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# Contract Interpretation

- The general goal of contract interpretation is to determine the true intentions of the parties at the time the contract was formed. (*Consolidated-Bathurst*)
- It is assumed that parties intend the legal consequences of their words. (*Eli Lilly*)
- The courts analyze contracts objectively (*BCCI*) and external evidence is not used when there is no ambiguity (*KPMG*).

## Misrepresentation and Tort

- Often contracts are made based on statements made during negotiations, not only based upon the written document. These statements may be puff, misrepresentation, warranty or condition.
    - Puff is promotional statements only with no legal value
    - Misrepresentations may be innocent, negligent or fraudulent
    - Warranties are representations, which become a term of the contract
    - Conditions are terms, which go to the very heart of a contract.

### Innocent Misrepresentation and Warranty

- When distinguishing between innocent misrepresentations and warranties the doctrinal test is did the parties intend the statement to be a binding promise? Factors to consider include:
    - Timing: earlier statements less likely to be warranties
    - Importance: did statements induce the contract
    - Forseeablitiy of reliance: did the speaker intend the statements to induce the contract
    - Relative knowledge and skill of parties.
    - Opinion vs fact: opinions should not bind
    - Context and formality
    - Disclaimers
    - Price: warranties and conditions cost money
- *Redgrave v. Hurd* established that rescission is available for innocent misrepresentation when the transaction has not been completed.
    - Reliance damages were not granted.
    - A lawyer agreed to move and join a practice based on statements about how much the business is worth, which turned out to be untrue.
- *Redican v. Nesbitt* confirms that rescission is not an option for a real estate transaction once it has been completed.
    - Cottage was not viewed before purchase and not what had been represented.
- *Heilbut, Symons v. Buckleton* confirms that there should be no damages for innocent misrepresentations, in the context of a sale of shares in a rubber company which turned out to have a deficit of rubber trees
    - Here it was found that neither party intended statements to be warranties.
- *Bentley Productions v. Smith* sets out a test for determining if a statement is a warranty:
    - The test is objective, based on conduct not thoughts of parties
    - If the purpose of the statements was to induce the other party to act then they are prima facie a warranty
    - Can be rebutted if the defendant can prove they were only innocent misrepresentations
    - In this case the seller of a used car stated it had only done 20 000 miles since maintenance which was not true, but encouraged the sale and could have easily been check by the seller.
    - Law and economics: should be the party in the best position to make inquiries who is responsible for them.
- *Leaf v. International Galleries* states that if more time has passed than would allow rescission for breach of condition than it is also to long for innocent misrepresentation

    - Here five years was clearly too long.
    - Mistake about whether a famous painter painted a painting.
- In *Ennis v. Klassen*, a contract for sale of BMW is rescinded when a misrepresentation about the model is discovered three days later.
    - In sale of goods context, it is generally accepted that rescission can be granted within a couple days, which is different than in a real estate context.
- *Murray v. Sperry Rand* found that statements that a harvester would meet a farmer's needs were warranties resulting in the manufacturer being liable.
    - Statement by the agent induced the sale and there were untrue statements in promotional materials resulting in the manufacturer liable.

## Fraudulent and Negligent Misrepresentations

- Fraudulent and negligent misrepresentation are tort not contractual claims.
- Tort damages can include: rescission and reliance damages.
- *BG Checo* established that when there is a prima facie action in tort and contract a party may sue in either or both.
    - Recovery in tort will still be subject to the terms of the contract
    - Modification is only for wrongs which fall within the scope of the contract
- Tort may not be used to avoid an exclusion clause (*Central Trust*)
- Fraud is very hard to prove having the higher standard of "clear and convincing evidence" than usual used in civil cases.
    - Also must be careful in making these claims as defamation damages and costs may be awarded against you if you cannot prove it.
- *Hedley Byrne* establishes the availability of negligent misrepresentation when there is no contractual relationship.
    - Duty of care because one party has special skill and knowledge.
    - Plaintiff relied upon information about creditworthiness of a loanee. The bank had a duty to give accurate information.
    - Here no liability due to an exclusion clause but the availability is opened up.
- In *Esso Petroleum* the statements made did not amount to a contract term but damages were awarded under negligent misrepresentation because of the reasonable reliance of the plaintiff. Here both reliance and "opportunity costs" were granted which is effectively contractual expectation damages.
    - Found liable in contract due to breach of warranty. Reasonable reliance on estimates made by a skilled person.
    - Liability in negligent misrepresentation because they should have taken reasonable care to ensure information used to induce a contract was accurate.
    - Here the choice to sue in tort or contract is less important. Damages same either way.

