesday, stating that the offer was to stay open until 9am on Friday. Dickenson decided to accept the offer however, he was informed that Dodds had sold the property to someone else on Thursday evening and tried to reach Dodds, leaving a letter with Dodds' mother-in-law where he was staying. An agent of Dickinson found Dodds on Friday morning at around 7am, but was informed that the property had already been sold. Dickinson brought an action of specific performance. He was successful at trial, which Dodds appealed.

ISSUE: Is the offeror bound not to revoke the offer and sell to someone else?

DECISION: Appeal allowed.

REASONS: When an offer has been made, the offeror is as free to revoke it as the offeree is to accept or reject it. Dickinson argued that the only way the offeror can revoke the offer is by explicit communication to the offeree, but this is rejected by the court. It is clear in law that an offer does not amount to an agreement and can be withdrawn at any point. Even though it was said that the offer was to remain open until Friday, this was not binding on Dodds. **There must be a "meeting of the minds" at the time the contract is formed, and this obviously could not occur here (as Dodds had already agreed to sell the property to a third party), so there could be no contract.**

Just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of the opinion that there was no binding contract for the sale of this property.

Communication of the withdrawal of the offer can be made by any *RELIABLE* third party (i.e. should not be a child).

QUESTION: Can you revoke your acceptance? When you get an offer and you accept it, there is a contract. You cannot revoke your acceptance.

QUESTION: Consider a situation where A posts a letter of acceptance and then later changes their minds and emails a revocation of acceptance. i.e. is No Harm No Foul legally founded? The other (strict) view is that the contract is formed at posting, so the revocation is not allowed. Also note that the postal rule is for the benefit of the offeree, so if you do not need the benefit, then No Harm No Foul may be the better approach.

Byrne v Van Tienhoven

(1880), 5 C.P.D. 344

RATIO: **The postal rule does not apply to revocation; revocation sent by post does not take effect until received by offeree. Revocation MUST be communicated to the offeree.**

FACTS: On October 1st D mailed a proposal to sell 1,000 boxes of tin plates to P at a fixed price. On October 8th, D mailed a revocation of offer, however that revocation was not received until the 20th. In the interim, on October 11th, P received the original offer and accepted by telegram and turned around and resold the merchandise to a third party on the 15th. Byrne brought an action for non-performance.

ISSUE: Does a withdrawal of an offer have any effect before it is communicated to the person to whom the offer was sent? What is the connection between the postal rule and revocation?

DECISION: An offer cannot be revoked after it has been accepted.

REASONS: If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it.

Errington v Errington And Woods

[1952] 1 K.B. 290, [1952] 1 All E.R. 149 (C.A.)

RATIO: **A unilateral contract cannot be revoked once the other party entered on performance of the act, but the contract would cease to be binding if the party left it incomplete and unperformed.**

FACTS: Mr Errington bought a house for his son and daughter in law, paying £250, and the remaining £500 coming from a mortgage, paid off with 15s a week by the newly weds. Mr Errington promised them they could stay in occupation as long as they paid the mortgage and that when all the instalments were paid it would be theirs. He gave her the building society book and said, 'Don't part with this book. The house will be your property when the mortgage is paid.' He died and the son left to move in with his mother. The mother sought possession from the daughter in law.

ISSUE: Can a unilateral contract be revoked after the death of the offeror?

DECISION: Appeal dismissed.

REASONS: The limit is where the daughter stops paying, and the father's estate has to pick up the bill. Then she would lose her right to stay.

QUESTION: Consider that I will pay $500 dollars if you will walk from Edmonton to Calgary. This is a unilateral contract. What happens if you end up in Airdrie and the offeror pulls up beside you and revokes the offer. Can they get away with this? **Once performance has begun, the contract cannot be revoked. Should also consider circumstances. Another argument is that there is an implied promise not to revoke an offer once performance has started.**

QUESTION: How would the Carlill Smokeball Company try and revoke their offer? Could probably do it through the newspaper, but probably has to have the same 'heft' as the original.

Barrick v Clark

[1951] SCR 177 [1950] 4 DLR 529

RATIO: **An offer which states that it will expire at a certain time cannot be validly accepted after that time. An offer which does not expressly provide for how long it is open is said to lapse after a REASONABLE time.**

Generally, what counts as a reasonable time can be assessed from two perspectives:

1. **An offer contains the implied term that it is automatically withdrawn by offeror after a reasonable time.**
2. **When an offer is not accepted within a reasonable time, it has implied been rejected by offeree.**

FACTS: B owned farmland that C wanted to buy. They entered into negotiations, which resulted in C making an offer of $14,500. B wrote back stating that the price was $15,000 and if the price was satisfactory the deal could be closed immediately. At this time C was away on a hunting trip. His wife received the letter and responded asking B to hold the offer open until her husband returned in around ten days. B did not reply. Thirteen days later, B

sold the property to someone else for $15,000. C did not return until twenty days after his wife received the offer. C sought specific performance of the alleged contract between him and B. The case was dismissed at trial, but found for C on appeal.

ISSUE: What is a reasonable amount of time that the offer must be left open for?

DECISION: Appeal allowed. A reasonable amount of time passed and the offer closed.

REASONS: Estey states that the reasonable time that this specific offer must be left open for is longer than for goods that fluctuate in price (such as stocks), or for perishable goods. The fields could not be used until spring anyway, which must be considered. However, through his actions and insistence on replying to Barrick's letters by wire Clark indicated that he did not have a spring date in mind, but wanted to get the sale done, or go off to pursue other options. Further, Barrick did not respond to Mrs. Clark's letter, so he was not bound to any particular period of offer. Any efforts by the offeree to unilaterally expand the offer period would allow the offeree to be in control of the acceptance conditions. The offeror must agree to the extension. In the result, leaving the offer open for thirteen days was a reasonable time, as Clark had indicated that he wanted to accept and close the sale as soon as possible.

Kellock, in a concurring judgment, discusses that much of the Court of Appeal's reasoning was based off claims that Barrick made concerning his intent to sell as soon as possible outside of his communication with Clark (the deal could be closed "immediately"). The offer by Barrick was clear that it should be dealt with swiftly, and thus the time frame was valid.

The reasonable time to accept an offer can be determined from the conduct and language of the two parties, the nature of the goods and other reasonable indications.

FORMATION OF THE AGREEMENT: CERTIANTY OF TERMS

An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete.

Although the parties may have reached agreement in the sense that the requirements of offer and acceptance have been complied with, there may yet be no contract because the terms of the agreement are uncertain or because the agreement is qualified by reference to the need for a future agreement between them.

Courts will not make an agreement for the parties, but will find certainty that which is capable of being rendered certain.

VAGUENESS

Where the courts cannot determine on what terms the parties have purportedly contracted, due to vagueness, the agreement is unenforceable. That said, courts do not expect commercial documents to

be drafted with strict precision, and will, particularly if the parties have acted on an agreement, do their best to avoid striking it down on the ground that it is too vague.

R v CAE Industries Ltd.

[1986] 1 F.C. 129, [1985] 5 W.W.R. 481, 30 B.L.R. 236, 20 D.L.R. (4th) 347

RATIO: **If parties have expressed themselves in language sufficiently clear so as to have created rights and obligations, the court will enforce the contract especially where the contract has been partly performed. Courts will struggle against vagueness, providing the contract is complete. Here, everything has been settled between the parties [no missing terms] and words such as "best efforts" can be given meaning.**

FACTS: CAE Industries wished to take over and run an aircraft maintenance base no longer required by Air Canada and the Government of Canada. An agreement was made, which contained many vague statements, but essentially stated that although the base usually generated 700 thousand man-hours per annum, the Government could not commit to guaranteeing more than 40-50 thousand – although they would use their "best efforts" to increase this number. The contract was formed, however the hours fell below 40 thousand and CAE sued for breach. They were successful at trial, which the Crown appealed.

ISSUE: Are the terms in the contract so uncertain that they render the contract unenforceable?

DECISION: Appeal dismissed. 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.

REASONS: Stone, writing for the majority, determines that the parties definitely intended to enter into a contract – particularly because they acted as if they did until the respondent brought this action (part performance as per Foley). The onus is on the Crown to prove that the parties did not intend to enter into a contract and they failed to prove this. Stone then carefully scrutinizes all of the "uncertain" clauses cited by the Crown and determines that none of them are so vague as to render no meaning to the contract. He states that **in business relationships the courts must make every effort to interpret vague terms and determine their intended meaning at the time the contract was formed.** He determines that the Crown guaranteed a certain amount of work, and this was not provided; therefore, the Crown breached the contract.

INCOMPLETE TERMS

Parties to an agreement may be reluctant to commit themselves to a rigid long-term arrangement, particularly when prices and other factors affecting performance are likely to fluctuate. They therefore attempt sometimes to introduce an element of flexibility into the agreement.

The Court must be satisfied that the parties have in fact concluded a contract, and not merely expressed willingness to contract in the future. It may have regard to what has been said and done, the

context in which it was said or done, the relative importance of the unsettled matter, and whether the parties have provided machinery for settling it.

May & Butcher Ltd. v. R.

[1934] 2 K.B. 17 (H.L.)

RATIO: **Agreements to agree are not enforceable. A statute may oust a reasonableness standard (in this case, the *Sale of Goods Act* prevents a price being fixed by a third party so the mechanism breaks down).**

FACTS: P wanted to but extra tents from Disposal Board. The Board defined terms including that they will sell old tents, at prices and dates to be agreed upon when tents becomes available, that delivery shall be agreed upon, and that disputes handled through arbitration. P made a deposit. Control of Board changed, and they refused to deliver specifications or allow for inspection. P insisted on this, so the Board no longer considered itself bound by the contract, and P sued for breach.

ISSUE: Were the terms of the contract sufficiently defined to constitute a legal binding contract between the parties?

DECISION: **An agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. Reasonable standard does not work here. The arrangement was just too loose.**

REASONS: Lord Buckmaster, for a unanimous court, held that no contract existed since part of contract was undetermined, specifically the price. An agreement to enter into an agreement is not a contract. Section 8 of the *Sale of Goods Act* provides for a price to be fixed in the future, but section 9 holds that is the price cannot be fixed by a third party, no agreement is formed. Buckmaster holds that being unable to fix between the parties and having a third party being unable to fix the price are the same.

On arbitration, Buckmaster agrees that if there was an agreement, it would have to go to arbitration, but as the agreement has been found not to exist, there is nothing binding on the parties. As for the argument of May & Butcher that the deposit was to secure them delivery of further parcels of tentage as it became available, Buckmaster finds that the deposit was really to ensure performance under the contract, and as no agreement was formed, this argument fails.

Hillas & Co. v. Arcos Ltd.

(1932), 147 L.T. 503 (H.L.)

RATIO: **Vague words or phrases can be interpreted in light of what is reasonable.**

An agreement may fail to specify matters such as price or quality, but lay down *criteria* for determining those matters. Alternatively, the agreement may provide *machin-*

***ery* for resolving matters originally left open. Content of option clause is determined with reference to other sections of the agreement or is derived from a REASONABLENESS standard.**

FACTS: Hillas & Company were merchants purchasing timber from Arcos. They reached an agreement to purchase 22,000 standards of timber, under the specific condition that they should also have the option of entering into a contract with Arcos to purchase 100,000 standards the following year with a 5% reduction on price. Arcos refused to sell them the 100,000 standards the following year. Hillas was successful at trial, which Arcos appealed successfully to the Court of Appeal.

ISSUE: Was the term negotiating the future sale a condition of the contract? Can you make a contract to enter into another contract?

DECISION: Appeal allowed. A binding contract existed to sell the 100,000 standards at a future date.

REASONS: The Court of Appeal allowed the appeal because there is some incompleteness about the quality of the "standards," The time of delivery, the ports to be used for the shipments. But, as below, the House of Lords completely reversed.

Businessmen familiar with their trade often "record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise." To which he concluded, that Courts must interpret contracts "fairly and broadly" following the maxim that "Words are to be so understood that the subject-matter may be preserved rather than destroyed." Wright qualified this statement by saying that courts can never create a contract where there is none.

McManus says that if this is not a contract, you can not have a contract in the lumbering industry. There is some inherent uncertainty. The issue is how to determine if someone intends to use this inherent uncertainty to argue the contract? This can usually be determined at trial on the face of the evidence.

The court said that the main contract talks about "standards of fair specification" while clause 9 just says "standards", but we can look to the main contract to modify a specific clause. The argument against that is that when the parties mean "standards of fair specification," and when they don't it is because they mean something else.

It would be mistaken to interpret the option as an offer into a new contract despite the wording suggesting otherwise ("the option of entering into a contract"). The contract for the option was formed as part of the initial agreement and was only to be executed at a later date.

EXAMPLE: I am going to sell my car to a coworker at a price that is market value (Criteria) as set by our employer (Machinery). If the employer refuses to set the price, then the machinery has failed, but has our contract failed? If we can argue that the "employer" is a neutral third party we could turn to another person. It depends on what "employer" actually

means. In *Sudbrook Trading v Eggleston* [1983], lease gave tenant the option to purchase the property "at such price as may be agreed upon by two Valuers, one to be nominated by" each party. The mechanism failed because lessor refused to appoint a valued. Issue is whether price mechanism is an essential term. If it is not and a reasonableness standard is consistent with the parties' intent, the court can set the price.

Foley v. Classique Coaches Ltd.

[1934] 2 K.B. 1 (C.A.)

RATIO: **This case is distinguished from *May & Butcher* because the arbitration clause referred to "the subject matter or construction of this agreement" and not "this agreement" and could therefore be used to fix the price.**

FACTS: Foley owned a gas station. He sold a piece of land attached to the filling station to Classique Coaches to use for their business on the condition that they purchase all of their gas from Foley for as long as he can supply it. There was no indication of price in the contract, however there was a clause stating that any arguments should be settled by arbitration. After three years, a lawyer for Classique Coaches claimed that because there was no stated price, the contract is not valid, at which point Classique Coaches began purchasing gas from other suppliers, and Foley sued for breach. Foley was successful at trial which Classique Coaches appealed.

ISSUE: Does the fact that no price is quoted mean that the contract was void for uncertainty?

DECISION: Appeal dismissed. Past performance will indicate that a contract is binding.

REASONS: Scrutton states that there was a binding contract. He struggles to fit together the precedents of *May & Butcher Ltd. v R*and *Hillas & Co., Ltd. v Arcos, Ltd. (1932)*. Holding that each of these cases was decided on the facts, he notes that the two parties acted for three years as if there was a contract, so Classique Coaches cannot simply decide not to adhere to it all of a sudden. Further, if there was an issue with the price it should have been settled by arbitration as was laid out in the contract – Classique breached the contract by going to other vendors.

How is this different from *May v Butcher*? It is because that "subject matter" may be arbitrated as included in the arbitration clause instead of just "agreement" to be arbitrated. This is perhaps not the best way to distinguish between the two cases.

AGREEMENTS TO NEGOTIATE

Empress Towners Ltd. v. Bank of Nova Scotia

[1991] 1 W.W.R. 537, 50 B.C.L.R. (2d) 126

RATIO: **Is renewal clause void for uncertainty? Three possibilities per *Brown*: (1) where rent is to be agreed, clause is normally not enforceable; (2) where rent is to be established by a formula [example: market value] but no machinery for application of the formula is provided [ie: *who* determines market value?], courts will often supply the machinery [ie: the court will determine what market value is]; (3) formula is set out but defective [example: formula provides for a market value price but there is no market activity] and machinery is provided for application of the formula, machinery *may* [perhaps] be used to cure defect in the formula. Here, formula is market value as mutually agreed. Effect is that landlord cannot be compelled to enter into a renewal at a rent which it has not accepted as the market rental. However, landlord has obligation to negotiate in good faith and not be unreasonable due to a term implied under the officious bystander and business efficacy principles.**

FACTS: A clause in lease provided for 5 year renewal period whereby parties mutually agree on new market rental rate for the renewal. Upon expiry of old lease term, Empress set out terms of new lease, including a $15,000 lump sum, claiming disagreement on rental allowed it to cancel lease.

ISSUE: Did the mutual agreement clause allow for cancellation by withholding agreement? Was it an agreement to agree?

DECISION: Appeal dismissed. The landlord is using his own default of $15,000 to justify terminating the lease. **The renewal clause was intended to have legal effect and was consistent with the party's intentions to negotiate in good faith.**

REASONS: If all that the parties say that they will enter into a lease at a rental to be agreed, no enforceable lease obligation is created: … there may however be an obligation to negotiate.

Lambert, writing for the majority, held there were two courses of action:

1. follow *May & Butcher Ltd. v R* - if there are things to be agreed upon then there is no contract; or
2. follow *Hillas & Co., Ltd. v Arcos, Ltd. (1932)* - the courts should strive to find meaning if there is an agreement between parties.

He held there were three approaches for determining rent:

1. rent to be agreed - cannot be enforced
2. rent to be established by formula (criteria), but no machinery to do so - the courts will generally supply machinery
3. a formula given but it is defective - the courts will cure the defect

He interprets the section of the clause requiring the parties to agree on the rent to mean:

1. Empress could not be compelled to enter into a market rental value;

2. there was an implied term that landlord will negotiate in good faith; and

3. an agreement on market rate would not be unreasonably withheld.

Implying these terms was acceptable for reasonability and for reasons of business efficacy. In the evidence adduced, Empress had not negotiated in good faith by adding the $15,000 "penalty". Good faith and reasonableness is the same as "best efforts."

This is the law, it is a very good case. Some courts have been hostile to good faith, but this Court was not.

As a final note, there is a difference between a contract with a renewal clause, and a contract created from the outset. In the first situation, you are applying *Empress*. In the second situation, there is no duty of good faith, as there is just negotiation. There is, however, a duty to negotiate honestly.

Manpar Enterprises Ltd. v. Canada

(1999), 173 D.L.R. (4th) 243 (B.C. C.A.)

RATIO: **There is no common law obligation to negotiate in good faith; it must be in the contract, either expressly or impliedly. There must be a benchmark. There is a duty to negotiate in good faith if there is already a contract, it is consistent with the language, and there is a benchmark by which to assess.**

FACTS: The parties entered into a contract for the extraction of sand from a Reserve. The permit was originally effective for five years. Under the permit, M was obliged to pay yearly rental on the plots on the reserve, as well as a royalty on the materials removed. It was also required to do reclamation work on the area from which sand and gravel were extracted. The permit provided for a right to renew for a further five years, subject to satisfactory performance, and renegotiation of the royalty rate and annual surface rental. The Band Council substantially agreed to the terms and conditions of the agreement between M and the Crown. M gave written notice of its intention to renew the permit for an additional five years. However, the Band became less satisfied with the permit arrangement. Neither the Crown nor the Band were prepared to renegotiate the royalty rate for the purpose of renewal. The Crown failed to renew the permit. M took the position that the Crown had repudiated its obligation to renew, and elected to accept the repudiation and commence an action for damages. At trial judge held that the renewal clause was void for uncertainty, which M appealed.

