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Private Law: Contracts

Christopher Scott

Outline for LAW 108A A01, as taught by Professor Andrew Newcombe

University of Victoria Faculty of Law

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Formation of Contract

Bargain Theory

Overview

- A contract is formed between two parties when the offeror makes an **offer** to the offeree, and the offeree **accepts** the offer. To be valid, the offeree must provide **consideration**.

Offer

- A binding offer requires **intent to be bound**: Would a reasonable party believe that the other party intended to be bound by the proposed terms? *Objective approach*. (*Smith v. Hughes*)
  - An **invitation to treat** does not satisfy this requirement. Invitations to treat include:
    - Advertisements or display of priced goods, (*Boots Cash*)
      unless it is clear and specific (e.g. "First 3 people in store get coats for $1!") (*Lefkowitz*)
- Also requires that the terms of the agreement are **not uncertain**. Grounds for uncertainty:
  - **Incomplete**. Lacking one or more essential terms (the "3Ps"):Price (as in *May & Butcher*), Property, or Parties.
  - **Vague** or **Ambiguous**.
  - **Agreement to Agree**, or (similarly) contracts/clauses to negotiate. (*Courtney*, *Empress*)
    - This does not apply to terms left to a defined arbitration process. (*Foley*)

"*The 3Ps*"

- The offer ceases to exist upon **rejection** or **expiry**. Four methods:
  - **Express term**: Contract states date of expiry.
  - **Lapse**: The offer expires after a (context-dependant) "reasonable time".
  - **Rejection** or **Counter-Offer**: Offeree rejects offer or makes counter offer.
  - **Revocation**: Offeror notifies offeree that offer is revoked
    - Generally must use same method of communication as was used for offer.
    - The offeror may revoke at any time prior to acceptance. Notice may be required.
- A **standing offer** is not binding unless procured with consideration or put under seal. (*Witham*)

Acceptance

- **Types**:
  - **Acceptance by Return Promise**: Forms a bilateral contract.
  - **Acceptance by Performance**: Forms a (valid) unilateral contract. (*Carlill*)
- **Communication**: Mode of acceptance may be stipulated by offeror.
  - Offeror may not stipulate silence as indication of acceptance. (*Felthouse*)
  - Generally, if not otherwise stipulated, acceptance should be in same mode as offer.
- **Postal Acceptance**: Contract is formed once notice of acceptance is put in the mail.(*Household Fire*)
- **Contracts by Fax**: Constitutes valid delivery of acceptance when received. (*Rolling*)
- **e-Contracts**: Valid acceptance as soon as the e-mail is *accessible* by the offeror.
  (*Electronic Transactions Act* (ETA) s. 18 [see C 67-69 for more])
- **Jurisdiction of Contract**: Contract is formed at the location of the offeror at the time of acceptance. (*Eastern Power*)
  - **Exception**: For postal acceptance, contract is formed at location of offeree.
- *See C 67 for details on electronic acceptance*

***Schiller v. Fisher* (SCC 1981)**

- **Facts**: π sends offer to Δ on Aug. 27 with clause requiring acceptance by Sept. 1; cover letter from Δ requested acceptance to be returned ASAP. Δ initials on Sept. 1, mails on the 3rd, and arrives on the 7th. *See C 66 for more details*
- **Issue**: Was there a valid formation of K? **Held**: Yes.
- **Ratio**: Parties can determine the sufficiency of communication of acceptance, and what acts suffice for acceptance. Requesting acceptance by initialing and a response "ASAP" means that acceptance occurs at the time that the offer is initialed, and the response need only be filed quickly (but not necessarily on the same day as the initialing).

Deferred Agreement

- There are three options for deferring agreement on a term of a contract:
  - **Agreement to Agree**: Courts will not enforce an agreement to come to a consensus that does not specify some "machinery" (e.g. arbitration) or formula for reaching it. (*Empress*)
    - As a corollary, courts won't enforce an agreement to negotiate. (*Courtney*)
  - **Formula & No "Machinery"**: The courts will supply the machinery to apply the formula. (*Empress*)
    - For instance, the courts *will* enforce a clause requiring arbitration. (*Foley*)
  - **"Machinery" & Faulty Formula**: Courts will order parties to use the machinery to cure the defect. (*Empress*)

Empress Towers Ltd. v. Bank of Nova Scotia (BCCA 1990)

- **Facts**: Δ has K with π to rent space. K has clause for renewal of rent at the market rate, *as agreed upon by the parties*. π refuses to negotiate fairly, Δ sues and wins at trial. π appeals.
- **Held**: Because parties agreed to a right of renewal to the mutually agreed market rate, π has implied obligations to negotiate in good faith and not to withhold agreement unreasonably.
- **Comments**: Controversial. Is the court implying a duty to negotiate in good faith in general?

