

Recent Developments in the Law of Contract

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I. Introduction

This paper highlights developments in the law of contract which have occurred since 1974. It does not purport to include every reported decision but rather is selective, and concentrates on those areas where the developments have been the most significant.

Attention is focussed on Canadian decisions from all jurisdictions, and on English decisions where they appear relevant to Canadian law. The paper examines general principles of contract law, as opposed to the law relating to particular types of contracts, and is divided into four principal categories: (1) formation of a contract; (2) contents of a contract; (3) elements vitiating a contract; (4) damages for breach of contract.

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II. Formation of contract

A. Offer and acceptance

The Alberta Court of Appeal in *Regina v. Dawood*¹ found it necessary to draw the time honoured distinction between an offer and a mere invitation to treat. Dawood was charged with stealing a blouse and a jumper from Kresge's department store. The single jumper had a price tag of \$5.77 but the price tag for the two-piece outfit of jumper and blouse was \$9.66. Ms Dawood was observed to take a blouse from a two-piece outfit and put it on a hanger along with a single jumper. Removing the \$9.66 tag, so that it appeared that the combined price for the jumper and blouse outfit was \$5.77, she then took the outfit to the checkout counter and paid the cashier the price of \$5.77. She was stopped by the store detective when she left the store and was later charged with theft. Defence counsel contended that, if an offence had been committed, it was the offence of false pretences and not theft. This contention was upheld by the majority of the Court. Ms Dawood could not be convicted of theft because property in the goods passed to her under the contract of sale. When she took the jumper and the blouse to the checkout counter she was offering to purchase them for \$5.77, and this offer was accepted by Kresge's through the cashier. At that time, a contract was formed and Dawood acquired title to the goods. In reaching their conclusion the majority relied upon a long line of case law which established that a shop display, even in a self-service store, can never amount to an offer but is merely an invitation to customers to make offers.²

There is nothing remarkable in the majority judgment, although Clement J.A. gave a very interesting dissent. Refusing to follow the traditional authorities, he stressed the realities of the operation of a self-service department store. He argued that it was artificial to consider the customer as making the offer to the cashier when the cashier's only role was to receive the price proffered by the customer and to bag the goods. In reality, the offer was made by the store when the article in question was displayed with the price tag affixed. The classic objection to this reasoning has been that a customer would accept that offer merely by taking the goods from the rack or off the shelf and would then be unable to change his

¹ [1976] 1 W.W.R. 262.

² See, e.g., *Pharmaceutical Society of Great Britain v. Boots Cash Chemists* [1953] 1 Q.B. 401 (C.A.); *Fisher v. Bell* [1961] 1 Q.B. 394 (Div.Ct); *R. v. Bermuda Holdings* (1969) 9 D.L.R. (3d) 595 (B.C.S.C.).

mind.³ Clement J.A. met that objection by deciding that a customer does not accept the store's offer until he actually carries the goods to the cashier and pays the price:

I have no doubt that in the circumstances above described a display of goods in a self-service department, with the price marked on each article, is a general offer by the store to its customers to sell those articles at the marked price. I am further clearly of the opinion that it is a term of such offer inevitably implied by the circumstances that the offer could be accepted in only one way, namely, the article to be carried to the cashier and payment made to her there of the marked price.⁴

In this case, therefore, Kresge's had made an offer to sell the goods for \$9.66 and Dawood had purported to accept that offer for \$5.77. Since the acceptance did not correspond with the offer, no contract was formed and no property in the goods could pass to Dawood. She was, therefore, rightly convicted of theft.

Mr Justice Clement's judgment is to be welcomed. Having applied the correct test, he came to a just conclusion. The test of whether an offer has been made is objective and one must ask how a reasonable person in the shoes of the offeree would have interpreted the statement or conduct of the offeror.⁵ Surely a reasonable man would assume that the store was offering to sell its goods at the price marked. While such an assumption might not be valid in every case, in the *Dawood* situation, Clement J.A. was more than justified in treating Kresge's as having made the offer.

The problem of whether an offer has been made was considered again by Moore J. in *Calgary Hardwood & Veneer Ltd v. C.N.R. Co.*⁶ Negotiations had been in progress for several years between the plaintiff and the defendant for the purchase by the plaintiff of a parcel of land owned by the defendant. The land was to be used for lumber storage and kiln drying operations to handle shipments of woods brought into Canada via Vancouver. Young, the defendant's industrial development officer, wrote the plaintiff a letter in which he said the defendant would agree to sell one half the parcel at \$4200 an acre and to lease the other half, if the plaintiff could obtain planning permission. The plaintiff made no written reply to that letter but immediately took steps to obtain the requisite planning permission. Nine months later, when the plaintiff was

³ See, e.g., Goddard C.J. in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists* [1952] 2 Q.B. 795, 802.

⁴ *Supra*, note 1, 270.

⁵ See, e.g., *Grant v. Province of New Brunswick* (1973) 35 D.L.R. (3d) 141 (N.B.S.C.).

⁶ [1977] 4 W.W.R. 18 (Alta S.C.).

notified that a development permit would be issued, the company informed Young that it wished to proceed in accordance with the letter. One week later Young telephoned the plaintiff to announce that the asking price for the land was now \$14,500 per acre. The defendant maintained that the letter was merely part of the process of negotiation and that it was not a definite offer to sell. It pointed out that the letter had stated that the defendant would "agree to sell" the land if planning permission could be obtained. Such wording, the defendant argued, indicated an agreement to agree in the future and certainly did not signify a definite offer to sell. Moore J., however, had no difficulty in determining that the defendant had made an offer on that date. All the terms of the contract were abundantly clear. The offer had been accepted by the plaintiff's obtaining planning permission and there was consequently no need for the plaintiff to reply directly to the letter to indicate acceptance. The offeror had indicated a particular mode of acceptance and therefore, by doing the act, the offeree had accepted the offer and did not have to notify the offeror in advance of its intention to accept. Presumably the mode of acceptance indicated was not exclusive, and the plaintiff was not prevented from immediately accepting the offer contained in the defendant's letter, thereby creating a contract conditional upon the acquisition of planning permission.

The Court was strengthened in its conclusion by the fact that although the defendant was advised of the steps being taken by the plaintiff to obtain approval for the development, it did nothing. Moore J. relied upon the promissory estoppel cases⁷ for the proposition that "a promise is binding in law if it was intended to be acted upon and was in fact acted upon by the person to whom it was given".⁸ Arguably, the cases do not go that far in that promissory estoppel cannot be used to create a cause of action but can merely be used as a defence when one party attempts to enforce his strict legal rights, having promised that he would not insist upon those strict rights.⁹ Moore J. also had some interesting remarks on the measure of damages awarded in this case, a topic which will be dealt with later in this paper.^{9a}

⁷ In particular *Central London Property Trust v. High Trees House* [1947] K.B. 130.

⁸ *Supra*, note 6; 27.

⁹ *Combe v. Combe* [1951] 1 All E.R. 767 (C.A.).

^{9a} *Infra*, see section V, Damages for breach of contract.

*Holmes v. Alexson*¹⁰ and *Roman Hotels v. Desrochers Hotels*¹¹ are two recent illustrations of the general rule that a contract is not formed until the acceptance has been communicated to the offeror. In both cases the offeree signed the contract on a Sunday but the acceptance was not communicated until the following Monday. Both cases held that the contract in question did not contravene the Federal *Lord's Day Act*¹² because the contract was not formed and the purchase did not take place until the Monday.

An offer, once made, can always be revoked before acceptance by the other party unless the parties have entered into a valid option.¹³ Therefore a promise by the offeror to keep his offer open for a specified period of time does not preclude him from retracting the offer within that specified period. To revoke an offer, the offeror must communicate the withdrawal to the offeree. *The Brimnes*¹⁴ case shows, however, that it is sufficient if the notice reaches the address of the offeree at such a time and in such a way that it would, in the normal course of business, come to the attention of the offeree. In that case, a notice of withdrawal of a ship from the service of charterers was sent by telex, and was held to be communicated when received by the plaintiff's telex machine during normal business hours. The plaintiff failed in its argument that the withdrawal took effect only when the telex message was read the next day. Megaw L.J. said:

[I]f a notice arrives at the address of the person to be notified, at such a time and by such a means of communication that it would in the normal course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his servants to act in a normal business like manner in respect of taking cognisance of the communication, so as to postpone the effective time of the notice until some later time when it in fact came to his attention.¹⁵

Of course, if an offer is expressly stated to be available for acceptance within a certain period of time, the offeree cannot accept that offer after the time limit has expired.¹⁶

The legal effect of options was considered by the English Court of Appeal in *Mountford v. Scott*.¹⁷ The defendant signed an agree-

¹⁰ (1974) 54 D.L.R. (3d) 175 (Ont.H.C.), aff'd (1976) 12 O.R. (2d) 431 (C.A.).

¹¹ (1976) 69 D.L.R. (3d) 126 (Sask.C.A.).

¹² R.S.C. 1970, c.L-13.

¹³ *Rei-Mar Investments v. Christie* (1974) 48 D.L.R. (3d) 315, 318 (B.C.S.C.).

¹⁴ [1974] 3 All E.R. 88 (C.A.).

¹⁵ *Ibid.*, 113.

¹⁶ *The Real Estate Center v. Ouellette* (1974) 47 D.L.R. (3d) 568 (N.B.S.C. App.Div.).

¹⁷ [1975] 1 All E.R. 198.

ment with the plaintiffs whereby, in consideration of the sum of one pound, he granted the plaintiffs an option to purchase his house for ten thousand pounds. The plaintiffs subsequently gave notice exercising the option. The defendant refused to complete the sale and the plaintiffs brought an action for specific performance. The Court held that a valid option had been created by the payment of one pound which was deemed to be valuable consideration. The effect of the valid option agreement was that the offer to sell was irrevocable for the specified period of time. Any attempted revocation by the optionor could be ignored by the optionee, and the optionee could still exercise the option. Russell L.J. stated the law clearly:

[A] valid option to purchase constitutes an irrevocable offer to sell during the period stated, and a purported withdrawal of the offer is ineffective. When, therefore, the offer is accepted by the exercise of the option, a contract for sale and purchase is thereupon constituted, just as if there were then constituted a perfectly ordinary contract for sale and purchase without a prior option agreement.¹⁸

As a result, the defendant could not prevent an enforceable contract for the sale of the land from coming into effect. Although the defendant argued that no order of specific performance should be made because the consideration for the option was trivial, the Court held that the amount of the consideration for the option arrangement was irrelevant as long as it was good consideration in the eyes of the law. The order of specific performance did not relate to the option contract, but rather to the contract of sale, for which the Court considered ten thousand pounds an adequate sum. In effect, however, the Court forced the specific performance of the option itself by preventing the optionor from retracting his offer and being sued for damages. It is the optionee's right to specific performance which leads one to the conclusion that a valid option to purchase land constitutes an interest in land. A similar claim for specific performance was upheld by the Alberta Supreme Court in *Kazakoff v. Milosz*.¹⁹

An option must be distinguished from a right of first refusal. *Canadian Long Island Petroleum v. Irving Industries*²⁰ illustrates that a right of first refusal does not create any interest in land. It is a purely contractual arrangement which is not specifically enforceable because the holder of such a right cannot require the

¹⁸ *Ibid.*, 201.