ISSUE: Was the renewal clause void for uncertainty?

DECISION: Appeal dismissed**.** Further, the crown had a fiduciary duty to the Band, and as such crafted language of clause to leave open possibility that a renewal or negotiation thereof may not happen.

REASONS: Hall, writing for the court, held that the language chosen in the renewal clause afforded the Crown considerable latitude in deciding whether to agree to any extension of the permit and in deciding what terms might be acceptable. No enforceable agreement arose out of the language of the renewal clause.

He distinguished *Empress Towers Ltd. v Bank of Nova Scotia* on the facts: there was no general market rate in this case, no element of objectivity, and no way to calibrate the value at hand. i.e. No Benchmark.

Wellington City Council v Body Corporate 51702 (Wellington)

[2002] 3 N.Z.L.R. 486 (C.A.)

FACTS: The Council entered into a "process" contract (contract A which determines how to negotiate the bigger contract B) with Alirae (Body Corporate 51702 (Wellington)) which obliged the Council's officers to "negotiate in good faith" with Alirae the sale of the Council's interest in the premises at 20 Brandon Street, Wellington, which Alirae was leasing. Negotiations broke down and Alirae sued for breach, alleging that they failed to conduct the negotiations in good faith. The trial judge found for Alirae and assessed damages of $580,209 on the basis that if the Council had not been in breach, a substantive contract for sale and purchase would probably have resulted and Alirae had lost the profit it would have achieved from developing the premises in the manner it had in mind.

ISSUE: Is an agreement to "negotiate in good faith" enforceable, or is it 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. Thus, the appeal was allowed and the contract deemed unenforceable.

REASONS: Breach lies in failure to try, either at all or according to whatever may be required. Breach does not lie in failing to agree. **An obligation to negotiate in good faith is not the same standard as an obligation to negotiate reasonably. The parties can still pursue their interests in what is subjectively honest. THIS DOES NOT MEAN MUCH. THERE IS WAYS YOU CAN FAKE THINGS. COURTS REALLY HAVE NO OBJECTIVE STANDARD TO MEASURE.**

The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lack the necessary certainty. The same does not apply to an agreement to use best endeavours.

The essence of the theory of contract is consensus. It follows that for there to be an enforceable contract, the parties must have reached 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 they may be implicit in what has been expressly agreed. Taking price as an example, for a contract to be enforceable the parties must have agreed upon the price, or at least they must have agreed upon objective means of sufficient certainty whereby the price can be determined by someone else, or by the Court. If the price is left for later subjective agreement between the parties, the contract is not enforceable.

SUMMARY:

Is good faith in contractual negotiations enforceable?

- As per *Empress* and *Manpar*, it is enforceable if the duty is pursuant to an existing contract, the duty is consistent with the parties' intent, and there is an objective benchmark against which the court can assess whether the party in question is in breach or not.
- As per *Wellington*, good faith simply means subjective honesty. This is at complete odds with *Empress*.

Bhasin v. Hrynew

2014 SCC 71, [2014] 3 SCR 495

FACTS: An enrollment director's agreement that took effect in 1998 governed the relationship between C and B. The term of the contract was three years. The applicable provision provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary. H was another enrollment director and was a competitor of B. H wanted to capture B's lucrative niche market and previously approached B to propose a merger of their agencies on numerous occasions. He also actively encouraged C to force the merger. B had refused to participate in such a merger. C appointed H as the provincial trading officer ("PTO"). The role required H to conduct audits of C's enrollment directors. B objected to having H, a competitor, review his confidential business records. In June 2000, C outlined its plans to the Commission and they included B working for H's agency. None of this was known by B. C repeatedly misled B by telling him that H, as PTO, was under an obligation to treat the information confidentially. It also responded equivocally (not exactly a lie, but not exactly clear) when B asked in August 2000 whether the merger was a "done deal". When B continued to refuse to allow H to audit his records, C threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Entire Agreement Clause (which prevents terms being implied). At the expiry of the contract term, B lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by H's agency.

ISSUE: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly (i.e. in good faith)? And, if so, did either of the respondents breach that duty?

DECISION: I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result. **If you add a provision to negotiate in good faith, you have bargained away some of your adversarial benefits.**

REASONS: Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze." In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle

of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties. Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

Should There Be a New Duty? In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.

A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

NOTE: In the case of *Gateway v Arton,* the judge made a pitch to include an implied term of good faith in ALL contracts. This was not upheld in *Bhasin*. There is only am implied term of good faith if it is consistent with the intention of the parties.

NOTE: *Bhasin* was applied in *Timberwest*. It concludes that the renewal clause mandating good faith in negotiations requires the defendant to take an "honest and reasonable" approach to renegotiating the rates.

NOTE: Consider the case where parties are in a contract with a renewal clause. Performance of that contractual obligation is to negotiate in good faith.

DIFFERENT LEVELS OF CONTRACTING DUTIES

Fiduciary Duty: The highest level of duty in which a party puts the interest of the other party before their own.

Good Faith as an Organizing Principle: Parties must perform their contractual duties honestly and reasonably. A contracting party should have appropriate regard to the legitimate contractual interest of the contracting partner.

Duty of Honesty: This duty applies to all contracts regardless of contractual intention but it is not a term. It does not mandate disclosure but does forbid lying or knowingly misleading on matters directly related to the performance.

Good Faith as a Term: A manifestation of the good faith principle.

Unconscionability: Cannot cross the line of procedural or substantive inequality. There cannot be exploitative conduct. Note that this is not a term, it is a doctrine.

Generally, there is a principle in law that wrongdoers should not benefit from their own wrong. Rules do, however, dictate results and "are applied on an all-or-nothing basis. If a rules requirements are met, it will command a specific result."

ANTICIPATION OF FORMALIZATION

Bawitko Investments Ltd. v. Kernels Popcorn Ltd.

(1991), 79 D.L.R. (4th) 97 (Ont. C.A.)

RATIO: **The effect of a stipulation that an agreement is to be embodied in a formal written depends on its purpose. Is the document incomplete and not binding until terms of document are agreed and document is executed OR is such a document intended only as a solemn record of an already complete and binding agreement? We must look to the party's intentions.**

FACTS: Plaintiff (respondent) was looking to acquire a franchise from the defendant (appellant), and at a meeting they made an oral agreement which partially amended part of the franchisor's agreement draft. Prior to the signing of the formal agreement draft, a dispute arose between the parties.

ISSUE: Can the oral contract in itself constitute a complete and legally enforceable contract, or was it subject to and dependent upon a formal written franchise document being settled, approved and executed by the parties?

DECISION: When the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract

REASONS: On the evidence, it could not be said the parties had agreed in April as to the final form of the franchise agreement; terms other than those specifically agreed to had yet to be settled and thus there was no meeting of the minds. The unsettled details of the complex agreement were not mere formalities. Even if the oral contract had been binding, Bawitko had been willing to complete the transaction only pursuant to an agreement that formed no part of the alleged agreement.

There is a strong argument to the contrary in that the oral conversation contemplated the draft agreement with the various provisions forming a viable contract. The trial judge potentially did nothing wrong.

THE ENFORCEMENT OF PROMISES

Consider a general promise made. If it is in writing this suggests that a promise was seriously made. If subsequent behaviour exhibits a reasonable reliance this also suggests enforceability. Also consider moral grounds in that promises should be kept.

The promisee must "purchase" the promise from the promisor. Example, seller promises to deliver 100 widgets on Friday for $100. The buyer promises to pay on delivery. Each are both a promisor and a promisee. Consideration is found if there is benefit or detriment. Nominal consideration is good consideration if it is bargained for. Part of an ingredient for an enforceable promise is that there is a voluntariness, just like a contract. That is, you cannot coerce or pressure someone to accept or make a promise.

In the context of unilateral contract, recall that doing the thing requested is acceptance and consideration.

Consider that A promises to guarantee the debt of B. The seal is an acknowledgement that I am undertaking an obligation that may not include consideration.

However, consider the promise to pay you $100 for $1. Nominal consideration is good consideration but, under no circumstances does $1 operate as good consideration for the promise of a payment of $100. In money for money, you have to be careful. Further, a something cannot just be tacked on to some agreement to fulfill the nominal consideration requirement. It must be a material aspect of the promise.

Three ways in which a promise can become enforceable:

(1) as a contract; Agreement/Acceptance, Completeness/Certainty. Includes Consideration, Intention to create relations, and evidence in writing in certain cases.

(2) as a deed; Promises can be made legally binding by making them in a particularly formal manner.

(3) by way of estoppel.

EXCHANGE AND BARGAINS

The Governors of Dalhousie College at Halifax v. The Estate of Arthur Boutilier, Deceased

[1934] S.C.R. 642

RATIO: **Consideration must flow from the promisee in that third party consideration is no consideration at all. Unless the promisor gets some specific benefit from a gratuitous promise, then there is no consideration. The general increasing expenditure does not constitute consideration.**

FACTS: B promised to donate to Dalhousie. B falls on hard times and tells Dalhousie that although he can't donate now, he will when can. B then dies. Dalhousie sues his estate for promised money.

ISSUE: Did B's promise constitute a binding contract?

DECISION: No. You can't contract into a gift. Dalhousie didn't offer anything in return. There was no consideration. Had B made a request for Dalhousie to do something in exchange for the donation, such as name a building after B, there would be consideration, and thus, a valid contract. **Acting on gift does not constitute consideration for it. We do not want to easily turn a gratuitous promise into contracts.**

REASONS: Crocket, writing for the court, decides that this gratuitous promise did not receive any consideration, and therefore that it is not a binding agreement. B did not promise to pay the money for any specific reason; he was not getting a specific benefit out of it. Unless the promisor gets some **specific** benefit from a gratuitous promise, then there is no con-

sideration. If he had donated money specifically for the construction of a certain new building this could be consideration; but no such purpose is found in this case and therefore there is no binding agreement.

Crocket also finds that estoppel does not apply here because it can only apply when a representation has been made in fact (so, when the promisor has partially performed his promise).

Note in the subscription that it said B was paying for the consideration of others. However, **third party consideration is no consideration. Consideration has to flow from the promisee.** The argument might be made that B gets satisfaction (and hence consideration) from knowing he is committing to a good cause and that is consideration, but this is not the law in Canada.

Brantford General Hospital Foundation v Marquis Estate

[2003] O.J. No. 6218 (Ont. S.C.J.), leave to appeal refused

RATIO: **A promise to subscribe to a charity is not enforceable in the absence of a bargain. If what you say is consideration does not come at the request of the donor, then that will not be construed as consideration.**

FACTS: M left hospital $2.8 million. Hospital named unit after him. In September 1998, widow was presented with a formal proposal that outlined the project and the hospital's interest in honouring her and the memory of Dr. Marquis by naming the new critical care unit after them. Widow signed pledged to leave more money over 5 years. She died within the first year and her estate refused to pay the balance of $800,000.

ISSUE: Is a pledge document a contract enforceable in law, or merely a “naked promise?”

DECISION: Action dismissed.

REASONS: Milanetti reaffirmed that Canadian courts follow English common law concerning pledges, namely that a promise to subscribe to a charity is not enforceable in the absence of consideration. Brantford held that their commitment to name the entirety of the new unit in honour of Dr. and Mrs. Marquis constituted *bona fide* consideration. While there was clear evidence that Mrs. Marquis was adamant that Dr. Marquis' recognition in the coronary care portion of the unit be retained, including his name and picture, it did not find the larger naming opportunity to be of vital importance to Mrs. Marquis in her decision to pledge the funds as it was at the suggestion of the hospital. As the decision to name the unit in honour of the Marquis' was still subject to board approval, it was difficult to say that this constituted *bona fide* consideration.

Based on the foregoing, most particularly the evidence of all of the plaintiff’s witnesses details the humble and modest nature of Mrs. Marquis, the court finds as a fact that **she never sought the naming of the unit as a condition for making the pledge. It was merely gratitude. Widow did not bargain for the naming.**

Wood v Lucy Duff-Gordon

118 N.E. 241 (U.S. N.Y., 1917)

RATIO: **A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed.**

FACTS: Defendant was a fashionable woman and designer capable of increasing the sales of certain goods by her endorsement. Defendant entered into an exclusive agreement with Plaintiff allowing him to place her endorsement and market defendant's designs and keep half of the profits. Plaintiff claimed she broke the contract by placing endorsements without his knowledge and keeping all the profits too herself.

ISSUE: Is there an enforceable contract even when there is no express promise by one of the parties?

DECISION: A promise to exclusively represent the interests of a party constituted sufficient consideration to require enforcement of an unstated duty to use reasonable efforts based on that promise. A promise may be lacking, and yet there might be "instinct with an obligation" imperfectly expressed.

REASONS: Duff-Gordon claimed that there was no corresponding request to her promise – she did not request anything from Wood, thus there was no consideration. Wood did not bind himself to anything, and therefore there was no contract. However, Cardozo, writing for the majority, said that it goes without saying that anyone who contracts to do this type of thing will do his or her best. Wood's promise to render accounts and to give Duff-Gordon 50% of the profits inherently implied that he would use reasonable effort to implement the agreement.

PAST CONSIDERATION

Infant Contracts : People under the age of 18 have limited capacity, and the law protects them. Therefore, the general rule is that infants are not obligated to contracts they make. It may be very dubious to enter into a contract with an infant, therefore. It only binds the infant if it is ratified or adopted as an adult.

Eastwood v Kenyon

(1840), 11 Ad. & E. 438, 113 E.R. 482 (Q.B.)

RATIO: **Past consideration is no consideration. Past consideration is no consideration because it provides no link between the alleged consideration and the promise made.**

FACTS: John Sutcliffe died and left Eastwood as the guardian to his infant daughter, Sarah. Eastwood borrowed money to pay for Sarah's education and Sarah promised to pay him back when she came of age and paid one year's interest to him. Sarah then married Kenyon who also promised to pay Eastwood back. Kenyon failed to do so and Eastwood sued. Kenyon said that he will pay the money after he got a child from Sarah.

ISSUE: Is a promise sufficient to form a contract?

DECISION: No contract was found to have existed. Consideration made in the past is no consideration at all.

REASONS: The court found that on the facts there was nothing more than a benefit voluntarily conferred by Eastwood and an express promise made by Kenyon to repay the money. Kenyon promised to pay the promissory note, but Eastwood gives nothing back but a thank you. How can doing something in the past affect a current promise? Taking care of Sarah was not done at Kenyon's request, it simply couldn't be. There is no link. Note however that if Eastwood sued Sarah, that would be enforceable because she reaffirmed the contract after she became an adult, as an exception to the common law rule of infant contracts.

Lampleigh v Brathwait
(1615), Hobart 105, 80 E.R. 255 (K.B.)

RATIO: **A promise made after performance can be enforced, only if it was understood by the parties that there will have some kind of reward prior the performance (contract quantum meruit – a reasonable amount). To be enforceable, (1) the act performed must have be at the request of the promisor, (2) it must be understood that payment would be made, and (3) if payment, promised in advance, would have been enforceable (i.e. the contract can not be illegal).**

FACTS: Brathwait killed a man and then requested Lampleigh seek a pardon for this crime from the King. Lampleigh rode around the country to obtain this pardon, after which Brathwait promised to pay Lampleigh £100.

ISSUE: Can a promise to pay after a request has been fulfilled be binding?

DECISION: Binding contract found, judgment for the plaintiff.

REASONS: It was only after Lampleigh returned that Brathwait promised to pay. Is this past consideration? Even though the official promise to pay came second, that does not matter because there is an implied promise of reasonable pay. The court held that while a mere voluntary promise is not sufficient consideration, there was a prior request and then the promise to pay. This is then not a *nudum pactum*, but rather coupled with the prior request and therefore a binding contract.

CONSIDERATION MUST BE IN THE EYES OF THE LAW

Thomas v Thomas
(1842), 2 Q.B. 851, 114 E.R. 330

FACTS: Executors of deceased's estate allowed his widow to live in one of his houses as long as she remained a widow, in consideration of the testator's wishes (not explicitly in the will or in contractual form). Subject to the widow paying $1 annually as ground rent and keeping the house in tenantable repair. An action for ejectment was then brought by one of the executors.

ISSUE: Was there consideration?

DECISION: Consideration - and therefore a contract was made. Mere motive need not be stated and we are not obliged to look for the legal consideration in any particular part of the instrument, we may look to any part.

REASONS: The issue is that the widow was gifted the ability to live in the house, with the ability of revocation. For nonrevocation of a gift, there must be an intention to donate, an acceptance of the gift, and a sufficient act of delivery. The Plaintiff is saying that the payment of money is just the burden of a revocable gift, and not consideration. In this case, the court says we do not know what the lease says, so it is not a gift with a burden.

FORBEARANCE TO SUE

Say that A is injured in a car accident due to the driving of B. we can have a situation where A agrees not to sue B or discontinuance of action in exchange for a payment of money. In that sense, the consideration is the promise not to sue or the discontinuance of the lawsuit BUT only so long as the claim is valid. There is no consideration if the sole consideration provided by A is his forbearance to enforce a claim which is clearly invalid and which he either knows to be invalid or does not believe to be valid. If there is a POSSIBILITY of a valid claim, that is the claim is doubtful in law, a promise to abandon it will constitute good consideration because there is still the possibility of winning the claim. Finally, a promise to abandon claim that was wrongly believed to be valid can constitute good consideration but it is subject to certain safeguards to prevent fraud.

BONA FIDE COMPROMISES OF DISPUTE CLAIMS

B.(D.C.) v. Arkin
[1996] 8 W.W.R. 100 (Man. Q.B.)

RATIO: **Forbearance to sue is valid consideration for a contract only when that the forbearer has a valid claim against the other party.**

FACTS: D.C.B.'s 14-year-old son shoplifted in Zellers along with a friend. He took $59.95 worth of goods which were recovered unharmed. Legal counsel for the store wrote the mother demanding restitution of $225, failing which the store would proceed with a civil action against her in accordance with the store's policy to recover the incremental costs of shop-

lifting from shoplifters and, in the case of children, their parents. D.C.B. paid the $225, but after obtaining legal advice, she sought the return of these funds.

ISSUE: Is forbearance to sue valid as consideration?

DECISION: Appeal allowed.

REASONS: Jewers held that the store did not have a valid claim against D.C.B. as a parent as there was no general rule that parents were liable for the torts of their children. Parents could only be liable if they were in some way negligent or had committed a tort in their personal capacities. While forbearance to sue was valid consideration for a contract, such a contract could not be upheld where the forbearer did not have a valid claim against the other party. D.C.B.'s mistaken belief that the store had a valid claim against her entitled her to a refund.