Consideration

Overview

- "Consideration means something valuable in the eye of the law, moving from the plaintiff: it may be some benefit to the [defendant] or some detriment to the [plaintiff]." (*Thomas*)
- The court does not inquire into the adequacy of the consideration. (*Thomas*)

Policy Functions

- **Evidentiary Function**: Formalities provide **evidence** of the existence of a contract.
- **Cautionary Function**: Formalities ensure that parties **deliberate** before they enter a contract
- **Channeling Function**: Formalities provide a **simple test** of the enforceability of a promise. They allow commercial actors to ensure that a promise will be enforceable.

Things Considered "Good" Consideration

- £1 yearly for a house (*Thomas*)
- Abandoning or limiting a legal right (*forbearance*) (*Hamer*)
  - **Note**: Whether or not it was a *functional* detriment or benefit is irrelevant. (*Hamer*)
- Forbearance on the right to sue, *if* the claim given up is "real" and "not frivolous", and is "honestly made" (i.e. promisor isn't aware it's insubstantial) (*Stott*)
- Reciprocal (mutual) promises (e.g. promise to buy following promise to sell) (*Witham*)
- Implied duties under K (e.g. duty to make "best efforts" in employment K) (*Wood*)

Things Not Considered "Good" Consideration

- Promises not to complain. (*White*)
- "Past consideration is no consideraton." (*Eastwood*, *Roscorla*)
  - **Exceptions**:
    - If the plaintiff performs an act without the parties agreeing on payment at the time, the subsequent promise to pay is enforceable if the act was done at the request of the promisor or with the expectation of compensation. (*Lampleigh*)
    - If a hospital/doctor administers treatment to an incapacitated patient, a request for treatment is implied, so that treatment is valid past consideration. (*Matheson*)

Roscorla v. Thomas (QB 1842)

- Contract formed for sale of horse, followed by promise that horse is healthy. Horse isn't healthy, but no consideration given for that promise, so promise not enforced.

Mutual Promises (Bilateral Contracts)

- Acceptance by reciprocal promise is good consideration, and forms a bilateral contract.(*Witham*)
- Once accepted, a bilateral contract cannot be revoked unilaterally. (*Dawson*, *Ayerswood*)
- Reciprocal promises can be **explicit** or **implied**:
  - **Explicit**: e.g. promise to sell goods in exchange for promise to purchase. (*Witham*)
  - **Implied**: (*Wood*)
    - "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. … If that is so, there is a contract" (*Wood*)
    - If implication of a promise is necessary for "business efficacy", then that promise may be implied. (*Wood*)

Unilateral Contracts

- Acceptance by performance (e.g. finding someone's lost dog) is good consideration, and forms a unilateral contract. (*Carlill*, *Dawson*, *Ayerswood*)
- If possible, a contract should be construed as bilateral over unilateral. (*Dawson*)
  - Can find implied promise (communication between parties may be "instinct with an obligation" that amounts to a reciprocal promise). (*Dawson*)
- Unilateral contracts may be revoked at any time prior to the promisee beginning performance. (*Baughman*, *Ayerswood*)
  - **Note**: Until full performance is obtained, the promisor is not bound by any obligations (other than the stated one not to revoke) (*Baughman, Ayerswood*)
- A **firm offer** (a promise not to revoke a unilateral contract) is only valid if obtained with consideration or placed under seal.
  - The court may use the **two contract approach** to enforce or imply a firm offer.
  - Consider *Errington*: Father buys house, tells daughter house is hers if she promises to pay out mortgage. Father dies, mortgage not paid out yet. Executor says house is father's.
    - Contract #1: Pay mortgage and house will be yours.
    - Contract #2: So long as you pay the mortgage you may remain in possession
      - This is an *implied promise* not to revoke Contract #1, found by the court.