¹⁹ (1977) 3 A.R. 275.

²⁰ [1974] 6 W.W.R. 385 (S.C.C.).

landowner to convey the land. Because it creates no interest in land, the rule against perpetuities is not applicable to such a right.

B. *Certainty*

There are two aspects to the notion of certainty of contract. First, the parties must have passed the stage of negotiation and actually reached an agreement. To determine whether a final, binding arrangement has been entered into is a difficult question of construction. This principle is often expressed in the maxim that one cannot have a contract to make a contract. Secondly, the essential terms of the parties' agreement must be present in clear and unambiguous language.

The first aspect of certainty often arises where the parties have made an agreement but there is an express or implied understanding that a formal contract will follow. This situation may be viewed in two possible ways: either the formal contract is a formality, a mere matter of detail which cannot alter what has already been agreed; or the formal contract is intended to be the actual agreement between the parties, in which case they have not yet concluded the terms of their bargain. The passage always quoted in this context is that of Parker J. in *Von Hatzfeld-Wildenburg v. Alexander*:

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.²¹

It was this problem of construction which faced the Ontario High Court in *Lake Ontario Cement Co. v. Golden Eagle Oil Co.*²² The parties had reached an agreement by mail that the defendant would supply oil to the plaintiff cement manufacturer for a fixed price. There was an express understanding that counsel for both sides would prepare a formal contract which would set forth precise terms and details. Golden Eagle's counsel prepared a draft contract which was submitted to the plaintiff. The draft contained a number of changes from the original agreement and provided for the

²¹ [1912] 1 Ch.284, 288-89.

²² (1974) 46 D.L.R. (3d) 659.

possibility of price increases during the continuation of the contract. A number of further drafts were prepared but no formal contract was ever signed. Golden Eagle then decided that the price it had quoted originally was too low and attempted to renegotiate. When the plaintiff insisted that the original price should remain unchanged, the defendant took the position that negotiations had collapsed and no contract existed between the parties. The plaintiff then claimed damages for breach of contract. The issue, therefore, was whether the parties had reached a binding agreement so that the formal contract was a mere formality which could not add to or vary the agreement already reached, or whether the formal contract was to constitute the contract between the parties so that the parties were still negotiating when the defendant decided not to proceed. The Court determined that the parties had reached a binding consensus since their conduct was consistent only with the existence of a contract. The evidence established that Golden Eagle reneged on the deal because the world price of oil had risen steeply and not because it thought that negotiations had fallen through. Indeed, they had never denied the existence of a contract until solicitors were consulted. Clearly, Golden Eagle was trying to renegotiate rather than still negotiate the original agreement. Furthermore, the terms of the bargain were quite clear from the letters and there was nothing which required clarification in the formal documents. The plaintiff, therefore, succeeded in its claim.

The English Court of Appeal in *Courtney and Fairbairn Ltd v. Tolaini Brothers (Hotels) Ltd*²³ also had to determine whether the parties were still negotiating or whether they had contractually bound themselves. Tolaini wanted to develop a site he owned. To that end, he contacted Courtney who was to act as the building contractor and introduce someone to finance the project. Courtney wrote Tolaini a letter in which he stated that he was in a position to introduce Tolaini to people interested in supplying the requisite financing. Assuming that financial arrangements would be concluded, he asked Tolaini to instruct his quantity surveyor to negotiate a fair and reasonable contract sum in respect of the project to be constructed by Courtney. In his reply, Tolaini agreed to these terms. Tolaini obtained financing for the project through Courtney's assistance and appointed his quantity surveyor to negotiate the price of the construction work with Courtney. These negotiations, however, broke down because of differences as to price. Tolaini employed another firm of contractors to do the cons-

²³ [1975] 1 All E.R. 716.

truction work and Courtney sued for breach of contract, claiming loss of profits. The Court held that no contract had been formed between the parties. There was no agreement as to price or the way in which the price was to be calculated. There was only an agreement to negotiate fair and reasonable terms. Everything was left to be agreed upon in the future. The Court refused to recognise a contract to negotiate,²⁴ holding that such agreement was too uncertain to have any binding force. A contract to negotiate was the same as a contract to enter into a contract — it was no contract at all. When a fundamental term such as price was left to be the subject of further negotiation, there could be no binding contract between the parties.

In practice, the two types of uncertainty overlap. In determining whether the parties have reached agreement or whether they are merely negotiating, the courts will look at whether the essential terms of the alleged contract have been determined by the parties. Hence, in the *Lake Ontario Cement* case, the Court saw that all the essential terms had been agreed upon in the letters and there was nothing to be clarified by the formal contract, whilst in the *Courtney* case the parties had not agreed upon the price for the construction project but had left it open for future agreement.²⁵

It has been necessary for the purposes of exposition to keep the two kinds of uncertainty distinct and the question now arises as to whether the terms of the agreement are sufficiently clear and complete. It is not easy to predict the court's decision in any given case. On the one hand the court is reluctant to conclude that the parties have failed to reach a binding agreement. In this regard reference is often made to Lord Tomlin in *Hillas v. Arcos*:

[T]he problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.²⁶

To this end the court has recourse to implied terms to give effect to the presumed intentions of the parties. On the other hand the court does not want to make the contract for the parties. The imposition of terms might result in an injustice to one or other of the parties and it is the parties' own fault if they have failed to agree on

²⁴ Thereby it doubted a *dictum* of Lord Wright in *Hillas v. Arcos* [1932] All E.R. 494, 147 L.T. 503 (H.L.).

²⁵ The recent decision of *Deslippe v. Maguire Construction* (1976) 66 D.L.R. (3d) 130 (Sask.Q.B.) encompasses both types of uncertainty.

²⁶ *Supra*, note 24, 499.

essential matters. Each party is entitled to know what his obligations are under a given agreement:

It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain.²⁷

It is interesting to contrast *MacIver v. American Motors*²⁸ with *Dwinell v. Custom Motors*.²⁹ In *MacIver* the plaintiff, a motor vehicle dealer, was negotiating with the defendant manufacturer for the removal of the dealership to larger premises. As part of these negotiations the defendant undertook to absorb the dealer's business losses until the completion of the new franchise agreement. There was no specification of the method by which the defendant would take care of such losses and the Court held that this was a matter entirely within the discretion of the defendant. The method was of no concern to the plaintiff. All that was important to the plaintiff was the fact that the defendant had undertaken such an obligation. The plaintiff was entitled to damages for breach of contract. In *Dwinell* the Court reached an opposite conclusion despite the fact that the obligations undertaken were at least as clear as in *MacIver*. The plaintiff had paid a deposit of \$500 to the defendant on the purchase of a used car which the plaintiff was ultimately unable to buy. An agreement was reached between the parties whereby the \$500 would be kept by the defendant to be used as a deposit when the plaintiff did in fact purchase a car valued at \$1395 or more. The plaintiff claimed the return of his deposit and succeeded because the Court found that the agreement was too uncertain to be enforceable, leaving essential matters to future agreement. No car or type of car was specified. No limit was placed upon the time within which the purchase had to take place. Nothing was said as to how the subsequent purchase was to be financed. Arguably, the obligations were as clear as they were in *MacIver* and yet the Court held that no binding contract had been formed.

The problem of certainty is often raised when land is involved and there is no clear statement as to how the purchase price is to be paid. Thus in *Phibbs v. Choo*³⁰ the parties entered into an agreement for the purchase of a parcel of land. The price was to be

²⁷ *Scammel v. Ouston* [1941] A.C. 251, 268-69 (H.L.) *per* Lord Wright.

²⁸ (1976) 70 D.L.R. (3d) 473 (Man.C.A.).

²⁹ (1975) 12 N.S.R. (2d) 524 (S.C.App.Div.).

³⁰ [1977] 1 W.W.R. 352 (Alta S.C.App.Div.).

... \$48.00 per cultivated acre and \$24.00 per grassland acre.

Half the purchase price was to be cash on possession of clear titles, the balance to be ½ the crop with no interest charged, on balance owing.^{30a}

The Court held that the contract was too uncertain to be specifically enforceable. There was nothing to indicate how the cash was to be paid or whether the vendor was entitled to security for any unpaid balance. No form of security was specified. Similarly there was no certainty as to what constituted one-half the crop, for example, as to whether it included hay. The purchaser argued that the provision as to crop payment was inserted for his benefit and that he could waive that condition and pay the total purchase price. This argument was rejected on the ground that "before a waiver or a relinquishment of a benefit may be permitted so as to allow specific performance, there must first be established that there is in existence a contract which may be sued on."³¹ It is difficult to appreciate why waiver should not have been available in these circumstances. The vendor would not have been prejudiced and there would have been no uncertainty as to the mode of paying the purchase price.

In *Kazakoff v. Milosz*,³² however, Moshansky J. was able to imply terms to render the parties' agreement sufficiently certain. The plaintiffs exercised an option to purchase the defendants' house. The purchase price was to be paid in the following manner:

Twenty thousand (\$20,000.00) dollars in cash and the remaining seven thousand nine hundred and ninety (\$7,990.00) dollars to be carried as a second mortgage by the vendor for a period of twenty years at an interest rate of nine and one quartier (9¼%) per cent simple interest per annum.³³

There was evidence, accepted by the Judge, that the parties had agreed that the second mortgage would be amortized over twenty years and that repayments would be monthly. Therefore, the Court concluded that it was a simple matter to determine the exact amount of each monthly payment. It was an implied term that the second mortgage was to be "repaid in blended monthly payments of principal and interest, amortized over a term of 20 years at 9¼ per cent interest per annum."³⁴ Specific performance was ordered.

It is far less common for an agreement for the sale of goods to be void for uncertainty. The applicable *Sale of Goods Act* is able to

^{30a} *Ibid.*, 353.

³¹ *Ibid.*, 359 per Morrow J.A.

³² *Supra*, note 19.

³³ *Ibid.*, 278.

³⁴ *Ibid.*, 288.

fill many of the gaps that the parties may leave. Thus, in *Kay Corporation v. Dekeyser*,³⁵ the parties agreed on the terms of a contract for the sale of goods except the time of payment. The buyer wanted to have some credit arrangement whilst the seller demanded payment on delivery. There was evidence that the parties had negotiated with respect to the time of payment but these negotiations had fallen through. Despite this, the Court relied upon section 27 of *The Sale of Goods Act*³⁶ of Ontario for the implication of the condition that payment was to be made on delivery.