PRE-EXISTING LEGAL DUTY

The traditional view is that if, in exchange for a promise, the promise agrees to perform a public duty, there is no consideration. However, if something extra is promised beyond the public duty, then consideration will be found.

Consider the situation where a father promises to pay a son for not selling drugs. Can the son sue? The problem is that there is no consideration here because the son had a public duty not to sell drugs. The reason is that there is no detriment to the promisee and there is no benefit to the promisor.

Consider the situation where a police officer sees a commotion you are involved in. The police officer promises to protect you if you pay him $100. Again, there is no consideration since the police officer had a public duty to help you regardless.

In contrast to the cases involving public duties, the performance of a duty owed to a third party has traditionally been viewed as good consideration, particularly in the family context. Consideration need to come from the promisee, but need not flow to the promisor.

Consider the case where a promisee nephew is engaged to his fiancé by contract. His uncle says that he promises to pay nephew some money per year. Then, the uncle does not pay and the nephew sues the uncle. The problem is that the nephew gets the money only if he gets married. How is that good consideration since he is already obligated to marry by contract with fiancé? The court said that the contract was binding despite preexisting legal duty. Fulfillment of a preexisting legal duty can be good consideration if it flows to a third party. Though this decision has been criticised.

Stilk v Myrick
(1809), 2 Camp. 317, 170 E.R. 1168, S.C. 6 Esp. 129 (Eng. K.B.)

RATIO: **Performance of a pre-existing duty is not legally sufficient consideration.**

FACTS: Stilk was contracted to work on a ship owned by Myrick for £5 a month, promising to do anything needed in the voyage regardless of emergencies. After the ship docked at Cronstadt two men deserted, and after failing to find replacements the captain promised the crew the wages of those two men divided between them if they fulfilled the duties of the missing crewmen as well as their own. After arriving at their home port the captain refused to pay the crew the money he had promised to them.

ISSUE: Was there legally sufficient consideration of this agreement to allow the sailors to collect?

DECISION: No consideration found; finding for the defendant.

REASONS: The court held that the original contract bound Stilk to perform any and all duties on board the ship, and thus performing the additional work of the deserted crewmen was not sufficient as consideration in light of the new promise. Court applies case of *Harris v Watson* which says that sailors would rather sink a ship than not get paid extra money in situations of emergency (Ha!). Very pro-management case. Choice between exploitation of sailors or foment mutiny. But these are not the only two choices. It all depends on how the facts are framed.

Gilbert Steel Ltd. v. University Const. Ltd.
(1976), 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (C.A.)

RATIO: **A prior duty owed to the promissor is not legally sufficient consideration. In amending a contract, both sides must provide fresh consideration.**

FACTS: On September 4, 1969, the plaintiff entered into a written contract with the defendant for the supply of steel at a fixed price for 3 building projects (specifically, the University project called for 2 buildings to be erected). Prior to the commencement of construction of the 1st of the two building for the University Project, the plaintiff announced a price increase. On October 22, 1969 the parties entered into a new contract for the supply of steel for the 1st building at the increased price. While the 1st building was still under construction, the plaintiff announced a 2nd price increase. On March 1, 1970, the parties entered into an oral agreement for the supply of steel for the 1st building reflecting the 2nd price increase. Further to their oral agreement on March 1, a written contract was sent to the defendant, but was never executed. The defendant continued to accept deliveries of the steel, but failed to make full payments against invoices reflecting the 2nd price increase. The plaintiff sued for breach of contract for the balance owing. The trial judge dismissed the plaintiff's claim and the plaintiff.

ISSUE: Was the oral agreement (reached on March 1) legally binding or did it fail for want of consideration? Was there not an obligation to already construct the buildings due to the previous contracts?

DECISION: Appeal dismissed.

REASONS: The appellant contends that the promise of a 'good price' for the second building constituted consideration for price variation, however the court held that this was too vague to be considered consideration.

The court dismissed the idea that there was mutual abandonment of the first contract and a new contract was formed; rather this was simply an agreement of a new price.

Also argument that there is an increased access to credit which the University receives as a result of the price hike. The argument against this is that this fact was not negotiated for. Hence not to be regarded as consideration.

Also argument that since University did not contest the increased price invoices, then there was estoppel. But promissory estoppel cannot be used as a sword, but only a shield. Also, there was no detrimental reliance.

Williams v Roffey Bros. & Nicholls (Contractors) Ltd.
[1990] 1 All E.R. 512 (C.A.A)

RATIO: **An abandonment of the contract by consensus of both parties can constitute good consideration for a subsequent contract where (1) The party promising to increase the payment offered receives a practical benefit, and (2) There is no economic duress or fraud on the part of the receiver of the payment.**

FACTS: P carpenter employed by D. During project P suffered financial difficulties since the price that P argued for was too low and there was trouble supervising the workforce. D agreed to pay an additional bonus to be paid as apartments finished. P didn't receive money.

ISSUE: Can there be sufficient consideration for a pre-existing duty? Is the promise to pay more supported by consideration?

DECISION: D's promise to pay was supported by consideration.

REASONS: Many benefits by payment. Practical benefits can be good consideration for promise to pay more. This scraps the strict view of *Stilk v Myrik* even though the court says they are not changing the law by overruling that case.

If A agrees to undertake work at fixed price, and before completion he declined to continue with it unless B agrees to pay an increased price, A may be guilty of securing B's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work (Economic Duress).

It is possible for a person to whom a promise was made, on which he has relied, to make an additional payment for services which he is in any event bound to render because of contract, to show that the promisor is estopped from claiming that there was no consideration (Promissory Estoppel).

Greater Fredericton Airport Authority Inc. v NAV Canada
[2008] N.B.J. No. 108, 2008 CarswellNB 147 (N.B. C.A.)

RATIO: **This case rejects the English doctrine from *Williams v Roffrey*. Finds that a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress. To establish duress, 2 conditions must be met: (1) promise made under pressure (demand/threat), (2) pressured party must have no option but agreeing. If these conditions met, 3 factors need to be analyzed: (1) was the promise supported by consideration? (2) was the promise made under protest? (3) were reasonable steps taken to disaffirm the promise?**

FACTS: The Airport is in a contract with Nav Canada. The Airport asks Nav to relocate some equipment which they are required to do under contract. Nav says why do we not just get new equipment? Contract says that Nav is responsible to pay for the new equipment they suggested. They decide they do not want to pay the money, and if the Airport does not pay, then we are not going to relocate. Airport pays under protest.

ISSUE: Was there sufficient consideration to find that a contract was created, or the existing contract modified? Was the promise obtained under economic duress?

DECISION: Appeal dismissed.

REASONS: The doctrine in *Stilk v Myrick* was an unsatisfactory way of addressing the enforceability of post-contractual modifications as existing contracts are frequently varied and modified to respond to contingencies not anticipated at the time the initial contract was negotiated and the law must then protect legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable.

The courts should recognize that while some gratuitous promises are not bargains supported by consideration, there may be other sound reasons for enforcement.

The doctrine of consideration and the concept of bargain and exchange should not be frozen in time so as to reflect only the commercial realities of another era; to the extent that the old doctrines interfere with the policy objectives underscoring the new, change is warranted.

Thus, the court accepted that a post-contractual modification, unsupported by consideration, may be enforceable as long as it is established that the variation was not procured by economic duress.

PROMISES TO ACCEPT LESS

Consider a debtor owing a creditor 100 dollars. The Creditor agrees to accept 80 dollars in full satisfaction of the debt. Does this agreement fail for want of consideration? In no way does paying 80 dollars equal paying 100 dollars.

Foakes v Beer
(1884), 9 App. Cas. 605 (H.L.)

RATIO: **An agreement to accept less than you are owed is not binding unless there is some consideration. A payment of a lesser sum in satisfaction of a larger amount does not constitute consideration.**

FACTS: As the result of a previous judgment, F owed B £2,090 19s. The two parties entered into an agreement (not under seal) that F would pay £500 immediately and £150 every 6 months until he had paid off the debt and in return B wouldn't take any action. F has paid off the entire principal and sought leave to proceed on the judgment. B claimed she was entitled to interest because the debt was not paid off immediately. F claimed there was a contract with no mention of interest which B claimed was invalid because she did not receive any consideration.

ISSUE: Is partial payment of a debt sufficient consideration for the original contract between F and B? That is, was the agreement to accept less than the whole debt legally binding?

DECISION: Appeal dismissed with costs, interest payment due.

REASONS: Selborne, writing for the court, held that as the agreement was not under seal the defendant was not bound unless there was consideration. He refers to *Pinnel's Case* and the doctrine: "that payment for a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum."

While he acknowledges that this doctrine has been criticized it has not been overruled and therefore somewhat hesitantly adopts it and dismisses the appeal.

Argument from doctrine of Cumber v Wane that the court should strive to give effect to the engagements which persons have thought proper to enter into, rather than cast about for subtle reasons to doubt them upon being unreasonable. Not accepted.

Circumstances where payment of a lesser sum is binding exceptions: (1) if the debt is paid before the date you are supposed to be paid, (2) if you give someone something of value for them to accept less, (3) contract under seal, (4) promissory note.

Robichaud v Caisse
New Brunswick Court of Appeal

RATIO: **Practical benefits can constitute consideration in cases of agreements to pay less. In this case, they saved time by going after the Debtor ("A bird in the hand is worth two in the bush") and that saving of time, effort and expense was construed as consideration.**

FACTS: R owes money to a lot of debtors. A judgment is granted against R and it is registered. R is trying to consolidate debt with AVCO in that AVCO will negotiate and lend money so

that creditors can be paid. Caisse agrees to remove judgment in return for a $1000 payment by R in full satisfaction. Caisse receives its cheque from AVCO but Caisse refused to approve the compromise agreement. The cheque was not cashed and the judgment was not removed.

ISSUE: Is the agreement unenforceable as per wont of consideration?

DECISION: Agreement upheld.

REASONS: It would be too simple to say that there was no consideration. However, undeniable that a financial group entered into an agreement on its own accord and there were practical benefits in terms of saving time, effort and expense. This case would have otherwise failed in *Foakes v Beer*.

Re Selectmove Ltd.
[1995] 2 All E.R. 531 (C.A.)

RATIO: **Even in a case where there may be a practical benefit to accepting a lesser amount in payment of a debt, this is not sufficient consideration to find a binding contract. *Foakes v Beer* is the precedent, and the court did not want to overrule that case. Note that in New Brunswick, there is no legislation to deal with the issue of this case (it is left to the common law), whereas in Alberta there is legislation that overrules *Foakes*.**

FACTS: Selectmove Ltd. had failed to submit payroll deductions from employees to the Crown. The company proposed it would pay £1,000 per month on the arrears. On October 9, 1991 the Crown demanded payment in full of £24,650.
The company submitted its current obligations in part and made seven £1,000 payments in 1992. In October 1991 it laid off all of its employees. In September 1992 the Crown sought a liquidation order for the company and the payment of the arrears in the amount of £17,466.60. Selectmove argued that the Crown had accepted the agreement in July 1991 for installment payments..

ISSUE: Was there sufficient consideration in the partial payment of the existing debt to find a binding contract?

DECISION: Appeal dismissed.

REASONS: The Crown argued that *Foakes v Beer* was the appropriate precedent for this case and that the agreement to pay less could not be consideration. Selectmove argued that *Williams v Roffey Bros. & Nicholls (Contractors) Ltd.* was the appropriate precedent as the Crown would have a practical benefit for waiting to retrieve the money owed as it would generate more money from an operating company rather than forcing a sale immediately. While Gibson, writing for the court, appreciates the argument made by Selectmove, he feels bound by *Foakes* and therefore dismisses the appeal.

Foot v Rawlings
[1963] S.C.R. 197, 41 W.W.R. 650, 37 D.L.R. (2d) 695

RATIO: **Prime example of court making up consideration through a highly fictitious analysis. Accepting terms that benefit the creditor for convenience can amount to consideration.**

FACTS: Foot owed Rawlings money for several debts. Rawlings was quite old and realized that the current agreement would make it hard for him to enjoy the money, and therefore offered a new agreement whereby the appellant would pay less money monthly as long as he gave post-dated cheques every six months for the following six months. If he performed this, then the respondent would not sue. Both parties signed this agreement on July 17, 1958. Foot followed this agreement, however after cashing the November 1960 cheque an action was brought for the balance.

ISSUE: Was there sufficient consideration in the substituted contract for it to be binding?

DECISION: Appeal allowed. The new agreement may continue and the respondent cannot sue unless the appellant fails to keep up the payments.

REASONS: The court says when you pay by cheque, then that paper cheque is of uncertain value?! But can a cheque not be considered just the same as cash?

After a careful review of the case law the judge decides that the respondent relinquished his right to sue when he entered into the substitute agreement. The consideration in the agreement was the appellant's agreement to provide the postdated cheques in advance purely for the benefit of the respondent so that he could enjoy the money before his death.

THE LEGISLATIVE RESPONSE TO *FOAKES V BEER*

Judicature Act
R.S.A. 2000, c. J-2, s. 13(1)

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

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

One point of contention with this legislation. If a debtor says here is a less amount for payment of the whole, but say the performance is delayed. Can you changed your mind to accept the lesser sum before the date of performance? The debtor may not be able to be saved under s. 13(1)(a) because the strict grammar suggests that he is only saved after complete performance. Further, the legislation seems to fail to save an agreement under which the creditor agrees to complete forgiveness of the debt.

However, there is some judicial authority that does away with this contention, but there has not been a recent case that completely rules out the contention as a possible interpretation.

SUMMARY

At common law, a lesser payment for more is not binding unless there is an agreement under seal, or accord with satisfaction (*Pinnel* says no consideration as quoted in *Foakes*, but consideration is found in some cases where there is some extra component like paying early, paying by cheques (*Foot v Rawlings*) or practical benefits (*Robichaud*)).

Note also that the case of *NAV Canada* suggest that no consideration is needed.

PROMISSORY ESTOPPEL AND WAIVER

As per Lord Denning: "there are cases in which a promise was made which was intended to create legal relations, and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases, the courts have said that the promise must be honoured." (*Hightrees*)

To show promissory estoppel, there must be a pre-existing legal relationship between the parties (essentially a contract). There must be a clear promise or representation of intention by the representor (*John Burrows*). The representor must know that the representee will act on the promise. The representee must act or rely on the representation.

Hughes v Metropolitan Railway Company
(1877) 2 AC 439 (H.L.)

RATIO: **If a promise is implied in negotiations and one party relies on that promise, then it is inequitable to allow the other party to act as though the promise does not exist. That is, if parties enter into a negotiation which has the effect of leading one party to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, the person who otherwise might have been able to enforce those rights will no longer be allowed to enforce them. The bulk of authorities says you do not need to have negotiations per se, you simply need representations. Even though the fact that negotiations made its way into the test, having actual negotiations are not necessary.**

FACTS: H owed property leased to M. H was entitled to compel the tenant to repair the building within six months' notice. Tenant M proposed to purchase building. Negotiations began but nothing was settled. Once six months were up, H sued M for breach and tried to evict. M then completed repairs.

ISSUE: Was there an implied promise that the six month term would be suspended during negotiations?

DECISION: Appeal dismissed. The obligation was suspended but it was not voided.

REASONS: Cairns, writing for the court, says that it would be unfair for the plaintiff to take advantage of the defendants by negotiating with them and stalling, allowing the six

months to expire and then suing them. However, he finds that this was not the case. They did not intend to take advantage of the defendants; they simply thought that the six month period was over. However, the judge states that through their dealings both parties made it inequitable to count the time of the negotiations as a part of the six months. The defendants relied on this promise, and therefore it would be unfair to make them liable in this case. The implied promise is enough to allow estoppel to apply.

Central London Property Trust Ltd. V. High Trees House Ltd.
[1947] 1 K.B. 130

RATIO: **If a promise is intended to be binding, intended to be acted upon, and was indeed acted on, it is binding so far as the 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.**

FACTS: High Trees leased apartments from Central London. Due to war and result of heavy bombing, occupancy rates were low. To ameliorate the situation, parties agreed to reduce rent. However, neither party stipulated the period for which reduced amount would apply. After the apartments were again at full occupancy, Central London sued for full rental costs.

ISSUE: Can the Defendant rely on the subsequent reliance for paying less rent? That is, were the plaintiffs estopped from alleging the rent should be more than the halved amount during wartime?

DECISION: Judgement for the plaintiff in the amount requested.

REASONS: The problem the tenant has is that there is an argument that there is no consideration supporting the variation since the landlord is not getting anything out of lessening the amount of the lease.

Estoppel by representation: If one party makes a representation as to a present or past fact upon which the other party relies to his detriment, the representor cannot afterwards repudiate the representation. In our case, we have landlord to tenant saying I will not charge you full rent. This is going to the future. Hence hard to treat as estoppel by representation.

Further, the court reasoned that the rent waiver was only meant to cover the wartime period. Therefore, it was not unjust to raise the rent back to the original amount after the war, when the defendant was able to pay it again. A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

In certain situations you can make representations that satisfy promissory estoppel, but resile that on notice.

QUESTION: Is promissory estoppel suspensory or permanent? In a suspensory situation, you can resile with reasonable notice. If you have continuing obligations (such as a lease) the view is that the estoppel is suspensory and you can give reasonable notice going forward as to bring the estoppel to an end for the future. A permanent estoppel is a once and for all obligation. Another scenario is *Foakes v Beer* where the creditor has accepted a sum, the creditor cannot go back on this.

John Burrows Ltd. V. Subsurface Surveys Ltd.

[1968] S.C.R. 607, 68 D.L.R. (2d) 354

RATIO: **Defence of equitable estoppel cannot be invoked unless there is evidence that one of the parties entered into a course of negotiation which had effect of leading the other to suppose that the strict rights under the contract would not be enforced à implied that there must be evidence from which it can be inferred that first party intended that the legal relations created by contract would be altered as a result of negotiations. Mere granting of friendly indulgences does not amount to a representation that later prevents the enforcing of the contract.**

FACTS: Burrow agrees to sell shares in his company to Subsurface. $42,000 was to be a promissory note paid annually for 10 years with 6% interest. Subsurface was late on some payments but Burrows did not take action. There was an acceleration clause that permitted the plaintiff to claim the entire balance if a payment was 10 days late. This clause was never used. Relationship turned sour, and when late on another payment, Burrows demanded full amount as per condition in contract saying this was the remedy. Subsurface claims estoppel as defence.

ISSUE: What is necessary for an estoppel to apply?

DECISION: Appeal allowed. There was no promise that intended to be binding here. Subsurface was liable for the full sum.

REASONS: Ritchie, writing for the court, states that estoppel does not apply in this case. He says that for estoppel to apply the conduct of Burrows must amount to a promise or assurance intended to alter the legal relations between the two, and that it is impossible to infer this from the facts of the case. He was simply acting as a friend, and not entering into any negotiations with Whitcomb over new terms of payment.