## Conditions

- Definition: a term so key that the person wouldn't have entered the contract if it was untrue.
- Give rise to expectation damages.
- *Sale of Goods Act*
    - Implied conditions that the good must correspond to the description and that goods will be durable for a reasonable amount of time.
    - Once goods have been accepted conditions become warranties and only damages are available.
    - Acceptance defined in the Act.

## Innominate Terms

- Terms that are strictly neither a warranty nor a condition. An ex post facto analysis is done to determine which it was.

# Parole Evidence and Standard Form Contracts

## Parole Evidence

- The general rule: with exceptions, extrinsic evidence is not admissible to add or subtract from a written agreement when the parties have apparently set out all the terms in writing. (*Gallin*)
    - Now the exceptions have effectively swallowed the rule.
    - Rationale: it is easier to examine a written document only allowing for less costly court time.
    - Enhance certainty of agreements.
    - The common law has historically been distrustful of oral evidence.
    - The rule is still important when dealing with sophisticated parties and to rule out use of evidence of parties subjective intents.
- Analytical approach to parole evidence questions (*Gallin*):
    - Determine if the representation is a warranty
    - Harmonize the warranty with the signed document if possible
    - If there is a contradiction there is a presumption that the written document governs.
- Reinforces the common law signature rule.
- In *Harwish* there was conflict between a signed loan guarantee and representation of the bank manager regarding release from that obligation.
    - The court concludes that a collateral agreement cannot be established when it contradicts the written one strongly reinforcing the parole evidence rule.
    - Collateral agreements can only add terms to the written contract.
    - Here found in favour of the defendant bank, partially based on distrust of the evidence given.
- Subsequently *Gallin* has reformed the strict rule from *Harwish* into a mere presumption. The BCCA and ONCA have both adopted *Gallin* making it the presumptive approach to parole evidence.
    - In the case of oral warranties the evidence is assumed to be admissible and the court should look for an interpretation, which allows both to be read together.
    - The written document only trumps if there is an express contradiction between it and the oral warranty.
    - Here the court stretched finding the exclusion clause only pertains to seeds and yield not to weeds. With the oral warranty that the seeds would grow very well, the farmer is allowed to recover.
- There are legislative provisions in *Business Practices and Consumer Protection Act* for consumer transactions allowing parole evidence to be admitted.
    - Note this is not the same as automatically overruling exclusion or other clauses.
- Standard form contracts now often contain entire agreement clauses to expressly remove the use of oral warranties.
    - In *Zippy Print* it is stated that a general exclusion clause will not overrule a specific representation intended to induce the party to contract. Express acknowledgement of such a provision is required.

## Standard Form Contracts and Reasonable Notice

- Current approach to exclusion clauses (from *Tercon,* see fundamental breach):
    - Does it apply?
    - If it does is there unconscionability?
    - Even if there is not unconscionability is there overriding public policy?
- Signature Rule: Parties signing a written document are bound by its terms whether or not they are aware of them (*L'Estrange*).
- Standard form contracts can also be unsigned, such as tickets
    - Here the common law doctrine of reasonable notice is applied, where by the issuer of the ticket must provide reasonable notice that there are additional terms, not of the specific terms.

    - Now people are generally aware of additional terms. Would be very hard to argue no reasonable notice.
- In *Thorton v. Shoe Lane Parking* a sign stating that "all cars are parked at owners risk" was not sufficient to exclude liability for personal injury
    - Special attention must be brought to particularly onerous exclusion clauses.
    - Court also uses past consideration as the ticket was "thrust" at him after he had already paid.
- In *Tilden v. Clendenning* the courts did not uphold an exclusion clause, which went against the purpose of additional insurance, which was purchased for a rental car and the statements made by an agent.
    - Party seeking to rely on onerous terms must show reasonable effort to bring them to attention to the other party, especial terms, which are inconsistent with the overall purpose of the contract.
    - The case had not been widely applied with courts tending to uphold exclusion clauses.
- In *Delaney v. Cascade* the court upheld an exclusion clause signed after he had paid for river rafting, because he was aware he would have to sign one and knew of the nature of the form and of the excursion.
    - Underlying issue of the court doubting the trial judges finding of causation, but that is a fact finding, which is difficult to overrule.
- *Karroll v. Silver Star* is a BC case, which limits *Tilden* to circumstances where one party knew the other had been misled.
    - Here the contract in question was only one page and easy to read making it safe to assume the party knew it would be bound by it.