C. Conditional agreements

A problem which has come to the fore in recent years is the effect of conditions precedent. The context in which the leading cases have arisen is that of the sale of land where one of the parties wants to protect himself against the non-happening of a certain event, such as the availability of mortgage financing. Two questions are raised by the cases. First, what are the obligations of the parties pending the satisfaction of the condition and secondly, can one or other of the parties unilaterally waive the necessity for fulfilment of the condition?

The first question is easier to answer. It is clear that implied obligations will be imposed on both parties prior to the satisfaction of the condition. Taking the simplest example of a condition precedent — there is a contract for the sale of land subject to the purchaser obtaining a mortgage for sixty per cent of the purchase price within one month of the date of the agreement. The vendor will be under an obligation to wait for the specified period to see whether the condition is fulfilled and will be unable to sell the land to a third party in the meantime and the purchaser will be under an obligation to use reasonable efforts to bring about the satisfaction of that condition. In other words, the agreement between the parties is not denuded of legal effect merely because it is subject to a condition. The parties cannot act as if there were no contract between them.³⁷ Thus in *Whitehall Estates Ltd v. McCallum* a contract for

³⁵ (1977) 76 D.L.R. (3d) 588 (Ont.C.A.).

³⁶ R.S.O. 1970, c.421.

³⁷ Thus, in *MacLean v. Ritchie & Ritchie* (1977) 21 N.S.R. (2d) 446, a contract for the sale of land, entered into on a Sunday, was subject to the purchaser's raising the purchase price by a certain date. The vendor argued that the agreement contravened the *Lord's Day Act*, R.S.C. 1970, c.L-13, s.4. The Court upheld that contention. The fact that the agreement was conditional upon the arranging of financing did not prevent it from being legally effective. The financing provision was not a condition precedent to the formation of

the sale of land was entered into subject to the purchaser "raising [a mortgage] of [approximately] 75% on or before June 30th 1972".³⁸ In the meantime, the vendor sold the land to a third party. The purchaser treated that as an anticipatory breach of contract and sued the vendor for specific performance. The Court held that the sale by the defendant was a breach of contract because he was under an obligation to wait for the specified period to see whether the plaintiff could arrange the necessary mortgage. Furthermore, the defendant's breach relieved the plaintiff from any obligation to satisfy the condition and he could immediately sue for specific performance:

It seems clear to me that the respondent by his conduct in entering into a contract to sell the land to a third party and informing the appellant of his refusal to sell rendered the performance of the condition impossible from a practical point of view and made it clear that he would not perform his obligation in any event.³⁹

In *Hogg v. Wilken*⁴⁰ an agreement for the sale of land was conditional upon the vendors obtaining a severance of two acres from the land agreed to be sold on or before May 15, 1974. The vendors applied to the appropriate committee for severance but withdrew their application on the ground that the committee would not view it favourably. The Court held that the purchaser was entitled to a mandatory order to compel the vendors to proceed with the application. The defendants were not acting in good faith to satisfy the condition and hence they were in breach of their obligations under the contract. "[T]he defendants cannot rely on their own failure to permit their application for severance to be determined by the committee as a ground for avoiding the contract."⁴¹ Similarly, in *Walton v. Landstock Investments Ltd*⁴² an obligation was placed upon the defendant to use reasonable efforts to satisfy the condition precedent and hence it was liable in damages for failure to exert such efforts.⁴³

the contract. This decision should be contrasted with that of Matas J. in *Re Grier & Krivak* (1972) 31 D.L.R. (3d) 381 (Man.Q.B.) where, on similar facts, the Judge held that the agreement was not avoided by the statute.

³⁸ (1975) 63 D.L.R. (3d) 320, 322 (B.C.C.A.).

³⁹ *Ibid.*, 336 per McIntyre J.A.

⁴⁰ (1974) 51 D.L.R. (3d) 511 (Ont.H.C.).

⁴¹ *Ibid.*, 513-14.

⁴² (1976) 72 D.L.R. (3d) 195 (Ont.C.A.).

⁴³ See also *Great Georgian Realty Group v. Genesis Marketing Organization* (1977) 76 D.L.R. (3d) 592 (Ont.H.C.).

The more difficult problem relates to the circumstances in which one party can unilaterally waive the necessity to comply with the condition and treat the contract as unconditional. This problem was directly faced by the Supreme Court of Canada in *Barnett v. Harrison*.⁴⁴ An agreement for the sale of land was conditional, *inter alia*, upon the purchaser obtaining approval for zoning changes. The agreement provided that if these conditions were not complied with, the contract would be null and void. The purchaser claimed that the conditions had been inserted solely for his benefit and could be unilaterally waived by him. The Supreme Court was unanimous in holding that conditions precedent could be waived by one party if there was an express waiver clause in favour of that party. Since there was an express waiver clause in respect of other conditions in the agreement, the Court held that these others could be the subject of a unilateral waiver.

The effect of an express waiver clause was considered by the British Columbia Supreme Court in *Hobart Investment v. Walker*.⁴⁵ An agreement for the sale of land was conditional on the purchaser's acquisition of certain other land and on rezoning. The agreement provided that these conditions were inserted for the sole benefit of the purchaser and could be waived by him, in whole or in part. Meredith J. held that this agreement was in reality a disguised option to purchase. The purchaser was bound only at its election. Presumably, by construing the arrangement as an option, the purchaser was under no implied obligation to use reasonable efforts to bring about the fulfilment of the conditions. On the facts, the trial Judge concluded that the option had not been exercised and hence the purchaser could not claim specific performance. The Court of Appeal rejected Meredith J.'s analysis of the contract.⁴⁶ It was not an option but simply a contract for the sale of land subject to two conditions precedent. Once the purchaser waived performance of these conditions, as it was entitled to do under the agreement, a valid enforceable contract resulted and the purchaser could sue for specific performance. The decision of the Court of Appeal is preferable. The vendor had not purported to grant an option and it was artificial to regard the transaction in that light.

The Supreme Court in *Barnett*, however, was divided on the issue of whether one party could waive conditions precedent in the absence of an express waiver clause. The majority, in a judgment

⁴⁴ [1976] 2 S.C.R. 531.

⁴⁵ (1976) 68 D.L.R. (3d) 348.

⁴⁶ (1977) 76 D.L.R. (3d) 156.

delivered by Dickson J., held that in those circumstances there was no right to a unilateral waiver. The purchaser could not waive fulfilment of the conditions even though, arguably, they were inserted for his sole benefit. To allow waiver would be to rewrite the contract for the parties. The parties should have expressly allowed a right of waiver. By refusing to allow waiver, Dickson J. said that the Court did not have to make the difficult determination of whether or not the conditions were inserted solely for the benefit of one party. Furthermore, if the purchaser could either rely on the conditions or waive them, he would in effect have an option to purchase the land for which he had paid nothing. Thus if the land increased in value, he could waive compliance and demand specific performance but if the land declined in value, he would not waive compliance and the agreement would become null and void in accordance with its terms.

The reasoning of the majority is too broad in ostensibly denying waiver in all cases where there is no express waiver clause. If it can be established that a condition has been inserted into the contract to protect one party, then there is no reason why waiver by that party should be unavailable. The other party is not prejudiced in any way. In many cases it is not difficult to determine that the conditions were inserted solely for the benefit of one party. The fact that occasionally it may be a difficult determination is no ground for denying waiver in all cases. Again, it is strange to speak of the purchaser having an option if he is allowed to waive performance of the conditions. He does not have an option because he is under an obligation to use reasonable efforts to satisfy the conditions. He cannot just sit back and wait for the agreement to come to an end. The actual decision in *Barnett*, however, can be supported on the ground that the parties' intention was to preclude unilateral waiver of the zoning conditions. Other conditions in the contract were the subject of an express waiver clause and so the absence of such a clause in respect of the zoning conditions was significant. Moreover, the agreement provided that the contract should become null and void if the relevant conditions were not complied with. Arguably, therefore, the parties had expressed their intention that these conditions could not be waived.

Dickson J. in *Barnett* was forced to deal with the case of *Beauchamp v. Beauchamp*.⁴⁷ There, an agreement for the sale of land was conditional upon the purchaser's being able to obtain within fifteen days, a first mortgage of \$10,000 and a second mortgage of \$2,500.

⁴⁷ [1973] 2 O.R. 43 (C.A.); aff'd [1974] S.C.R. v.

Within the fifteen day period, the purchasers were able to arrange a first mortgage for \$12,000 whereupon they notified the vendors that the conditions had been fulfilled. The vendors refused to close the transaction on the ground that the condition had not been complied with. The Ontario Court of Appeal held that that condition had been met or alternatively, it had been waived by the purchasers. Dickson J. saw no difficulties in that decision:

That case should, I think, be regarded as one in which the condition precedent was satisfied and not one in which it was waived.⁴⁸

Both Laskin C.J. and Spence J. dissented in *Barnett*:

A condition which is characterized as a condition precedent may be one in which both parties have an interest and yet it may be subject to waiver at the suit of one only of the parties. That is because their interest in it may not be the same. The condition may be for the protection of one party only in the sense that it is solely for his benefit, but it may be important to the other party in the sense that he is entitled to know the consequence of its performance or waiver by the date fixed for its performance so that he may, if he is the vendor, either collect his money or be free to look for another purchaser. It would, in my view, be a mistake to move from the fact that both parties have an interest in the performance or non-performance of a condition of the contract to the conclusion that the condition cannot therefore be waived at the suit of the one party for whose sole benefit the condition was introduced into the contract.⁴⁹

The fact that the condition might depend upon the conduct of a third party did not make that contingency a true condition precedent which could not be waived. Here the purchasers were perfectly entitled to waive compliance with the condition and to obtain specific performance.

The majority decision was soon followed by the British Columbia Court of Appeal in *Matrix Construction v. Chan Go See*.⁵⁰ The agreement for sale contained a clause that it was subject to the purchaser's acquiring adjoining property by a specified date and the Court held that this condition could not be unilaterally waived by the purchaser. The Court agreed with Dickson J.'s treatment of *Beauchamp*. However, Henry J. in *Brooks v. Alker*⁵¹ relied upon *Beauchamp* for the proposition that the purchaser could waive compliance with a "subject to financing" clause, neatly sidestepping *Barnett* by saying that the Supreme Court in that case expressly endorsed *Beauchamp*. It would seem that the law in this area is not as clear

⁴⁸ *Supra*, note 44, 560.

⁴⁹ *Ibid.*, 538-39, *per* Laskin C.J.

⁵⁰ [1976] 2 W.W.R. 764.