Going Transaction Adjustments (Contractual Modifications)

The Established Approach

- A variation of a contract is not binding unless there is new consideration. (*Stilk*, *Gilbert Steel*)
  - Promising to fulfill obligations under original contract is *not* consideration. (*Stilk*)
  - Forbearance on the right to sue is good consideration, subject to some requirements (see Things Considered "Good" Consideration, above) (*Stott*)
  - **Exception**: Variations under seal are binding.
- Instead of finding that the contract was varied, courts may find that the contract was **rescinded** and a new contract formed. Here, the obligations under the old contract may count as consideration for the new one (since they are "new" promises) (*Raggow*)
- Promises categorized as variation:
  - Promises to pay extra to employees. (*Stilk*)
  - Paying compensation to employer for losses incurred. (*Stott*)
  - "Mere" change in price of product. (*Gilbert Steel*)
- Agreements categorized as rescission (followed by new contract):
  - Agreement with employees to reduce wages during WWI (*Raggow*)

Debt Settlement

- At common law, an agreement for a debtor to pay less than what was initially owed will not be enforced. (*Foakes*)
- In BC, the *Law and Equity Act* s. 43 overrides this; debt settlement will be upheld.

Doctrinal Changes in Other Jurisdictions

***Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* (QB 1991)**

- **Facts**: π has K with Δ to complete some carpentry work. Mid-K, π is in financial trouble, so Δ agrees to pay π a bonus to ensure that work is completed.
- **Issue**: Was there consideration for this agreement? **Held**: Yes.
- **Ratio**: If the following hold:
  1. A enters K with B to work for (or supply goods to) B for payment
  2. Prior to completion B has reason to doubt that A can/will complete the K
  3. B then promises A extra pay for a promise of timely completion.
  4. B obtains from this a benefit (or obviates a detriment)
  5. B's promise is not the result of economic duress or fraud

  Then the benefit to B is consideration for that promise.
  "Pragmatic" (or "commercial") advantages, such as avoiding delays or avoiding the expense of getting others to complete the K, qualify as "benefit" in the above.

***NAV Canada v. Greater Fredericton Airport Authority Inc.* (NBCA 2008)**

- **Ratio**:
  - A post-contractual modification is enforceable even if not supported by consideration, so long as it was not procured under economic duress.
  - Presence of consideration is strong evidence against duress, but is inconclusive.
    - The converse holds as well.

Remedies for Breach

The Compensation Principle

Overview

- "The party complaining should, as far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed." (*Wertheim*)
  - This is the *expectancy measure* of damages.
- If expectation damages are not provable, **reliance damages** may be sought. (*Anglia*)
  - **Limitation**: Reliance damages may not exceed expectation damages (if known). (*Bowlay*)
  - Reliance damages may include expenditures incurred prior to the contract, provided that it was reasonably in the contemplation of both parties that they would be wasted by a breach of the contract. (*Anglia*)

Measures for Damages

- The Fuller & Perdue article presents three measures for damages:
  1. **Restitution**: Contract-breaker must return the value he received from the other party.
     - Policy: Preventing unjust enrichment.
  2. **Reliance**: If party A breaks a contract that party B has relied on (and is consequently harmed), A must restore B to his position prior to the contract.
  3. **Expectation**: If party A breaks a contract with party B, A must place B in the position he would have occupied had the contract not been broken.

Cost of Performance vs. Loss of Value

- The purpose of the contract is important; if a clause is essential to the contract (i.e. not merely incidental), then generally cost of performance will be granted. (*Peevyhouse*)
- If the **diminution** to the plaintiff is much less than ("out of proportion with") the cost of performance, only that diminution need be compensated. (*Peevyhouse*)
  - The *Peevyhouse* case has additional qualifications (e.g. performance must be incidental to the contract, and not a "main object") (*Peevyhouse*)
  - This also applies in cases where performance results in destruction. (*Jacob & Youngs*)
- In a contract for **psychic satisfaction**, the cost of performance is awarded. (*Radford*)
- The loss of **consumer surplus** (amount consumer is willing to pay above market value) is compensable in lieu of the cost of performance (esp. if the latter is much greater). (*Ruxley*)
- The **loss of a chance** to win or obtain some benefit is compensable. (*Chaplin*)
  - Lack of certainty is no defence; the jury may assess damages however it likes. (*Chaplin*)
  - There must be *some* reasonable probability of the plaintiff realizing an advantage of some real, substantial monetary value. (*Kinkel*)