The equitable defence in Hightrees 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. Parties did not enter in to negotiations that would have had the effect of leading Subsurface to believe that Burrows had agreed to disregard that part of the contract.

D. & C. Builders Ltd. v. Rees
[1966] 2 Q.B. 617

RATIO: **Substitute agreements require consideration to be binding at common law. Though substitute agreements may be acceptable in equity even if they do not have consideration so long as there is no undue pressure.**

FACTS: R commissioned DC to do work. They did work and gave bill. R paid an amount, and received a discount leaving an amount to be paid. R did not pay and DC were in financial trouble. R, knowing this, offered a lesser amount in satisfaction of debt. DC said it would not satisfy debt, but R was clear that this was all they were going to pay, nothing more. DC had to accept without going bankrupt, and signed something saying that this satisfied the debt, but then sued for the remaining.

ISSUE: Can a party accept a lesser amount for satisfaction of a debt and then demand payment in full?

DECISION: Appeal dismissed. DC is entitled to the full amount. There was no agreement because of undue pressure.

REASONS: Lord Denning clears up the law regarding substitute contracts. He says that at common law, they are not allowed unless there is consideration provided. Without consideration, there can be no substitute agreement that is accepted at common law. However, substitute agreements that satisfy the necessary accord can be valid in equity, even if they do not have consideration, if it would be inequitable to allow the creditor to sue for the money from the original contract. To satisfy this requirement an agreement must have been made, the debtor must have relied upon it, and it must be unfair to allow the creditor to claim more money.

Denning states that in this case there is no consideration; therefore the agreement will not stand in common law but might be allowed in equity. However, he states that the pressure placed on D. & C. by Rees forced them to accept an agreement that was unsatisfactory. Therefore it would not be inequitable to allow the creditor to claim the rest of the money, and thus the appeal is dismissed.

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.
[1994] 2SCR 490

RATIO: **To waive rights there must be full knowledge of rights and an unequivocal and conscious intention to waive them. However, a waiver can be retracted explicitly or implicitly through reasonable notice in reasonable time. The difference between a waiver and estoppel is that a waiver is the voluntary relinquishment of some know right or advantage. Estoppel is the inhibition to assert that waived right.**

FACTS: In 1978, Maritime Life issued an insurance policy on the life of MF to Saskatchewan River Bungalows (SRB). In 1984, ownership of the policy was transferred to Fikowski, who became the beneficiary, with SRB remaining responsible for paying the annual premi-

ums. On July 24, SRB mailed a cheque to pay the annual premium due on July 26, but the cheque was never received by Maritime Life, nor was it deducted from SRB's bank account. After expiry of the grace period on Aug. 26, Maritime Life sent a late payment offer to SRB agreeing to accept payment of the July premium if it was postmarked or received by September 8, but SRB did not respond to the offer. In November, Maritime Life wrote a letter advising Fikowski that the premium due on July 26 remained unpaid and stating that "this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984 premium". Finally, in February 1985, Maritime Life sent a notice of policy lapse to SRB and Fikowski, with an application for reinstatement appended to the notice requiring evidence of insurability. Since Saskatchewan River Bungalows closed its hotel business and picked up the corporate mail infrequently during the winter season, it did not become aware of the late payment offer, the November letter or the lapse notice until April. It then began to search for the lost premium cheque. It was not until July 1985 that Saskatchewan River Bungalows sent a replacement cheque to Maritime Life, and a cheque for the 1985 premium. Both cheques were refused. MF was by then terminally ill and uninsurable. He died in August. Maritime Life rejected Saskatchewan River Bungalows' claim for benefits under the policy on the ground that it was no longer in force.

ISSUE: Was Maritime Life estopped from strictly enforcing the lapse due to their conduct in the November letter waiving their rights to expect timely payment?

DECISION: Maritime's waiver was no longer in effect when SRB sought to make payments in July. Appeal allowed and SRB not entitled to any benefits under the policy.

REASONS: Major, writing for the court, held that the demand for payment in the November letter was a clear and unequivocal expression of Maritime Life's intentions to continue coverage upon payment of the July premium and, as such, constituted a waiver of the time requirements under the policy. However, the waiver was not still in effect when SRB tendered payment of the missing premium in July. Waiver could be retracted if reasonable notice was given to the party in whose favour it operated. In the case at bar, the respondents were not aware of Maritime Life's waiver until they received the November letter in April 1985 and therefore they did not rely on it. The statement that "this policy has lapsed" contained in the February lapse notice therefore took effect on its terms. In any event, once SRB opened their mail in April, they clearly became aware of Maritime Life's intention to retract its waiver. Even if a reasonable notice requirement were imposed, it would thus be adequately met by SRB's failure to tender a replacement cheque until July, three months later. As a result, Maritime Life was only required to reinstate coverage if the respondents provided evidence of insurability, which was not possible in this case.

International Knitwear Architects Inc. v. Kabob Investments Ltd.
(1995), 17 BCLR (3d) 125

RATIO: **When notice is given to effect a purpose, the notice must be for a reasonable period but need not be dated. A reasonable time period can be implied. What length of time**

is required for notice depends on facts and equities including the conduct of the parties.

FACTS: International Knitwear had been a tenant of Kabob's pursuant to a written lease of commercial premises. The five-year term of the lease was to run from May 1, 1987 to the last day of April, 1992. By May 1, 1989, Knitwear's business was experiencing difficulties. As a result, its principal asked Kabob if it would agree to a reduction in rent. Wishing to help its tenant through a difficult time, Kabob agreed to a reduction to $1,000 per month. No rent was paid on December 1, 1991. On December 13 a bailiff entered and took possession of the premises under Kabob's warrant and on December 24 demanded arrears, interest, and payment in full from January 1, 1992. Knitwear sued for illegal distress and Kabob counterclaimed for the full amount of rent and other moneys owing.

ISSUE: Was the notice written on December 24, 1991 effective in reviving the original escalated price of the lease event though Knitwear had agreed to lower the price? Can Knitwear claim the money from the date of notice or for the entire length of the lease?

DECISION: Knitwear is not entitled to claim money from Kabob for the whole term of the lease. They can however, using promissory estoppel claim money after Dec 1991 when Kabob stopped payments. Kabob is liable to pay the original increased price for the last three months.

REASONS: Southin, writing for the court, held that the finding of the judge on the matter of estoppel was correct, but that Knitwear's claim that they were unable to revive the obligation until the end of the lease in April was incorrect. He asked two questions relating to notice given to effect a purpose:

1. Must the notice be for a reasonable period?
2. If so, must the notice specify the period?

He held that the notice must be for a reasonable time, but need not be directly stated. Holding a one month notice was sufficient, he found Knitwear liable for rent in full beginning February 1 to the end of the term in April.

W.J. Alan & Co. v. El Nasr Export & Import Co.

[1972] 2 QB 189

RATIO: **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.**

FACTS: WJ agreed to sell coffee beans at price to El payable on credit. Contract stipulated price payable in certain currency at time of equal exchange rate but credit amount in other currency. There were other discrepancies but those were rectified in later agreement, but not the currency discrepancy. Exchange rate changed dramatically resulting in significant loss. WJ sought to revert currency and demanded further payment, but El raised promissory estoppel in that the redrafting to correct other discrepancies included implied promise that the currency would not be reverted. WJ argued that El had not acted to their detriment in reliance of this promise as they had gained a benefit.

ISSUE: Is detrimental reliance an essential element of promissory estoppel?

DECISION: Appeal allowed.

REASONS: Megaw held that there had been a variation in the form of payment in the revised agreement to pound sterling and that W.J. Alan had waived their right to be paid in shillings. He rejected the supposition that this was a sale of goods deliverable in installments where the terms could vary and held that the sellers could not unilaterally change the currency of exchange.

Denning agreed, holding that once an alternative method of payment is accepted (the pounds sterling) it is deemed to have been accepted as a term of the contract and the sellers had waived their right to be paid in shillings. W.J. Alan could not then withdraw this waiver if it was either too late, or if it would be unconscionable in the circumstances. On the subject of detriment, Denning held that there was no support in the case law for that requirement, simply that the other party had relied on the decision and altered their position.

The Post Chaser

[1982] 1 All E.R. 19 (Q.B.)

RATIO:

FACTS: P sold oil to D who in turn sold it to sub-buyers. Under the contract the sellers were to give notice to the buyers of the ship's sailing "in writing as soon as possible after vessel's sailing." This was not done until a month after ship sailed, but the buyers did not protest about the lack of timeliness. However, the sub-buyers did protest at the bottom of the chain and rejected documents as being out of time, and so the buyers then wanted to resile. The sellers were forced to sell oil at a loss elsewhere and they claimed for damages.

ISSUE: Did the buyers waive their right to reject the sellers' tender of documents for failure of sellers to make a timely declaration of the ship?

DECISION: Judgment for the plaintiff.

REASONS: Goff refers to the words of Cairns in *Hughes v Metropolitan Railway Company*, stating that a representator would not be allowed to enforce his rights where it would be inequitable as regards the dealings between the parties. In the case at bar, Société Italo-Belge did represent that they were waiving their right to reject the tender, but in order for Palm and Vegetable Oils to use estoppel, they would have had to rely on that representation in a way which would render it inequitable for Société Italo-Belge to enforce their rights. Referring to *W.J. Alan & Co. v El Nasr Export & Import Co.* and the principle that detrimental reliance is not necessary, he finds nothing on the evidence that there was any change in actions by the sellers which would make enforcement of the buyer's rights inequitable. Noting the very short time (two days) before notice was given, he found it impossible to infer any prejudice by the enforcement. As there was no reliance interest,

the complete elements of promissory estoppel were absent and thus he found for Société Italo-Belge.

SWORD OR SHIELD?

Combe v Combe
[1951] 2 K.B. 215

RATIO: **Estoppel can only be used as a defence and not as a cause of action where one did not exist before.**

FACTS: Mr. and Mrs. were married and Mr. promised he would pay annual maintenance (with an implicit forbearance to sue). Marriage broke down and Mr. refused to pay maintenance. A good time later, Mrs. brought action to have promise enforced. Despite the implicit forbearance to sue, it was found that there was no consideration in exchange for the promise and so no contract. She also argued that promissory estoppel applied as she had acted on the promise to her own detriment. She won some amount at trial notwithstanding she could not claim the entire amount due to *Limitations Act*.

ISSUE: Can estoppel be used as a cause of action?

DECISION: Appeal allowed.

REASON: Denning, writing for the court, clarifies his words concerning estoppel from *High Trees*. He clearly states that it cannot be used as a cause of action, but only as a defence when someone is trying to claim that a promise they made did not have consideration and is therefore not binding; estoppel is a "shield", not a "sword". Therefore, the only issue in this case is whether or not the wife gave consideration for the yearly payments. Denning decides that she did not, as there is no evidence the husband ever requested the wife not to go to court. Even if she had promised not to do so, there would still be no cause of action as one cannot waive a statutory right. In the result, her claim must fail.

Hypothetically, if she could sue on promissory estoppel, the problem is she would still be suing in equity which is designed to protect the disadvantaged.

EXAMPLE: Say A and B are in a contract and A is to deliver a car on Friday. A calls B and says I cannot make delivery on Friday, how about Monday? B says delivery on Monday is fine. That is the estoppel. Then A delivers the car on Monday, B rejects delivery, so now A is going to sue. There is a breach of contract by rejecting delivery. B says that you delivered late, so do not have to accept delivery. A then says you are estopped from asserting late delivery.

Petridis v Shabinsky
(1982), 132 D.L.R. (3d) 430 (Ont. H.C.)

RATIO: **Wavier exists where: (1) a party has the right to rescind or repudiate upon the other party's failure to do something, (2) he may by word or deed waive or suspend that right, and (3) if he does then equity will sometime snot permit him or will control him in the strict enforcement of those suspended or waived rights.**

FACTS: P carried on a restaurant business in premises leased from S for a term due to. During the lease he had spent a lot on renovation. The lease contained an option to renew to be granted upon notice in writing by P on or before December 31, 1980. There was an agreement to postpone negotiations until after that date. S made two offers of a five-year term at an increased rent, one on January 28, 1981, and another on February 24, 1981, the latter offer being repeated on April 15th. Although the parties' main dispute centered on the new rent for the premises, neither invoked an arbitration clause in the original lease. When the impasse continued, S wrote to P revoking all previous offers and demanding vacant possession. S accepted an offer by a third party to lease the premises. P sought a declaration that the lease had been renewed according to its terms or through the application of the doctrines of waiver or promissory estoppel.

ISSUE: Does promissory estoppel apply here?

DECISION: Judgement for the plaintiff, and the lease was renewed.

REASONS: THIS IS NOT A GREAT CASE. Grange held that Petridis could not rely on the doctrine of promissory estoppel because the representation giving rise to the estoppel must be made at a time when a legal relationship exists, and here the option to renew ceased to exist after December 31, 1980. However, there is an argument that the optioner/optionee relationship persisted past the renewal writing date. Could you not say that the representation was the agreement to talk about this after the holidays? The better way around the estoppel is that it is being used as a sword by the tenant in this case.

However, Petridis could succeed on the basis of the doctrine of waiver. This is still not available as a cause of action, but as the landlord had given a notice to evict and then Petridis pursued the action in response to the eviction notice, it is essentially still being used as a defence. Shabinsky had recognized the continuance of the right of the tenant to renew and chose not to insist on the expiry of the option because he wanted to persuade Petridis to stay at an increased rent. As a result, it would be inequitable to permit him to terminate the negotiations without some reasonable notice to Petridis. Shabinsky should have reverted to his strict rights of enforcing it in accordance with an extended time limit, perhaps one of only a few days in the circumstances. Consideration was not necessary because the landlord could always reassert its strict right provided it was not inequitable to do so. The extension of time here was not a variation of the written contract but a waiver of a right under that contract.

Robichaud v Caisse
New Brunswick Court of Appeal

RATIO: **Estoppel CAN be used as a cause of action.**

FACTS: R owes money to a lot of debtors. A judgment is granted against R and it is registered. R is trying to consolidate debt with AVCO in that AVCO will negotiate and lend money so that creditors can be paid. Caisse agrees to remove judgment in return for a $1000 payment by R in full satisfaction. Caisse receives its cheque from AVCO but Caisse refused to approve the compromise agreement. The cheque was not cashed and the judgment was not removed.

ISSUE: Can estoppel be used as a cause of action?

DECISION: Agreement upheld.

REASONS: Rice's concurring judgment dealt with Robichaud's argument for relief on the basis of promissory estoppel. After reviewing the case law and agreeing that estoppel can only be invoked as a defence, he writes that the distinction between estoppel as a ground for defence but not as a ground for action has been widely critiqued. Finding that in the case at bar the Caisse could invoke promissory estoppel against Robichaud (even though they could not because they are already a creditor that did not need to go to court to get a declaration as to seizure), he found it contrary to the equitable principle of estoppel that Robichaud would not be able to utilize it in an action (BUT, Robicaud could have come to court and say that any seizure is wrongful, to which Caisse would say otherwise, and Robichaud could claim promissory estoppel as a defence). Robichaud changed his position to his detriment in reliance on the promise of the Caisse, and thus is entitled to a judgment.

When you argue detrimental reliance, first argue that you do not need it, but in the alternative, that there is no detrimental reliance.

Detrimental Reliance: Debtor has governed their affairs accordingly.

INTENTIONS TO CREATE LEGAL RELATIONS

Balfour v Balfour
[1919] 2 K.B. 571 (Eng. C.A.)

RATIO: **Intentions to create legal relations is a distinct aspect of Contract Law. For arrangements made between husbands and wives (or families in general) there is a presump-**

tion that they are not generally contracts as the parties do not intend to be legally bound by the agreements.

FACTS: Mr. Balfour and his wife went to England for a vacation, and his wife became ill and needed medical attention. They made an agreement that Mrs. Balfour was to remain behind in England when the husband returned to Ceylon (Sri Lanka) and that Mr. Balfour would pay her £30 a month until he returned. This understanding was made while their relationship was fine; however the relationship later soured. The lower court found that there was sufficient consideration in the consent of Mrs. Balfour and thus found the contract binding, which Mr. Balfour appealed.

ISSUE: Was Mr. Balfour's offer intended to be legally binding?

DECISION: Appeal allowed.

REASONS: There was an argument that by accepting the £30 she gave up her pledge credit (i.e. going to a store and saying 'put that on my husband's tab'). Hence, there was consideration.

Atkin held that the law of contracts is not made for personal family relationships. As there was no intent to be legally bound when the agreement was agreed upon, there can be no legally binding contract. Atkin holds that if the courts were to allow all wives to come to court when agreements had been broken with their husbands then the courts would be overrun with frivolous cases.

Warrington, concurring in the result, agreed substantially with Atkin, but added that there was no bargain of any kind made by Mrs. Balfour sufficient for a binding contract.

You can attack this case, at least in the modern context, on an equality argument. This is a value based context. Ask how this law reinforce patterns of exclusion and abilities? You can use Feminism to destabilize the law. Isolating a woman from the sphere of divorce of a legal order legitimizes their minority status. The law is contingent. It tries to be objective, but is applied at a time and place. In 2016, there are a lot more stay-at-home Dad's, so can you use Feminist theory to support these people? One of the main points of Feminism is equality, so this idea should apply.

EXAMPLE: Boy gets invitation to party but does not show up. Mother of birthday boy sends mother of no-show an invoice for not showing up. What could the consideration possibly be? This is not just a problem of lack on intention to create legal relations, but also a lack of consideration.

FORMALITY: PROMISES UNDER SEAL

Royal Bank v Kiska
[1967]2 O.R. 379, 63 D.L.R. (2d) 582 (C.A.)

FACTS: Plaintiff brought action for guarantee signed by defendant. No wafer seal was attached to the guarantee but the world "seal" was printed on the document next to the space in which the defendant wrote his signature. The majority of court found that the guarantee was binding because it was supported by consideration. Laskin J.A. found no consideration, guarantee could not be enforced only if it constituted a sealed instrument

ISSUE: Does a signature and written "Seal" constitute consideration?

DECISION: As per Laskin, JA….No. The written "Seal" is not consideration for an actual seal.

REASONS (Dissent): Laskind JA does not find consideration so he has to go on to deal with the "Seal" issue. The respective words are merely anticipatory of a formality which must be observed and are not a substitute for it. The written "Seal" was an invitation to place a seal. Laskin, JA. affirms the need of formality rather than dispensing with it.

FORMALITY: THE REQUIREMENT OF WRITING

Why do certain kinds of contracts have to be reduced to writing or evidenced by writing? There used be a lot of fraud in a Plaintiff claiming a contract but there not being one.