⁵¹ (1975) 60 D.L.R. (3d) 577 (Ont.H.C.).

as the majority decision in *Barnett* would suggest. A distinction must be drawn between "subject to financing" clauses and other conditions. While the courts are prepared to permit waiver of financing provisions relying on *Beauchamp*, it is unlikely, in view of *Barnett*, that one party will be able to waive other kinds of conditions in the absence of an express waiver clause.

D. Consideration

It has been established since *Stilk v. Myrick*⁵² that a plaintiff does not furnish consideration by promising to perform contractual obligations already owed to the defendant under a previous contract between the parties. *Gilbert Steel Ltd v. University Construction Ltd*⁵³ provides a recent application of this rule. In that case, the plaintiff, in a written contract, undertook to supply steel at a fixed price for construction work being carried out by the defendant. The plaintiff then discovered that steel prices were rising and sought an agreement for an increase in price for the further supply of steel under the contract. The defendant orally agreed to that variation and accepted deliveries of steel against invoices reflecting the raised price. It did not, however, pay the price increase and the plaintiff sued for the difference between the original contract price and the new price. The Court held that the new arrangement was not supported by fresh consideration and was, therefore, unenforceable. The steel company was already obliged to deliver steel at the original contract price and consequently promised nothing of value in exchange for the defendant's promise to pay the higher price. The plaintiff argued that the parties had entered into a totally new contract and had thereby rescinded their original agreement. The consideration for the new contract was the parties' mutual agreement to forego their rights under the old, partially executory, contract.⁵⁴ The Court rejected that contention, holding that the parties did not intend to rescind their original agreement and to replace it with a new one. This was a simple case of the variation of an agreement unsupported by fresh consideration. The alteration was solely for the plaintiff's benefit and hence it could not be enforced by him.

⁵² (1809) 2 Camp. 317, 170 E.R. 1168.

⁵³ (1976) 12 O.R. (2d) 19 (C.A.).

⁵⁴ In *Rottacker Farms v. C & M Farms* (1976) 2 A.R. 1 (S.C.App.Div.) the Court held that the parties had mutually agreed to rescind their old contract and to enter into a new arrangement. The new agreement was, therefore, supported by consideration.

One of the submissions of the plaintiff in the *Gilbert Steel* case was that the defendant, by its conduct in not repudiating the invoices as they were received, had acquiesced in the price increase and hence was estopped from pleading a lack of consideration. The Court rejected that argument on the ground that estoppel could not be used to create a cause of action; it could not be used to supply consideration where there was none, so as to create a contract. A recent case in England, however, suggests that promissory estoppel can sometimes be used to create a cause of action. Lord Denning M.R. in *Evenden v. Guildford City Football Club*⁵⁵ said that the doctrine of promissory estoppel was not limited to cases where the parties were in an existing contractual relationship and one of the parties promised that he would not insist upon his rights under that contract. He stated the doctrine of estoppel in broad terms:

It applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act on it and he does act on it.⁵⁶

In that case, Evenden was employed, from 1955, by a supporters' club of a football club to work as a groundsman. In 1968 it was decided that he should be employed by the football club itself to do the same work. In accordance with that decision, he ceased to be employed by the supporters' club. It was understood by everyone concerned that Evenden would not be prejudiced in any way by the change-over and that his employment should be regarded as continuous. In 1974 he was made redundant and he claimed that he was entitled to a redundancy payment calculated on the basis that he had been continuously employed from 1955-1974. The defendant argued that the redundancy payment should be based on the period he had been employed by the football club. Lord Denning M.R. held, *inter alia*, that this was a case where the doctrine of promissory estoppel applied. A representation had been made by the defendant that Evenden's employment would be treated as continuous:

That representation was intended to be binding and intended to be acted on. He did act on it. He did not claim from the supporters' club the redundancy payment to which he would otherwise have been entitled from that club. Six months later his claim against the supporters' club was barred by lapse of time. It would be most unfair for the football club to go back now on that representation... . The employment must be treated as continuous for 19 years.⁵⁷

⁵⁵ [1975] 3 All E.R. 269 (C.A.).

⁵⁶ *Ibid.*, 273.

⁵⁷ *Ibid.*

In general, the court does not inquire into the adequacy of consideration. On occasions, however, the inadequacy of the consideration goes to the question of unconscionability. If the consideration is markedly inadequate and if there is a serious inequality in the bargaining power of the parties, the court may set the contract aside as being unconscionable. Such was the situation in *Pridmore v. Calvert*⁵⁸ in which the plaintiff was injured as a result of the negligent driving of the defendant. Soon after the accident she was interviewed by an insurance adjuster and she signed a release of all claims arising out of that accident for the sum of \$331.40. She later sued the defendant in tort and her damages were assessed at about \$21,000. The Court held that the release was no bar to her claim. It would be inequitable to hold her to that bargain. The amount received by her was totally inadequate and the parties were on a substantially unequal footing. The plaintiff was still suffering from the effects of the accident when she signed the release and she received no independent advice. Indeed, the Court determined that no independent person would have advised her to agree to that settlement.⁵⁹

E. Privity

A difficult question is whether a defendant can rely upon an exemption clause expressed for his protection when he is not a party to the contract containing that clause. In 1962 the House of Lords in *Scruttons Ltd v. Midland Silicones Ltd*⁶⁰ held that stevedores were not entitled to the protection of an exemption clause in a contract of carriage because they were not parties to that contract. They were held to be liable in negligence. However, the possibility of protection was left open where the carrier expressly contracted as agent for the stevedores. Lord Reid specified four propositions to be satisfied before an agency argument could be accepted:

I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later

⁵⁸ (1975) 54 D.L.R. (3d) 133 (B.C.S.C.).

⁵⁹ The Court followed the earlier decision, on similar facts, of Anderson J. in *Towers v. Affleck* [1974] 1 W.W.R. 714 (B.C.S.C.).

⁶⁰ [1962] A.C. 446 (H.L.).

ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.⁶¹

The problem was reconsidered by the Privy Council in 1974 in *The New Zealand Shipping Co. v. A.M. Satterthwaite & Co.*⁶² where the majority (Lords Wilberforce, Hodson and Salmon) concluded that Lord Reid's four propositions had been satisfied. A contract was made between a shipper and a carrier for the carriage of machinery from England to New Zealand. The machinery was damaged through the negligence of the defendant stevedore whilst being unloaded and the question was whether the stevedore was entitled to rely on an exemption clause in the bill of lading as against the consignee of the goods. The exclusion clause expressly protected agents and independent contractors of the carrier and it provided that the carrier was acting as agent for all persons who might act as its servants, agents or independent contractors. Lord Wilberforce, delivering the majority judgment, held that Lord Reid's first three propositions were clearly satisfied. The bill of lading made it quite clear that the stevedore was intended to be protected by the exemption clause. The carrier expressly contracted as agent for the stevedore and had authority from the stevedore to do so. Indeed, the defendant habitually acted as the carrier's stevedore in the port of discharge and was the parent company of the carrier.

The only difficulty lay with Lord Reid's fourth proposition. Had any consideration moved from the stevedore? Lord Wilberforce analysed the transaction in traditional terms by holding that:

[T]he bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers and the stevedore, made through the carrier as agent. This became a full contract when the stevedore performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions and limitations contained in the bill of lading.⁶³

The shipper had made an offer of a unilateral contract to the stevedore and the stevedore had accepted that offer by doing the requisite act. The fact that the stevedore was already under an obligation to the carrier to discharge the cargo did not prevent its performance of those services from amounting to consideration:

An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration and does so in the present case: the promisee obtains the

⁶¹ *Ibid.*, 474.

⁶² [1974] 1 All E.R. 1015.

⁶³ *Ibid.*, 1020.

benefit of a direct obligation which he can enforce. This proposition is illustrated and supported by *Scotson v. Pegg*⁶⁴ which their Lordships consider to be good law.⁶⁵

The consignee, in the same position as the consignor, was entitled to the benefits of and bound by the stipulations in the bill of lading by his acceptance of it and request for delivery of the goods under it. The majority also thought that, by giving effect to the bill of lading so as to protect the stevedore, its decision was in accordance with the intentions of the parties:

It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight. They [their Lordships] see no attraction in this consequence.⁶⁶

Lords Dilhorne and Simon delivered dissenting judgments. They agreed that it would be possible for a well drafted exemption clause to protect third parties but concluded that the exclusion clause under consideration was not sufficiently clear. On its face, it was part of an agreement between the shipper and the carrier and could not be construed as an offer of a unilateral contract by the shipper to the stevedore.

The British Columbia Supreme Court in *Calkins & Burke Ltd v. Far Eastern Shipping Co.*⁶⁷ refused to follow the Privy Council decision. Schultz J. said that he was bound to apply *Scruttons v. Midland Silicones* as adopted by the Supreme Court of Canada in *Canadian General Electric Co. v. Pickford & Black Ltd.*⁶⁸ In particular, he distinguished the *New Zealand Shipping* case on the ground that there was no evidence that the carrier had authority to contract as agent for the stevedore. Presumably, we must wait for the Supreme Court of Canada to determine whether or not the Privy Council decision will be applied in Canada.

*Beswick v. Beswick*⁶⁹ illustrated the use of specific performance to avoid some of the injustices of the privity doctrine. That decision was recently applied in *Waugh v. Slivak*.⁷⁰ A father and a son died in an air crash. Shortly after their death, those people interested in

⁶⁴ (1861) 6 H. & N. 295, 158 E.R. 121.

⁶⁵ *Supra*, note 62, 1021.

⁶⁶ *Ibid.*

⁶⁷ (1976) 72 D.L.R. (3d) 625.

⁶⁸ [1971] S.C.R. 41.

⁶⁹ [1968] A.C. 58 (H.L.).

⁷⁰ (1975) 62 D.L.R. (3d) 577 (B.C.S.C.).

the father's estate executed a contract to govern the distribution of the estates and agreed to release all claims against both estates. The father's former wife later repudiated this agreement and the other contracting parties sued her for specific performance. It was held that the action should succeed. Only one of the plaintiffs had furnished consideration to support the agreement but she could maintain the action for the benefit of herself and the third parties. Bouck J. said:

Beswick v. Beswick decided that specific performance of a contract can be ordered where the persons between whom consideration passed or their personal representatives are parties to the action. This is so despite the fact that strangers to the contract who have not given consideration may benefit from the decree.⁷¹

F. *The Statute of Frauds*

The doctrine of part performance was considered by the House of Lords in *Steadman v. Steadman*.⁷² It seems that the English courts are more liberal than their Canadian counterparts in determining the kinds of acts needed to invoke the doctrine. Lord Simon said:

If the plaintiff proves that he carried out acts in part performance of *some contract* to which the defendant was a party while the latter stood by, it becomes inequitable that the latter should be allowed to plead, in exoneration of reciprocal obligations, that *any such contract* was unenforceable by reason of the statute — particularly when it is borne in mind that few acts of performance point exclusively to a particular contract, least of all a particular multi-term contract. But 'some such contract' must be a contract with the defendant — otherwise no equity arises against him to preclude his pleading the statute.⁷³

In this regard, he followed the principle stated by Upjohn L.J. in *Kingswood Estate Co. Ltd v. Anderson*:

The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.⁷⁴

The test in Canada is somewhat narrower. Rand J. in *Deglman v. Guaranty Trust Co. of Canada* expressed it in the following manner:

⁷¹ *Ibid.*, 587.