Remoteness

- Damages that are too remote are unrecoverable.
- To avoid a finding of remoteness, damages must be one of: (*Hadley*)
  - In "the usual course of things" (i.e. arising naturally, no special circumstances)
  - In "the reasonable contemplation of the parties" (i.e. informed of special circumstances)

- Unusually large profits that are lost due to breach of contract are only compensable if they were in the reasonable contemplation of the breaching party. (*Victoria Laundry*)
  - *See C 18 for note on communication of special circumstances.*
- Experts are expected to know the usual result of a breach of K (in their field). (*Victoria Laundry*)
  - **Note**: Even experts are not expected to be contemplating *unusual* losses (*Victoria Laundry*)
  - This [constructed] knowledge falls under the 2nd branch of the *Hadley* test (special circ.).
- It may be sufficient to show that a reasonable person would have realized that the losses were sufficiently likely to make payment of damages proper. (*Koufos*)
- **Framing of the issue** is important. Consider *Parsons* (UK):
  - **Facts**: Faulty food hopper installed in pig pen, pigs get e. coli.
    - **Trial J.**: Too remote, couldn't have predicted e. coli specifically.
    - **Appellate J.**: Not too remote; could have predicted illness generally.

Mental Distress (Non-Pecuniary Damages)

The Law Today: The *Fidler* Test

- Loss of enjoyment, mental suffering, distress, etc., are all **non-pecuniary** losses.
- The *Hadley* rule applies to non-pecuniary damages as well. Reasonably foreseeable distress is compensable (so long as it is not "incidental" to breach, e.g. feeling bad about firing) (*Fidler*)
- The test for compensability of non-pecuniary losses: (*Fidler*)
  1. Was peace of mind part of the contract?
     - **Note**: "*part*" (new test) vs. "*purpose*" or "*major part*" (old test) of contract.
  2. Was the distress significant enough to be compensated?

Former Law

- These examples are **still useful**! Each of these situations provides a precedent for finding that peace of mind was part of the contract.
- *See briefs from Oct. 19 for more detailed information.*
- **Prior to 1973**, non-pecuniary damages were not compensable. (*Addis*, *Hobbs*)
  - **Exceptions**: (*Addis*)
    - Breach of promise to marry
    - Failure to pay on cheque
    - Vendor failure to make title
- **Between 1973 and 2006**, additional categories opened up (*See C 25 for more examples*):
  - **Contracts for peace of mind**: Holidays (*Jarvis*, 1973), Wedding Photos (*Wilson*, 1988), Wedding Music (*Dunn*, 1978), Disability insurance (*Warrington*), Luxury cars (*Wharton*)
  - **Pets**: Death while in aircraft hold (*Newell*, 1976), Loss from a kennel (*Ferguson*), Failure to notify of cat's residence (*Weinberg v. Connors* ["*Hobocat*"], 1994), Dog purchased with unknown severe medical problems (*Pezzente*, 2005)
- The expectation interest is used for non-pecuniary damages; awards usually small. (*Wilson*)
- It is necessary for pleasure or peace of mind to be a "major part" of the contract to compensate for displeasure or distress. (*Wharton*)
  - If not, can still recover damages for inconvenience or discomfort caused by breach.

Aggravated Damages and Employment Contracts

Termination of Employment Contract

- Employer must supply "reasonable notice" (up to 24 months) of termination.

The Law Today: The *Honda* Test

- Employees may claim aggravated damages for mental distress caused by the employer's bad faith in termination. Must have suffered *actual* and *compensable* (i.e. pecuniary) harm. (*Honda*)
- Distress incidental to termination (i.e. feeling bad) is not compensable. (*Honda*)

Former Law

- Aggravated damages are only claimable in a wrongful dismissal suit if the employer's conduct was "independently actionable" (some confusion on that term) (*Vorvis*)
- No aggravated damages for mental distress resulting from termination of employment (even harsh or insensitive); overturned *Vorvis* rule. (*Wallace*)
- In a wrongful dismissal suit, the plaintiff *can* get an extension to the reasonable notice period if termination was harsh or unduly insensitive (the "*Wallace* bump-up") (*Wallace*)
  - Highly criticized: Why are better-paid employees compensated better for mental distress? Why only for wrongful dismissal cases? Why use the doctrinal back-door?

