Court File No. CV-16-11389-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (Collectively the "Applicants") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

Court File No. CV-16-11549-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

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# BRIEF OF AUTHORITIES OF THE MONITOR

**(Re: Motion Returnable April 13, 2017)**

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**Primary Sources**

17. *AVG Management Science Ltd.* v. *Barwell Developments Ltd.*, [1979] 2 S.C.R. 43

18. *Knupp v. Bell*, [1968] S.J. No. 222 (C.A.)

19. *Plas-Tex Canada Ltd.* v. *Dow Chemical of Canada Ltd.*, 2004 ABCA 309, [2004] A.J. No. 1098

**Secondary Sources**

20. Hall, Geoff R., *Canadian Contractual Interpretation Law*, Third Edition, 2016: LexisNexis Canada

# TAB 1

** Preliminary Version **

*Case Name:*

# Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)

**Tercon Contractors Ltd., Appellant;**
**v.**
**Her Majesty The Queen in Right of the Province of British, Columbia, by her Ministry of Transportation and Highways, Respondent, and**
**Attorney General of Ontario, Intervener.**

[2010] S.C.J. No. 4

[2010] A.C.S. no 4

2010 SCC 4

[2010] 1 S.C.R. 69

[2010] 1 R.C.S. 69

86 C.L.R. (3d) 163

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EYB 2010-169491

2010EXP-608

J.E. 2010-321

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[2010] 3 W.W.R. 387

315 D.L.R. (4th) 385

2010 CarswellBC 296

281 B.C.A.C. 245

65 B.L.R. (4th) 1

File No.: 32460.

Supreme Court of Canada

Heard: March 23, 2009;
Judgment: February 12, 2010.

**Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.**

(142 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Contracts -- Formation -- Offer -- Invitation to tender or bid -- Terms -- Express terms -- Exclusion clauses -- Appeal by Tercon Contractors Ltd. (Tercon) from judgment of British Columbia Court of Appeal setting aside Tercon's successful action against British Columbia allowed -- The Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process -- Properly interpreted, the exclusion clause did not protect the Province from Tercon's damage claim which arose from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders.*

*Construction law -- Bidding process -- Invitation to tender or bid -- Bids -- Breach of tender -- Contracts -- Building contracts -- Terms -- Clauses -- Appeal by Tercon Contractors Ltd. (Tercon) from judgment of British Columbia Court of Appeal setting aside Tercon's successful action against British Columbia allowed -- The Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process -- Properly interpreted, the exclusion clause did not protect the Province from Tercon's damage claim which arose from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders.*

Appeal by Tercon Contractors Ltd. (Tercon) from a judgment of the British Columbia Court of Appeal setting aside Tercon's successful action against British Columbia. A request for expressions of interest by the Ministry of Transportation and Highways (the Province) for designing and building a highway resulted in six teams making submissions. The Province subsequently decided to design

the highway itself. Following a request for proposals (RFP) by the Province for the construction of the highway, Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. However, Brentwood had entered into an agreement with an unqualified bidder to undertake the work as a joint venture, as the RFP stipulated that only the six teams were eligible to submit a proposal. The RFP included an exclusion of liability clause which barred claims for compensation as a result of participating in the tendering process. The trial judge found that the Province breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted egregiously. She also held that it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Province's unfair dealings with a party who was not entitled to participate in the tender in the first place. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

HELD: Appeal allowed. The trial judge correctly concluded that the bid was submitted on behalf of a joint venture which was an ineligible bidder under the terms of the RFP and that this breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders. Clear language would have been necessary to exclude liability for breach of the implied obligation, particularly in the case of public procurement. The Court could not accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder to participate. Further, the Court could not conclude that the parties, through the words found in the exclusion clause, intended to waive compensation for conduct like that of the Province in this case that struck at the heart of the integrity and business efficacy of the tendering process which it undertook.

**Statutes, Regulations and Rules Cited:**

Ministry of Transportation and Highways Act, R.S.B.C. 1996, c. 311, s. 4, s. 23, s. 23(1)(c)

**Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

**Court Catchwords:**

*Contracts -- Tendering contract -- Breach of terms -- Ineligible bidder -- Exclusion of liability clause -- Doctrine of fundamental breach -- Province issuing tender call for construction of highway -- Request for proposals restricting qualified bidders to six proponents -- Province accepting bid from ineligible bidder -- Exclusion clause protecting Province from liability arising from participation in tendering process -- Whether Province breached terms of tendering contract in entertaining bid from ineligible bidder -- If so, whether Province's conduct fell within terms of exclusion clause -- If so, whether court should nevertheless refuse to enforce the exclusion clause because of unconscionability or some other contravention of public policy.*

**Court Summary:**

The Province of British Columbia issued a request for expression of interest ("RFEI") for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents that it now intended to design the highway itself and issued a request for proposals ("RFP") for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim." As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company ("EAC"), which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a "major member" of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon's favour. She held that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province's breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

*Held* (McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting): The appeal should be allowed. The Court agreed on the appropriate framework of analysis but divided on the applicability of the exclusion clause to the facts.

*Per* McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.: With respect to the appropriate framework of analysis the doctrine of fundamental breach should be "laid to rest". The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause. Despite agreement on the appropriate frame-

work of analysis the court divided on the applicability of the exclusion clause to the facts of this case as set out below.

*Per* LeBel, Deschamps, Fish, Charron and **Cromwell** JJ.: The Province breached the express provisions of the tendering contract with Tercon by accepting a bid from a party who should not even have been permitted to participate in the tender process and by ultimately awarding the work to that ineligible bidder. This egregious conduct by the Province also breached the implied duty of fairness to bidders. The exclusion clause, which barred claims for compensation "as a result of participating" in the tendering process, did not, when properly interpreted, exclude Tercon's claim for damages. By considering a bid from an ineligible bidder, the Province not only acted in a way that breached the express and implied terms of the contract, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process.

Submitting a compliant bid in response to a tender call may give rise to "Contract A" between the bidder and the owner. Whether a Contract A arises and what its terms are depends on the express and implied terms and conditions of the tender call and the legal consequences of the parties' actual dealings in each case. Here, there is no basis to interfere with the trial judge's findings that there was an intent to create contractual obligations upon submission of a compliant bid and that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. The tender documents and the required ministerial approval of the process stated expressly that the Province was contractually bound to accept bids only from eligible bidders. Contract A therefore could not arise by the submission of a bid from any other party. The trial judge found that the joint venture of Brentwood and EAC was not eligible to bid as they had not simply changed the composition of their team but, in effect, had created a new bidder. The Province fully understood this and would not consider a bid from or award the work to that joint venture. The trial judge did not err in finding that in fact, if not in form, Brentwood's bid was on behalf of a joint venture between itself and EAC. The joint venture provided Brentwood with a competitive advantage in the bidding process and was a material consideration in favour of the Brentwood bid during the Province's evaluation process. Moreover, the Province took active steps to obfuscate the reality of the true nature of the Brentwood bid. The bid by the joint venture constituted "material non-compliance" with the tendering contract and breached both the express eligibility provisions of the tender documents, and the implied duty to act fairly towards all bidders.

When the exclusion clause is interpreted in harmony with the rest of the RFP and in light of the commercial context of the tendering process, it did not exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder to participate in the tendering process. The closed list of bidders was the foundation of this RFP and the parties should, at the very least, be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred only upon one potential bidder. The requirement that only compliant bids be considered and the implied obligation to treat bidders fairly are factors that contribute to the integrity and business efficacy of the tendering process. The parties did not intend, through the words found in this exclusion clause, to waive compensation for conduct, like that of the Province in this case, that strikes at the heart of the tendering process. Clear language would be necessary to exclude liability for breach of the implied obligation, particularly in the case of public procurement where transparency is essential. Furthermore, the restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. When the statutory provisions which governed the tendering process in this case are considered, it seems unlikely that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. The text of the exclusion

clause in the RFP addresses claims that result from "participating in this RFP". Central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders -- the process followed by the Province -- is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

*Per* McLachlin C.J. and **Binnie**, Abella and Rothstein JJ. (dissenting): The Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion compensation clause. The clause is clear and unambiguous and no legal ground or rule of law permits a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation in this case. A court has no discretion to refuse to enforce a valid and applicable contractual term unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. The public interest in the transparency and integrity of the government tendering process, while important, did not render unenforceable the terms of the contract Tercon agreed to.

Brentwood was a legitimate competitor in the RFP process and all bidders knew that the road contract would not be performed by the proponent alone and required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor or identified with Brentwood as a joint venture "proponent" with EAC. Tercon has legitimate reason to complain about the Ministry's conduct, but its misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Contract A is based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. At issue is the intention of the *actual* parties not what the court may project in hindsight would have been the intention of *reasonable* parties. Only in rare circumstances will a court relieve a party from the bargain it has made.

The exclusion clause did not run afoul of the statutory requirements. While the *Ministry of Highway and Transportation Act* favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement and cannot plausibly be interpreted to have that effect. Tercon -- a sophisticated and experienced contractor -- chose to bid on the project, including the risk posed by an exclusion of compensation clause, on the terms proposed by the Ministry. That was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

The trial judge found that Contract A was breached when the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. The Ministry was at fault in its performance of the RFP, but the process did not thereby cease to be the RFP process in which Tercon had elected to participate.

The interpretation of the majority on this point is disagreed with. "Participating in this RFP" began with "submitting a proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid was considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (an ineligible bidder) instead of Brentwood itself (an eligible bidder) would be to give the clause a strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem to the majority *ex post facto* to have been an unfair and unreasonable clause.

Moreover, the exclusion clause was not unconscionable. While the Ministry and Tercon do not exercise the same level of power and authority, Tercon is a major contractor and is well able to look after itself in a commercial context so there is no relevant imbalance of bargaining power. Further, the clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A were available. The parties expected, even if they did not like it, that the "no claims" clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

Finally, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

**Cases Cited**

By Cromwell J.

**Applied:** *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; **considered:** *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Cahill (G. J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1; **referred to:** *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57.

By Binnie J. (dissenting)

*Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197, aff'd [1994] B.C.J. No. 2658 (QL); *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461; *Re Millar Estate*, [1938] S.C.R. 1; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4) 650.

**Statutes and Regulations Cited**

*Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, ss. 4, 23.

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Waddams, S. M. *The Law of Contracts*, 5 ed. Aurora, Ont.: Canada Law Book, 2005.

**History and Disposition:**

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Mackenzie and Lowry JJ.A.), 2007 BCCA 592, 73 B.C.L.R. (4) 201, 40 B.L.R. (4) 26, 289 D.L.R. (4) 647, [2008] 2 W.W.R. 410, 249 B.C.A.C. 103, 414 W.A.C. 103, 66 C.L.R. (3d) 1, [2007] B.C.J. No. 2558 (QL), 2007 CarswellBC 2880, setting aside a decision of Dillon J., 2006 BCSC 499, 53 B.C.L.R. (4) 138, [2006] 6 W.W.R. 275, 18 B.L.R. (4) 88, 51 C.L.R. (3d) 227, [2006] B.C.J. No. 657 (QL), 2006 CarswellBC 730. Appeal allowed, McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting.

**Counsel:**

*Chris R. Armstrong*, *Brian G. McLean*, *William S. McLean* and *Marie-France Major*, for the appellant.

*J. Edward Gouge*, *Q.C.*, *Jonathan Eades* and *Kate Hamm*, for the respondent.

*Malliha Wilson* and *Lucy McSweeney*, for the intervener the Attorney General of Ontario.

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[Editor's note: A corrigendum was published by the Court March 18, 2010. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of LeBel, Deschamps, Fish, Charron and Cromwell JJ. was delivered by

CROMWELL J.:--

I. Introduction

**1** The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

**2** The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

**3** The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted "egregiously" (

2006 BCSC 499, 53 B.C.L.R (4th) 138, at para. 150). The judge then turned to the Province's defence based on an exclusion clause that barred claims for compensation "as a result of participating" in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon's claim for damages. In effect, she held that it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Province's unfair dealings with a party who was not entitled to participate in the tender in the first place.

**4** The Province appealed and the Court of Appeal reversed (2007 BCCA 592, 73 B.C.L.R. (4th) 201). Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

**5** On Tercon's appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the request for proposals (RFP) and, if not, whether Tercon's claim for damages is barred by the exclusion clause.

**6** In my respectful view, the trial judge reached the right result on both issues. The Province's attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, pre-selected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacke[d] the underlying premise of the [tendering] process" (para. 146), a process which was set out in detail in the contract and, in addition, had been given ministerial approval as required by statute.

**7** As for its reliance on the exclusion clause, the Province submits that the parties were free to agree to limitations of liability and did so. Consideration of this submission requires an interpretation of the words of the clause to which the parties agreed in the context of the contract as a whole. My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon's damage claim which arises from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealings with a party who was not entitled to participate in that process.

**8** I would allow the appeal and restore the judgment of the trial judge.

## II. Brief Overview of the Facts

**9** I will have to set out more factual detail as part of my analysis. For now, a very brief summary will suffice. In 2000, the Ministry of Transportation and Highways (the "Province") issued a request for expressions of interest ("RFEI") for designing and building a highway in northwestern British Columbia. Six teams made submissions, including Tercon and Brentwood Enterprises Ltd. Later that year, the Province informed the six proponents that it now intended to design the highway itself and would issue a RFP for its construction.

**10** The RFP was formally issued on January 15, 2001. Under its terms, only the six original proponents were eligible to submit a proposal. The RFP also included a clause excluding all claims for damages "as a result of participating in this RFP" (s. 2:10).

**11** Unable to submit a competitive bid on its own, Brentwood teamed up with Emil Anderson Construction Co. ("EAC"), which was not a qualified bidder, and together they submitted a bid in Brentwood's name. Brentwood and Tercon were the two short-listed proponents and the Ministry ultimately selected Brentwood as the preferred proponent.

**12** Tercon brought an action seeking damages, alleging that the Ministry had considered and accepted an ineligible bid and that but for that breach, it would have been awarded the contract. The trial judge agreed and awarded roughly $3.5 million in damages and prejudgment interest. As noted, the Court of Appeal reversed and Tercon appeals by leave of the Court.

## III. Issues

**13** The issues for decision are whether the trial judge erred in finding that:

1. the Province breached the tendering contract by entertaining a bid from an ineligible bidder.
2. the exclusion clause does not bar the appellant's claim for damages for the breaches of the tendering contract found by the trial judge.

## IV. Analysis

### A. *Was the Brentwood Bid Ineligible?*

**14** The first issue is whether the Brentwood bid was from an eligible bidder. The judge found that the bid was in substance, although not in form, from a joint venture of Brentwood and EAC and that it was, therefore, an ineligible bid. The Province attacks this finding on three grounds:

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture;
(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;
(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent, in place and allowed it to enhance its ability to perform the work.

**15** While these were the Province's main points, its position became more wide-ranging during oral argument, at times suggesting that it had no contractual obligation to deal only with eligible bidders. It is therefore necessary to take a step back and look at that threshold point before turning to the Province's more focussed submissions.

#### 1. The Province's Contractual Obligations in the Bidding Process

**16** The judge found, and it was uncontested at trial, that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. This finding is not challenged on appeal, although there was a passing suggestion during oral argument that there was no contractual obligation of this sort at all. The trial judge also held, noting that this point was uncontested, that a joint venture between Brentwood and EAC was ineligible to bid. This is also not contested on appeal. These two findings are critical to the case and provide important background

for an issue that is in dispute, namely whether the Brentwood bid was ineligible. It is, therefore, worth reviewing the relevant background in detail. I first briefly set out the legal framework and then turn to the trial judge's findings.

2. Legal Principles

**17** Submitting a compliant bid in response to a tender call *may* give rise to a contract -- called Contract A -- between the bidder and the owner, the express terms of which are found in the tender documents. The contract may also have implied terms according to the principles set out in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, and *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860. The key word, however, is "may". The Contract A - Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties' actual dealings. The Court emphasized in *M.J.B.* that whether Contract A arises and if it does, what its terms are, depend on the express and implied terms and conditions of the tender call in each case. As Iacobucci J. put it, at para. 19:

> What is important ... is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call [Emphasis added.]

3. The Trial Judge's Findings Concerning the Existence of Contract A

**18** The question of whether Tercon's submission of a compliant bid gave rise to contractual relations between it and the Province was contested by the Province at trial. The trial judge gave extensive reasons for finding against the Province on this issue. We are told that the Province did not pursue this point in the Court of Appeal but instead premised its submissions on the existence of Contract A. The Province took the same approach in its written submissions in this Court. However, during oral argument, there was some passing reference in response to questions that there was no Contract A. In light of the position taken by the Province on its appeal to the Court of Appeal and in its written submissions in this Court, it is now too late to revisit whether there were contractual duties between Tercon and the Province. Even if it were open to the Province to make this argument now, I can see no error in legal principle or any palpable and overriding error of fact in the trial judge's careful reasons on this point.

**19** The trial judge did not mechanically impose the Contract A - Contract B framework, but considered whether Contract A arose in light of her detailed analysis of the dealings between the parties. That was the right approach. She reviewed in detail the provisions of the RFP which supported her conclusion that there was an intent to create contractual relations upon submission of a compliant bid. She noted, for example, that bids were to be irrevocable for 60 days and that security of $50,000 had to be paid by all proponents and was to be increased to $200,000 by the successful proponent. Any revisions to proposals prior to the closing date had to be in writing, properly executed and received before the closing time. The RFP also set out detailed evaluation criteria and

specified that they were to be the only criteria to be used to evaluate proposals. A specific form of alliance agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept this form of contract substantially, and security was lost if an agreement was not executed. The Ministry reserved a right to cancel the RFP under s. 2.9 but in such event was obliged to reimburse proponents for costs incurred in preparing their bids up to $15,000 each. Proponents had to submit a signed proposal form, which established that they offered to execute an agreement substantially in the form included in the RFP package. Further, they acknowledged that the security could be forfeited if they were selected as the preferred proponent and failed to enter into good faith discussions with the Ministry to reach an agreement and sign the alliance agreement.

**20** In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.

**21** There is, therefore, no basis to interfere with the judge's finding that there was an intent to create contractual obligations upon submission of a compliant bid. I add, however, that the tender call in this case did not give rise to the classic Contract A - Contract B framework in which the bidder submits an irrevocable bid and undertakes to enter into contract B on those terms if it is accepted. The alliance model process which was used here was more complicated than that and involved good faith negotiations for a contract B in the form set out in the tender documents. But in my view, this should not distract us from the main question here. We do not have to spell out all of the terms of Contract A, let alone of Contract B, so as to define all of the duties and obligations of both the bidders and the Province. The question here is much narrower: did contractual obligations arise as a result of Tercon's compliant bid and, if so, was it a term of that contract that the Province would only entertain bids from eligible bidders? The trial judge found offer, acceptance and consideration in the invitation to tender and Tercon's bid. There is no basis, in my respectful view, to challenge that finding even if it were open to the Province to try to do so at this late stage of the litigation.

### 4. The Trial Judge's Finding Concerning Eligibility

**22** It was not contested at trial that only the six original proponents that qualified through the RFEI process were eligible to bid. This point is not in issue on appeal; the question is what this eligibility requirement means. It will be helpful, therefore, to set out the background about this limited eligibility to bid in this tendering process.

**23** To begin, it is worth repeating that there is no doubt that the Province was contractually bound to accept bids only from eligible bidders. This duty may be implied even absent express stipulation. For example, in *M.J.B.*, the Court found that an implied obligation to accept only compliant bids was necessary to give business efficacy to the tendering process, noting, at para. 41, that a bidder must expend effort and incur expense in preparing its bid and must submit bid security and that it is "obvious" that it makes "little sense" for the bidder to comply with these requirements if the owner "is allowed, in effect, to circumscribe this process and accept a non-compliant bid". But again, whether such a duty should be implied in any given case will depend on the dealings between the parties. Here, however, there is no need to rely on implied terms. The obligation to consider on-

ly bids from eligible bidders was stated expressly in the tender documents and in the required ministerial approval of the process which they described.

**24** As noted, in early 2000, the Province issued a RFEI based on a design-build model; the contractor would both design and build the highway. The RFEI contemplated that a short list of three qualified contractors, or teams composed of contractors and consultants, would be nominated as proponents. Each was to provide a description of the legal structure of the team and to describe the role of each team member along with the extent of involvement of each team member as a percentage of the total scope of the project and an organization chart showing each team member's role. Any change in team management or key positions required notice in writing to the Province which reserved the right to disqualify the proponent if the change materially and negatively affected the ability of the team to carry out the project.

**25** Expressions of interest ("EOI") were received from six teams including Tercon and Brentwood. The evaluation panel and independent review panel recommended a short list of three proponents with Tercon topping the evaluation. Brentwood was evaluated fifth and was not on the short list. Brentwood was known to lack expertise in drilling and blasting and so its EOI had included an outline of the key team members with that experience. EAC did not participate and had no role in the Brentwood submission. The results of this evaluation were not communicated and the process did not proceed because the Province decided to design the project itself and issue an RFP for an alliance model contract to construct the highway.

**26** It was clear from the outset that only those who had submitted proposals during the RFEI process would be eligible to submit proposals under the RFP. This was specified in the approval of the process by the Minister of Transportation and Highways ("Minister") before the RFP was issued. It is worth pausing here to briefly look at the Minister's role.

**27** Pursuant to s. 23 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, the legislation in force at the relevant time, the Minister was required to invite public tenders for road construction unless he or she determined that another process would result in competitively established costs for the work. The section provided:

> **23** (1) The minister must invite tenders by public advertisement, or if that is impracticable, by public notice, for the construction and repair of all government buildings, highways and public works, except for the following:
>
> ...
>
> (c) if the minister determines that an alternative contracting process will result in competitively established costs for the performance of the work.
>
> (2) The minister must cause all tenders received to be opened in public, at a time and place stated in the advertisement or notice.
> (3) The prices must be made known at the time the tenders are opened.
> (4) In all cases where the minister believes it is not expedient to let the work to the lowest bidder, the minister must report to and obtain the approval of the Lieutenant Governor in Council before passing by the lowest tender, except if delay would be injurious to the public interest.

...

**28** These provisions make clear that the work in this case had to be awarded by public tender, absent the Minister's approval of an alternative process, and had to be awarded to the lowest bidder, absent approval of the Lieutenant Governor in Council. As noted, ministerial approval was given for an alternative process under s. 23(1)(c). The Minister issued a notice that, pursuant to that section, he approved the process set out in an attached document and had determined it to be an alternative contracting process that would result in competitively established costs for the performance of the work. The attached document outlined in seven numbered paragraphs the process that had been approved.

**29** The document described the background of the public RFEI (which I have set out earlier), noting that *only those firms identified through the EOI process would be eligible to submit proposals for the work* and that they would receive invitations to do so. The Minister's approval in fact referred to the firms who had been short-listed from the RFEI process as being eligible. If this were taken to refer only to the three proponents identified by the evaluation process of the RFEI, Tercon would be included but Brentwood would not. However, no one has suggested that anything turns on this and it seems clear that ultimately all six of the RFEI proponents -- including both Tercon and Brentwood -- were intended to be eligible. The ministerial approval then briefly set out the process. Proposals "by short listed firms" were to be evaluated "using the considerations set out in the RFP".

**30** It is clear, therefore, that participation in the RFP process approved by the Minister was limited to those who had participated in the RFEI process.

**31** The Province's factum implies that the Minister approved inclusion of the exclusion clause in the RFP. However, there is no evidence of this in the record before the Court. The Minister's approval is before us. It is dated as having been prepared on August 23, 2000 and signed on October 19, 2000, and approves a process outlined in a two-page document attached to it. It says nothing about exclusion of the Province's liability. The RFP, containing the exclusion clause in issue here, is dated January 15, 2001 and was sent out to eligible bidders under cover of a letter of the same date, some three months after the Minister's approval.

**32** The RFP is a lengthy document, containing detailed instructions to proponents, required forms, a time schedule of the work, detailed provisions concerning contract pricing, a draft of the ultimate construction contract and many other things. Most relevant for our purposes are the terms of the instructions to proponents and in particular the eligibility requirements for bidders.

**33** The RFP reiterates in unequivocal terms that eligibility to bid was restricted as set out in the ministerial approval. It also underlines the significance of the identity of the proponent. In s. 1.1, the RFP specifies that only the six teams involved in the RFEI would be eligible. The term "proponent", which refers to a bidder, is defined in s. 8 as "a team that has become eligible to respond to the RFP as described in Section 1.1 of the Instructions to Proponents". Section 2.8(a) of the RFP stipulates that *only* the six proponents qualified through the RFEI process were eligible and that *proposals received from any other party would not be considered.* In short, there were potentially only six participants and "Contract A" could not arise by the submission of a bid from any other party.

**34** The RFP also addressed material changes to the proponent, including changes in the proponent's team members and its financial ability to undertake and complete the work. Section 2.8(b) of the RFP provided in part as follows:

> If in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed ... or if, for financial or other reasons, the Proponent's ability to undertake and complete the Work has changed, then the Ministry may request the Proponent to submit further supporting information as the Ministry may request in support of the Proponent's qualification to perform the Work. If in the sole discretion of the Ministry as a result of the changes the Proponent is not sufficiently qualified to perform the Work then the Ministry reserves the right to disqualify that Proponent and reject its Proposal.

**35** The proponent was to provide an organization chart outlining the proponent's team members, structure and roles. If the team members were different from the RFEI process submission, an explanation was to be provided for the changes: s. 4.2(b)(i). A list of subcontractors and suppliers was also to be provided and the Ministry had to be notified of any changes: s. 4.2(e).

**36** The RFP provided proponents with a mechanism to determine whether they remained qualified to submit a proposal. If a proponent was concerned about its eligibility as a result of a material change, it could make a preliminary submission to the Ministry describing the nature of the changes and the Ministry would give a written decision as to whether the proponent was still qualified: s. 2.8(b).

**37** Brentwood tried to take advantage of this process. The trial judge thoroughly outlined this, at paras. 17-23 of her reasons. In brief, Brentwood lacked expertise in drilling and blasting and by the time the RFP was issued, it faced limited local bonding capacity due to commitments to other projects, a shorter construction period, the potential unavailability of subcontractors and limited equipment to perform the work. It in fact considered not bidding at all. Instead, however, it entered into a pre-bidding agreement with EAC that the work would be undertaken by a joint venture of Brentwood and EAC and that upon being awarded the work, they would enter into a joint venture agreement and would share 50-50 the costs, expenses, losses and gains. The trial judge noted that it was common in the industry for contractors to agree to a joint venture on the basis of a pre-bid agreement with the specifics of the joint venture to be worked out once the contract was awarded and that Brentwood and EAC acted consistently throughout in accordance with this industry standard.

**38** Brentwood sent the Province's project manager, Mr. Tasaka, a preliminary submission as provided for in s. 2.8(b) of the RFP, advising of a material change in its team's structure in that it wished to form a joint venture with EAC. This was done, the trial judge found, because Brentwood thought it would be disqualified if it submitted a proposal as a joint venture without the Ministry's prior approval under this section of the RFP. The Province never responded in writing as it ought to have according to s. 2.8(b).

**39** It seems to have been assumed by everyone that a joint venture of Brentwood and EAC was not eligible because this change would not simply be a change in the composition of the bidder's team, but in effect a new bidder. Without reviewing in detail all of the evidence referred to by the trial judge, it is fair to say that although Brentwood ultimately submitted a proposal in its own name, the proposal in substance was from the Brentwood-EAC joint venture and was evaluated as such. As the trial judge concluded:

> The substance of the proposal was as a joint venture and this must have been apparent to all. The [project evaluation panel] approved Brentwood/EAC as joint venturers as the preferred proponent. The [panel] was satisfied that Tercon had the capacity and commitment to do the job but preferred the joint venture submission of Brentwood/EAC. [para. 53].

**40** There was some suggestion by the Province during oral argument that the trial judge had wrongly imposed on it a duty to investigate Brentwood's bid, a duty rejected by the majority of the Court in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116. In my view, the trial judge did no such thing. As her detailed findings make clear, the Province: (1) fully understood that the Brentwood bid was in fact on behalf of a joint venture of Brentwood and EAC; (2) thought that a bid from that joint venture was not eligible; and (3) took active steps to obscure the reality of the situation. No investigation was required for the Province to know these things and the judge imposed no duty to engage in one.

5. The Province's Submissions

**41** I will address the Province's first two points together.

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture; and
(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;

**42** I cannot accept these submissions. The issue is not, as these arguments assume, whether the Province contracted with a joint venture or whether EAC had contractual obligations to the Province. The issue is whether the Province considered an ineligible bid; the point of substance is whether the bid was from an eligible bidder.

**43** At trial there was no contest that a bid from a joint venture involving an ineligible bidder would be ineligible. The Province's position was that there was no need to look beyond the face of the bid to determine who was bidding: the proposal was in the name of Brentwood and therefore the bid was from a compliant bidder. Respectfully, I see no error in the trial judge's rejection of this position. There was a mountain of evidence to support the judge's conclusions that first, Brentwood's bid, in fact if not in form, was on behalf of a joint venture between itself and EAC; second, the Province knew this and took the position that it could not consider a bid from or award the work to that joint venture; third, the existence of the joint venture was a material consideration in favour of the Brentwood bid during the evaluation process; and finally, that steps were taken by revising and drafting documentation to obfuscate the reality of the situation.

**44** Brentwood was one of the original RFEI proponents and was of course eligible to bid, subject to material changes in the composition of its team. EAC had not submitted a proposal during the RFEI process. It had been involved in advising the Ministry in relation to the project in 1998 and, in the fall of 2000, the Ministry had asked EAC to prepare an internal bid for comparison purposes (although EAC did not do so) as EAC was not entitled to bid on the Project.

**45** As noted earlier, after the RFP was issued, Brentwood and EAC entered into a pre-bidding agreement that provided that the work would be undertaken in the name of Brentwood-Anderson, a joint venture, that the work would be sponsored and managed by the joint venture and that upon

being awarded the contract, the parties would enter into a joint venture agreement. Brentwood advised the Ministry in writing that it was forming a joint venture with EAC "to submit a more competitive price"; this fax was in effect a preliminary submission contemplated by s. 2.8(b) of the RFP and was written, as the trial judge found, because Brentwood assumed that it could be disqualified if it submitted a proposal as a joint venture unless prior arrangements had been made. The Province never responded in writing to this preliminary submission, as required by s. 2.8(b). There were, however, discussions with the Province's project manager, Mr. Tasaka who, the trial judge found, understood that a joint venture from Brentwood and EAC would not be eligible. As the judge put it, the Province's position appears to have been that the Brentwood/EAC proposal could proceed as long as the submission was in the name of Brentwood.

**46** In the result, EAC was listed in the ultimate submission as a "major member" of the team. The legal relationship with EAC was not specified and EAC was listed as a subcontractor even though, as the trial judge found, their relationship bore no resemblance to a standard subcontractor agreement. The trial judge found as facts -- and these findings are not challenged -- that Brentwood and EAC always intended between themselves to form a joint venture and to formalize that arrangement once the contract was secured, and further, that the role of EAC was purposefully obfuscated in the bid to avoid an apparent conflict with s. 2.8(a) of the RFP.

**47** During the selection process, it became clear that the bid was in reality on behalf of a joint venture. The project evaluation panel ("PEP") requested better information than provided in the bid about the structure of the business arrangements between Brentwood and EAC. Brentwood responded by disclosing the pre-bid agreement between them to form a 50/50 joint venture if successful. The PEP understood from this that Brentwood and EAC had a similar interest in the risk and reward under the contract and that this helped satisfy them that the "risk/reward" aspect of the alliance contract could be negotiated with them flexibly. The PEP clearly did not consider EAC to be a subcontractor although shown as such in the bid. In its step 6 report, the PEP consistently referred to the proponent as being a joint venture of Brentwood and EAC or as "Brentwood/EAC" and the trial judge found that it was on the basis that they were indeed a joint venture that PEP approved Brentwood/EAC as the preferred proponent. This step 6 report was ultimately revised to refer only to the Brentwood team as the official proponent. The trial judge found as a fact that this revision was made because "it was apparent that a joint venture was not eligible to submit a proposal"(para. 56).

**48** The findings of the trial judge and the record make it clear that it was no mere question of form rather than a matter of substance whether the bidder was Brentwood with other team members or, as it in fact was, the Brentwood/EAC joint venture. As she noted, at para. 121 of her reasons, the whole purpose of the joint venture was to allow submission of a more competitive price than it would have been able to do as a proponent with a team as allowed under s. 2.8(b) of the RFP. The joint venture permitted a 50/50 sharing of risk and reward and co-management of the project while at the same time avoiding the restrictions on subcontracting in the tendering documents. As the judge put it, the bid by the joint venture constituted "material non-compliance" with the tendering contract: "[t]he joint venture with EAC allowed Brentwood to put forward a more competitive price than contemplated under the RFEI proposal. This went to the essence of the tendering process" (para 126).

**49** The Province suggests that the trial judge's reasons allow form to triumph over substance. In my view, it is the Province's position that better deserves that description. It had a bid which it knew

to be on behalf of a joint venture, encouraged the bid to proceed and took steps to obfuscate the reality that it was on behalf of a joint venture. Permitting the bid to proceed in this way gave the joint venture a competitive advantage in the bidding process, and the record could not be clearer that the joint venture nature of the bid was one of its attractions during the selection process. The Province nonetheless submits that so long as only the name of Brentwood appears on the bid and ultimate contract B, all is well. If ever a submission advocated placing form above substance, this is it.

**50** It is true that the Province had legal advice and did not proceed in defiance of it. However, the facts as found by the trial judge about this legal advice hardly advance the Province's position. The judge found that the Province's lawyer was not aware of the background relevant to the question of whether the Brentwood bid was eligible, never reviewed the proponent eligibility requirements in the RFP and was not asked to and did not direct his mind to the question of eligibility. As the trial judge put it, the lawyer "appears to have operated on the assumption that Brentwood had been irreversibly selected" (para. 70).

**51** The Brentwood/EAC joint venture having been selected as the preferred proponent, negotiations for the alliance contract ensued. The trial judge found that by this time, all agreed that a joint venture was not an eligible proponent and the Ministry was taking the position that the contract could not be in the name of the joint venture. Brentwood and EAC executed a revised pre-contract agreement that provided, notwithstanding the letter of intent from the Ministry addressed to Brentwood indicating that the legal relationship between them would be contractor/subcontractor, the contract would be performed and the profits shared equally between them. The work was to be managed by a committee with equal representation, the bond required by the owner was to be provided by both parties and EAC indemnified Brentwood against half of any loss or cost incurred as a result of performance of the work. According to schedule B4 of the RFP, all subcontracts were to be attached to the RFP but no contract between Brentwood and EAC was ever provided or attached to the proposal.

**52** The Province has identified no palpable and overriding error in these many findings of fact by the trial judge. I conclude, therefore, that we must approach the case on the basis of the judge's finding that the bid was in fact, if not in form, submitted by a joint venture of Brentwood and EAC, that the Ministry was well aware of this, that the existence of the joint venture was a material consideration in favour of the bid during the evaluation process and that by bidding as a joint venture, Brentwood was given a competitive advantage in the bidding process.

**53** I reject the Ministry's submissions that all that matters is the form and not the substance of the arrangement. In my view, the trial judge's finding that this bid was in fact on behalf of a joint venture is unassailable.

**54** I turn to the Province's third point:

> (iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent in place and allowed it to enhance its ability to perform the work.

**55** This submission addresses the question of whether the joint venture was an eligible bidder. The Province submits that it is, arguing that s. 2.8(b) of the RFP shows that the RFP contemplated that each proponent would be supported by a team, that the composition of the team might change

and that the Province under that section retained the right to approve or reject changes in the team of any proponent. I cannot accept these submissions.

**56** Section 2.8 must be read as a whole and in light of the ministerial approval which I have described earlier. Section 2.8(a), consistent with that approval, stipulates that only the six proponents qualified through the RFEI process were eligible to submit responses and that proposals from any other party "shall not be considered". The word "proponent" is defined in s. 8 as a team that has become eligible to respond to the RFP. The material change provisions in s. 2.8(b) should not be read as negating the express provisions of the RFP and the ministerial approval of the process. When read as a whole, the provisions about material change do not permit the addition of a new entity as occurred here. The process actually followed was not the one specified in the bidding contract and was not authorized by the statute because it was not the one approved by the Minister.

**57** Moreover, even if one were to conclude (and I would not) that this change from the Brentwood team that participated in the RFEI to the Brentwood/EAC joint venture by whom the bid was submitted could fall within the material change provisions of s. 2.8(b), the Province never gave a written decision to permit this change as required by that provision. As the trial judge noted, in fact the Province's position was that such a bid would not be eligible and its agents took steps to obfuscate the true proponent in the relevant documentation.

**58** The trial judge also found that there was an implied obligation of good faith in the contract and that the Province breached this obligation by failing to treat all bidders equally by changing the terms of eligibility to Brentwood's competitive advantage. This conclusion strongly reinforces the trial judge's decision about eligibility. Rather than repeating her detailed findings, I will simply quote her summary at para. 138:

> The whole of [the Province's] conduct leaves me with no doubt that the [Province] breached the duty of fairness to [Tercon] by changing the terms of eligibility to Brentwood's competitive advantage. At best, [the Province] ignored significant information to its [i.e. Tercon's] detriment. At worst, the [Province] covered up its knowledge that the successful proponent was an ineligible joint venture. In the circumstances here, it is not open to the [Province] to say that a joint venture was only proposed. Nor can the [Province] say that it was unaware of the joint venture when it acted deliberately to structure contract B to include EAC as fully responsible within a separate contract with Brentwood, so minimizing the [Province's] risk that the contract would be unenforceable against EAC if arrangements did not work out. .... The [Province] was ... prepared to take the risk that unsuccessful bidders would sue: this risk did materialize.

**59** To conclude on this point, I find no fault with the trial judge's conclusion that the bid was in fact submitted on behalf of a joint venture of Brentwood and EAC which was an ineligible bidder under the terms of the RFP. This breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders.

B. *The Exclusion Clause:*

1. Introduction

**60** As noted, the RFP includes an exclusion clause which reads as follows:

> **2.10** ... Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.[Emphasis added.]

**61** The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour. She also found that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the nature of the Province's breach. The Province contends that the judge erred both with respect to the construction of the clause and her application of the doctrine of fundamental breach.

**62** On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462. I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages, and even if I am wrong about that, the clause is at best ambiguous and should be construed *contra proferentem* as the trial judge held. As a result of my conclusion on the interpretation issue, I do not have to go on to apply the rest of the analytical framework set out by Binnie J.

**63** In my view, the exclusion clause does not cover the Province's breaches in this case. The RFP process put in place by the Province was premised on a closed list of bidders; a contest with an ineligible bidder was not part of the RFP process and was in fact expressly precluded by its terms. A "Contract A" could not arise as a result of submission of a bid from any other party. However, as a result of how the Province proceeded, the very premise of its own RFP process was missing, and the work was awarded to a party who could not be a participant in the RFP process. That is what Tercon is complaining about. Tercon's claim is not barred by the exclusion clause because the clause only applies to claims arising "as a result of participating in [the] RFP", not to claims resulting from the participation of other, ineligible parties. Moreover, the words of this exclusion clause, in my view, are not effective to limit liability for breach of the Province's implied duty of fairness to bidders. I will explain my conclusion by turning first to a brief account of the key legal principles and then to the facts of the case.

### 2. Legal Principles

**64** The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As

Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."

**65** In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting from "participating in this RFP", properly interpreted, excludes liability for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

3. Application to this Case

**66** Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, my view is that this claim does not fall within the terms of the exclusion clause.

**67** To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e. g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers Ltd.*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116,"it is imperative that all bidders be treated on an equal footing ... Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder".

**68** This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *Cahill (G. J.)& Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, at para. 35:

> The owner -- in this case the government -- is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner -- here the government -- sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

**69** One aspect that is generally seen as contributing to the integrity and business efficacy of the tendering process is the requirement that only compliant bids be considered. As noted earlier, such a requirement has often been implied because, as the Court said in *M.J.B.*, it makes little sense to think that a bidder would comply with the bidding process if the owner could circumscribe it by accepting a non-compliant bid. Respectfully, it seems to me to make even less sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved process.

**70** The closed list of bidders was the foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. Thus, it seems to me that both the integrity and the business efficacy of the tendering process support an interpretation that would al-

low the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP.

**71** The same may be said with respect to the implied duty of fairness. As Iacobucci and Major JJ. wrote for the Court in *Martel*, at para. 88, "[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process." It seems to me that clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

**72** The proper interpretation of the exclusion clause should also take account of the statutory context which I have reviewed earlier. The restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. It seems unlikely, therefore, that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. Of course, it is true that the exclusion clause does not bar all remedies, but only claims for compensation. However, the fact remains that as a practical matter, there are unlikely to be other, effective remedies for considering and accepting an ineligible bid and that barring compensation for a breach of that nature in practical terms renders the ministerial approval process virtually meaningless. Whatever administrative law remedies may be available, they are not likely to be effective remedies for awarding a contract to an ineligible bidder. The Province did not submit that injunctive relief would have been an option, and I can, in any event, foresee many practical problems that need not detain us here in seeking such relief in these circumstances.

**73** The Province stresses Tercon's commercial sophistication, in effect arguing that it agreed to the exclusion clause and must accept the consequences. This line of argument, however, has two weaknesses. It assumes the answer to the real question before us which is: what does the exclusion clause mean? The consequences of agreeing to the exclusion clause depend on its construction. In addition, the Province's submission overlooks its own commercial sophistication and the fact that sophisticated parties can draft very clear exclusion and limitation clauses when they are minded to do so. Such clauses contrast starkly with the curious clause which the Province inserted into this RFP. The limitation of liability clause in *Hunter Engineering*, for example, provided that "[n]otwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise ..." (p. 450). The Court found this to be clear and unambiguous. The limitation clause in issue in *Guarantee Co. of North America v. Gordon Capital Corp.* [1999] 3 S.C.R. 423, provided that legal proceedings for the recovery of "any loss hereunder shall not be brought ... after the expiration of 24 months from the discovery of such loss" (para. 5). Once again, the Court found this language clear. The Ontario Court of Appeal similarly found the language of a limitation of liability clause to be clear in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1. The clause provided in part that if the defendant "should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% or the annual service charge or $10,000, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy ..." (p. 4). These, and many other cases which might be referred to, demonstrate that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions.

**74** I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from "participating in this RFP". As noted, the limitation on who could participate in this

RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and *proposals received from any other party would not be considered.* Thus, central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

**75** The Province would have us interpret the phrase excluding compensation "as a result of participating in this RFP" to mean that compensation is excluded that results from "submitting a Proposal". However, that interpretation is not consistent with the wording of the clause as a whole. The clause concludes with the phrase that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim". If the phrases "participating in this RFP" and "submitting a Proposal" were intended to mean the same thing, it is hard to understand why different words were used in the same short clause to express the same idea. The fact that the Minister had approved a closed list of participants strengthens the usual inference that the use of different words was deliberate so as not to exclude compensation for a departure from that basic eligibility requirement.

**76** This interpretation of the exclusion clause does not rob it of meaning, but makes it compatible with other provisions of the RFP. There is a parallel between this case and the Court's decision in *M.J.B.* There, the Court found that there was compatibility between the privilege clause and the implied term to accept only compliant bids. Similarly, in this case, there is compatibility between the eligibility requirements of the RFP and the exclusion clause. Not any and every claim based on any and every deviation from the RFP provisions would escape the preclusive effect of the exclusion clause. It is only when the defect in the Province's adherence to the RFP process is such that it is completely outside that process that the exclusion clause cannot have been intended to operate. What is important here, in my view, is that the RFP in its conception, in its express provisions and in the statutorily required approval it was given, was premised on limiting eligibility to the six proponents in the RFEI process. Competition among others was not at all contemplated and was not part of the RFP process; in fact, the RFP expressly excluded that possibility. In short, limiting eligibility of bidders to those who had responded to the RFEI was the foundation of the whole RFP. As the judge found, acceptance of a bid from an ineligible bidder "attacks the underlying premise of the process" established by the RFP: para. 146. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP.

**77** This interpretation is also supported by another provision of the RFP. Under s. 2.9, as mentioned earlier, the Province reserved to itself the right to unilaterally cancel the RFP and the right to propose a new RFP allowing additional bidders. If the exclusion clause were broad enough to exclude compensation for allowing ineligible bidders to participate, there seems to be little purpose in this reservation of the ability to cancel the RFP and issue a new one to a wider circle of bidders. It is also significant that the Province did not reserve to itself the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility. The RFP expressly did exactly the opposite. None of this, in my opinion, supports the view that the exclusion clause should be read as applying to the Province's conduct in this case.

**78** To hold otherwise seems to me to be inconsistent with the text of the clause read in the context of the RFP as a whole and in light of its purposes and commercial context. In short, I cannot

accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP's eligibility requirements as to who may participate in it, or to render meaningless the Minister's statutorily required approval of the alternative process where this was a key element. The provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

**79** If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants". Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle *contra proferentem*: see, e.g. *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57, at pp. 68-69. Following this approach, the clause would not apply to bar Tercon's damages claim.

## V. Disposition

**80** I conclude that the judge did not err in finding that the Province breached the tendering contract or in finding that Tercon's remedy in damages for that breach was not precluded by the exclusion clause in the contract. I would therefore allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The parties advise that the question of costs has been resolved between them and that therefore no order in relation to costs is required.

The reasons of McLachlin C.J. and Binnie, Abella and Rothstein JJ. were delivered by

**81** BINNIE J. (dissenting):-- The important legal issue raised by this appeal is whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, suggested should be laid to rest 21 years ago (p. 462).

**82** On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while

in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.

## I. Overview

**83** This appeal concerns a contract to build a $35 million road in the remote Nass Valley of British Columbia (the "Kincolith project"). The respondent Ministry accepted a bid from Brentwood Enterprises Ltd. that did not comply with the terms of tender. Tercon, as the disappointed finalist in the bidding battle, seeks compensation equivalent to the profit it expected to earn had it been awarded the contract.

**84** Tercon alleged, and the trial judge found, that although the winning bid was submitted in the name of Brentwood (an eligible bidder) Brentwood in fact intended, with the Ministry's knowledge and encouragement, to do the work in a co-venture with an ineligible bidder, Emil Anderson Construction Co. ("EAC"). The respondent Ministry raised a number of defences including the fact that the formal contract was signed in the name of Brentwood alone. This defence was rejected in the courts below. The Ministry's substantial defence in this Court is that even if it failed to abide by the bidding rules, it is nonetheless protected by an exclusion of compensation clause set out clearly in the request for proposals ("RFP"). The clause provided that "no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP" and that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim" (s. 2.10 of the RFP).

**85** The appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of contract of sophisticated and experienced parties in a commercial environment to craft their own contractual relations. I agree with Tercon that the public interest favours an orderly and fair scheme for tendering in the construction industry, but there is also a public interest in leaving knowledgeable parties free to order their own commercial affairs. In my view, on the facts of this case, the Court should not rewrite -- nor should the Court refuse to give effect to -- the terms agreed to by the parties.

**86** I accept, as did the courts below, that the respondent Ministry breached the terms of its own RFP when it contracted with Brentwood, knowing the work would be carried out by a co-venture with Brentwood and EAC. The addition of EAC, a bigger contractor with greater financial resources than Brentwood, created a stronger competitor for Tercon than Brentwood alone. However, I also agree with the B.C. Court of Appeal that the exclusion of compensation clause is clear and unambiguous and that no legal ground or rule of law permits us to override the freedom of the parties to contract (or to decline to contract) with respect to this particular term, or to relieve Tercon against its operation in this case.

## II. The Tendering Process

**87** For almost three decades the law governing a structured bidding process has been dominated by the concept of Contract A/Contract B initially formulated in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The analysis advanced by Estey J. in that case was that the bidding process, as defined by the terms of the tender call, may create contractual relations ("Contract A") prior in time and quite independently of the contract that is the actual subject matter of the bid ("Contract B"). Breach of Contract A may, depending on its terms, give rise to contractual remedies for non-performance even if Contract B is never entered

into or, as in the present case, it is awarded to a competitor. The result of this legal construct is to provide unsuccessful bidders with a *contractual* remedy against an owner who departs from its own bidding rules. Contract A, however, arises (if at all) as a matter of interpretation. It is not imposed as a rule of law.

**88** In *Ron Engineering*, the result of Estey J.'s analysis was that as a matter of contractual interpretation, the Ontario government was allowed to retain a $150,000 bid bond put up by Ron Engineering even though the government was told, a little over an hour after the bids were opened, that Ron Engineering had made a $750,058 error in the calculation of its bid and wished to withdraw it. Estey J. held:

> The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a contract in accordance with the instructions to tenderers and in conformity with its own tender. [p. 127]

In other words, harsh as it may have seemed to Ron Engineering, the parties were held to their bargain. The Court was not prepared to substitute "fair and reasonable" terms for what the parties had actually agreed to.