The purpose of the *Statute of Frauds* in 1677 was to prevent fraudulent litigants from enforcing promises that had never been made. Certain kinds of contracts had to be evidenced in writing to be enforceable such as sale of goods, wares and merchandise for a price of 10 pounds or more.

Modern form like the *Sale of Goods Act*, R.S.A. 2000 says that a contract for the sale of any goods of the value of $50 or upwards is not enforceable by action unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

Statute of Frauds covers five categories of contracts:

1. Contracts to charge an executor or administrator on a special promise to answer damages out of his own estate.
2. Contracts made upon consideration of marriage.
3. Contracts to answer for the debt, default or miscarriage of another person.
4. Contracts not to be performed within a year. Rule in *Adams v Union Cinema*: contract only has to be in writing if its performance of **necessity** must last longer than 1 year. Rule in *Hanau v Ehrlich*: if there is no mention of time and time is uncertain or indefinite, the agreement is not within the statute. Very pro-plaintiff approach. Example: An oral contract for 3 year hockey performance but is cut from the team the next day. This is not enforceable. Example: A lifetime oral contract of employment? Possible it could be performed within a year if the employee dies before the year is up, also no time is specifically mentioned.
5. Contracts for the sale or an interest in land.

"No action shall be brought" has been interpreted as relating to procedure and not validity. Non-compliance with the Statute only renders a contract unenforceable but it does not render it void or invalid.

Guarantees Acknowledgement Act, RSA 2000, c G-11 says under section 3 that no guarantee has any effect unless the person entering into the obligation appears before a lawyer (who does not stand to benefit) and signs the certificate. Further, under s. 4, the certificate must be in the prescribed form.

What counts as some memorandum? The whole idea is the court is trying to come to a good result. It must adduce the existence of the contract and not fail for uncertainty. i.e. you need parties, property and price. Further, the document need not be intended as a memo of the contract (eg. Reference to an oral contract in an email as evidence of a contract). It can be constituted as several different documents. But it must be signed by the defendant (initialing, hand-printed are sufficient). Additionally, it is sufficient if the memo comes into existence before the action is commenced.

In the electronic realm, there is effort to develop rules to confer on electronic transactions the same legal recognition as paper based transactions. However, most common law provinces excludes agreements that create or transfer interest in land. But it has been held that an email with the sender's name typed at the bottom is "signed" for the purpose of the Statute of Frauds.

PART PERFORMANCE

Part performance is a doctrine used to circumvent the strict application of the Statute of Frauds. Equity courts decided to enforce contracts for sale of interest in land notwithstanding the absence of a sufficient note or memorandum. This intervention by equity and the circumstances that must be proved to allow equity to dispense with the writing requirement has become known as the doctrine of "part performance." One rationale is that the written memo is supposed to count as evidence, but we can also use the Plaintiff's part performance as evidence. But what counts as sufficient acts of part performance?

Deglman v Guaranty Trust Co.
[1954] S.C.R. 725, [1954] 3 D.L.R. 785

RATIO: **Two tests as per *Maddison v Alderson:* (1) All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable THE ACTUAL oral agreement as that alleged, (2) The acts relied on "must be unequivocally, and in their own nature, referable to SOME such oral agreement as that alleged."**

FACTS: Nephew lived with aunt for a while. She told nephew that he if was good to her and helped she would leave her house to him when she died. He did things like driving her around the city and doing odd jobs and errands. She didn't leave the house to him in her will. He is making a claim for **restitution**: you provide something to someone else and now you want it back because the contract was not performed.

ISSUE: What is the nature of part performance and will it enable a court to order specific performance of a contract?

DECISION: The respondent is entitled to recover for his services – what the deceased would have had to pay for them on a purely business basis to any other person. This goes to Unjust enrichment.

REASONS: The majority of the SCC applies a narrower test. It does not meet the actual agreement nor does it meet some such agreement. It is clear that none of the numerous acts done by the respondent in performance of the contract were in their own nature unequivocally referable to No. 548 Besserer Street, or to any dealing with that land.

As per *Maddison v Alderson*, "**All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged**." **Little bit of a problem with this, though. For example, the acts of part performance could be consistent with various types of contracts, not just the one being alleged.** A plaintiff who relies upon acts of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds should first prove the acts relied upon; it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts.

The other test reference in *Maddison v Alderson* says that the acts relied on **"must be unequivocally, and in their own nature, referable to THE ACTUAL such agreement as that alleged."**

Justice Rand (minority) says that the nephew should get a contractual quantum meruit in that he should be paid for his work.

Justice Cartwright (majority) says that the nephew will get a restitutionary quantum meruit. He disagrees with Rand in that since the contract is unenforceable, you should stop talking about it. Rand continues to talk about it. For a restitutionary quantum meruit, you have to show unjust enrichment, corresponding deprivation, and the lack of juristic reason. In this case, the estate had the enrichment of the nephew having done the work. There is a deprivation in that the nephew gave up time and money to do this work. Further, there is no reason to say that the estate should be enriched at his expense.

Thompson v Guaranty Trust Co.

[1974] S.C.R. 1023, [1973] 6 W.W.R. 746

RATIO: **Unequivocal performance in accordance with the intent of an oral contract satisfies part performance and takes the actions out of the realm of s. 4 in the Statute of Frauds.**

FACTS: Appellant as plaintiff sued for specific performance of an agreement alleged to have been entered into between him and the deceased whereby the deceased agreed in consideration for remaining to work and operate the farmland until his death, the plaintiff will get the whole estate.

ISSUE: Was there sufficient acts of part performance to take the case out of s. 4 of the Statute of Frauds?

DECISION: Yes.

REASONS: Applies the looser test of *Madison*. The very vague and general character of the services performed in *Deglman* bear little resemblance to the services performed in the present case. Also notable that the nephew had his own life away from the aunt and with his own wife and family in *Deglman*. If fact, the performance almost goes to complete performance instead of part performance. This case is evidence that the looser *Madison* is common law in Canada.

Lensen v Lensen
[1984] 6 W.W.R. 673, 14 D.L.R. (4th) 611

There are two bases for the doctrine of part performance. First, more orthodox approach sometimes called "alternative evidence." Under this approach acts of part performance are viewed as being evidence sufficiently cogent to allow a court of equity to enforce the contract even though it could not be enforced at common law because of non-compliance with the statute. It is necessary for the "acts" of part performance be adduced as a pre-condition to the introduction of parol evidence to prove the contract.

The second theoretical basis of the doctrine emphasizes the acts of part performance not so much for their evidentiary value but as raising equities in the plaintiff's favour which render it unjust not to enforce the contract.

The acts need not unequivocally refer to the contract in question but must prove the existence of some contract and be consistent with the one alleged. However, if the acts relied upon are unequivocally referable in their own nature to some dealing with the land the requisite test is met.

PRIVITY OF CONTRACT

A person who is a complete stranger to the contract has no legal right to enforce the promise of any party to that contract. A second kind of person that is affected is the third party beneficiary, the person identified and intended by the promisor and promise to receive all or part of the benefit of the agreed upon performance. The Canadian provinces (among common law jurisdictions) are essentially alone in their retention of the formal general prohibition on enforcement of a contract by a third party beneficiary.

EXAMPLE: You are in a contract to buy A's house and A breaches the contract. You decide you do not care. Your contract's professor decides to sue on it because she believes breaches of contracts should be addressed. She would be an officious intermeddle.

EXAMPLE: A owns a house, the deal is that B will buy it but it will be conveyed to C. A and B have a contract and C is a 3rd party beneficiary. Historically, there was no problem with C suing. See *Provender* below. However, the law changed dramatically as time passed in England. See *Tweddle* below.

Provender v Wood
(1630), Het. 30, 124 E.R. 318

FACTS: Wood agreed with Provender's father to pay £20 to Provender after Provender and Wood's daughter were married. Wood did not pay and Provender brought action.

ISSUE: Can Provender, who was not party to the agreement but is the beneficiary of the money, bring an action for enforcement?

DECISION: Finding for the plaintiff.

REASONS: The court held that "the party to whom the benefit of a promise accrews may bring his action." Provender was not an officious intermeddle.

Tweddle v Atkinson
(1861), 1 B & S 393, 121 E.R. 762 (Q.B.)

RATIO: **Third parties to a contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it.**

FACTS: John, father of William, agreed with Guy so that Guy would pay William £100 after marrying his daughter. The written agreement contained a clause which specifically granted William the power to sue for enforcement of the agreement. Guy died, and the estate would not pay and William sued.

ISSUE: Does William Tweddle have standing to sue for enforcement of the contract?

DECISION: Judgment for the defendant. The 3rd party cannot successfully sue.

REASONS: Wightman held that there was precedent that a stranger to the consideration of a promise can still have an action if the relationship is close enough (*Bourne v Mason*, 1669). Despite this precedent, he maintains that the current position is that no stranger to the consideration can take action, even if it was for his benefit.

Crompton examines whether there was consideration from the son and holds that natural love and affection (from the marriage) was not sufficient consideration. This is in contrast to *Provender* where the governing ethic was honour; here the governing paradigm is exchange and reciprocity. Crompton further says it would be "a monstrous proposition" if an individual would be able to sue for a contract but not be able to be sued under it. The answer to this is that he undertook no obligations. The real monstrosity is that someone can get away with a contract in situations like this.

Blackburn deals with an agency argument that natural love and affection trickles from the father to the son and this entitles son to sue in his father's place (as if he had provided the consideration). Blackburn holds that the cases say that natural love and affection are not sufficient consideration for an action.

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd.
[1915] UKHL 1

RATIO: **Only parties to a contract can sue for a breach of contract. The only exception to this rule is if a party named in the contract was acting as an agent of another party; in this case, the unnamed party can be sued.**

FACTS: Dunlop, a tire manufacturing company, made a contract with Dew (Contract #1), a trade purchaser, for tires at a discounted price on condition that they would not resell the tires at less than the listed price and that any reseller who wanted to buy them from Dew had to agree not to sell at the lower price either (but they did not have to enforce and could only be sued if an agreement was not reached, not if that agreement was breached). Dew sold the tires to Selfridge at the listed price and made Selfridge agree not to sell at a lower price either and that they would pay £5 in damages if they violated this agreement (Contract #2). Selfridge proceeded to sell the tires below the price he promised to sell them for (Contract #3 with customer which breached Contract #2). Dunlop brought action and was successful at trial but this was overturned by the Court of Appeal.

ISSUE: Is it possible for Dunlop (seller in Contract #1) to sue Selfridge (buyer in Contract #2) even though no contractual relationship exists between them?

DECISION: Appeal dismissed.

REASONS: The Lords agree fundamentally with the decision of the Court of Appeal; there was no contract between Dunlop and Selfridge and therefore Dunlop cannot sue. There are a few fundamental principles of law underpinning this decision: a) the doctrine of privity, which states that only a party to a contract can sue in breach of the contract; b) the doctrine of consideration would require the promisee (Dunlop) to give consideration to Selfridge for the contract to be completed, and this did not occur as Dunlop did not give anything to Selfridge here (Selfridge made a promise to Dunlop to only sell at a certain price but it was gratuitous because Dunlop gave no consideration in return); c) the only way that a principal not named in a contract can be sued is if he acted as an agent on behalf of one of the parties privy to the contract. Dew was not acting as an agent for Dunlop, therefore this does not apply in this case. If Dew were Dunlop's agent, then the effect of the two deals would really be one deal. In an agency agreement, the Agent disappears and the contract is between the principal (Dunlop) and the third party (Selfridges) The principal gives tires and the third party gives money. This did not happen here. The court held that the tires belonged to Dew, not Dunlop. They had already sold them.

WAYS IN WHICH A THIRD PARTY MAY ACQUIRE THE BENEFIT

For some specific matters, legislatures have decided that a third party bar would be inappropriate and unfair. Now, also a common law exception for employees claiming the benefit of a limitation of liability clause and another for waivers of subrogation rights.

Insurance Act allows for a beneficiary to enforce the payment of money made payable to him in the contract.

Another way to obviate privity is if the plaintiff can establish a collateral contract. For example, P sues hairdryer manufacturer pursuant to a collateral contract containing the warranty.

Beswick v Beswick
[1966] 1 Ch. 538, [1966] 3 All E.R. 1 (C.A.)

RATIO: **Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or, if he refuses to join, by adding him as a defendant.**

FACTS: Peter Beswick was a coal merchant. He agreed to sell his business to his nephew, the respondent, if he paid him a certain sum of money for as long as he lived, and then to pay his wife (the appellant) £5 per week for the rest of her life after he died. He died, and the nephew only paid his aunt once before stating that no contract existed between them. She was also the administratrix of her husband's will. Mrs. Beswick was unsuccessful at trial which she appealed.

ISSUE: Is Mrs. Beswick able to sue her nephew either in her own personal capacity, as the executrix of the will, or both?

DECISION: Appeal allowed.

REASONS: Denning held that if the decision in the lower court "truly represents the law of England, it would be deplorable." Denning holds that the rule of privity is simply a procedural rule going to the form of remedy, not to the right. Finding that Mrs. Beswick has a legitimate interest to enforce the contract as it was made for her benefit she has an interest protected by law. He distinguishes *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd.* as Dunlop had no legitimate interest other than maintaining prices to the public disadvantage. Apparently *Dunlop* was an issue of procedure and not substantive??? The common law is not made stronger by pretending it is consistent.

The other Lord Justices agree in the result with Denning, but differ on reasoning. They hold (as Denning did) that Mrs. Beswick had a right to sue as the administratrix of the estate, but not as the beneficiary of the contract.

Beswick v Beswick
[1968] A.C. 58, [1967] 2 All E.R. 1197 (H.L.)

RATIO: **Third parties cannot sue for breach of contract when they were not a party to the contract, even if they were named as a benefactor of the contract. Executors of wills can sue for specific performance of promises made in contracts with the deceased.**

FACTS: As above…

ISSUE: As above…

DECISION: Appeal dismissed.

REASONS: The argument being made is that the money is supposed to go to the widow, but if she is suing in the estate, what is the loss to his estate? It was never supposed to go to the estate. You are only entitled to nominal damages. The rebuttal is that the estate may well have planned for this aspect of her income to be handled by the nephew, so there is some loss much more than nominal. The House of Lords decide that the aunt has no right to sue her nephew in her own capacity as she was not a party to the contract. This overturns Denning's findings in the lower court allowing third parties to sue for benefits that were guaranteed to them under a contract. However, in her capacity as the administratrix she is able to sue him for the **specific performance** of his promise that was made in the contract.

New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd
[1975] A.C. 154, [1974] 1 All E.R. 1015 (P.C.)

FACTS: A drilling machine was to be shipped from Liverpool to Wellington, New Zealand. The bill of lading stipulated the limited liability of the carrier, Federal Steam. It further stated that the clause would extend to servants, agents, and any independent contractors, which is often referred to as a "Himalaya clause". The carrier company was a subsidiary of the company that also owned the stevedore operation that unloaded the drill. Due to negligence the stevedores damaged the drill while unloading it. The stevedores claimed protection of the immunity clause in the contract between the carrier and Satterthwaite.

ISSUE: Does the limited liability clause in the bill of lading apply to the stevedores? To what extent is Federal Steam an agent for NZ Shipping Co.?

DECISION: Appeal allowed with costs to the appellant, liability clause applies.

REASONS: Wilberforce, writing for the majority, lays out a test for agency: (1) if the party is meant to be covered by provisions; (2) if the promissor is clearly acting as agent for the party; and (3) if the promissor has authority to do this; then consideration moves from party through agent to promissee. Applying this to the case it is clear that the subsidiary relationship between the parties answers yes to each of these questions.

Satterthwaite agreed to exempt carrier and agents from liability in the bill of lading and commercial realities must mean that this covers the whole carriage from loading to discharge. This is essentially a "unilateral" contract which becomes bilateral with the specific performance of loading the goods. These acts constituted consideration for an agreement between Satterthwaite and NZ Shipping and therefore NZ Shipping would be subject to the exemption conditions of the bill of lading. Wilberforce makes it clear that this decision is in the interest of ensuring an efficient global market; the owners should have been insured since they knew the true value of the goods.

The question is that how can there be consideration since the stevedores were doing what they were already required to do under the contract with the carrier? When a third party asks to fulfill a pre-existing legal duty, there will be good consideration.

London Drugs Ltd v Kuehne & Nagel International Ltd
[1992] 3 SCR 299, 97 DLR (4th) 261

FACTS: London Drugs delivered a transformer to the respondents for storage until it was to be used. In transfer, two employees of Kuehne & Nagel (Bassart and Vanwinkel) negligently dropped the machine causing $33,000 of damage. There was a clause in the contract stating that the "warehouseman's liability was limited to $40" unless specifically stated otherwise. No further statements had been made. The employees were found liable in trial, but their appeal was allowed at the Court of Appeal and London Drugs appealed to the Supreme Court.

ISSUE: Did the employees owe London Drugs a duty of care? Were the employees covered under the limitation of liability clause?

DECISION: Appeal dismissed. The employees were protected by the contractual provision limiting liability if (as was the case here) the clause was expressly or implicitly for the benefit of the employees and the employees were performing the very services provided for in the contract. The liability of the employees was therefore limited to $40.

REASONS: Iacobucci, writing for the majority, finds that the employees did owe a duty of care, and that they were negligent. Therefore the only issue is whether they are excluded from liability under the limitation clause. The main obstacle to this finding is the doctrine of privity of contract; Iacobucci states that the only reason to reject the employee's claim is a strict adherence to this doctrine. He holds that when the parties signed the contract they knew of the clause, and knew that employees of the company would be handling the material.

He also says that this change to the doctrine of privity is only incremental, and not large enough to require legislative support. In this case he says that to allow the employees to benefit from the limitation coincides with the agreement of the parties when they signed the contract. Further, there are policy reasons to allow the exclusion – particularly that employees do not expect to be found liable when there are clauses that specifically state that they are excluded.

He sets out a two-step test that must be satisfied in order for employees to be excluded from liability: (1) the limitation of liability clause must, either expressly or impliedly, extend its benefit to the employee(s) seeking to rely on it; and (2) the employees 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 other party when the loss occurred.

Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.
(1993), 107 D.L.R. (4th) 169 (S.C.C.)

FACTS: Edgeworth Construction Ltd. was engaged in the business of building roads in British Columbia. In 1977, it bid on a contract to build a section of highway in the Revelstoke ar-

ea. Its bid was successful, and Edgeworth entered into a contract with the province for the work. Edgeworth alleges that it lost money on the project due to errors in the specifications and construction drawings. It commenced proceedings for negligent misrepresentation against the engineering firm which prepared those drawings, N.D. Lea & Associates Ltd. as well as the individual engineers who affixed their seals to the drawings. The Province had separate contracts with ND Lea and Edgeworth. The Court of Appeal ruled that Edgeworth was not entitled to pursue action against the engineers since there was no duty of care. The Court of Appeal said Edgeworth's only recourse was against the Province, however the Province's contract contained a limited liability clause, which exempted the Province from liability. Thus, the Court of Appeal's ruling meant that Edgeworth couldn't claim their losses against anyone. Edgeworth appealed this ruling.