Punitive Damages

- Punitive damages are an exception to the general rule that damages are compensatory; consequently, they are only granted in exceptional cases. (*Fidler*)
- There are two requirements for a punitive damages claim: (*Whiten*)
  1. Misconduct must be "**highly reprehensible**"
  2. Misconduct must be an **independently actionable** harm.
     - Can be an independent breach of contract, or a breach of fiduciary obligations. (*Fidler*)
     - In a denial of insurance benefits case, the duty of good faith is an implied contractual obligation that satisfies this test. (*Fidler*)
- The court has set out a **policy framework** for guiding applications of punitive damages:(*Whiten*)
  - **Exceptionality**: Punitive damages are the exception to the rule.
  - **Rationality**: Must be linked to at least one of the following goals:
    - Punishment
    - Deterrence
    - Denunciation
  - **Proportionality**: The total sum awarded (incl. non-punitive and criminal damages) must be proportionate to:
    Blameworthiness of defendant's conduct — Degree of vulnerability of the plaintiff
    [Potential] harm directed at plaintiff — Need for deterrence
    Advantage wrongfully gained by the defendant's misconduct

Mitigation

Overview

- A party claiming pecuniary damages must take reasonable steps to **mitigate** those losses. Failure to do so will limit damages to those that could not be avoided. (*Payzu*)
- It is generally reasonable to accept subsequent offers from the party in default; refusing to do so (and not otherwise mitigating) constitutes a failure to mitigate. (*Payzu*)
  - **Exception**: This excludes personal services contracts. (*Payzu*)
  - Other situations might be excluded as well; the reasonableness of re-contracting with the defaulting party is a question of *fact*, not law. (*Payzu*)
- Damages are **compensatory**. Managing to avoid losses entirely will result in nominal (or no) damages. (*British Westinghouse*)
- **Impecuniosity**: Lack of resources is generally no defence for failure to mitigate in the commercial context. (*Freedhoff*)
  - **Exception**: If the breach of contract related to financing (i.e. reneging on promise to loan), then impecuniosity is a defence. (*General Securities*)
  - **Exception**: Impecuniosity is a defence in consumer transaction cases. (*Wroth*)

Policy Rationales

- **Avoidance of hardship and unfairness**:
  - **Contract liability is absolute**: Even innocent reasons for a breach provide no excuse for contractual liability.
  - **Quantum**: the normal measure of damages is quite high; can lead to overcompensation.
  - **Unfair surprise versus reasonable expectations**: It is unfair to make the defendant liable for losses that the plaintiff could have avoided.
- **Fair allocation of risk**: Often the plaintiff is in the best position to deal with the consequences of the breach.
- **Avoiding economic waste**: Mitigation promotes efficiency

Date of Assessment of Damages

- Generally, damages are assessed *at the time of breach* (actually a reasonable time after the breach, once the period for mitigation has passed). Thus, parties have a duty to begin mitigation *immediately*. (*Asamera*)
- If there are "unique circumstances" entitling the plaintiff to specific performance, the damages may be assessed *at the time of trial* instead. (*Wroth*)
- The court has discretion to take into account any special circumstances that indicate it is unreasonable to require the plaintiff to mitigate immediately. (*Asamera*)

Lost Volume

- If supply of the product exceeds demand, then the plaintiff will be unable to mitigate. (*Apeco*)
  - E.g. Suppose Δ agrees to rent space from π, and then reneges. Even if π subsequently rents that space out, if other (identical) spaces remain unrented, loss hasn't been avoided.

Doctrine of Election (and the Mitigation Debate)

- If one party repudiates a contract, the other party may: (*McGregor*)
  1. Accept repudiation and sue for damages for breach immediately.
  2. Disregard repudiation and force the contract to stay in effect.
     - The electing party can then sue when the contract is actually broken.
- The dissent in *McGregor* objects to this doctrine, stating that the electing party has a duty to mitigate. This dissent was preferred by Laskin J.A. in *Finelli v. Dee* (Ont. C.A. 1968), but has not yet been accepted into precedent in Canadian courts.