⁷² [1974] 2 All E.R. 977.

⁷³ *Ibid.*, 999.

⁷⁴ [1963] 2 Q.B. 169, 189 (C.A.) citing Fry, *Treatise on the Specific Performance of Contracts* 6th ed. (1921) 278, para.582.

In relation to specific performance, strict pleading would seem to require a demonstrated connection between the acts of performance and a dealing with the land before evidence of the terms of any agreement is admissible. This exception of part performance is an anomaly; it is based on equities resulting from the acts done; but unless we are to say that, after performance by one party, any refusal to perform by the other gives rise to them, which would in large measure write off the section, we must draw the line where those acts are referable and referable only to the contract alleged.⁷⁵

McDonald J. in *Toombs v. Mueller*⁷⁶ recognized that there was this divergence of judicial opinion between England and Canada. He assumed, without deciding, that the narrower test was the law in Alberta but came to the conclusion that the plaintiffs' acts of part performance had satisfied even that test. In that case the plaintiffs had entered into possession of the land in question and had paid mortgage instalments to the two mortgagees. Those acts were unequivocally referable to the alleged oral contract of sale and were inconsistent with a tenancy agreement.

The Ontario Court of Appeal in *Ackerman v. Thompson and McKinnon, Auchincloss, Kohlmeyer, Inc.*⁷⁷ has confirmed the view that the doctrine of part performance applies solely to contracts involving land and not to other agreements which might fall foul of *The Statute of Frauds*.^{77a}

III. Contents of contract

A. Terms or representations

It is often difficult to determine whether a pre-contractual statement has become a term of the contract between the parties. It might be thought that, if the statement is expressly included in the later contract, it must amount to a term of that agreement and cannot operate as a mere representation. This was not the position adopted by the Ontario Court of Appeal in *Richview Construction Co. v. Raspa*.⁷⁸ The plaintiff was interested in purchasing a building lot. It saw a suitable lot and asked the real estate agent whether the

⁷⁵ [1954] 3 D.L.R. 785, 787 (S.C.C.). See also *Brownscombe v. Public Trustee of Alberta* [1969] S.C.R. 658; *Thompson v. Guaranty Trust Co. of Canada* (1973) 39 D.L.R. (3d) 408 (S.C.C.).

⁷⁶ (1974) 47 D.L.R. (3d) 709 (Alta S.C.); rev'd without written reasons, [1975] 3 W.W.R. 96 — see Editor's Note [1975] 5 W.W.R. 520.

⁷⁷ (1974) 47 D.L.R. (3d) 524.

^{77a} R.S.O. 1970, c.444.

⁷⁸ (1975) 11 O.R. (2d) 377.

lot was fully serviced. The agent replied that it was and a clause in the subsequent agreement of purchase so stated. The land was conveyed to the plaintiff and when it was later discovered that the lot was not fully serviced, the plaintiff brought an action for damages for breach of contract. The first question was whether the statement in the agreement was a contractual term or a mere representation:

To elevate a "mere representation" to the category of a "warranty" it is not enough to show that the statement, originally made orally, has been included in the written contract. Such inclusion simply puts beyond dispute that the representation was made...⁷⁹

The Court determined that the statement was intended to be a term because it was clear that the purchaser would not have made the purchase without the assurance that the lot was fully serviced, and because the defendant should have known whether or not the statement was correct. The Court, however, further held that the warranty had not survived the subsequent conveyance of the land. There was no express statement in the deed that the lot was fully serviced and hence it was too late for the plaintiff to succeed. The principle laid down by Duff J. in *Redican v. Nesbitt* came into play:

Finality and certainty in business affairs seem to require that as a rule, where there is a formal conveyance, such a condition or warranty should be therein expressed, and that the acceptance of the conveyance by the vendee as finally vesting the property in him is the act which for this purpose marks the transition from contract *in fieri* to contract executed; and this appears to fit in with the general reasoning of the authorities.⁸⁰

The burden was thus upon the plaintiff to make a careful search before transfer to determine whether the lot was fully serviced or to include an express term to that effect in the deed of conveyance.

If the pre-contractual statement is not expressly included in the contract, the plaintiff will be faced not only with the problem of whether it was intended to take effect as a term but also with the rigours of the parol evidence rule. He will have two options open to him: he may be able to establish that the contract was intended to be partly written and partly oral; or he may be able to show that the statement formed the basis of a contract collateral to the main contract. The first method was adopted by Roskill and Geoffrey Lane L.JJ. in *J. Evans & Son v. Andrea Merzario Ltd.*⁸¹ The plaintiff imported machines into England from Italy and employed the services of the defendant to arrange transportation. The

⁷⁹ *Ibid.*, 382.

⁸⁰ [1924] S.C.R. 135, 146-47.

⁸¹ [1976] 2 All E.R. 930 (C.A.).

defendant proposed the use of transportation containers. The plaintiff wanted to ensure that these containers would be shipped under deck and the defendant gave an oral assurance to that effect. On the faith of that assurance, the plaintiff agreed to the use of such containers. Due to an oversight, the first container used was shipped on deck and the machine was lost overboard. The plaintiff sued for damages for breach of contract and the defendant relied upon a clause in the contract of carriage which gave the defendant complete freedom as regards the means of transportation of the goods and which exempted the defendant from liability for loss or damage to such goods unless caused by the defendant's wilful neglect whilst in its actual custody. Roskill L.J. said that there was no need to resort to the device of the collateral contract. The contract here was intended to be partly oral and partly in writing:

The defendants gave such a promise which to my mind against this background plainly amounted to an enforceable contractual promise. In those circumstances it seems to me that the contract was this: "If we continue to give you our business, you will ensure that those goods in containers are shipped under deck"; and the defendants agreed that this would be so. Thus, there was a breach of that contract by the defendants when this container was shipped on deck; and it seems to me to be plain that the damage which the plaintiffs suffered resulted from that breach.⁸²

The defendant could not rely upon the express exclusion clauses because these were overridden by the prior oral assurance. The oral promise would have been illusory if the exemption clauses were upheld and hence, as a matter of construction, the parties did not intend those provisions to take effect.

Lord Denning M.R. preferred to rely upon the device of the collateral contract:

[I]t seems to me plain that Mr. Spano [the defendant's agent] gave an oral promise or assurance that the goods in this new container traffic would be carried under deck. He made the promise in order to induce Mr. Leonard [the plaintiff's agent] to agree to the goods being carried in containers. On the faith of it, Mr. Leonard accepted the quotations and gave orders for transport. In those circumstances the promise was binding.⁸³

The English Court of Appeal relied upon a collateral contract in the later case, *Esso Petroleum Co. v. Mardon*.⁸⁴ Esso acquired a site on the busy main street of a town for development as a service station. Figures were prepared and it was estimated that the annual

⁸² *Ibid.*, 935.

⁸³ *Ibid.*, 933.

⁸⁴ [1976] 2 All E.R. 5.

consumption of gas would be 200,000 gallons by the third year of operation. Esso applied for planning permission and the planning authority required the gas pumps to be placed at the back of the site where they would be accessible only by side streets and would not be visible from the main street. The result of this was to falsify the estimates prepared by Esso but no revised figures were prepared. Subsequently, Esso entered negotiations with the defendant for the lease of the service station. On the faith of the estimates, the defendant was induced to take a lease of the premises. The annual consumption of gas averaged about 70,000 gallons and the defendant was forced to give up possession. When Esso claimed possession of the station and money owing for gas supplied, the defendant counterclaimed, *inter alia*, for damages for breach of contract. The Court held that Esso was in breach of a collateral warranty. Esso did not guarantee that the annual consumption would be 200,000 gallons but it did impliedly promise that its forecast was reliable and had been made with reasonable care. Esso was in a position of special knowledge and expertise and its estimates had clearly induced the defendant to make the tenancy agreement. In those circumstances, the Court was ready to imply a collateral warranty.

The defendant also made a claim in tort for negligent misstatement and the Court of Appeal held that a duty of care could exist in respect of pre-contractual statements. The fact that the negotiations led to a contract between the parties did not preclude the application of *Hedley Byrne v. Heller*⁸⁵ to the pre-contractual dealings. Mardon, therefore, had alternative remedies in contract and tort. It will be interesting to see the extent to which the Canadian courts apply the law of negligent misstatement to representations made in advance of a contract. One stumbling block may be the *dictum* of Pigeon J. in *J. Nunes Diamonds Ltd v. Dominion Electric Protection Co.*:

Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can be considered as "an independent tort" unconnected with the performance of that contract...⁸⁶

B. *The relative importance of contractual terms*

Traditionally, a distinction has been drawn between two kinds of contractual terms — conditions and warranties. A breach of

⁸⁵ [1964] A.C. 465 (H.L.).

⁸⁶ (1972) 26 D.L.R. (3d) 699, 727-28 (S.C.C.).

condition entitles the innocent party to treat the contract as discharged whereas a breach of warranty does not. The question whether a provision is a condition or a warranty depends upon the intention of the parties at the time of making their agreement. This distinction was incorporated into *The Sale of Goods Act*. Thus, as an example, section 12(2) of the Ontario Statute provides:

Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract.⁸⁷

In 1962 the English Court of Appeal introduced a third kind of term.⁸⁸ This was a term which could not be categorized, at the formation of the contract, as a condition or a warranty. The innocent party's right to treat the contract as ended depended upon the nature of the breach of such a term and the seriousness of the consequences flowing from that breach. Arguably, this third type of term should not be relevant to sale of goods cases because the Act contemplated a rigid division between conditions and warranties. However, the English Court of Appeal in *Cehave NV v. Bremer Handelsgesellschaft*⁸⁹ decided that not all the terms in a contract for the sale of goods could be classified as conditions or warranties. There was room for innominate terms. That case concerned the sale of some tons of citrus pellets which were to be shipped "in good condition". Part of the cargo was severely damaged by overheating and the buyer rejected the whole cargo on the ground that the pellets had not been shipped "in good condition". The Court held that that term was not a condition in the traditional sense. The buyer should not have the right to reject the whole cargo unless there was a "serious and substantial" breach of that promise. Lord Denning M.R. said:

In my opinion therefore, the term "shipped in good condition" was not a condition strictly so called; nor was it a warranty strictly so called. It was one of those intermediate stipulations which gives no right to reject unless the breach goes to the root of the contract.⁹⁰

The breach, in that case, was slight and so the buyer was not entitled to reject the cargo but had to found his remedy in damages.