ISSUE: Is the defendent exempt from liability due to the intervention of the Ministry and their liability clause? That is, can N.D. Lea shelter under the liability exemption of the contract between the government and Edgeworth?

DECISION: Appeal allowed.

REASONS: McLachlin, writing for the majority, holds that liability for negligent misrepresentation occurs when a defendant: (1) makes a representation, (2) knows it will be relied upon, and (3) it is relied upon. When Edgeworth performed the construction it was relying on N.D. Lea, not the provincial government. Following the provisions in *London Drugs* the court finds there was no express or implied protection of the respondent in the contract. In fact, it seems like the intention was to protect the government alone. Further, unlike in *London Drugs* the respondent could have drawn up a contract that protected it from liability.

Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.
[1999] 2 SCR 108

FACTS: Fraser River owned a ship that sank while it was under charter by Can-Dive. Can-Dive was negligent in the sinking of the ship. Fraser River recovered from their insurance company, who in turn sued Can-Dive. However, there was a clause in the contract between Fraser River and their insurance company stating that the insurance company could not bring actions against any charterers of Fraser River, however Fraser River made an additional agreement to waive the right to the waiver of subrogation. Can-Dive was found liable at trial but that was overturned by the Court of Appeal and Fraser River sought leave to appeal to the Supreme Court.

ISSUE: Can Can-Drive benefit and/or bring action to enforce the limitation clause in the contract between Fraser River and their insurance company.

DECISION: Appeal dismissed.

REASONS: Definition: **Subrogation** means that insurance companies generally have the right to step into the shoes of the party whom they want to compensate (Fraser River) and sue any party whom the compensated party could have sued (Can-Drive). In this case, the insur-

ance contact with Fraser contained a waiver of subrogation clause but later got the permission of Fraser to sue Can-Dive.

Iacobucci, writing for a unanimous court, clarifies that the test in *London Drugs* does not only apply to employees, but to any third party who meets the requirements. He goes on to say that the evidence in favor of relaxing the doctrine of privity is even more convincing in this case than in *London Drugs* as it explicitly states that charterers will be exempted in the contract. As Can-Dive was expressly mentioned in the contract, and they were doing the activity anticipated in the contract (chartering), they are covered by the limitation clause and therefore the insurance company cannot sue them. Further, the plain reading of the contract shows that this should be the case. Fraser River was acting as the agent of Can-Dive when they excluded them from liability.

When Fraser and their insurer decided to amend their agreement (by waiving the waiver) this was at a point at which Can-Dive's right under the contract had already crystalized into actual benefit. Fraser and the insurer cannot revoke unilaterally Can-Dive's rights once they have developed into an actual benefit.

CONTINGENT AGREEMENTS

A contingent agreement is also called a conditional agreement, and an agreement is conditional if its operation depends on an event which is not certain to occur.

Recall the case of *Dawson v Springer*. The contract was subject to Springer getting a helicopter and taking Dawson in it. The implied subsidiary obligation is to make good faith efforts. If this condition is fulfilled, then the principle obligation of giving 10% of the stake is fulfilled. But if the condition is not fulfilled, there may still be a breach of contract as was the case in this case.

Door 1: Condition precedent to creation (formation) of the contract (obligation). There is no binding agreement because the condition precedent is Illusory – it is based on whim, fancy, or dislike. It has no objective content and therefore cannot be enforce.

Door 2: Condition precedent to duty to perform the primary contractual obligation. THIS IS THE SAME AS A CONDITION SUBSEQUENT. There is a contract and you could imply subsidiary obligations.

Wiebe v Bobsien
[1985] 1 WWR 644, 59 BCLR 183

FACTS: W is the plaintiff purchaser who made an interim agreement with B the defendant vendor for the sale of house subject to plaintiff selling his own residence before a certain date. Defendant purported to cancel the agreement before that date, but plaintiff did not accept cancellation and sold his home before required date. The defendant refused to close.

ISSUE: Was the interim agreement a binding contract, or a failed OPTION TO PURCHASE that the defendant was entitled to cancel.

DECISION: In this case, the contract and the surrounding events indicate the parties intended to reach a consensus when they executed the interim agreement. Completion of the sale was suspended pending disposition of the plaintiff's home.

REASONS: Defendant claimed that there was no consideration since the $1,000 deposit would go back to purchaser if transaction collapsed as was the case here.

Condition precedent can operate either to prevent the creation of a contract, or merely suspend performance of some or all of the obligation until the condition is met. It will depend on the intent of the parties as gathered from the words they have employed, and it will be interpreted according to general rules of construction.

The law seems to lean in favour of the concept that where there is a condition precedent such as a "subject to" clause, a contract is formed on signing by the parties. It is merely in suspense pending the completion of the condition. A general rules is laid down that in a real estate transaction a condition precedent which must be performed by the purchaser will not usually prevent the formation of a contract but will simply suspend the covenant of the vendor to complete until the condition precedent is met by the purchaser.

This decision was affirmed on appeal, but Lambert JA dissented. He wrote that there was a third class of condition precedent where it will not be possible to imply the missing term, and the agreement will fail for uncertainty. What terms should be implied? These days, it may fail for uncertainty.

RECIPROCAL SUBSIDIARY OBLIGATIONS

The conclusion that a contract exists before the primary obligations becomes operative suggests that parties are subject to other obligations in the meantime. These are subsidiary obligations and where a condition precedent is not accompanied by a requirement that either of the parties take steps to procure its fulfilment, their reciprocal subsidiary obligation may be defined as the simple obligation to refrain from withdrawing from the contract.

The courts often inclined to the view that one of the parties has an implied subsidiary obligation to take steps to bring about the state of affairs constituting the fulfillment of the condition.

Dynamic Transport v OK Detailing
[1978] 2 SCR 1072

FACTS: Both parties were aware that subdivision approval was required but the agreement is silent as to whether vendor or purchaser would obtain this approval.

ISSUE: Whether subsidiary obligations relating to the satisfaction of a condition precedent exist in the absence of express contractual provision.

DECISION: The common intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision.

REASONS: The parties created a binding agreement. It is true that the performance of some of the provisions of that agreement was not due unless and until the condition was fulfilled, but that on way negates or dilutes the force of the obligations imposed by those provisions, in particular, the obligation of the vendor to sell and the obligation of the purchaser to buy. These obligations were merely in suspense pending the occurrence of the event constituting the condition precedent.

The existence of a condition precedent does not preclude the possibility of some provisions of a contract being operative before the condition is fulfilled.

The remedy is that the vendor will make bona fide efforts, and if they do not, the purchaser will be entitled to damages.

Consider the idea that if you do not make the application you have conceded that the application had a substantial chance of success…

REMEDIES FOR BREACH OF SUBSIDIARY OBLIGATIONS

Courts that award damages for breach of a subsidiary obligation of the kind addressed in *Dynamic Transport Ltd*. generally recognize that there is no guarantee that the requisite approval or state of affairs would have been achieved if proper efforts were made; what the victim of breach has lost is the *chance* to realize the benefit that would have followed from the fulfilment of the condition. Note that a plaintiff who requests specific performance may end up with neither performance nor damages if approval is not granted.

Even if the court has to make something up, they will generally try to assess damages. It is no argument that it is too hard to assess monetary value. We do not know what the basement of chance is, but there is an Ontario Court of Appeal decision that gave an award based on an assessed 20% chance of success. See below.

Eastwalsh Homes Ltd. v. Anatal Developments Ltd.
(1993), 12 OR (3d) 675

RATIO: If a contract fails due to an external element, the courts will still not award damages for breach if the chances of success were extremely low.

FACTS: Agreement for Real Estate transaction. Best efforts for one party to have subdivision plan registered before closing date of sale. If condition did not occur, agreement terminated. Plan was not registered and sale did not happen.

ISSUE: Did a breach of the agreement occur?

DECISION: Yes, but damages were nominal; failure would have occurred with best efforts.

REASONS: Breach occurred because no effort to obtain approval from municipality. Damages were nominal because even if best efforts were used to obtain approval, parties did not leave enough time to complete the task. Outcome was the same.

UNILATERAL WAIVER

Parties to a contract that includes a condition precedent as one of its terms can agree to vary or waive satisfaction of the condition. However, in many cases one of the parties wishes to waive the condition so the contract can be given effect while the other does not. For example, the home buyer hypothesized at the beginning of this chapter may wish to proceed with purchase of the house, even though he or she is not able to obtain financing by the date specified in the condition precedent. If he or she purports to waive fulfilment of the condition, is the seller obliged to complete the transaction? Common sense would suggest that, since the condition was included to ensure that the purchaser would have funds available to make the purchase and was thus intended for the purchaser's benefit, he or she should be permitted to waive it. Waiver would, of course, put the purchaser in the position of being subject to an unconditional contractual obligation to pay the purchase price on the agreed date, regardless of whether he or she has succeeded in arranging the necessary funds from an external source.

Turney v Zhilka
[1959] SCR 578

RATIO: This decision is wrong, but the ratio is right. A condition can be waived if a term is for the sole benefit of one party, the condition is not a true condition precedent and the condition is severable.

FACTS: Parties entered into a continent agreement for the purchase and sale of land. Condition was: Providing the property can be annexed to the Village…and a plan is approved by the Village Council for subdivision. Purchaser made some efforts to secure fulfillment of the condition but then purported to simply waive fulfillment of the condition. Vendors claim that they are not bound by the agreement because the condition was no fulfilled. Trial judge said that the condition was for sole benefit of purchaser and so the purchaser could waive the condition which the Court of Appeal affirmed.

ISSUE: Did the purchaser have the right to unilaterally waive the condition precedent?

DECISION: The purchaser had no right to waive the annexation condition which was a true condition precedent.

REASONS: The obligations, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party – the Village Council. This is a true condition precedent -- an external condition upon which the existence of the obligation depends. Until the event occurs, there was no right to performance on either side. The parties did not promise that it would occur. The purchaser now seeks to make the ven-

> dor liable on his promise to convey in spite of non-performance of the condition and this to suit his own convenience only. …Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.
>
> **The issue in this case is that there was a finding of fact that the clause was for the benefit of the purchaser alone, so why should he not be entitled to unilaterally waive the condition?**

How have courts gotten around *Turney*. They apply *Dynamic* in that a true condition precedent can have implied subsidiary obligations. *Turney* has been otherwise distinguished, or just outright ignored.

You can get away from *Turney* by drafting your contract around it by including a waiver clause. Have a clause saying that the condition precedent can be waived, therefore it is not a true condition precedent. Another possibility is to frame the condition so that the appropriate party can declare the contract null and void.

The purchaser may at any time, up to and including the __day of __, 199__ , waive the protection of the above clause in whole or in part by giving notice to that effect to the vendor in writing at __ (address).

This agreement may be declared null and void at the option of the purchaser (vendor) if the purchaser (vendor) is unable to obtain by the __ of __ , 19 __ , financing upon the following terms and the deposit shall be returned to the purchaser without deduction

REPRSENTATION AND TERMS

There are statements made without contractual intent, or as mere representations, which are not terms of the contract but can lead to the limited legal consequences, or a statement may be construed as a term of the contract, leading to more serious legal liabilities in the event that it is broken. "Mere puffs" or general sales talk does not represent misrepresentation. Statements of opinion of belief are also not considered as misrepresentation. Though lying about your opinion can be negligent and therefore actionable in tort.

Misrepresentation must be (1) unambiguous, (2) material (it must be one which would affect the judgment of a reasonable person in deciding whether or on what terms to enter into the contract without making such inquiries as he would otherwise make), or (3) relied on by the representee.

Misrepresentation and Rescission

Rescission is the remedy for misrepresentation. It is an expression which is used in a variety of ways, at least three of which can be clearly identified: (a) setting aside of a contract because of some defect affecting its formation, such as misrepresentation, duress, or undue influence, (b) discharge of an existing contract by subsequent agreement of the parties, or (c) incorrect used to refer to when an innocent party is discharged from having to carry out his or her obligations because of the other party's serious breach.

Misrepresentation and Tort

Either fraudulent misrepresentation or negligent misstatement. In the latter, **if you can show a special relationship between the speaker and the speakee**, there is a duty on the speaker to be careful in what they say. A representation is otherwise fraudulent if either the misrepresentor knew that the statement was false or made the statement recklessly and without care, whether it was true or false.

Redgrave v Hurd
(1881), 20 Ch. D. 1 (C.A.)

RATIO: **A representation is fraudulent if either the misrepresentor knew that the statement was false or made the statement recklessly and without care, whether it was true or false. You can show tort in this case so you may be able to get damages as well as rescession.**

FACTS: Redgrave advertised to sell his business premises and a share in his business, representing that it brought in between £300 and £400 a year when it truly grossed less than £200 a year. The defendant purchased the property and a partnership in the law practice on the premises on the basis of this representation. However, when he discovered that the law practice was "utterly worthless" he refused to complete his payments. The plaintiff sued for specific performance. Redgrave was successful at trial (on basis of no reliance) and Hurd appealed.

ISSUE: Can a defendant rescind a contract because of a misrepresentation?

DECISION: Appeal allowed, contract rescinded.

REASONS: The plaintiff argues that the defendant cannot rescind the contract because he simply should have used due diligence and sought more information before purchasing the premises. However, the judge rejects this and says that the only limitation on suing for a misrepresentation is the limitation period, which starts when the fraud reasonably should have been discovered.

Jessel states that if it is shown that a representation was made in an attempt to induce a party to enter into a contract, and the contract was in fact formed, then there is a presumption that the representation was relied upon. This can only be refuted by proving that the party hearing the representation had definite knowledge to the contrary, or by explicit evidence that they did not rely on the representation. Where you have neither evidence that he knew the facts showing that the statement was untrue, or that he did anything to show that he did not rely upon the statement, the inference remains that he relied upon the statement as being a material statement (condition) in the contract. Therefore, its being untrue is sufficient ground for the rescission of the contract. This comes from the courts of equity; common law takes a different approach.

In this case the judge finds the misrepresentation to have been innocent. Therefore, the contract can be rescinded but damages are not awarded (Hurd's pleadings were not complete).

REASONABLE OPPORTUNITY TO DISCOVER THE TRUTH

Representee does not have any obligation of due diligence as per Redgrave. It is not a response to the plaintiff that saying if you used due diligence you could find out the misrepresentation is false. If the plaintiff is duped by a liar, the fraudster cannot use as a defence that if you had not been so stupid, you could find out I was lying. The courts will not accept this argument. Reasonable opportunity to discover the truth will never work. Note that in England, a claim under innocent misrepresentation, it has been suggested that a reasonable opportunity to discover the truth may determine the outcome of the case.

What about damages in tort? An ingredient in establishing a special relationship, the plaintiff must show that it was reasonable to rely on the words of the speaker. Tort law might say you cannot establish a special relationship because your reliance was unreasonable.

In summary, the reasonableness of your reliance is irrelevant for rescission, but it is relevant for recovery of damages in tort.

Smith v Land and House Property Corp
(1884), 28 Ch. D. 7 (C.A.)

RATIO: A statement of opinion, from a knowledgeable party to one who is not, is a representation. If false, it is actionable. Innocent misrepresentation allows rescission.

FACTS: Land and House contracted with Smith to buy the title of the Marine Hotel at Walton-on-the-Naze. Smith had advertised that it was let to Fleck, "a most desirable tenant". Land and House agreed to buy the hotel however Fleck, who had been overdue with rent, went bankrupt just before transfer of title. Land and House refused to complete the transaction, defending Smith's specific performance suit on the basis that the description of Fleck's virtues was grounds for misrepresentation.

ISSUE: Was the statement a mere opinion or a representation of fact?

DECISION: Appeal dismissed.

REASONS: Bowen held that when facts are equally known to both sides, then statements are generally opinions, however when facts are not equally known, then a statement of opinion by one who knows the facts best is often a statement of material fact as they are implying that his opinion has justification. In this case, with Fleck being behind in his rent, the statement of him being a "desirable tenant" was not a true statement and thus Land and House were entitled to not complete the transaction due to misrepresentation.

The misrepresentation was unambiguous through the words used, and it is also material because whether or not Fleck is a good tenant is determinative on whether or not a person would want to purchase the property.

Bank of BC v Wren Developments Ltd.
(1973), 38 D.L.R. (3d) 759

RATIO: **Failures or omissions can qualify as a misrepresentation especially if there is an active concealment of the truth. Negligent misrepresentation permits rescission.**

FACTS: Smith and Allan were directors of Wren. They wanted a loan, so they put up shares in another company that Wren owned as collateral with the Bank. Smith had the bank cash in shares without Allan knowing, who thought that the shares were still in place. Allan went to the bank to ask about them and they said they would "get back to you later on the details". The bank claimed the balance owing in place of the collateral from Allan.

ISSUE: Was there a misrepresentation of the facts?

DECISION: Judgment for the defendant.

REASONS: Munroe held that Allan had laboured under the mistaken belief that collateral security pledged by the company was still at the bank. He had not been informed of any sale or exchange, his signature was required for banking transactions, and neither he nor the company had ever authorized Smith to act as agent. He had been materially misled by the words, acts and conduct of the Bank. Satisfied that Allan would not have signed the second loan guarantee if he had known all the facts, Munroe found he was induced by misrepresentation (failure to disclose facts) to sign the second agreement. In the circumstances, he is not liable for repayment of the second agreement.

Universal Concerts Canada v Ryckman Amateur Sports Society
[1997] AJ No 1228

RATIO: There is a requirement to disclose if only a half-truth has been provided, there is an active concealment of the truth, or there are changing circumstances.

FACTS: Universal is the plaintiff in an action for breach of a lease contract. They are a concert promoter, in this case for shock rocker Marilyn Manson. The defendant is the lessor of a Calgary area. There was argument that the Marilyn Manson act was controversial, so that there was a misrepresentation by omission, and defendant's sought a rescission of contracts.

ISSUE: Was there a duty to disclose the controversy surrounding the act?

DECISION: Court grants summary judgment as there are no genuine triable issues between the parties.

REASONS: The response is that that the defendant previously allowed hard rock acts to be booked into the Max Bell without comment. Further, there was a brief oral description of the act, and there was no criteria put in place as to the types of Rock acts that could play in the Max Bell. Secondly, the Plaintiff gave the Defendant a warning and offered to provide the Defendant with further information about Marilyn Manson by the Defendant declined the Plaintiff's invitation.

INDEMNIFICATION

Indemnification can be raised in rescission. You must be required to do something (perhaps rent money or a duty to repair) as stated in the contract to be able to seek indemnification.