**89** In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, Contract A included a "privilege" clause which stated that the owner was not obliged to accept the lowest or *any* tender. The Court implied a term, based on the presumed intention of the parties, that notwithstanding the privilege clause, only compliant bids were open to acceptance. While the owner was not obliged to accept the lowest compliant bid, the privilege clause did not, as a matter of contractual interpretation, give the owner "the privilege" of accepting a non-compliant bid. *M.J.B.* stops short of the issue in the present appeal because in that case, there was a breach of Contract A but no clause purporting to exclude liability on the part of the owner to pay compensation in the event of a Contract A violation.

**90** In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, the Court enforced the rules of the bid depository system against a contractor whose bid was based on what turned out to be a mistaken view of its collective bargaining status with the International Brotherhood of Electrical Workers. The Court again affirmed that "[t]he existence and content of Contract A will depend on the facts of the particular case" (para. 36). Ellis-Don sought relief from its bid on the basis of a labour board decision rendered subsequent to its bid that upheld, to its surprise, the bargaining rights of the union. This Court held that no relief was contemplated in the circumstances under Contract A and none was afforded, even though this was a costly result when viewed from the perspective of Ellis-Don.

**91** In *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, citing *M.J.B.*, the Court implied a term in Contract A obligating the owner to be fair and consistent in the assessment of tender bids. On the facts, the disappointed bidder's claim of unfair treatment was rejected.

**92** Finally, in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, the unsuccessful bidder claimed that Edmonton had accepted, in breach of Contract A, a competitor's non-compliant bid to provide heavy equipment of a certain age to move refuse at a waste disposal site. The Court refused to imply a term "requiring an owner to investigate to see if bidders will really do what they promised in their tender" (para. 50). Accepting the existence of a duty of "fairness and equality", the majority nevertheless held that "[t]he best way to make sure that all bids

receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information" (para. 52). In other words, the majority's interpretation of the express terms of Contract A was enforced despite Double N Earthmovers' complaint of double dealing by the owner.

**93** On the whole, therefore, while *Ron Engineering* and its progeny have encouraged the establishment of a fair and transparent bidding process, Contract A continues to be based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. Only in rare circumstances will the Court relieve a party from the bargain it has made.

**94** As to implied terms, *M.J.B.* emphasized (at para.29) that the focus is "the intentions of the actual parties". A court, when dealing with a claim to an implied term, "must be careful not to slide into determining the intentions of reasonable parties" (emphasis in original). Thus "if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis".

**95** Tercon is a large and experienced contractor. As noted by Donald J.A. in the B.C. Court of Appeal, it had earlier "successfully recovered damages from the [Ministry] on a bidding default on a previous case" (2007 BCCA 592, 73 B.C.L.R. (4th) 201, at para. 15). See *Tercon Contractors Ltd. v. British Columbia* (1993) 9 C.L.R. (2d) 197 (B.C.S.C.) aff'd, [1994] BCJ No. 2658 (C.A.) (QL). Thus Tercon would have been more sensitive than most contractors to the risks posed by an exclusion of compensation clause. It nevertheless chose to bid on the project on the terms proposed by the Ministry.

## III. Tercon's Claim for Relief from the Exclusionary Clause it Agreed to

**96** In these circumstances, the first question is whether there is either a statutory legal obstacle to, or a principled legal argument against, the freedom of these parties to contract out of the obligation that would otherwise exist for the Ministry to pay compensation for a breach of Contract A. If not, the second question is whether there is any other barrier to the court's enforcement of the exclusionary clause in the circumstances that occurred. On the first branch, Tercon relies on the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311 ("*Transportation Act*" or the "Act"). On the second branch, Tercon relies on the doctrine of fundamental breach.

### A. *The Statutory Argument*

**97** Section 4 of the *Transportation Act* provides that before awarding a highway contract, "the minister must invite tenders in any manner that will make the invitation for tenders reasonably available to the public", but then provides for several exceptions: "The minister need not invite tenders for a project ... if ... (c) the minister believes that an alternative contracting process will result in a competitively established cost for the project". Here the required ministerial authorization was obtained for an "alternative process". The reason is as follows. As noted by Cromwell J., the Ministry's original idea was to use a "design-build" model where a single contractor would design and build the highway for a fixed price. The Ministry issued a request for expressions of interest ("RFEI") which attracted six responses. One was from Tercon. Another was from Brentwood. EAC declined to bid because it did not think the "design-build" concept was appropriate for the job.

**98** On further reflection, the Ministry decided not to pursue the design-build approach. It decided to design the highway itself. The contract would be limited to construction, as EAC had earlier advocated. EAC was not allowed to bid despite the Ministry coming around to its point of view

on the proper way to tender the project. The Ministry limited bidding on the new contest to the six respondents to the original RFEI, all of whom had been found capable of performing the contract. But to do so, it needed, and did obtain, the Minister's s. 4 approval.

**99** A question arose during the hearing of the appeal as to whether the Minister actually approved an "alternative process" that not only restricted eligibility to the six participants in the RFEI process (an advantage to Tercon and the other five participants), but also contained the "no claims" clause excluding compensation for non-observance of its terms (no doubt considered a disadvantage). In its factum, the Ministry states:

> In this case, the Minister approved an alternate process under [s. 4(2) of the B.C. *Transportation Act* ]. That process was set out in the Instructions to Proponents, which included the No Claim Clause. Having been approved by the Minister, the package (including the No Claims Clause) complied with section 4 of the *Transportation Act*. [para. 70]

**100** Tercon argued at the hearing of this appeal that as a matter of *law*, Contract A could not have included the exclusion clause because

> [t]he policy of the [*Transportation Act*] is to ensure that the Ministry is accountable; to preserve confidence in the integrity of the tendering process. To ensure that is so and that the Minister is accountable, the Ministry must be held liable for its breach of Contract A in considering and accepting a proposal from the joint venture... .
>
> ...
>
> **MADAM JUSTICE ABELLA:** Can I just ask you one question. Is it your position, sir, that you can never have -- that a government can never have a no claims clause?
>
> **MR. McLEAN:** Yes. Under this statute because of the policy of the statute. [Transcript, at pp. 26-27]

**101** While it is true that the Act favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement, and cannot plausibly be interpreted to have that effect.

**102** In the ordinary world of commerce, as Dickson C.J. commented in *Hunter*, "clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance" (p. 461). Moreover, as Mr. Hall points out, "[t]here are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks" (G. R. Hall, *Canadian Contractual Interpretation Law* (2007), at p. 243). Tercon for example is a sophisticated and experienced contractor and if it decided that it was in its commercial interest to proceed with the bid despite the exclusion of compensation clause, that was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

**103** To the extent Tercon is now saying that as a matter of *fact* the Minister, in approving the RFP, did not specifically approve the exclusion clause, and that the contract was thus somehow *ultra vires* the Ministry, this is not an issue that was either pleaded or dealt with in the courts below. The details of the ministerial approval process were not developed in the evidence. It is not at all evident that s. 4 *required* the Minister to approve the actual terms of the RFP. It is an administrative law point that Tercon, if so advised, ought to have pursued at pre-trial discovery and in the trial evidence. We have not been directed to any exploration of the matter in the testimony and it is too late in the proceeding for Tercon to explore it now. Accordingly, I proceed on the basis that the exclusion clause did not run afoul of the statutory requirements.

B. *The Doctrine of the Fundamental Breach*

**104** The trial judge considered the applicability of the doctrine of fundamental breach. Tercon argued that the Ministry, by reason of its fundamental breach, had forfeited the protection of the exclusion of compensation clause.

**105** The leading case is *Hunter* which also dealt with an exclusion of liability clause. The appellants Hunter Engineering and Allis-Chalmers Canada Ltd. supplied gearboxes used to drive conveyor belts at Syncrude's tar sands operations in Northern Alberta. The gearboxes proved to be defective. At issue was a broad exclusion of warranty clause that limited time for suit and the level of recovery available against Allis-Chalmers (i.e. no recovery beyond the unit price of the defective products). Dickson C.J. observed: "In the face of the contractual provisions, Allis-Chalmers can only be found liable under the doctrine of fundamental breach" (p. 451).

**106** This doctrine was largely the creation of Lord Denning in the 1950s (see, e.g., *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.)). It was said to be a rule of law that operated independently of the intention of the parties in circumstances where the defendant had so egregiously breached the contract as to deny the plaintiff substantially the whole of its benefit. In such a case, according to the doctrine, the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its "fundamental" breach even if the parties had excluded liability by clear and express language. See generally S. M. Waddams, *The Law of Contracts* (5th ed. 2005), at para. 478; J. D. McCamus, *The Law of Contracts* (2005), at pp. 765 *et seq.*

**107** The five-judge *Hunter* Court was unanimous in the result and gave effect to the exclusion clause at issue. Dickson C.J. and Wilson J. both emphasized that there is nothing inherently unreasonable about exclusion clauses and that they should be applied unless there is a compelling reason not to give effect to the words selected by the parties. At that point, there was some divergence of opinion.

**108** Dickson C.J. (La Forest J. concurring) observed that the doctrine of fundamental breach had "spawned a host of difficulties" (p. 460), the most obvious being the difficulty in determining whether a particular breach is fundamental. The doctrine obliged the parties to engage in "games of characterization" (p. 460) which distracted from the real question of what agreement the parties themselves intended. Accordingly, in his view, the doctrine should be "laid to rest". The situations in which the doctrine is invoked could be addressed more directly and effectively through the doctrine of "unconscionability", as assessed at the time the contract was made:

> It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. [p. 462]

Dickson C.J. explained that "[t]he courts do not blindly enforce harsh or unconscionable bargains" (p. 462), but "there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong, rather than relying on the artificial legal doctrine of 'fundamental breach'" (p. 462). To enforce an exclusion clause in such circumstances could tarnish the institutional integrity of the court. In that respect, it would be contrary to public policy. However, a *valid* exclusion clause would be enforced according to its terms.

**109** Wilson J. (L'Heureux-Dubé J. concurring) disagreed. In her view, the courts retain some residual discretion to refuse to enforce exclusion clauses in cases of fundamental breach where the doctrine of *pre*-breach unconscionability (favoured by Dickson C.J.) did not apply. Importantly, she rejected the imposition of a general standard of reasonableness in the judicial scrutiny of exclusion clauses, affirming that "the courts ... are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them" (p. 508). Wilson J. considered it more desirable to develop through the common law a *post*-breach analysis seeking a "balance between the obvious desirability of allowing the parties to make their own bargains ... and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves" (p. 510).

**110** Wilson J. contemplated a two-stage test, in which the threshold step is the identification of a fundamental breach where "the foundation of the contract has been undermined, where the very thing bargained for has not been provided" (p. 500). Having found a fundamental breach to exist, the exclusion clause would *not* automatically be set aside, but the court should go on to assess whether, having regard to the circumstances of the breach, the party in fundamental breach should escape liability:

> Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it <u>in the context of subsequent events such as a fundamental breach</u> committed by the party seeking its enforcement through the courts... . [T]he question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause? [Emphasis added; pp. 510-11.]

**111** Wilson J. reiterated that "as a general rule" courts should give effect to exclusion clauses *even in the case of fundamental breach* (p. 515). Nevertheless, a residual discretion to withhold enforcement exists:

> Lord Wilberforce [in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.)] may be right that parties of equal bargaining power should be left to live with their bargains regardless of subsequent events. I believe, however, that there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances. [Emphasis added; p. 517]

Wilson J. made it clear that such circumstances of disentitlement would be rare. She acknowledged that an exclusion clause might well be accepted with open eyes by a party "very anxious to get" the contract (p. 509). However, Wilson J. did not elaborate further on what such circumstances might be because she found in *Hunter* itself that no reason existed to refuse the defendant Allis-Chalmers the benefit of the exclusion clause.

**112** The fifth judge, McIntyre J., in a crisp two-paragraph judgment, agreed with the conclusion of Wilson J. in respect of the exclusion clause issue but found it "unnecessary to deal further with the concept of fundamental breach in this case" (p. 481).

**113** The law was left in this seemingly bifurcated state until *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. In that case, the Court breathed some life into the dying doctrine of fundamental breach while nevertheless affirming (once again) that whether or not a "fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law" (at para. 52). In other words, the question was whether the parties *intended* at the time of contract formation that the exclusion or limitation clause would apply "in circumstances of contractual breach, whether fundamental or otherwise" (para. 63). The Court thus emphasized that what was important was not the label ("fundamental or otherwise") but the intent of the contracting parties when they made their bargain. "The only limitation placed upon enforcing the contract as written in the event of a fundamental breach", the Court in *Guarantee Co.* continued,

> would be to refuse to enforce an exclusion, of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or [note the disjunctive "or"] unfair, unreasonable or otherwise contrary to public policy, according to Wilson J. [Emphasis added; para. 52.]
>
> (See also para. 64.)

What has given rise to some concern is not the reference to "public policy", whose role in the enforcement of contracts has never been doubted, but to the more general ideas of "unfair" and "unreasonable", which seemingly confer on courts a very broad after-the-fact discretion.

**114** The Court's subsequent observations in *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, should be seen in that light. *Domtar* was a products liability case arising under the civil law of Quebec, but the Court observed with respect to the common law:

> Once the existence of a fundamental breach has been established, the court must still analyse the limitation of liability clause in light of the general rules of contract interpretation. If the words can reasonably be interpreted in only one way, it will not be open to the court, even on grounds of equity or reasonable-

> ness, to declare the clause to be unenforceable since this would amount to re-writing the contract negotiated by the parties. [Emphasis added; para. 84.]

While the *Domtar* Court continued to refer to "fundamental breach", it notably repudiated any judicial discretion to depart from the terms of a valid contact upon vague notions of "equity or reasonableness". It did not, however, express any doubt about the residual category mentioned in *Guarantee Co.*, namely a refusal to enforce an exclusion clause on the grounds of public policy.

**115** I agree with Professor Waddams when he writes:

> [I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

**116** While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief *against* enforcement. As Duff C.J. observed:

> It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
>
> (*Re Millar Estate*, [1938] S.C.R. 1, at p. 4)

See generally B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2007* (2007), 1.

**117** As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

**118** There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but

the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

**119** A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (para. 53). (See also McCamus, at p. 774, and Hall, at p. 243). What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

**120** Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

**121** The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

**122** The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

**123** If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

## IV. Application to the Facts of this Case

**124** I proceed to deal with the issues in the sequence mentioned above.

### A. *Did the Ministry Breach Contract A?*

**125** The trial judge found that the parties intended to create contractual relations at the bidding stage (i.e. Contract A): 2006 BCSC 499, 53 B.C.L.R. (4th) 138, at para. 88. I agree with that conclusion. If there were no intent to form Contract A, there would be no need to exclude liability for compensation in the event of its breach.

**126** The Ministry argued that Contract A was not breached. It was entitled to enter into Contract B with Brentwood and it did so. There was no privity between the Ministry and EAC. The Ministry would have had no direct claim against EAC in the event of deficient performance. I accept as correct that Brentwood, having obtained Contract B, was in a position of considerable flexibility as to how and with whom it carried out the work. Nevertheless, it was open to the trial judge to conclude, as she did, that the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. At the end of an unfair process, she found, Contract B was not awarded to Brentwood (the eligible bidder) but to what amounted to a joint venture consisting of Brentwood and EAC. I therefore proceed with the rest of the analysis on the basis that Contract A was breached.

B. *What is the Proper Interpretation of the Exclusion of Compensation Clause and Did the Ministry's Conduct Fall Within its Terms?*

**127** It is at this stage that I part company with my colleague Cromwell J. The exclusion clause is contained in the RFP and provides as follows:

> **2:10**...
>
> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agree that it has no claim.

In my view, "participating in this RFP" began with "submitting a Proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid *was* considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (ineligible) instead of Brentwood itself (eligible) would, I believe, take the Court up the dead end identified by Wilson J. in *Hunter*:

> ... exclusion clauses, like all contractual provisions, should be given their natural and true construction. Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause. [p. 509]

Professor McCamus expresses a similar thought:

> ... the law concerning exculpatory clauses is likely to be more rather than less predictable if the underlying concern is openly recognized, as it is in *Hunter*, rather than suppressed and achieved indirectly through the subterfuge of strained interpretation of such terms. [p. 778]

**128** I accept the trial judge's view that the Ministry was at fault in its performance of the RFP, but the conclusion that the process thereby ceased to be the RFP process appears to me, with due respect to colleagues of a different view, to be a "strained and artificial interpretatio[n] in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause".

**129** As a matter of interpretation, I agree with Donald J.A. speaking for the unanimous court below:

> The [trial] judge said the word "participating" was ambiguous. With deference, I do not find it so. The sense it conveys is the contractor's involvement in the RFP/contract A stage of the process. I fail to see how "participating" could bear any other meaning. [Emphasis added; para. 16.]

Accordingly, I conclude that on the face of it, the exclusion clause applies to the facts described in the evidence before us.

C. *Was the Claim Excluding Compensation Unconscionable at the Time Contract A was Made?*

**130** At this point, the focus turns to contract formation. Tercon advances two arguments: firstly, that it suffered from an inequality of bargaining power and secondly, (as mentioned) that the exclusion clause violates public policy as reflected in the *Transportation Act*.

(1) Unequal Bargaining Power

**131** In *Hunter*, Dickson C.J. stated, at p. 462: "Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded." Applying that test to the case before him, he concluded:

> I have no doubt that unconscionability is not an issue in this case. Both Allis-Chalmers and Syncrude are large and commercially sophisticated companies. Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. [p. 464]

While Tercon is not on the same level of power and authority as the Ministry, Tercon is a major contractor and is well able to look after itself in a commercial context. It need not bid if it doesn't like what is proposed. There was no relevant imbalance in bargaining power.

(2) Policy of the *Transportation Act*

**132** As mentioned earlier, Tercon cites and relies upon the policy of the Act which undoubtedly favours the transparency and integrity of the bidding process. I have already discussed my reasons for rejecting Tercon's argument that this "policy" operates as a bar to the ability of the parties to agree on such commonplace commercial terms as in the circumstances they think appropriate. In addition, the exclusion clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A (specific performance or injunctive relief, for example) were available.

**133** In this case, injunction relief *was* in fact a live possibility. Although Tercon was not briefed on the negotiations with other bidders, the trial judge found that Glenn Walsh, the owner of Tercon, "had seen representatives of EAC with Brentwood following [the Brentwood/EAC interviews with the Ministry and Bill Swain of Brentwood]", and when asked whether Tercon was going to sue, Walsh had said "no" without further comment. Had Tercon pushed for more information and sought an injunction (as a matter of private law, not public law), at that stage the exclusion clause would have had no application, but Tercon did not do so. This is not to say that estoppel or waiver applies. Nor is it to say that injunctive relief would be readily available in many bidding situations (although if an injunction had been sought here, the unavailability of the alternative remedy of monetary damages might have assisted Tercon). It is merely to say that the exclusion clause is partial, not exhaustive.

**134** The Kincolith road project presented a serious construction challenge on a tight time frame and within a tight budget. Contract A did not involve a bid for a fixed price contract but for the right to negotiate the bid details once the winning proponent was selected. In such a fluid situation, *all* participants could expect difficulties in the contracting process. Members of the construction bar are nothing if not litigious. In the circumstances, the bidders might reasonably have accepted (however reluctantly) the Ministry's need for a bidding process that excluded compensation, and adjusted their bids accordingly. The taxpayers of British Columbia were not prepared to pay the contractor's profit twice over -- once to Brentwood/EAC for actually building the road, and now to Tercon, even though in Tercon's case the "profit" would be gained without Tercon running the risks associated with the performance of Contract B. The Court should not be quick to declare such a clause, negotiated between savvy participants in the construction business, to be "contrary to the Act".

### D. *Assuming the Validity of the Exclusion Clause at the Time the Contract was Made, is There Any Overriding Public Policy That Would Justify the Court's Refusal to Enforce it?*

**135** If the exclusion clause is not invalid from the outset, I do not believe the Ministry's performance can be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding public policy. While there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case. There *was* an RFP process and Tercon participated in it.

**136** Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they didn't like it, that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

**137** While the Ministry's conduct was in breach of Contract A, that conduct was not so extreme as to engage some overriding and paramount public interest in curbing contractual abuse as in the *Plas-Tex* case. Brentwood was not an outsider to the RFP process. It was a legitimate competitor. All bidders knew that the road contract (i.e. Contract B) would not be performed by the proponent alone. The work required a large "team" of different trades and personnel to perform. The issue was

whether EAC would be on the job as a major sub-contractor (to which Tercon could not have objected) or identified with Brentwood as a joint venture "proponent" with EAC. All bidders were made aware of a certain flexibility with respect to the composition of any proponent's "team". Section 2.8(b) of the RFP provided that if "a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed, ... the Ministry may request [further information and] ... reserves the right to disqualify that Proponent, and reject its Proposal". Equally, "[i]f a qualified Proponent is concerned that it has undergone a material change, the Proponent can, at its election, make a preliminary submission to the Ministry, in advance of the Closing Date, and before submitting a Proposal... . The Ministry will, within three working days of receipt of the preliminary submission give a written decision as to whether the Proponent is still qualified to submit a Proposal."

**138** The RFP issued on January 15, 2001. The Ministry was informed by Brentwood of a "proposed material change to our team's structure" in respect of a joint venture with EAC by fax dated January 24, 2001. From the Ministry's perspective, the change was desirable. EAC was a bigger company, had greater expertise in rock drilling and blasting (a major part of the contract) and a stronger balance sheet. EAC was identified in Brentwood's amended proposal as a sub-contractor. In the end, the Ministry did not approve the January 14, 2001 request, presumably because it doubted that a change in the "composition of the Proponent's team's members" could, according to the terms of the RFP, include a change in the Proponent itself.

**139** The Ministry did obtain legal advice and did not proceed in defiance of it. On March 29, 2001, the Ministry noted in an internal e-mail that a Ministry lawyer (identified in the e-mail) had come to the conclusion that the joint venture was not an eligible proponent but advised that Contract B could lawfully be structured in a way so as to satisfy both Brentwood/EAC's concerns and avoid litigation from disappointed proponents.

**140** I do not wish to understate the difference between EAC as a sub-contractor and EAC as a joint-venturer. Nor do I discount the trial judge's condemnation of the Ministry's lack of fairness and transparency in making a contract B which on its face was at odds with what the trial judge found to be the true state of affairs. Tercon has legitimate reason to complain about the Ministry's conduct. I say only that based on the jurisprudence, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

**141** The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.

## V. Disposition

**142** I would dismiss the appeal without costs.

*Appeal allowed,* McLACHLIN C.J. *and* BINNIE, ABELLA *and* ROTHSTEIN JJ. *dissenting.*

**Solicitors:**

*Solicitors for the appellant: McLean & Armstrong, West Vancouver.*

*Solicitor for the respondent: Attorney General of British Columbia, Victoria.*

*Solicitor for the intervener: Attorney General of Ontario, Toronto.*

* * * * *

Corrigendum, released March 18, 2010

Please note the following changes in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, released February 12, 2010:

(1) Para. 5, line 2: "RFP" should read "request for proposals ("RFP")".
(2) Para. 9, line 7: "request for proposals ("RFP")" should read "RFP".
(3) Para. 26, lines 2-4: "This was specified in the Minister of Transportation and Highway's ("Minister") approval of the process before the RFP was issued." should read "This was specified in the approval of the process by the Minister of Transportation and Highways ("Minister") before the RFP was issued."
(4) Para. 39, line 2 of the quote: " The [project evaluation panel ("PEP")] approved" should read "The [project evaluation panel] approved". In line 3 of the quote, "PEP" should read "[panel]".
(5) Para. 47, line 2: "PEP" should read "project evaluation panel ("PEP")".
(6) Para. 50, line 7: "appears" should read " "appears".
(7) Para. 58, line 8 of the quote: "fo" should read "of". In line 9 of the quote "exclude" should read "include".
(8) Para. 81, line 6: "[1989" should read "[1989]".
(9) Para. 85, line 5: "knowledgable" should read "knowledgeable".
(10) Para. 91, line 1: "2006" should read "2000".
(11) Para. 113, line 12: "*Guarantee Trust*" should read "*Guarantee Co.*".
(12) Para. 114, line 4 after the quote: "*Guarantee Trust*" should read "*Guarantee Co.*".

# TAB 2

June 30/16

**Court File No. CV-16-11389-00CL**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

June 30, 2016

The sales process is reasonable. Although that sales process is not to the advantage of anyone.

The Russian Dragon rep. counsel ~~is not~~ cannot proceed. See my endorsement on the Russian record of Mr. Horwich.

I am satisfied that the DIP loans and security meet the tests set out in section 11.2 of the CCAA for the reasons set forth in the second report of the Monitor. It is supported also by the foreign representative of UCI.

The deposits on ~~[illegible]~~ properties that are never encumbered by mortgage security

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

**(PROCEEDING COMMENCED AT TORONTO)**

## MOTION RECORD
**(Returnable June 30, 2016)**


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have no security interest, which is also the case for other unsecured creditors on those properties. There is likely substantial equity in the properties well in excess of the deposits. I do not see the DIP terms as being unfair to the depositors.

The confidential appendix to the report of the Monitor and of the NOI proposal trustee is to be sealed.

Order to go.

# TAB 3

# 978011 Ontario Ltd. v. Cornell Engineering Co.*
# [Indexed as: 978011 Ontario Ltd. v. Cornell Engineering Co.]

53 O.R. (3d) 783

[2001] O.J. No. 1446

Docket No. C30940

Court of Appeal for Ontario

**Weiler, Rosenberg and MacPherson JJ.A.**

April 20, 2001

* Application for leave to appeal to the Supreme Court of Canada dismissed November 1, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. Bulletin, 2001, p. 1969. S.C.C. File No. 28665.

Employment--Contracts--Plaintiff drafted contract to provide personal services to defendant--Personal services contract contained clear and obvious termination clause providing for compensation to plaintiff at rate equal to two times total remuneration paid to plaintiff to date in event of unilateral termination of agreement--Personal relationship between parties and trust reposed in plaintiff by defendant did not impose duty on plaintiff to bring term to defendant's attention--Defendant was in position of ascendancy--Plaintiff specifically asked defendant to read contract before signing it--Defendant did not act with any special regard for plaintiff's interests throughout relationship--Trial judge erred in purporting to rectify personal services agreement by striking out termination clause.

The defendant C Ltd. was owned by S and B. S was a very experienced businessman with a Masters Degree in Business Administration from Harvard. M, a professional engineer, was a family friend of S who acted as a personal mentor to him on business matters. B decided to sell his shares in the defendant company. S approached M and discussed the purchase by M of B's interest. M agreed to go to work for the defendant and to purchase B's shares in three instalments. It was a term of the agreement that M had to satisfy B that he had the ability to take over B's role as president of the company. M was advised by the company's accountant that it would be beneficial to all parties for M's services to be provided through a corporation, pursuant to a written services agreement. S asked M to prepare a written document. M obtained a standard form contract from his professional association and made a number of revisions. He struck out the termination provisions in the printed contract and inserted, in slightly larger type, a provision that if either the personal services contract or the agreement to purchase B's shares at the completion of the contract were terminated or changed, the company would pay compensation to M equal to two times the total remuneration already paid

to M to date. M presented the agreement to S and asked him to read it. S signed the agreement without reading more than the first page. He did not read the termination clause. The company subsequently unilaterally terminated the services agreement. M brought an action to enforce the termination clause. The trial judge held that, in the circumstances under which the agreement was signed, M owed a duty to bring the termination clause to S's attention before S signed the contract. The trial judge purported to rectify the agreement by striking out the termination clause. He then dismissed the action. M appealed.

Held, the appeal should be allowed.

Absent a special relationship, the common law in Canada has yet to recognize that in the negotiation of a contract, there is a duty to have regard to the other person's interests. The failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. Nor is the fact that the clause was not subject to negotiations sufficient in itself. The law does, however, regulate contractual conduct between individuals through the imposition of three types of standards: unconscionability; good faith; and the fiduciary standard. The circumstances where the law requires more than self-interested dealing on the part of a party share certain characteristics. First, one party relies on the other for information necessary to make an informed choice, and, second, the party in possession has an opportunity, by withholding or concealing information, to bring about the choice made by the other party. If one party to a contract relies on the other for information, that reliance must be justified in the circumstances. The following five factors are indicative of situations where reliance is justified: (1) a past course of dealing between the parties in which reliance for advice, etc. has been an accepted feature; (2) the explicit assumption by one party of advisory responsibilities; (3) the relative positions of the parties, particularly in their access to information and in their understanding of the possible demands of the dealing; (4) the manner in which the parties were brought together and the expectation that could create in the relying party; and (5) whether trust and confidence has been knowingly reposed by one party in the other.

The trial judge erred in finding that before signing the contract, S was entitled to expect that M would specifically tell him about the termination clause because they had a fiduciary-type relationship. Although S and M were friends and S acted as a mentor in advising M on his career, M had no prior dealing and no relationship with B. The undisputed purpose of the services agreement was to facilitate the transfer of B's shares to M. M was at the mercy of B's discretion in that even if he raised the money for the first payment towards the purchase of B's shares, B still had to be satisfied of M's ability to run the company before transferring his shares. Without the termination clause, M had no protection from B. It was S who explicitly assumed advisory responsibilities and it was S who was in a position to influence M. M intended to leave the agreement with S to read and advised him to read it. S and B would have had ready access to the necessary information had it not been for S's precipitous act in deciding to sign the agreement after reading only the first page. M did nothing to pressure S to sign the agreement without reading it. The agreement was easy to read, and the changes to the standard form contract were easy to detect. S's failure to act reasonably in the circumstances should not exonerate the company from the terms of the contract. The negotiating tactics which S employed in the sale of B's shares indicated a commercial arm's-length approach to business dealings with M. He did not have regard for M's interests. He was not a "relying party" on M. Having regard to all the circumstances, S was not justified in law in expecting that he would not be bound by the termination clause in the services agreement when he signed it without reading it.

Before the remedy of rectification can be obtained, an applicant must establish: (a) that the written document in issue does not reflect the true intention of the parties; and (b) that the parties shared a common, continuing intention up to the time of signing the document concerning a matter that is not reflected in the agreement. In order for the trial judge to apply the doctrine of rectification, he not only had to find that the services agreement did not represent the common intention of the parties, he had to be positively satisfied as to what their common intention was. In the absence of any common intention as to what was to happen if the services agreement were unilaterally terminated, rectification was inapplicable. Before the signing of the services agreement, there was no common intention nor any understanding as to what would happen if the company unilaterally terminated M because there was never any discussion about it beforehand.

Even if the doctrine of rectification were applicable to a unilateral mistake when the contract is no longer capable of performance, it would be inappropriate to apply it in this case.

Cases referred to

Bell v. Lever Brothers Ltd., [1931] All E.R. Rep. 1, [1932] A.C. 161, 101 L.J.K.B. 129, 146 L.T. 258, 48 T.L.R. 133, 76 Sol. Jo. 50, 37 Com. Cas. 98 (H.L.); Can-Dive Services Ltd. v. Pacific Coast Energy Corp. (2000), 134 B.C.A.C. 19; Craven v. Strand Holidays (Canada) Ltd. (1982), 40 O.R. (2d) 186, 142 D.L.R. (3d) 31 (C.A.); Downtown King West Development Corp. v. Massey Ferguson Industries Ltd. (1996), 28 O.R. (3d) 327, 133 D.L.R. (4th) 550, 1 R.P.R. (3d) 1 (C.A.), revg (1993), 14 O.R. (3d) 528, 33 R.P.R. (2d) 27 (Gen. Div.) [Leave to appeal to S.C.C. refused (1996), 96 O.A.C. 233]; Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997), 34 O.R. (3d) 1, 148 D.L.R. (4th) 496, 32 B.L.R. (2d) 1, 35 C.C.L.T. (2d) 298 (C.A.); Freedman v. Mason, [1958] S.C.R. 483, 14 D.L.R. (2d) 529; H.F. Clarke Ltd. v. Thermidaire Corp., [1973] 2 O.R. 57, 33 D.L.R. (3d) 13, 9 C.P.R. (2d) 203 (C.A.), revd [1976] 1 S.C.R. 319; Hartog v. Colin & Shields, [1939] 3 All E.R. 566 (K.B.); L'Estrange v. Graucob (F.) Ltd., [1934] All E.R. Rep. 16, [1934] 2 K.B. 394, 103 L.J.K.B. 730, 152 L.T. 164 (D.C.); Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860, 2000 SCC 60, 186 F.T.R. 231n, 193 D.L.R. (4th) 1, 262 N.R. 285, 36 R.P.R. (3d) 175, 3 C.C.L.T. (3d) 1; Montreal Trust Co. of Canada v. Birmingham Lodge Ltd. (1995), 24 O.R. (3d) 97, 125 D.L.R. (4th) 193, 21 B.L.R. (2d) 165, 46 R.P.R. (2d) 153 (C.A.); Pointe Anne Quarries Ltd. v. "M.F. Whalen" (The) (1921), 63 S.C.R. 109, 63 D.L.R. 545; Stepps Investments Ltd. v. Security Capital Corp. (1976), 14 O.R. (2d) 259, 73 D.L.R. (3d) 351 (H.C.J.); Tilden Rent-A-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400, 4 B.L.R. 50 (C.A.)

Authorities referred to

Finn, P., "The Fiduciary Principle" in T. Youdan, ed., Equity, Fiduciaries and Trusts (Scarborough, Ont.: Carswell, 1989)
Gonthier, Hon. Charles D., "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000), 45 McGill L.J. 567
Story, J., Commentaries on Equity Jurisprudence, as Administered in England and America, 13th ed. (Boston, Little, Brown, 1886)
Waddams, S.M., The Law of Contracts, 3d ed. (Toronto: Canada Law Book, 1993)

APPEAL from a judgment of Cullity J. (1998), 41 B.L.R. (2d) 219, 41 C.C.E.L. (2d) 118 (Ont. S.C.J.) dismissing an action to enforce a termination clause in a contract.

Brian P. Bellmore and Karen M. Mitchell, for appellant. John P. Brown and Patrick Hill, for respondent.

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The judgment of the court was delivered by

**WEILER J.A.:--**

Overview

[1] The respondent, Cornell Engineering Company Limited ("Cornell"), unilaterally terminated its contract (hereinafter called the Services Agreement) with the appellant, 978011 Ontario Ltd., for the services of Glenn Macdonald ("Macdonald"). The appellant brought an action to enforce the clause in the contract that provided for compensation upon unilateral termination. In the alternative, the appellant claimed damages at common law for the wrongful dismissal of Macdonald. Robert Stevens, who signed the Services Agreement on behalf of the respondent, did not read the termination clause before signing it. Stevens and his partner, Remzi Bimboga, are the sole shareholders, officers and directors of the respondent. The trial judge held that, in the circumstances under which the Services Agreement was signed, Macdonald owed a duty to bring the termination clause in the agreement to Stevens' attention before Stevens signed the contract. The trial judge purported to rectify the Services Agreement by striking out the termination clause. After striking out the termination clause, the trial judge dismissed the appellant's action in its entirety.

[2] The appellant submits that Macdonald did not conceal the termination clause from Stevens and that he had no duty to draw the termination clause to the attention of Stevens simply because outside of the business relationship Macdonald and Stevens maintained a personal relationship as friends. The appellant further submits that the doctrine of rectification does not apply when, as here, the mistake is unilaterally Stevens' and the contract is no longer capable of performance.

[3] For the reasons that follow, I would agree with the appellant that Macdonald had no duty to draw the termination clause to Stevens' attention. I say this for two reasons. First, although there was a relationship of trust between Stevens and Macdonald, it was one in which Stevens acted as a mentor and was in a position of ascendancy, not dependency, with respect to Macdonald. Second, Macdonald discharged his duty, if one existed, when he advised Stevens to read the contract. If Stevens had followed Macdonald's advice he would have had the means to ascertain the terms of the clearly visible termination clause.

[4] The trial judge also erred when he purported to rectify the contract by striking out the termination clause. In order for the remedy of rectification to apply, there must be a mutual intention between the parties concerning what would happen in the event Cornell unilaterally terminated the Services Agreement. There is no evidence that such a mutual intention existed. The parties had never discussed what was to happen in the event Cornell unilaterally terminated the Services Agreement. Even if the doctrine of rectification were applicable to a unilateral mistake when the contract is no longer capable of performance, it would be inappropriate to apply it in this case.

## The Facts

### The parties

[5] Macdonald, aged 41, is a qualified professional engineer with aspirations to own a business. He is the sole shareholder, director and officer of the appellant corporation.

[6] Bimboga is also 41 years of age. He studied and worked abroad and emigrated from Turkey to Canada in 1985. Around this time, he met Stevens and they went into business together. Because of his uneasiness with the English language, he relied on Stevens' articulateness, knowledge and familiarity with the Canadian business scene. Stevens took care of "external" matters while Bimboga concentrated on the "internal" and production side of the business.

[7] Stevens is 70 years of age and a very experienced businessperson. He holds a Masters Degree in Business Administration from Harvard University. Prior to purchasing Cornell in 1990, he was the owner of Beatty Brothers, an appliance manufacturer. He also was the Vice-Chair and a member of the Board of Directors of General Steelwares, a company which had $600 million in annual sales. As Vice-Chair, the presidents of the six divisions of General Steelwares reported to him. He is knowledgeable and experienced in matters of contract negotiation and formation.

[8] Stevens was a friend of Macdonald's family for many years and had acted as a mentor to Macdonald on business matters since January 1992, providing business and career advice to him. Macdonald valued their relationship and respected Stevens. He did not question Stevens or his expertise on business matters and looked up to him as a role model.

[9] Cornell was incorporated in Ontario in 1945 and carried on the business of stamping metal to be used in the manufacturing of household appliances. Stevens and Bimboga purchased Cornell in 1990 and were the sole shareholders, officers and directors of Cornell. Stevens owned 51 per cent of the Cornell shares and Bimboga owned the remaining 49 per cent. Stevens and Bimboga had financed the total purchase price of Cornell in 1990.

### Events leading up to the signing of the Services Agreement

[10] In or about 1992, Bimboga developed health problems and decided to sell his shares in Cornell. There was a Shareholders Agreement between Stevens and Bimboga containing a buy-sell clause. This clause required Stevens to sell his shares unless a purchaser could be found for Bimboga's interest. It was in Stevens' interest to find a purchaser for Bimboga's shares.

[11] In June 1992, Macdonald sought Stevens' personal advice regarding the purchase of another company that Macdonald was in the process of negotiating. During the meeting, Macdonald began to consider the opportunity of working for Stevens and to learn more about the business as an employee.

[12] By letter dated June 23, 1992, Macdonald raised the possibility of working under Stevens at Cornell. He stated that he could not "imagine a more exciting or rewarding opportunity", that he would "never let Stevens down", and that he would "love to give [Stevens] a chance to pass on some of [his] expertise to someone who is willing, eager, and more than capable to sop it up like a dry sponge. I would love to be that sponge".

[13] As a result of this letter, Stevens met with Macdonald on June 26, 1992. After Macdonald indicated he would be interested in working for Cornell, Stevens suggested that Macdonald might

want to buy Bimboga's interest. Stevens also suggested that, when he retired, Macdonald might acquire his majority interest as well.

[14] Over the next several months, Stevens and Macdonald discussed the possible terms for Macdonald to purchase Bimboga's interest in Cornell. Initially, Stevens advised that the price of Bimboga's shares was $1,000,000. Then Stevens advised that Bimboga had changed his mind and did not want to sell his shares. A few weeks later, Stevens told Macdonald that Bimboga would sell his shares for $1,150,000. Later, he again told Macdonald that Bimboga had changed his mind.

[15] In September 1992, Stevens told Macdonald that Bimboga would sell his shares for $1,450,000. Macdonald did not ask why the price kept increasing. (Bimboga testified that his asking price for his shares was always $1,450,000. Stevens testified that it was his negotiating style to advise Macdonald that the shares were not for sale.)

[16] Macdonald was to make a first payment of $650,000 for Bimboga's shares in January 1995. Cornell was to provide financing for $150,000, leaving Macdonald to obtain financing for the remaining $500,000. During a two-year period Macdonald also had to satisfy Bimboga that he had the ability and experience to take over Bimboga's role as president of Cornell.

[17] On October 5, 1992, Stevens advised Macdonald that Bimboga had agreed to the flexible closing date and to pay a salary of $55,000. As a result of the agreement, Macdonald declined a salary of $135,000 per year as President of Don Park and did not pursue further interviews for a position at Noranda. Macdonald began work at Cornell on January 4, 1993.

The Services Agreement

[18] Stevens arranged for Macdonald to meet with Cornell's accountant on February 17, 1993. The accountant advised that it would be beneficial to both Cornell and Macdonald for his services to be provided to Cornell through the appellant corporation, pursuant to a written Services Agreement. Stevens asked Macdonald to prepare a written agreement.

[19] Macdonald had not previously prepared such an agreement. He obtained a copy of an 11-page printed contract for the provision of engineering services from his professional association as a guide. He prepared two copies of the printed agreement on which he made a number of revisions to the standard form document -- striking out some of the clauses and attaching labels over the deleted clauses on which he had typed other terms. The amendments to the first page of the document described the services to be performed for Cornell over a period of two years for an annual fee of $55,000.

[20] Macdonald struck out the termination provisions in the printed contract and opposite them inserted the following clause in slightly larger type:

1.7 Without the mutual consent of the Client and the Engineer, should either this contract or the agreement to purchase 49 per cent of Cornell Engineering Company Ltd. by Glenn Macdonald at the completion of this contract, be terminated or changed, the following terms shall be honoured:

(a) the engineer and Glenn Macdonald shall be released from all conditions and commitments associated with both this contract and the agreement to purchase 49 per cent of Cornell Engineering Company Ltd.
(b) the client shall pay compensation to the Engineer at a rate equal to two times the total remuneration already paid to the Engineer to date.

There had been no prior discussion between the parties as to what would occur if Macdonald's employment was terminated and he did not purchase the shares of Cornell.

[21] On March 3, 1993, Macdonald presented two copies of the Services Agreement to Stevens at his office and asked that Stevens read the agreement. Macdonald was anticipating that Stevens would need time to review the 11-page contract and would likely suggest some amendments. In his evidence-in-chief, Stevens testified that he asked Macdonald, "Does this cover what you want, what you want to do?" to which Macdonald replied, "yes". In cross-examination, Stevens testified that he asked Macdonald, "Is this agreeable to you?" to which Macdonald responded, "Is this agreeable to you?" Stevens then told Macdonald, "It looks like you've covered everything you wanted."

[22] Stevens acknowledged that he knew it was important to read a document before execution, because once signed one would be bound by the document whether it had been read or not. He admitted that he read and agreed with the terms described on the first page of the Services Agreement and specifically agreed to the provisions regarding the performance of the described services over a two-year period at the rate of $55,000 per year.

[23] There was no pressure on Stevens to sign the Services Agreement. Because Stevens was in a position of ascendancy, Macdonald testified that he did not consider it appropriate to demand that Stevens read the Agreement before signing it.

Performance of the Services Agreement

[24] From January 4, 1993 to July 4, 1994, Macdonald provided the services referred to in the Services Agreement and the appellant rendered monthly invoices. On August 26, 1993, Macdonald, Stevens and Bimboga reviewed a third and final draft of an agreement containing the terms of the share purchase upon which they had all agreed (the "Skeleton Agreement"). The substantive provisions of the Skeleton Agreement were as follows:

-- Cornell shall redeem all shares owned by Bimboga and re-issue shares to Macdonald on a pro-rata basis as he pays for them.

-- The price paid by Macdonald to Bimboga for his share interest shall be $1,450,000.00 payable in the following way:

(a) $500,000.00 payable on January 4, 1995,
(b) $300,000.00 payable on January 6, 1997,
(c) $650,000.00 payable on January 8, 1999.

-- Macdonald may pay Bimboga the $300,000.00 sum prior to January 6, 1997.

-- Interest shall be calculated monthly on the unpaid portion of the $300,000.00 at a rate of prime plus 1 per cent and paid by Macdonald to Bimboga on January 5, 1996 and January 6, 1997.

-- The closing date may be earlier than January 4, 1995 should it be agreed by Stevens, Bimboga, and Macdonald.

-- Bimboga shall be available for a period of three months after the closing date to assist in the daily operations of Cornell.

[25] When Macdonald reviewed the draft documentation prepared by Cornell's solicitors, he advised Stevens that it was not satisfactory. Stevens advised Macdonald that revisions to the draft should be deferred until Macdonald had obtained financing for the share purchase.

[26] Macdonald made extensive efforts to obtain financing for the purchase of Bimboga's shares. By July 1994, about 18 months into the Services Agreement, these efforts had not been successful. Macdonald admitted that there was no point in continuing the Services Agreement if he could not obtain financing but he still hoped to do so.

[27] On July 4, 1994, Bimboga requested a meeting during which he and Stevens told Macdonald that they would not pay for services rendered during the month of June 1994 and would not pay any future remuneration. They also demanded that Macdonald sign the share purchase documentation in the form prepared by Cornell's solicitors and immediately deliver a $60,000 deposit to Bimboga. Macdonald was told that unless he agreed to those demands, "the deal was dead." Macdonald requested an opportunity to speak to a financial or legal advisor.

[28] On July 5, 1994, after meeting with his advisors, Macdonald advised Bimboga and Stevens that he was not prepared to work without remuneration but would provide a $60,000 deposit to be placed in trust upon signing a mutually acceptable share purchase agreement. Bimboga, however, continued to demand that he be paid $60,000 immediately or he would sue Macdonald for the salary already paid, legal costs and "suffering".

[29] Shortly before trial, Macdonald received payment from Cornell for services rendered in June.

The Trial Judge's Reasons

[30] The following excerpts encapsulate the trial judge's reasons, reported at (1998), 41 B.L.R. (2d) 219 at pp. 238-41, 41 C.C.E.L. (2d) 118 (Ont. S.C.J.):

> No cases were cited by counsel in which a contract was avoided, or equitable relief granted, on the ground of a unilateral mistake that consisted of one [party's] ignorance

of the existence of a particular term in a written agreement. However, I do not believe that there can be any material distinction in principle between such a case and those like Stepps Investments Ltd. v. Security Capital Corp. (1976), (1977), 14 O.R. (2d) 259] where, unknown to one of the parties, provisions had been omitted or a case such as Hartog v. Colin & Shields, [1939] 3 All E.R. 566 (Eng. K.B.) where an offer for sale of a commodity was mistakenly expressed in terms of a particular price per pound instead of per piece.

In considering the legal effect of Stevens' mistake, the relationship between the Services Agreement and the oral contract of employment between Cornell and Macdonald that preceded it is of the utmost importance. The latter contained no provision for compensation to Macdonald in the event of a termination of the Share Purchase Agreement or of negotiations for such an agreement. The question had not been discussed.

. . . . .

The substitution of the Services Agreement for the contract of employment was made primarily for tax purposes. Although the objects of the Services Agreement were defined in terms of specific projects to be completed by the Plaintiff through Macdonald -- and although there is evidence that Macdonald worked diligently to complete them -- the evidence is overwhelming that the main purpose of the Services Agreement was the same as that of the employment contract: to permit Macdonald to acquire the necessary knowledge and expertise to satisfy one of the preconditions for a share purchase. It was, as I have mentioned, conceded that, if the parties agreed not to proceed with the share purchase, the Services Agreement would terminate. In my judgment, Bimboga and Stevens would have been quite reasonable in assuming that the Services Agreement would contain nothing substantive that was not in the employment contract, other than the procedures discussed with the tax expert from Price Waterhouse for the purpose of giv ing tax efficacy to an agreement for services to be provided by the Plaintiff through its employee, Macdonald.

. . . . .

The possible qualification that must be considered arises from Mr. Bellmore's submission that, even if all the above facts were proven, equitable relief should be denied as the mistake arose from Stevens' negligence in not reading the agreement. Mr. Bellmore relied heavily on the decision of the Court of Appeal in Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997), 34 O.R. (3d) 1, and, in particular, on the following passage from the judgment of the Court delivered by Robins J.A. [at p. 2]:

> As a general proposition, in the absence of fraud or misrepresentation, a person is bound by an agreement to which he has put his signature whether he has read its contents or has chosen to leave them unread: . . . Failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. A busi-

> nessman executing an agreement on behalf of a company must be presumed to be aware of its terms and to have intended that the company would be bound by them. The fact that Mr. Gordon chose not to read the contract can place him in no better position than a person who has. Nor is the fact that the clause is in a standard pre-printed form and was not a subject of negotiations sufficient in itself to vitiate the clause. L'Estrange v. Graucob, [1934] 2 K.B. 394 at p. 403, . . . Craven v. Strand Holidays (Canada) Ltd. (1982), 40 O.R. (2d) 186 (C.A.) at p. 194 . . .

In the circumstances of that case the Court of Appeal held that the trial judge was in error in finding that it was an "unacceptable commercial practice" for the party who prepared the contract to fail to bring the clause in dispute to the attention of the other party. The Court found that there was no special relationship existing between the parties that imposed any such obligation.