⁸⁷ R.S.O. 1970, c.421.

⁸⁸ *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26.

⁸⁹ [1975] 3 All E.R. 739.

⁹⁰ *Ibid.*, 748.

C. Exemption clauses and the doctrine of fundamental breach

In recent years, the courts have had little difficulty in evading the application of exemption clauses. If the document containing the exclusion clause is unsigned, the courts insist that the plaintiff must have reasonable notice of the exempting provision.⁹¹ If the document is signed, the court will construe any exempting clause strictly and will resolve any ambiguities against the defendant.⁹² Lord Denning M.R. is more radical in his treatment of exclusion clauses. In *Levison v. Patent Steam Carpet Cleaning Co.*, he stated:

[A]n exemption or limitation clause should not be given effect if it was unreasonable, or if it would be unreasonable to apply it in the circumstances of the case. I see no reason why this should not be applied today, at any rate in contracts in standard forms where there is inequality of bargaining power.⁹³

This approach, as yet, has not been followed. The courts prefer to adopt the more traditional methods of avoiding harsh exemption clauses.

As a final resort, there is always recourse to the doctrine of fundamental breach and recent authorities suggest that it is not difficult to establish that a fundamental breach has occurred. Since the House of Lords' decision in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*,⁹⁴ there has been some confusion as to the circumstances in which a defendant who is guilty of a fundamental breach will be prevented from relying upon an exemption clause in his favour. The rule, from cases like *R.G. McLean Ltd v. Canadian Vickers Ltd*⁹⁵ and *Harbutt's Plasticine Ltd v. Wayne Tank & Bump Co.*⁹⁶ seems to be that, if the plaintiff treats the breach as discharging the contract then the whole contract, including the exclusion clause, falls to the ground with the result that the defendant can no longer rely on that clause. If, on the other hand, the plaintiff elects to affirm the contract, it is a question of construction as to whether the exemption clause covers that fundamental breach.

*Canso Chemicals Ltd v. Canadian Westinghouse Co.*⁹⁷ is typical of the modern decisions. The defendant sold electrical equipment to

⁹¹ See, e.g., *Willis v. FMC Machinery & Chemicals* (1976) 68 D.L.R. (3d) 127, 149-50 (P.E.I.S.C.).

⁹² See, e.g., *Dabous v. Zuliani* (1976) 68 D.L.R. (3d) 414 (Ont.C.A.).

⁹³ [1977] 3 All E.R. 498, 503 (C.A.).

⁹⁴ [1967] 1 A.C. 361.

⁹⁵ [1971] 1 O.R. 207 (C.A.).

⁹⁶ [1970] 1 All E.R. 225 (C.A.).

⁹⁷ (1974) 54 D.L.R. (3d) 517 (N.S.S.C. App.Div.).

the plaintiff to be used in the production of chemicals. The equipment was unable to operate at full capacity because of a serious error in its design. It was repaired some two and a half months later and from that time operated satisfactorily. The plaintiff claimed for loss of profits during the period of reduced capacity and the defendant relied upon the following exemption clause in the contract:

The Company warrants the apparatus to be supplied hereunder to be of the kind designated or specified. The Company shall repair or replace any defective part or parts, f.o.b. the Company's factory, repair shop or warehouse, which prove to be defective under normal and proper use within one year from the date of shipment, provided that the Purchaser gives the Company immediate written notice of any such defect or defects. In no event ... shall the Company be liable for special or consequential damages or damages for loss of use and on expiration of the Warranty period, any liability of the Company shall terminate. This constitutes the only Warranty of the Company and no other warranty or condition, statutory or otherwise, shall be implied.⁹⁸

First, Coffin J.A. determined that a fundamental breach of contract had taken place by utilizing a very broad test:

I would crystallize the issue here by the following test — was the design error which resulted in the malfunction of the rectifier equipment such as to justify a repudiation of the contract by the respondent? I think under all the circumstances and in light of the authorities cited above⁹⁹ that it was. Put simply, the respondent ... had received equipment which was essentially different from that contemplated by the parties. Certainly it could not be suggested that it was within the contemplation of the parties that the equipment would have the design error it did.¹⁰⁰

Having established the fundamental breach, Coffin J.A. concluded that the plaintiff had the option of affirming or rejecting the contract. In this case, the plaintiff had elected to treat the contract as subsisting and, therefore, it was a question of construction to determine whether the exemption clause covered the breach involved. Coffin J.A. had few qualms in construing the clause against the defendant and allowing recovery by the plaintiff:

I am of the opinion that the ... exclusion clause in the present case can only be given business efficacy or indeed common sense if it is limited to liability to repair or replace parts that prove to be defective under normal and proper use within one year from the date of their shipment. Surely this is what the parties meant by the exclusion clauses and I think it is stretching one's imagination too far to say that in addition the parties

⁹⁸ *Ibid.*, 528.

⁹⁹ These authorities were the *Suisse Atlantique* case, *supra*, note 94 and the *Harbutt's Plasticine* case, *supra*, note 96.

¹⁰⁰ *Supra*, note 97, 534.

intended the exclusion clauses to relieve the appellant from all liability arising out of a breakdown or malfunction of the equipment due to a design error.¹⁰¹

MacKeigan C.J.N.S., in a vigorous and forceful dissent, felt that full effect should be given to the exemption clause as it was quite unambiguous. There was no inequality in the bargaining power of the parties and the clause did not purport to exclude all of the defendant's liability. He was also of the opinion that there had been no fundamental breach in these circumstances. There was only a temporary and a partial failure of the equipment and such a failure should not constitute a breach going to the root of the contract.

In *Findlay v. Couldwell*¹⁰² Ruttan J., in the British Columbia Supreme Court, was able to construe a very specific exclusion clause so as not to apply to a fundamental breach. A contract for the sale of a car provided that the vehicle was sold on an "as is" basis with no warranties or guarantees of any kind. Five days later the engine blew up and it was held that the plaintiff could recover damages for breach of contract. In construing the clause, Ruttan J. took account of pre-contractual representations made by the defendant. The defendant had advised the plaintiff that "this was a good little highway car, economic and reliable and that he had had the car completely checked out by his mechanic".^{102a} In these circumstances, the defendant was unable to rely upon the exemption clause. In *Inelco Industries Ltd v. Venture Well Services Ltd*,¹⁰³ however, a lease of a gas compressor provided that the lessee should assume the entire risk of loss and damage to the equipment from any cause whatsoever and that it was the lessee's duty to insure against such risk. Despite a possible fundamental breach by the lessor, the lessee elected to retain the compressor and it was damaged by fire whilst attempts were being made by the lessor to repair it. It was held that the lessee had expressly assumed the risk and could derive no assistance from the doctrine of fundamental breach. The clause allocating the risk of damage was clearly intended to cover this particular situation. Sinclair J.A. pointed out:

Responsible businessmen leasing and renting valuable equipment will, or ought to make arrangements to cover the possibility of loss from fire or other causes. Among other things, they will no doubt arrange their insurance coverage accordingly. I have no doubt whatever that

¹⁰¹ *Ibid.*, 537-38.

¹⁰² (1976) 69 D.L.R. (3d) 320.

^{102a} *Ibid.*, 324.

¹⁰³ (1975) 59 D.L.R. (3d) 458 (Alta S.C. App.Div.).

[the relevant clauses] ... of the lease were prepared with such thoughts in mind. Those provisions of the lease are perfectly clear, straightforward in their application.¹⁰⁴

The present Canadian position with regard to exemption clauses and fundamental breach was clearly stated by Weatherston J. in *Cain v. Bird Chevrolet-Oldsmobile Ltd* in 1976.¹⁰⁵ If the innocent party elects to terminate the contract because of a fundamental breach, then any exemption clause ceases to have effect. Even if he elects to affirm the contract, the courts will not construe an exemption clause so as to protect the defendant from liability for a fundamental breach. In that case, the defendant had sold a truck which was seriously defective and it was held that the buyer was entitled to terminate the contract and to recover damages despite a very wide exemption clause. On similar facts, the same conclusion was reached in Alberta in *Neilson v. Maclin Motors Ltd*.¹⁰⁶ The doctrine of fundamental breach is prospering in all parts of Canada.

In the *Levison* case, Lord Denning M.R. concluded that the doctrine of fundamental breach applies, with special force, where there is inequality of bargaining power:

If a party uses his superior power to impose an exemption or limitation clause on the weaker party, he will not be allowed to rely on it if he has himself been guilty of a breach going to the root of the contract.¹⁰⁷

Even in other cases, the court would construe an exemption clause so that, as far as possible, it would not protect against a fundamental breach.

A claim of fundamental breach has been rejected in very few recent decisions. One such case was *Peters v. Parkway Mercury Sales Ltd* in 1975.¹⁰⁸ In that case, the Court was reluctant to apply the doctrine of fundamental breach to the purchase of a six year old car with a speedometer reading of some 62,000 miles. At the time of the sale the defendant had given the plaintiff a written guarantee which provided that the defendant would pay fifty per cent of all repairs required within thirty days and fifteen per cent of any repairs required within two years. All other guarantees and representations were excluded. The plaintiff drove the car for thirty-eight days before it developed serious transmission problems. The Court held that the purchaser was unable to terminate the

¹⁰⁴ *Ibid.*, 467-68; see also *Henuset Bros v. Highland Stock Farms* (1975) 63 D.L.R. (3d) 554 (Alta S.C.).

¹⁰⁵ (1976) 69 D.L.R. (3d) 484 (Ont.H.C.).

¹⁰⁶ (1976) 71 D.L.R. (3d) 744 (Alta S.C.).

¹⁰⁷ *Supra*, note 93, 504.

¹⁰⁸ (1975) 10 N.B.R. (2d) 703 (S.C. App.Div.).

contract as there had been no fundamental breach. The fact that a secondhand car was involved was material to the Court's decision. Hughes C.J.N.B. said:

In my opinion there is a substantial distinction between the implied condition of fitness in the case of the sale of a secondhand car and that which is implied in the sale of a new car. Persons who purchase used cars, especially older models with substantial mileage, must expect defects in such cars will come to light at any time. In the present case the insistence of the plaintiff on the benefit of a used car guarantee and the reluctance of the vendor to give such a guarantee clearly indicate that the parties realized the possibility that the car was not likely to be free of defects and that some defects might come to light even within the first thirty days following the sale. In my view they entered into the contract of sale and purchase on that basis.¹⁰⁹

Despite this decision, the recent cases are moving towards a broader notion of fundamental breach with the result that it can almost be equated with any breach that entitles the plaintiff to treat the contract as discharged. A breach of condition and a fundamental breach are scarcely distinguishable.