In tort, the question is had the plaintiff known the truth, would they have entered into the contract? If no, but for the tort, could have been engaged in profitable endeavors at another location. In tort, it is an opportunity cost issue.

Kupchak v Dayson Holdings Ltd
(1965), 53 WWR 65, 53 DLR (2d) 482 (BCCA)

RATIO: Situations where the misrepresentee is not entitled to claim rescission: (1) when third party rights intervene. (2) When there is election or affirmation. (3) When there is laches or delay. (4) When rescission would cause radical injustice to misrepresentor. (5) When there is innocent misrepresentation and the contract has been executed.

Monetary compensation may be granted under recission where it is impossible or inequitable to restore the original property.

Note that allegations of fraud are serious and potentially very damaging to those accused of deception. Where a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent, costs on a solicitor-and-client scale are appropriate.

FACTS: The Kupchaks bought the shares of a motel company from Dayson Holdings giving in exchange two properties on Haro Street and North Vancouver and a mortgage for $64,500 for the motel. In July 1960, the lawyer for the Kupchaks stopped making payments on the mortgage as they had discovered that past earnings of the hotel were false. On September 16 their solicitor wrote to Dayson referring to "proposed action against your client". Dayson subsequently (on October 19) sold half of their interest in the Haro Street Property to Marks Estates Ltd. and **the existing building was torn down and an apartment complex erected**. Dayson issued an unsuccessful writ for foreclosure against the Kupchaks in 1961. On November 21, 1961 the Kupchaks commenced their action against Dayson for rescission; in the meantime they had continued to live in and operate the motel. At trial the judge found there was fraud but denied recission and awarded only damages and the Kupchaks appealed.

ISSUE: Can the plaintiffs claim a rescission and if so, what can they get?

DECISION: Appeal allowed, contract rescinded and compensation ordered.

REASONS: Davey, writing for the majority, analyses the case law to see if the plaintiff's are entitled to recission in the circumstances. Looking at the British case of *Spence v Crawford*, Lord Wright held that dealings in property obtained by fraud cannot be used to bar restitution - there must be flexible remedies to attempt to restore parties to their original positions. Courts have the jurisdiction to do what is practically just, however, if the case involves fraud, the gloves are off, and the Court will really assist the plaintiff. Davey holds that a remedy of rescission (accompanied by restitution) is equitable and its application is discretionary while noting that when applied it must be moulded to the exigencies of the case. He further notes that in cases of innocent misrepresentation courts will not be as interventionist as the parties are not at fault, however in fraudulent misrepresentation the courts will exercise their jurisdiction to order recission to the fullest unless that order would be impractical or unjust**. In the case at bar, to return the property at Haro Street would be unjust due to the fundamentally altered nature.**

Even though equity is not supposed to give damages, it can order compensation to make good some deficiency in perfect restitution, and so orders rescission and compensation of the value of property as it was at the time the contract was signed, plus a 5% per annum interest.

In considering the defence of affirmation (that the plaintiffs affirmed the contract by retaining the shares of the motel and remaining as directors of the company), Davey finds that they had no other option - to return the shares would have required the defendant's signature and the defendant would have had to nominate new directors, neither of which there is any indication Dayson would have agreed to. **Mitigation is not affirmation.** On laches, the facts show that the defendant was aware of an action as early as September of 1960 and there was no prejudice against them as a result of the action not being commenced until November 1961.

Sheppard, in the dissent, finds that the definitively positive action of the Kupchaks continuing to administer the motel is sufficient evidence for the defence of affirmation.

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

FACTS: An agent of Buckleton purchased shares from an agent of Heilbut, Symons & Co. on two occasions based on what the respondent's claim was a representation that the company was a "rubber company". The company turned out to be sour and Buckleton lost money on the transaction and brought an action for breach of warranty.

ISSUE: Did the actions of the appellant constitute a representation?

DECISION: Appeal allowed.

REASONS: Moulton, writing for the majority, says that strictly speaking the contracts in this case were not contracts of sale, as the defendant was only an agent of the rubber company and he was to undertake the necessary action to procure the shares for the plaintiff.

The court holds that in order to establish a cause of action in damages for misrepresentation the statement must have been fraudulent, or it must have been made recklessly. He clearly states that it is a principle of law that a person is not liable for damages resulting from an innocent misrepresentation. This case was an innocent misrepresentation; therefore the appeal must be allowed as no damages can stem from an innocent misrepresentation. As per Denning, there must be intention for it to be a term of the contract.

Dick Bentley Productions Ltd. v Harold Smith (Motors) Ltd.
[1965] 1 WLR 623, [1965] 2 all ER 65 (CA)

RATIO: A representation made in the course of dealings for a contract for the very purpose of inducing another party to enter into the contract is presumed *prima facie* to be a warranty of that contract and therefore, a breach of it will lead to a cause of action for damages – even if it is innocently made. It is an objective test that is used to determine if a representation was a warranty – if it was intended to be acted upon, and was acted upon, then it is a warranty. **If a representation is made in the course of dealings for a contract for the very purpose of inducing him to act on it by entering into the contract, it is prima facie grounds for inferring that the representation was intended as a [term/promise/warranty].**

FACTS: Bentley purchased a car from Smith, relying on the representation that it had only traveled 20,000 miles after it had been repaired. Subsequent to the purchase it became clear that the engine had been driven much farther and repairs were required. Bentley brought an action for breach of warranty and was successful at trial, being awarded damages of £400, which Smith appealed.

ISSUE: Was the statement about the car's milage an innocent representation or a "warranty" (subsidiary or less important term of contract, or a more general term of the contract)?

DECISION: Appeal dismissed.

REASONS: Denning, writing for a unanimous court, states that there is a *prima facie* assumption that a representation made in the course of dealings for a contract for the very purpose of inducing a party into the contract is a warranty. It was intended to be acted upon, and it was in fact acted upon. The appellant was a car salesman and therefore that he should have taken the diligence to discover how far it had traveled or at least he should not have made a false representation if he did not know the exact distance. Denning agrees with the trial judge that the representation was not fraudulent; however, it was stated as a fact and was a warranty in the contract for the sale of the car. Therefore, breaching it gives rise to a cause of action for damages.

Leaf v International Galleries
[1950] 2 KB 86, [1950] 1 All ER 693 (CA)

RATIO: **Execution is never a bar in the context of fraud, but otherwise you cannot claim rescission if the contract was already executed. This is especially true in the case of land transactions, though McCamus suggests alternatives. In this case, Denning suggests some flexibility in the case of personal property and that there may be rescission for misrepresentation even if the contract has been executed.**

FACTS: In March 1944, Leaf paid £85 for a painting from International Galleries which was described in the contract as "One original oil painting Salisbury Cathedral by J. Constable". Hence it was a term of the contract. **The contract was completely executed (was not still in play).** Approximately five years later Leaf took the painting to Christie's to put it up for auction and was informed that it was not a Constable. He returned the painting to International Galleries and requested his money back. The gallery insisted that it was a Constable and refused to give him back his money. Leaf brought an action for rescission claiming there was innocent misrepresentation and that he paid money on reliance.

ISSUE: Is a buyer allowed to rescind a contract in equity **even though it is executed**?

DECISION: Appeal dismissed.

REASONS: Denning, writing for a unanimous court, held that counsel for the appellant had claimed the wrong remedy - there should have been a claim for damages under the *Sale of Goods Act, 1893*. There was a mistake as to quality of the painting (not being a Constable) and thus two avenues for breach: condition and warranty. However, under the *Sale of Goods Act, 1893* a person is deemed to have accepted goods "when after a lapse of a reasonable time, he retains the goods without intimating . . . he has rejected them" and a reasonable time has definitely passed in this case. If a claim for breach of condition fails (as it does) then it is necessary by implication that a claim for rescission should fail.

Evershed questions whether the court should hold to the doctrine in *Seddon v North Eastern 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.

STATUTORY REFORM

In *Report on Consumer Warranties and Guarantees in the Sale of Goods*, we recommended that all statements by business sellers including consumer sales should be treated as warranties.

The Ontario *Business Practices Act* gives a right of rescission in respect of misrepresentations inducing contracts for the sale of goods and certain services supplied to consumers. The courts are also empowered to make a money award in lieu of rescission, for which the primary measure envisaged rests on restitutionary principles.

The defects in the present law may be summarized as follows. A misrepresentation that is neither fraudulent nor negligent and that odes not constitute a term of a contract is actionable neither in tort nor in contract. While a plaintiff who has been induced to enter into a transaction by a defendant's false statement may seek rescission of the transaction, in some cases the right of rescission may be too narrow and in others too broad. We recommend that a representee should be able to rescind a contract that has been induced by misrepresentation even though the contract has been wholly or partly performed. We recommend that where a party to a contract would otherwise have a prima facie right to rescission, the court should have the power to deny rescission or to declare it ineffective, awarding damages in lieu thereof.

Sale of Goods Act
RSA 2000, c S-2

When the buyer has accepted the goods or part of them the breach of any condition to be fulfilled by the seller shall only be treated as a breach of warranty and not as a ground for rejecting the goods unless there is a term of the contract expressed or implied to that effect.

The buyer shall be deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he was rejected them.

Fair Trading Act
RSA 2000, CD – 2

EXAMPLES OF UNFAIR PRACTICES
• Subjecting a consumer to undue pressure or influence to buy. Example: A salesperson spends four hours in a consumer's home trying to sell a vacuum cleaner.

• Taking advantage of a consumer's inability to understand a consumer transaction. Example: A seller convinces a consumer who can't speak or read English to sign a multi-page contract.

• Charging a price that grossly exceeds the price of similar goods that are readily available without informing the consumer of the difference and the reason for the difference. Example: A contractor doesn't tell a homeowner that the repairs to his roof that cost $7,500 could have been be done by a competitor for $2,500.

• Charging a price for goods or services that is more than 10 per cent – to a maximum of $100 – higher than the estimate given for those goods or services unless the consumer has specifically agreed to the increase. Example: A repair shop says it will cost $150 to fix an item, but the final bill is $400.

• Representing that goods or services are of a particular standard, quality, grade, style or model if that representation is untrue. Example: A furniture dealer says a coffee table is solid wood when it is really particleboard. • Representing that goods have or have not been used to an extent that is different from the fact. Example: The seller tells a consumer that a car has 100,000 kilometers on it and the true mileage is 200,000 kilometers.

• Representing that goods are new when they are used, deteriorated, altered or reconditioned. Example: A computer is sold as new, but the seller has reconditioned it.

• Making an untrue statement about a good's prior history or use. Example: The seller tells the consumer that a car was only driven by the owner of a dealership when it was a lease-back from a rental company.

• Representing that goods or services are available in accordance with a prior representation when they are not. Example: The seller says the goods were seized from Canada Customs when they were actually purchased as regular inventory.

• Representing that a voucher from one supplier can be used for goods or services at regular or discount price if the first supplier knows (or ought to know) that the second supplier will not honour the voucher. Example: A company sells a coupon book knowing that some of the businesses will not honour the coupons.

• Representing that goods are available in a particular quantity if they are not. Example: A store advertises it has 35 stereos for sale when in fact it has one stereo in stock.

• Representing that goods or services will be supplied within a stated time if the supplier knows (or ought to know) the goods will not be available. Example: A hot tub company promises a tub will be installed on Christmas Eve when it knows the installation staff will not be available.

• Representing that a specific price benefit exists if it does not. Example: A business advertises that an item is on sale or the price is '20 per cent off' if the item has never been sold at the regular price.

• Representing that a part, replacement, repair or adjustment is needed or desirable if it is not. Example: A shop replaces a dryer motor when only the belt needed replacing.

• Representing that the supplier is asking for information, conducting a survey or making a solicitation when that is not true. Example: A door-to-door salesperson asks a consumer to fill out a home-environment survey when he or she actually wants to do a product demonstration.

• Giving an estimated price for goods or services if they cannot be provided for that price. Example: A renovation company tells a homeowner that it can replace the garage door for $500 when it knows the price for parts alone is $700.

• Representing the price of goods or services in a manner that a consumer might reasonably believe the price refers to a larger package of goods or services. Example: A company advertises it will build a complete fence for a home for $2,000 when the fence project is for the rear of the house only. Adding two more sides would cost $1,500 more.

• Representing that a consumer will obtain a benefit for finding other customers if it is unlikely that the consumer will obtain such a benefit. Example: A multi-level marketer agrees to give you a reduced price on your next order when you refer a friend to the company, but it never gives you a reduction

• Representing a product's performance capability or length of life without proper testing to substantiate the claim.

CONCURRENT LIABILITY IN CONTRACT AND TORT

A concurrent or alternative liability will not be admitted if it were to allow the plaintiff to circumvent a contractual term. You should plead both in your statement of claim though.

Sodd Corp v N. Tessis
(1977), 17 OR (2d) 158, 25 CBR (NS) 16

FACTS: Tessis, a chartered accountant, advertised sale by tender of the stock of a furniture business which had gone bankrupt. Sodd submitted a tender after examining the stock and was told by Tessis that the retail value was double the wholesale cost, which they relied upon in submitting the tender. The contract contained a clause that there was no warranty or condition as to the quality or condition of the stock. The stock turned out to be significantly overvalued and Sodd sued. Tessis claimed no relationship that gives rise to duty of care existed and the exemption clause exempted him regardless. He also claimed no legitimate reliance interest as he did not hold himself out as having special knowledge. Sodd was successful at trial which Tessis appealed.

ISSUE: Is the respondent entitled to damages?

DECISION: Appeal dismissed with costs.

REASONS: Lacourcière, writing for a unanimous court, held that Tessis was liable both in contract and in tort. He held that the relationship of Tessis to Sodd as an accountant was sufficient to create a special relationship: he had a professional responsibility and therefore a duty of care. The valuation was thus a negligent misrepresentation intended to be acted upon and creates liability in contract and in tort. Further, he held that the representation as to the value of the goods was a warranty.

Regarding the exemption clause, Lacourcière says that the exemption clause does not include negligent misrepresentation. Because it is not included specifically, the clause will be interpreted *contra proferentem* against the person who drafted the agreement. This is because the exclusion clause was not in the collateral contract, just the main contract.

What about the plaintiff's responsibility to find out the truth? The Court said that there was no opportunity or it was very limited to discover the truth, so no argument to upset reliance.

BG Checo International Ltd v British Columbia Hydro & Power Authority
[1993] 1 SCR 12

FACTS: BG Checo successfully bid to erect transmission towers on BC Hydro's property. The contract said that BC Hydro would clear their land before the towers were erected, but they did not. As a result, BG Checo's work was more difficult and expensive. They sued in breach of contract and negligent misrepresentation. The contract included an "on your

own" clause. The lower courts allowed BG Checo to claim in both contract and tort, which BC Hydro appealed.

ISSUE: If there is a breach of contract, can you also sue in tort for the negligent misrepresentation that led to the breach?

DECISION: Appeal dismissed.

REASONS: La Forest and McLachlin, writing for the majority, decide that they can sue in both causes of action, and that there are different remedies for both actions because the law should allow wronged plaintiffs to recover in any way possible. In the contract action, the goal is to put the plaintiff in the position that they would have been in if the contract was performed. In the negligence action the damages could amount to any loss that reasonably stemmed from the negligence, as the goal is to put the plaintiff in the place they would have been in if the representation never happened.

For breach of contract, if the contract had been performed, they would not have to have done the additional work. But, if they had not spending time doing the additional work, they would have participated in something else making money elsewhere, so there were opportunity costs. This is what the Court missed.

They state that a tort action is only disallowed if it is explicitly set out that this is the case in the contract. In this case, the contract did not limit the BC Hydro's duty. Therefore, they have the ability to sue in both, but this case needs to be sent back to trial to determine the damages in tort.

They also state that the damages for breach of contract are to put the party in the position it would have been in had the contract been completed.

The Court considered three situations where a party can sue in tort and contract.

1. **INCREASE IN STANDARD OF CARE** "where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they could not recover in tort for the higher contractual duty." Though the right to sue in tort still exists, it is generally not practical.

2. **CONTRACT LOWERS THE DUTY** "where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances." This does not necessarily extinguish the right to sue in tort unless it is explicit in the contract.

3. "where the duty in contract and the common law duty in tort are co-extensive." In such cases, "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 Court found that the current situation fell into the third category and so BG Checo was able to sue in both tort and contract.

CLASSIFICATION OF TERMS

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd
[1962] 2 QB 26, [1962] 1 All ER 474 (CA)

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 not being able to obtain all or a substantial proportion of the benefits that they intended to receive by entering into the contract) - if they do, then repudiation is in order, else only damages can be awarded.**

FACTS: Hong Kong Fir agreed to rent their ship to Kawasaki for 24 months and stated on the date of delivery that the ship was fitted for use in ordinary cargo service. However, due to the fact that the engine room staff was inefficient and the engines were very old, the ship was held up for 5 weeks, and then needed 15 more weeks worth of repairs after the deal had been made. Kawasaki "repudiated" the contract, and Hong Kong Fir sued for wrongful repudiation. Hong Kong Fir was successful at trial and Kawasaki appealed.

Note that the term repudation is used to refer to a severe breach of contract; or, alternatively, to the election if the party not at fault to treat the contract asdischarged by the breach.

ISSUE: What is the test for determining if a breach of a contract leads to a right of repudiation? Is there a breach of term such that the charterers can repudiate the contract or are they liable for wrongful repudiation?

DECISION: Appeal dismissed.

REASONS: Diplock, writing for a unanimous court, states that the test does not always depend on whether the thing that was breached was a warranty or a condition, as sometimes the circumstances are more complex than this. He states that the correct test is to look at the events which have occurred as a result of the breach at the time when the contract was purported to be repudiated and to decide if these events deprived the party attempting to repudiate of the benefits that it expected to receive from the contract. He decides that 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.

Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.
[1974] A.C. 235, [1973] 2 All ER 39 (H.L.)

FACTS: L. Schuler were a manufacturing company and they granted Wickman the sole right to sell their products in the UK. In the terms of the agreement, Wickman were to visit six of Schuler's major British clients each week for the duration of the contract (4 years), which they failed to do. It said in the contract that this was a "condition" of the agreement. Schuler repu-

diated the contract. The initial arbitrator found for Wickman, which was reversed at trial but then restored in the Court of Appeal.

ISSUE: Does calling something a "condition" in the contract mean that its breach leads to a right of rescission?

DECISION: Appeal dismissed.

REASONS: Lord Reid, writing for the majority, states that simply calling something a "condition" does not make its breach necessarily result in a right of rescission. In this case, it is clear that it would be almost practically impossible for Wickman to successfully complete all of the visits – what if someone was sick, etc. There was also another clause in the contract that said Schuler would inform the distributor of material breaches and demand a remedy, which did not occur here.

Why not just interpret the word condition as it is used in the contract on a technical argument? It is a pretty harsh conclusion.