In the circumstances of this case, I find that such a special relationship existed. Stevens was Macdonald's mentor. He had taken a genuine and great interest in Macdonald and his career plans and had been generous with his advice and assistance. As far as Macdonald's career was concerned, the relationship was more akin to that of a parent than just a family friend. They were working towards an association that in everyday language could be described as a partnership and that, in my view, would have much the same fiduciary implications. Macdonald had been effusive in his gratitude to Stevens and had assured him that he would never let him down. Stevens trusted Macdonald completely and relied upon him to prepare the Services Agreement in accordance with their prior discussions. In these circumstances I believe that Stevens was entitled to assume that Macdonald would not present him with an agreement that contained important provisions that were not in the employment contract without drawing their existence to his attention. When, contrary to his accustomed practice, Stevens proposed to sign the Services Agreement without reading beyond the first page, Macdonald chose to remain silent notwithstanding his knowledge that Stevens was unaware of the existence, and purported effect, of paragraph 1.7. While Macdonald had no obligation to actively advance or protect Stevens' interests during their negotiations -- the relationship was not a fiduciary one in that sense -- Macdonald had, in my judgment, a sufficient obligation to act in good faith towards Stevens to require disclosure of the existence of paragraph 1.7: Waddams, The Law of Contracts (3rd ed., 1993), paras. 427-33; Finn, "The Fiduciary Principle", in Essays in Equity, Fiduciaries and Trusts, T.G. Youdan ed., (Carswell, 1989), at pp. 16-24. Stevens' alleged negligence arose out of his reliance that Macdonald would act in good faith. Macdonald did not do so and, in my judgment, he is not entitled to rely on the terms of the paragraph.

The Law

[31] The law to be applied to this case is not really in issue. A succinct formulation of the law is found in Can-Dive Services Ltd. v. Pacific Coast Energy Corp. (2000), 134 B.C.A.C. 19 by Southin J.A. at para. 137, in which she quotes J. Story, Commentaries on Equity Jurisprudence, as Administered in England and America, 13th ed. (Boston, Little, Brown, 1886), vol. 1, paras. 147-55. Story states that a unilateral mistake as to a material term of a contract will afford a ground of relief in

equity where the mistake operates as a fraud or surprise upon the ignorant party. However, Story adds at para. 147:

> But in all such cases the ground of relief is not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them. For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other upon the ground of confidence or otherwise, there the court will not interfere. . . .

[32] This quote encapsulates the fact that we have a judicial system that emphasizes individual responsibility and self-reliance. Generally, parties negotiating a contract expect that each will act entirely in the party's own interests. Absent a special relationship, the common law in Canada has yet to recognize that in the negotiation of a contract, there is a duty to have regard to the other person's interests, namely, to act in good faith: see Bell v. Lever Brothers Ltd., [1932] A.C. 161, [1931] All E.R. Rep. 1 (H.L.), and more recently, Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860, 2000 S.C.C. 60 at para. 73. In keeping with the principle of self-reliance imposed by law on each party to a contract, the failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. Nor is the fact that the clause was not subject to negotiations sufficient in itself: see Fraser Jewellers (1982) Ltd. v. Dominion Electric Prot ection Co. (1997), 34 O.R. (3d) 1 at p. 10, 148 D.L.R. (4th) 496 (C.A.); L'Estrange v. Graucob (F.) Ltd., [1934] 2 K.B. 394 at p. 403, [1934] All E.R. Rep. 16.

[33] The law does, however, regulate contractual conduct between individuals through the imposition of three types of standards: unconscionability, good faith and the fiduciary standard. All three standards are points on a continuum in which the law acknowledges a limitation on the principle of self-reliance and imposes an obligation to respect the interests of the other. They are defined by P. Finn, "The Fiduciary Principle", in T. Youdan, ed., Equity, Fiduciaries and Trusts (Scarborough, Ont.: Carswell, 1989), 1 at 4 as follows:

> "Unconscionability" accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. "Good faith", while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other.[1] at end of document] The "fiduciary" standard[2] at end of document] for its part enjoins one party to act in the interests of the other -- to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour. Much the most contentious of the trio is the second, "good faith". It often goes unacknowledged. It does embody characteristics to be found in the other two.

[34] The circumstances where the law requires more than self-interested dealing on the part of a party share certain characteristics. First, one party relies on the other for information necessary to make an informed choice and, second, the party in possession of the information has an opportunity, by withholding (or concealing) information, to bring about the choice made by the other party. See Finn, supra, at pp. 17-18[3] at end of document] and Waddams, The Law of Contracts, 3d ed. (Toronto: Canada Law Book, 1993), at para. 438. If one party to a contract relies on the other for infor-

mation, that reliance must be justified in the circumstances. Finn, supra, suggests at p. 20 that the following five factors are indicative of situations where reliance is justified:

(1) A past course of dealing between the parties in which reliance for advice, etc., has been an accepted feature;
(2) The explicit assumption by one party of advisory responsibilities;
(3) The relative positions of the parties particularly in their access to information and in their understanding of the possible demands of the dealing;
(4) The manner in which the parties were brought together, and the expectation that could create in the relying party; and
(5) [W]hether "trust and confidence" knowingly [has] been reposed by one party in the other.

[35] The presence of one of these elements alone will not necessarily suffice to justify the imposition of a duty in law on the other. Dependence, influence, vulnerability, trust and confidence are of importance only to the extent that they evidence a relationship suggesting an entitlement not to be self-reliant: see Finn, supra, at p. 47. While the relationship may be the foundation for the entitlement, in and of itself, the relationship does not create the entitlement. The entitlement arises either because one party has no ability to readily inform himself or herself by accessing important information or because one party has an inability to appreciate the significance of the information. That inability may be due to a cognitive disability or it may arise out of the circumstances created by the other party. To determine whether the entitlement is created, regard must be had to all the circumstances.

Issue on Appeal

[36] The trial judge found that prior to signing the contract, Stevens was entitled to expect that Macdonald would specifically tell him about the termination clause because they had a fiduciary-type of relationship. Was he correct? The answer to this question requires a more detailed examination of the facts and the trial judge's findings.

Analysis

[37] The trial judge found that a special relationship existed between Macdonald and Stevens based on the following factors: Stevens had previously advised Macdonald about career prospects; they were working towards a partnership and partners owed one another a fiduciary duty. Despite these findings, the trial judge found at para. 65, "Macdonald had no obligation to actively advance or protect Stevens' interests during their negotiations." Therefore, the relationship was not a fiduciary one.

[38] However, based upon Stevens' complete trust in Macdonald, the trial judge found that Macdonald had an obligation to act in good faith towards Stevens. He went on to hold that this obligation to act in good faith required Macdonald to disclose the existence of the termination clause to Stevens, and that Stevens should not be held responsible for his own negligence in failing to read the agreement because he had trusted Macdonald and relied on him to prepare the Services Agreement.

[39] I respectfully disagree that Stevens was justified in law in relying on Macdonald to bring the termination clause to his attention. In reaching his conclusion, the trial judge relied on Finn, supra,

and Waddams, supra. I will also follow the indicia used by these authors as a guide in my conclusion.

(1) Past course of dealing

[40] When Stevens signed the Services Agreement, he did so on behalf of Cornell. Although Stevens and Macdonald were friends and Stevens acted as a mentor in advising Macdonald on his career, Macdonald had no prior dealing and no relationship with Bimboga, the other person affected by the Agreement. The undisputed purpose of the Services Agreement was to facilitate the transfer of Bimboga's shares in Cornell to Macdonald. Macdonald was at the mercy of Bimboga's discretion in the sense that even if he raised the money for the first payment towards the purchase of Bimboga's shares, Bimboga still had to be satisfied of Macdonald's ability to run the company before transferring his shares. Without the termination clause, Macdonald had no protection from Bimboga.

[41] It is also important to recall that Macdonald turned down a salary of $135,000 as President of Don Park for an indefinite period in return for a two-year employee position for $55,000. In this context, the termination clause in the Services Agreement, although one-sided, was not unreasonable. Furthermore, by entering into the Services Agreement, Macdonald was potentially relinquishing his common law protection from wrongful dismissal. In these circumstances, the inclusion of a termination clause in the agreement was not unusual.

[42] At para. 58, the trial judge considered Hartog v. Colin & Shields, [1939] 3 All E.R. 566 (K.B.) and Stepps Investments Ltd. v. Security Capital Corp. (1976), 14 O.R. (2d) 259, 73 D.L.R. (3d) 351 (H.C.J.) and concluded that there is no material distinction in principle between those cases and the present one. In both Hartog, supra, and Stepps Investments, supra, the parties had specifically discussed and agreed to a term of a contract that was then unilaterally changed without notice to the other party.

[43] It appears that the trial judge was of the opinion that since Macdonald had already started work for Cornell, all of the terms of his employment had been agreed upon and therefore the termination clause was a unilateral change to the oral agreement. Technically, the parties to the oral contract were not the same as the parties to the written contract. The oral contract was entered into by Macdonald personally, the written contract was entered into by the appellant corporation. More importantly, there was no discussion, and no prior agreement between any of the parties regarding termination.

[44] Upon seeing the 11-page agreement, Stevens must have known from the length of the document that it contained terms other than the few that had been agreed upon orally. The terms that had been agreed upon orally, namely, compensation of $55,000 per annum, at the rate of 1/12 per month, and the duration of the agreement, two years, were all on the first page which Stevens read.

(2) Explicit assumption by one party of advisory responsibilities

[45] It was Stevens who explicitly assumed advisory responsibilities and it was Stevens who was in a position to influence Macdonald.

(3) Relative positions of the parties, particularly in their access to information and in their understanding of the possible demands of the dealing

[46] Macdonald intended to leave the agreement with Stevens to read and in fact advised him to read it. Stevens and Bimboga would have had ready access to the necessary information had it not been for Stevens' precipitous act in deciding to sign the agreement after reading only the first page. Macdonald did nothing to pressure Stevens to sign the agreement without reading it.

[47] The Agreement was easy to read with clear headings including the heading "Termination" in bold. The changes to the standard form were easy to detect. After the heading "Termination" there is a line drawn through the remainder of the pre-printed portion that remains visible on the right-hand side. The amendment that is typed in is located on the opposite side and stands in slightly larger type than the pre-printed font and is clearly worded. Stevens could readily have accessed the information concerning the termination clause by simply reading the Services Agreement.

[48] In Stepps, supra,5 part of the rationale for the decision of Grange J.A., that there was a duty on the party making a change to the agreement to draw it to the attention of the other side, was that the significance of the change was not easy to detect. That is not the situation here. Nor is this a case where a party has accepted a standard form contract containing onerous and verbose provisions in small type and in circumstances where it could not reasonably be expected for the signing party to read to the contract: see Tilden Rent-A-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.). In this case, Stevens, an experienced person in signing contracts, had the opportunity to examine the documents, and was encouraged to do so. The clause is plainly visible, clearly worded and capable of being detected as in Downtown King West Development Corp. v. Massey Ferguson Industries Ltd. (1996), 28 O.R. (3d) 327, 133 D.L.R. (4th) 550 (C.A.), leave to appeal to the S.C.C. refused (1996), 96 O.A.C. 233; Craven v. Strand Holidays (Canada) Ltd. (1982), 40 O.R. (2d) 186, 142 D.L.R. (3d) 31 (C.A.). Stevens' failure to act reasonably in the circumstances should not exonerate Cornell from the terms of the contract.

(4) The manner in which the parties were brought together and the expectation that could be created in the relying party

[49] The negotiations for the sale of Bimboga's shares, carried out through Stevens, involved the use of a negotiation "tactic". Stevens represented that the sale was on, then off, then on again, returning each time to Macdonald with an increase in the purchase price. In acting in this manner Stevens did not have regard for Macdonald's interests and therefore this conduct would not require Macdonald to have regard for Stevens' interests. The negotiating tactic that Stevens implemented indicates a commercial arm's-length approach to business dealings with Macdonald. The actions of Stevens do not suggest that he, on behalf of Cornell, was a "relying party" on Macdonald.

[50] In deciding what the expectations of the parties were at the time the contract was signed, the court is entitled to have regard to the parties' actions after the signing of the contract: Montreal Trust Co. of Canada v. Birmingham Lodge Ltd. (1995), 24 O.R. (3d) 97 at p. 108, 125 D.L.R. (4th) 193 (C.A.). When Cornell withheld payment to Macdonald under the Services Agreement in June 1994, the trial judge found that Stevens, "supported or at least acquiesced in, and associated himself with Bimboga's threats to cause Cornell to discontinue the payments". Both before and after the signing of the contract, Stevens' actions do not give rise to a reasonable expectation that Macdonald would have regard for his interests.

(5) Whether trust or confidence has knowingly been reposed by one party in the other

[51] The trial judge found that Stevens trusted Macdonald completely and Macdonald knew this. He found in effect that Macdonald took advantage of that trust. The trial judge appears to conclude that Macdonald took advantage of this "special relationship" without adequate consideration of all the circumstances. As Finn, supra, indicates, the presence of trust and confidence may be the foundation for a reasonable expectation that one party should have regard to the interests of the other but it, alone, will not create that obligation. Stevens was in an advisory position to Macdonald, it was not the other way around. Quite apart from advancing Macdonald's interests, when their interests did not coincide, Stevens appears to have had no regard for Macdonald's interests in his dealings with him. As a sophisticated and experienced businessperson, Stevens had the cognitive ability to appreciate the significance of the document he was signing. That ability was not impaired as a result of any act by Macdo nald.

[52] Having regard to all of the circumstances, Stevens was not justified in law in expecting that he would not be bound by the termination clause in the Services Agreement when he signed the agreement without reading it.

(6) Is rectification applicable?

[53] Before the remedy of rectification can be obtained an applicant must establish: (a) that the written document in issue does not reflect the true agreement of the parties, and (b) that the parties shared a common, continuing intention up to the time of signing the document concerning a matter that is not reflected in the agreement: Can-Dive Services Ltd. v. Pacific Coast Energy Corp., supra, at para. 159; H.F. Clarke Ltd. v. Thermidaire Corp., [1973] 2 O.R. 57 at pp. 64-65, 33 D.L.R. (3d) 13 (C.A.) (revd on other grounds, [1976] 1 S.C.R. 319); Pointe Anne Quarries Ltd. v. "M.F. Whalen" (The) (1921), 63 S.C.R. 109 at pp. 126-27, 63 D.L.R. 545.

[54] In order for the trial judge to apply the doctrine of rectification, he not only had to find that the Services Agreement did not represent the common intention of the parties, he had to be positively satisfied as to what their common intention was. In the absence of any common intention as to what was to happen in the event that the Services Agreement was unilaterally terminated, rectification is simply inapplicable. Prior to the signing of the Services Agreement, there was never any common intention or understanding as to what was to happen in the event that Cornell unilaterally terminated Macdonald because there was never any discussion about it beforehand. The trial judge accepted Stevens' evidence that he would not have signed the agreement had he known of the termination clause. There is no evidence, however, that Macdonald would have signed the Services Agreement without the termination clause.

[55] In view of my conclusion, it is unnecessary for me to deal with the other issues raised by the appellant.

Conclusion

[56] I would allow the appeal, set aside the judgment of the trial judge and grant judgment in accordance with the termination clause in the Services Agreement with costs here and at trial to the appellant.

Appeal allowed.

## Notes

Note 1: At pp. 11-12, Finn, supra, gives examples of relationships where a duty of good faith has been imposed. These include an applicant applying for insurance; a doctor counselling a patient on a proposed treatment.; the possessor of superior information dealing with one to whom that information is not reasonably accessible.

The duty of good faith requires the person exercising a power or discretion to have regard to the other person's interests but this does not necessarily mean that the other person's interests are paramount; see Freedman v. Mason [1958] S.C.R. 483, 14 D.L.R. (2d) 529; The Hon. Justice Charles D. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000), 45 McGill L.J. 567 at pp. 583-84, subtitled "Good Faith in Contracts".

Note 2: Well-known categories of fiduciary relationships that come to my mind here include solicitor-client, trustee and cestui que trust, parents and children under age, adults and "ancient" parents, and relationships where one of the parties has some known infirmity. Before enforcing a contract in these relationships, acourt will want assurance that in entering into the contract the ascendant party acted only with regard to the dependent party's interests.

Note 3: Although Finn's comments are directed to the circumstances in which a fiduciary relationship will be found, I am of the opinion that they are equally applicable to the circumstances in which a lesser duty of good faith will be imposed.

# TAB 4

*Indexed as:*

# Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.

**Between**
**Fraser Jewellers (1982) Ltd., plaintiff (respondent), and Dominion Electric Protection Co. and Ian Wright and Donald Land, defendants (appellant)**

[1997] O.J. No. 2359

34 O.R. (3d) 1

148 D.L.R. (4th) 496

101 O.A.C. 56

32 B.L.R. (2d) 1

35 C.C.L.T. (2d) 298

1997 CanLII 4452

71 A.C.W.S. (3d) 871

Docket: C14470

Ontario Court of Appeal
Toronto, Ontario

**Robins, Osborne and Abella JJ.A.**

Heard: January 7, 1997.
Judgment: June 10, 1997.

(24 pp.)

*Contracts -- Performance or breach -- Fundamental breach -- What constitutes a fundamental breach -- Remedies for breach -- Damages -- Extent of liability, losses attributable to breach -- Causation.*

This was an appeal by the defendant from a judgment awarding the plaintiff damages for the failure of the defendant security protection firm to properly transmit burglar alarm signals to the police department. The plaintiff operated a jewellery store in Cornwall, Ontario. It contracted with the defendant to provide an alarm system and monitoring service. The contract specified that the defendant was not an insurer, and limited its liability for loss. The plaintiff's store was robbed, in a holdup by masked bandits, of jewellery worth about $50,000.00. The robbers had never been apprehended nor had the goods been recovered. During the robbery, store employees pressed a hidden alarm button installed by the defendant. The signal was received in the defendant's central station in Ottawa. However, the defendant's employee failed to respond to the signal for about ten minutes. By the time he called the Cornwall police, a store employee had already called them, and the robbers were gone. The issues raised on this appeal were whether the defendant's conduct in failing to notify the Cornwall police promptly of the alarm could be said to have caused the plaintiff's loss, and whether the defendant could rely on the contract to limit its liability.

HELD: The appeal was allowed, and the judgment was varied by reducing the award of damages from $50,000.00 to $890.00. The court rejected the appellant's arguments on the causation issue. The case was a marginal one, involving elements of conjecture and speculation as to when certain events would have occurred had the defendant contacted the police within one minute. Nonetheless, there was sufficient evidence as to the time and distance factors upon which the trial judge could rely to draw the inferences necessary to conclude that the robbers could have been caught or the jewellery recovered had the defendant not negligently delayed in contacting the police. The decision was within the province of the trial judge, and ought not to be interfered with on appeal. The court agreed with the appellant on the issue of limitation of liability. The trial judge had held that the defendant's failure to respond promptly to the alarm signal constituted a fundamental breach of the agreement, making it unfair or unreasonable to permit enforcement of the exclusionary clause. The appeal court did not accept this conclusion. The breach in this case was not fundamental and, even if it were, the circumstances were not such as to warrant striking down the limitation of liability clause. The plaintiff could not be said to have been deprived of substantially the whole benefit of the contract. The contract, for both installation and monitoring of the equipment, had continued intact. There was no suggestion that the plaintiff was rushed or pressured in any way into signing the contract, or that the defendant obtained the contract by taking any undue advantage of the plaintiff. To make the defendant liable as an insurer would be to change fundamentally the contract agreed to by the parties. There was no basis to change the agreement; the parties should be held to their bargain.

**Counsel:**

Paul J. Martin for the appellant. Michael R. Salhany for the respondent.

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The judgment of the Court was delivered by

1 **ROBINS J.A.**:-- This is an appeal from a judgment awarding the plaintiff, a retail jeweller, damages resulting from the failure of the defendant, a security protection firm, to properly transmit

burglar alarm signals to a municipal police department. This failure is alleged to have permitted two robbers to escape from the plaintiff's premises with jewellery worth $50,000.

THE FACTS

(a) The Agreement

**2** The plaintiff Fraser Jewellers (1982) Ltd. operates a jewellery store in Cornwall, Ontario. The company is owned and controlled by Stuart Gordon. The defendant Dominion Electric Protection Co., which operates under the name "ADT" or "ADT Security Systems", is in the security protection business.

**3** In 1986, Mr. Gordon contacted ADT with a view to upgrading his company's burglar alarm equipment and subscribing to ADT's monitoring service. The company had used ADT alarm equipment for some years but had not previously subscribed to its monitoring service. Following discussions between Mr. Gordon and an ADT representative, the parties entered into a "Purchase Order and Service Agreement" on March 11, 1986 (the "agreement" or the "contract"). Pursuant to this agreement, ADT was to furnish and install a new protective signalling system for $3700 and provide Fraser Jewellers, for an annual fee of $890, with a monitoring service that was to be effected by way of signal recognition and notification by ADT's central station in Ottawa to the Cornwall municipal police.

**4** Paragraph E of the agreement is central to this appeal. This provision is set out in bold block letters and reads:

> It is understood that ADT is not an insurer, that insurance, if any, shall be obtained by the customer and that the amounts payable to ADT hereunder are based upon the value of the services and the scope of liability as herein set forth and are unrelated to the value of the customer's property or property of others located in customer's premises. ADT makes no guarantee or warranty, including any implied warranty of merchantability or fitness, that the system or services supplied, will avert or prevent occurrences of the consequences therefrom, which the system or service is designed to detect or avert; that if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% of the annual service charge or $10,000.00, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy; and that the provisions of this paragraph shall apply if loss, damage or injury irrespective of cause or origin, results, directly or indirectly to person or property from performance or non-performance of obligations imposed by this contract or from negligence, active or otherwise, of ADT, its agents or employees.

**5** Mr. Gordon testified that he did not read the agreement, that he was unaware of this provision, and that it was not pointed out to him by ADT's representative. He testified also that Fraser Jewellers did not insure itself against losses resulting from robbery other than by way of a rider to its fire insurance policy which limited recovery for such losses to $2000. The cost to jewellers of this form of coverage was apparently such that it was not considered "worthwhile". "I thought", Mr. Gordon said, "I'd self-insure myself rather than pay out those premiums every year". Fraser Jewel-

lers had prior agreements with ADT relating to the installation of ADT equipment that contained terms similar to para. E.

(b) The Holdup

**6** On March 23, 1988, shortly after 10 a.m., two men wearing balaclavas and brandishing guns entered the plaintiff's store. After emptying a diamond ring display case into a duffle bag, they handcuffed Mr. Gordon and an employee, Bernice Patterson, together back to back, put them in the cellarway and closed the door. While they were there, Mr. Gordon heard the robbers opening and emptying another jewellery display case until one of them said "come on". After that, he heard the front door close. Mr. Gordon and Mrs. Patterson then came out of the cellarway, went to the front door and saw the robbers walking across the street toward Pitt Street where they turned south and disappeared from view. While still handcuffed, Mrs. Patterson managed to call the police. The robbers have never been apprehended nor have the goods been recovered.

**7** While the robbers were on the premises, Mrs. Patterson and Mr. Gordon each surreptitiously pressed a hidden holdup alarm button that had been installed and was being monitored by ADT. The alarm signal was properly received in ADT's central station in Ottawa. However, the ADT employee in charge, for no apparent reason, failed to respond to the signal for approximately ten minutes. By the time he called the Cornwall police, Mrs. Patterson had already called them herself and the robbers were gone.

THE TRIAL

**8** Fraser Jewellers brought this action to recover the loss it sustained as a result of the robbery. It contends that the robbery could have been circumvented, and the jewellery could have been recovered, had ADT properly responded to the alarm signal. ADT, on the other hand, says that its employee's failure to act more promptly was not the cause-in-fact of the loss; the robbers would have been gone before the police arrived even if the police had been called sooner. Furthermore, ADT argues, its liability, should it be found liable, is limited by para. E of the agreement to a sum not exceeding the annual service charge of $890.

**9** The action came on for trial before the Honourable Mr. Justice Morin, sitting without a jury, in Cornwall. Following a five-day trial, the learned judge, in lengthy oral reasons, rejected ADT's defences and awarded the plaintiff the full amount of the loss, which he assessed at $50,000. ADT now appeals to this court from that judgment.

THE ISSUES

**10** The appeal raises two basic issues:

(1) the causation issue: can ADT's conduct in failing to notify the Cornwall police promptly of the alarm be said to have caused Fraser Jewellers' loss?
(2) the limitation of liability issue: is ADT entitled to rely on the provisions of para. E to limit its liability to an amount equal to the annual monitoring charge?

1. The Causation Issue

**11** It is a truism that a plaintiff must prove its case by a fair preponderance of credible evidence. If at the close of the case the evidence is equally balanced, the plaintiff will have failed to meet its

burden and the cause of action will not have been made out. The question then is whether the plaintiff here has established on the balance of probabilities the necessary causal relationship between the defendant's failure to promptly report the alarm signal and the robbery loss. Put another way, has the plaintiff satisfied the burden of proving that it would not have suffered the loss had ADT given the Cornwall police timely notice of the alarm?

**12** In deciding this issue, the trial judge made a number of findings as to the precise times at which certain events had or should have occurred. None of these findings is in dispute:

(a) ADT received a holdup alarm signal from Fraser Jewellers at ADT's central station in Ottawa at 10:21:21 a.m.;
(b) ADT should have notified the Cornwall police within a minute after receiving the alarm;
(c) Mrs. Patterson, while still handcuffed, managed to telephone the police at 10:26:57. The robbers had by then left the store and, as noted above, were last seen as they crossed the street and disappeared at the next corner;
(d) a police officer was dispatched to the scene at 10:27:20;
(e) at 10:28:19, the police officer radioed that he was in the area; and
(f) at 10:31:50, ADT finally responded to the alarm and notified the police.

**13** The trial judge, primarily on the basis of inferences he drew from these findings, concluded that:

> had the Cornwall police been contacted by the defendant company within a minute of the hold-up alarm being received by the defendant company (that is at approximately 10:22:21) there is a reasonable likelihood that the robbers would have been apprehended and the stolen goods recovered.
>
> ...
>
> ... on the balance of probabilities ... the police would have been on the scene within approximately three and a half minutes after Mrs. Patterson pressed the hold-up alarm button at 10:21:21 if the defendant had not breached its duty to the plaintiff.
>
> Mrs. Patterson estimates that from the time she rang the alarm to the time she saw the robbers crossing the street after the robbery, some four minutes had passed. I accept her evidence in that respect. It is likely, therefore, that had the defendant company acted reasonably the police would have been on the scene in time to at least see the robbers exiting the store.
>
> I conclude from all the circumstances that it is likely that the robbers would have been apprehended or at the very least the stolen goods would have been recovered. I find therefore that the plaintiff suffered damages as a result of the defendant company's breach.

**14** There can be no question but that ADT's inaction over the nine to ten minute period in issue constituted a breach of this company's contractual duty to Fraser Jewellers. The agreement between

these parties is an agreement for security services that are to be provided in emergencies such as the emergency in this case. The time within which these services are to be performed is clearly of the essence of the agreement. ADT does not deny this, but, as I have indicated, argues that there is no causal connection between its negligent failure to provide the contemplated service within a reasonable time and the loss resulting from the robbery. In ADT's submission, the trial judge erred in concluding that the plaintiff had proven that but for ADT's breach it was likely that "the robbers would have been apprehended or at the very least the goods would have been recovered".

**15** On ADT's analysis of the evidence, the robbers would have fled the scene of the crime before a police officer arrived even if there had been no delay in contacting the police. Working backwards from the time the police received Mrs. Patterson's call, ADT submits that three to four minutes must have elapsed from the time Mrs. Patterson and Mr. Gordon assured themselves that the robbers had left the store to the time they called the police. At the least, that much time must have elapsed in view of the fact that before making this call, they came out from the cellar, went to the front of the store, watched the robbers cross the street and walk to the next corner, struggled to free themselves of the handcuffs, and used the phone while still handcuffed.

**16** The robbers, ADT hypothesizes, left the store at about 10:23, and could not have been there for more than about five minutes in all. Given the time it took the police to reach the store in response to Mrs. Patterson's call, ADT contends that even if the police had been contacted within a minute of the alarm being received, the robbers would have been gone before they reached the scene. The trial judge's finding to the contrary, the argument concludes, is not supportable. The evidence is not such that it can be found to preponderate in favour of the plaintiff's theory of what would have happened if ADT had reacted more appropriately to the alarm. The plaintiff, therefore, cannot be said to have discharged the burden of proof it was obliged to meet.

**17** While ADT's submissions are not without merit and, indeed, might have been accepted by another trier of fact, as a matter of appellate review, I am not persuaded that there is any valid basis for interfering with the factual findings that served to satisfy the judge that the plaintiff's loss was the proximate result of the defendant's breach of contract.

**18** The case is manifestly a marginal one, and there are, as the defendant argues, elements of conjecture and speculation involved in the decision. Nonetheless I am of the view that there was sufficient evidence, particularly the evidence as to the time and distance factors, upon which the trial judge could rely to draw the inferences necessary to conclude on the balance of probabilities that the robbers could have been caught or the jewellery recovered had ADT not negligently delayed contacting the police. The decision was within the province of the trial judge and ought not to be rejected because an appellate court may hold a view of the facts or their relative importance different than that of the trial judge. Accordingly, I would reject this ground of appeal.

2. The Limitation of Liability Issue

**19** On this aspect of the case, the trial judge held that ADT was not entitled to rely on para. E of the agreement to limit its liability to the plaintiff. For all practical purposes, he held the clause to be unenforceable. In reaching this conclusion, he had reference to Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, the most recent decision of the Supreme Court of Canada on the question of judicial control of exclusionary provisions designed to reduce or eliminate liability in private contracts.

**20** In that case, the Supreme Court of Canada was unanimous in holding that, while such provisions, prima facie, were enforceable according to their true meaning, a court was empowered in limited circumstances to grant relief against provisions of this nature. The Supreme Court of Canada, however, was evenly divided on the question of the test to be used to determine when or in what circumstances the power to grant relief should be exercised.

**21** Applying the test advanced by Wilson J., the trial judge held that ADT's failure to respond promptly to the holdup alarm signal constituted a fundamental breach of the agreement and went on to ask whether, in the context of this fundamental breach, it was "fair and reasonable" to enforce the exclusionary clause. His response to that question was that it would be "unfair or unreasonable" in the circumstances of this case "to permit the defendant company to limit its liability to the plaintiff company on the basis of clause E of the agreement." Accordingly, he gave no effect to the clause.

**22** As an alternative approach, the trial judge applied the test advocated by Dickson C.J.C. in Hunter to the effect that an exclusion of liability clause should be enforced in accordance with its terms and without regard to any question of fundamental breach save only if the clause is "unconscionable". Applying this test, the judge stated that "if the law requires a finding of unconscionability in order to deprive the defendant company of the benefit of clause E" he would make such a finding. "No honest and fair man", he said, "would expect in the circumstances of this case that clause E of the agreement should be worked against the plaintiff company to limit its recovery to $890. To that extent it would be unconscionable to do so."

**23** With deference to the learned judge, I am unable to accept his conclusions. In my opinion, the breach in this case was not fundamental and, even if it were, the circumstances here are not such as to warrant striking down this limitation on liability clause. In the context of this commercial transaction, I see nothing unfair or unreasonable or, indeed, unconscionable in giving effect to this term of the agreement between the parties.

**24** If, as I understand it, a fundamental breach occurs when the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit of the contract, no such breach occurred here. See, Hunter, supra, per Wilson J. at p. 499, and Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827 at 849 (H.L.)

**25** Fraser Jewellers cannot be said to have been deprived of substantially the whole benefit of this contract. Looked at in it entirety, the contract called for both the installation and monitoring of an alarm system. Save for the single event which gave rise to this action, and which occurred some two years after the contract was agreed to, the contract was performed properly and without complaint. The plaintiff had the benefit of it throughout the whole period. Moreover, the contract continued in effect after the holdup and, indeed, remained in effect at the time of trial. It is significant that the plaintiff did not treat the breach as fundamental and has not sought to terminate the contract on the doctrine of fundamental breach.

**26** There is, of course, a difference between negligent performance of a contract and fundamental breach: B.G. Linton Construction Ltd. v. Canadian National Railway Company, [1975] 2 S.C.R. 678 at 692. In the former case, an aggrieved party's remedy may be limited to damages; in the latter, where it can be said, for instance, that the breach goes to the root of the contract or the contract has not been performed at all, the aggrieved party may void the contract. The present case, in my opinion, raises only a question of the negligent performance of a contractual duty.

**27** The defendant's negligence in failing to respond appropriately to the alarm cannot be equated to a fundamental breach of the agreement. It is important to recognize that this was not a deliberate or wilful breach or a refusal of ADT to perform its contractual duty. The trial judge's concerns in this regard raise questions which were not before him in this case. At most, the untimely response was the consequence of a lapse or error on the part of an ADT employee. The commercial purpose of the transaction was not thereby destroyed. Indeed, as I have noted, the contract has continued intact. In these circumstances, the breach, while entitling the plaintiff to damages, cannot be characterized as fundamental.

**28** However, whether the breach is fundamental or not, an exclusionary clause of this kind, in my opinion, should, prima facie, be enforced according to its true meaning. Relief should be granted only if the clause, seen in the light of the entire agreement, can be said, on Dickson's C.J.C.'s test, to be "unconscionable" or, on Wilson J's test, to be "unfair or unreasonable". The difference in practice between these alternatives, as Professor Waddams has observed, "is unlikely to be large.": Waddams, The Law of Contract 3rd ed. (1993), at p. 323.

**29** The trial judge concluded that para. E was unfair, unreasonable or unconscionable on the basis of his findings to the effect, in summary, that: the agreement was not read by Mr. Gordon; para. E was not brought to his attention; the agreement was on a standard printed form and was not negotiated; the exemption clause was "unusual in character"; and there was an "inequality of bargaining power" between the parties. In my respectful opinion, these factors are either immaterial to the issue or, on the facts of this case, not such as to render this limitation clause unenforceable.

**30** As a general proposition, in the absence of fraud or misrepresentation, a person is bound by an agreement to which he has put his signature whether he has read its contents or has chosen to leave them unread. Cheshire, Fifoot & Furmston's Law of Contract 13th ed. (1996) at p. 168. Failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. A businessman executing an agreement on behalf of a company must be presumed to be aware of its terms and to have intended that the company would be bound by them. The fact that Mr. Gordon chose not to read the contract can place him in no better position than a person who has. Nor is the fact that the clause is in a standard pre-printed form and was not a subject of negotiations sufficient in itself to vitiate the clause. L'Estrange v. F. Graucob Ltd., [1934] 2 K.B. 394 at 403; Craven v. Strand Holidays (Canada) Ltd. (1982), 40 O.R. (2d) 186 at 194 (C.A.).

**31** This is not a case in which the clause limiting liability was so obscured as to make it probable that it would escape attention. This contract was printed and contained on essentially one sheet of paper. The limitation provision was highlighted in bold block letters. The language is clear and unambiguous. There was no need to resort to a magnifying glass to see it or a dictionary to understand it. Nothing was done to mislead a reader. Had Mr. Gordon perused the contract, he would have been aware of the limitation. The fact that he did not is irrelevant to the question of the fairness or conscionability of the contract.

**32** The trial judge held that it was the defendant's responsibility to bring the clause to the "specific attention" of the plaintiff and to explain its effect. Not to have done so, he found, constituted an "unacceptable commercial practice". As I view the matter, there was no special relationship existing between these parties that imposed any such obligation on the defendant. This is an ordinary commercial contract between business people. If anything, given that the plaintiff contacted the defendant to upgrade an existing system whose installation was governed by a contract containing a similar limitation provision, it could be reasonably be assumed that the plaintiff was aware of the

limitation imposed on ADT's potential liability. Be that as it may, in this commercial setting, in the absence of fraud or other improper conduct inducing the plaintiff to enter the contract, the onus must rest upon the plaintiff to review the document and satisfy itself of its advantages and disadvantages before signing it. There is no justification for shifting the plaintiff's responsibility to act with elementary prudence onto the defendant.

**33** It is not suggested that the plaintiff was rushed or pressured in any way into signing the contract. Nor is it suggested that the defendant engaged in any dubious conduct to achieve this end. The plaintiff had all the time needed to read the contract and consider its terms and, admittedly, could have questioned ADT's representative on any provision about which it may have had doubt. It accordingly must be treated in the same manner as a subscriber who signed the contract with full knowledge of the exclusion provision: see Karroll v. Silver Star Mountain Resorts Ltd. (1988), 33 B.C.L.R. (2d) 160 (B.C.S.C.).

**34** The trial judge was of the opinion that there was an inequality of bargaining position between the plaintiff, a small retailer, and the defendant, a large security protection firm, and treated this as militating in favour of striking the clause. While I agree that such inequality is a relevant criterion, the fact that the parties may have different bargaining power does not in itself render an agreement unconscionable or unenforceable. Mere inequality of bargaining power does not entitle a party to repudiate an agreement. The question is not whether there was an inequality of bargaining power. Rather, the question is whether there was an abuse of the bargaining power.

**35** On the facts of this case, there is no evidence of any such abuse. Nothing in this record indicates that the defendant obtained the contract by any unfair use of its stronger position or sought to take undue advantage of the plaintiff or, indeed, that the plaintiff was victimized as a consequence of its weaker position. The fact that the plaintiff is a small business is not sufficient to justify the court's interference with the parties' contractual arrangements. Nor, as I indicated earlier, is the fact that the agreement is in the form of a standard printed contract.

**36** The remaining question is whether the terms of the exclusion provision are, as the trial judge viewed them, so "unusual in character" or so unfair or unconscionable that their enforcement would constitute an "unacceptable commercial practice". In deciding this question, the provision, as I have already stated, must be considered in the light of the entire agreement.

**37** Paragraph E makes it clear that ADT is not an insurer; that insurance, if any, should be obtained by the customer; that the amounts payable by the customer are based on the value of the services; and that the scope of liability is unrelated to the value of the customer's property.

**38** Having regard to the potential value of property kept on a customer's premises, and the many ways in which a loss may be incurred, the rationale underlying this type of limitation clause is apparent and makes sound commercial sense. ADT is not an insurer and its monitoring fee bears no relationship to the area of risk and the extent of exposure ordinarily taken into account in the determination of insurance policy premiums. Limiting liability in this situation is manifestly reasonable. The clause, in effect, allocates risk in a certain fashion and alerts the customer to the need to make its own insurance arrangements. ADT has no control over the value of its customer's inventory and can hardly be expected, in exchange for a relatively modest annual fee, to insure a jeweller against negligent acts on the part of its employees up to the value of the entire jewellery stock whatever that value, from time to time, may be.

**39** The alarm services were to be provided on the understanding that the charges were based upon "the value of the services and the scope of liability" set out in the agreement and not upon "the value of the customer's property". To now make the security company liable, effectively as an insurer, for the value of the customers property and not for the stipulated damages would be to fundamentally change the contract agreed to by the parties. The view expressed by Pigeon J., speaking for the majority of the Supreme Court of Canada in a case involving an almost identical clause, J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co., [1972] S.C.R. 769 at 778, is apposite:

> It is an essential basis of the contract between the parties that [the security protection company] is not to be in the situation of an insurer. It is in consideration of this stipulation that the charges are established "solely on the probable value of the service", not on the value of the goods intended to be protected. To make the protection company liable, in the case of the failure of its protection system, not for the stipulated nominal damages ($50) but for the full value of the goods to be protected, is a fundamental alteration of the contract.

**40** Furthermore, the exemption clause with which we are concerned here cannot properly be said to be unusual. Indeed, it appears from the decided cases that clauses limiting a security company's liability for acts arising out of its own negligence are a common feature of commercial relations of this type. These clauses have been upheld in this province in a number of cases, none of which was referred to by the trial judge, and generally in the United States where the same issue has arisen in cases involving companies doing business in Ontario pursuant to contracts containing similar exclusion clauses.

**41** In D. Thomas Furs Ltd. v. Wackenhut of Canada Ltd. [1989] O.J. No. 1758 (Ont. Dist. Ct.), where a security company, as in the present case, was guilty of negligence in failing to report an alarm, Mandel D.C.J. gave effect to a clause limiting damages to a percentage of the annual service charge holding that there was "nothing unfair or unreasonable or unconscionable" in so doing. In Marmac Credit Jewellers Ltd. v. Dominion Electric Protection Company (1978), 3 B.L.R. 144 (Ont. H.C.J.), Morand J., while finding that the security company was in breach of its contract in negligently failing to properly protect the plaintiff against burglary during a temporary installation, refused to hold that the breach was fundamental and limited proven damages of $20,000 to $250 pursuant to a clause virtually the same as the clause in this case. In Loeb Inc. v. Bomar Security and Investigations Ltd. [1993] O.J. No. 109 (Ont. Ct. Gen. Div.), another case in which a monitoring service neglected to report a burglary to the police, Day J. held that a limitation clause similar to the one in issue was not unconscionable and awarded damages accordingly. See also J. Nunes Diamonds v. Dominion Electric Protection Co., supra. For a collection of the American cases on the subject, see Annotation, Liability of Persons Furnishing, Installing, or Servicing Burglary or Fire Alarm System for Burglary or Fire Loss, 37 A.L.R. 4th 47 (1985).

**42** In sum, I see nothing unfair or unreasonable or unconscionable in enforcing para. E. Its words are clear and susceptible of only one meaning. None of the factors relied on by the trial judge serve to vitiate its terms or indicate a departure from commercially acceptable standards. In these circumstances, there is no basis for disturbing the agreement. In my opinion, the parties should be held to their bargain.

DISPOSITION

**43** For these reasons, I would allow the appeal and vary the judgment of Morin J. by deleting the figure of "$50,000" in paragraph 1 and substituting therefore the figure of "$890". Further, I would vary paragraph 2 to provide that the respondent recover one-half of its costs of the action. The appellant is entitled to the costs of the appeal.

ROBINS J.A.
OSBORNE J.A. - I agree.
ABELLA J.A. - I agree.

# TAB 5

*Case Name:*

# MORRISON v. COAST FINANCE LTD. et al.

[1965] B.C.J. No. 178

55 D.L.R. (2d) 710

British Columbia Court of Appeal

**Davey, Sheppard, Bull, JJ.A.**

Judgment: October 27, 1965

(46 paras.)

**Counsel:**

*A. G. MacKinnon*, for appellant.

*B. J. McConnell*, for respondents.

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**1** **DAVEY, J.A.**:--The appellant Morrison, an old woman 79 years of age, and a widow of meagre means, was persuaded by two men, Lowe and Kitely, to borrow $4,200 from the respondent Coast Finance Ltd. on a first mortgage on her home for that amount and interest to maturity and to lend the proceeds to them so that Lowe could repay $915 that he owed the finance company, and he and Kitely could pay the other respondent company $2,302 for two automobiles they were buying from it for resale. The proceeds of the loan were applied accordingly and the balance was repaid at once to the finance company and automobile company, respectively, by way of prepayment of monthly instalments, insurance premiums, and costs. The mortgage was to be repaid at the rate of $300 a month, which was to be secured from payments to be made by Lowe at the finance company's office on her account by way of repayment of the money lent to him and Kitely. She had no other means of repaying the money, and the house was her only substantial asset. She had no independent advice, although the evidence shows she wanted and asked for help. Lowe and Kitely failed to pay the appellant. She commenced action to have the mortgage set aside as having been procured by undue influence and as an unconscionable bargain made between persons in an unequal position. She did not join Lowe and Kitely as defendants to the action.

**2** The learned trial Judge dismissed the action on the grounds that the relationship between the parties was not such as to create a presumption of undue influence, and that none had been proven;

that there was nothing in the terms of the mortgage to make it an unconscionable transaction. In my respectful opinion that learned trial Judge took too narrow a view of the appellant's case on the second ground.

**3** Appellant's principal submission before us on this second ground was that, not only the mortgage, but the whole transaction was unconscionable; that it was unconscionable for Lowe and Kitely and the two companies to have the appellant mortgage her home in order to secure the money to lend to Lowe and Kitely to enable them to pay off the finance company and buy the two cars from the automobile company. This case is somewhat sketchily, but sufficiently, set up in the pleadings: see *Nocton v. Lord Ashburton*, [1914] A.C. 932, headnote (2). Counsel told us he took this point below, and respondents' counsel made only a qualified denial. It is apparent that the learned trial Judge and respondents' counsel did not appreciate the full scope of appellant's case on this point.

**4** The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. 484, *per* Lord Selborne, L.C., at p. 491; or perhaps by showing that no advantage was taken: see *Harrison v. Guest* (1855), 6 De G. M. & G. 424 at p, 438, 43 E.R. 1298; affirmed (1860), 8 H.L.C. 481 at pp. 492-3, 11 E.R. 517. In *Fry v. Lane* (1888), 40 Ch. D. 312, Kay, J., accurately stated the modern scope and application of the principle, and discussed the earlier authorities upon which it rests. At p. 322 he said:

> The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.
>
> This will be done even in the case of property in possession, and *à fortiori* if the interest is reversionary.
>
> The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord *Selborne's* words, that the purchase was "fair, just, and reasonable."

**5** The finance company was engaged in the business of financing automobile purchases and lending money on mortgages. The other respondent company was an automobile dealer. They shared adjoining offices, employed the same solicitor, and had a common office manager, one Crawford, who in the final stages of this transaction acted for both companies. The president, director, and owner of half the shares of the finance company was a director of the automobile company,

and with his wife controlled it. The finance company financed most of the automobile company's paper.

**6** There can be no doubt about the inequality in the position of the appellant on one side and the respondent companies and Lowe and Kitely on the other. The question is whether the transaction was so unfair that it creates a presumption of overreaching by the respondents.

**7** The learned trial Judge approached this question as if it was a simple case of the appellant borrowing money from the finance company for her own purposes -- that is to say to lend it to Lowe and Kitely. Accordingly he looked to see if the terms of the mortgage were unconscionable. If that were the true scope of the inquiry, I would agree with his conclusion, for although the rate of interest is high and the mortgage does not state the effective rate of interest as required by the *Interest Act*, R.S.C. 1952, c. 156, s. 6, the rate of interest is not so high as to be exorbitant for a loan up to 100% of the value of the security, as this was.

**8** But this was not a simple loan of that kind. It was a loan to the appellant to advance the interests of the companies as well as Lowe and Kitely by providing her with money to lend to Lowe and Kitely to enable them to carry out their arrangements with the companies. Crawford made certain that the proceeds of the loan reached the two respondent companies. The appellant, Lowe and Kitely, did not retain one cent of the money advanced, although the two men got delivery of the two automobiles they bought with the money.

**9** The extreme folly of this old woman mortgaging her home in order to borrow money which she could not repay out of her own resources, for the purpose of lending it to the two men, who were comparative strangers, is self-evident. It would have been bad enough if there had been any prospect of profit, but there was no expectation of reward and no real security. The amount to be paid back to her was exactly the amount of her mortgage to the finance company. The respondent companies knew the essential facts, and undertook the preparation of the documents for the transaction. For them to take advantage of her obvious ignorance and inexperience in order to further their respective businesses raises a presumption of fraud within the above authorities. The distinction between the case which the learned trial Judge considered, and that which arises on the evidence was neatly put by appellant's counsel. He said it would not be wrong for a bank to lend money to an old and ignorant person, upon usual banking terms, for his own purposes, but quite wrong to lend him money on those terms so that he might lend it to an impecunious debtor from whom the bank intended to recover it in payment of a bad debt.

**10** There is supporting evidence of gross overreaching by the respondent companies. They received the application for the loan, not from the appellant, but from Lowe or Kitely, who, with them, were to benefit by it. Without having seen the appellant, Crawford obtained a valuation of her home and instructed the companies' solicitor to prepare the mortgage. He first met her when she came to the companies' office with Lowe, Kitely, and Lowe's friend, Ivy Patton, just before signing the mortgage. She was alone with persons expecting to benefit by her folly. He took them to the respondents' solicitor to sign the papers, where he must have heard the appellant say to Lowe, when she learned the amount of the mortgage, "Frank, that is more than I agreed to lend you". He must have heard the appellant ask the solicitor, "Should I sign this?", showing that she felt the need of advice, and the solicitor inform her that he could not advise her without knowing more of her arrangements with her friends. Crawford does not admit hearing these things, but he does not deny that he did so, and he must have heard them since the solicitor says Crawford was within 3 ft. of the appellant at the counter.

**11** After the mortgage had been signed Crawford escorted the party back to his office, where he had a cheque for the proceeds of the mortgage made out to the appellant and had her endorse and hand it to Lowe or Kitely; then he secured it from them, and it was deposited to the account of the automobile company, out of which Lowe's debt of $915 to the finance company was paid. This money was thereby disbursed and distributed the day before the mortgage was registered, a course so unusual that it excites suspicion. Significant also is the fact that, either late that day or the next, Crawford drew a promissory note from Lowe to the appellant for the amount of the mortgage and had Lowe sign it. At the same time he drew a conditional sales agreement between Lowe and Kitely and the automobile company for the two cars they had bought, and caused the automobile company to assign its vendor's interest to the appellant, notwithstanding Lowe and Kitely had earlier paid the purchase price in full from the proceeds of the loan. The companies were turning over to this inexperienced, unprotected old woman, as the sole security for a loan she was making to advance the interests of Lowe and Kitely and themselves, a security of questionable value. I cannot believe that the law is so deficient that it cannot reach and remedy such a gross abuse of overwhelming inequality between the parties.