Equitable Remedies

Specific Performance

- Specific performance is an order compelling the party in breach to perform the contract.
- Only available in certain circumstances:
  - Unique goods (*Behnke*)
  - Land (although not an absolute rule; only if no available substitute) (*Semelhago*)
  - Relational contracts (*Sky Petroleum*)
- **Note**: Specific performance is *never* granted for personal services contracts (absolute rule).
- Reasons for not applying specific performance as the default remedy:
  - **History**: Equity prevails over common law; only used if damages inadequate.
  - **Ideology:** Liberalism; autonomous individuals, separation of law and morality.
  - **Practicality**: Damages are often more convenient and may be preferred by the plaintiff. A plaintiff may not want to deal with a hostile co-contractor.
  - **Administration**: Specific performance is difficult for courts to supervise.
  - **Adverse Impact on Mitigation**: If specific performance was the presumptive remedy, then there would be no obligation to mitigate.
  - **Avoidance of Hardship**: Might be overly burdensome to the defendant. It would shift the burden of mitigation to the defendant and this might prove costly and unfair.

Injunctions

- An injunction is an order for a party not to take an action that would result in the breach or the non-performance of the contract.
- There are 3 requirements for granting an injunction: (*Warner Bros.*)
  - The contract must include a negative covenant related to the injunction
  - It must not be tantamount to ordering a specific performance
  - Damages must be inadequate, or too speculative.
- An injunction to encourage or put pressure on one party to continue to work for the employer (but not to force them to continue outright) is not tantamount to specific performance. (*Lumley*)
  - There has been much criticism of this decision, in particular due to sexism at the time.
- Compulsion is more likely to be found in the context of contracts of lengthy duration and involving relationships of mutual trust and confidence that have since been ruptured. (*Warren*)
  - e.g. The manager-client relationship in the music industry. (*Page One*)
  - This indicates an expansion of what might be considered "compulsion" since *Lumley* and *Warner Bros*.; it now includes prohibiting someone from pursuing their chosen occupation. (*Warren*, *Page One*)

Policy Considerations

- **Reasonable expectations** vs. **Unfair Surprise**.
- **Unjust Enrichment**: Has one party gained at the expense of another, for example, as a result of money being exchanged for the promise to perform an act?
- **Reasonable Reliance**: Did one party rely on the other party's promise to their detriment?
- **Promotion of Private Ordering vs. Social Utility**: Will this type of promise contribute to social utility, or is it an area that should be left to private ordering?

Contract Formation

- The Court frequently considers these policy factors in finding formation (or implied clauses):
  - Enforcing **voluntary obligations** assumed in a bargain context.
  - Avoiding **imposing** [new] contractual obligations.
  - Protecting the **reasonable expectations** of the parties.
  - Protecting **reasonable reliance** upon promises.
  - Avoiding imposing **unfair surprise** on parties.
  - Developing rules that promote **commercial efficiency**. (*Wood*)

Remoteness

- **Degree of probability/foreseeability of loss**: what would ordinarily be expected in the circumstances.
- **Communication of special circumstances**: Fact of communication plus particulars; clarity and specificity.
  - Was there an assumption of responsibility? Cases go both ways with respect to the type of "acceptance" required (e.g. *Horne* and *Cornwall Gravel*, see *C 18*). It will not be conclusive, but may be an important factor nonetheless.
- **Defendant's knowledge**: In general, and of plaintiff's business in particular.
  - *Hadley v Baxendale* (carriers) versus *Victoria Laundry* (expertise re: boilers, knew use).
  - As a general rule if the defendant has only a transitory relationship with the plaintiff, then scope of liability might be reduced. If there is an established relationship between the parties then defendant's knowledge of plaintiff's business is likely to be greater. However, where consumer expectations are reasonable and created by the defendant, then liability might result even where the relationship is transitory (*Cornwall Gravel*).
- **Nature of Defendant's business**: Expertise and what is being offered to the plaintiff.
- **Sophistication of Parties**: Generally, the more sophisticated/knowledgeable the parties, the more likely the damages in question will be foreseeable.
- **Ordinary allocation of risk**: Understandings or expectations in the marketplace (custom of the trade). Where a party to a contract may suffer exceptional harm if a contract is breached (e.g. loss of lucrative contracts), then the defendant will only be liable for those losses if it can be reasonably and fairly said that they were aware of them.
- **Proportionality**: comparison of contract price and nature of the service with risk (ultimate loss claimed).

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