## Fundamental Breach

- THIS DOCTERINE IS NO LONGER USED IN CANADIAN LAW
- The rule: an exclusion clause cannot be relied upon for damages resulting from a fundamental breach, one that goes to the very root of the contract.
- Developed in *Karsales*: a car salesperson cannot rely on an exclusion clause for a contract for sale of a car when the car in question was completely undrivable.
    - Applied as a rule of law notwithstanding the intention of the parties.
    - The wording of the exclusion clause is irrelevant since it does not apply at all.
- In *Photo Production* it is stated that fundamental breach is only a rule of construction.
    - Here a security company employee intentionally started a fire.
    - The company is found to not be liable due to an exclusion clause. The court looks at risk allocation as this was very cheap security and Photo Production could have got insurance of their own to cover this loss.
    - The fundamental breach was only able to bring the contractual relations to an end
- In *Hunter Engineering* the Supreme Court of Canada states that if fundamental breach exsists in Canada it is only a rule of construction
    - Here they find the breach didn't go to the heart of the contract. Only affected the gears, which were only 10% of initial contract. Exclusion clause upheld.
    - State that unconscionability is better for exclusion clauses
- In *Tercon* the Supreme Court of Canada explicitly end fundamental breach. Instead they create a new approach to exclusion clauses:
    - Does the exclusion clause apply as a matter of interpretation?
    - Is the clause unconscionable?
    - If not, is there an override policy reason to not apply it?
    - Here the exclusion clause did not apply as a matter of interpretation. The province chose an ineligible bid in a RFP and their conduct was described as egregious. Here the damage was not from Tercon participating in the RFP but from the participation of ineligible parties.

# Power of the Court in Contract Enforcement

## Unconscionability, Undue Influence and Duress

- All three doctrines look at unfairness of bargain and protecting weaker parties.
- There is overlap but each one focuses on something different:
    - Undue influence looks at the improper exercise of influence by someone is a relationship of trust and confidence.
    - Unconsionability looks at the morality of a bargain in terms of the inequality between parties and of the bargain.
    - Duress is coercion, which vitiates consent with the focus on the force one party uses against another.

### Unconsionability

- There are two lines of unconsionability cases in British Columbia with the more traditional approach in *Morrison* followed most often.
    - *Morrison* uses the two part test of inequality of bargaining power + substantial unfairness.
    - *Harry v. Kreutzinger* uses a one step approach of is the contract substantially divergent from commercial community standard as to be void.
- Trebilcock has criticized the use of unconsionability as interfering with parties' ability to voluntarily enter contracts in a free market society.
    - Finds it especially problematic to focus on inequality of the bargain, as courts should not question the adequacy of consideration.
- *Marshall v. Canada Permanent Trust* applies the two-step test finding that the motives of the parties are irrelevant to whether the transaction is unconscionable in the context of a real estate transaction.
    - Rescission but not costs are granted, as the "stronger" party was unaware of the "weaker" party's incapacity from a stroke.
- *Mundinger v. Mundinger* applies unconsionability to family law and divorce proceedings.
    - A very unequal separation agreement, which the husband had the wife sign while in the hospital following an overdose is overturned.
    - The court assigns full solicitor costs against the husband to show disapproval.
- *St. Pierre v. St. Pierre* is another family case where the grandmother sell house to grandson for far less than market value.
    - Contract is rescinded.
    - Focus on lack of independent legal advice, however in BC this is a contextual factor only.
- *Lidder v. Munro* is an ICBC case involving a Punjabi immigrant with limited knowledge of English who is pushed to sign a release.
    - Not non est factum as he knew what he was signing or undue influence as the was not use of power to overcome his will.
    - Clear inequality of knowledge and power of the parties and the bargain was unequal.
    - ICBC also gave misrepresentations to discourage him from seeking legal advice encouraging Lidder to sign an unfair contract.
    - ICBC held to a very high standard as a monopoly public insurer.
- *Business Practices and Consumer Protection Act* sets out factors to consider relating to unconscionability.
    - Reverse burden put on the supplier to show no unconscionability.

### Undue Influence – Bank Loan Cases

- Undue Influence is an equitable doctrine fond in contracts and wills and estates. It results in a contract being voidable. Courts may also grant rescission.
- Definition: The use of power by one person over another to induce them to enter a transaction (*Earl of Aylesford v. Morris*).