**12** Probably the whole transaction ought to be set aside, but that cannot be done as Lowe and Kitely are not before us, and the automobiles sold to them are likely worthless and irrecoverable. That has troubled me. On reflection, I have concluded that it will be sufficient to set aside the mortgage, without requiring the appellant to repay the money, since, as was intended, that part which was not immediately repaid to or retained by the finance company was immediately returned on other accounts to the companies, who were acting in concert. That will allow the sale of the automobiles and the payment of Lowe's debt to stand. The automobile company loses nothing and justice will be done to the finance company by requiring the appellant as a condition of relief to transfer to it Lowe's promissory note and the conditional sales agreement that the companies secured for her.

**13** I should add that the companies called only their solicitor and his student-at-law, and did not call Crawford or any other officer, and made no attempt to prove that the whole transaction was fair, just and reasonable.

**14** In view of the tenor of this judgment and the criticism of the companies, I should add that the criticism does not extend to their solicitor or his student. The evidence does not indicate that the solicitor knew that the money the appellant was borrowing was in the main to be at once returned to the companies on transactions between them and Lowe and Kitely. So far as he knew this was a simple routine loan by the finance company. The facts known by the two companies and their participation in the proceeds of the mortgage made it their duty to see that the appellant received independent advice, but the knowledge possessed by the solicitor was not sufficient to impose that duty upon him, and he is not to be criticized for not doing so. But I think it would have been better if he had told her to consult another solicitor instead of telling her he could not advise her.

**15** In conclusion the way in which the form for maker on the mortgage was completed must be deprecated. The solicitor certified that the appellant mortgagor was personally known to him, which was not the case. He established her identity to his satisfaction by putting certain questions to her. He should have required some one personally known to him to identify her under oath and have so certified on the appropriate form. The loose practice followed in this case facilitates impersonation and forgery of documents of title of which we have had a recent example.

**16** Contrary to the rules the exhibits are printed in numerical order instead of chronological. The respective solicitors ought not to have accepted or approved the book in that form, nor should the Registrar have settled it. In similar cases we have deprived the successful party of a substantial part of his costs, but because of the incidence of such an order, I think we ought not to do so here.

**17** I would allow the appeal accordingly.

**18** SHEPPARD, J.A.:--This appeal is from the judgment of Hutcheson, J., dismissing the plaintiff's action to set aside a mortgage by the plaintiff to the defendant Coast Finance Ltd. The facts follow.

**19** In 1960 the plaintiff, an elderly widow then 79, owned a house in New Westminster from which she derived a rent of $30 a month for each of three rooms when rented, $5 from a rented garage and $75 from the Old Age Pension. From that sum she paid taxes, repairs and provided her living. A month or two before April 12, 1960, the date of the mortgage in question, one Kitely rented one of her rooms. Kitely was an alcoholic and on becoming ill was visited by members of Alcoholics Anonymous and by one Lowe, not a member of that organization. Lowe informed the plaintiff that he wished to help Kitely get into the business of selling autos as Kitely had only one lung and in that business the work was light. Later Lowe said that Kitely would have to "put up some money in it"; he thought $300 or $350 would permit Kitely to become associated with Lowe in the selling of autos, that a partner, Barney, had approximately $900 invested. Accordingly Lowe wished the plaintiff to borrow $300 to $350 for Kitely.

**20** On April 12, 1960, the plaintiff executed a mortgage at the office of Boucher, solicitor for the defendant companies, under the following circumstances. The Coast Finance Ltd. was a finance company with two shareholders; one of these shareholders, together with his wife, held the majority of shares in the Vancouver Associated Car Markets Ltd. (Associated Co.), which was in the business of selling automobiles, and its financing of sales was put through the defendant the Finance company. Both companies had offices in the same building and Crawford was office manager of both companies. In view of the authority exercised by Crawford for each company, in arranging the mortgage, its terms, the disbursement for the Finance company, and in executing the assignment (ex. 6) for the Associated Co., it would appear that Crawford was really the manager of each company.

**21** On April 11, 1960, the sales manager of the Associated Co. asked Crawford to find out whether the plaintiff's house was sufficient security for a mortgage of $4,000 to $5,000. Crawford learned that the mortgage by the plaintiff was for the purposes of Lowe and Kitely to be used in part by them for the purchase of autos from the Associated Co. On April 12, 1960, Crawford had a search made of the plaintiff's property and reported to the Associated Co. that the plaintiff's house was security up to $4,000 or $5,000. On the morning of April 12th, Crawford had given instructions to Boucher, solicitor for the defendant companies, to prepare the mortgage in question. According to the plaintiff, Lowe, Kitely and Ivy Powell, a friend of Lowe, called on the plaintiff and took her by automobile to an office where Lowe and Kitely went inside leaving the two women outside in the automobile for some time. Later that afternoon Lowe, Kitely, Mrs. Powell and the plaintiff called upon Crawford at the office of the defendant the Finance company. Up to that time Crawford had received no instructions from the plaintiff about the mortgage. About 4:30 p.m. Crawford took the four to the office of Boucher, a solicitor, where Boucher had the plaintiff execute a mortgage to the Finance company for $4,816. Boucher, whose evidence the learned trial Judge accepted, explained the mortgage to the plaintiff at the counter in the outer office where the others were seated;

that the mortgage was for $4,816, and when the plaintiff saw the amount, she said to Lowe, "Frank, this is more money than I promised to lend you". Then followed some conversation between Lowe and the plaintiff. Eventually she asked Boucher if she should sign the mortgage and he said that he was not prepared to advise her but he did explain to her all the relevant parts. Eventually she said that she guessed it was all right, "Where do I sign?" She thereupon executed the mortgage and Boucher executed the acknowledgment thereon.

**22** From Boucher's office, Crawford, Lowe, Kitely, Mrs. Powell and the plaintiff went to the office of the defendant the Finance company. According to Crawford a cheque was made out for $4,200 from the Finance company to the plaintiff (ex. 8) who endorsed and delivered it to Lowe and Kitely who gave a receipt (ex. 10); the cheque was then deposited to the account of the Associated Co. At this time the mortgage had not been registered and, on the evidence, it is not usual to advance money before registration; Crawford stated that Boucher advised him on this occasion that it would be permissible to advance the money before registration, but Boucher denies having ever given such advice. Further, no orders were obtained from the plaintiff for payment out of the proceeds, but later the proceeds were disbursed by the Associated Co. as follows:

I. Received by the Finance company $2,309.60 as follows:

(a) retained by the Finance company for payment of interest on the mortgage in advance, $616;

(b) paid to the Finance company in payment of a debt of Lowe secured by Steinson's mortgage, $915;

(c) paid to the Finance company in prepayment of the instalments under the mortgage for two months, and a fraction of the third instalment, $778.60;

making a total to the Finance company of $2,309.60.

II. Retained by the Associated Co. for two autos which were sold to Lowe and Kitely, $2,302;

III. Expenses of mortgage:

(a) to Boucher for legal fees for preparing and registering the mortgage, $60.50;

(b) to C. A. Bass for insurance, $143.90; making a total of expenses, $204.40.

**23** A grand total of $4,816, the amount of the mortgage.

**24** The plaintiff expected some security for these monies; that evening Crawford prepared and sent to her:

(a) A conditional sale agreement (ex. 6) covering the two autos sold by the Associated Co. to Lowe and Kitely, and assigned by the Associated Co. to the plaintiff.

As these two autos were paid for by cash out of the proceeds of the plaintiff's mortgage, hence any security of the seller therein was illusory.

(b) A promissory note (ex. 3) whereby the defendant Lowe agreed to repay the amount of the advance at the rate of $300 per month.

**25** On April 13, 1960, Boucher found that the duplicate certificate of title was not in the Land Registry Office and therefore that the mortgage could not be registered. Marshall-Gratrix, his student, called on the plaintiff to obtain the certificate of title and she attempted to explain the transaction to him. She was obviously worried about the whole matter. She said she had signed the mortgage to get out of Boucher's office. "They were all shouting at me." She produced the certificate of title and Marshall-Gratrix explained to her that he represented the mortgagee and did not represent her and if she had any doubts, she should see a lawyer of her own. She asked him whom to consult and he told her how to get the names of lawyers but refused to recommend anyone. The following day the certificate of title was found on a desk in Boucher's office, no doubt having been placed there by Lowe. Marshall-Gratrix under the circumstances telephoned the plaintiff about the certificate of title and she explained that someone, whose name she forgot, had given her a note, and she said, "That was all right, wasn't it?" He made some non-committal remark and did not pursue the matter any further. The mortgage was registered against the plaintiff's house.

**26** The business of Lowe and Kitely did not materialize; Lowe was in the penitentiary and Kitely's whereabouts are unknown to Crawford. The plaintiff has no monies with which to meet the payments under the mortgage and no source of revenue, and on September 18, 1961, brought action to set aside the mortgage. After trial before Hutcheson, J., that learned Judge on October 23, 1964, delivered the judgment dismissing the action and in his reasons held against undue influence as follows:

> I doubt if the acts particularized as constituting the undue influence can be so characterized. In any event I cannot find upon the evidence that Andrew Crawford at any time exerted upon the plaintiff any undue influence within the proper meaning of that phrase and I must therefore conclude that the plaintiff was not induced to enter into the mortgage that it is sought to set aside by any undue influence exerted by either of the defendant companies.
>
> . . . . .
>
> What transpired in the companies' offices in Mrs. Morrison's presence following the execution of the mortgage obviously did not lead to her signing that document. There steps were taken to carry out the agreement that had previously been made between Mrs. Morrison and Lowe that she would raise money on the security of her property and that the money she might borrow would be turned over to Kitely and Lowe as a loan to assist in their new venture. That verbal agreement was made before Mrs. Morrison was in touch with the Coast Finance Ltd. and that company was not a party to it. In any event I cannot find that Mr. Crawford was guilty of any improper conduct on this occasion.
>
> It is also alleged that Kitely and Lowe exercised undue influence in order to obtain the signature of the plaintiff to the indenture of mortgage. The plaintiff's ev-

> idence did not, in my view, disclose any conduct on their part that would support this allegation. In any event Kitely and Lowe were not acting on behalf of Coast Finance Ltd. nor is it shown that that company was aware of any improper conduct on their part.

**27** The appeal is argued on the ground that the basis for rescission is not undue influence proved to have been exercised in fact, but rather upon constructive fraud, one of the frauds mentioned in *Earl of Chesterfield v. Janssen* (1750), 2 Ves. Sen. 125 at p, 155, 28 E.R. 82 and which fraud may be inferred from the relation of the parties which may permit the inference, as in *Inche Noriah v. Shaik Allie Bin Omar* (1928), 98 L.J. P.C. 1, or in the case at bar from the transaction itself, because the inequality of the parties and the inadequacy of consideration to the plaintiff indicate that an advantage had been taken of her: *Baker v. Monk* (1864), 4 De G. J. & S. 388, 46 E.R. 968, followed in *Fry v. Lane*, 40 Ch. D. 312. Lord Chancellor Eldon in *Huguenin v. Baseley* (1807), 14 Ves. 273, 33 E.R. 526, stated at p. 300:

> The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.

**28** Therefore it is contended that the presumption is to be drawn that the plaintiff's intention to execute the mortgage was so produced, in the absence of proof that the transaction occurred under circumstances which enabled the plaintiff to exercise an independent will so as to justify the Court in holding that the transaction was the result of a free exercise of her will. See *Allcard v. Skinner* (1887), 36 Ch. D. 145 at p. 171, cited in *Glover v. Glover*, [1951] 1 D.L.R. 657 at p. 663. The circumstances are similar to those in *Hrynyk v. Hrynyk*, [1932] 1 D.L.R. 672, 40 Man. R. 173, [1932] 1 W.W.R. 82 (C.A.) where the father transferred his assets to the defendant son for a covenant to support him which was so vague as to be illusory and it was held that the transaction was improvident and should be set aside following *Fry v. Lane, supra.* In this case, while the plaintiff did expect to be provided by Lowe and Kitely with security, that provided was:

(a) A conditional sale agreement signed by Lowe and Kitely to the Associated Co. and assigned by it, under which the security was illusory as the Associated Co. had received the payment therefor before the lien note was signed;

(b) A promissory note signed by Lowe which was expected to be paid out of the profits of the business of selling second-hand automobiles to be carried on by Lowe and Kitely, which expectation has, of course, been disappointed, Lowe then being in the penitentiary and the whereabouts of Kitely being unknown to Crawford.

**29** On the facts established, there is an alternative remedy in account, on the basis of a personal liability of the defendants in that Lowe and Kitely became trustees of the funds received from the mortgage and that Crawford, the agent of the defendant companies, knowingly participated in the breach of equitable duty of Lowe and Kitely so as to make the defendant companies equally liable in account.

**30** The position of the plaintiff here is similar to the plaintiff in *Nocton v. Lord Ashburton*, [1914] A.C. 932, where Viscount Haldane, L.C., said at p. 957:

> I think that Neville J. was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence.

**31** The relief in account may readily be given in this action as the substantial facts are not rebutted by the defendant companies but are largely confirmed by the answers of Crawford on discovery.

**32** Lowe and Kitely were trustees for the plaintiff of the proceeds of the mortgage under the circumstances that they, being agents and fiduciaries of the plaintiff, put themselves in a position where their duty and interests were in conflict.

(1) Lowe and Kitely were agents of the plaintiff in applying for the mortgage to the defendant company. There was no application by her; Crawford admits he had no instructions from the plaintiff. The application for the mortgage came to him from Lowe for himself and Kitely.

(2) Lowe and Kitely were also fiduciaries of the plaintiff; "fiduciary" is defined in Black's Law Dictionary as "relating to or founded upon a trust or confidence", and in *Re Coomber, Coomber v. Coomber*, [1911] 1 Ch. 723, by Fletcher Moulton, L.J., at pp. 728-9 as follows:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it.

approved in *Glover v. Glover, supra*, at pp. 663-4. Lowe and Kitely were agents and fiduciaries of the plaintiff:

(a) in that they advised the plaintiff about obtaining the loan from the Finance company and handing over the proceeds to them;

(b) in that the plaintiff at Boucher's office stated that she expected the loan to be for $300 to $350 and when she saw that it was in the amount of $4,816 she asked Lowe and Kitely for their advice;

(c) and in that Lowe and Kitely applied for the loan on behalf of the plaintiff and thereupon the plaintiff endorsed to them the cheque for $4,200, relying upon them to use it in the business of selling automobiles.

**33** The equitable rule is that an agent or fiduciary who puts himself in a position where his interest and duty are in conflict becomes liable in account. In *Parker v. McKenna* (1874), L.R. 10 Ch. 96, certain directors were held liable in account for profits made by their taking over from a shareholder his agreement to purchase shares in their company. Lord Cairns, L.C., at p. 118 said:

> Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict.

**34** A similar result is found in *Mayor, etc., of Salford v. Lever*, [1891] 1 Q.B. 168, where a purchasing agent accepted a bribe; and in *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 39 Ch. D. 339, where the officer of the plaintiff company received profits as a shareholder in another company from the plaintiff's business going to that other company.

**35** The conflict of duty and interest arose in the case at bar by Lowe and Kitely applying for the loan as agents of the plaintiff to be used to purchase Kitely into an automobile business then being carried on and expected to produce $300 a month to repay the mortgage, but which Lowe and Kitely intended to use for their own profit apart from such business, as by Lowe paying the Finance company, and by their buying two cars from the Associated Co. Again, there was a trust in handing the cheque to Lowe and Kitely. The defendant companies became equally liable to account as were Lowe and Kitely. When a third person knowingly participates with a trustee in the breach of trust such third person becomes subject to the same liability as the trustee, including the liability to account.

**36** In *Rolfe v. Gregory* (1865), 34 L.J.Ch. 274, the wrongful receipt and conversion of trust property placed the receiver in the same position as the trustee from whom he received it. There the Lord Chancellor stated at p. 275:

> This wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee from whom he received it, and by the principles of this Court he becomes subject in a Court of equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself.

**37** In *Soar v. Ashwell*, [1893] 2 Q.B. 390, Lord Esher, M.R., stated at p. 394:

> The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of

> Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his cestui que trusts for all such money or property without regard to lapse of time.

**38** And Bowen, L.J., at pp. 396-7:

> Secondly, the rule as to limitations of time which has been laid down in reference to express trusts has also been thought appropriate to cases where a stranger participates in the fraud of a trustee: *Barnes v. Addy* (L.R. 9 Ch. 244). Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant...

**39** The defendant companies could not be liable if they took the funds as *bona fide* purchasers. Initially the companies had, through Crawford, notice that the monies were trust funds in the hands of Lowe and Kitely, as Crawford knew that Lowe had applied for the loan on behalf of the plaintiff and that Lowe and Kitely intended to benefit from the transaction by purchasing" two automobiles from the Associated Co. Hence Crawford, and therefore his companies, knew that Lowe and Kitely were in a position where their interest and duty were in conflict. A cheque for the proceeds of the loan was handed to the plaintiff who endorsed it at once to Lowe and Kitely, who passed it on to the Associated Co. The fact that the proceeds passed through the hands of the plaintiff would not prevent a trust unless Lowe and Kitely disclosed to the plaintiff all material facts as in *De Bussche v. Alt* (1878), 2 Ch. D. 286, and also, that this plaintiff could exercise an independent will: *Allcard v. Skinner, supra*, at p. 171. In *British America Elevator Co. v. Bank of British North America*, 46 D.L.R. 326, [1919] 2 W.W.R. 748, [1919] A.C. 658, the elevator company remitted funds to its agent to purchase grain and the bank, with the assent of the agent, applied the monies in discharge of the agent's indebtedness to the bank. The bank was held liable in account. That appears to be the position of the defendant companies.

**40** Heretofore the defendants have been dealt with on the basis of Crawford having been at the most a participant in the breach by notice of the trust. But the evidence goes much further to prove that Crawford assisted Lowe and Kitely as agents for the plaintiff mortgagor to obtain the proceeds of the mortgage for their own advantage and that of the defendant companies. That is shown by the following circumstances:

(1) The defendant companies, through Crawford, carried out the transaction with undue haste. On April 12th Crawford instructed Boucher to prepare the mortgage, and at 4:30 that afternoon Crawford, with the plaintiff and three others, attended at Boucher's office and had the mortgage executed, then returned to the office of the defendant companies. The proceeds of the loan were disbursed at once. It is unusual to disburse a mortgage before registration but Crawford states that Boucher advised him that in this instance it would be in order to make the disbursements. That Boucher denies.

(2) The mortgage transaction was irregular as not in the usual form. There were no instructions from the plaintiff to prepare the mortgage and no application by her

for the mortgage. The proceeds were disbursed immediately by having the plaintiff endorse the cheque to Lowe and Kitely, who delivered the cheque to the Associated Co. where it returned under the control of Crawford and there the monies were used in discharging for the Finance company a personal debt of Lowe, the trustee, and in paying future interest and instalments under the mortgage and in paying to the Associated Co. the purchase price of two automobiles bought by Lowe and Kitely.

(3) That night or the following day Crawford prepared and sent to the plaintiff the conditional sales agreement but that was a mere sham security as Crawford must have known that the automobiles were paid for out of the proceeds of the loan received by the Associated Co.

**41** Further, Crawford had prepared the note (ex. 3) which was signed by Lowe, who went to the penitentiary. In the result, Crawford's knowledge exceeded that of Marshall-Gratrix, but Marshall-Gratrix warned the plaintiff to obtain independent advice, as to him the transaction called for that precaution, as the plaintiff had not the mental capacity to exercise the independent will required by *Allcard v. Skinner, supra*, to determine whether or not she should give the mortgage in question and deliver the proceeds to Lowe and Kitely. As Marshall-Gratrix knew the plaintiff should have had independent advice, then equally so must Crawford have known, and therefore the defendant companies.

**42** A trustee who acquires a benefit from his office is liable to account for that benefit: *Keech v. Sandford* (1726), 2 Eq. Cas. Abr. 741, 22 E.R. 629; *Boston Deep Sea Fishing & Ice Co. v. Ansell, supra*, and equally any person who knowingly participates with the trustee in the breach of the trustee's duty.

**43** It follows that the defendant companies through Crawford, their office manager, have knowingly participated in the breach of trust by applying the trust funds to the personal benefit of the trustees and therefore the defendant companies have become liable as trustees to the plaintiff and are liable to account for the benefits received. This claim in account is not expressly raised in the statement of claim but follows from the allegations in the statement of claim and the admissions of Crawford on discovery, hence the material facts are before the Court.

**44** Under such circumstances the defendant companies are deemed to hold for the plaintiff the funds advanced under the mortgage; those funds will therefore be taken as applied in payment of the mortgage and the discharge thereof delivered forthwith to the plaintiff by the Finance company.

**45** The plaintiff will have the costs of the action and of the appeal.

**46** BULL, J.A.:--In this appeal I agree with my brother Davey that the learned trial Judge was right in finding that the appellant had not proved undue influence as she must under the attendant circumstances and relationship between the parties, but that he took too narrow a view on the other main cause of action that the transaction constituted an inequitable and unconscionable bargain with respect to which relief should be granted. I concur in my said brother's view that although the terms and conditions of the mortgage sought to be set aside in themselves were not inequitable, the whole transaction of which the mortgage was a very important and integral part was patently unconscionable, and that both respondents actively participated in that transaction to their own respective interests. Although circumstances and lack of parties make it clear that the whole unconscionable trans-

action cannot be rescinded, I have reached the conclusion that equity requires that the mortgage itself should be rescinded on the terms set out by my brother Davey. Therefore, I would allow the appeal on that basis for the reasons set out in his judgment and in which I fully concur.

# TAB 6

*Case Name:*

# HARRY v. KREUTZIGER

[1978] B.C.J. No. 1318

95 D.L.R. (3d) 231

9 B.C.L.R. 166

1978 CanLII 393

British Columbia Court of Appeal

**McIntyre, Craig, Lambert, JJ.A.**

Judgment: December 29, 1978

(33 paras.)

**Counsel:**

*Robert Easton*, for appellant.

*Timothy P. Cameron*, for respondent.

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1 **MCINTYRE, J.A.**:--The appellant sued to have the Court set aside the sale to the respondent of his 6-ton fishing boat, the "Glenda Marion". He alleged fraudulent misrepresentation, and in the alternative sought relief from an unconscionable bargain. At trial the action was dismissed [3 B.C.L.R. 348]. This appeal was taken, and before this Court the appellant confined his claim to that of unconscionable bargain.

2 The appellant is an Indian who lives in Powell River, British Columbia. He is married with six children aged from 6 to 19. He suffers from a congenital hearing defect, but is by no means totally deaf. He has a Grade V education, and according to the trial Judge is a mild, inarticulate, retiring person, and it would appear from the evidence that he is not widely experienced in business matters. He is a commercial fisherman and a logger.

3 In 1958 the appellant purchased the "Glenda Marion", a 30-foot gas-powered fishing boat. It was registered as a 6-ton vessel and was used for gill-netting and trolling. The vessel had become

largely obsolete by 1973 and had very small value as a boat. However, because of the commercial fishing licence attributable to the vessel, it acquired substantial value after 1968 and particularly in 1973.

**4** Prior to 1968, any person could apply for and acquire a commercial salmon fishing licence. In 1968 the situation changed, when the Government adopted the policy of reducing the size of the salmon fishing fleet in the interests of economy and conservation. Fishing boats were granted licences in one of three categories, A, B and C, depending upon quantities of salmon landed in previous years. Any new boat could be licensed for salmon fishing only if a transfer of an existing licence from an old boat could be arranged. The effect of this arrangement was to freeze the number of commercial licences, and as a result they began to acquire real value.

**5** The appellant wished to replace the "Glenda Marion", which had a licence, with a new boat. He had saved $5,200 towards a new vessel and had made two unsuccessful applications, one in 1971 and one in 1972, for financial assistance to the Indian Fishermen's Assistance Programme for this purpose. He made a third application in 1973. This programme was administered by the Fisheries Service of the Department of the Environment and received its funds from the Department of Indian Affairs and Northern Development. Under this plan an Indian could obtain a grant of tonnage, that is, an entitlement to a commercial fishing licence based on the tonnage of a boat, from a "tonnage bank" operated by the programme. This tonnage had to be purchased by the acquisition of licensed boats by the scheme. It was available to needy Indians who were assisted under the programme. If the appellant's application had been accepted, the programme could have acquired the "Glenda Marion" by purchase from the appellant. The licence or tonnage attributable to the vessel, that is, 6 tons, would have passed with the purchase to the tonnage bank. When the appellant purchased his new boat, if the events reached that stage, the tonnage in the tonnage bank would have been available to him. His new boat would have been licensed. He was also free, if he chose, to sell the boat privately. If he adopted this course, however, the licence or tonnage would follow the sale and he would lose it and thereby virtually exclude himself from further fishing. He had been warned by an officer of the programme that the assistance fund, formed as it was to protect and assist Indian fishermen, would not look favourably upon an application for assistance if the appellant sold his boat privately thus depriving the fund of the tonnage and making it more difficult to carry out its objectives.

**6** After making his application for aid in August of 1973, the appellant spoke to one Robinson, administrator of the programme, who arranged to have one Fred Shaughnessy acquire the "Glenda Marion" for the fund. On October 4, 1973, the appellant signed a transfer of the boat to the Department of the Environment for $2,000. The Department held the transfer, but the matter was never concluded. No reason for the failure to complete the sale was given in evidence. Had it been concluded, the appellant would have received $2,000 and the tonnage would have been passed to the tonnage bank. On the acquisition of his new boat, he could have, and he intended to, apply for the tonnage from the bank. Subject to qualifying for assistance in the first place, he would have received the tonnage and had the licence and would have acquired a new boat fully licensed. The only fair inference one can draw from these facts is that in the abortive arrangements made with the Indian Assistance Fund and described above, the appellant was attempting to dispose of his boat only and was not surrendering as well the licence or the tonnage necessary for his continued fishing.

**7** A further detail regarding the licensing of boats should be mentioned. The category of licence sought by the respondent in his purchase of the "Glenda Marion" was an A licence. The "Glenda

Marion" had an AI licence. This was a form of licence available only to Indians for which a lower licence fee was payable than upon an A licence. Otherwise, the licences were identical. When a boat with an AI licence was sold to a white man, he could convert the AI licence to an A licence, but only upon paying to the Government full licence fees for the previous years during which it had existed as an AI licence.

**8** In November, 1973, the respondent was seeking to purchase a vessel with an A licence. It was clear from the evidence that due to the restrictive licensing policy described above and due as well to the fact that 1973 yielded one of the best salmon harvests in British Columbia's history, licences had acquired great value. The evidence showed, and the trial Judge found, that Class A licensed tonnage was worth about $2,500 per ton. This figure was in addition to the value of the hull and machinery. The "Glenda Marion", being licensed for 6 tons, had a value for licence alone of $15,000. The respondent was well aware of this valuation. He knew the licence had value apart from the boat. The trial Judge said:

> I am satisfied the defendant believed the "Glenda Marion" with its licence had a value of $16,000 in November 1973 and that sales of similar vessels on the open market at that time supported this belief.

**9** There was ample evidence to support this conclusion. It may be found in the evidence of one Mazzone, an employee of a large fishing company actively engaged in 1973 in the purchase of tonnage, and of one Bell, engaged then in the "Government Buy Back Programme", by which licensed vessels were acquired by the Government and retired from fishing to assist in reducing the fleet. It should also be observed that in registering the transfer of the boat with the Regional Director of Fisheries in Vancouver the respondent was required to sign a record of transfer form covering the transaction. In completing the form in the space for purchase price which required that he show "total value including value of all other consideration", he entered the figure of $16,000.

**10** The respondent approached the appellant on November 18, 1973, in Powell River. The "Glenda Marion" had sunk a few days before (no reason was disclosed in the evidence) and had been refloated by the appellant. This fact is mentioned to indicate the boat as such was of small value at this time. After some discussion, during which the appellant told the respondent of his arrangement to sell the boat to the assistance programme, the appellant expressed doubt about the sale and said he wished to acquire a new boat and licence. The respondent, though he conceded in evidence that he knew little of the operation of the assistance programme, assured the appellant that as an Indian he would not have any difficulty in acquiring a new licence after sale to the respondent. The respondent gave the appellant a cheque for $2,000, which had been back-dated by the respondent to September 1, 1973, obviously to give the impression that the sale had been arranged before the agreement with the assistance programme. The appellant took the cheque and said he would consider the matter and give the respondent his decision the next day.

**11** The appellant decided against the sale overnight, after discussions with his brother, and gave the cheque to his brother to return to the respondent. He said he adopted this course because he did not wish to face the respondent. The cheque was returned the next day, but after receipt the respondent went to the appellant's home and slipped the cheque under his door. A further meeting took place on November 20, 1973, when the respondent gave further assurances to the appellant that he would be able to get a licence for a new boat. The cheque was handed back and forth several times, the respondent returning it to the appellant after each refusal to sell. Finally it was agreed that

the boat would be sold for $4,500. A handwritten memorandum to this effect was signed by the parties. A further cheque was given for the remainder of the purchase price to the appellant. However, when the respondent sought to transfer the licence he discovered the necessity to repay back licence fees in the amount of $570 in order to convert the licence into an A licence. He stopped payment of the cheque for $2,000, and issued a new one for $1,430, which was sent to the appellant. This was done without notice to or consent of the appellant.

**12** From this recital it is at once clear that the appellant made an improvident bargain. He parted with an asset worth $16,000 for $4,500, later reduced by $570. The question for decision is: Did he enter into this bargain under such circumstances that the Court will exercise its equitable jurisdiction to rescind the contract and return the parties to their original positions? The trial Judge held that he had not. He said, after declining to find that the appellant had been induced to enter the contract by false representations and after discussing various authorities [at pp. 355-6]:

> In the present case, I conclude that the principles discussed by Lord Denning, M.R. in the *Bundy* case [*infra*] are not applicable. To begin with, this is not a case where the plaintiff was compelled to enter into the transaction by reason of his own needs or desires. He complains that he did not have any independent advice before entering into the transaction. But, again, this is not a situation where the agreement was reached as a result of one session of bargaining. Rather, the defendant approached the plaintiff and made a proposal to him and tendered a cheque. The plaintiff accepted that cheque but reserved his right to consider the proposal before reaching a decision. Then he went away and, after considering the matter, decided not to sell the "Glenda Marion" to the defendant. He had his brother return the cheque the next day. Thereupon the defendant attended at the residence of the plaintiff and slipped the cheque under the door. At that point the plaintiff had made his decision known to the defendant. He could have torn up the cheque and refused to discuss the matter further with the defendant. Instead, he went the next day and bargained with the defendant. He indicated to the defendant that he had been dealing with a third party who had considered offering him $4,500 for the vessel. Apparently that transaction had fallen through. Ultimately the defendant offered to pay $4,500 for the "Glenda Marion" and the plaintiff accepted that offer. Now the plaintiff complains that the consideration was grossly inadequate. However, over the span of the three days during which negotiations took place the plaintiff had an opportunity, if he had desired, to seek independent advice as to the current market value of a class "A-l" commercial salmon fishing licence with a six-ton vessel. He did not seek such independent advice. In the circumstance he cannot be heard to complain that the price was inadequate.

**13** The principles upon which a Court will interfere with a concluded transaction and nullify it upon the ground that it is unconscionable have found frequent expression. An early Canadian case is *Waters v. Donnelly* (1884), 9 O.R. 391. The leading pronouncement on the subject in British Columbia is to be found in *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (3d) 710 at p. 713, 54 W.W.R. 257 at p. 259, where Davey, J.A., speaking for himself and Bull, J.A., said:

The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. 484, *per* Lord Selborne, L.C., at p. 491; or perhaps by showing that no advantage was taken: see *Harrison v. Guest* (1855), 6 De G. M. & G. 424 at p. 438, 43 E.R. 1298; affirmed (1860), 8 H.L.C. 481 at pp. 492-3, 11 E.R. 517. In *Fry v. Lane* (1888), 40 Ch. D. 312, Kay, J., accurately stated the modern scope and application of the principle, and discussed the earlier authorities upon which it rests. At p. 322 he said:

> "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.
>
> "This will be done even in the case of property in possession, and *à fortiori* if the interest is reversionary.
>
> "The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable.'"

**14** This case has been followed in such cases as *Knupp v. Bell et al.* (1966), 58 D.L.R. (2d) 466 [affd 67 D.L.R. (3d) 256 (Sask. C.A.)], and *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R. (2d) 260, and it was cited with approval by Lord Denning, M.R., in *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757 at p. 764, which case discusses the applicable principles.

**15** From these authorities this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

**16** Like many principles of law, it is much easier to state than to apply in any given case. In the cases cited above the facts were such that the application of the remedy was clearly required. In the case at bar the facts do not speak as clearly. None the less, I am of the view that this appeal should succeed and the contract be rescinded. The appellant, by education, physical infirmity and economic circumstances, was clearly not the equal of the respondent. The evidence supports the conclusion

that the appellant wanted to continue fishing and wanted to retain his licence or tonnage. It shows as well that the respondent proceeded aggressively with full knowledge of the value of the licence. He expressed regret at one stage that he had not acquired three or four more licences, they were so valuable. The appellant did not wish to sell and resisted for a time by returning the cheque and delaying a decision. The arbitrary withholding of $570 by the respondent is illustrative of his attitude to the appellant. Despite the fact that the trial Judge found that the appellant had not shown that he entered the contract on the basis of representations made by the defendant, I cannot but conclude that the appellant was anxious to preserve his licence, and that he was assured, falsely or recklessly by the respondent that he would have no difficulty getting another licence if he sold the "Glenda Marion" to the respondent. In this respect he was given assurances on a subject of prime importance by the respondent, who admitted he knew little or nothing of the matter. The respondent also knew that the preservation of his licence was a vital consideration to the appellant. The respondent sought out the appellant and in his dealings would not take no for an answer. He persuaded the appellant to enter a bargain after, by his own admission, making assurances which were untrue regarding the chance of the appellant to get a licence. He thereby procured an asset worth $16,000 for $4,500, which he later chose to reduce by $570. The position taken by appellant's counsel was that the appellant's ignorance, coupled with pressures exerted upon him by the respondent, caused the inequality of the bargaining position. In my view, the improvidence of the bargain is shown. On the whole of the evidence, it is also my view that the appellant was so dominated and overborne by the respondent that he was, in the sense of that term used by Davey, J.A., in the *Morrison* case, *supra*, within the power of the respondent in these dealings.

**17** Some more precise reference to the evidence may be helpful. The first meeting between the respondent and the appellant took place on November 18, 1973. During the conversation that day the licence was discussed and, while the appellant indicated that he would be willing to sell the boat, he did not wish to part with the licence. He was told "there was no problem to get licences for Indians". There was also conversation about another possible purchaser for the boat who, it was said, might pay $4,500. This was why the respondent raised his price. At the close of this meeting the respondent gave the appellant a cheque for $2,000 which, as has been noted, he back-dated to September 1, 1973, to give the appearance that the sale had preceded the sale to the assistance scheme. The appellant took the cheque because, he said, the respondent kept telling him he could easily get a licence. That evening, after a discussion with his brother, he returned the cheque by sending it back with his brother. He said "I did not want to face him." The respondent, despite this incident, pressed on to acquire the boat. He returned the cheque to the appellant's house. When the appellant received it -- he was absent when it arrived -- he took it back personally. He said: "He kept phoning me all the time at night and I thought if I went back I might as well face him, you know."

**18** There is some confusion about how many subsequent meetings occurred. The appellant's brother testified that two more meetings took place, and at both of these meetings the appellant continually reiterated his fear that he would not be able to obtain another licence and received repeated assurances that being an Indian he would get one easily. The respondent said, however, that there was only one more meeting. In any event, this final meeting occurred on November 20, 1973, in the coffee shop of the Marine Hotel; the respondent, the appellant and the appellant's brother, James Harry, were present. At this meeting the appellant again returned the respondent's cheque saying "I am not going to sell my boat, I am scared of losing my licence." Discussion continued for some time; they left the coffee shop and went into the bar where the respondent and James Harry drank

beer but apparently the appellant did not. At length the appellant apparently decided that he would sell his boat for $4,500. He swore that the only reason for finally agreeing to the sale was that he had accepted the advice that he could preserve his licence. He said in cross-examination, "I believed him, that is the only reason I let her go." In my opinion, it is clear from the evidence that the respondent, a man of greater business experience, greater education and with a full knowledge of the value attributable in the autumn of 1973 to a commercial fishing licence, took advantage of his general superiority and prevailed upon the appellant to enter into this bargain against his best interests.

**19** I take this view with the utmost respect to the trial Judge. I have, however, considered his reasons for refusing to apply the principles in the *Bundy* case and I remain of the view that I have expressed. It is true, as he has pointed out, that appellant could have sought advice; he could have torn up the cheque; he could have refused to have any dealings with the respondent; but this will be true of almost any case where an unconscionable bargain is claimed. If the appellant had done these things, no problem would have arisen. The fact remains, however, he did not, and in my view of the evidence it was because he was overborne by the respondent because of the inequality in their positions and the principles of the cases cited apply.

**20** I would allow the appeal and direct that the contract be rescinded; that the respondent deliver the "Glelnda Marion" to the appellant upon payment by the appellant to the respondent the sum of $3,930.

**21** CRAIG, J.A.:--I agree that this appeal should be allowed for the reasons given by McIntyre, J.A., and also for the reasons given by Lambert, J.A., and I agree with the order which McIntyre, J.A., proposes.

**22** LAMBERT, J.A.:--I have had the advantage of reading the opinion of my erstwhile brother McIntyre. That opinion has been handed to my brother McFarlane to be announced in open Court and left with the Registrar in accordance with s. 27(3) of the *Court of Appeal Act*, R.S.B.C. 1960, c. 82, as amended [1961, c. 13, s. 2]. I would allow the appeal and make the order proposed by McIntyre, J.A.

**23** The leading judgment of this Court on unconscionable bargains is *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (2d) 710, 54 W.W.R. 257, and a concise expression of the legal principle followed in that case by Davey, J.A., and by my brother Bull is set out in the judgment of Davey, J.A., in these words [at p. 713 D.L.R., p. 259 W.W.R.]:

> ... a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable ...

**24** McIntyre, J.A., has re-stated that principle in his judgment.

**25** I do not disagree that the principle, as stated by Davey, J.A., and by McIntyre, J.A., is appropriate to apply in this case as an aid in the determination of whether this is a case where rescis-

sion should be granted, though I am not satisfied that the principle, so stated, exhausts all cases where rescission might be ordered under the rubric of unconscionable bargain.

**26** I agree wholeheartedly with McIntyre, J.A., when he says that it is easier to state the principle than to apply it in a given case. Indeed, to my mind, the principle is only of the most general guidance. It is not a principle of the type which can be applied to facts to produce, by a logical process, a clear conclusion. To think of it as such a principle is to obscure the real process of consideration and judgment that leads to a decision in this kind of case.

**27** I consider that the judgment of the English Court of Appeal in *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, is subject to the same limitation. In that case, Lord Denning, M.R., analyzed five types of unconscionable bargain and synthesized them into one general principle. He called the five types: duress of goods, unconscionable transactions, undue influence, undue pressure and salvage agreements. He stated the general principle in these terms [at p. 765]:

> 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 on 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 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. With these explanations, I hope this principle will be found to reconcile the cases.

**28** This statement was clearly not intended as a touchstone, since the liberal employment of adjectives makes it too flexible for that purpose, but rather as a demonstration that the categories of grounds for rescission are interrelated and based on a common foundation, so that cases of one of the five types may provide guidance on another of the types. Accordingly, again, the statement of principle has been only of the most general assistance to me in reaching my decision on the facts of this case.

**29** In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the *Morrison* case and the *Bundy* case, are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate

from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.

**30** The single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded must be answered by an examination of the decided cases and a consideration, from those cases, of the fact patterns that require that the bargain be rescinded and those that do not. In that examination, Canadian cases are more relevant than those from other lands where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were, in some respects, rougher and, in other respects, more fastidious. In my opinion, it is also appropriate to seek guidance as to community standards of commercial morality from legislation that embodies those standards in law. I have, therefore, particularly considered the facts and decisions in *Morrison v. Coast Finance Ltd., supra; Knupp v. Bell et al.* (1966), 58 D.L.R. (2d) 466; affirmed 67 D.L.R. (2d) 256 (Sask. C.A.); *Miller et al. v. Lavoie* (1966), 60 D.L.R. (2d) 495, 63 W.W.R. 359; *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R. (2d) 260; *Gladu v. Edmonton Land Co.* (1914), 19 D.L.R. 688, 8 Alta. L.R. 80, 7 W.W.R. 279; and *Hnatuk v. Chretian* (1960), 31 W.W.R. 130; and I have considered the provisions of the *Trade Practices Act*, 1974 (B.C.), c. 96, and the *Consumer Protection Act*, 1977 (B.C.), c. 6.

**31** I have applied the standards derived from those authorities to the facts in this case, which are that the respondent purchased for $4,500 a boat that he knew to be worth $16,000 from the appellant, whom he knew to be partially deaf, easily intimidated and ill-advised, by a process of harassment. In my opinion, the whole circumstances of the bargain reveal such a marked departure from community standards of commercial morality that the contract of purchase and sale should be rescinded.

**32** I do not believe that the process of reasoning that I have adopted is in any way different from the process of reasoning adopted by McIntyre, J.A., in this case or by Davey, J.A., in the *Morrison* case, *supra.*

**33** I would allow the appeal and make the order proposed by McIntyre, J.A.

# TAB 7

*Case Name:*

# Cain v. Clarica Life Insurance Co.

**Between**
**Edward Cain (also known as Ted Cain), respondent/ Appellant by Cross-Appeal (plaintiff), and Clarica Life Insurance Company, formerly known as The Mutual Life Assurance Company of Canada, appellant/respondent by Cross-Appeal (defendant)**

[2005] A.J. No. 1743

2005 ABCA 437

263 D.L.R. (4th) 368

[2006] 7 W.W.R. 111

54 Alta. L.R. (4th) 146

384 A.R. 11

47 C.C.E.L. (3d) 70

[2006] CLLC para. 210-001

144 A.C.W.S. (3d) 876

2005 CarswellAlta 1871

Docket: 0403-0295-AC

Alberta Court of Appeal
Edmonton, Alberta

**Côté and Paperny JJ.A. and Sulyma J. (ad hoc)**

Heard: October 31, 2005.
Judgment: December 15, 2005.

(80 paras.)

*Civil procedure -- Settlements -- What constitutes -- Appeal by employer from decision, reported at [2004] A.J. No. 837, to award former employee amount over severance package already paid, allowed -- Severance package was valid settlement agreement -- Judge erred in failing to give agreement legal effect.*

*Contracts -- Consensus, lack of -- Unconscionable transactions -- Unequal bargaining positions -- No overwhelming imbalance in bargaining power led employee to accept severance package, paying employee nine months' severance.*

*Employment law -- Termination of employment -- Wrongful dismissal -- Reasonable notice period or wages in lieu -- Nine months' pay as severance was reasonable where employee had 30 years or service -- Severance payment gave employee certainty.*

Appeal by Clarica Life from a decision awarding a former employee $98,000 in a wrongful dismissal action. Cain was an employee of Metropolitan Life for 30 years. He had a management position when Clarica bought Metropolitan. Cain signed a contract with Clarica, ending his employment with Metropolitan and commencing employment is a similar position with Clarica. Under the contract, Clarica could terminate Cain's employment without cause on 30 days' notice. Things did not go well over the next two years and Cain was demoted to a non-managerial position. He considered himself constructively dismissed. He worked an additional three months to let his pension benefits vest. Negotiations ensued to work out a severance deal. Four months later Cain accepted approximately nine months' pay in a lump sum as severance. Cain got another job. He sued Clarica for wrongful dismissal. Clarica defended, claiming the severance package was more than Cain was entitled to under his employment contract. Cain was awarded a further $98,000 on top of the $88,000 previously paid by Clarica, representing a total of 22 months' pay.

HELD: Appeal allowed. Cain's suit was dismissed. Clarica's payment of severance was a valid and binding settlement contract. The trial judge erred in failing to give any legal effect to this settlement contract. He erred in failing to consider that Cain got a new job within less than a year. Even if 22 months' pay was the correct amount, it was just a ceiling, and there was no floor at the time the severance package was being negotiated. The package gave Cain certainty, and the judge erred in not considering that that had value. There was no overwhelming imbalance in bargaining power, and no evidence of bad faith on Clarica's part.

**Appeal From:**

Appeal from the Judgment by The Honourable Mr. Justice S.M. Sanderman. Dated the 9th day of July, 2004. (2004 ABQB 531, Docket: 0103-24611)

**Counsel:**

C.J. Schultz, for the Respondent/Appellant by Cross-Appeal (Plaintiff)

A.J. Kotkas, K.J. Clayton, for the Appellant/Respondent by Cross-Appeal (Defendant)

REASONS FOR JUDGMENT

Reasons for judgment were delivered by Côté J.A. Concurred in by Paperny J.A.. Concurred in by Sulyma J..

CÔTÉ J.A.:--

A. Introduction

**1** The issue here is whether there is any legal basis to upset a settlement contract between an employer and employee after constructive dismissal.

B. Facts

**2** The respondent was employed for about 30 years by Metropolitan Life Insurance Company. The appellant company bought Metropolitan. In short order the respondent signed several contracts, which ended his employment with the old company, and gave him a manager's position with the new company, similar to the position he had previously held. The new contract allowed the employer to dismiss him without cause on 30 days' notice.

**3** The respondent entered into his duties, but after about two years, things did not go well. The employer demoted him to a non-manager's job, which he objected to. It offered an assistant manager's job. He considered himself constructively dismissed.

**4** An arrangement was worked out under which he would stay actually working for 3 months, evidently without waiving any of his claims for constructive dismissal. That 3 months allowed pension benefits to vest. I am not certain whether this was before the settlement contract, but the contract certainly accepted this feature.

**5** Then ensued some months of negotiation about a severance package. The details are as follows.

2000

| | |
|---|---|
| January 21 | Respondent demoted. He immediately asked whether he could get a severance package, and was told the new contract did not provide for one. The appellant's official testified that he then said that he would inquire. The respondent promptly took advice from an employment lawyer. |
| January 25 | That official said that another manager's position might |

be open.

January 31 — The respondent called to inquire both about that possible managerial position and a possible severance deal.

February 2 — The appellant offered the respondent a position as an agency manager.

February 3 — The appellant confirmed that in talks scheduled for February 17, they would finalize a severance option.

February 17(?) — At the scheduled meeting, the appellant employer offered the respondent two severance alternatives. Either:

(a) 10 months, paid month by month, which would end if he got a new job, or
(b) 7 months as a lump sum, presumably non refundable.

March 28 — Respondent commented on why he thought the appellant's offer was too low in amount.

end of March (?) — Appellant company increased its offer to 12 months (payable month by month) or 9 months' lump sum.

April 18 — Appellant company offered either an agent's position or a lump sum severance payment of over $88,000 (which the trial reasons say is about 9 months' pay).

April 24 — The respondent wanted to be able to transfer most of such a lump sum to his RRSP and so not pay income tax; the appellant company said it was willing. Such a signed document is in evidence (Tab 51).

May 1 — Respondent formally resigned and took payment of the lump sum discussed previously (Tab 46).

**6** It is important to notice one point which counsel for the respondent stresses and the trial reasons twice found. The new contract's clause letting the appellant employer terminate without cause on 30 days' notice was not mentioned. The appellant never suggested that the respondent had no right to a severance package, or no right to sue for constructive dismissal. The parties negotiated only two issues. First was the size of the severance package, based on what was the respondent's effective monthly pay, and how many months should be allowed.

**7** Second was the settlement's form. Would it be a series of monthly payments, which would end if the respondent got another job? That is one of the two alternatives which the appellant first suggested. Or would it be a lump sum payable in any event and not subject to any deduction for new employment? That is the other alternative offered. It is what the respondent seemed more interested in, and ultimately preferred.

**8** At the end, the respondent agreed to the settlement package, though he said he was not happy with it. He had it paid into his bank account. He never repudiated the settlement package, nor tried to return the money.

**9** Around the end of 2001, the respondent got a new job like his old one, as a branch manager of another insurance company, as he had anticipated that he would.

**10** Around that time, the respondent's lawyers issued a statement of claim against the appellant. His pleading simply alleged that his employment of 31 years continued throughout, and was regulated by the two new contracts signed. He alleged wrongful dismissal and claimed reasonable notice of 30 months. It recited the lump sum he had received, but not any agreement surrounding it. That is the only pleading which the respondent ever filed.

**11** The appellant pleaded the earlier contracts for 30 days' notice, and acceptance of the severance package, and said that there had been failure to mitigate, and the severance package exceeded what the respondent was entitled to.