IV. Elements vitiating contract

A. *Mistake*

Cheshire and Fifoot divide mistake into three generally acceptable categories — common mistake, mutual mistake and unilateral mistake.¹¹⁰ In common mistake, the parties have reached an agreement based upon some common fundamental assumption of fact which turns out to be false. Common mistake will rarely render a contract void unless it is a mistake as to the existence of the subject matter of the contract. The courts are, however, inclined to treat the agreement as voidable in equity and to set it aside on terms.¹¹¹ Sometimes, relief is available through the doctrine of rectification. If it can be established that the parties were in complete agreement on the terms of their bargain but a mistake was made in transcribing that oral agreement into written form, the courts will rectify the written contract so that it complies with the prior oral agreement. In *Glascar Ltd v. Polysar*,¹¹² the Court found that the parties had intended a contract for the sale of land to be

¹⁰⁹ *Ibid.*, 710-11.

¹¹⁰ Cheshire and Fifoot, *The Law of Contract* 9th ed. (1976) 206-207. These categories were accepted by Grange J. in *Stepps Investments v. Security Capital Corp.* (1976) 14 O.R. (2d) 259, 269-70.

¹¹¹ *E.g.*, *Solle v. Butcher* [1950] 1 K.B. 671 (C.A.).

¹¹² (1975) 61 D.L.R. (3d) 577 (Ont.H.C.).

conditional upon the defendant obtaining the necessary consent to severance and it rectified the written contract accordingly. Rectification constitutes an exception to the parol evidence rule and a heavy burden is placed upon the party seeking that remedy.

In mutual mistake, the parties are at cross purposes although neither party is aware of the other's mistake. Cheshire and Fifoot give the example of a contract for the sale of a car where each party believes that a different car is the subject matter of the sale. The question whether mutual mistake nullifies the contract depends upon an objective construction of the "agreement". Grange J. in *Stepps Investments v. Security Capital Corp.* expressed the test in this way:

The test in such a case is an objective one: if a reasonable man would upon all the evidence find a contract with specific terms the contract will stand, otherwise the contract will be voided by reason of the mistakes of the parties.¹¹³

The court, therefore, will enforce what a reasonable man would consider to be the agreement between the parties. If it is impossible, even on an objective test, to infer any agreement, then the court must hold there to be no contract.¹¹⁴ Southey J., in *Staiman Steel Ltd v. Commercial & Home Builders Ltd*, expressed the Court's approach to a mutual mistake:

In such a case, [*i.e.* mutual mistake] the Court must decide what reasonable third parties would infer to be the contract from the words and conduct of the parties who entered into it. It is only in a case where the circumstances are so ambiguous that a reasonable bystander would not infer a common intention that the Court will hold that no contract was created.¹¹⁵

In unilateral mistake, only one party is mistaken and the other party is aware or ought to be aware of that mistake. To render the contract void, the mistake must be as to the terms of the contract.¹¹⁶ In those cases where it is doubtful whether the contract is void, the courts are prepared to grant relief by treating the contract as voidable in equity. This was the approach taken by Grange J. in the *Stepps Investments*¹¹⁷ case. Indeed, the courts often prefer to grant equitable relief because, in that way, they have the discretion as to

¹¹³ (1976) 14 O.R. (2d) 259, 269 (H.C.).

¹¹⁴ *Raffles v. Wichelhaus* (1864) 159 E.R. 375 is one of the few cases where the contract was void for mutual mistake.

¹¹⁵ (1976) 13 O.R. (2d) 315, 320-21 (H.C.).

¹¹⁶ *McMaster University v. Wilchar Construction* [1971] 3 O.R. 801 (H.C.); *aff'd* without reasons (1973) 12 O.R. (2d) 512.

¹¹⁷ *Supra*, note 113. The Judge followed the decision of Denning L.J. in *Solle v. Butcher*, *supra*, note 111.

whether or not to set aside the agreement and they can impose terms as a condition of relief.

B. *Misrepresentation*

One question raised by recent cases is whether a contract involving land can be rescinded for misrepresentation after it has been executed. It is clear that if the misrepresentation is fraudulent the innocent party will still be entitled to rescind.¹¹⁸ It is now settled that the contract can also be set aside if the misrepresentation gives rise to an *error in substantialibus*. This doctrine was applied by the majority of the Alberta Court of Appeal in *Alessio v. Jovica*.¹¹⁹ That case concerned the sale of land to be used for the construction of a duplex. The defendant, through his real estate agent, represented that he foresaw no difficulties with the construction of such a duplex. In fact, a building permit would not be issued in respect of that lot until proper sewage facilities were installed at a cost of some \$3,000. The majority held that the vendor had made an innocent misrepresentation which led to an *error in substantialibus* and the purchaser was entitled to rescind the transaction, despite the execution of the contract:

In my opinion, the purchaser here received something completely different from that which it was innocently represented by the agent to be. Unless there is some other reason to the contrary, the sale should be rescinded.¹²⁰

One can see that the test proposed for establishing an *error in substantialibus* is broad and severely limits the rule of no rescission of an executed contract for the sale of land.¹²¹

A defendant often attempts to exclude liability for misrepresentations by an express clause in the contract to the effect that no representations have been made. It is clear that such clauses are not effective as against fraudulent misrepresentations. Thus, in *Chua v. Van Pelt*,¹²² the vendor of land fraudulently misrepresented to the purchaser the heating capacity of a boiler used to heat a greenhouse. The Court held that the purchaser was entitled to damages for fraudulent misrepresentation despite the presence of an exemption clause. "A party to a contract cannot rely on an exclusion

¹¹⁸ See, e.g., *Redican v. Nesbitt*, *supra*, note 80.

¹¹⁹ (1973) 42 D.L.R. (3d) 242; Allen J.A. dissented in part.

¹²⁰ *Ibid.*, 257 *per* Sinclair J.A.

¹²¹ *Alessio v. Jovica* has been followed subsequently in *Gronau v. Schlamp Investments* (1974) 52 D.L.R. (3d) 631 (Man.Q.B.) and *Byron Creek Collieries v. Coleman Collieries* (1975) 59 D.L.R. (3d) 533 (Alta S.C.).

¹²² (1977) 74 D.L.R. (3d) 244 (B.C.S.C.).

clause to avoid liability for fraud...¹²³ The Court in the *Alessio* case went further and held that an express exemption clause was not intended to cover an *error in substantialibus*. Such an error was analogous to a fundamental breach of contract and the clause would have to be abundantly clear to preclude relief from such a mistake.

C. Duress, undue influence and unconscionability

The law has developed three separate categories to deal with the problem of undue pressure exercised by one party to a contract — duress, undue influence and unconscionability.

Duress is the narrowest of the three categories. It is limited to physical threats to the person, threats of wrongful imprisonment and the unlawful detention of the victim's goods. The concept of duress was clearly explained by Spencer J. in *Saxon v. Saxon*:

The law draws a distinction between duress and undue influence. Duress in the execution of a contract or deed occurs when there is a physical compulsion of the person, which must be very rare, or when there is a threat to the person's life or limb, or a threat of a physical beating (mayhem) or of imprisonment... It may also take into account threats of a wrongful imprisonment or prosecution of the person ... and possibly of the person's near relative ...¹²⁴

In that case, a wife was entitled to set aside a conveyance to her husband of her one-half interest in the matrimonial home. There had been a history of domination by the husband and he had struck her on several occasions. He also threatened to kill her and their children if she refused to sign the requisite transfer of her interest. The judge had no difficulty in finding duress on that evidence.

Undue influence was developed by the courts of equity to broaden the concept of unlawful pressure. Spence J. explained it in these terms:

In contrast to duress, undue influence may exist without violence or threats of violence against the victim. It depends upon the existence of a relationship between two parties which, while it continues, causes one to place a confidence in the other, which produces a natural influence over the one which that other abuses to his own advantage.¹²⁵

Certain relationships raise a presumption of undue influence, such as parent and child, doctor and patient and religious leader and

¹²³ *Ibid.*, 253 *per* Verchere J.

¹²⁴ [1976] 4 W.W.R. 300, 305 (B.C.S.C.).

¹²⁵ *Ibid.*, 306.

disciple. In other cases, such as husband and wife, the influence must be proved in fact.¹²⁶

Both duress and undue influence deal with the question of whether the victim has consented to the transaction. In recent years, the concept of unconscionability has arisen. Here the courts do not look so much at the element of consent but rather they determine whether undue advantage has been taken of a party in a seriously inferior bargaining position. If that is the case, the courts will set aside the transaction.¹²⁷ In determining the respective bargaining positions of the parties, the courts will look at a number of factors such as age, poverty, illiteracy and emotional state. A number of provinces have passed unconscionable transactions acts¹²⁸ but these statutes are limited in scope dealing solely with the cost of loans and the courts have overtaken the legislatures in the regulation of unconscionable transactions.

Lord Denning M.R., in an important judgment in *Lloyds Bank v. Bundy*,¹²⁹ drew upon authorities from all three categories of unlawful pressure and came to the conclusion that there was a common thread running through all of the cases. The courts were concerned with protecting the party in the inferior bargaining position and it was irrelevant that relief was framed in terms of duress or undue influence or unconscionability:

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own

¹²⁶ Lord Chelmsford L.C. in *Tate v. Williamson* (1886) L.R. 2 Ch. App. 55, 61 stated the doctrine:

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

¹²⁷ See, e.g., *Morrison v. Coast Finance* (1965) 55 D.L.R. (2d) 710 (B.C.C.A.).

¹²⁸ E.g., *The Unconscionable Transactions Relief Act*, R.S.O. 1970, c.472.

¹²⁹ [1975] 1 Q.B. 326 (C.A.).

self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.¹³⁰

The other members of the Court of Appeal preferred to rest their judgments on traditional notions of undue influence. It was not long, however, before Canadian courts adopted the approach suggested by Lord Denning M.R. An early application came in *McKenzie v. Bank of Montreal*.¹³¹ The plaintiff, in that case, was emotionally attached to one Vernon Lawrence. Lawrence was in debt to the Bank of Montreal and he fraudulently mortgaged the plaintiff's car to secure his indebtedness to the bank. The bank wrongfully seized the car for non-payment of the debts. The plaintiff and Lawrence went to the bank to secure the release of the car and she was induced by the bank's credit manager, Carl Warwick, to sign a number of documents which she did not read, one of which was a mortgage of her farm land in favour of the bank to secure Lawrence's outstanding debts. Stark J., in the Ontario High Court, relying upon the *dicta* of Lord Denning M.R. in the *Lloyds Bank* case, held that the mortgage should be set aside. His judgment was affirmed in the Court of Appeal, where Houlden J.A. said:

We think that there was evidence on which the trial Judge could find that there was an obligation on the bank to ensure that the plaintiff knew what she was signing, and what the effect of the document would be. Considering the bank's wrongful detention of the plaintiff's automobile, the bank's knowledge of the crooked dealings of Lawrence, the bank's obtaining of a substantial judgment against Lawrence which was unsatisfied, and Warwick's representation to the plaintiff that the documents were mere formalities, we think that there was inequality of bargaining power in this case, and the bank failed to meet the obligation that rested on it to see that the plaintiff was aware of what she was doing when she executed the mortgage: *Lloyds Bank v. Bundy*, [1974] 3 All E.R. 757.¹³²

V. Damages for breach of contract

The major development in the law of contractual damages in recent years has been the recognition of mental distress as a reco-

¹³⁰ *Ibid.*, 339.