    - Example: A caregiver threatens to leave a dependent elderly person unless said elderly person gives them a gift (*Re Craig*).
- There are two categories of undue influence:
    - Actual undue influence: claimant must prost the wrongdoer exerted undue influence
    - Presumed undue influence: a special relationship of trust and confidence exists
        - *De jure*: categories of relationships which raise the presumption of undue influence: fiduciary relationship, trustee/beneficiary, solicitor/client, doctor/patient, priest/worshipper
        - *De facto*: a relationship of trust and confidence.
        - Once one of these relationships is established the burden is on the party seeking to uphold the agreement to show no undue influence.
- Spousal relationships may be de facto relationships for undue influence if (*BMO v. Duguid*):
    - There is trust and confidence placed with one partner with regards to finances.
    - Or sexual and emotional ties are used as a "ready weapon" by one partner over the other.
- *Royal Bank of Scotland v. Etridge* sets out criteria for when banks have constructive notice of undue influence and steps that should be taken:
    - Facts: spousal guarantee for a loan claimed to be invalid due to undue influence
    - Transactions will be set aside when: one spouse is acting as an agent for the bank (rare), or when then bank has actual or constructive notice of undue influence.
    - Banks are under constructive notice when:
        - The transaction had no clear financial benefit to one party and,
        - There is a relationship between parties which raises suspicion of undue influence
        - Court suggests banks should be on notice for all no commercial guarantees.
    - In order to be able to uphold guarantees banks must:
        - Meet with the spouse privately
        - Explain the extent of the liability
        - Warn of the risk
        - Urge the person to obtain independent legal advice
    - Banks are free of liability when there is independent legal advice but that does not guarantee there was no undue influence
- *Lloyd's Bank v. Bundy*: found by majority on undue influence even though Denning used unconsionability
    - Father guarantees mortgage for son and bank employee pushes him to guarantee more than he in fact has.

## Duress

- Historically focuses on voluntariness of the consent to the contract: must be a coercion of will, which vitiates consent going beyond commercial pressure (*Pao On*).
    - A common law doctrine, which previously resulted in contracts being void.
    - Now contracts are voidable and the victim may choose whether or not to enforce them (fusion of law and equity).
- Categories of duress:
    - Duress to person: threats to person or family
    - Duress to goods: threat to damage or take property, or to not release it (ie pawnbrokers)
    - Economic duress: New category. Must go beyond economic pressure and looks at the state of mind of the pressured party.
- Examples of findings of economic duress:
    - *Port Caledonia*: There was a contract for rescue assistance from tug to prevent collision. The tug signaled for lots of money or no help.
    - *D & C Builders*: Overdue bill with creditors facing bankruptcy. Forced to accepted less or none at all.

- *Stott v. Merit:* Agreement to pay client debt on an account was found to be economic duress but it was found that subsequent conduct affirmed the agreement.

- The modern test for economic duress comes from *Universe Tankships*
  - 1. Pressure amounting to compulsion of will of the victim. Factors for this are:
    - If the coerced party protested
    - Availability of other course of action
    - Independent legal advice
    - If the coerced party took steps to avoid the contract
  - 2. Illegitimacy or illegality of the pressure and the nature of the demand
  - 3. If it is found that the victim later implicitly approved that contract once there was no longer force it will be upheld
- *Nav Canada* finds that legitimacy of the pressure is difficult to work with and instead look only to the effect on the victim in GTM setting.
  - With GTM setting breach of contract is not illegal so that criteria doesn't work
  - Creates a special GTM test for economic duress:
    - Was there pressure?
    - Was there no practical alternative?
    - Did the coerced party consent? Was there consideration, protest, or reasonable steps to disaffirm the promise?
  - Good faith and independent legal advice are not defences here.
- There is no SCC decision in this area but the BC Law Reform has suggested rejecting *Nav Canada* and sees no need for a GTM specific duress test.

## Penalties and Forfeiture

- Section 24 of the *Law and Equity Act* gives the courts broad discretionary powers to intervene in the case of penalties and forfeitures.
- Contracts may have terms, which lay out what will happen in the case of a breach. When this is this case they may only stipulate liquidated damages, not penalties.
  - Liquidated damages: a fair pre-estimate of what the damages from breach would be
  - Penalty: a sum, which is excessive and unconscionable compared to the actual loss.
- An clause requiring payment of gross trading profits for selling a competitors goods was found to be excessive and punitive (*HF Clarke v. Thermidaire*)
  - Actual loss was $92 000; gross trading profits were $239 000
  - Even though the clause was called a liquidated damages clause, this does not automatically make it one.
- Forfeiture clauses are also invalid if they are penal in nature *(Stockloser v. Johnson*)
  - At law forfeiture clauses are binding. However equity can step in if:
    - The some forfeited is disproportionate to the damage.
    - It is unconscionable for the seller to retain the money.
  - When there is no forfeiture clause the buyer cannon recover money already paid so long as the seller keeps the contract open.
  - In this case the forfeiture clause, which allowed the seller to reclaim machinery and keep payments in the case of default, was not unconscionable.
- Some argues that the power to strike down penalty clauses is a blatant interference with freedom of contract and that they should be upheld.