**12** The respondent filed no reply, and his statement of claim was never amended.

**13** The trial reasons [2004] A.J. No. 837, ( 2004 ABQB 531) awarded the respondent a further $98,000 plus interest, on top of the lump sum of $88,000 previously paid. They held that none of the contracts bound the respondent, for various reasons. So they awarded in all about 22 months' pay (19 after the 3 months worked), without any deduction for the outside earnings by the respondent during that period. The employer appeals.

C. Validity of the Earlier Contracts

**14** The trial reasons devoted much of their length to the earlier contracts which transferred employment to the respondent, and discussing whether they were enforceable. But the conclusions which I reach below make it unnecessary for me to reach any opinion on those topics.

**15** I must emphasize that those two earlier contracts were signed far before the negotiation of the settlement (severance package) which I discuss here. It is critical not to apply any of counsel's or the trial reasons' discussion of those earlier circumstances to this later separate transaction.

D. Pleading

**16** My reasons and my conclusion proceed upon the merits of the suit, not upon any point of practice or procedure.

**17** However, I consider it necessary to comment on the manner in which the respondent's solicitors proceeded. The statement of defence of the appellant clearly pleaded all along that the respondent had terminated his own employment by resigning and taking the severance package. But no pleading by the respondent ever questioned the validity of the deal made for a severance package, nor even suggested that there was no such deal.

**18** The respondent's solicitors faxed a letter to the other side just before the then-scheduled trial opening. But the letter was confined to other matters, and said nothing about the severance package or the deal accompanying it.

**19** Yet the trial reasons appear to have set aside the severance contract between the parties on the basis that it was unfair or unconscionable. The reasons find a contract, but apparently conclude that it is void. Presumably the respondent argued thus at trial.

**20** That procedure flew in the face of many of the Rules of Court respecting pleadings. To invoke the doctrine of unconscionability after such a procedure (as the respondent's factum on appeal does), can be most unfair to the opposing party. See Wilder v. Wolch (2000) 250 A.R. 258, 2000 ABCA 26 (para. 11); A-C-H Int. v. Royal Bank (2005) 197 O.A.C. 227, 231-32 (paras. 13-21) (C.A.). It is a matter of natural justice. The Supreme Court of Canada and this Court have often pointed out the impossibility of finding unpleaded legal flaws in contracts. To save ink, I merely note the references in Stevenson and Côté, Alberta Civil Procedure Handbook, under Rr. 104, 109, 110(2), 115 and 123; and Stevenson and Côté, Civil Procedure Encyclopedia, Chap. 11, Part B.7, Chap. 12, Part D.2, and Chap. 13, Parts E.3, E.5, H, and J. Cf. Chap. 14, Part B (2003).

**21** It is the duty of all concerned to ensure that the issues tried be confined to those pleaded, unless there is

(a) a proper motion to amend the pleadings, and
(b) satisfaction of the usual tests for a later amendment of pleadings, and
(c) an order approving a precise amendment.

**22** In another case with different substantive law and evidence, such lack of natural justice could well lead to a new trial and additional discovery.

E. Was there a Settlement Contract?

**23** The respondent's counsel evidently took the position at trial that there had been no settlement contract. The trial reasons properly concluded that there had been one (even if the reasons called it invalid or unenforceable). The respondent's factum offers no argument on the point, but his counsel's oral argument contended that the trial judge's fact findings here were wrong.

**24** The facts as found clearly establish the negotiation and formation of a contract, and what were its terms.

**25** Nor was the $88,000 a tentative payment subject to adjustment. Such tentative (monthly) sums were one of the things which the appellant employer had first proposed. But the respondent himself elected to reject that and instead to negotiate an increased lump sum payable in any event, irrespective of whether the respondent got another job promptly. The trial reasons found that the respondent was then confident of being able to get an equivalent job quickly. The lump sum could not be a payment to stand in any event without adjustment or refund, unless there was an agreement making it final.

**26** There is some evidence that the respondent may have thought that he had outsmarted the appellant employer by getting paid that large lump sum, without signing a release (A.B. pp. 43-4). And the respondent's oral argument on appeal was similar. But the terms of the correspondence making the agreement made it obvious to any objective observer that it was a final settlement. What else could "severance package" mean, in this factual context? The respondent testified that he had understood that a release would be necessary, and that money would not be paid without it (pp. 43-4). On May 1, 2000 the respondent resigned, by email (Tab 46). He received and kept the lump sum when he left Clarica. Given all the history up to then, that was powerful confirmation of an agreement.

**27** Besides, someone who voluntarily resigns ordinarily does not get damages for wrongful dismissal. In context, the resignation was tantamount to a release. And it was at the same time the lump sum was paid and accepted.

**28** The trial reasons finding a settlement contract are plainly correct and supported by evidence.

F. Grounds for Attacking the Settlement Agreement

**29** But the trial reasons declined to give any legal effect to this settlement contract.

**30** Paragraphs 17 to 27 of the reasons appear to invoke the doctrine of unconscionability. I will discuss it in Part F, and in Parts G to J below. In Part K, I will deal with the trial reasons' and respondent's doctrine of good faith.

**31** The tests for unconscionability at common law or in equity are not always stated the same way, or even firmly, especially in England. I have looked carefully at Canada's undoubted leading case, Morrison v. Coast Finance (1965) 54 W.W.R. 257, 259 (B.C. C.A.). It was approved by the majority in Norberg v. Wynrib [1992] 2 S.C.R. 226, 248, 138 N.R. 81, 98-99 (para. 30), and in C.I.B.C. v. Ohlson (1997) 209 A.R. 140, 146 (para. 20) (Alta. C.A.). Those cases are very instructive. See also Calgary v. N. Constr. Co. [1986] 2 W.W.R. 426, 442-3 (C.A.); Brewery Bev. & S.D.W. v. Labatt's Alta. Brewery (1996) 184 A.R. 162, 170-71; Adams, "Misrepresentation and Fraud", in 31 Hals. Laws, para. 854 (4th ed. 2003 reissue).

**32** Those authorities discuss four elements which appear to be necessary for unconscionability. (Some cases state some of the four as exceptions to be disproved by the alleged oppressor, but nothing turns on onus in this case.) The four necessary elements are

1. a grossly unfair and improvident transaction; and

2 victim's lack of independent legal advice or other suitable advice; and

3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. other party's knowingly taking advantage of this vulnerability.

**33** No reported case has come to my attention which upset a contract in the absence of one of these four elements, let alone all of them. I discuss each of the four elements below.

G. Was this Bargain Grossly Improvident?

1. Introduction

**34** In some reported cases, the contract gave no benefit whatever to the victim. For example, he simply guaranteed someone else's loan and got no benefit, direct or indirect. That is not the situation here.

**35** A court cannot find unconscionability just because the price was too high or too low. Still less can it so find because the price now appears too high or low with the benefit of later events and hindsight. Instead, the test is based on what was known at the time the bargain was made: was it far outside the proper range? Was it grossly inadequate? See Black v. Blair Athol Farms [1996] 5 W.W.R. 516, 523 (paras. 15-16) (Man. C.A.); cases in Part F, supra.

2. Opening Bid

**36** The trial reasons noted the appellant employer began with an opening bid: 7 months' notice (para. 21). The trial reasons called it very modest and suggested that it should have been 22 months (paras. 26, 27, 31), and so concluded that this was not good faith and fair dealing (para. 31). I disagree. That the opening offer by one side was too high or too low, is not the test. No one offered any authority for that idea. If it were the test, no sale of a rug would ever bind. Parties very often begin their bargaining a long way apart. The issue is not whether the negotiation tactics on one side could have led to a grossly improvident bargain, e.g. had the other side accepted at once with no more discussion. It is whether in fact they led to one. What was the final bargain?

**37** Such an examination of opening offers is especially inappropriate here. The respondent was told by a lawyer that he was entitled to go to court and sue for damages of about a month per year of service.

**38** The trial reasons did not accurately reflect what the appellant company's opening offer was. In fact, it gave two alternatives: month-by-month payment, or a non-refundable lump sum. The appellant company explained that the difference was that the former was conditional on not being able to get another job.

3. Working Notice

**39** I also have trouble seeing any adverse significance of the respondent's need to stay and work 3 more months (trial reasons paras. 25, 27). The appellant employer readily permitted that, so its

conduct there was opposite of unconscionable. No one argues that the appellant ever threatened to deny that.

4. Price was Within a Proper Range

**40** It is vital to examine closely the actual price agreed upon here.

**41** The trial reasons seemed to suggest in places that 20 to 24, or 22 months was a proper award to the respondent, and so the approximately 9 contracted for was unfair. (See paras. 17-20.) But 22 months is not what the law would award. Even assuming for the sake of argument that a gross 22 months was a proper starting point, a court would make two very important deductions.

**42** First, any period spent with the same employer after termination or acceptance of repudiation, earning salary, would have to be credited. In this case, that went on for 3 months. The trial reasons later recognized that in a different context (damages in para. 32). But the trial reasons did not allow for this when using 22 months as a ruler to compare with the bargain struck.

**43** The second deduction is as follows. The respondent must give credit for any salary earned from other employers during the proper notice period (the postulated ensuing 19 months). That is because the issue is damages. The notice period is but a step in calculating damages. If a fired employee earns as much as his past employer would have paid him, in the notice period, he or she has no loss. Where there is no loss, there are no damages.

**44** There were just such earnings here during that period: the respondent did temporary work for two other insurance companies, as the trial reasons find. Indeed, by the end of the following year, the respondent did get a new permanent job similar to his old job, again with another big insurance company. The reasons so find. But the reasons do not account for this, even in the discussion of liability or in the calculation of damages. With respect, that was error.

5. Future Was Unknown

**45** There is no evidentiary base to support the conclusion that the offer was improvident. No one other than the respondent testified for the respondent.

**46** The evidence is indeed contrary. One must remember that the settlement contract was made at the time that the respondent left the appellant's employment. When future employment would be obtained was then unknown to both sides. The trial reasons found that the respondent expected to be hired elsewhere quickly. He testified that he was one of the ablest managers in Canada (pp. 42, 45, 48). For all we know, the appellant employer may also have thought that he would be hired quickly. If it did, then its offer and the final settlement were by no means too low. I repeat that the test is what people thought at the time. Hindsight is irrelevant.

**47** To put it another way, even if 22 months (or 19) were the correct amount, it was only a ceiling. There was little or no floor at the time of negotiating the settlement (severance), because the respondent was still working for the appellant for pay, and might have got a new job right after that work ended.

**48** This bargain gave the respondent certainty which he lacked before. The appellant's first offer had two alternatives. One was a monthly sum, which would end when new employment was found (or would deduct such new earnings). So how much it would yield was then uncertain. The respondent rejected that. He insisted upon, and got, a firm deal for a non-refundable lump sum paya-

ble up front. Thus he got certainty. The parties finally negotiated the lump sum at the equivalent of about 9 months' pay. If the respondent had got a new equivalent job in less than 9 months, he would have made a profit. Had he arranged one at or before the day he stopped work with the appellant (as he hoped), the whole $88,000 would have been profit, not compensation.

**49** Therefore, to evaluate the bargain negotiated, one would have to compare a certain 9 months (settlement) with a very uncertain amount somewhere between 0 months and 19 months (lawsuit). The sum negotiated (9 months) was about midway in that range. The settlement bargain was a prediction or bet that the respondent would get a new job about 9 months after stopping work for the appellant company. Or, one may look on it as valuing the situation as a 50% chance that he would get a new job promptly.

**50** What if things had turned out as the respondent anticipated, and he got a new equivalent job shortly after he took the lump-sum settlement? Could the appellant employer have sued to get its lump sum back? No; such a suit by the appellant would be frivolous. Yet had the respondent got a new job quickly (as the respondent anticipated), the bargain would have been a disaster for the appellant employer, yielding it nothing in return for its $88,000.

**51** Both sides decided not to gamble, but to compromise on a bird in the hand.

6. Settlements Remedy Existing Uncertainty

**52** The whole point of a settlement is to replace an unpredictable dispute or suit with a certain contract. It does not matter that one party valued his opponent's chances in the suit lower than did the opponent himself. Parties settle because they think a suit or trial will yield less than the settlement. It is of the essence of such a settlement that each party relies on his own evaluation and takes his chances. See Radhakrishnan v. Univ. of Calgary (2002) 312 A.R. 143, 2002 ABCA 182 (especially paras. 52 ff.).

**53** Furthermore, litigation is uncertain and expensive. Even for the "winner", party-party costs rarely repay more than half of his or her legal bills. Though some case authority favors the respondent and bypasses the change of employer and the terms of the new employment agreement, and recognizes the full 30 years' seniority, there is other contrary authority. There is also some conflict in the reported cases about duty to mitigate damages by staying on in the lower job. Little in litigation is certain. Even if 19 months had been a proper ceiling (award in the absence of any new employment), knocking off something for a quick cash settlement might have been justifiable. So even 19 months is not necessarily a firm comparator or ceiling.

**54** It is an error to look at events in hindsight, and then use them to measure a settlement contract made earlier before those facts were known. Still less to call it improvident or unfair. Least of all can one attack a settlement on the ground that one party was right all along and should not have compromised: Radhakrishnan v. U. of C., supra (paras. 44-47); A.-G. B.C. v. Deeks Sand & Gravel Co. [1956] S.C.R. 336, 344; Robertson v. Walwyn Stodgell Cochrane Murray [1988] 4 W.W.R. 283, 285, 24 B.C.L.R. (2d) 385 (C.A.); Ronald Elwyn Lister v. Dunlop Can. [1982] 1 S.C.R. 726 , 42 N.R. 181 (paras. 31-33); cf. Hrycoy v. Hrycoy Est. (2004) 357 A.R. 329, 333-34, 2004 ABCA 320 (para. 15).

H. Was There Independent Advice?

**55** Where unconscionability (or undue influence) is alleged, independent legal advice is usually a complete answer to the claim: 31 Hals. Laws, para. 854, n. 7, supra; Hrycoy v. Hrycoy Est., supra, (para. 15); authorities cited above in Part F; Ma v. MIV Therapeutics (2004) 203 B.C.A.C. 117, 2004 BCCA 483 (paras. 22-4); cf. Ronald Elwyn Lister v. Dunlop Can. [1982] 1 S.C.R. 726, 739 e, h, 744 b-c, 745 b, 42 N.R. 181.

**56** Professor Guest used to espouse that "traditional" view in Chitty on Contracts: see vol. 1, paras. 7-044 and 7-045 (27th ed. 1994). He now suggests that the test be made more flexible, because of Boustany v. Pigott (1993) 69 P. & C.R. 298 (P.C. (E.C.)). See Chitty, 29th ed. vol. 1, para. 7-119 (2004). But the court in Boustany never denied that lack of independent advice is an element of unconscionability. Though a lawyer was consulted in Boustany, it was unclear who retained him, the person signing was elderly and of low intelligence, and the strong party went directly to her, behind the back of the person appointed to run her affairs. Worse still, the oppressor selected the lawyer, and it is very doubtful that his advice was independent. The case establishes no general principle, is not reported in any of the general law reports, and is plainly distinguishable. And the general legal theory of unconscionability seems further advanced in Canadian cases than in English.

**57** Here the uncontradicted evidence is that the mentally acute respondent promptly consulted a lawyer, who told him what he could expect to get if he sued. The respondent could go back to him any time he wanted. The lawyer's advice was higher than the number which the trial judge adopted.

**58** Furthermore, the appellant's opening offer expressly referred to the difference between a non-returnable lump sum, and payments conditioned on getting no new job. So the appellant flagged the issue for the respondent.

**59** The trial reasons emphasize that the respondent did not "retain" the lawyer and did not employ him or her to negotiate (para. 17). However, he did have the benefit of legal advice, and knew that he had four alternatives:

(a) he could stay with the same employer at the same salary,
(b) he could leave and get paid compensation until he got a new job, up to a maximum;
(c) he could leave and sue the employer for up to 30 months' salary, less if he found a new job sooner, or
(d) he could negotiate a fixed sum with his employer.

He chose option (d).

**60** This is not a case where a written settlement contract contained tricky clauses which undid its apparent benefits. The respondent knew just what severance package he was getting.

I. Was There Overwhelming Imbalance in Bargaining Power?

**61** Maybe the appellant employer was somewhat more competent than the respondent employee in such matters. Doubtless it had more money in the bank. Maybe the appellant did gain some advantage from consulting its lawyers more often (though no one has suggested to us what that advantage could have been).

**62** But unconscionability or related doctrines do not require complete equality of bargaining power. If they did, very few contracts would survive, and still fewer between an employer and an employee would.

**63** To upset a bargain, there must be a great disparity in bargaining power (and use made, advantage taken, of it): see the cases cited in Part F above.

**64** The respondent was 52 at the relevant time. He was not under any type of disability recognized in the case law.

**65** He was constructively dismissed, but it was done in a reasonable manner. If he had been upset, surprised and humiliated when he was demoted (trial reasons, para. 22), that was over 3 months before he made the deal. No one hurried or pressured him. He negotiated effectively. Nor is there any evidence that he was under any financial pressure. Indeed, he made his decision about the lump-sum settlement while he still had his regular pay cheques coming in.

**66** The respondent was a reasonably sophisticated businessman. For over 30 years he had worked for a very large life insurance company (or companies), in big cities in more than one province. He had been a manager for 26 years. At one point, he had been a regional vice-president.

**67** The trial reasons said that the proper amount of notice depends upon not only length of service, but also character of employment, responsibilities of the employee, and his experience, training and qualifications (para. 26). It is evident that the trial reasons therefore concluded that the respondent had a good deal of ability and experience.

**68** The appellant cites a great deal of trial evidence about how experienced the respondent was in negotiating contracts and dealing with employment situations (factum, para. 16; e.g. A.B. p. 49). Counsel for the respondent has not (in her factum or orally) pointed to any contrary evidence.

**69** Nor could the respondent so argue. The cornerstone of his case throughout has been that he was very able and experienced, indeed one of the best in Canada, and so should have got heavy damages.

**70** The respondent had enough wit to contact two former managers of the company and discuss with them what severance packages they had negotiated, and to make notes of that (A.B. pp. 30-31, and E140).

**71** I have seen no reported case where a person even remotely resembling the respondent has been held to be the victim of an unconscionable bargain. Nor should such bargains be upset on that ground: see Century 21 Campbell Munro v. S & G Estates (1992) 54 O.A.C. 315, 319-20 (paras. 9-13) (D.C.); Ronald Elwyn Lister v. Dunlop Can., supra (para. 23).

J. Knowingly Taking Advantage

**72** There is no evidence in this suit that the appellant employer knew or thought that the respondent did not know what he was doing, or that he was desperate for some reason, or that the appellant had the respondent in a vise. Yet the cases cited in Part F, supra, and the Boustany case, all require that. Nor was there anything known to the appellant to suggest to it that the bargain discussed was grossly unfair or improvident. I see nothing which would have made such a conclusion obvious, or even reasonable.

**73** Indeed, the shoe may be on the other foot. As noted, the respondent seems to have hoped that since he did not sign a release, he could keep the settlement money (severance package) and sue for more (oral evidence, A.B. pp. 43-44). That claim of no contract properly failed at trial.

K. Doctrine of Good Faith

**74** The trial reasons postulate a duty of good faith and fair dealing (paras. 28-30). Very possibly it may just be another name for unconscionability, or have the same elements.

**75** If this is not unconscionability under a new name, then I do not know what legal doctrine it is. The reasons rely on passages in Wallace v. U.G.G. [1997] 3 S.C.R. 701 taken out of context. They are not about compromising a wrongful dismissal complaint. They are about how to fire an employee, and extending the notice period for bad conduct of the employer. Nor was the appellant here a fiduciary of the respondent. Nor did the Supreme Court of Canada say that such settlements are contracts uberrimae fidei, the way that insurance contracts are. The duty postulated is clearly not a generalized duty to exercise any contractual power in good faith. The trial reasons spoke of how to make contracts, not how to exercise powers under them.

**76** This "good faith" attack fails in fact and law.

L. Conclusion

**77** The conclusion in the trial reasons that this was an unfair negotiation suggests an implied finding that this settlement was unconscionable. Such a finding is an error in law and the facts found in the trial reasons about the severance package settlement contract do not satisfy the tests for any of the elements found in the case law on upsetting contracts for unconscionability or undue imbalance of bargaining power.

**78** Therefore, the settlement contract (severance package) is a valid and binding contract which has been performed. The respondent has accepted the money. He is not entitled to more, and has bargained away all his earlier claims. Validity, interpretation, or effects of the earlier contracts of employment become academic.

**79** I would allow the appeal, and dismiss the respondent's suit with costs to the appellant in both courts.

**80** The cross-appeal seeks higher damages than the trial judge awarded. Since there is no liability, I would dismiss it, but limit costs of the cross-appeal to $1,000 (including any disbursements on the cross-appeal).

CÔTÉ J.A.
PAPERNY J.A.
SULYMA J. (ad hoc)

# TAB 8

# Mundinger v. Mundinger

[1968] O.J. No. 1339

[1969] 1 O.R. 606

3 D.L.R. (3d) 338

1968 CanLII 250

Ontario
Court of Appeal

**Schroeder, Kelly and Laskin, JJ.A.**

December 12, 1968.

G.B. Bagwell, Q.C., for appellant.

W.D. O'Malley, Q.C., for respondent.

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**1** **SCHROEDER, J.A.**:-- This is an appeal from a judgment pronounced by Hartt, J., on September 5, 1967, whereby he dismissed the plaintiff's action against her husband for alimony; for an order declaring that a certain separation agreement entered into between the parties on June 9, 1965, was null and void and should be set aside on the ground that the plaintiff was induced to execute it through the husband's fraud and threats and by reason of duress and undue influence, at a time when, to his knowledge, she was suffering from a serious nervous breakdown and was not in a mentally competent condition to appreciate the nature and quality of her act; and further dismissing the plaintiff's claim for an order declaring null and void a certain conveyance by the wife to the husband of property known and described for municipal purposes as 23 Oriole Gardens in the City of Toronto, and a conveyance by the wife to the husband of her interest in a 50-acre parcel of land in the Township of Uxbridge in the County of Ontario both of which properties had been registered in the names of the spouses as joint tenants.

**2** The parties were married on April 5, 1939, and resided throughout their married life in the City of Toronto. There were three children of the marriage who are now of age and married. The wife complained of many acts of cruelty on the part of the husband during their married life and more particularly of his conduct to her towards the end of the period of cohabitation. Her principal

complaint was as to an intimate and adulterous relationship between the husband and one Doris Johnson, which he stubbornly continued notwithstanding his wife's emphatic objections. She alleged that her husband's maltreatment had caused her to have a nervous breakdown. She became so depressed in this unhappy state of affairs that while under the care of her family physician who was administering tranquillizers to her she took an overdose of those drugs and became so dangerously ill that she was confined to the hospital on April 26, 1965, where she remained until May 14, 1968.

**3** During her confinement in the hospital the husband demanded a separation. This ill-timed and inconsiderate request was a severe shock to the appellant which aggravated the condition of tension and anxiety under which she was then labouring. Shortly after her return from the hospital the husband presented and asked her to sign a separation agreement which had been prepared by his solicitor, which provided, inter alia, that in consideration of $5,000 she was to relinquish all rights to support and maintenance, was to convey to her husband her undivided one-half interest in the Oriole Gardens property the equity value of which was said to be $20,000, and to convey her one-half interest in the farm property near Uxbridge, which was said to have a value of approximately $40,000. Although she was advised by the respondent that she did not require a solictor she heeded the advice of a friend and consulted Mr. Bowden McLean, a solicitor, who wrote a letter dated June 1, 1965, to Messrs. Rowland & Givertz, the respondent's solicitors, expressing his client's dissatisfaction with the agreement and stating the terms which would be acceptable to her.

When the husband was apprised of the terms so proposed he flew into a violent rage and a quarrel ensued, in the course of which he addressed his wife in an abominable manner and adopted a very threatening attitude towards her. He stated that he had a solicitor who could look after their affairs and it was not necessary that she be separately advised. On or about June 9, 1965, the defendant redrafted the agreement as previously prepared by his solicitors in the same terms but substituting for the sum of $5,000 to be paid to the wife, the sum of $10,000. In the result the appellant was induced to telephone Mr. McLean, to advise him that she had settled her affairs with her husband and that he should submit his account for services rendered.

**4** The defendant is the president of the Mundinger Company Limited and related enterprises which engages in the merchandising of musical instruments and provides musical instruction. For many years following the marriage the wife took an active part in the business as an officer and employee of the company and more especially in the teaching activity. In 1952 or 1953 the said Doris Johnson entered the service of the company and almost immediately thereafter replaced the wife not only in the conduct of the company's affairs but apparently, also, in the husband's affections. The learned Judge found that the continued association between the defendant and Mrs. Johnson on a personal basis "was such that the defendant well knew that it was injurious to the health of the plaintiff". "On this ground alone", he stated, "I would have found that the plaintiff, Mrs. Mundinger, was entitled to alimony." He held, however, that the separation agreement signed by the wife was a bar to her cause of action. He stated:

> I have given to the evidence prolonged and anxious consideration, and I have come to the conclusion that on the evidence before me, and having in mind the onus of proof that a case had not been made out.

He found on the evidence of one Jack Souter and Dr. Caroline Hobbs, a resident intern at St. Michael's Hospital, that the wife was mentally capable of entering into these transactions, diregarding almost entirely the evidence of her family physican who had treated her for many years and of

Dr. Fischer, an eminent psychiatrist under whose care she had been for several years prior to the dates with which we are concerned. Both of these medical witnesses, who were familiar with the unhappy situation in which this unfortunate plaintiff was involved, testifed that, in their opinion, she was not in a mental condition to exercise proper judgment in matters affecting her property rights and temporal welfare. The evidence of the witnesses Souter and Givertz, the solicitor, was based on their observation of the appellant during the short period when she executed the separation agreement and deeds respectively. The young resident intern formed no settled opinion as to the mental capacity of the appellant to transact business of such a nature and, in any event, her testimony upon this point was quite inconclusive. There was no proper ground for preferring it to the evidence of her general physician and Dr. Fischer.

**5** With deference to the learned Judge's view we are all of the opinion that he arrived at his decision in this case under the belief that despite the circumstances disclosed in evidence the onus of proof lay throughout on the plaintiff. The transactions in question are unconscionable and improvident on their very face as the learned Judge suggested. The plaintiff, now 52 years of age, has devoted the most important years of her life to her husband and their three children. She was influenced by her husband when suffering from the effects of a serious nervous breakdown, while under the influence of tranquillizers and other forms of sedation prescribed for her condition and doubtless also while affected by brandy which was liberally provided by the husband for reasons best known to himself, to surrender all rights to future support and maintenance and to part with a valuable interest in two pieces of real estate for the paltry consideration of $10,000. Her condition was such that it can clearly be asserted that her husband was in a position of dominance and control over her of which he took full advantage by exercising undue influence upon her to carry off this improvident and nefarious transaction.

**6** The governing principle applicable here was laid down by this Court in the oft-cited case of Vanzant v. Coates (1917), 40 O.L.R. 556, 39 D.L.R. 485. It was there held that the equitable rule is that if the donor is in a situation in which he is not a free agent and is not equal to protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so because of their position. In that case the circumstances were the advanced age of the donor, her infirmity, her dependence on the donee; the position of influence occupied by the donee, her acts in procuring the drawing and execution of the deed; and the consequent complete change of a well-understood and defined purpose in reference to the disposition of the donor's property. It was held that in those circumstances the onus was on the plaintiff to prove by satisfactory evidence that the gift was a voluntary and deliberate act by a person mentally competent to know, and who did know, the nature and effect of the deed, and that it was not the result of undue influence. That onus had not been discharged; and it was therefore held to be unnecessary for the defendant to prove affirmatively that the influence possessed by the plaintiff had been unduly exercised.

**7** The principle enunciated in Vanzant v. Cotes, supra, has been consistently followed and applied by the Courts of this Province and the other common law Provinces of Canada. The effect of the relevant decisions was neatly stated by Professor Bradley E. Crawford in a commentary written by him and appearing in 44 Can. Bar Rev. 142 (1966) at p. 143, from which I quote the following extract:

> If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an im-

> provident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests.

This correctly sets forth the effect of the decisions bearing upon this and like problems and I adopt it as an accurate statement of the law. On the evidence in the present case there was that combination of inequality and improvidence which justifies the Court in saying that the defendant has failed to discharge the onus which, in the circumstances, was cast upon him.

**8** The appeal is allowed with costs. The separation agreement shall be declared null and void and set aside. The deed of the farm property shall likewise be declared null and void and be set aside. There shall be a declaration that the wife is entitled to alimony for a sum to be determined on a reference to the Master for that purpose which shall be payable from the date of the commencement of the action. There shall also be a reference to the Master with respect to the residential property at Oriole Gardens which has been sold by the defendant and to fix the proportion of the proceeds thereof payable to the appellant. Counsel stated that since the conveyance of the farm property to the husband he has expended certain monies in the making of improvements thereto. On the reference to the Master there shall also be an inquiry as to the extent of these improvements and their value, the wife to be allowed occupation rent for the period during which she was excluded from enjoyment of the property. The sum of $10,000 paid by the husband to the wife will, of course, be taken into account by the Master in determining what is due to the appellant. The appellant shall have the costs of the trial, the costs of the appeal and the costs of the reference on a solicitor-and-client basis.

Appeal allowed.

# TAB 9

*Case Name:*

# PARIS v. MACHNICK

[1972] N.S.J. No. 190

32 D.L.R. (3d) 723

7 N.S.R. (2d) 634

Nova Scotia Supreme Court Trial Division

**Hart, J.**

December 14, 1972

(11 pages) (31 paras.)

**CASES JUDICIALLY NOTICED:**

Haygarth v. Wearing (1871), L.R. XII Equity, 320, folld. [para. 25].
Gladu v. Edmonton Land Co. (1914), 19 D.L.R. 688, folld. [para. 27].

**COUNSEL:**

T. ROBERT PARKER, for the plaintiff
WILLIAM J. GRANT, Q.C., and DOUGLAS A. CALDWELL, for the defendant

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This case was heard on December 7 and 8, 1972. Judgment was delivered on December 14, 1972.

1 **HART, J.**:-- The plaintiff in this proceeding is an illiterate woman, 59 years old. On March 27, 1972, she conveyed her home and farm property at Bayfield, in the County of Antigonish, consisting of approximately 107 acres of land, a small house, a barn and other outbuildings, to the defendant for the sum of $ 2,500. She now claims that the conveyance should be set aside, or, in the alternative, that she should be awarded compensation since the consideration paid for the property by the defendant was grossly inadequate, and she did not at the time of the transaction fully understand what was taking place.

2 The plaintiff and her late husband lived on their farm property for a good many years. Up until the time of his death on February 16, 1972, Ernest R. Paris had kept the farm in operation. Dur-

ing the last years of his life he was unable by reason of illness to do all the necessary work and his brother, William Paris, used to come down quite regularly from New Glasgow to assist him with the farming operation. At the time of his death, he had thirteen dairy cows, sixteen other young cattle and a bull, and he had been planting crops of potatoes, turnips and grain on the cultivated portion of his land. He also had a lobster fishing license, as his property bordered on the sea, and he maintained a boat and fishing gear for this purpose.

**3** According to the evidence, the late Mr. Paris was [*page636] the one who conducted the family business and had entrusted his legal affairs to Mr. Rod Chisholm, a lawyer practicing in the Town of Antigonish. By his Will, he appointed the plaintiff executrix and left all his property to her. With the assistance of Mr. Chisholm, as proctor for the estate, the plaintiff was granted probate of her husband's Will on February 24, 1972.

**4** During the month following her husband's passing, the plaintiff remained at the farm but stayed at neighbours' houses at night for company. Her brother-in-law, William Paris, came out two or three times a week from New Glasgow to assist her with the farm operation, and said that he was doing this as a result of a promise he had given to his late brother to look after the plaintiff after he was gone. He expected to assist her with the disposal of the cattle, the farm equipment and the lobster boat and fishing equipment, and that she would eventually dispose of the property but reserve the home for herself as she had no other place to live.

**5** The plaintiff, however, did not wait for Mr. William Paris' assistance, but decided to liquidate her holdings on her own. She had no immediate relatives in the area and wished to go to visit her sister in Halifax, and decided to dispose of everything. She thought she would stay with her sister during the winter months, but wanted to be able to come back to her home in the summer and do a bit of gardening but did not wish to keep or operate the farm.

**6** Early in the week of March 20, the plaintiff was in a small meat and grocery store operated by Mrs. Vacheresse, in Antigonish. She and her late husband had dealt and purchased provisions at this store and had known Mrs. Vacheresse for many years. Mrs. Vacheresse knew that the plaintiff's husband had died and, on the assumption that the plaintiff would not carry on the farm operation, asked her whether she had any beef for sale. The plaintiff replied that she was going to sell everything including the farm. Upon learning of this intention, Mrs. Vacheresse recalled that the defendant, who was a student taking his degree in education at the university, had asked her, some time before, to keep an eye open for any rundown farms that might be for sale. She discussed this with the plaintiff and was asked to call the defendant to see if he would be interested. This was done, and in a short time the defendant arrived at the store.

**7** The plaintiff and the defendant discussed the ownership [*page637] of the property and its location and made arrangements to visit the farm the next day. In order to make certain that the plaintiff was authorized to sell the property, the defendant consulted a lawyer across the street, who came over to the store to speak with the plaintiff. Mr. MacLellan, who had only been admitted to the bar early that month, looked at the documents the plaintiff had with her and satisfied himself that she was entitled by virtue of her husband's Will to dispose of the property. He advised the defendant that he would require a copy of her late husband's deed, and returned to his office.

**8** Mr. MacLellan says that he enquired whether the plaintiff was being represented by Mr. Chisholm in connection with the sale of her property, since he appeared to be a proctor for the es-

tate, but was told by the plaintiff that Mr. Chisholm was not working for her in connection with the sale.

**9** The following day, the defendant went to the assessment office to obtain some information about the plaintiff's property. He discovered that it was assessed for $ 1,475, and contained about 100 acres. He also found that there were outstanding taxes against the property of approximately $ 250. Late that afternoon, he went to Bayfield to view the property and met the plaintiff at the house. It was a cold, snowy winter afternoon, but with her assistance he was able to get a fairly good idea of what the property consisted of. He walked down the cleared land with her and went as far as the beach and then back into the house to discuss the matter. The plaintiff went upstairs and came down with her late husband's original deed to the property from the Nova Scotia Land Settlement Board, and they then discussed the sale of the place. The defendant says that he made an offer of $ 2,500 for the property and she accepted. The plaintiff says that she was asked how much she wanted for the property, and when she said $ 400, the defendant told her that he would give her more than that but no amount was mentioned. She also says that she told the defendant she wanted to be able to stay in the house for the rest of her life and this was understood between them. The plaintiff says the defendant agreed to buy the property but no price was set. He needed a few days to make arrangements for the completion of the sale and it was agreed that they would meet in Antigonish the following Monday.

**10** The next day the defendant took the deed into Mr. MacLellan and authorized him to proceed with the search of [*page638] title. The plaintiff sold off the cattle at about $ 100 a head and the hay at $ 15 a ton. She did not discuss these sales or the sale of the property with Mr. William Paris, or any solicitor, or even with the neighbours where she stayed at night. She felt she had the right to sell everything and did not choose to discuss it with anyone else.

**11** By Friday, Mr. MacLellan had completed a search of title and advised the defendant that the transfer could proceed.

**12** Early Monday morning, the plaintiff came into Mrs. Vacheresse's store, anxious to complete the sale. When she found out that the defendant was not quite ready, she returned home. The defendant was, at this time, having a deed prepared by Mr. MacLellan and receiving instructions for himself and a Mr. Morgan as to how the deed should be executed. He had, by this time, realized that the plaintiff could not read or write and was instructed by the lawyer to read the deed over to her to make sure that she understood it before having her place her "X" on the document in the presence of Mr. Morgan. When the deed was ready, the plaintiff was picked up by the defendant and brought back to the store, where the transaction was completed in the presence of Mrs. Vacheresse and Mr. Morgan. The defendant read aloud parts of the original deed to the plaintiff's husband and compared them with the new deed that she was to sign. He did not, in fact, read over the new deed to the plaintiff. The plaintiff then placed her "X" on the new deed and Mr. Morgan wrote in her name and signed as a witness. The plaintiff then asked for something to show that she had a right to stay on the property and the defendant wrote out on a plain yellow piece of paper and affixed his signature to the following "You may stay in your house and use small lot for garden in the summer." This signed document was given to the plaintiff, as well as a cheque for $ 2,500.

**13** The plaintiff was concerned about keeping money with her and said that she would like to put it in the bank. Since the banks were now closed, the defendant asked Mrs. Vacheresse to call the bank and arrange to let the plaintiff in. This was done and the defendant drove the plaintiff to the bank and the money was deposited into her account. The defendant then drove her home and re-

turned to the lawyer's office to have the oath of the witness completed. He subsequently recorded the deed and paid outstanding taxes in the amount of $ 243.52. [*page639]

**14** From the evidence as a whole, I am satisfied that the plaintiff wanted to dispose of her property, knew she was signing a deed, knew that the deed would convey her property to the defendant and was content with the transaction. I am further satisfied, however, that the plaintiff had absolutely no comprehension of the value of her property or the amount of money which was paid to her by the defendant. She had attended only the first grade in school and could neither read nor write. She could count to twenty and make change in a store but was completely lost beyond this point. At one time when asked to place a value on her property, she thought it was worth $ 400, and at another time, $ 600 or maybe $ 1,500. I do not believe that at any stage in the proceedings she agreed to the $ 2,500 purchase price, and, further, that even if she had she would not have appreciated whether that price had any relationship to the actual value of her land. She simply had no mental capacity to understand figures in this range. In her mind she was prepared to take whatever purchase price the purchaser was prepared to give her for the property, and, in my opinion, she would not know the difference between $ 500 and $ 5,000.

**15** There was some evidence that she had valued her property at less than $ 3,000 for probate purposes but I am not convinced that she was the author of this valuation. With her inability to appreciate values it is more likely that she simply went along with someone else's suggestion. In any event it was not an appraised value.

**16** After this sale had been completed Mr. William Paris met Mrs. Vacheresse and discovered to his surprise that the cattle, hay and property had been sold. He immediately went to discuss the matter with the plaintiff and when he learned of the purchase price, believed it to be far below the actual value of the property. He told the plaintiff that she had sold the property for too little money and it was at this stage that she began to regret having gone through with the transaction without consulting Mr. Paris or anyone else for advice.

**17** A day or so later, Mr. William Paris took the plaintiff to the defendant's apartment to discuss the sale. Mr. Paris advised the defendant that he considered the purchase a "steal" and suggested that the purchase price and the amount paid for taxes be refunded and the transaction cancelled. The defendant's reaction was that he had gotten a good buy but that he might consider the suggestion if his expenses for legal fees and time were refunded as well. Mr. Paris claims this was agreed and the defendant says it [*page640] was not, but, in any event, the defendant wanted a week to consider the matter and they were to meet again at his apartment. At the subsequent meeting, Mr. Paris came alone since the plaintiff was in hospital and was advised by the defendant that he had taken legal advice and considered the transaction a valid one. He felt the plaintiff had known what she was doing and had the right to sell the property if she wished, and he was not prepared to upset the transaction.

**18** Two appraisers were called by the plaintiff to place a current value on the property in question. Mr. Fred H. MacDonald was the first such witness, and he was qualified as the Regional Director of Assessment for the Pictou assessment district. He admitted that he had no evidence of sales in Antigonish County from which to establish unit values but had used his knowledge of sales of similar waterfront properties in Pictou, Cape Breton and Yarmouth counties as a guide to his valuations. In his opinion, the property, including the house and barn, had a market value of $ 15,000 at the time of the sale.

**19** The next appraiser was Mr. Fred Taylor, a Director of Assessment for Antigonish-Guysborough assessment district. This witness was in a much better position to determine the market value of the subject property since he has available to him all the information concerning sales of real property in Antigonish County as provided on the affidavits submitted with payment of deed transfer tax in that County. He indicated that the assessment of the property at the time of the sale was $ 1,475, and that a re-assessment of the property had just been completed since the last assessment was based on values five years ago. The re-assessed value of the property upon which the 1973 assessment will be based has been calculated at $ 7,000. Of this amount, he states that $ 5,500 is for land value and the remainder for the house, barn and other assessable elements. This re-assessment is based upon 1971 values.

**20** Mr. Taylor testified as to a few recent sales in the County at values which exceeded the proposed 1973 re-assessment values of the properties and this is some indication that the proposed re-assessed value of the plaintiff's property would be less than actual market value. The evidence of Mr. MacDonald based as it was on knowledge of actual sales in adjoining counties indicated a value of more than twice the proposed re-assessed value to be placed on the property. [*page641]

**21** I believe it is reasonable to conclude from all of the evidence that the actual market value of the plaintiff's 9property on the day of the sale was $ 9,000; $ 2,000 of which can be attributed to the house and barn, situate on a two-acre site and the balance of $ 7,000 to the remainder of the land.

**22** We thus have a factual situation in which an illiterate lady sold a farm property worth $ 9,000 to a stranger for $ 2,500 cash and a written promise to let her stay in the house and use a small lot for a garden in the summer. Although the deed may not have been fully read over and explained to her, she admits that she knew that she was conveying her property to the purchaser and intended to do so. She had no idea, however, of the value of that property or any real understanding of the value of the consideration that was paid to her. The purchaser obviously knew he was getting a "good buy" and under these circumstances the Court must decide whether its discretion should be exercised to protect the plaintiff from her own folly.

**23** From the earliest times, Courts of equity have exercised their discretion to set aside or alter inequitable and unconscionable bargains. This was particularly so in cases of expectant heirs selling their future inheritance without a proper appreciation of its value and without independent advice, and in cases of usury where the debtor was under pressure and in no position to match the demands of the money-lender. This equitable jurisdiction was extended in the case of money lending transactions by the passage of the Money Lending Acts in England.

**24** By a series of decided cases, the same principles of equitable relief have been extended to many situations in which an unconscionable transaction has taken place between persons in grossly unequal bargaining positions, and an excellent summary of these cases may be found in Halsbury, 3rd ed., vol. 17, at p. 682, in the authorities listed to support the statements in paragraph 1313, which are as follows:

"Jurisdiction to grant relief. Courts of equity have undoubted jurisdiction to grant relief against every species of fraud, including cases where it may be apparent, from the intrinsic nature and subject of the bargain itself, that it was one which no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other; in fact, an inequitable and unconscionable bargain. [*page642]

The principle has now been extended to all cases in which the parties contracting do not meet on equal terms, and is not limited to expectant heirs, but applies to all persons under pressure without adequate protection, and the onus of supporting the transaction is thrown on the person benefiting. In determining whether the bargain is a hard one, the whole transaction has to be considered and not only the price."

**25** One of the authorities quoted in Halsbury is Haygarth v. Wearing (1871), L.R. XII Equity, p. 320. In that case the defendant advised an unmarried school teacher that she had been left a small inheritance of property by her late brother. She had no knowledge of her brother's affairs or the value of the property and was persuaded by the defendant to sell it to his daughter at a price which, subsequently, turned out to be less than one-fifth of its actual value. Sir John Wickens, V.C., in delivering judgment summarized the situation as follows:

"In considering the Plaintiff's title to relief it is necessary to notice the question, which was much argued, whether there was any fiduciary relation between Wearing and Miss Haygarth in August or October, 1866. I think there was not. In my opinion, Mr. Wearing was not, at either date, disentitled to enter into a contract with Miss Haygarth for the sale of the property she had inherited, by reason of his having acted as her agent without her knowledge, or because of the existence between them of any relation which withdrew contract between them from the considerations affecting contracts between strangers. He knew everything about the property and the circumstances. She knew nothing, and he knew that she knew nothing. He was more or less of a man of business; she was as far as possible removed from a woman of business; and these circumstances would necessarily be of importance in judging of the effect in this Court of any contract between them. But fiduciary relation, in the sense in which this Court used those words and applies them in exercising a most valuable part of its jurisdiction, there seems to me to have been none. Independently, however, of any fiduciary relation, this Court holds that a person obtaining a conveyance of real estate on the faith of certain representations which are afterwards shewn to be untrue, must submit to have the conveyance treated as fraudulent and void against the person deceived. In this [*page643] case the representation that he made to her - as I infer from the evidence, and especially from his own answer - was, that the value of what she had to sell was about 100 pounds. This was not a mere purchaser's assessment, but a deliberate statement made to her by a person having full knowledge, which statement was asked by her for her guidance in the transaction, and was acted on by her in reliance on its good faith and accuracy."

**26** The Haygarth and Wearing case appears to me to be quite similar to the case at bar, as I believe that the plaintiff was in fact relying upon the defendant to establish a fair and reasonable purchase price and the defendant must have realized this from her conduct.

**27** In Canada a somewhat similar situation was considered in Gladu v. Edmonton Land Co. (1914), 19 D.L.R. 688, where land was purchased from an illiterate for $ 2,000, when it had an obvious value of approximately $ 20,000. Scott, J., in his judgment, at p. 692, says:

"The only conclusion I can reach upon the evidence as to value is that the consideration payable by Everest or the defendant company was grossly inadequate.

Gladu is an ignorant, uneducated half-breed who cannot speak the English language. In dealing with Everest he was dealing with one of far superior intelligence, who, by reason of his acting as the agent of defendant company at Grouard, must be presumed to be well acquainted with the value of real estate in that neighbourhood. In their dealings Gladu was without independent advice, and he

appears to have been ignorant of the value of his property. That he was in needy circumstances at the time is shewn by the fact that he was indebted to the Hudson's Bay Co. in a large amount. The prospect of paying this debt and of receiving what to him must have been a large sum of money in the immediate future was a temptation which he appears to have been unable to resist, and he was thus practically at the mercy of Everest.

It appears to be a well settled principle that, under circumstances such as these, the burden of shewing the fairness of the transaction is upon the person seeking to uphold it. (See Evans v. Llewellin, 1 Cox 333; Baker v. Monk, 10 Jur. N.S. 691; [*page644] O'Rorke v. Bolingbroke, 2 App. Cas. 814, at 823; Fallon v. Keenan, 12 Gr. 388; and Brady v. Keenan, 14 Gr. 214.) As the evidence shews that the sale in question was an unfair one, it should not, in my opinion, be upheld."

**28** Having considered all of the evidence and these authorities, I have reached the conclusion that the sale of the plaintiff's property to the defendant on these terms was an inequitable and unconscionable transaction and one that is voidable at the instance of the plaintiff. Counsel for both parties suggested at the hearing that if I should reach this conclusion an adjustment of the terms of sale would be preferable to its rescission. Even had this suggestion not been made I believe that this would be the proper method of disposing of the matter.

**29** I direct therefore that the defendant convey to the plaintiff a lot of land of approximately two acres on which the house and barn is situate and pay to the plaintiff the sum of $ 4,500.

**30** I have not suggested that a life estate only in the home property be conveyed to the plaintiff, since I understand from what was said by counsel that the defendant has no desire for possession of this part of the property, whereas the plaintiff wants to be free to use it when she wishes. If I am incorrect in my understanding and am so advised by counsel I would be prepared to convert the conveyance to that of a life interest and to adjust the amount of money to be paid by the defendant to the plaintiff for the entire property, subject to a life estate.

**31** The plaintiff is also entitled to her costs of action to be taxed.

Judgment for the plaintiff.

# TAB 10

*Case Name:*

# GLADU v. EDMONTON LAND CO.

[1914] A.J. No. 73

19 D.L.R. 688

Alberta Supreme Court

**Scott, J.**

Judgment: October 22, 1914

(15 paras.)

**Counsel:**

*O. M. Biggar*, K.C., and *A. F. Ewing*, K.C., for the plaintiffs.

*C. C. McCaul*, K.C., and *S. A. Dickson*, for the defendant.

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1 **SCOTT, J.**:--The plaintiffs seek to set aside a transfer made by plaintiff Gladu to defendant company of certain lands in or in the vicinity of Grouard. The grounds upon which they seek this relief are that Gladu executed the transfer without knowing the effect thereof and without the intention of divesting himself of the title and ownership of the lands; that defendant company obtained the execution thereof by falsely and fraudulently representing that it was some other and different document than a transfer of the land; that it was obtained without valuable consideration, and that the transaction was improvident and the circumstances of the parties such as to make it improper to enforce it. A further ground relied upon is that the transfer was void by reason of its being in contravention of sec. 31 of the Dominion Lands Act.