¹³¹ (1975) 55 D.L.R. (3d) 641 (Ont.H.C.); aff'd (1976) 12 O.R. (2d) 719 (C.A.).

¹³² (1976) 12 O.R. (2d) 719, 720 (C.A.).

verable head of damage. This whole topic was considered extensively by Borins J. in a well-reasoned decision in *Newell v. Canadian Pacific Airlines*.¹³³ He traced the development of the law in this area and concluded that the plaintiffs were entitled to recover damages for their mental anguish.

In that case, the plaintiffs were travelling to Mexico and they wished to take with them, on the flight, their two pet dogs. The representatives of the defendant told the plaintiffs that it would be impossible for the dogs to travel in the passenger compartment, despite the offer from the plaintiffs to purchase the entire first class section of the aircraft for that purpose. The representatives suggested that the dogs should be carried in the cargo compartment of the aircraft and, in response to the plaintiffs' obvious concern for the welfare of the pets, assured the Newells that the dogs would arrive in "first class condition when the aircraft arrived in Mexico City".^{133a} Unfortunately, the dogs were placed next to a container of dry ice which emitted carbon dioxide fumes. When the flight arrived in Mexico, one was dead and the other was comatose. Although the remaining pet's life was saved, the Newells were extremely distressed at the condition of their pets. The defendant was sued for breach of its contract to carry the dogs safely and part of the claim was for general damages to compensate the plaintiffs for the "anguish, loss of enjoyment of life and sadness".^{133b}

Borin J. reviewed the relevant law. Damages for mental distress were first awarded in England in 1973 in *Jarvis v. Swan Tours Ltd.*¹³⁴ There, the plaintiff booked a winter holiday with the defendant and it was held that he was entitled to be compensated for his disappointment and distress due to the poor facilities provided by the ski resort in contravention of the promises in the defendant's brochure. Lord Denning M.R. stated:

In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and the frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities.¹³⁵

¹³³ (1976) 74 D.L.R. (3d) 574 (Ont.Cty Ct).

^{133a} *Ibid.*, 576.

^{133b} *Ibid.*, 575.

¹³⁴ [1973] 1 Q.B. 233 (C.A.).

¹³⁵ *Ibid.*, 237-38.

This case was soon followed in England, in *Jackson v. Horizon Holidays*¹³⁶ and it was applied in Canada in *Elder v. Koppe*.¹³⁷ In the *Elder* case, the defendant agreed to rent a motor home to be used for the plaintiffs' holiday. The defendant failed to provide the vehicle and the Court held that the plaintiffs could recover damages for their inconvenience and disappointment. Cowan C.J. applied the *Jarvis* case:

It is true that the *Jarvis* case relates to a contract to provide a holiday, and to provide the entertainment, the loss of which is used as a basis for recovery of damages and that, in the present case, there was no reference in the contract to provision of a holiday. However, the evidence is that the defendant knew that the motor-home was to be used by the plaintiffs for holiday purposes, and for the purpose of touring and providing accommodation for the plaintiffs and their visitors.¹³⁸

In *Heywood v. Wellers*¹³⁹ the English Court of Appeal went further than the previous authorities and allowed recovery for mental anguish although a spoiled holiday was not involved. The plaintiff had instructed the defendant, a firm of solicitors, to apply for an injunction to prevent a man from harassing her. The defendant obtained an interim injunction but took no steps to enforce it, with the result that the man continued to harass her. It was held that the plaintiff was entitled to damages for mental distress. The Court said that mental anguish was no different from any other kind of damage and recovery depended upon a straight application of the *Hadley v. Baxendale*¹⁴⁰ rules regarding remoteness of damage.^{140a} It was reasonably foreseeable by the defendant that continued molestation of the plaintiff would result in her further mental distress. James L.J. said:

It is also the law that where, at the time of making a contract, it is within the contemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause vexation, frustration or distress, then if a breach occurs which does bring about that result, damages are recoverable under that heading (*Jarvis v. Swan's Tours Ltd*). Not in every case of breach of contract on the part of a solicitor towards his client will damages be recoverable under this head. It is only when the service or services contracted for are such that both solicitor and client contemplate that a failure by the solicitor to perform the contract will foreseeably occasion vexation, frustration or distress.¹⁴¹

¹³⁶ [1975] 3 All E.R. 92 (C.A.).

¹³⁷ (1974) 53 D.L.R. (3d) 705 (N.S.S.C.).

¹³⁸ *Ibid.*, 708-709.

¹³⁹ [1976] 1 All E.R. 300; see also *Cox v. Philips Industries* [1976] 1 W.L.R. 638 (Q.B.).

¹⁴⁰ (1854) 9 Ex. 341.

^{140a} That is, the test in *Hadley v. Baxendale* as possibly interpreted by Asquith L.J. in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 K.B. 528 (C.A.). But see, *Koufos v. Czarnikow Ltd* [1969] 1 A.C. 350 (H.L.).

¹⁴¹ *Supra*, note 139, 308.

In the *Newell* case, Borins J. determined that the English law was applicable in Ontario. He therefore applied the *Hadley v. Baxendale* test, came to the conclusion that it was reasonably foreseeable that breach of this contract would entail mental distress to the plaintiffs and awarded the plaintiffs general damages in the sum of \$500.

A few months earlier, Anderson J. in *Tippet v. International Typographical Union*¹⁴² awarded damages for loss of reputation and mental distress to members of a union who had been charged with "ratting" and had been wrongfully expelled from that union. The judge stated:

Thus it appears that while the plaintiffs did not suffer any pecuniary loss they did suffer loss of social prestige. They were classed as "rats" and, as such, had to cross a picket line every day for more than two years. This loss of social prestige was a foreseeable consequence of the wrongful expulsion.¹⁴³

Each plaintiff was awarded \$500 in general damages.

*Deber Investments Ltd v. Roblea Estates Ltd*¹⁴⁴ contains a recent discussion of the distinction between penalty clauses and liquidated damages clauses. The case concerned a purchaser's claim for the return of a deposit made on the sale of land, on the ground that it constituted a penalty. The Court was adamant that a deposit could not be forfeited if it was penal and was not a genuine pre-estimate of the probable loss to be incurred by the vendor in the event of the purchaser reneging. In this respect, Canadian law was seen as far more favourable to the defaulting purchaser than English law where deposits, as opposed to part payments, are in general irrecoverable.¹⁴⁵ The Court determined, on the facts, that the deposit was in the nature of a penalty and the seller was ordered to return it less the amount of its actual loss.

VI. Conclusions

In recent years, the Canadian courts have tended to uphold well-established principles of the law of contract. Thus, the majority of the Alberta Court of Appeal in *Dawood*¹⁴⁶ adopted the traditional view that a display in a self-service store is merely an invitation to treat. Similarly, the British Columbia Supreme Court has applied

¹⁴² (1976) 71 D.L.R. (3d) 146 (B.C.S.C.).

¹⁴³ *Ibid.*, 149-50.

¹⁴⁴ (1976) 21 N.S.R. (2d) 158.

¹⁴⁵ *Ibid.*, 170.

¹⁴⁶ *Supra*, note 1.

the full force of the privity doctrine in *Calkins & Burke v. Far Eastern Shipping*¹⁴⁷ and the Ontario Court of Appeal has followed the rule in *Stilk v. Myrick*¹⁴⁸ in the *Gilbert Steel* case.¹⁴⁹ There have been numerous decisions on the effect of conditions precedent and it is unfortunate that the Supreme Court of Canada should have failed to clarify the law in *Barnett*¹⁵⁰ and that the majority in that case should have so strictly interpreted *Turney v. Zhilka*¹⁵¹ as to allow no unilateral waiver in the absence of an express waiver clause. Lower courts have done their best to avoid *Barnett* in "subject to financing" situations.¹⁵² In the area of fundamental breach, however, the Canadian courts have been prepared to go very far in striking down exemption clauses, in particular to help the consumer. There has also been a broadening of the concept of *error in substantialibus* so as to permit the rescinding of executed contracts for the sale of land and to evade the application of exclusion clauses.¹⁵³

Important advances have been made by the English courts and in particular by Lord Denning M.R. He is prepared to extend the notion of promissory estoppel,¹⁵⁴ to apply the *Hedley Byrne* test to pre-contractual misrepresentations,¹⁵⁵ to extend the *Hong Kong Fir* approach to sale of goods cases,¹⁵⁶ and to award damages for mental distress in the contractual context.¹⁵⁷ Moreover, he has made a valiant attempt in *Lloyds Bank v. Bundy*¹⁵⁸ to tie together the various forms of relief from undue pressure and to rest them on the concept of inequality of bargaining power.

It will be interesting to see the extent to which the Canadian courts will follow Lord Denning's lead in the next few years. Already, the *Bundy* case has been followed in Ontario¹⁵⁹ and mental anguish has been recognized as a proper head of damage for breach of contract.¹⁶⁰

¹⁴⁷ *Supra*, note 67.

¹⁴⁸ *Supra*, note 52.

¹⁴⁹ *Supra*, note 53.

¹⁵⁰ *Supra*, note 44.

¹⁵¹ [1959] S.C.R. 578.

¹⁵² *Whitehall Estates v. McCallum*, *supra*, note 38 and *Brooks v. Alker*, *supra*, note 51.

¹⁵³ See, e.g., *Alessio v. Jovica*, *supra*, note 119.

¹⁵⁴ *Evenden v. Guildford City Football Club*, *supra*, note 55.

¹⁵⁵ *Esso Petroleum v. Mardon*, *supra*, note 84.

¹⁵⁶ *Cehave NV v. Bremer Handelsgesellschaft mbH*, *supra*, note 89.

¹⁵⁷ E.g., *Jarvis v. Swans Tours*, *supra*, note 134.

¹⁵⁸ *Supra*, note 129.

¹⁵⁹ *McKenzie v. Bank of Montreal*, *supra*, note 131.

¹⁶⁰ E.g., *Newell v. Canadian Pacific Airlines*, *supra*, note 133.