## Illegality

- There are three types of illegality, which result in contracts being unenforceable:
  - Contrary to public policy
    - Contracts injurious to the state

        - Contracts injurious to the administration of justice
        - Contracts involving immorality
        - Contracts affecting marriage
        - Contracts in restraint of trade
        - Contracts to benefit a crime
    - Common law illegality
        - Contracts that require contravention of legal obligations imposed by the common law.
    - Statutory illegality
        - Expressly or impliedly prohibited by statute
        - Entered with the object of committing an act prohibited by statute
        - Requires performance contrary to a statute
        - Confers benefits for violating a statute.
- The courts will not aid a cause of action founded upon illegal or immoral grounds (*Holman v. Johnson*)
    - Here the contract was enforced. The plaintiff sold the defendant tea knowing it would be smuggled into England.
    - Court recognizes the plaintiff committed no crime
- Surrogacy contracts have been found to be contrary to public policy (*Baby M*)
    - Also in violation of the *Assisted Human Reproduction Act*.
    - Here a contract included payments on the condition that the surrogate gives up the child at birth, which the surrogate tried to refuse to do.
    - The contract was found to be unenforceable, but the child was given to the biological parents as it was found to be in the child's best interest.
    - Policy: want to avoid the potential to degrade women and some things cannot be purchased.
- In *Shafron v. KRG* the court strikes down a non-compete covenant from an employment contract
    - Finds ambiguity in the geographical limits of "Metropolitan city of Vancouver" making it prima facie unreasonable
    - Falls into category of restraint of trade
    - Non-competes may be enforced if they are reasonable: limited temporally, geographically, and scope of activity
- The courts have become more flexible with approaches to illegality in recent cases.
- *New Solutions v. Transport North American* shows the courts reading down an interest rate, which was so high as to violate section 347 of the *Criminal Code*
    - S. 347 violations are not treated the same as other forms of illegality. The contract and clause are both valid, the interest rate is just lowered to the highest amount which is legal.
    - Do not use the blue pencil test here: cross out illegal provision and if the contract can stand then it does in this form, otherwise the whole agreement is void.
- In *Still v. Minister of National Revenue* the court allows a woman who accidentally worked illegally to receive EI, which she had been paying into.
    - She was acting in good faith, not an illegal immigrant and there was no overriding policy.
    - Question to ask: What is the statutory purpose and would enforcing the contract in these specific circumstance really be contrary to public policy?

## Consumer Protection

Business Practices and Consumer Protection Act CP 253
Rushak v. Henneken CP 257
Telus Mobility Arbitration Clause CP 274

# Mistake and Frustration

## Mistake

- Be careful to distinguish from frustration, which involves mistakes about future events.
- Categories of mistakes:
    - Common: both parties make the same mistake
    - Mutual: Misunderstanding where parties are at cross-purposes
    - Unilateral: One party is mistaken about an important fact, and the other party knows or out to know of the mistake.
- Mistakes made about the terms of a contract are formation mistakes.
    - General Rule: if there is a true ambiguity regarding an important/fundamental term of the agreement; and there is no reason to prefer one party's understanding over the other, the agreement may be void for mistake.
    - Result is no contract
    - Policy: assignment of risk
- *Reffles v. Wichelhaus* shows the typical approach to mistake about terms where the contract is void as there was no meeting of the minds. Effectively they each entered a different contract.
    - There is a contract for cotton to be shipped on "Peerless." Turns out there are two ships with the name Peerless and each believed it was a different one.
    - Later analysis of this shows that it's unlikely to be used. When the first ship arrived the buyer did not complain that he received no cotton. No longer require "meeting of the minds"
- In *Staiman Steel v. Commercial* the contract is upheld despite the plaintiff believing more steel should have been involved.
    - The defendant tried to deny delivery of the steel that everyone agreed was a part of the contract, which was not allowed by the court.
    - The contract for the bulk steel was clear and upheld regardless of disagreement over the extra.
- *Bell v. Lever Bros* on common law mistake: Here there was employee misconduct unknown to employer. Generous severance agreement. Employer later finds out and wants them set aside.
    - Identity of parties, identity of subject matter or,
    - Residual category of mistake: quality of the subject matter.
        - Example: contract for a painting, clearly exists… but maybe a copy not an originals. These are like conditions of the contract.
        - Very narrowly construed. Fundamental essential quality where both parties make a mistake.
    - If any of these are the case then there is no contract.
- In *Sherwood v. Walker* a contract is found to be void over a common law mistake in assumption about he essential quality of the item. To be void the mistake must go to the substance of the agreement.
    - Here it was a cow, which was presumed barren up turned out to be with calf.
    - Void because the subject matter of the contract does not exist. A barren cow is a different creature than a breeding cow.
    - The dissent saw no issue as the contract was for that cow, which is what was sold.
- There is inconsistency in the law with regard to equitable mistake between different jurisdictions. It has been retained in Canada, but was overrule in England in *Great Peace*.
    - When equitable mistake is found the contract is voidable rather than void.
- *Solle v. Butcher* shows the courts use of equitable mistake.
    - Equity will relieve parties from the consequences of a mistake when the contract was entered under:
        - under a common and fundamental misapprehension;
        - it can do so without injustice to third parties, and
        - it is unconscientious/unreasonable for the other party to avail herself of the advantage