2 Gladu entered for the lands in question as a homestead, about March, 1912. On or prior to June 11 of the same year, one Everest, an agent of defendant company, approached him with the object of buying his homestead. They met on that day at the house of Father Falher, a Roman Catholic priest, at Grouard, Gladu being a Roman Catholic and one of his parishioners. There a document was drawn up by Everest, which was interpreted by Father Falher to Gladu, who signed it. In effect it was an agreement for the sale whereby Gladu agreed to sell to Elverest the lands in question except 40 acres thereof, the consideration being that Everest was to locate half-breed scrip upon the whole property at his own expense; to sixrvey the whole property; to pay Gladu $1,000, of

which $100 was to be paid at once and the balance when the scrip was located; to build Gladu a house of the value of $300; to pay the account of the Hudson's Bay Co. against him, amounting to $200 or $250, and to transfer five lots to Bishop Grouard. On the same day Everest obtained from Gladu an option to purchase the property on substantially the same terms as those contained in the agreement for sale. This option expired on August 10, 1912, but, by a memorandum indorsed upon it purported to have been signed by Gladu, it was renewed for a further period of fifty days from November 12, 1912. Beyond the advance by Everest or defendant company of sums amounting in all to about $350, nothing was done by them in the way of exercising their rights under the option before it finally expired.

**3** On January 15, 1913, Gladu, at the instance of Everest or defendant company, applied to the Department of the Interior for the cancellation of his homestead entry and for permission to place half-breed scrip on the land. He was notified by letter from that department, dated February 18, 1913, that his entry would be cancelled, and he was allowed sixty days to locate half-breed scrip thereon. On March 14, 1913, more than two months after the option expired, Everest obtained from Gladu an agreement for the sale of the whole property in question for $2,000, payable $100 at the date of the agreement and the remaining $900 on or before sixty days after the registration of the title in Gladu's name. Although it is not so stated in the agreement, it is admitted by Everest that he was to pay for the scrip and the expenses of locating it, and that Gladu was to receive the $2,000 in addition to the amounts which had already been advanced to him. On the same day defendant company located the half-breed scrip, and also on the same day Gladu executed a transfer thereof to the company. The patent issued to him on June 30, 1913, and on July 10 following the company registered its transfer and obtained a certificate of title, the title being subject to the caveats hereinafter referred to.

**4** On May 2, 1913, Gladu executed a transfer of the property to his co-plaintiff, who on the same day executed a declaration of trust whereby he declared that he would hold the property in trust for Gladu and for his sole use and benefit. On 23rd of the same month Blair filed a caveat claiming an interest under his transfer. On June 14 he gave an option to one Flater to purchase the property for $20,000. On June 28 the latter filed a caveat claiming an interest as purchaser under a memorandum in writing dated June 14, 1913. On July 2, 1913, defendant company filed a caveat claiming an interest under its transfer from Gladu, which was then unregistered.

**5** I hold, upon the evidence, that at the time Gladu executed the agreements for sale of June 11, 1912, and March 15, 1913, it was his intention to sell the lands outright to Everest, and that he knew the nature and effect of those agreements. The first was interpreted to him by his parish priest, and it would be difficult to believe that the latter would have permitted him to execute it unless he knew its purport. The second agreement was interpreted to him by the subscribing witness, who in each case was first sworn by a justice of the peace to duly interpret them, and it is unreasonable to presume that the interpreter violated his oath by falsely interpreting it, especially in view of the fact that he has testified that he properly interpreted it. In addition to what I have stated, the conduct of Gladu throughout leads to no other conclusion than that he intended to sell the property to Everest. I also hold that at the time Gladu executed the transfer to defendant company he knew its nature and effect. That also was executed in the presence of an interpreter, who was sworn as such, and who testified that he duly interpreted it to him. I am also of opinion that the transfer to defendant company was not in contravention of sec. 31 of the Dominion Lands Act. That section renders void only assignments or transfers of homesteads or purchased homesteads before the issue of letters patent. The land in question was not a homestead at the time of the transfer, as Gladu had previously aban-

doned his homestead entry, and the fact that by permission of the Department of the Interior half-breed scrip was located upon it would not, in my view, constitute it a purchased homestead.

**6** The only other ground upon which the plaintiffs seek relief is that the transaction was improvident and that the circumstances of the parties were such as to make it improper to enforce it. There is nothing in the evidence to shew what the value of the property was on June 11, 1912, the date of the first agreement. For anything that appears in the evidence the price fixed by that agreement may have been its full value at that time. In my view, however, its value at that time is not material, as I think any rights which Everest or defendant company may have had under that agreement were abandoned by Everest accepting at that time an option in lieu of it and afterwards accepting a renewal of that option. It therefore follows that before Everest obtained the agreement of March 15 he and defendant company had, by reason of the expiry of the renewed option, forfeited any claim they may have had to even the 87 acres which was the subject matter of the first agreement. By reason of the value of the half-breed scrip not having been shewn, I am unable to determine whether the price fixed by the last, agreement was greater or less than that fixed by the first. I think, however, that only the value of the property at the date of the last agreement and the contemporaneous transfer to the defendant company should be considered in determining the question of the adequacy of the consideration for the purchase.

**7** On December 16, 1912, during the currency of Everest's renewed option, defendant company entered into an agreement with a firm of Zirbes & McKenzie to sell to them 87 acres of the 128 acres forming the area of the lands in question for $18,000. If that was the selling value of the 87 acres it follows that the value of the whole parcel was greatly in excess of that amount.

**8** The other evidence of value is that of plaintiff Blair that its value in March and July, 1913, was from $15,000 to $20,000; the affidavit of Mr. Henry, the managing director of the defendant company, endorsed upon the transfer, that in his opinion its value was $15,000, and the fact that in an agreement between defendant company and Zirbes & McKenzie and others, dated March 12, 1913, it is recited that that firm had re-sold five blocks of 36 lots each, and parts of four other blocks being portions of the 87 acres, for $12,900.

**9** Everest states that under the agreement of March 15, 1913, he was to pay Gladu $2,000 in addition to the sum already advanced to him (about $500 in all), and, although it is not so stated, I think it must be assumed that he was to pay for the scrip to be located on the land. Its value not having been shewn, the total amount which he or defendant company would have to pay in order to acquire the title to the property cannot be determined, but, in order to find that they were paying a reasonably fair price for it, I would have to assume that the value of the scrip was at least $100 per acre, or $12,800 for the whole parcel. Even in the absence of evidence as to its value, I think it may reasonably be presumed that it is far below that amount. The only conclusion I can reach upon the evidence as to value is that the consideration payable by Everest or the defendant company was grossly inadequate.

**10** Gladu is an ignorant, uneducated half-breed, who cannot speak the English language. In dealing with Everest he was dealing with one of far superior intelligence, who, by reason of his acting as the agent of defendant company at Grouard, must be presumed to be well acquainted with the value of real estate in that neighbourhood. In their dealings Gladu was without independent advice, and he appears to have been ignorant of the value of his property. That he was in needy circumstances at the time is shewn by the fact that he was indebted to the Hudson's Bay Co. in a large amount. The prospect of paying this debt and of receiving what to him must have been a large sum

of money in the immediate future was a temptation which he appears to have been unable to resist, and he was thus practically at the mercy of Everest.

**11** It appears to be a well settled principle that, under circumstances such as these, the burthen of shewing the fairness of the transaction is upon the person seeking to uphold it. (See *Evans v. Llewellin*, 1 Cox 333; *Baker v. Monk*, 10 Jur. N.S. 691; *O'Rorke v. Bolingbroke*, 2 App. Cas. 814, at 823; *Fallon v. Keenan*, 12 Gr. 388; and *Brady v. Keenan*, 14 Gr. 214.) As the evidence shews that the sale in question was an unfair one, it should not, in my opinion, be upheld.

**12** It was contended by defendant company that the relief claimed by the plaintiffs cannot be granted, because *restitutio in integram* cannot be made by Gladu or those claiming under him. One of the grounds of this contention is that defendant company has entered into contracts for the sale of portions of the land in question to different persons, who have in turn agreed to sell to others, and that the rights of these different purchasers have intervened. I cannot see any force in this contention. The defendant company has not transferred any portion of the property to these purchasers, nor can it do so except subject to the interests of the plaintiffs. The right of these purchasers to acquire an interest in the property is, in my view, dependent entirely upon the defendant company obtaining such an interest in the property as would enable it to convey to them, and if it be held that it has not acquired an interest I fail to see how the purchasers from it could be held to have acquired any interest. Many of the purchasers obtained their agreements for sale before the issue of the certificate of title to defendant company, and those who obtained their agreements after its issue must, by reason of the Blair caveat being noted thereon, be presumed to have entered into the agreements with notice of his claim to the property.

**13** Another ground for this contention is that the half-breed scrip which defendant company located upon the land cannot be restored. If it were the fact that scrip of similar nature and quality could not be procured in the market it might be open to question whether their inability to restore the scrip could disentitle the plaintiffs to the relief they seek, but in my view it is a matter of common knowledge that scrip of that description which would answer all the purposes of that placed upon the land can be procured in the open market. One of the defences raised by the defendant company is that the plaintiffs are estopped by their laches, but I cannot find that they have been guilty of laches to such an extent as would estop them from obtaining the relief they seek. For the reasons I have stated I hold that the plaintiffs are entitled to a judgment directing that upon payment by the plaintiffs to the defendant company of the amount found due to the latter upon the taking of the account now directed the transfer by Gladu to defendant company be set aside and the registration thereof and the certificate of title issued thereon cancelled.

**14** It appears in evidence that defendant company have expended a large sum in procuring a survey of a property, or a large portion thereof, into lots, and in the preparation and registration of a plan thereof, and that this has increased the value of the property by an amount considerably in excess of the amount so expended. As the plaintiffs will have the benefit of such increase, I think it is only reasonable that they should bear this expense, especially in view of the fact that they consented to the preparation and registration of the plan.

**15** I direct a reference to the Clerk of the Court to ascertain and state the amount which should be paid by the plaintiffs to defendant company for the moneys paid by it to plaintiff Gladu, the amount paid expended by it in the purchase and location of the half-breed scrip on the lands in question, and in procuring the survey and plan thereof and the registration of same, together with interest on the moneys so paid and expended. The plaintiffs will have the costs of the action.

# TAB 11

# Black v. Wilcox

[1976] O.J. No. 2167

12 O.R. (2d) 759

70 D.L.R. (3d) 192

1976 CanLII 555

Ontario
Court of Appeal

**Evans, Howland and Blair, JJ.A.**

February 17, 1976

Earl A. Cherniak, Q.C., and Vincent J. Calzonetti, for appellant.

Martin A. Bitz, for respondent.

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**1** The judgment of the Court was delivered by **EVANS, J.A.**:-- The plaintiff appeals from the judgment of The Honourable Mr. Justice Keith pronounced on February 19, 1975, wherein the plaintiff's action was dismissed with costs.

**2** The plaintiff had been the owner of a 100-acre farm in the County of Lambton and conveyed it to the defendant in consideration of the assumption by the latter of encumbrances having a value of approximately $5,200. The plaintiff retained for his lifetime and that of his intended wife the right to continue living in a house located on the farm which had a value of $250. There was no provision for the repair and maintenance of the building. The agreement was executed on June 25, 1971, and the deed some few weeks later.

**3** The plaintiff pleaded and adduced evidence at trial in an effort to establish that at the time of the execution of the agreement he was unaware, because of intoxication, of what he was signing and was of the opinion that he was signing a mortgage instead of an agreement of sale. Much of the evidence at trial was in support of this plea of non est factum.

**4** The plaintiff also alleged in his statement of claim that the consideration set out in the deed was substantially less than the value of the land, and in all the circumstances the transaction was unconscionable. He had no independent legal advice.

**5** The trial Judge delivered very short reasons at the conclusion of argument and found that the plaintiff was an unreliable witness, that he was quite capable of understanding what he was signing and that he did not need independent advice as to the nature of the document. He further accepted the evidence of the defendant that there was no representation by the defendant that the document in question was a mortgage and dismissed the action. It may be that counsel for the plaintiff at trial did not vigorously pursue the alternate claim for relief based on the plea that this was an unconscionable transaction or perhaps the trial Judge did not appreciate the full scope of the plaintiff's case on this point. Whatever the reason, it would appear from the recorded reasons that the trial Judge ignored the plea that the transaction was unconscionable in view of the condition of the plaintiff at the time that the agreement was entered into, the fact that he had no independent legal advice, together with the overwhelming evidence that the amount paid for the property was substantially less than the current value of the farm. This plea is to be distinguished from one based on undue influence in which the sufficiency of consent is attacked.

**6** In this Court the plaintiff did not seek to set aside the conveyance on the basis that at the relevant time his faculties were impaired by alcohol and that he was unable to appreciate the nature and effect of the contract which he had executed. His sole argument was that the transaction in the circumstances established by the evidence was unconscionable and should be set aside. At the time of sale the plaintiff was a 45-year-old unmarried man who had lived all his life on the farm in question. He was residing there with a lady whom he subsequently married. There is ample evidence that the plaintiff was an alcoholic and that his continuous over- indulgence was known to his neighbours in the area of whom the defendant Wilcox was one. In fact, one of the neighbours stated in evidence that she could not remember ever having seen the plaintiff sober. This factor alone would weigh heavily in the determination whether an inequality of position existed between the parties which placed the defendant in a position to take unfair advantage.

**7** The plaintiff did not operate the farm but had rented it to the defendant at $1,250 per annum for some six or seven years. There was a mortgage on the property in the amount of some $3,000 which was in arrears as well as unpaid taxes which the mortgagee had paid in order to avoid a tax sale. The total amount of encumbrances against the property was in the vicinity of $5,200.

**8** The evidence is that the farm was worth at least $20,000 and possibly could have been sold for as much as $25,000 or $30,000. The house on the property was estimated by the defendant to have a rental value of $50 per month. The photographs entered as exhibits and the evidence of the dilapidated condition of the building would not support such a generous rental value.

**9** The defendant testified that he had been told by Morris Lloyd, the mortgagee, that the latter proposed to foreclose the mortgage as there appeared to be no hope of obtaining payment from the plaintiff. The defendant repeated this conversation, which was denied by Lloyd, to the plaintiff and advised him that he should take some proceedings to protect the property. The plaintiff and the defendant then had some discussion with respect to the farm, as a result of which the defendant took the plaintiff to his lawyer who prepared an agreement for sale. Some weeks later he again took the plaintiff to the same lawyer who attended to the execution of the deed in question.

**10** There is no doubt on the evidence that the plaintiff had been drinking on the dates on which the documents were executed. The lawyer who prepared the documents was not called to give evidence and it was agreed that his evidence would have been to the effect that:

> He did not represent the documents to be a mortgage and as far as he was aware the plaintiff was not drunk and that he, the solicitor, did not represent the plaintiff Black in the transaction.

**11** The learned trial Judge dismissed the action on the basis that the plaintiff had not established his case based on the principle of non est factum. In so holding he made findings of credibility adverse to the plaintiff and favourable to the defendant with respect to the nature of the documents signed by the plaintiff and the representations made by the defendant with respect to the nature of those particular documents. That finding was not attacked on the appeal and the conclusion at which I have arrived does not depend upon the credibility of the plaintiff.

**12** The defendant is a 43-year-old farmer who has farmed extensively in the area for some 15 years. He appears to be an intelligent and knowledgeable man who has been successful in his farming operations. He had rented the farm from the plaintiff for a period of years and their relationship in a business sense was very satisfactory. On a consideration of the undisputed evidence there is no doubt that the plaintiff, because of his addiction which was a matter of common knowedge, was placed in an unequal bargaining position vis-a-vis the defendant. In order to set aside the transaction between the parties, the Court must find that the inadequacy of the consideration is so gross or that the relative positions of the parties is so out of balance in the sense that there is a gross inequality of bargaining power or that the age or disability of one of the contracting parties places him at such a decided disadvantage that equity must intervene to protect the party of whom undue advantage has been taken.

**13** The fact that the parties may not be equally protective of their rights when entering upon a transaction or that the transaction may be improvident as far as one party is concerned, is not necessarily a ground for the setting aside of the agreement.

**14** In considering whether a Court should intervene it is necessary to look at all of the circumstances surrounding the transaction action but it is not necessary to find any intentional fraud. The question is whether the transaction reveals a situation existing between the parties which was heavily balanced in favour of the defendant and of which he knowingly took advantage. The law on this point was stated in Waters v. Donnelly (1884), 9 O.R. 391 at pp. 397-8, by Osler, J.A., in a case which involved the transfer of properties of unequal value:

> There is no doubt of the existence of material difference between the values of the two properties, an inadequacy of consideration. That alone is not to be taken into consideration, and that alone will not suffice to avoid a transaction between the parties. Courts do not exist to protect people against foolish bargains, and unless the inadequacy of consideration is so gross, unless the disparity is so gross, as Lord Brougham has somewhere described it, as to be heard of with uplifted hands and exclamations of astonishment, it is not a ground upon which Courts of Equity can interfere. Nevertheless, it is evidence, and it is to be looked at in cases where the question of the equality of position between parties is to be taken into consideration, and where an undue advantage has been taken by one

> party of another. Where it exists in connection also with a weakness of mind on the part of the person who complains of the bargain, these two circumstances taken together form rather a strong ground for the interference of the Court.

When the case came before the Divisional Court by way of appeal, Boyd, C., held at p. 401 that the law to be applied in cases of this nature was that stated by Sir Edward Sullivan M.R., in Slator v. Nolan (1876), 11 Ir. R. Eq. 367 at pp. 386-7, as follows:

> "... if two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand; and there are several cases which shew, even where no confidential relationship exists, that where parties were not on equal terms, the party who gets a benefit cannot hold it without proving that everything has been right and fair and reasonable on his part:"

**15** A review of the evidence establishes that the parties in this case were not bargaining on equal terms. The plaintiff was over-matched and overreached by the defendant and acting without proper information and advice sold the property for substantially less than its actual value. A bargain which was grossly improvident to the plaintiff has been established and a presumption arises that the transaction was unconscionable which can only be rebutted by the introduction of evidence on the part of the defendant that the transaction was just, fair and reasonable. In the present case there has been a complete failure on the part of the defendant to rebut the presumption of unconscionability which arises from the evidence. In fact his own evidence confirms that the transaction was improvident and indicates that he took advantage of a situation in which he held the dominant position.

**16** Counsel have referred us to many Canadian, English and Australian authorities and while it is difficult to draw a clear pattern from the varied factual situations presented in the several cases, one central theme arises and that is the pronounced inequality of bargaining power between the parties and the gross improvidence of the contract. When these common features appear, inequality of position, an overreaching by the stronger and a highly beneficial bargain to him, a presumption arises that the stronger party has, in the words of Lord Selborne, L.C., in Earl of Aylesford v. Morris (1873), L.R. 8 Ch. App. 484 at p. 491, made:

> ... an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.

**17** On the evidence, the impugned transaction is unconscionable and improvident on its face. Those factors cast upon the defendant the obligation of showing that the presumption of unfair advantage has been displaced. This he has failed to do. A long line of judicial authority in this Province has followed the principle stated in Vanzant v. Coates (1917), 40 O.L.R. 556, 39 D.L.R. 485,

and restated in Mundinger v. Mundinger, [1969] 1 O.R. 606, 3 D.L.R. (3d) 338 [affirmed [1970] S.C.R. vi, 14 D.L.R. (3d) 256n], that in a situation of this nature, the Court will invoke the equitable rule that a person who is not equal to protecting himself will be protected, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so by reason of their commanding and superior bargaining position. The combination of inequality of position and improvidence is the foundation upon which the doctrine is based. The plaintiff's bargaining power was grievously impaired by reason of his excessive indulgence in alcohol. This condition was readily apparent to the defendant who exploited it to his advantage as evidenced by the enormous discrepancy between the purchase price of the property and its market value.

**18** It would not be consistent with equity and good conscience to permit this bargain to remain unimpeached. The plaintiff was hopelessly over-matched and the defendant, who had to be aware of the great disparity in their positions, overreached and sought to obtain a benefit immoderately advantageous to him. In such circumstances, in my opinion, a Court must exercise its equitable jurisdiction and set aside the unconscionable transaction.

**19** The appeal is allowed, the judgment below is struck out and the conveyance in issue declared null and void and set aside. A reference is directed to the Local Master at Sarnia to take account of what is due to the defendant who shall be entitled to a lien on the subject property for the amount so found.

**20** The plaintiff is entitled to the costs of the trial, the costs of this appeal and the costs of the reference.

Appeal allowed.

# TAB 12

*Case Name:*

# Titus v. William F. Cooke Enterprises Inc.

**Between**
**Douglas L. Titus (Plaintiff/Respondent), and**
**William F. Cooke Enterprises Inc., WM.F. Cooke Holdings Inc., WFC Holdings Inc., William F. Cooke Television Productions Inc., Designers Patio Inc., William F. Cooke Television Programs and William F. Cooke (Defendants/Appellants)**

[2007] O.J. No. 3148

2007 ONCA 573

284 D.L.R. (4th) 734

228 O.A.C. 232

61 C.C.E.L. (3d) 202

[2007] CLLC para. 210-036

160 A.C.W.S. (3d) 273

2007 CarswellOnt 5229

Docket: C45093

Ontario Court of Appeal
Toronto, Ontario

**D.H. Doherty, J.C. MacPherson and E.A. Cronk JJ.A.**

Heard: June 13, 2007.
Judgment: August 22, 2007.

(56 paras.)

*Employment law -- Termination of employment -- Wrongful dismissal -- Appeal by employer from award of damages in favour of employee for wrongful dismissal allowed, judgment set aside and action dismissed -- Employee worked for employer for 18 months before he was fired -- He signed a release and obtained settlement package -- As a senior, knowledgeable lawyer particularly well-versed in contract and employment law, including law relating to wrongful dismissal, employee knew well his position and his options -- Nothing unconscionable in employer's conduct towards employee -- Employee could not resile from choice he made, including the money he accepted before commencing litigation.*

*Contracts -- Consensus, lack of -- Unconscionable transactions -- Appeal by employer from award of damages in favour of employee for wrongful dismissal allowed, judgment set aside and action dismissed -- Employee worked for employer for 18 months before he was fired -- He signed a release and obtained settlement package -- As a senior, knowledgeable lawyer particularly well-versed in contract and employment law, including law relating to wrongful dismissal, employee knew well his position and his options -- Nothing unconscionable in employer's conduct towards employee -- Employee could not resile from choice he made, including the money he accepted before commencing litigation.*

Appeal by the employer, William F. Cooke Enterprises, from an award of damages in favour of the employee, Titus. Titus worked for the employer as in-house corporate counsel for 18 months until he was fired. The employer offered him a settlement package, provided he signed a release. Titus accepted the offer and signed the release. He then obtained new, but less remunerative, employment within two weeks. He brought an action against the employer claiming that the settlement and release were unconscionable. The trial judge found in Titus's favour. On appeal, the employer argued that the trial judge erred by setting aside the release Titus had signed.

HELD: Appeal allowed, judgment set aside and action dismissed. The trial judge never referred to and did not apply the law of unconscionability. The employer's offer of three month's salary in lieu of notice was not grossly unfair in light of Titus's 18 months of service. Titus was a senior, knowledgeable lawyer particularly well-versed in contract and employment law, including the law relating to wrongful dismissal. He knew well his legal entitlement to severance, the amount which would be reasonable and the options available to him when he was presented with the offer. There was nothing unconscionable in the employer's conduct towards Titus. Therefore, Titus could not resile from the choice he made, including the money he accepted before commencing litigation.

**Appeal From:**

On appeal from the judgment of Justice Victor Paisley of the Superior Court of Justice dated February 22, 2006.

**Counsel:**

Brian P. Bellmore for the appellants.

R. Brent Raby for the respondent.

The judgment of the Court was delivered by

**J.C. MacPHERSON J.A.:--**

## A. INTRODUCTION

**1** The respondent, Douglas Titus, was employed as in-house corporate counsel by the appellant William Cooke and his group of companies (collectively, the "appellants"). The respondent worked for the appellants for eighteen months, from March 28, 2000 to September 28, 2001.

**2** On September 28, 2001, the appellants fired the respondent. They offered the respondent a settlement package, provided he signed a release. The respondent accepted the offer and signed the release on the spot.

**3** The respondent sought and obtained new, albeit less remunerative, employment within two weeks. He received the settlement funds within a month. Shortly thereafter, he sued the appellants, claiming that the settlement and release were unconscionable.

**4** Following a short trial, the trial judge, Paisley J., found in favour of the respondent. The appellants appeal, but on only one issue - did the trial judge err by setting aside the release that the respondent had signed?

## B. FACTS

### (1) The parties and the events

**5** The respondent graduated from Queen's Law School in 1975 and was called to the Ontario Bar in 1977.

**6** From 1978 to 1987, the respondent served as an in-house counsel for Proctor & Gamble. His employment was terminated in 1987 and he accepted a severance package from the company.

**7** In May 1988, the respondent went to work for the appellants, a group of Ontario companies controlled by William Cooke that carry on the business of distributing American television programs to television networks and independent television stations in Canada. The respondent was employed by the appellants to replace their in-house corporate counsel who was on leave. When this counsel returned, the respondent's employment was terminated. He received a severance package, which he accepted, in March 1989.

**8** From May 1989 to April 1991, the respondent was employed as an in-house counsel at Boeing de Havilland. His employment with that company was terminated in 1991 and he accepted a severance package.

**9** From 1991 to 1994, the respondent served a second stint as in-house counsel with the appellants. When his employment was terminated in 1994, he accepted a severance package that included permission to use an office in the appellants' premises while he searched for new employment.

**10** From 1994 to 1997, the respondent was largely unemployed except for a six-month period when he worked for the Practice Advisory Service of the Law Society of Upper Canada.

**11** From 1997 to 1998, the respondent was employed as an in-house counsel for Fantasia, an adult entertainment company, at a salary of $65,000 per year. He resigned his position because of concerns about his employer's business activities.

**12** In 1999, the respondent made a major career change. He abandoned his search for a corporate counsel position and became a full-time duty counsel with Legal Aid Ontario. His salary was $45,000 per year.

**13** In early 2000, the appellants approached the respondent again regarding the possibility of employment as in-house counsel. The parties engaged in sporadic negotiations for three months and ultimately reached an agreement. The respondent would work as in-house counsel at a salary of $115,000 per year. He would also receive a car allowance of $450 per month, payment of his law society fees and practice insurance, and parking and medical benefits.

**14** The respondent commenced employment on March 28, 2000. He performed effectively. However, eighteen months later, on Friday, September 28, 2001, William Cooke called the respondent into his office and told him that he was being terminated due to business downsizing.

**15** David Fraser, the appellants' chief financial officer, joined the meeting and presented the respondent with a written termination letter and severance offer, signed by Mr. Cooke, the crucial terms of which were:

> We write to inform you that as a result of a change in our business requirements and our long-term personnel plans, it is necessary to make certain personnel decisions.
>
> Your employment with the Company will be terminated effective today.
>
> In an effort to assist you herein, the Company is prepared to provide you with the following separation package:
>
> 1. The Company will forthwith pay you 2 weeks of base salary (less applicable deductions) as termination pay in accordance with Section 57(1)(a) of the *Employment Standards Act*, S.O. 1990, as amended (the "Act");
> 2. The Company is prepared to pay you a gratuitous additional lump sum payment equal to 2 1/2 months of your annual salary (less applicable deductions). These payments exceed your statutory entitlement pursuant to the Act. You are no longer required to report to work.
> 3. Your benefits, will be maintained until the earlier of the 31st day of October, 2001 or the date on which you obtain alternate employment.
>
> ...
>
> 8. The Company is prepared to provide you with a letter of reference.
> 9. In exchange for all of the above, we require you to execute the attached Release, confirming your acceptance of this arrangement on or before Friday October 5, 2001.

10. If you choose not to accept this separation package and sign the attached Release, the Company will pay you your 2 weeks of termination pay under the Act.

**16** The release referred to in paragraphs 9 and 10 provided that the respondent released and forever discharged the appellants from all actions, causes of action, suits and complaints arising from his "hiring by, employment with and cessation of employment with the Employer". The release concluded with these words, in highlighted capital letters directly above the space for the respondent's signature:

> I HAVE READ THIS DOCUMENT AND I UNDERSTAND THAT IT CONTAINS A FULL AND FINAL RELEASE OF ALL CLAIMS THAT I HAVE OR MAY HAVE AGAINST THE RELEASEES. I AM SIGNING THIS DOCUMENT VOLUNTARILY.

**17** The respondent read the documents at the meeting. Mr. Cooke and Mr. Fraser suggested that he take them home and consider them over the weekend. The respondent declined. He signed the release and requested immediate payment of the settlement funds. The appellants prepared a cheque for $16,087.65, being the amount of the severance funds ($28,750), less statutory deductions for withholding taxes. The respondent left the premises with the cheque.

**18** Due to a drafting error, the cheque could not be cashed. The respondent contacted Mr. Fraser the following week to advise of the problem with the cheque and requested that the appellants pay him the two weeks statutory severance and pay the balance of the settlement funds into his Registered Retirement Savings Plan ("RRSP") without deduction for withholding taxes. The appellants agreed to do this. On October 31, 2001, the respondent delivered to the appellants the documents they required to directly deposit the funds to his RRSP and, on November 1, 2001, the appellants issued a cheque to the respondent for $4,423.08 (for the statutory two-week notice period) and deposited $24,326.92 (the balance of the remaining two and one-half months agreed notice period) directly into the respondent's RRSP account.

**19** On October 12, 2001, two weeks after his termination, the respondent obtained employment as duty counsel with Legal Aid Ontario. His income from October 12 to December 31, 2001 was $12, 312.21.

### (2) The litigation

**20** On April 9, 2002, the respondent commenced an action against the appellants seeking damages for wrongful dismissal. Central to the success of the action was the respondent's request that the release he had signed be set aside as unconscionable, or as having been procured by undue influence or duress.

**21** For reasons unknown, the trial did not take place for almost four years. The trial commenced on February 20, 2006. The trial judge heard testimony from Mr. Titus, Mr. Cooke and Mr. Fraser on February 20 and 21. Counsel made their closing submissions on February 22 and the trial judge rendered an oral judgment the same day.

**22** The essential terms of the employment contract were not in dispute - base salary of $115,000, car allowance of $450 per month, payment by the appellants of law society fees and practice insurance, and parking and medical benefits.

**23** On two disputed issues - whether the employment contract was for an indefinite term and whether the base salary was subject to a $5,000 increase after one year of service - the trial judge found in favour of the respondent. On a third disputed issue, the trial judge held that the appropriate period of common law notice for the termination of the respondent was ten months. The appellants do not appeal these dispositions.

**24** However, in order to reach the issue of common law damages for wrongful dismissal, the trial judge first had to consider whether the release was binding on the respondent. If it was binding, then the respondent could have no cause of action against the appellants because the release specifically precluded this.

**25** The trial judge held that the release did not bind the respondent. He concluded: "In my view, it would be wrong for me to apply the release as written, to deny the employee the compensation that he was entitled to by the Common Law". The appellants appeal this component of the judgment.

## C. ISSUE

**26** The only issue on the appeal is whether the trial judge erred in concluding that the release signed by the respondent should be set aside.

## D. ANALYSIS

**27** In his Statement of Claim, the respondent pleaded unconscionability, undue influence and duress. In the short trial, the respondent advanced only a claim based on unconscionability.

**28** At the start of his oral reasons, the trial judge defined the issues in this fashion:

> The plaintiff, Douglas Titus, is a member of the Bar of Ontario and was employed by the defendant when he was terminated without cause. The plaintiff signed a release on termination. The principal issues which I have to decide are: What was the agreement that the plaintiff and defendants entered into. Was it for a limited time period, or was it an indefinite contract of employment. *Was the release signed and accepted, signed in circumstances that are unconscionable or unfair, so as to render the release unenforceable*, and, if so, the proper notice or salary in lieu of notice in the event that the contract was for an indefinite term. (Emphasis added.)

**29** The trial judge then provided a comprehensive and careful review of the facts. Next, he analyzed the first issue and concluded that the employment contract was for an indefinite term. The appellants do not challenge this conclusion on this appeal.

**30** At this point in his oral reasons (represented by twenty-three pages of typed transcript), the trial judge turned to the second issue, the release issue: "What to make of the release".

**31** Unfortunately, in his consideration of this issue, the trial judge did not apply the law of unconscionability; indeed, he never referred to the concept. Instead, he anchored his analysis of the release issue in the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. Applying *Wallace* to the circumstances relating to the release, the trial judge concluded:

> This is a breach of good faith as the law, which I have reviewed, would define it. This was an exercise of power in the circumstances where the employer, in a relatively secure position, was aware that the employee was in a very insecure position. And that was unfair and a breach of good faith.

**32** The appellants contend that the trial judge's finding of "breach of good faith" was misconceived (because it was unresponsive to the pleaded and argued central issue - unconscionability) and, in any event, was grounded in a misreading of *Wallace*. I agree with these submissions.

**33** In *Wallace*, the court held that there is no actionable tort of breach of duty of good faith and fair dealing in the employment law context. However, bad faith conduct *in the manner of dismissal* may be compensated for by an addition to the applicable common law notice period awarded to the employee. As explained by Iacobucci J. at para. 88:

> The appellant urged this Court to recognize the ability of a dismissed employee to sue in contract or alternatively in tort for "bad faith discharge". Although I have rejected both as avenues for recovery, by no means do I condone the behaviour of employers who subject employees to callous and insensitive treatment in their dismissal, showing no regard for their welfare. Rather, I believe that such bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period.

See also: *Cain v. Clarica Life Insurance Co.* (2005), 263 D.L.R. (4th) 368 at paras. 74-76 (Alta. C.A.).

**34** With respect, the trial judge failed to recognize the distinction drawn in *Wallace* between, on the one hand, a substantive tort of bad faith discharge (rejected) and, on the other hand, enhanced damages for bad faith conduct by the employer in the manner of discharge (accepted).

**35** I observe that the respondent did not attempt, either in his factum or in oral argument, to uphold the release component of the trial judgment on the basis of the trial judge's 'good faith' analysis. Rather, the respondent's position is that on the basis of the record before the trial judge (now before this court) the release should have been set aside as unconscionable. In oral argument before this court, this is where the argument was joined. I turn, therefore, to this issue.

**36** A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party: see Fridman, *The Law of Contract in Canada* (Fifth Edition), p. 320.

**37** In *Black v. Wilcox* (1976), 12 O.R. (2d) 759 at 762 (C.A.), Evans J.A. discussed the foundations of unconscionability in a similar fashion:

> In order to set aside the transaction between the parties, the Court must find that the inadequacy of the consideration is so gross or that the relative positions of the parties are so out of balance in the sense of gross inequality of bargaining power or that the age or disability of one of the controlling parties places him at such a decided disadvantage that equity must intervene to protect the party of whom undue advantage has been taken.

**38** In a recent case dealing with the doctrine of unconscionability in a wrongful dismissal context, *Cain v. Clarica Life Insurance Co., supra*, Côté J.A. reviewed the leading cases and academic commentary and concluded, at para. 32:

> Those authorities discuss four elements which appear to be necessary for unconscionability ...
>
> 1. a grossly unfair and improvident transaction; and
> 2. victim's lack of independent legal advice or other suitable advice; and
> 3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
> 4. other party's knowingly taking advantage of this vulnerability.

**39** In my view, the respondent could not bring himself within any of these four elements.

### (1) Grossly unfair transaction

**40** The appellants' offer of three month's salary in lieu of notice was not grossly unfair. The appellants sought legal advice about the contents of their settlement offer. The respondent had worked for the appellants for only eighteen months. It should be noted that he had worked for the appellants on two previous occasions, for ten months and three years respectively. However, when he was terminated on these prior occasions the respondent accepted severance packages. Accordingly, his previous periods of employment can do no more than provide context for fixing an appropriate notice period.

**41** It is true that the trial judge, after considering the factors in *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), determined that the appropriate notice period was ten months, and that the appellants do not challenge this conclusion. However, the fact that ten months is a reasonable notice period does not mean that the appellants' offer of three months was grossly unfair. If the respondent accepted the offer, he would receive the money immediately, he would have an opportunity to mitigate his damages by seeking new employment (in fact, the respondent obtained a new position within two weeks of his termination) and, importantly, he would avoid the delay, costs and uncertainty of litigation.

**42** The linking of the letter of reference to acceptance of the settlement offer is potentially problematic. There is no legal obligation on an employer to provide a letter of reference. However, a threat to withhold a letter of reference by the employer as part of a negotiation/litigation strategy may, in some situations, provide valuable support for an employee's subsequent claim that a release was unconscionable and should not be enforced.

**43** Whatever may be said about the threat to withhold a letter of reference in some other factual context, it played a very small part in the process that produced this release. Moreover, the respondent did not seek to negotiate on this issue and it appears that he did not request a reference letter as he sought new employment.

**44** Finally, linking the settlement offer to the release was not grossly unfair. The respondent, with long experience in both contract and employment law, described it in his testimony as "look[ing] like a standard release taken out of the text books". In short, it was fair for the appellants, in the context of a reasonable settlement offer, to propose a release. It was then up to the respondent to accept, reject or negotiate any component of the offer, including the release. The respondent accepted the offer.

### (2) Absence of legal advice

**45** Obviously, this factor is inapplicable in this case. The respondent is a senior lawyer with extensive experience in contract and employment law. In his *curriculum vitae*, the respondent described himself as "Senior Counsel for two multinationals: Boeing Canada Ltd. And Proctor & Gamble Inc." Under the heading *Significant Activities and Accomplishments*, he recorded: "Employment Law: Counsel for senior management in all areas of employment including Wrongful Dismissals ....". In short, the respondent did not want or need legal or other advice.

### (3) Overwhelming imbalance in bargaining power

**46** There is an inherent imbalance in bargaining power between an employer and an employee when the former terminates the employment of the latter. The employer's business will continue, the employer will be there, and the employee will be gone. Thus, as Iacobucci J. said in *Wallace, supra*, at para. 95: "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection".

**47** In this case, the respondent asserts that the starting point of vulnerability at the moment of termination was magnified by two important personal circumstances - the recent death of his father (three weeks before termination) and his desperate financial situation (high debt load).

**48** Acknowledging these aspects of general and specific vulnerability, they do not, in my view, rise to the level of creating an overwhelming imbalance in bargaining power in this case.

**49** The generalized vulnerability of all terminated employees is diminished in this case by the fact that the respondent was a senior, knowledgeable lawyer particularly well-versed in contract and employment law, including the law relating to wrongful dismissal. In short, the respondent knew well his position and his options (accept, reject, negotiate).

**50** The death of his father was, of course, a difficult and sad event for the respondent. However, the appellants put no pressure on the respondent and told him to take the time he needed to deal with this unfortunate event. As for the respondent's high debt load, it is not clear from the record how the respondent got in this predicament. After all, for the eighteen months before his termination he was receiving a salary of almost $10,000 per month plus generous benefits and he was living at his parents' home. Additionally, the picture of financial desperation is clouded somewhat by the fact that the respondent chose to place most of the severance money he accepted and received in his RRSP account rather than pay down his debt.

### (4) Employer taking advantage of employee's vulnerability

**51** The appellants sought legal advice about an appropriate severance package to present to the respondent. The contents of the package were not unreasonable. The termination was announced, and the severance package presented, in private in a company office and in a polite, professional

manner. The appellants strongly advised the respondent to take time to consider their offer. When the respondent rejected their advice and asked for immediate payment, the appellants wrote a cheque the same day. After the cheque could not be cashed due to an inadvertent drafting error and the respondent requested a combination of payments directly to himself and into his RRSP account, the appellants complied with this request one day after receiving the relevant documents.

**52** It is true that the appellants fired the respondent and that the termination was without cause. However, the law permits this and structures both how termination is achieved (manner) and its consequences for the employee (compensation). In this case, the appellants' conduct was professional and lawful throughout.

**Conclusion**

**53** In his factum, the appellants' counsel writes:

> 60. It is submitted that as an experienced lawyer, the Respondent knew of his legal entitlement to severance, the amount which would be reasonable and the options available to him when he was presented with the offer:
>
> (a) accept the Severance Offer and Release and locate immediate re-employment; or
> (b) refuse to accept the Severance Offer and Release and negotiate for a higher severance package; and/or
> (c) refuse to accept the Severance Offer and Release, and commence litigation in hope of recovering greater severance pay in lieu of notice after mitigation.

**54** I agree with this analysis, although I would add the words "try to" in front of "locate immediate re-employment" in option (a). The respondent, with legal knowledge and experience - in short, with eyes wide open - chose option (a). There was nothing unconscionable in the appellants' conduct towards the respondent and, therefore, the respondent cannot resile from the choice he made, including the money he accepted before commencing litigation.

## E. DISPOSITION

**55** I would allow the appeal, set aside the judgment, and make an order dismissing the action.

**56** The parties are agreed that the question of costs should be addressed after the release of these reasons. The appellants should deliver their costs submissions (not longer than three pages plus supporting documents) within two weeks of the release of these reasons. The respondent should deliver his submissions in a similar format within two weeks of receipt of the appellants' submissions.

J.C. MacPHERSON J.A.
D.H. DOHERTY J.A.:-- I agree.
E.A. CRONK J.A.:-- I agree.

# TAB 13

*Case Name:*

# Gordon v. Krieg

**Between**
**Elizabeth Ann Gordon, Plaintiff, and**
**William Krieg, Kathleen Anne Krieg, Wolfram Oscar Krieg, Norwich Real Estate Services Inc., David Kilby, Craig Rodney Hostland R 340 Enterprises Ltd. dba Pillar to Post, R 340 Enterprises Ltd., Caire Fillon and A-1 Appraisals Ltd., Defendants, and**
**David Kilby, Craig Rodney Hostland R 340 Enterprises Ltd. dba Pillar to Post, R 340 Enterprises Ltd., Wolfram Oscar Krieg and Norwich Real Estate Services Inc., Third Parties, and**
**Interior Testing Services Ltd., Third Party**

[2013] B.C.J. No. 1002

2013 BCSC 842

33 R.P.R. (5th) 282

228 A.C.W.S. (3d) 576

2013 CarswellBC 1319

Docket: 42218

Registry: Vernon

British Columbia Supreme Court
Kelowna, British Columbia

**P. Rogers J.**

Heard: September 10-14, 17-21, 24-28, October 1-5, 9-12, December 10-14, 2012; February 4-5, and 7-8, 2013.
Judgment: May 15, 2013.

(216 paras.)

*Contracts -- Terms -- Express terms -- Exclusion clauses -- Liability for breach -- Action for damages for negligent misrepresentation and breach of contract allowed in part -- Plaintiff sued vendors, their realtor and home inspector for damages resulting from settling of home -- At time of purchase, slope in floor and foundation cracks were visible -- Inspector liable for breach of contract and negligent misrepresentation -- He failed to advise plaintiff of potential structural problems with house and to consult a specialist -- Plaintiff was 25 per cent negligent for not taking further steps to investigate the sloping floors -- Limiting clause in contract applied limiting damages to cost of contract of $408.*

*Real property law -- Sale of land -- Misrepresentation -- Negligent misrepresentation -- Quality defects -- Patent -- Action for damages for negligent misrepresentation against vendors dismissed -- Plaintiff sued for damages resulting from settling of home -- At time of purchase, slope in floor and foundation cracks were visible -- Vendors' statements made in the property disclosure statement were representations only and did not amount to a vendor's warranty -- The defects were not latent and triggered an obligation to have that defect inspected by a qualified person.*

*Real property law -- Real estate agents and brokers -- Liability -- Types of -- Breach of duties of disclosure -- Action by purchaser for breach of duty pf care against vendors' realtor dismissed -- Plaintiff alleged realtor had duty to disclosure to her his knowledge about potential structural defects wit home -- Vendors' realtor owed no duty of care to the plaintiff -- He acted solely as the vendor's agent and was required to act solely in the interests of his client.*

Action for damages for negligent misrepresentation, breach of duty of care and breach of contract. The plaintiff purchased a home in 2006 from the defendant Krieg. Before closing, the plaintiff had hired the defendant Kilby, a home inspector, to advise her as to the qualities of the house. The house had settled significantly by that time and various adjustments and accommodations for settlement present in the house were made in the four years immediately following its construction. Kilby told the plaintiff that he had looked for more cracks in the foundation wall but had not found any and that the foundation was, therefore, solid, that she could have someone come to look at the sloping floor in the master bedroom but that he felt that the slope was not related to the foundation. He also advised her that repairs to the house would not cost more than $500. Satisfied with the inspector's report, the plaintiff completed her purchase. About half a year later, she learned that the foundation in one corner of the building had settled so that floor joists had pulled away from the sill plate on the foundation's top surface. The plaintiff commenced the present action against the vendors, the home inspector and the vendors' real estate agent. In addition to claims relating to the property, the plaintiff sought damages for emotional distress, loss of income, loss of business assets, and loss of income from room rentals she expected to receive by letting out bedrooms to college students.

HELD: Action allowed against Kilby only. The foundation was now in a reasonably steady state. Whatever movement the foundation had in the past, that movement never rendered the house uninhabitable or unsafe for ordinary use and occupation. The claim against the vendors for negligent misrepresentation based on the statements made in the property disclosure statement was dismissed. The statements made in the property disclosure statement were representations only and did not amount to a vendor's warranty. The defects were not latent as the slope in the floor was clearly visible as were the numerous cracks in the foundation walls. The fact that the floors were sloped was an observable defect that triggered an obligation to have that defect inspected by a qualified person.

The vendors' realtor owed no duty of care to the plaintiff. He acted solely as the vendor's agent and was required to act solely in the interests of his client. To impose a duty of care on the realtor towards the plaintiff would have the practical effect of imposing dual agency on parties who had specifically contracted for sole agency and thus place the agent in a conflict of interest. Kilby was liable for breach of contract and negligent misrepresentation. He breached the inspection contract by failing to advise the plaintiff that because there could be structural problems with the house, she should consult a structural engineer or a renovation contractor. The statements in the inspection report constituted negligent misrepresentation. Kilby's bad advice did not, however, obviate the plaintiff's obligation to take reasonable care for her own financial well-being. By not taking further steps to investigate the sloping floors, the plaintiff was 25 per cent negligent. The plaintiff was also bound by the contract's limited liability clause which restricted damages to the price of the contract. The plaintiff was thus entitled to judgment to 75 per cent of $408.

**Counsel:**

Counsel for the Plaintiff: R.M. Moffat.

Counsel for the Defendants, W. Krieg and K.A. Krieg: W.C. Shields.

Counsel for the Defendants and Third Parties, W.O. Krieg and Norwich Real Estate Services Inc.: S.G. Cordell.

Counsel for the Defendants and Third Parties, D. Kilby, C.R. Hostland R 340 Enterprises Ltd. dba Pillar to Post and R 340 Enterprises Ltd.: T.H. Pettit.

No other appearances.

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**Reasons for Judgment**

P. ROGERS J.:--

**Introduction**

**1** After 26 years of living on her own in rented accommodation, Ms. Gordon decided to buy a house. With the help of her real estate agent, she found a house that she liked. She made an offer to buy the house. The vendor accepted the offer. Shortly after the vendor accepted her offer, Ms. Gordon hired a house inspector to advise her as to the qualities of the house. Satisfied with the inspector's report, Ms. Gordon completed her purchase. About half a year later, Ms. Gordon learned that the foundation in one corner of the building had settled so that floor joists had pulled away from the sill plate on the foundation's top surface. Dismayed by this development, Ms. Gordon sued William and Kathleen Krieg who sold her the house, the vendors' real estate agent Wolfram Krieg and the brokerage through which he conducted his business, the house inspector Mr. Kilby and his employer, and several other entities who in the past had something to do with the construction and inspection of the house. Ms. Gordon has settled her claims against those other entities and has taken her claims against the vendor, real estate agent, and house inspector to trial.

**2** At trial, the liability issues boiled down to whether William and Kathleen Krieg had negligently misrepresented the condition of the house, whether Wolfram Krieg had owed and breached a duty of care to Ms. Gordon, and, finally, whether the house inspector had breached his contract with Ms. Gordon or had negligently misrepresented its condition to Ms. Gordon. If Mr. Kilby had breached the contract or acted negligently, the question then becomes whether Ms. Gordon was bound by a contractual clause which limits the inspector's liability to the price of the inspection.

**3** In addition to claims relating to the property, Ms. Gordon advanced a claim for emotional distress, loss of income, loss of business assets, and loss of income from room rentals she expected to receive by letting out bedrooms to college students.

**4** The defendants at trial issued third party notices claiming contribution and indemnity from one another and from other named and unnamed entities who they say caused or contributed to Ms. Gordon's loss.

**5** The defendants contested the quantum of Ms. Gordon's claim. The issues there were whether future movement of the foundation would be such that comprehensive and very expensive steps need to be taken to prevent all further movement of the foundation, or whether future movement would be so slight as to permit relatively less expensive repairs. The defendants argued that Ms. Gordon's loss must be the lesser of the diminution of the value of the house due to settlement or the cost of repair. In either case, they say that Ms. Gordon's damages are comfortably less than $100,000. Ms. Gordon, on the other hand, says that her damages are in the $500,000 to $600,000 range.

**6** At all material times, Mr. Kilby was acting in his capacity as a home inspector for R 340 Enterprises Ltd. doing business as Pillar to Post ("PTP"), and at all material times Wolfram Krieg was acting in his capacity as a real estate agent under the direction of Norwich Real Estate Services Inc. Those corporate entities are vicariously liable for any liability that may be found against Messrs. Krieg or Kilby respectively.