The Court of Appeal of Alberta says that there are three steps: (1) apply the traditional warranty/condition test as articulated in *Bentsen*: There is no way of deciding that question except by looking at the contract in light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition by the failure to perform which the other party is relieved of his liability to perform. (2) include consideration of the commercial setting when assessing surrounding circumstances. (3) if intent thus far not determined, then the basis for seeking out that intent should be, as put forward by Hong Kong Fir, an assessment of the gravity of the event to which the breach gave rise.

Note that as a contracting party, you have the right to be unreasonable in the sense that even when the breach of a term has produced a minor event, it can be treated as a breach of condition. While you have to look through the eyes of a reasonable person, it may not be classified as a condition, but if you convey the importance of some term, it may be considered a condition when assessing all of the circumstances. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

FRUSTRATION

First City Trust Co. v. Triple Five Corp.
Alberta Court of Appeal, 1989

The doctrine of frustration arises when something dramatic and unforeseen occurs and as a matter neither party had assumed the risk of occurring which arose without fault of either party, and that it makes performance functionally impossible or illegal.

Consider a performer rents a musical hall which then burns down due to no one's fault. It makes performance functionally impossible since the performance cannot be held. Plaintiff then wants to sue for thrown away costs for all advertising, but the defendant can argue frustration as a defence.

The key to both the understanding and the application of the doctrine of frustration in modern times is the idea of a radical change in the contractual obligation, arising from unforeseen circumstances in respect of

which no prior agreement has been reached, those circumstances having come about without default by either party.

PAROLE EVIDENCE RULE

Prohibits outside evidence of classification of a contract, when that contract is to be considered the sole source. The traditional version holds that where a written agreement appears on its face to be a complete agreement, parole evidence [outside communication] cannot be admitted that contradicts, varies, adds or subtracts from the terms of the written agreement. One must determine that the written agreement appears to be incomplete before one can turn to consider evidence of prior communications.

The modern version places emphasis on the need to demonstrate that the parties actually intended to reduce the agreement into writing as a precondition to the application of the rule. In determining whether the parties actually did intend to reduce their agreement into written form, all evidence of their prior communications relevant to this issue is admissible.

STANDARD FORM CONTRACTS AND EXCLUSION CLAUSES

IMPLIED TERMS

Machtinger v Hoj Industries
[1992] 1 SCR 986

FACTS: Both appellants began working for HOJ Industries, a car dealer, in 1978, and were discharged in 1985 without cause. At the time they were dismissed Machtinger was credit manager and rust-proofing sales manager and Lefebvre was sales manager. Each had entered into a contract for employment for an indefinite period which contained a clause allowing the respondent to terminate his employment without cause, in Machtinger's case without notice and in Lefebvre's case on two weeks' notice. Under the provincial *Employment Standards Act* the appellants were entitled to a minimum notice period of four weeks. After they were dismissed, the respondent paid each of them the equivalent of four weeks' salary. The appellants brought action for wrongful dismissal and the trial judge found that they were entitled to reasonable notice of termination, and that the period of reasonable notice for Machtinger was 7 months and for Lefebvre, 7½ months, however this was overturned by the Court of Appeal.

ISSUE: When should the Court imply a term in a contract?

DECISION: Appeal allowed, lower court judgment restored.

REASONS: McLachlin, writing a concurring judgment, examined the legal principles governing the implication of terms. She identifies three types of implied terms: (1) **terms implied by fact** (intention required, overlooked but obviously assumed), (2) **terms implied by law** (no intention required, includes good faith), and (3) **terms implied by custom and usage** and identifies #2 as the type the courts will read into a contract. Implication of law can

be from custom, for business efficiency (what is necessary in a contract), or what is reasonable.

She finds that the Court of Appeal erred in characterizing a term implied in law as a term implied in fact, which brought in the intentionality of the parties. Holding that the employer had a legal obligation to provide reasonable notice and that this can only be displaced by an express contrary agreement, the court imposed a reasonable term of notification on HOJ; HOJ industries.

Gateway Realty Ltd. v. Arton Holdings Ltd.
(1992) 106 NSR (2d) SC

FACTS: Gateway owns shopping mall of which Zellers is a tenant. Lease permitted Zellers to occupy premises and to even remain absent, or they could assign it to a third party without the landlord's consent. Zellers is approached by Arton, a competitor of Gateway, and asks to come to our mall, but Zellers says that Arton must take an assignment.

Arton undertook best efforts to fill the space in agreement, but Gateway would go to Arton and suggest tenants, and Arton continually said no. What is going on here is, that it is better to let the space go dark and then eliminate your competition. The rent from a subtenant was not as much as sinking the competition all together.

Gateway brought action claiming breach of good faith term.

DECISION: Court said that there is an implied term of good faith. Court suggests that all terms include a term of good faith, but this is not true at all. Some of the language used by the Court, however, suggest that the good faith term was implied in fact. The source is a clarification of tenancy obligations, or that it is an amendment.

"Parties must exercise their contractual rights honestly, fairly, and in good faith. Bad faith is a conduct that is contrary to community standards of honesty, reasonableness or fairness."

Bhasin v Hrynew
2014 SCC 71

FACTS: An enrollment director's agreement that took effect in 1998 governed the relationship between C and B. The term of the contract was three years. The applicable provision provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary. H was another enrollment director and was a competitor of B. H wanted to capture B's lucrative niche market and previously approached B to propose a merger of their agencies on numerous occasions. He also actively encouraged C to force the merger. B had refused to participate in such a merger. C appointed H as the provincial trading officer ("PTO"). The role required H to conduct audits of C's enrollment directors. B objected to having H, a competitor, review his confidential business records. In June 2000, C outlined its plans to the Commission and they included B working for H's agency. None of this was known

by B. C repeatedly misled B by telling him that H, as PTO, was under an obligation to treat the information confidentially. It also responded equivocally (not exactly a lie, but not exactly clear) when B asked in August 2000 whether the merger was a "done deal". When B continued to refuse to allow H to audit his records, C threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Entire Agreement Clause (which prevents terms being implied). At the expiry of the contract term, B lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by H's agency.

ISSUE: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly (i.e. in good faith)? And, if so, did either of the respondents breach that duty?

DECISION:

REASONS: The trial judge said that C misled and was dishonest with B on a number of fronts. There was an implied term of good faith. The SCC said that there is no term of good faith in the contract between C and B because it falls outside of existing situations and relationships where good faith is implied. As well, the term cannot be implied as that would be contrary to the entire agreement clause.

However, C is in breach of the new duty in contractual performance. This new common law duty applies to all contracts and means that parties must not lie or otherwise knowingly mislead each other about matters directly linked to performance of the contract.

Had C been honest, B would have sought to sell or otherwise monetize his agency before C triggered decision not to renew.

Duty of honesty is a hybrid. While not like a term, and operates irrespective of parties' intention. Like a term, its violation is considered a breach of contract sounding in damages, the remedy for which is not limited to rescissionary measures one generally associates with violation of a contractual doctrine such as unconscionability.

Three situations where good faith in contractual performance has been triggered: (1) where the parties must cooperate in order to achieve the objects of the contract, (2) where one party exercises a discretionary power under the contract, (3) where one party seeks to evade contractual duties.

Good faith is a principle. An emanation of it is the term of good faith. Recall in Gateway that there was an implied term of good faith. This term required them to act in good faith and agreeing to take on a reasonable subtenant.

In the *Waters* case, the plaintiff was young an unsophisticated and described as easily led, and the defendant is the shrewd businessman. The young man ended up vastly overpaying for a stable. The Court said that the plaintiff was overmatched and overreached. The contract was set aside under the doctrine of unconscionability. Usually leads to rescission.

INCORPORATION

Thorton v Shoe Lane Parking Ltd.
[1971] 2 QB 163

RATIO: **The implied term must verge on the obvious. For example, it is perhaps obvious that the parkade should take care of the cars. But is the liability exclusion clause part of this contract? Denning says if ticked is delivered by an attendant, this is an offer which is to be accepted and the customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or if the company did what was reasonably sufficient to give him notice of it. Alternatively, if the ticket is delivered by an automatic machine, acceptance is when money is put into the machine, and notice about exclusion must be nearby, not far away for it would be too late and must be noticeable at time the contract is formed. Further, he is not bound by the terms printed on the ticket if they differ from the notice.**

For unsigned document, incorporation of clause by notice and must analyse whether proper notice was given.

FACTS: Thornton parked his car in the Shoe Lane parking lot while he was at a musical performance. He received a ticket from an automatic machine. On the ticket was printed the time of issue, and a statement that the ticket is issued subject to the conditions posted in the parking lot. These conditions were posted in the office where you had to pay upon departure, and on the wall opposite the ticket machine, however the poster was not very prominent. The conditions included exempting Shoe Lane from any liability for injury caused to the customer while their car was in the parking building. Thornton was seriously injured when placing goods in his trunk before leaving by another car. At trial the judge found that Thornton was 50% responsible for the act, but awarded him 50% damages from Shoe Lane, which they appealed.

ISSUE: Is the exempting condition, posted in the garage, part of the contract? Does the fact that the ticket was dispensed automatically matter?

DECISION: Appeal dismissed.

REASONS: Lord Denning states that this case differs from the preceding cases because the ticket is issued automatically and not from a clerk. Therefore, there is no chance to look at the conditions, reject them, and get your money back. Effectively the offer is made by Shoe Lane in having the machine posted with the prices, and this offer is accepted when the driver places money in the machine. This contract cannot be subject to conditions that are presented after this time. The writing on the ticket stating that it was subject to the conditions was not visible until after the contract had been formed, therefore the contract is not truly subject to the conditions. The ticket is simply a receipt showing that the contract had been formed. Further, Shoe Lane did not do what was reasonably sufficient to give noti ce of the conditions to Thornton – a driver would have to wander around the parking lot to discover them, which is more than can be asked of a sensible patron.

Megaw agrees, but focuses exclusively on the fact that the defendant did not give reasonable notice rather than the formation of the contract prior to the conditions being delivered. Willmer states that in cases involving an automatic ticket machine there is something distinctly irrevocable about the offer made by the company owning the parking lot.

Tilden Rent-A-Car Co. v Clendenning
18 OR (2d) 601

RATIO: **When you sign a document, the starting position is that you read the document. Only reasonable expectations will be protected. The party offering the clause must draw it to the attention of the other side if there are onerous terms that the offering party knows the other side is unaware of.**

FACTS: Clendenning rented a car from Tilden Rent-A-Car. He signed the rental agreement which contained an exclusion clause denying coverage for accidents that occur if the driver had consumed any alcohol, although he testified that he had inquired what the $2/day fee covered and was told "full non-deductible coverage". While in Vancouver, Clendenning hit a pole after having consumed alcohol. He pleaded guilty to impaired driving and tried to collect from the insurance policy to pay for the damages of his accident. He was successful at trial which Tilden appealed.

ISSUE: Is the exemption clause valid?

DECISION: Appeal dismissed with costs.

REASONS: Dubin, writing for the majority, held that the exclusion clause conflicts with the total coverage clause. Further the clause is onerous as it is overbroad - a driver would not be covered if they had a single glass of wine or if they were driving 1km/h over the speed limit. Tilden argues that under *L'Estrange* as Clendenning signed the contract he was bound. This is rejected as the clerk was aware he had not read the contract and the purpose of signing is to manifest consent (*consensus ad idem*). Dubin highlights the distinction between the consumer and commercial spheres: a signature in the commercial sphere creates the presumption of an agreement whereas the reality in the consumer sphere is not that of consensus; generally the signing of a contract is hurried and informal. Sufficiency of notice and proportionality trump the notion that the signature is binding.

Lacourcière, in the dissent, held that the contract was not difficult to read (the terms clearly printed on the reverse) and was brought to the customer's attention clearly, fulfilling sufficiency of notice. While agreeing that the clause is strict, he held that it was economically efficient as insurance companies set their rates based on risk and as other rental companies have a similar approach it was not an unusual clause. Citing *New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.*, he finds that the court should give effect to the intent of a commercial document. With this he concludes the contract was binding.

Karroll v Silver Star Mountain Resorts Ltd.
(1988), 33 BCLR (2d) 160

RATIO: **No general requirement that a party tendering a document for signature to draw reasonable attention to a particular clause to the signee. Only when a reasonable person would have known that the other party was not consenting will the clause not be considered part of the contract. Relevant factors to consider in determining whether there was a duty to take reasonable steps to advise of an exclusion or waiver include: (1) the effect of the clause in relation to the nature of the contract, (2) the length and format of the contract, and (3) the time available for reading and understanding it.**

Other factors that vitiate the clause being part of the contract is if there is fraud, misrepresentation going to the nature of the clause (does not have to be fraudulent), non est factum (narrow defence that says the document I signed was radically different from what I thought I was signing)

FACTS: Karroll had sustained a broken leg when she collided with another skier while participating in a downhill recreational skiing competition sponsored by the resort. The resort had retained Vernon Ski Club to provide starters, timers, recorders and gate keepers for the race, and had paid club an honorarium for their services. Vernon had been told by the resort it and its members were covered by the resort's liability insurance and by waivers releasing them from liability. Karroll had participated in the event for four years prior to the race in which she was injured, and had always been required to sign a release. Prior to participating in the race, she had signed a one-page document headed "Release and Indemnity-Please Read Carefully". The heading was in capital letters. In signing the release, Karroll agreed to assume risks inherent in participating in the race and release the resort and its agents from all claims resulting from personal injury arising out of participation in the race. She did not recall whether she read the heading at the top of the form, and asserted she did not read the body of the document. She acknowledged she could have read the document in one or two minutes, but was unable to recall if she was in fact given an opportunity to take the time to read it. Karroll contended she was not bound by the release, arguing she was not given adequate notice of its contents or sufficient opportunity to read and understand it. Alternatively, she submitted that the document afforded a defence only to the resort, not to the ski club and its members.

ISSUE: Is the indemnity agreement binding, and if so, on whom?

DECISION: Action dismissed.

REASONS: McLachlin held that it was not a general principle of contract law that a party proferring for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. The burden was on Karroll to show fraud or misrepresentation, or that Silver Star knew or had reason to know she was mistaken as to terms of the document. Relevant factors to consider in determining whether there was a duty to take reasonable steps to advise of an exclusion or waiver include:

1. the effect of the clause in relation to the nature of the contract;

2. the length and format of the contract; and

3. the time available for reading and understanding it.

Karroll signed the release knowing it was a legal document affecting her rights. The release was short, easy to read and headed in capital letters. In the circumstances, a reasonable person in would not conclude that Karroll was not agreeing to terms of the release. In any event, Silver Star took reasonable steps to discharge any obligation to bring the contents of the release to Karroll's attention.

As to whom the release covered, the terms of the release were broad enough to encompass Karroll's claims against Vernon Ski Club and its members, even though the club was not a party to the release - the release clearly stated that waiver of liability extended to agents and indicated that resort was contracting on behalf of its agents.

UNANIMOUS DECISION ON HOW TO APPROACH EXLSUCION CLAUSES

1. **Is there a breach of the contract?**
2. **If yes, is the exclusion clause at issue part of the contract? (*Karroll, Tilden*)**
3. **If yes, does the exclusion clause apply to the circumstances as a matter of interpretation?**
4. **If yes, is the exclusion cause unconscionable at the time the contract was made? Might arise out of situations of unequal bargaining power, or might arise out of policy considerations arising from relevant legislation like the *Transportation Act*.**
5. **Assuming validity, is there any overriding public policy that would justify the court's refusal to enforce it? Is the conduct so extreme and abhorrent that you cannot rely on the clause?**

FUNDAMENTAL BREACH

Karsales (Harrow) Ltd v Wallis
[1956] EWCA Civ 4

RATIO: A disclaimer of warranties, no matter how widely expressed is *"only available to a party where he is carrying out his contract in its essential respect ……. They do not avail him when he is guilty of a branch which goes to the root of the contract."*

FACTS: Mr. Wallis viewed a used Buick car that was being sold by Stinton for £600. Wallis found the car to be in excellent condition, and agreed that he would buy the car if Stinton would arrange financing through a hire-purchasecompany. Karsales (Harrow) Ltd. bought the car and sold it to Mutual Finance Ltd., which then finally lent the car to Wallis on hire-purchase terms. Wallis had not seen the vehicle since his first viewing. About a week later, the car was left outside, late at night. The following morning, Wallis inspected the car and found it to be in a substantially different state than it was when he first saw the vehicle: the bumper was being held on by a rope, the new tires were taken off and old ones put on, the radio had been removed, the chrome strips around the body

were removed, and the car would not run. Wallis refused to pay for the car since it was not in the same condition as when he agreed to make the purchase.

REASONS: Denning LJ established a new precedent by declaring this a fundamental breach: that is, a breach that goes to the root of the contract, where the breach is so severe that there cannot be a contract after this breach.

Tercon Contractors Ltd. v British Columbia (Transportation and Highways)
2010 SCC 4

FACTS: BC put out a call (a request for expressions of interest - RFEI). Six teams responded (including Tercon and Brentwood). A request for proposals (RFP) followed, stating that only the participants to the RFEI could submit bids. Tercon responded; Brentwood responded but had partnered with EAC for part of the work who was not a qualified bidder. BC accepted the bid from Brentwood/EAC. Tercon sued BC for damages on the basis that by accepting an ineligible bid BC was in breach of contract, causing Tercon to lose the project. Exclusion clause said that "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim." TJ said that the clause does not apply because was not intended to apply to someone who is not even eligible. The CA just said that the clause is a complete answer, so no claim.

ISSUE: Can Tercon succeed in an action based on breach of Contract "A" or is the no claims clause a complete answer? (Tercon is seeking compensation equiv. to the profit it expected to earn had it been awarded Contract "B").

DECISION: Appeal allowed. Government cannot rely on exclusion of liability clause.

REASONS (Majority): My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon's damage claim which arises from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealings with a party who was not entitled to participate in that process.

In the alternative, if the clause on the face applies, he would construe it against the maker. If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants".

REASONS (Dissent): The exclusion clause does apply, so we must press on with the unconscionability test. In this case, we do not have unconscionability at the time the contract was made since the two parties are both powerful companies and equally matched. Tercon is a big tough

company. But, can also assess based on relevant legislation. In this case, the policy of the *Transportation Act*¸ Ministry must be accountable, and integrity of tendering process must be respected.

Assuming validity, is there any overriding public policy that would cause Court to refuse enforceability. Have to look at time of performance. The Ministry's misconduct is not as abhorrent as in the case of *Plas-Tex Canada* (where Dow sold resin they knew was defective and included an exclusion clause that was a complete answer). So, Tercon loses because exclusion clause applies. At the end of the decision he says that it would be unfair to allow Tercon to win, because the tax payers would have to pay twice the amount. Must pay Brentwood as well as Tercon.