    - Here a seven-year lease was signed for 250 pounds / month not knowing the flat was rent controlled at 140. The plaintiff tries to uphold the lease and demand the lower rate, which the court does not allow.
    - Plaintiff can choose full rescission or to maintain the contract at full rent.
    - Doesn't want the leases to be void, so that landlords cannot use this to throw tenants out.
- *Great Peace Shipping v. Tsavliris* lays out the test for a contract to be void due to a common mistake, and over turns *Solle v. Butcher* stating that there is no doctrine of equitable mistake in England and that *Bell v. Lever Bros* is the law.
    - Common assumption about the state of affairs
    - No warranty about said state of affairs. No common law mistake when there has been risk allocation.
    - No fault to either for the mistake
    - Performance is impossible
    - The state of affairs in question is vital to the contract
- *Miller Paving v. Gotttardo Construction* states that *Solle v. Butcher* and equitable mistake are retained in Canadian law to allow for flexibility.
    - Consistent with the English courts typically being more doctrinal and conservative than Canadian courts are.

## Rectification

- Courts may correct typographical or transcription errors in contracts.
- Requirements for rectification (*Performance Industries v. Sylvan Lake Golf and Tennis Club*):
    - Plaintiff proves the existence and content of prior oral agreements
    - Convincing proof of the oral agreements – beyond the balance of probabilities but less than beyond a reasonable doubt.
    - Plaintiff provides the precise wording for the rectification
    - Plaintiff shows that the defendant knew or ought to have known about the mistake in the written agreement

## Frustration

- Frustration is a type of mistake but is distinguished as it is a mistake about future events rather than about current facts.
- Frustration occurs when events occurring after the formation of the contract make performance impossible or would impose undue hardship.
- Traditionally the law of contracts used the rule of absolute promises and caveat emptor, refusing to recognize frustration (*Paradine v. Jane*).
    - The party, which has the chance of profit must bare the risk of loss.
- In order to be entitled to frustration the plaintiff must show that:
    - There is a basic underlying assumption fundamental to the contract, which has been disrupted by a frustrating event. This can be the continued existence of physical goods required for the contract (*Taylor v. Caldwell*). Or it can also be a change, which destroys the commercial purpose of the contract (*Krell v. Henry*).
    - Substantial hardship, which must be so significant that it would be unjust to enforce the contract (*National Carriers*).
    - Unanticipated risk. The frustrating event must be entirely unforeseen.
        - A delay of 180 days in port by the Port Authorities was not an unforeseen risk in the context of salvage vessels (*Sea Angel*). Here the risk of delay was contemplated in the contractual provisions as well.
    - No allocation of risk by the contract.
    - No fault by either party that the contract cannot be performed.

- Historically frustration could not be used for sale of land, but was allowed in *KBK v. Safeway*
    - Confirms *Victoria Woods*, which states that knowledge of intention to develop is not sufficient for frustration based on subsequent rezoning.
    - Here the purchase price was calculated based on the development potential (FSR), and the contract specifically referred to the buyer's intention to develop and the zoning designation.
- An agreement is frustrated if the benefiting party is unable to fulfill obligations to try. (*Rickards v. Diebold*).
    - Employment termination settlement frustrated by death of beneficiary. Required him to try to find other work.
- BC has a *Frustrate Contracts Act* but it does not define what frustration is. (See binder for print out)
    - Reliance losses beyond prepayment are compensable
    - Loss must be apportioned equally in restitution