## The Facts

**7** Some facts in this case are in dispute, others are not. Where there is a conflict in the evidence on a significant point I will resolve that conflict in this section of these reasons.

### 1990: Construction

**8** The house in question is located in Kelowna B.C. Its address is 1156 Cerise Drive and it is located on Lot 4 of the original subdivision plan. The property developer was Knorr Construction and the house was built in 1989 or 1990.

**9** The house is a rancher-style single-storey dwelling built over a crawl space. The house faces north with its long axis running generally east-west. The living room is in the north-east corner, the dining room is on the eastern most wall, the kitchen and family room are in the northeast corner. A bedroom lies on the south wall between the family room and the master bedroom. The master bedroom has an ensuite bathroom. The ensuite lies in the southwest corner of the house. A third bedroom is located on the northwest corner of the house. The crawl space extends under the full width and breadth of the habitable portions of the house. The crawl space is approximately four feet high and is unfinished except for a floor of thin concrete. The foundation walls mark the perimeter of the house. The foundation wall is topped by a sill plate. The floor joists were nailed to the sill plate. As

originally built, the interior of the house was supported by two east-west load-bearing walls, one under the living room floor and another much longer wall running under the middle of the house's long axis. The builder poured a slab of concrete adjacent to the north-western corner of the house and constructed a two-car garage over the slab. The garage is attached to the house.

**10** In July and December 1989 the soil of Lot 4 was tested for suitability for development. The testing and the subsequent analysis were carried out by the structural engineer Norman Williams of the firm Interior Testing Services Ltd. Mr. Williams advised the property developer that the soil under Lot 4 was significantly looser than the soils of nearby properties. Mr. Williams recommended three options for building a house on Lot 4. The first option was to remove the loose soil and replace it with compacted layers of new soil. The second option was to sink vertical support piles into the soil and to attach the house's foundation to the piles. The third option was to remove fill under the footing walls to a depth of two feet, to replace that fill with compacted layers on which the foundation footings would be placed, and then to use sufficient steel re-enforcing bars in the foundation walls so that the walls would resist significant cracking in the event of loss of soil support. For each construction method Mr. Williams recommended that the soils under the house be protected from water penetration. In that regard, Mr. Williams recommended that the water from the roof drains be directed away to the sides of the lot, that the lot's landscaping be sloped away from the building's walls, and that care be taken to prevent irrigation water from approaching the foundation. Mr. Williams opined that if one of the three site preparation and construction methods he recommended were employed, and the water control precautions were taken, settlement issues under the house would be limited to an acceptable degree and would not cause significant foundation cracks.

**11** New-house foundations are expected to settle on the order of an inch or so. By making the recommendations that he did, Mr. Williams clearly anticipated that if a house was built on Lot 4, it would settle more than the expected one inch and that its foundation could well crack as a result of such settlement. He also anticipated that if the site was prepared and the house was built in one of the three ways he recommended, the house settlement, while being in excess of one inch, would remain within acceptable limits.

**12** At trial, the geotechnical engineer Mr. Smith testified as to his understanding of the documents concerning the construction of the house which were prepared by Interior Testing and by Mr. Williams. Mr. Smith said that according to those documents, Mr. Williams certified that the soils for the footings had been properly prepared, i.e.: that the soil under the footings had been excavated to a depth of two feet and replaced with compacted fill upon which the footings were placed. In the course of cross-examination, PTP's counsel Mr. Pettit suggested to Mr. Smith that Mr. William's documents indicated that only one foot of soil beneath the foundation had been excavated and compacted. When that proposition was put to Mr. Smith, he agreed that compacting soil one foot below the footings was less optimal than compacting two feet.

**13** Close examination of Mr. Williams' record reveals that it says:

> Contractor was instructed to dig footing an additional 1' and compact base of footing.

I interpret that to mean that the contractor was told to excavate three feet beneath the footing. The premise for Mr. Smith's criticism of the contractor's work is, therefore, without foundation.

**14** Mr. Smith did say that he agreed with the proposition that of the three solutions that Mr. Williams proposed, the property's developer chose the least expensive and highest risk option. Mr. Smith went on to say that while the foundation walls had been built with reinforcing steel, the walls were obviously not strong enough to resist failure when they lost the support of the soil beneath them.

**15** On the day that the house was finished, the foundation walls were, presumably, level.

### 1990 - 1994: Mr. Zarr

**16** Mr. Zarr bought the house shortly after it was built. That was in 1990. Mr. Zarr has a background in the house construction industry; he had worked in house framing and construction for a year and a half and then as a drywaller for the next nineteen years. After leaving the drywalling business, Mr. Zarr began his own business delivering water to drilling rigs in Alberta. Mr. Zarr was 82 years old when he testified at trial.

**17** Mr. Zarr said that during the first year or so of ownership, he noticed cracks in the drywall on the walls of the main and the ensuite bathrooms. He also noticed that the kitchen floor had a bow in it. Mr. Zarr testified that after he brought those defects to the builder's attention, the builder had the drywall repaired and that the builder made a sort of bracket out of 2x6s which he placed under the joists of the kitchen floor. According to Mr. Zarr, the kitchen floor was fine after that and no more cracks appeared in the drywall.

**18** Mr. Zarr did some construction work on the property. He built a set of shelves along the western inside wall of the garage and enclosed those shelves with framing and drywall. Mr. Zarr and a friend also built a detached garage on the property. The detached garage is located on the north-eastern corner of the lot. According to Mr. Zarr, it took about two weeks for him and his friend to build the garage. The floor of the detached garage is concrete slab and the building is finished in the same fashion as the exterior of the house proper. Although it is a garage by design, the building has been used primarily as a shop for doing hobbies or for storing surplus items.

**19** Mr. Zarr further testified that he extended the roof downspouts away from the side of the house. There are several downspouts on the house; Mr. Zarr did not specify which spouts he extended. According to the geotechnical engineer Mr. Smith, in July 2007 the downspouts at the east and west sides of the house disappeared into the ground adjacent to the foundation walls. I accept Mr. Smith's evidence concerning those downspouts and I conclude from it that Mr. Zarr did not extend the downspouts that drained into the ground adjacent to the east and west sides of the house.

**20** Mr. Zarr lived in the house until 1994. In February of that year he sold the house to the defendants Mr. and Mrs. Krieg. After selling the house on Cerise Drive, Mr. Zarr went on to act as the general contractor on the construction of a new house in a different neighbourhood.

**21** Mr. Zarr denied that he had ever noticed that the floors of the master bedroom and ensuite were sloped. Mr. Zarr also denied that he or someone on his behalf had constructed additional temporary supporting walls in the crawl space or that they applied shims to fill a gap between the floor joists and the foundation sill plate in the southwest corner of the building.

**22** William Krieg testified that shortly after he moved into the house he noticed that temporary supporting walls had been constructed in the crawl space. He and his sister-in-law Ms. Fedoriw told the court that sometime in 1994 they both saw that a support wall had been built in the south-west

portion of the crawl space, directly under the ensuite bathroom floor. The bottoms of the 2x4 vertical support beams of this wall where shimmed with wedges of wood. Ms. Fedoriw noticed that one of the beams was nevertheless hanging loose. According to Ms. Fedoriw, the floors of the master bedroom and the ensuite bathroom were sloped. Mr. Krieg acknowledged that Ms. Fedoriw told him that the floors were sloped. He testified that he was not troubled by her advice; the floors in that area of the house seemed fine to him. Wolfram Krieg acted as the realtor when Mr. Zarr sold the house to the Kriegs, and when he toured the house before listing it, he also noticed that the floor in the master bedroom was definitely slanted.

**23** The state of the house when the Kriegs bought it in 1994 is a point of import in this case. If by then the foundation of the house had already settled to such a degree that a support wall had to be put up in the crawl space and the floors of the master bedroom and ensuite were sloped, an inference could be drawn that some if not most of the foundation settlement had already occurred by the time that the Kriegs bought the house. If that is so, the amount of further settlement might be minimal. If, on the other hand, the house was in perfect condition when the Kriegs bought it, an inference could be drawn that the settlement that it displayed when the plaintiff took possession in 2006 was a recent and ongoing phenomenon. In that case, additional significant settlement might be expected to occur.

**24** I find that on this issue I am persuaded by the evidence of Ms. Fedoriw and Wolfram Krieg. I accept Ms. Fedoriw's testimony that she noticed sloped floors when she first stepped into the master bedroom in 1994 and that she saw the temporary support wall in the crawl space below the ensuite and master bedroom floor. I also accept her evidence that she saw one of the vertical posts in that support wall hanging loose; i.e.: not actually weight bearing. Wolfram Krieg's evidence was likewise clear and uncomplicated. I find William Krieg's evidence on this point less convincing -- he was, in my view, a suggestible and not entirely reliable witness.

**25** I do not accept Mr. Zarr's evidence that he was unaware of sloping floors and the support walls in the crawl space. Given Mr. Zarr's previous experience in the construction industry, particularly his having worked as a house framer, I find it is more likely than not that sometime between 1990 and 1994 Mr. Zarr noticed that the floors in the south-west corner of the house were sloping. I find that Mr. Zarr either had Knorr return to the property and build the supporting wall under the ensuite or that he used his own imperfect carpentry skills to shore up the floor by building that temporary support wall himself. Mr. Zarr was likely confused about that wall -- he thought that it was put under the kitchen floor, but the evidence showed that no support wall was constructed there. Mr. Zarr is an elderly man -- it is likely that his memory of having this work done has faded. I find that his evidence on this point is unreliable rather than dishonest.

**26** I find additional support for my conclusion that the house settled significantly in its first few years in the evidence of the geotechnical engineer Mr. David Smith. He opined that newly constructed buildings typically experience "immediate" settlement, immediate meaning within the first year or so after completion. He also opined that it was unlikely that the house did not settle at all as he understood Mr. Zarr's story to be.

**27** For these reasons I also find that in addition to the support wall in the crawl space, the various other adjustments and accommodations for settlement present in the house were made in the four years immediately following its construction. Those adjustments included moving baseboards, repositioning striker plates on door jambs, shaving the tops of doors so they would fit into

out-of-square openings, and applying patching compound to the interior of a crack in the western foundation wall.

### 1994 - 2006: William and Kathleen Krieg

**28** During their stay in the house, the Kriegs were not bothered by the sloping floors of the master bedroom and ensuite bathroom. Their lack of concern flowed in part from the fact that they did not actually use those rooms themselves -- they saved that part of the house for guests like Ms. Fedoriw -- and in part from their simply becoming used to the slope of those floors.

**29** In early 2006 the Kriegs had to make a hard choice about where they were to live for the rest of their lives. That choice was driven by their need to provide care for their disabled daughter. The Kriegs were aging -- by then they were in their early 80's -- and their daughter, who cannot care for herself, was in her late 40's. The Kriegs knew that as they grew older they would be less and less able to look after their child. No one in their family, all of whom lived in Winnipeg, Manitoba, was willing to come to Kelowna to help them out. In the result, the Kriegs decided to sell their house on Cerise Drive and to move to Winnipeg. In Winnipeg they would be close to family and their daughter's care would be assured.

**30** At this point it is useful to note that Kathleen Krieg has suffered a severe stroke. She was not able to testify at the trial. The Kriegs' daughter was not able to testify either. In the result, at trial William Krieg spoke for the family. William Krieg's evidence was, as noted earlier, not particularly reliable. He was a suggestible witness. He tended to agree with whatever proposition was put to him in direct and cross-examination. Further, he is elderly and has suffered a stroke himself. His memory has been affected by age and ill-health. For these reasons I am cautious about accepting William Krieg's evidence except where it was corroborated by another's testimony or by documentary evidence.

**31** William Krieg retained Wolfram Krieg to act as the listing agent for the sale of the house on Cerise Drive. In early March William Krieg and his wife and assistant Julie Krieg visited Cerise Drive. Their purpose was to tour the house, to take measurements, and to make observations useful to preparation of the listing. Both Wolfram and Julie Krieg testified that they noticed that the floors in the house were definitely slanted. I accept their testimony. Because the crawl space was not habitable, neither Wolfram nor Julie went down there to look around.

**32** William Krieg stipulated that the house be listed for an asking price of $419,800 and that the listing period be only three months rather than the usual six. William Krieg signed three documents presented to him by Wolfram Krieg. He signed a document entitled "Working with a Realtor". That document specified that Wolfram Krieg was his exclusive agent for the sale of the house during the listing period and that Wolfram Krieg would act for him only. William Krieg signed a listing agreement setting the asking price and listing period. Finally, William Krieg filled out and signed a property disclosure statement (the "P.D.S."). The P.D.S. stipulated, among other things, that William Krieg was not aware of any structural defects in the house. It also stipulated that he had a duty to amend the P.D.S. in the event that he became aware of changes that would render the P.D.S. inaccurate.

**33** During the first two weeks that the house was on the market, no one showed interest in it. Wolfram Krieg met with William Krieg to talk about reducing the price. William Krieg agreed to

lower his asking price by $20,000. On March 20, 2006 he signed an amendment to the listing agreement stipulating that the new asking price was $399,800.

**34** After the price was lowered, people started coming to view the house. No one made an offer though. That was because the property suffered from two drawbacks. The first was that it had virtually no back yard. The second was that the floors in the master bedroom and the ensuite were noticeably slanted. Negative comments to that effect were communicated by realtors to Julie Krieg. One of those realtors, Ms. Gurnsey, gave evidence to the effect that she recalls noticing that the floors in the house were sloped. Her practice was to provide feedback of that sort to the listing realtor and that she had no reason to believe that she had not done so in this case.

**35** Around the end of March or the beginning of April 2006, Wolfram Krieg spoke to William Krieg about the difficulties that they were encountering in their effort to sell the house. Wolfram Krieg told William Krieg that people were complaining about the sloping floors. At that point in time, neither Wolfram Krieg nor William Krieg felt that the sloping floors were anything other than a cosmetic defect. That is because, so far as they could tell, the floors did not affect the habitability of the house and they did not present a safety hazard. As noted earlier, Wolfram Krieg saw that the floors were sloped when he listed the house for Mr. Zarr in 1993 and to his eye they were sloped to the same degree when he saw the house again in 2006. Nevertheless, in order to help make the house more attractive to potential purchasers, William Krieg advised Wolfram Krieg that he would contact a contractor to see what could be done to fix the floors.

**36** On April 7, 2006, William Krieg telephoned the Kelowna office of Team Foundation Systems Ltd. I cannot rely too much on William Krieg's evidence relating to his interactions with Team Foundation personnel. I do accept the evidence of Ms. Brown, Team Foundation's receptionist, Mr. McKinney, Team's estimator, and Mr. Wilson, Team's principal. According to their evidence, and confirmed by the notes that each made in the course of their dealings with William Krieg, on April 7, 2006, he told Ms. Brown that the foundation of his house had cracked and that the house had settled. He wanted Team to come by to give him an estimate of the cost of repair. Mr. McKinney attended at the house and walked around, through, and under the house. Outside, he observed cracks in the foundation. Inside the crawl space he saw two substantial cracks in the foundation. On the main floor he saw that the interior doors were sticking in their jambs and that the floor in the master bedroom had a noticeable and substantial slope to it. Describing the slope, Mr. McKinney said that a tall lamp on a bedside table in the master bedroom was leaning like the Tower of Pisa. William Krieg was about to leave for a two-week stay in Winnipeg, and Mr. McKinney agreed to provide him with an estimate of the work needed to correct the problems with the house after he returned from his trip.

**37** Mr. McKinney visited the house again while the Kriegs were out of town. Mr. Wilson went with him on that occasion. They walked around the exterior of the house but did not go inside. They observed two cracks in the foundation, one of which was approximately 1/4 inch wide. It was obvious to both gentlemen that the house had settled substantially.

**38** Mr. McKinney then prepared an estimate for the cost of repairing the house. Mr. Wilson vetted his work to make sure that it would be a good forecast of the cost of fixing the problems. At this point, neither Mr. McKinney nor Mr. Wilson could say why the foundation had cracked and the house settled, but loss of soil support in the southwest corner seemed to them to be a logical suspect cause. They did not know whether the house had reached a steady state or whether the settlement process was ongoing. The estimate that they prepared for the Kriegs contemplated the installation of

twelve helical piles driven into the soil adjacent to the existing foundation, raising the foundation with jacks, and attaching the foundation to the piles. Team estimated the cost of the work at $33,829 exclusive of fees for necessary geotechnical and structural engineering advice.

**39** On April 27, 2006, Mr. McKinney and Mr. Wilson met with the Kriegs at the house on Cerise Drive. Mr. Wilson walked through the interior of the house. He saw that the floor in the master bedroom was slanted and that doors were sticking in their jambs. In the crawl space, he saw at least two significant cracks in the foundation walls, one of which was about 1/4 inch wide. After touring the house, Mr. McKinney and Mr. Wilson sat down with the Kriegs at their kitchen table and discussed the repair quote. Mr. Wilson explained that the quote did not include the cost of the geotechnical and structural engineers that the Kriegs would have to retain in order to carry out the repair project. A day or so after that meeting, William Krieg telephoned Mr. McKinney and instructed him to go ahead with the project. Several days later, but before Mr. McKinney had taken any substantial steps to initiate the repair project, William Krieg called again, this time instructing Mr. McKinney to not proceed with the repairs.

**40** What happened between William Krieg's instructions to start and then to stop repairs was that he and Wolfram Krieg spoke by telephone and then met in person to discuss the problems with the house. The telephone call happened on April 27. In that call, William Krieg told Wolfram Krieg that the cost of repairing the floors would be $30,000 to $35,000. William Krieg did not tell Wolfram Krieg anything more than that. Wolfram Krieg decided to convene a meeting with the Kriegs to talk about the effect that the Team quote would have on their effort to market the property. They met at the Krieg's house the next day.

**41** Once again, I cannot give much weight to William Krieg's recollection of that meeting. In the course of his testimony he said on the one hand that he told Wolfram Krieg that the foundation of the house was broken and that Wolfram Krieg instructed him to not make the repairs but to reduce the price of the house instead. On the other hand, under cross-examination, William Krieg admitted that he had no real recollection of his conversation with Wolfram Krieg on April 28, of what he said to Wolfram Krieg or what Wolfram Krieg said to him, or what they discussed at all. William Krieg's only clear recollection of that meeting was its outcome; that he would reduce the asking price of the house from $399,800 to $369,000. Given the frailties of William Krieg's recollection on this and other elements of the case, I find that I am not able to rely on his evidence to make findings of fact about this meeting.

**42** Julie Krieg attended the meeting at the Kriegs' house on April 28 as well. She spent her time conversing with Kathleen Krieg. Because her attention was primarily elsewhere, Julie Krieg could not add to the evidence concerning the conversation between her husband and William Krieg.

**43** For his part, Wolfram Krieg testified that during the meeting on April 28, William Krieg confirmed that he had an estimate of $35,000 to fix the sloping floors. William Krieg did not describe the work that would be done in any detail. At this point in time, William Krieg had already made an offer on, or had actually bought, a house in Winnipeg. I find that he was therefore highly motivated to sell the Cerise Drive house so that he and his family could move ahead with their plan to relocate to Manitoba. He did not want anything to get in the way of getting a buyer for the Kelowna house. For that reason, I find that William Krieg did not tell Wolfram Krieg what work was contemplated in the Team quote. From Wolfram Krieg's perspective, then, he knew that the quote was for work of an unspecified nature which would result in the floors not being sloped any more.

**44** In the course of their conversation at that meeting, Wolfram Krieg suggested to his client that the P.D.S. be updated to reflect the current situation. He suggested that, based on William Krieg's advice that the floors had been in a steady state for the past 10 years, the P.D.S. include a statement to the effect that the southwest corner has a slope in the floor and that it had been like that for the past 10 years, or that it was like that and did not change. William Krieg was reluctant to change the P.D.S. to include that wording. In the face of his client's recalcitrance, Wolfram Krieg telephoned his broker (i.e.: the owner of the real estate franchise through which Wolfram Krieg conducted his business) and asked for advice on whether the P.D.S. needed to be changed given the advent of the repair quote. After talking to his broker, Wolfram Krieg considered the situation. He knew about the sloped floors and he knew that they were an obvious defect in the house. He had received negative feedback from other persons about the floors, and so he knew that the state of the floor was not hidden from prospective purchasers. Wolfram Krieg did not know why the floors were sloped. He speculated that perhaps they had been built that way, given that they were in substantially the same state when he first saw the house in 1993. He advised William Krieg that because the sloping floors were clearly evident they were not a defect that required mention on the P.D.S. William Krieg was not inclined to amend the P.D.S. in any event, and so no change was made to it. The only change in the marketing of the house flowing from the April 28 meeting was William Krieg's decision to lower his asking price from $399,800 to $369,800, a drop of $30,000.

**March - June 2006: Sale to Ms. Gordon**

**45** Ms. Gordon is a ceramic artist. Before she bought the house on Cerise Drive she had made a modest living creating wearable ceramics. She manufactured her ceramics in a small workshop that she set up in her rented suite and in a larger studio space she leased at the Rotary Center for the Arts building in downtown Kelowna. She sold her products out of her studio and home workshop and at various craft fairs to which she travelled in B.C. and Alberta. Ms. Gordon's income from her art business varied. She filed tax returns showing that her income in the period 2004 to 2006 was:

| Year | Gross Business Income | Net Business Income |
|---|---|---|
| 2004 | $28,918 | $7,460 |
| 2005 | $28,371 | $8,199 |
| 2006 | $30,416 | $11,343 |

**46** In early 2006, Ms. Gordon's landlord of 26 years gave her notice that he was going to sell the house in which her two-bedroom suite was located. Coincidentally, around the same time Ms. Gordon expected to receive two inheritances. With those inheritances and her own savings, Ms. Gordon had $130,000 in cash to put down on a house. She had additional savings of $5,000 for ve-

hicle repairs and another $25,000 that she had earmarked for renovations to create a studio in whatever house she bought. Ms. Gordon learned that she could borrow up to $230,000 for a house purchase. The most that she was willing to spend on a house without depleting her reserves was, therefore, $360,000. She did not want to buy a house that required a lot of repairs or maintenance.

**47** Ms. Gordon went about looking for a house in a methodical way. She attended a new home buyer seminar hosted by Mr. McJannet. Mr. McJannet is a mortgage broker. She received a binder at the seminar. The binder contained a section having to do with home inspections. That section recommended the Pillar to Post home inspection agency. That section was not authored by PTP. Although Ms. Gordon believes that a PTP promotional brochure was in her binder in 2006, her notes of her conversation with Mr. McJannet in 2007 clearly show that was not the case. Ms. Gordon cannot, therefore, be said to have reasonably relied on any PTP promotional material that she received at the new home buyer seminar.

**48** Ms. Gordon's next step was to interview real estate agents. She settled on Ms. Tremeer. Ms. Gordon retained Ms. Tremeer to act as her agent for the purpose of finding and buying a house. In March and April 2006 Ms. Tremeer took Ms. Gordon to view a number of houses. None of them suited Ms. Gordon.

**49** Then, on or about May 8, 2006, Ms. Tremeer noticed that the asking price for the house on Cerise Drive had been reduced to a point just above Ms. Gordon's maximum spend. She contacted Ms. Gordon with that news. Ms. Gordon was interested in looking at the property. Ms. Tremeer and Ms. Gordon went to Cerise Drive and they visited the house. As they toured the place, Ms. Gordon noticed that the drywall tape in a corner of the ensuite bathroom wall was rippled. Ms. Tremeer noticed and remarked on unevenness of the floor in the dining room. Ms. Tremeer noticed that the floor in the master bedroom was sloping, but did not mention her observation to Ms. Gordon. Ms. Gordon felt that the house would suit her purposes because it had a detached shop and an attached two-car garage which could be suitable as a studio, as well as two bedrooms that she could rent out for extra income. Ms. Gordon and Ms. Tremeer visited the house again a few days later. On this occasion Ms. Gordon went down into the crawl space. Ms. Tremeer stayed upstairs. The crawl space was full of various items in storage. Ms. Gordon took a look at the furnace but did not make a detailed inspection of the crawl space.

**50** Ms. Gordon was interested enough in the property to instruct Ms. Tremeer to write up an offer of $360,000. Ms. Tremeer drafted the offer on May 8, and Ms. Gordon signed it on May 10.

**51** On Ms. Tremeer's advice, Ms. Gordon made her offer subject to, among other things, being satisfied by the Kriegs' P.D.S. and to her obtaining an inspection report "against any defects whose cumulative cost of repair exceeded $500 and which reasonably may adversely affect the property's use or value". The offer stipulated that the last day on which Ms. Gordon could waive the subject clauses was May 19, 2006.

**52** Ms. Tremeer gave the offer to Wolfram Krieg and he or his wife sent the offer on to the Kriegs in Winnipeg. William Krieg telephoned Wolfram Krieg and instructed him that the Kriegs would accept the offer as presented. The Kriegs signed the offer and returned it to Wolfram Krieg.

**53** Ms. Gordon then set about retaining a house inspector. She selected PTP. PTP is a franchise. The PTP franchisee for the Kelowna area is R 340 Enterprises Ltd. Mr. Hostland is the guiding mind of PTP's operations in Kelowna. Mr. Kilby is an employee of the franchisee. On or around May 10, Ms. Gordon called PTP's office. She spoke to Ms. Janussen. Ms. Janussen asked for some

details about the house that Ms. Gordon wanted inspected and the two women discussed appointment times for the inspection. Ms. Gordon rejected that Friday afternoon and instead selected Monday, May 15, at 9 a.m. Ms. Janussen told Ms. Gordon that she would have to sign a contract and pay the inspection fee, and that she would send a copy of the contract to Ms. Gordon via Ms. Tremeer's office. On May 11, Ms. Janussen sent a promotional brochure and a quote for the inspection of $400 plus GST to Ms. Tremeer's office for delivery to Ms. Gordon. Through oversight Ms. Janussen did not include a copy of PTP's standard contract. Ms. Gordon received the promotional material and the quote from Ms. Tremeer's office later that day or the next.

**54** As PTP's manager and general overseer of operations, it was Mr. Hostland's duty to ensure that PTP's customers signed PTP's standard contract. On May 14, as Mr. Hostland was reviewing PTP's inspection bookings for the coming week, he realized that Ms. Gordon had an appointment for the next day but that she had not yet signed the PTP contract.

**55** Mr. Hostland testified that the notes he made on PTP's contact form indicate to him that he telephoned Ms. Gordon sometime in the afternoon or evening of Sunday, May 14, and that he explained to her that she would have to sign a contract with PTP before she received the results of the home inspection. He testified that only rarely does he have to contact a customer so close to the inspection date and that when he does he invariably goes over the main points of the contract with the customer while on the telephone with them. Mr. Hostland testified that his invariable practice in such situations is to tell the customer that the contract is a limited liability contract and that the limit of liability is to the fee paid for the inspection. He said that it was his practice to also point out to the customer that the inspection does not form a warranty of the home or that the house complies with relevant bylaws. He tells the customer that PTP will do a visual but not a technically thorough inspection. Mr. Hostland's purpose in following that practice is to ensure that the customer, who may not have seen the contract at that point in time, is aware that there are limits to a home inspection. Mr. Hostland's note on the contact information sheet relating to Ms. Gordon says this:

> She was unable to get from Marilyn. I explained the contract terms over the phone -- she will sign on site Monday morning.

**56** Mr. Hostland had no present recollection of speaking to Ms. Gordon on May 14, but based upon the notes that he made on the contact sheet, he believes that he followed his usual practice on that day.

**57** Ms. Gordon denies that she had a conversation with Mr. Hostland on Sunday May 14. She denies that he told her that PTP would ask her to sign a limited liability contract or that he told her about the limits to the inspection.

**58** In view of what transpired between Ms. Gordon and Mr. Kilby on May 15, it may not matter whether Mr. Hostland did or did not speak to Ms. Gordon on May 14. For what it may be worth, I am inclined to accept Mr. Hostland's version over Ms. Gordon's. I have come to that conclusion because Mr. Hostland made a note of having had that conversation and he was not challenged by the proposition that he made the note at some other time. There are good business reasons for PTP to insist that its customers sign the PTP contract ahead of a house inspection. Those reasons include PTP's modest fee structure and its legitimate desire to limit its exposure to potentially very large claims. Mr. Hostland was therefore very well motivated to take steps to ensure that Ms. Gordon had some forewarning of the terms of the contract that she would be asked to sign and to give PTP time

to call off the inspection in the event that Ms. Gordon was not willing to accept the contract terms as described.

**59** Ms. Gordon, on the other hand, had many things on her mind that day. She had been in to see Ms. Tremeer and had signed a contract with Ms. Tremeer appointing her as Ms. Gordon's exclusive agent for the purchase of the house. This was an important undertaking, yet at trial Ms. Gordon had no recollection of it. It seems to me that if Ms. Gordon did not recall the meeting that actually happened with Ms. Tremeer and signing the agency contract as she no doubt did that day, it is equally likely that she had the conversation with Mr. Hostland as he described but that she simply does not remember it now. Having no memory of the conversation, and it being somewhat in her interest to deny speaking to Mr. Hostland about PTP contracts on May 14, I find that Ms. Gordon has unconsciously converted her lack of recollection into a flat denial.

**60** Mr. Kilby arrived at the house at 9 a.m. on May 15. Ms. Tremeer met him there and let him into the house. Mr. Kilby conducted the exterior portion of his inspection. In the course of that inspection Mr. Kilby noted, among other things, that the roof shingles were at the end of their life and that there was a large open crack in the foundation wall on the south side of the house. Mr. Kilby made this note about that crack:

> Vertical shrinkage/settlement crack observed mid back. Grout to avoid moisture entry.

**61** Mr. Kilby then went inside the house to complete his notes concerning the exterior inspection. Then he completed his inspection of the inside of the house. In the crawl space he noted that the foundation crack he had seen outside extended all the way through the width of the foundation wall. He could not see the full length of the crack because the upper half of the wall was covered by white styrofoam insulation board. Mr. Kilby made this note concerning that crack:

> Vertical stress/settlement crack mid back. No significant displacement. Grout to Avoid moisture entry. Patch spalled parging, remove where loose.

**62** Mr. Kilby did not see the second foundation crack that both Mr. McKinney and Mr. Wilson had observed when they visited the house in April.

**63** In the master bedroom, Mr. Kilby observed abnormal flooring. He wrote this in his report about the master bedroom floor:

> Furnishings limits viewing to assess all. Uneveness observed in the floor. This may be caused by a number of issues/items that are not apparent in a visual only inspection. Further investigation may be required by others as determined by client.

**64** Mr. Kilby saw the temporary support wall that had been built under the ensuite floor. He attached no significance to that wall. He thought that it may have been built in order to steady or support something heavy like a bathtub on the floor overhead.

**65** Mr. Kilby did not move or dislodge any objects on or in the property as he performed his inspection. He did not notice the other foundation crack or cracks that were present in the crawl space and were seen by Mr. McKinney and Mr. Wilson. Mr. Kilby did not see, or if he saw he did not recognize the import of, the repositioned striker plates on door jambs, shaved doors, crooked

door openings, and gaps that were present between the baseboards and the floors in the southwest corner of the house. All of these features were there to be seen and would not have required Mr. Kilby to move or reposition objects in the house.

**66** While he was conducting his inspection, Mr. Kilby saw that another person had arrived at the house. He testified that he thought that person was doing an appraisal for mortgage financing. That person left the house before Ms. Gordon arrived.

**67** After going through the house, Mr. Kilby retired to write his report at the computer station that he had set up in the kitchen. Ms. Gordon arrived at approximately 11:30 a.m. Mr. Kilby greeted her, they exchanged introductions and pleasantries, and they went into the kitchen. There, Mr. Kilby gave Ms. Gordon the PTP contract to read and, if she agreed to its terms, to sign. Ms. Gordon did not express any surprise at being handed a contract. Neither did she assert that, so far as she was concerned, there was no need to sign a contract because she considered the quote and promotional material she received via Ms. Tremeer's office several days earlier to be the terms of her agreement with PTP (import of this will be discussed later).

**68** Mr. Kilby instructed Ms. Gordon to read the contract. She sat with the document before her for about ten minutes. According to Mr. Kilby, Ms. Gordon appeared to have read and understood the contract. According to Ms. Gordon, she had difficulty reading the contract because parts of it were in small print and she did not have her reading glasses with her. She said that she told Mr. Kilby about her needing her non-prescription reading glasses. Mr. Kilby does not recall her saying that. He went on to testify that he always has his reading glasses with him when he works on his computer and that in the past he has happily lent them to customers who say they have forgotten their glasses. Mr. Kilby testified that he would have made that same loan to Ms. Gordon had she said anything to him about not having her reading glasses.

**69** After Ms. Gordon indicated by word or gesture that she had finished reading the contract, Mr. Kilby went over its salient terms with her. Ms. Gordon recalls that Mr. Kilby told her that he was going to give her the results of a visual inspection only of the house and that the PTP report would be in two parts: the written portion contained in a binder that he would give to her, and an oral part as he and she walked through the house. Ms. Gordon did not recall anything else that Mr. Kilby told her about the contract. Mr. Kilby testified that he has a routine that he follows in every case when he explains the PTP contract to customers. Among other things, he tells the customer that the contract limits PTP's liability for mistakes to the cost of the inspection and that the inspection is a visual inspection only, that is to say he does not have x-ray vision to see through walls. Mr. Kilby remembers that after he told Ms. Gordon about the limited liability term, she said words to the effect of, "Does that mean I can't sue you?"

**70** Mr. Kilby and Ms. Gordon both testified that they understood that if Ms. Gordon did not sign the PTP contract, Mr. Kilby would pack up his equipment and leave. They both knew that Ms. Gordon would not receive the results of the inspection unless and until that contract was signed.

**71** The PTP contract begins with this headline:

> **VISUAL INSPECTION AGREEMENT**
>
> **PLEASE READ THIS AGREEMENT CAREFULLY THIS AGREEMENT SUPERSEDES ALL PREVIOUS COMMUNICATIONS**

72 The contract describes the inspection that PTP will do as follows:

> **2. The Client will receive a written report of Inspector's observations of the accessible features of the Property**. Subject to the terms and conditions stated herein, the inspection includes the visual examination of the home's exterior including roof and chimney, structure, electrical, heating and cooling systems, insulation, plumbing, and interior including floors, walls, ceiling and windows; it is a reasonable effort to disclose the condition of the house based on a visual inspection. Additionally, Inspector will functionally operate major built-in appliances. Conditions beyond the scope of the inspection will not be identified. No engineering services are offered.
>
> **3. This Inspection Report is based on the condition of the Property existing and apparent as of the time and date of the inspection.** Not all conditions may be apparent on the inspection date due to weather conditions, inoperable systems, inaccessibility of areas of the Property, etc. Without dismantling the house or its systems, there are limitations to the inspection. Throughout any inspection, inferences are drawn which cannot be confirmed by direct observation. Clues and symptoms often do not reveal the extent or severity of problems. Therefore, the inspection and subsequent Inspection Report may help reduce the risk of purchasing the property; however, an inspection does not eliminate such risk nor does the Inspector assume such risk. While some of the less important deficiencies are addressed, an all inclusive list of minor building flaws is not provided. **Inspector is neither responsible nor liable for the non-discovery of any patent or latent defects in materials, workmanship, or other conditions of the Property, or any other problems which may occur or may become evident after the inspection time and date**. Inspector is neither an insurer nor guarantor against defects in the building and improvements, systems or components inspected. Inspector makes no warranty, express or implied, as to the fitness for use or condition of the systems or components inspected. Inspector assumes no responsibility for the cost of repairing or replacing any unreported defects or conditions, nor is Inspector responsible or liable for any future failures or repairs.

73 The contract's limitation clause says this:

> **4. Inspector and its employees are limited in liability to the fee paid for the inspection services and report** in the event that Client or any third party claims that Inspector is in any way liable for negligently performing the inspection or in preparing the Inspection Report, for any breach or claim for breach of this Visual Inspection Agreement or for any other reason or claim.

74 The emphasized words noted above appear in the original document. The contract is printed in compact but not microscopic print. Except for the headline, which is in larger print, the contract's terms are uniformly presented to the reader. That is to say the limitation clause is not buried, or obscure, or any more or less difficult to read than any other clause.

75 After signing the contract and paying PTP's fee, Mr. Kilby and Ms. Gordon walked through the house. In the crawl space, Mr. Kilby pointed out the one foundation crack that he saw. That was

a crack on the south wall and somewhat west of the wall's midpoint. Mr. Kilby also pointed out the presence of efflorescence in the vicinity of the crack. He explained to Ms. Gordon that the white powdery efflorescence indicated intrusion of water or water vapour. He told her that the crack needed to be closed by grout.

**76** According to Ms. Gordon, Mr. Kilby went on to tell her that he had not seen any other cracks in the crawl space and so there was no need to worry about the one on the south wall. Ms. Gordon also testified that she asked him whether this was a solid house and that Mr. Kilby answered "yes". Mr. Kilby denies that he said such things to Ms. Gordon.

**77** Upstairs, in the master bedroom, Mr. Kilby discussed the uneven floor with Ms. Gordon. She says that he told her that she could have someone look into it, to which she replied, "Well, I have someone right here", meaning Mr. Kilby. Ms. Gordon testified that Mr. Kilby told her that the uneven floor was not related to the foundation. Mr. Kilby does not recall discussing the uneven floor with Ms. Gordon, but says that if he did, he would not have said anything more than that she could get someone else to have a look at it. He testified that he would not have gone beyond that advice because he has no expertise in what could cause a floor to be uneven or in how such a problem might be rectified.

**78** In all, Mr. Kilby and Ms. Gordon spent 15 to 20 minutes going through the house. After their tour was over, Ms. Tremeer arrived. Ms. Gordon testified that Ms. Tremeer asked Mr. Kilby if he had noticed any items that would cost more than $500 to repair and that Mr. Kilby said no. Ms. Tremeer did not recall that conversation. Mr. Kilby testified that he did not recall being asked that question but that if it had been asked he would not have given an answer. That is because he has no expertise in the cost of fixing problems and that, in any event, the roofing was at the end of its life and repairing or replacing it would certainly have cost more than $500.

**79** I have considered the circumstances of the witnesses to the happenings in the house on May 15. For Mr. Kilby, inspecting Cerise Drive was just another inspection -- it was not substantially different than the 1,100 or so inspections that he had carried out in his career to that point. There was no reason for it to stand out in his mind. I note that in his examination for discovery, Mr. Kilby testified that he had no specific recollection of the conversations that he had with Ms. Gordon on that day. At trial, Mr. Kilby testified that after reviewing the documents relating to the case, his memory of his interactions with Ms. Gordon had improved. His memory had most improved when it came to recalling what each said to the other while they walked through the house. I am not persuaded by that explanation. It appears that the only document that Mr. Kilby could have relied upon to recover his memory is the written inspection report. That document was in front of him during the discovery. I cannot believe that he went into the discovery without first having reviewed it. I therefore have reservations about Mr. Kilby's evidence concerning his conversation with Ms. Gordon during the walk through of the house.

**80** I do, however, accept Mr. Kilby's evidence relating to his description of the terms of the contract to Ms. Gordon. That portion of their interaction was governed by Mr. Kilby's usual routine and practice. There was no reason for him to have deviated from that practice on that day.

**81** Ms. Gordon, on the other hand, was experiencing her first house inspection. She was vitally interested in its result and, it being an unusual event for her, it is likely that she would impress memories of the event. For that reason, I find that her recollection of what she and Mr. Kilby said to each other during the walk through is more reliable than his. I find that while they were in the crawl

space, Mr. Kilby did tell Ms. Gordon that he had looked for more cracks in the foundation wall but had not found any and that the foundation was, therefore, solid. I find that in the master bedroom, Mr. Kilby did advise Ms. Gordon that she could have someone come to look at the sloping floor. When she indirectly asked him for his opinion about the floor, he replied that he felt that the slope was not related to the foundation. This was, from Mr. Kilby's point of view that day, a reasonable thing to say; after all, after looking at the crawl space he thought that the foundation was solid, so why would the sloping floor be related to the foundation?

**82** As for the cost of repairs, the items on Mr. Kilby's written report that he indicated needed immediate attention were relatively minor: sealing exposed nail heads on roof flashing, installing a protective cover over low wiring, adjusting the door between the garage and house, replacing the furnace air filter, fixing loose brickwork on the exterior fascia, and grouting the one foundation crack that he noticed. The roof did not need immediate replacement. Ms. Gordon's offer to buy the house was subject to defects costing no more than $500 to repair. No person other than Mr. Kilby had gone through the house in detail. Ms. Tremeer and Ms. Gordon needed information on that point in order to assess whether to waive that subject clause. It was therefore not unexpected and entirely reasonable for Ms. Tremeer to have asked Mr. Kilby at the end of the inspection whether he had seen defects the repair of which would cost more than $500. Given the relatively minor defects Mr. Kilby noted in his report, I find that it is more likely than not that Mr. Kilby gave an off-the-cuff reply in the negative.

**83** When the inspection was finished and Mr. Kilby had left the property, Ms. Tremeer and Ms. Gordon considered whether to waive the offer's inspection subject clause. Ms. Gordon felt that the inspection had gone well. She decided to waive the clause.

**84** On May 16 Ms. Gordon met with Ms. Tremeer. They went over the Kriegs' P.D.S. Ms. Tremeer's testified that she understood that the P.D.S. was important. She said:

> Q: Do you recall anything more about your discussion with Miss Gordon about that document or what was on that document?
>
> A: Um, yes we went through it line by line, we read every line.
>
> Q: Why did you choose to do that as a realtor?
>
> A: Because it is what we go by, it is the realtor's bible. Its, that's what the seller says is in the house, that's what the seller warrants the state of the house is in to the new buyer, so it is very important that we be happy with every one of his lines.

**85** Ms. Tremeer did not say that she told Ms. Gordon that the P.D.S. was in fact the Kriegs' warranty as to the state of the house.

**86** For Ms. Gordon's part, when the Kriegs' counsel Mr. Shields pointed out that the P.D.S. indicated that Mr. Krieg was not aware of any structural defects in the house, Ms. Gordon said this:

> Q.: So, in essence where box number H is checked off, you didn't really rely upon that, what the vendor had put in there, did you? You were satisfied, based upon what Mr. Kilby had told you, that information, and that is what you relied upon, you didn't rely upon the property disclosure statement, did you?
>
> A.: I relied on what Mr. Kilby had told me and on the property disclosure statement. Mr. Kilby had told me that there wasn't anything to worry about and this is confirmed here that Mr. and Mrs. Krieg did not know of any structural problems. If they had known of anything they were required to tell me about it. And they didn't.

**87** On May 16, 2006 Ms. Gordon waived all of the subject clauses to her offer to purchase the house. The transaction closed and Ms. Gordon took possession on June 15, 2006.

**June 2006 - Present: Ms. Gordon**

**88** At first, Ms. Gordon was pleased with her new house. By September 2006 she had found renters for each of the two spare bedrooms in the house. Each renter paid Ms. Gordon $450 per month. However, she soon began to notice that some things were amiss. She saw that the doors in the master bedroom and ensuite were did not sit squarely in their frames. She discovered that the floor of the master bedroom was sloped. She saw that there were gaps between the baseboards and the floors in the master bedroom and the ensuite. There was a 1/4" gap between the wall and the floor by the shower stall in the ensuite. These things did not overly concern Ms. Gordon. Ms. Gordon offered no explanation for why it was that she noticed these aspects of the house only after moving in and not before.

**89** In January 2007, however, Ms. Gordon's satisfaction with the house was shaken. That came about when one of her friends came for a visit. Her friend went down into the crawl space and happened to notice light coming in from above the foundation wall. She pulled out a piece of fibreglass insulation that was resting between the ends of the floor joists in the southwest area of the crawl space. With the insulation removed Ms. Gordon's friend saw that the ends of the floor joists were suspended above the sill plate on the top of the foundation wall. She pointed this out to Ms. Gordon. Ms. Gordon became concerned and unhappy. Ms. Gordon called PTP and had Mr. Kilby and Mr. Hostland over to have a look at the foundation. In the course of their visits, Messrs. Kilby and Hostland removed more of the fibreglass insulation that was packed between the joist ends. They discovered that the southwest corner of the building was not resting on the foundation. It was, in fact, being held up by the walls and roof of the house. How long the joists had been suspended in the air was then and is now not known. However, it was clear that at some point in the past someone

had used pieces of lumber and applications of grout in an effort to close the gap between the joists and the sill plate. Mr. Kilby and Mr. Hostland also observed foundation wall cracks in addition to the crack that Mr. Kilby noticed in May 2006. These were the cracks that Messrs. Wilson and McKinney had seen in April 2006. These additional cracks clearly indicated that the southwest corner of the foundation had settled and was lying below its original elevation.

**90** Notwithstanding her knowledge that the house's foundation had cracked and settled, Ms. Gordon decided to press on with her plan to renovate the attached garage. She wanted to turn that space into a studio where she could make her ceramic art pieces. Ms. Gordon's desire for a home-based studio was spurred by the fact that her lease at the Rotary Center for the Arts would expire in September 2007. Ms. Gordon retained Mr. Budd. Mr. Budd operates a renovation contracting business. Mr. Budd had seen the cracked and settled foundation earlier in 2007 but his knowledge of that problem did not prevent him from accepting Ms. Gordon's retainer to do a $22,000 renovation of the attached garage.

**91** Mr. Budd started work on the renovation in March 2007. He did two or three day's work but then became concerned that perhaps the wall of the garage was being affected by settlement as well. He advised Ms. Gordon that if he continued on and completed the job, there was a possibility that some of his work would have to be removed in order to fix what he thought to be a settlement problem in the garage. Under cross-examination by Mr. Pettit, Ms. Gordon admitted that she could have chosen to rough in a studio in the garage. That would have entailed insulating the street-side wall, bringing in water and drainage, and putting down appropriate flooring. She rejected that notion though, saying that a roughed in studio would not be an appropriate space for her to create her ceramic art. Mr. Budd testified that a studio could have been roughed into the garage space at a cost of several thousand dollars less than the original contract price of $22,000.

**92** When Ms. Gordon's lease at the arts center expired she ousted one of her tenants and moved her studio equipment into the vacated bedroom. She testified that since September 2007, she has been foregoing rent of $500 per month because she had to use that bedroom to store her studio equipment.

**93** In July 2007, on instruction from the plaintiff, Mr. Howard Johnson surveyed the foundation. He did not measure the tops of the foundation walls because they were difficult to access. Instead, Mr. Johnson surveyed various points on the footings on which the foundation walls rested and the corresponding undersides of the floor joists where they intersected the foundation walls. Mr. Johnson assumed that the foundation footings and walls respectively were roughly uniform in height. That assumption was not proven to be true - - in fact, Mr. Johnson himself testified that the elevation of the footings could vary by up to one inch and that the elevation of the top of the foundation wall could vary due to trowelling and construction practice. Mr. Johnson testified that some builders are simply not very particular about how level they make their foundation footings.

**94** Subject to whatever variances may have been present in the foundation footings and walls, Mr. Johnson's survey revealed that the southwest corner of the foundation was approximately six inches below level.

**95** Mr. Johnson charged Ms. Gordon $300 for his survey. Mr. Johnson testified that he could have done another survey later. A second survey, separated by one, two, three, or -- even better -- four years, would have provided empirical evidence of whether the foundation has continued to sink or whether it has reached a steady state. The evidence was quite clear that Ms. Gordon could have

afforded a second survey. She offered no explanation for not ordering one. This is odd, given that a central issue in this case is whether the foundation will be subject to significant further settlement. Evidence that settlement is a present and ongoing process would tend to show that further settlement may be significant. Evidence that settlement is static would tend to show that any further sinking will be minimal.

**96** In November 2008, Ms. Gordon hired Mr. Johnson to shore up the southwest corner of the building. Mr. Johnson and his crew used a jack to lift and level the floors of the master bedroom and ensuite. They then rebuilt the supporting pony wall under those floors. The crew also manufactured long shims which they placed between the sill plate on the top of the foundation wall and the ends of the floor joists. When their work was done, the floors were level and the house's structure was resting as it should on its foundation. Mr. Johnson charged Ms. Gordon $408 for that work.

**97** In August 2007, Ms. Gordon took employment at a machine shop. She worked there until she was laid off in November 2008. Unfortunately, her work at the machine shop caused Ms. Gordon a repetitive strain injury to her wrists. She has not fully recovered from that injury. After the machine shop, Ms. Gordon worked for a short time as a sales clerk at a dress shop. In the spring of 2009, Ms. Gordon started full-time work as a clerk at a bulk food store. Her income from her employment has been uniformly greater than her income from her ceramic art. Counsel asked Ms. Gordon why she took employment in 2007:

> Q.: In 2007 you went out and got paid employment.
>
> A.: Yes
>
> Q.: Why was that?
>
> A.: I knew that this lawsuit was gonna be costing massive amounts of money that I didn't have and I had, um, in order to obtain some more credit so I could borrow some money for paying for the, uh, engineers and legal fees and everything I needed to arrange a large line of credit and in order to do that I needed to have, uh, have a regular source of income.