## Remedies

- General rule for damages is to put the injured party in the same position they would be if the contract had been performed (*Wertheim v. Chicoutimi Pulp*). This would be expectation damages.
- However, a plaintiff may choose between expectation or reliance measures of damages:
    - Pre-contractual reliance damages were granted in *Anglia v. Reed*. Here there was no way to know what expectation damages would be.
        - Granting pre-contractual damages has been criticized as unjust enrichment.
    - Reliance damages should not be allowed to exceed expectation damages (*Bowlay Logging*)
- In some cases expectation damages, or cost of performance can be vastly disproportionate with the increase in market value of land.
    - In *Groves v. John Wunder*, the plaintiff was granted the cost of remediating land as the defect was caused by the defendant's willful breach of contract. Loss of market value was $12 000 and the cost of performance was $60 000.
        - Dissent: Because the property was not unique and had no special value to the plaintiff's only loss of market value should be granted.
    - However in *Peevyhouse* considerations of economic waste lead to loss of value rather than cost of performance being granted.
        - Cost of performance would have been $25 000 which is far more than the value of the property for a $300 increase in value.
        - Dissent: freedom of contract.
    - Consumer surplus (the subjective value a person places on something over and above market value) will be considered in determination cost of performance vs. loss of market value. (*Ruxley*).
- Lost volume takes into account supply and demand in sale of goods contexts.
    - *Thompson v. Robinson*: breach of contract to buy car at market value results in loss to the plaintiff because supply is greater than demand. Damages granted.
    - *Charter v. Sullivan*: breach of contract to buy a car results in not loss to the plaintiff, as demand is greater than supply. Nominal damages granted only.
    - *Sale of Goods Act*: section 53 default is to grant damages for the difference between market and contract price. (Can use common law on the exam, just something to be aware of)
- Loss of a chance is compensable for breach of contract if the plaintiff can prove (*Follard v. Reardon*):
    - But for the wrongful conduct of the defendant the plaintiff could have obtained a benefit of avoided loss
    - The chance of loss was significant, above mere speculation. Lowest so far is 10%.
    - The chance of loss was dependant on something other than the plaintiff
    - The lost chance had a practical value

- The leading case on loss of a chance is *Chaplin v. Hicks* which is about a beauty competition
    - The difficulty in calculating damages does not mean that the plaintiff should not be compensated. Chance here was almost 25%.
    - Now used in real estate contexts and by oil companies denied exploration licenses.
- *Carson v. Willitts* in loss of a chance in an oil drilling senario.
    - Would need expert evidence on actual chance of finding oil
    - Difficulties in determining the quantum of damages are no reason to refuse to award them.

## Remoteness

- Remoteness is a way to limit contract damages balancing reliance and unfair surprise.
    - Deals with the problem of the ripple effect with damages from the breach of a contract.
- Damages must have been in the reasonable contemplation of the parties either because they should have been in the usual course of events or because special circumstances were communicated (*Hadley v. Baxendale*).
    - Damages must arise naturally from the breach of the contract.
    - Communication of special circumstances allows for the contract to properly reflect is and allow for allocation of risk.
- In *Horne v. Midland* it was proposed that special circumstances must be expressly accepted in the terms of the contract (or in a second contract) and that notice is not sufficient. This has not been followed.
- In *Cornwall v. Puralator* the court rejects that a special contract is required as stated in *Horne*.
    - There was evidence of the communication between the parties and Puralator is not a common carrier.
- In *Victoria Laundry* the court distinguishes between lost profits (which are recoverable) vs lucrative profits (which are not).
    - The defendant here was an engineering firm aware of the time issue making them liable for loss of general profits, but would not be able to foresee especially lucrative dying contracts the plaintiff lost out on.
- *Heron II* gives a modern restatement of Hadley saying that damages must be sufficiently likely to make it proper to hold the defendant liable.
- Second hand tractors can not be responsible for huge business risks (*Munroe Equipment*).
- Proper communication of the commercial use and time constraints for a hydraulic tractor allowed recovery for lost profits (*Sycrup v. Economy Tractor*).

## Intangible Injury and Punitive Damages

- Historically damages for metal distress were not allowed in contract, except (*Addis v. Gramophone*):
    - Breach of a promise to marry
    - Failure to pay on cheque (bank mistake)
    - Vendor failure to make title
    - And physical discomfort / railway cases (*Hobbs*)
- In *Jarvis v. Swan Tours* mental distress damages are allowed because the essence of the contract was enjoyment.
    - Based off of finding that there was a breach of warranty and conditions in a vacation brochure.
- Wrongful conduct before a contract breach cannot give rise to mental distress damages as the distress was not caused by the breach (*Vorvis v. ICBC*)
- Peace of mind does not need to be the essence of the contract so long as it is an important aspect (*Farley*)
- Wedding photos (*Wilson*) and disability insurance (*Warrington*) were also found to be peace of mind / enjoyment contracts.
- Pets were another exception to no damages for mental distress:

    - *Newell*: Dogs die in CP hold, after Newell offered to buy the whole first class cabin to keep them with him and CP assured him they would be safe. $500 in 1976.
    - *Ferguson*: Kennel looses dog. Finds that the purpose of a kennel is for peace of mind that dog is safe while you are gone
    - *Weinberg v. Connors*: Very particular cat adoption contract requiring notice given of where the cat is. Purpose of this was peace of mind.
- Physical discomfort was expanded to include a humming noise made by a luxury vehicle (*Wharton*).
- Mental distress damages are not available for being fired:
    - Employers have the right to terminate employees with cause or notice
    - See *Addis*
    - However there is a duty for good faith dealings in the manner of termination (*Keays v. Honda*)
- Corporations cannot suffer mental distress
- *Fidler v. Sun Life* gives the current approach to mental distress damages in contract:
    - Was an object of the contract to secure psychological benefit putting mental distress with in the reasonable contemplation of the parties for a breach?
        - Old cases show examples of such contracts
        - Communication of special circumstance (*Hadley v. Baxendale* approach to damages)
    - Was the mental suffering of a degree worthy of compensation?
    - Here $20 000 was granted for being denied disability insurance for five years.
- Punitive damages are very rare in contract and are only used as a deterrence, usually for insurance companies.
    - *Whiten v. Pilot*: insurance company pursues arson claim against a policyholder whose house burned down in spite of no evidence to force a lower settlement. Granted 1 million in punitive damages.

## Mitigation

- A claimant must take reasonable steps to avoid loss except where they are entitled to specific performance, or maybe where they can act unilaterally.
- Policy: avoid hardship and unfairness, fair allocation of risk, avoid economic waste / promote efficiency
- It can be reasonable to have continued dealings with the contract breaker to mitigate loss, except for personal service contracts (*Payzu*).
- In *White & Carter v. McGregor*, the court finds that the plaintiff was entitled to perform the contract and receive full compensation despite breach by the defendant, where the defendant's cooperation is not required.
    - Doctrine of Election: accept repudiation or treat contract as still in effect and perform it unilaterally (Must be a legitimate interest in performance)
    - Dissent: Repudiation does not require consent.
- *Finelli v. Dee* a Canadian court suggests that White should not apply, but that here there was trespass so the party was not entitled to perform the contract.
- In *Pezzente v. McClain* a dog owner paid $10 000 for surgery for a $350 dog and is trying to reclaim it from the breeder based on breach of warranty.
    - Only able to receive $350 due to mitigation requirement. Economically that would be put down dog and get new one.
    - Shows how economic concerns and contract don't always recognize certain interests

## Specific Performance

- Specific performance is when the court orders the party in breach to perform the contract.
- This remedy is only available when common law damages would be insufficient.

- Seen in the following situations (Specific performance is seen as exception to the rule favouring damages):
    - Unique goods (*Behnke*)
    - Unique land – used to be all land (*Semelhago*)
    - Where transfer of land is conditional on work being done (*Tenenbaum*)
    - Long term supply contracts where one party may go out of business (*Sky Petroleum*)
- Courts will not grant specific performance for personal service contracts.
- In *Tenenbaum v. WJ Bell Paper* there was a sale of land contract with conditions that the defendant build a road an sewers on his own land for the use of the plaintiff
    - It can be seen that damages are insufficient because the building is to take place on defendant's land. Plaintiff cannot pay to have it done
    - Also work to be done as condition on sale of land contract.
- In long-term supply agreements damages are insufficient due to the complexity of supply chains and the ripple effect with damages.
    - In *Sky Petroleum*, cheap gas had also become a unique good giving additional rational for specific performance.
- *Cooperative Insurance v. Argyll* shows the court declining to grant specific performance for a store closing for economic reasons in violation of a long-term lease.
    - Can't force someone to run a business.
- In *Warner Bros v. Nelson* the court grants an injunction for the negative covenant, but not the positive one in an exclusivity agreement between and actress and studio.
    - They cannot make her work for them, but enforce that she cannot work for anyone else as an actress. Note these covenants were primarily enforced against women.
    - Found to not be equivalent of enforcing a personal service agreement, even though she was unlikely to be employed in any other occupation.
    - Subsequent cases have followed the rule that injunctions cannot prevent someone from pursuing their chosen occupation (*Warner v. Mendi*). Stated that the decision for Bette Davis was equivalent to specific performance.

## Restitution

- Restitution is its own cause of action, where the court can require the defendant to account to the plaintiff for any benefits received as a result of the breach of contract.
    - Disgorgement of profits
    - Based on how much the one party benefits, not how much the other suffers
- In *AG v. Blake*, Blake writes a book about being a secret agent in violation of his contract
    - Restitution does not require contract damages
    - Does the plaintiff have a legitimate interest in preventing the defendant's profit making activity?
    - Here granted
- Concerns: effect on commerce. Courts want to promote efficient breach.