**98** Ms. Gordon's output of ceramic art has, since 2007, been virtually nil. Despite this, she still keeps her art supplies in one of the house's bedrooms. Ms. Gordon thus foregoes the $500 per month rent that she could get for that room if it were empty and if she kept her supplies elsewhere, such as her attached garage or detached shop.

**99** Ms. Gordon has, in fact, borrowed money to fund her lawsuit against the defendants. Her borrowings to date are on the order of $80,000. The total amount of interest and premiums she has paid for life insurance against her borrowings to December 31, 2011 is $9,890.88. Ms. Gordon has

paid an additional $3,600 interest from then to September 1, 2012. Her interest payments continue at about $400 per month.

**100** Ms. Gordon claims special damages as follows:

- Loss of value of building permit for garage to studio conversion: $36.75
- Irrigation Repair: $222.54
- Drainpipe extensions: $14.11 and $2.29
- Renovation fees thrown away paid to Mr. Budd: $2,120.00
- Stabilization fee paid to Mr. Johnson: $408.00
- Prescription and over the counter medications: $500.00

**101** These items were noted in Exhibit 18. The other items in Exhibit 18 (excepting interest payments and bank charges) are litigation disbursements.

**102** Ms. Gordon complains that her emotional wellbeing has been damaged by her experience with the house. In support of her claim for damages for emotional upset, Ms. Gordon submitted two reports from her family physician Dr. Crittenden. Those reports indicate that it was in October 2009 that Ms. Gordon made her first complaint of emotional upset relating to the house. Her complaints since then have been an amalgam of unhappiness and stress relating to the state of the house itself, litigation over the house, her financial circumstances, and her work environment. Dr. Crittenden diagnosed Ms. Gordon as suffering from a degree of depression and anxiety. He prescribed a course of the tranquillizer Ativan.

**103** At trial, Ms. Gordon presented with a noticeably flat affect. She was clearly unhappy with her situation. Ms. Gordon's primary complaint, though, had to do with her finances. She was very unhappy at having incurred approximately $80,000 of debt in order to fund her litigation. She has been able to pay only the interest on her debt and does not know how, other than through success in this suit, she can pay off the principal of that debt. Ms. Gordon was also manifestly unhappy about her work situation. She testified that she felt frustrated and has been occasionally driven to tears by having to adhere to her employer's schedule whereas in the past her work as an artisan allowed her ample flexibility. For example, on one occasion Ms. Gordon wished to go to a badminton tournament but her employer refused to give her time off from her job. Before taking up wage employment, Ms. Gordon could have simply shuttered her studio for a week or so and attended the tournament. Ms. Gordon's evidence made it clear that she is deeply rankled by the loss of her independence.

### Foundation Settlement: Present and Future

**104** Ms. Gordon maintains that she has seen signs in the house that indicate to her that it is still settling. Ms. Gordon also relied on observations by the structural engineer Mr. Frie to support her admittedly lay opinion. Mr. Frie tendered an expert report which addressed, among other things, whether settlement was an ongoing issue. Mr. Frie opined that settlement was ongoing. He based his opinion on a number of observations that he made about the house.

**105** I regret that I cannot rely on Mr. Frie's report. I have come to that conclusion due to a number of flaws that appear in his several reports and because of the way that those reports were generated. As to the latter, under cross-examination Mr. Frie admitted that Ms. Gordon's counsel Mr. Moffat drafted the report for him. Mr. Frie has basically adopted Mr. Moffat's writing as his

own. That the report was produced this way diminished my confidence that Mr. Frie has expressed his own unbiased views. It suggests that Mr. Frie has, instead, unconsciously allowed himself to be an advocate for Ms. Gordon.

**106** As to the errors in his report, on some general matters Mr. Frie was simply wrong. For example, Mr. Frie asserted, incorrectly, that the detached shop was part of the original construction of the house. For another example: in his June 6, 2012 report, Mr. Frie quoted Mr. Smith's April 1, 2011 report as saying "Under the garage (detached garage) a geotextile was placed over the excavated surface and approximately 1.2 m of fill was placed in lifts and compacted". In his report, Mr. Smith had, in fact, attributed the geotextile fabric to the attached garage, not the detached garage. Mr. Frie admitted that he had deliberately added the words "detached garage", thus purposefully misquoting Mr. Smith. The difference matters; Mr. Frie was of the view that the detached shop is more stable than the attached garage. Attributing the geotextile fabric to the detached shop would tend to bolster his opinion. Attributing the fabric to the attached garage would tend to undermine Mr. Frie's opinion that the attached garage is settling along with the house. Mr. Frie could offer no explanation for having made this error.

**107** More specifically, to support his opinion that foundation settlement is a present and ongoing process Mr. Frie relied upon his interpretation of various photographs of the house and on his memory of what he saw and when. Under cross-examination, Mr. Frie admitted that in many cases he was either mistaken or that he had forgotten the state of the house when he first viewed it. For example, based on photographs of a pile of loose bricks by the front door, Mr. Frie asserted that between 2007 and 2011 the front of the house sank. Mr. Frie admitted that a loose pile of bricks by the front door is a poor indicator of anything and that they do not prove anything beyond the fact that they were at the front of the house. Further, Mr. Frie asserted that a crack in the cement slab outside of the detached shop first appeared between 2011 and 2012, thus providing a clear and unequivocal indication that the ground around the detached shop was in the process of moving. On the strength this observation, Mr. Frie confirmed his opinion that the ground around the house was actively settling. Mr. Frie was, however, forced to admit that very same crack had, in fact, been there in 2007 and that it was not actually proof of recent settlement. Finally, in his 2011 report he stated that the foundation had not moved between 2007 and 2011, but then that it had suddenly started moving between 2011 and 2012. He attributed that movement to the foundation being on "soft ground". The difficulty with that proposition is that the foundation has always been on soft ground -- Mr. Frie had no explanation other than perhaps an earthquake (there was no evidence that a seismic event had happened in that interval) for settlement having been static for four years and then suddenly become active.

**108** Finally, Mr. Frie brought a degree of hubris and inconsistency to his task. As to hubris: Mr. Frie's testimony was to the effect that when it comes to soil stability, he sees little need for the opinion of a geotechnical engineer. His evidence was that, having been a structural engineer for more than 40 years, he knows what needs to be known about soil conditions. Geotechnical engineers are, in his view, "nice to have" but unnecessary. That was the gist of his evidence at trial. The weight of the other evidence at trial, and in particular the weight of the evidence of the two geotechnical engineers and the one other structural engineer, was to the effect that in cases like this house on this soil, geotechnical advice is not merely "nice to have" but that it is, instead, essential.

**109** As to inconsistency: when he was confronted by an earlier version of his report under cross-examination, Mr. Frie was forced to admit that despite his view that geotechnical advice was

not necessary, he had in fact instructed Ms. Gordon's counsel to retain a geotechnical engineer and, further, that he was not prepared to give a final structural engineering opinion until he after he received the geotechnical report. Mr. Frie was not able to reconcile those two views.

**110** For these reasons I find that it would be unsafe to give much weight to Mr. Frie's opinions and conclusions.

**111** I do accept that between 2007 and the end of 2012 there has been some additional drywall cracking on the main floor of the house. I find that these are consistent with the geotechnical opinions of Messrs. Smith and Imada. In 2011 those gentlemen independently came to the conclusion that, subject to water infiltration or significant seismic events, if the house's foundation does have more settlement, that movement will be limited to a maximum of 50 millimeters. Mr. Johnson's work in late 2008 put the weight of the house back on its foundation. I find that it is more likely than not that in response to the load going back on the sill plate, the foundation has moved down slightly. That movement would account for the additional drywall cracking about which Ms. Gordon complains. There was, however, no empirical evidence to establish that the movement has been anything other than the movement Messrs. Smith and Imada predicted in their reports.

**112** For these reasons, I find that the foundation has moved slightly since late 2008 but that that movement has been within the parameters predicted by the geotechnical engineers. The evidence at trial was clear that the drain pipes in the southwest corner have now been relocated so that water is no longer passing directly down along the foundation walls.

**113** There was no evidence as to what magnitude of seismic event would be necessary to cause damage to this house that would not also be caused to other residences in the area. There was no evidence at trial as to the frequency of such seismic events. I accept the evidence of the structural engineer Mr. Weilmeier, who said that residences like Ms. Gordon's house do not have to be constructed to guard against damage by earthquake.

**114** I accept the opinions of the structural engineers who testified that further movement by the foundation of up to 50 millimeters would not put an unreasonable stress on the structure of the house. That is because the building has a wooden frame which is both flexible and robust. The engineers felt that it would be prudent to institute a system of monitoring the elevation of the foundation. I agree with that proposition.

**115** In conclusion, I find that the foundation is now in a reasonably steady state. Further, I find that the evidence does not support the proposition that there is a realistic or a substantial possibility that the foundation will settle more than an additional 50 millimeters. Finally, whatever movement the foundation has had in the past I find that that movement never rendered the house uninhabitable or unsafe for ordinary use and occupation.

## The Plaintiff's Claims

### Against William and Kathleen Krieg

**116** Ms. Gordon's claim against William and Kathleen Krieg is grounded in the tort of negligent misrepresentation. Ms. Gordon asserts that before they accepted her offer to buy the house, William and Kathleen Krieg knew or ought to have known that the foundation of their house had cracked and settled, that the floors of the master bedroom and ensuite were sloped, and that extensive work costing no less than $35,000 was required to repair the problems with the house. Ms.

Gordon argues that William and Kathleen Krieg misrepresented their knowledge of the state of the house to her. She says that the misrepresentation was embodied in the P.D.S. that William Krieg completed in March 2006 and which he did not update in April after he had Team Foundation to the house. Ms. Gordon says that William and Kathleen Krieg thus represented to her that the house had no structural defects when, in fact, they were aware that it did have structural defects.

**117** Ms. Gordon maintains that she relied in part upon the Kriegs' P.D.S. when she decided to waive the subject clauses, thus committing herself to buy the house.

**118** Ms. Gordon has not argued, nor was there evidence to support the notion, that the Kriegs committed any misrepresentations other than those allegedly contained in the P.D.S. Ms. Gordon does not take the position that the P.D.S. was anything other than a set of representations concerning the Kriegs' knowledge of the state of the house. More specifically, she does not argue that the P.D.S. amounted to the vendor's warranty as to any particular quality of the building or property. Ms. Gordon's position is congruent with the law: statements made in property disclosure statements are representations only -- they do not in and of themselves, amount to a vendor's warranty: *Kiraly v. Fuchs*, 2009 BCSC 654.

**119** It is important to note that earlier in the proceeding Ms. Gordon's pleadings asserted that that the Kriegs had committed fraudulent misrepresentation. Ms. Gordon amended her notice of civil claim five times. By the time the case came to trial, Ms. Gordon had abandoned her pleading of fraudulent misrepresentation, thus confining her claim to negligent misrepresentation.

**120** The essential elements of negligent misrepresentation are:

1. There must be a relationship between the person making the representation and the person receiving it.
2. The representation must be untrue, inaccurate or misleading.
3. The person making the representation acted negligently in making it.
4. The person to whom the representation was made relied on it in a reasonable manner.
5. The reliance was detrimental in the sense that damages flowed from the reliance.

(*Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87)

**121** Misrepresentation in the context of real estate transactions has recently been examined by this court in the case of *Cardwell v. Perthen*, 2006 BCSC 333, affirmed on appeal, 2007 BCCA 313. In *Cardwell*, Ballance J. held that a vendor will not be responsible for misrepresentations to a purchaser unless he:

a. fraudulently misrepresents or conceals a defect;
b. knows of a latent defect that renders the house unfit for habitation;
c. is reckless as to the truth or falsity of the statements relating to the fitness of the house for habitation; or
d. breaches his duty to disclose a latent defect that renders the premises dangerous.

**122** The first avenue in *Cardwell* that leads to vendor liability does not apply here, because Ms. Gordon has not alleged fraud.

**123** The evidence in the case established beyond question that Mr. Zarr, the Kriegs, and Ms. Gordon successfully lived in the house throughout. No engineer or expert in construction matters testified that the house has ever, for any reason, been uninhabitable or dangerous. Therefore the second and third avenues to vendor's liability do not apply here either.

**124** The fourth avenue does not apply here because even if the defects in the house were latent, the defects have not rendered the house dangerous.

**125** On a straightforward application of the law relating to misrepresentation in the context of real estate transactions, then, Ms. Gordon's claim against William and Kathleen Krieg must fail. I note that this result may have been different had Ms. Gordon persisted with her allegation of fraud by William and Kathleen Krieg.

**126** Before leaving this discussion, I will return for a moment to the question of latent versus patent defects in order to explain my conclusion that the defects in this house were not latent. In *Cardwell*, Ballance J. described the difference between latent and patent thus:

> [122] The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person: ***44601 B.C. Ltd. v. Ashcroft (Village),*** [1998] B.C.J. No. 1964 (S.C.) [***Ashcroft***]; ***Bernstein v. James Dobney & Associates***, 2003 BCSC 986 [***Bernstein***]. In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example ***Eberts v. Aitchison*** (2000), 4 C.L.R. (3d) 248, 2000 BCSC 1103.

**127** I accept Ms. Gordon's evidence that when Mr. Kilby pointed it out she noticed the slope in the master bedroom floor. I find that Ms. Gordon did not subjectively appreciate what the slope could signify. In my opinion, a reasonable person in Ms. Gordon's position would have been alerted by the sloped floors and would have appreciated that they: a) were not normal, and b) needed to be looked into. That further inquiry could have been performed by Ms. Gordon herself. If she had undertaken that inquiry she would have paid attention to the state of the foundation walls. Ms. Gordon would have seen the numerous cracks evident in the interior and exterior of the foundation walls and she would have learned for herself that the foundation in the southwest corner of the building had subsided. Alternatively, if it was not reasonable for Ms. Gordon to have looked into the state of the foundation herself, the fact that the floors were sloped was an observable defect that triggered an obligation to have that defect inspected by a qualified person. Given the clues present in the building, and given the nearly instantaneous diagnosis Team Foundation's personnel came to, I find that a qualified person would have had no difficulty discovering the cracked and settled foundation.

**128** For these reasons I conclude that the cracked and settled foundation was there to be seen and appreciated by a reasonable prospective purchaser. It was a patent defect. Because it was a patent defect, it cannot be the subject of a claim by Ms. Gordon for negligent misrepresentation.

**129** In the result, the claims against William and Kathleen Krieg must be dismissed.

**Against Wolfram Krieg**

**130** Before embarking on a discussion of Ms. Gordon's claims against Wolfram Krieg, it is useful to note that Wolfram Krieg made no representations to Ms. Gordon independent of or in addition to the vendor's representations. For that reason, Ms. Gordon has no claim against Wolfram Krieg for having made negligent misrepresentations to her.

**131** Instead, Ms. Gordon asserts that Wolfram Krieg is liable to her for:

> - Breaching a duty owed to her to independently inspect the Cerise Drive house, inform himself of its defects, and to share that information with her; and
> - Breaching a duty owed to her to share with her the knowledge that he gained in his meeting with William Krieg on April 28, 2006. It was in that meeting that William Krieg advised Wolfram Krieg that the repair estimate was $30,000 to $35,000.
>
> (from Ms. Gordon's notice of civil claim)

**132** Ms. Gordon also asserts that Wolfram Krieg learned from William Krieg in their meeting that the house's foundation was actually cracked. For the purposes of this discussion, it does not matter whether Wolfram Krieg knew that the foundation was cracked. The fact that he knew of the $35,000 quote is, in my opinion, sufficient to trigger a discussion of this issue. Adding knowledge of cracks in the foundation to the factual matrix would not alter the calculus of Wolfram Krieg's potential for liability. That addition might have mattered had Ms. Gordon alleged fraud against Wolfram Krieg, but she did not, and so the issue is moot.

**133** Whether Wolfram Krieg owed a duty of care to Ms. Gordon is a matter of law. The principles that govern whether a duty of care exists between a plaintiff and defendant were laid down in the Supreme Court of Canada decision of *Cooper v. Hobart*, 2001 SCC 79. The Court began its discussion by harking back to the genesis of the law of negligence:

> 22 In *Donoghue v. Stevenson*, [1932] A.C. 562, the House of Lords revolutionized the common law by replacing the old categories of tort recovery with a single comprehensive principle -- the negligence principle. Henceforward, liability would lie for negligence in circumstances where a reasonable person would have viewed the harm as foreseeable. However, foreseeability alone was not enough; there must also be a close and direct relationship of proximity or neighbourhood.

**134** Proximity was the next subject of discussion in *Cooper*. The Court referred to *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.):

> 24 In *Anns*, supra, at pp. 751-52, the House of Lords, per Lord Wilberforce, said that a duty of care required a finding of proximity sufficient to create a *prima facie* duty of care, followed by consideration of whether there were any factors negativing that duty of care. This Court has repeatedly affirmed that approach as appropriate in the Canadian context.

**135** The Court then observed that the importance of the *Anns* decision was its recognition that policy plays important roles in determining whether a particular relationship gives rise to a duty of care. The Court articulated the test of whether a duty of care exists in this way:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, [1987] J.C.J. No. 15, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> (emphasis in original)

**136** As to the first stage of the *Anns* process, on the facts of the present case, I have no doubt that Wolfram Krieg could have reasonably foreseen that Ms. Gordon could suffer harm if he failed to inspect the house and if he failed to tell Ms. Gordon of the result of his inspection. Likewise, Wolfram Krieg could reasonably have foreseen that Ms. Gordon would suffer harm if he did not volunteer to tell her what he knew about the $35,000 quote or, assuming he knew about it, about the cracked foundation. The foreseeability element of the first stage of the *Anns* test is, therefore, made out here.

**137** The second part of the first stage of the *Anns* test presents some difficulty for Ms. Gordon. That second part is: "are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?"

**138** The facts of this case are that Wolfram Krieg was acting solely as the vendor's agent. Real estate agents who act solely for one side of a transaction provide a valuable service to their clients. Those valuable services are set out in the Working with a Realtor contracts that both Ms. Gordon and the Kriegs made with their respective agents. Among other things, those contracts required the realtor to act solely in the interests of his client. To impose a duty of care of the type that Ms. Gor-

don advocates would vitiate at least that part of the sole agency contracts. It would have the practical effect of imposing dual agency on parties who have specifically contracted for sole agency.

**139** Further, to impose a duty of care such as Ms. Gordon proposes would be to place Wolfram Krieg in a position of conflict; he would have to choose between exposure to a claim by his client for impairing his client's interest and exposure to a claim by a purchaser for failing to compromise that same interest. Simply put, there are good policy reasons for preserving the relationship that arises when a realtor agrees to act exclusively for a client. In other words, the duty of care that Ms. Gordon advocates would jeopardize that relationship by setting up a conflict between the realtor and his client.

**140** For these reasons, I find that sufficient policy reasons arise from the relationship between the parties to justify resisting the imposition of a duty of care such as Ms. Gordon advocates. In the result I find that Ms. Gordon has not established that in law Wolfram Krieg owed a duty of care to her.

**141** Ms. Gordon's claims against Wolfram Krieg and his real estate brokerage must be dismissed.

### Against PTP, Mr. Kilby, and Mr. Hostland

**142** In the course of the trial, Ms. Gordon admitted that she had not made out a case against Mr. Hostland. She agreed that her claims against Mr. Hostland should be dismissed with costs to be determined.

#### *What Contract?*

**143** Before discussing this topic it is important to appreciate that Ms. Gordon's notice of civil claim asserted that the contract she had with PTP was comprised of the materials she received by fax from PTP on May 11. She asserts that the faxed materials comprised PTP's offer to inspect the house for the fee quoted and PTP's warranties that:

a. PTP provided a comprehensive home inspection system;
b. PTP provided a comprehensive reporting system;
c. The Plaintiff could rely on the PTP report "from offer to purchase to resale";
d. PTP provided "... the best system in the industry in a comprehensive way that leaves you anxiety free";
e. PTP would "assess for significant deficiencies";
f. PTP would "fairly and accurately report on the condition of the home";
g. That "nobody is more thorough" than PTP;
h. PTP would provide "a comprehensive cost estimate for repairs";
i. PTP would provide "structural and building envelope reviews by a professional engineer";
j. PTP "was skilled and experienced in the business of home inspections".

**144** Ms. Gordon says that her contract with PTP was made when she accepted PTP's offer when she called PTP on May 12 and made an appointment to inspect the house at 9 a.m. the following Monday.

**145** In its defence, PTP argues that the contract between it and Ms. Gordon comprised the written contract that Ms. Gordon signed on May 15 at the Cerise Drive house.

**146** This issue is not difficult to resolve. Ms. Gordon acknowledged that when she spoke on the telephone to PTP's receptionist Ms. Janussen, she was told that she would have to sign a contract. Ms. Gordon made of note of that fact and that note was entered into evidence in the trial. Ms. Gordon admitted that the note recorded what had been said to her. No reasonable person who had just had that conversation and who then received PTP's promotional material could have mistaken the promotional material for a contract. The PTP brochure was clearly nothing more than an enticement to Ms. Gordon to give PTP her business. I have already found that Mr. Hostland advised Ms. Gordon that she would have to sign a contract on May 15 before she could receive the results of the home inspection, and the evidence is clear that Mr. Kilby presented Ms. Gordon with that contract as soon as she arrived at the house that morning. Ms. Gordon admitted that she understood that if she did not sign that contract Mr. Kilby would not provide her with the results of his inspection.

**147** Given these facts, it is beyond question that Ms. Gordon did not have a contract with PTP until she signed the document that Mr. Kilby presented to her on May 15.

### *Limited Liability Clause*

**148** The next issue to consider is whether Ms. Gordon is bound by the contract's limited liability clause. Ms. Gordon based her resistance to the limited liability clause on two propositions. The first is that she and PTP were not *ad idem* on the terms of the agreement. The second is that she should not be held to it because the limited liability clause is an unconscionable contractual provision.

### *Non Est Factum*

**149** The general rule is that a party is bound by the terms of the contract he or she executes: *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (S.C.). There are exceptions to that basic proposition. One of those exceptions invokes the principle of *non est factum*, i.e.: "it is not my deed". According to *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 (C.A.), a party cannot be bound to a contract when the document was signed in circumstances which made it not the party's act. The defence of *non est factum* is a difficult one to make out. In his text *The Law of Contract in Canada*, 6th ed., (Scarborough: Carswell, 2011) at page 280-282, Fridman Q.C. wrote:

> ... It is a difficult matter to invoke the plea successfully. The onus of proof is heavy upon a party raising the plea. What must be proved, as the Ontario Divisional Court stated is that the party relying on *non est factum* was not careless and that the document signed was different from what the party in question thought he or she was signing. Most of the cases in which it has been raised resulted in lack of success for the party seeking to rely on the plea. Various reasons were given for this. In some instances there was no mistake. In others the mistake that was made did not go to the nature of the document that was signed, but either to its contents or its legal consequences, neither of which would suffice to satisfy the test in *Saunders*. In other instances the plea failed because of the carelessness of the party raising the plea (but the defence will operate if the mistake was caused by the other party's fraud or negligence). Where the plea has been

> successful, it has been because the party signing the document was ignorant of the English language and did not know what was going on; or was of limited education and reading ability and was mistaken as to what the document was; or relied on what she was told by her husband to whom she was subservient in business matters, so she did not know what she was signing.

**150** Ms. Gordon says that she cannot be bound to the terms of the contract because she was not aware of its provisions and because Mr. Kilby applied undue pressure on her to sign it. She says that she was not aware of its provisions because she did not have her reading glasses with her and she could not read the contract without them. Ms. Gordon's evidence-in-chief on that point was this:

> Q: What did that document look like?
>
> A: It looked like there was three pages of very small print.
>
> Q: So he brings out this, this document does he?
>
> A: Yes.
>
> Q: 'K, and then what discussion takes place?
>
> A: He wanted me to read it and sign it. And I looked at it and I had trouble reading it. The print was very tiny, um, long lines of tiny print, um, I said that I didn't have my reading glasses, um, the information that I received had said that the report would be easy to read so I didn't bring my reading glasses. I tried to read the contract and had real difficulty reading it.
>
> Q: What was the difficulty?
>
> A: The difficulty was that the print was really small and detailed and I had trouble actually reading the document, even though I could make out some

of the words, by the time that I got to the end of the line it was just difficult to comprehend.

A: Why was it difficult to comprehend?

Q: I couldn't read it continuously, I was struggling to make out the words.

**151** Ms. Gordon's testimony shows that she was aware that she had contractual terms in front of her and that she applied herself to reading them. I have found that Mr. Kilby paraphrased for Ms. Gordon the essential elements of the contract and of the limited liability clause in particular. Mr. Kilby's paraphrasing did not misrepresent the terms of the contract, nor did he suggest to Ms. Gordon that the contract governed some relationship other than the relationship between Ms. Gordon and PTP.

**152** The evidence at trial clearly demonstrated that Ms. Gordon knew that the contract that Mr. Kilby presented to her concerned the home inspection that she wanted PTP to perform. It cannot be said that Ms. Gordon thought that she was signing one thing but that she signed something else entirely.

**153** Ms. Gordon says that Mr. Kilby applied pressure on her to sign the contract in a rush. She says that she needed to have the result of the home inspection from Mr. Kilby and that Mr. Kilby gave her to understand that his schedule would not permit time for her to carefully go through the contract's terms. The theory that underlies Ms. Gordon's position is that her circumstances were such that she had no choice but to do business with PTP. According to her, she had only that day and that time to obtain a home inspection report.

**154** There are flaws in Ms. Gordon's contention. One of those flaws lies in Ms. Tremeer's evidence that she had in her office business cards from numerous home inspection agencies and that her practice is to allow her client to choose whichever inspector the client wants to do business with. I infer from that evidence that Ms. Gordon was aware that PTP was not the only home inspection agency operating in the Kelowna area. Another flaw in Ms. Gordon's position is the uncontested evidence that Ms. Gordon was able to arrange a home inspection with PTP on relatively short notice. Ms. Gordon adduced no evidence that she would have been unable to arrange an appointment with some other inspection agency in the event that she was unhappy with PTP's terms. Finally, Ms. Gordon had until May 19 to remove the subject clauses in her offer to purchase. Ms. Gordon therefore had four days within which to consider her position. It cannot be said, therefore, that anything Mr. Kilby did applied unreasonable pressure on Ms. Gordon to sign a contract she did not like or did not understand.

**155** In the result I have concluded that the defence of *non est factum* cannot assist Ms. Gordon.

***Unconscionable Contract***

**156** Ms. Gordon's second line of attack on the limited liability clause is that it is unenforceable because it is unconscionable. PTP correctly points out that, despite having amended her statements and notice of claim five times, Ms. Gordon has never specifically pled that the exclusion clause was unconscionable. In fact, her pleadings do not address the written contract at all -- she has maintained throughout that the contract been her and PTP comprised the fee quote and the promotional materials she received by fax via Ms. Tremeer's office. PTP argues that Ms. Gordon should not be heard to argue unconscionability without first having plead it.

**157** Ms. Gordon's pleadings are not perfect and PTP is correct when it says that Ms. Gordon did not put unconscionable contract squarely on the issue board. However, Ms. Gordon clearly understood and was not prejudiced by PTP's reliance on the exclusion clause, PTP was not taken by surprise by Ms. Gordon's position that she should be excused from its effect, and in the course of the trial the parties adduced evidence relevant to the question. In other words, the parties conducted the trial as if unconscionable contract was a live issue. In these narrow and, I hope, rare circumstances I will consider Ms. Gordon's argument on unconscionable contract notwithstanding the state of her pleadings.

**158** In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, the Supreme Court of Canada established the analytical framework for the consideration of a contractual exclusion clause. Binnie J., wrote:

> [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" ([*Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426], at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

**159** The *Tercon* analysis requires a three-stage process: applicability, unconscionability, and overriding public policy. As to the first, applicability, Ms. Gordon's claims sound in breach of contract and the tort of negligence. All have to do with Mr. Kilby's performance during the home inspection. Broadly put, Ms. Gordon complains that Mr. Kilby did not do a proper job of inspecting the house because he missed or misinterpreted signs of settlement and that he failed to warn her of the condition of the house. Those acts would be breaches of the contract between her and PTP. She

complains that Mr. Kilby gave her negligent advice -- that the house was solid, that the sloping floors were not associated with the foundation, and that the cost of needful repairs would be less than $500 -- and that she acted on that advice to her detriment. If proven, that would be the tort of negligent misrepresentation. The exclusion clause contains these terms:

> **4. Inspector and its employees are limited in liability to the fee paid for the inspection services and report** in the event that Client or any third party claims that Inspector is in any way liable for negligently performing the inspection or in preparing the Inspection Report, for any breach or claim for breach of this Visual Inspection Agreement or for any other reason or claim.

**160** The clause clearly provides protection for negligence in performing the inspection or preparing the report and any breach of the agreement. Ms. Gordon's claims fall squarely inside the scope of the exclusion clause. The clause is therefore applicable to the claim and the first stage of the *Tercon* test is met.

**161** In *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, Frankel J.A., discussed the test for unconscionablity in contract. He wrote:

> [29] The language used to express the test for unconscionability has varied over the years. It was put this way by Mr. Justice Davey, as he then was, in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 at 713 (B.C.C.A.):
>
> > [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].
>
> [30] That test was recently discussed in *McNeill v. Vandenberg*, 2010 BCCA 583, and *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500. In *McNeill*, Madam Justice Garson stated:
>
> > [15] In order to set aside a bargain for unconscionability, a party must establish:
> >
> > (a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
> > (b) proof of substantial unfairness in the bargain.
> >
> > This test was articulated in *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (B.C.C.A) at 173 and reiterated in *Klassen v. Klassen,* 2001 BCCA 445.

> [31] In *Roy*, Mr. Justice Tysoe (at para. 29), quoted the following from the judgment of Madam Justice McLachlin, as she then was, in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263 (C.A.):
>
> > Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrsion v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).
>
> Mr. Justice Tysoe went on to state (at para. 30), that in *Tercon*, Binnie J. was "not intending to signal a departure from the usual test for unconscionability."

**162** The first question to ask is, as Garson J.A. put it in *McNeill*, was there "inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger"? That test has been recently applied in this court in the retrial of the *Roy* matter. The retrial is reported at *Roy v. 1216393 Ontario Inc.*, 2012 BCSC 1752, and on the issue of inequality of the parties' positions, Bruce J, wrote:

> [138] ... To render the contract or the limitation clause invalid there must be evidence that the aggrieved party was in the control or power of the other party to the extent that their will is overborne. Typical examples include ignorance of the contract terms due to illiteracy, blindness, and senility of the weaker party. ...

**163** In the present case, none of those typical examples apply to Ms. Gordon. She was not illiterate, blind or senile. She felt that she was in a hurry and had to get the house inspection done that day, but her belief was not reasonable in light of the fact that she had four more days to complete a house inspection. Ms. Gordon may not have had her reading glasses with her that day, but that is no answer because she could, in fact, make out the words of the contract without the glasses. Ms. Gordon simply did not take the time she needed to carefully read the document. In any event, Ms. Gordon cannot be said to have been ignorant of the essential terms of the contract, including the limitation clause. That is because Mr. Kilby explained those terms to her verbally before she signed it. I do not doubt that Ms. Gordon was careless in signing the contract, and I do not doubt that she now regrets having done so. However, the evidence does not go so far as to show that Mr. Kilby somehow procured her signature by overwhelming ability to act independently.

**164** Because the evidence does not satisfy me that there was the necessary degree of equality of position between Ms. Gordon and PTP, it is not strictly necessary to consider whether the bargain was substantially unfair. For the sake of completeness, however, I will comment on that issue.

**165** The first point to make is that the fact that the presence of a liability limitation clause does not automatically signal substantial unfairness. Instead, the whole of the contract must be taken into

account. Here, the contract provided that PTP would provide an inspector who would divide about three hours between, first, inspecting the house and preparing a written report, and, second, conversing with Ms. Gordon. In return, Ms. Gordon paid a fee of $400. That works out to about $133 per hour. That fee had to cover Mr. Kilby's wage and all of PTP's overhead. The contract required PTP to conduct a visual inspection only -- neither party expected that PTP would get all forensic on the property by poking holes in walls, tearing up floor boards, or removing insulation. Four hundred dollars does not seem an unreasonable figure for the relatively limited service the contract contemplated. I grant that it might be different if PTP had charged, say, $40,000 for its three hours of time. In that case, it would be difficult to see how such a large fee could be rationally connected to the value of the limited services provided.

**166** As for the role that the limitation clause plays in the assessment of fairness, it is important to note that the asset that was being inspected was a house that was about to sell for $360,000. Absent the limitation clause, PTP would have been open to claims in the range of tens and hundreds of thousands of dollars. In that case, the fee that PTP charged to Ms. Gordon would have to reflect that risk; it would have been much higher. The limitation clause had the effect, therefore, of moderating the price PTP charged and of bringing that price into a range that was affordable to Ms.Gordon. Rather than being unfair, the limitation clause brought the price Ms. Gordon paid for the inspection down to a point that she could afford.

**167** For these reasons I find that the bargain between Ms. Gordon and PTP was not substantially unfair.

**168** Turning, then, to the final element of the *Tercon* process, the question is whether there is "an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts" (*Tercon,* at para. 123). Put simply, Ms. Gordon did not adduce any evidence that such a public policy exists. This leg of the *Tercon* test does not apply.

**169** It follows that I must conclude that the liability limitation clause is binding on Ms. Gordon. If PTP or Mr. Kilby breached the contract or uttered negligent misrepresentations, Ms. Gordon's damages against them must be limited to $400.

***Breach of Contract***

**170** The first paragraph of the PTP contract says this:

> ... The inspection is performed in accordance with the Standards of Practice of the American Society of Home Inspectors (ASH I (R)) and in accordance with any applicable State or Provincial specific standards ...

**171** For the purposes of this matter, the parties accepted that only the ASHI standards were applicable and that there were no relevant State or Provincial specific standards.

**172** The second paragraph of the contract says this:

> ... Subject to the terms and conditions stated herein, the inspection includes the visual examination of the home's exterior including roof and chimney, structure, electrical, heating and cooling systems, insulation, plumbing, and interior including floors, walls, ceiling and windows; it is a reasonable effort to disclose the

> condition of the house based on a visual inspection. Additionally, Inspector will functionally operate major built-in appliances. Conditions beyond the scope of the inspection will not be identified. No engineering services are offered.

**173** Any reasonable interpretation of the word "structure" in this provision must include the foundation. In my view, then, the PTP contract required Mr. Kilby to perform a visual inspection of, among other things, the foundation of the house and to report to Ms. Gordon problems that he noted in the condition of that foundation.

**174** I have found that when they visited the house in April 2006, Messrs. McKinney and Wilson saw at least two significant cracks in the southwest area of the foundation. They did not have to move anything, peel back insulation, roll away carpets, or dig through dirt to see those cracks. I find that one of the cracks that they saw was the large crack that Mr. Kilby noted in the middle of the south foundation wall. The other was on the west wall near the ladder leading down into the crawl space. Mr. Kilby failed to see that second crack. Had he seen it, Mr. Kilby would have appreciated that the portion of the southwest foundation wall between the two cracks had settled and had broken away from the main structure. He would certainly have reported that observation to Ms. Gordon. Had he appreciated that the southwest portion of the foundation had settled, he would have been less sanguine than he was about the sloping floors in the master bedroom and ensuite.

**175** Further, the gaps in the baseboards, the adjusted striker plates on the doors and the crooked door jambs were all there for Mr. Kilby to see. Common sense dictates that those features were not part of the original design and construction. Mr. Kilby testified that on his inspection the doors, floors and walls were "functional" and therefore not worthy of comment. That may be so, in the sense that the walls were keeping out the weather, the floors could bear weight, and the doors separated the rooms of the house, but the condition of the walls, floors, and doors taken together clearly pointed in the direction of something being wrong with the structure. It was Mr. Kilby's contractual duty to pay attention to those clues and to at least report them to Ms. Gordon. He failed to do either.

**176** On the issue of the sloping floors, it was not, in my view, good enough for Mr. Kilby to write in his report that "Further investigation may be required by others as determined by client." That was a milquetoast recommendation and nearly useless to a lay person such as Ms. Gordon. At a minimum, Mr. Kilby had a contractual duty to advise Ms. Gordon that because there may be structural problems with the house, she should consult a structural engineer or a renovation contractor.

**177** Although Ms. Gordon adduced expert evidence from the home inspector Mr. Link, I find that his evidence was not necessary to establish that Mr. Kilby breached the terms of PTP's contract with Ms. Gordon. That is because Mr. Kilby's failures speak for themselves.

**178** I find that Mr. Kilby did not do as the contract required him to do, which was to spot faults in the structure of the house that were worthy of note and to report them to Ms. Gordon.

### *Negligent Misstatement*

**179** I have found that Mr. Kilby told Ms. Gordon that he had looked for more cracks in the foundation wall but had not found any and that the foundation was, therefore, solid. I have also found that Mr. Kilby advised Ms. Gordon that she could have someone come to look at the sloping floor but that when she indirectly asked him for his opinion about the floor, he told her that he felt

that the slope was not related to the foundation. Finally, I have found that Mr. Kilby said to Ms. Gordon and Ms. Tremeer that repairs to the house would not cost more than $500.

**180** Mr. Kilby had special knowledge concerning house inspection. Ms. Gordon relied on his knowledge and advice and it was reasonable for her to do so. Had Mr. Kilby not told her these things but had, instead, told her that the foundation had cracked and settled and that the sloping floors and other signs of settlement in the house were attributable to that settlement, and had he said that the cost of rectifying the cracked foundation and sloping floors was either more than $500 or was beyond his ability to estimate, I have no doubt that Ms. Gordon would have chosen not to waive the inspection subject clause in her offer to buy the house. In that case the contract would not have completed or the parties would have negotiated some lower price for the house. As it turned out, Ms. Gordon relied on Mr. Kilby's advice and bought a house that required some work and expense to bring it into a condition where its frame rests on its foundation.

**181** I find that Mr. Kilby did commit the tort of negligent misrepresentation and that Ms. Gordon is entitled to damages thereby.

**Contributory Negligence**

**182** PTP argues that Ms. Gordon's own negligence contributed to her loss. PTP says that Ms. Gordon was negligent for having failed to heed Mr. Kilby's advice that she should have a qualified person investigate the sloping floor in the master bedroom.

**183** The sloping floor was an obvious defect. Ms. Gordon specifically retained PTP and Mr. Kilby to advise her as to the quality of the house. Ms. Gordon actually received advice from Mr. Kilby recommending investigation of the sloping floor. Ms. Gordon did not act on that advice. Instead, she chose to rely on Mr. Kilby's opinion that the slope was not related to the foundation. On Mr. Kilby's advice, Ms. Gordon assumed that the sloped floor did not have to do with the foundation. But the floor was still sloping, it was still an obvious problem with the house, and even if it was not associated with the foundation, it still needed to be looked into at greater length. Mr. Kilby's negligent advice that the floor was not related to the foundation did not eliminate all possible problems with the structure of the house that would lead to a sloped floor. In short, Mr. Kilby's bad advice did not obviate Ms. Gordon's obligation to take reasonable care for her own financial well-being. I find that Ms. Gordon ought to have taken further steps to look into the sloped floors. Had she done so by hiring someone like Mr. Budd, for example, she would have learned that there was a problem with the house's foundation. By not taking those steps, Ms. Gordon's failure to act reasonably contributed to her loss.

**184** I cannot say with precision to what degree Mr. Kilby's negligence and Ms. Gordon's contributory negligence led to her loss. On the whole, though, I find that Mr. Kilby's behaviour was more blameworthy than Ms. Gordon's behaviour. Had Mr. Kilby been less off-hand in his remarks, Ms. Gordon would have been more likely to take the hint that there was something wrong with the house. She may well have shunned the house entirely. I attribute 75% of Ms. Gordon's loss to Mr. Kilby's negligence and 25% to her own negligence.

**Damages**

**185** Ms. Gordon claims damages under these heads of loss:

a. Pecuniary damages for depression, anxiety and distress;

b. The cost of repair or replacement of her property;
c. The loss of the opportunity to carry on her work and "capital asset" of her art and craft business;
d. Loss of tenant's rents;
e. The loss of opportunity to maximize income tax benefits from operating her home-based business at a high enough revenue level;
f. The interest costs of borrowing $80,000 to finance investigations and prosecute claims.

**Emotional Upset**

**186** Ms. Gordon claims non-pecuniary damages of $50,000 under this head of loss. I accept Dr. Crittenden's medical opinion that since buying the house, Ms. Gordon has developed depression. Depression is a genuine psychological disorder -- when it can be attributed to a tort or was a foreseeable consequence of breach of contract, it may be compensable. In Ms. Gordon's case, the problems with the house are a contributing factor to her depression. The other factors are stresses stemming from her finances, her debt load, the fact that she now works for a wage rather than as an artisan, and, finally, the litigation itself.

**187** Ms. Gordon's affliction is not, however, particularly severe and, given its causes, I infer that her depression will abate when the litigation is over and the uncertainty of her life's direction diminishes. In my view, a non-pecuniary award of $10,000 would adequately compensate Ms. Gordon for that part of her psychological upset that was directly caused by PTP's tort and breaches of contract.

**Cost of Repair or Diminution of Value**

**188** The parties approached the issue of damages relating to the house itself from different perspectives. Ms. Gordon premised her claim for damages on the theory that the risk of future settlement is such that the structure must be stabilized by the installation of helical piles around the building's perimeter. According to the experts on whom Ms. Gordon relied, the total cost of that work would be on the order of $510,000.

**189** The defendants premised their approach to damages on the assumption that the risk of future settlement is low and that what future settlement may occur will in any event be limited to about 50 mm. If the risk of future settlement is that slight, it will cost much less to repair the building. In that case, for example, helical piles will not be necessary; all that will be necessary will be to jack up the wooden structure so that it is level, to secure the newly level building to the foundation, to sheath and seal the walls, and to make some cosmetic repairs to the interior. According to the defence experts, the cost of those repairs would be on the order of $65,000 to $70,000.

**190** There was another difference in the approaches taken by the parties to their assessment of damages. Ms. Gordon presented her claim in 2013 dollars. That is to say, Ms. Gordon took the view that her damages should be fixed at the current price of fixing the house in the way she proposes. The defendants, on the other hand, argued that Ms. Gordon suffered her loss on the day the house changed hands from the Kriegs to her. The defendants say that the proper way to calculate Ms. Gordon's loss is to postulate how much the house would have been worth in 2006 had there been no settlement issues, subtract from that figure how much it would cost to rectify the settlement issues,

and compare that net figure to the price that Ms. Gordon actually paid for the house. The difference, if any, is, so say the defendants, the true measure of Ms. Gordon's loss.

**191** Turning to the first point of disagreement on the damages issue, Ms. Gordon maintains that the task of repairing of her house should be assessed as a future loss. She asserts that as a future loss, the loss is recoverable there is a realistic possibility of it coming to pass as opposed to it being more likely than not that the loss will occur (i.e.: on the balance of probabilities, which is the test for a past or present loss). Ms. Gordon goes on to argue that since the evidence of the geotechnical engineers was to the effect that the building will likely settle to some further degree, the onus lies on the defendants to show that there is zero risk of the house settling more than the maximum 50 mm that those engineers have predicted. Ms. Gordon submits that if the defendants cannot demonstrate that there is no risk of settlement beyond that limit, then there must be a realistic possibility of greater settlement. In that case, she says, the cost of repair to her house must be based on the installation of helical piles around the perimeter of the building and all of the work associated with attaching the foundation to those piles and leveling the whole assembly with jacks, pins, and braces. According to Ms. Gordon's experts, the cost of that effort, including interior and exterior renovations plus a living-out allowance for Ms. Gordon while the work is under way, is as I have noted earlier, on the order of $510,000.

**192** The flaw in Ms. Gordon's position is that the evidence led at trial established that while future settlement is likely, it is likely to be limited to no more than 50 mm. According to the geotechnical engineer's evidence, which I accept, future settlement exceeding 50 mm would be caused by one or both of two events: water flowing down the afflicted portions of the foundation wall or seismic events. The evidence demonstrated that the downspouts have been redirected away from the house and there was no evidence that water would flow down the foundation walls from any other source. The risk that the building will suffer additional settlement due to water infiltration appears to be minimal.

**193** The geotechnical engineers testified that seismic events will likely happen in the future, but their evidence did not go so far as to indicate whether those seismic events would be likely to be of a magnitude sufficient to cause further settlement. It is, therefore, purely speculative to say that in the future an earthquake will cause the house to settle more than 50 mm. Speculation cannot bottom a finding that the happening of a future event is a realistic or a substantial possibility; that conclusion can only be grounded on evidence, and such evidence does not exist here.

**194** For those reasons I am driven to conclude that there is insufficient evidence on which I can rely to find that helical piles and all of the expense associated with their installation is the proper measure of Ms. Gordon's damages. Instead, the proper measure of damages is the cost of leveling the wooden structure and attaching that structure to the foundation below. I accept the opinion evidence of the quantity surveyor Mr. Artis in that regard. Mr. Artis estimated that the cost of that scope of work would be on the order of $65,000 exclusive of geotechnical engineering fees, a building permit, a week or so of living-out allowance while the work was underway, and HST. Mr. Artis testified that $2,000 would be a reasonable prediction of the geotechnical fees.

**195** In my opinion, a reasonable global assessment of the cost of repairing Ms. Gordon's house in the manner recommended by Mr. Artis is $80,000. This would include an amount for periodic monitoring of the foundation and for any further cosmetic repairs that may be necessary in the future.

**196** The next issue under this head of loss is whether Ms. Gordon's damages for the repair of the house should be fixed at $80,000 *simpliciter* or whether her loss is the difference between what she paid for the house in 2006 and whatever its actual value was given the settlement and the damaged foundation. The law on this point is clear: proper methodology to employ in this case is the latter, i.e.: the diminution of value due to defect as of the date of loss: *Wiebe v. Gunderson*, 2004 BCCA 456 at para. 24.

**197** Ms. Gordon did not present evidence of the 2006 fair market value of the house with the settlement and the broken foundation. The defendants did adduce such evidence by way of a report by the real estate appraiser Mr. Beatty. In his report, Mr. Beatty opined that absent settlement problems, in 2006 the fair market value of the house would have been $405,000. He testified that a willing purchaser would require that the price of the house be reduced by the cost of remedying the settlement problems and that the same purchaser would require a further discount of 10% to take into account the stigma and uncertainties inherent in the purchase of a damaged asset like this house. I accept that evidence.

**198** I have come to the conclusion, then, that the proper measure of Ms. Gordon's damages relating to the house itself is as follows:

| | | |
|---|---|---|
| Fair market value in 2006 | $405,000 | |
| Less cost of repair | | $ 80,000 |
| Sub-total | $325,000 | |
| Less 10% for stigma | | $ 32,500 |
| Sub-total | $292,500 | |

The difference between the price that Ms. Gordon paid for the house and its true fair market value is $67,500. Ms. Gordon's loss is, therefore, $67,500.

**Loss of Opportunity to Earn Income/Loss of Earning Capacity**

**199** Ms. Gordon complains that she has suffered a past loss of opportunity to earn income and a loss of her capacity to earn income in the future as a result of her troubles with the Cerise Drive

house. There are two difficulties with those claims. The first difficulty is that since the accident Ms. Gordon has actually earned more money working for a wage than she has ever earned making her ceramic art. Ms. Gordon's income has not diminished, it has increased. Ms. Gordon's true complaint here appears to be that her disposable income, i.e.: the amount of money available to her to support her lifestyle, has decreased. The reason that her disposable income has decreased is because she has used her savings and has borrowed money to fund this lawsuit and she has to pay interest on those borrowings, thus leaving her with very little left over to buy the necessities of life. Her claim is not, therefore, for loss of income, but for diminution of her lifestyle. To the extent that such a loss is compensable, the award for it lies in non-pecuniary damages.

**200** The second problem with Ms. Gordon's claims for loss of opportunity and loss of capacity to earn income is that the defendants' showed that Ms. Gordon has not acted reasonably to mitigate her damages. As noted earlier, in March 2007 Ms. Gordon had the money and the desire to convert her attached garage into a studio. She abandoned that project when Mr. Budd advised her that some of the renovations might have to be removed and replaced if it turned out that the garage needed repairs due to settlement. However, a roughed in studio could have been constructed in the garage for several thousand dollars less than a full-on conversion. A roughed in studio would have nevertheless been functional and would have allowed Ms. Gordon to carry on with her art work. A reasonable person in Ms. Gordon's position, assuming that she was genuine and motivated in her desire to work as an artisan, would have gone ahead with the roughed in renovation. With roughed in studio, Ms. Gordon would have been able to keep up her production. Had Ms. Gordon taken that step and all other things being equal, there is no reason to conclude that she would have earned any less money from her art than she would have had the house not had settlement problems.

**201** There is a third problem with Ms. Gordon's claim, but that problem applies only to her claim for loss of earning capacity. The problem is that no evidence at trial suggested that for reasons directly attributable to the house Ms. Gordon's capacity to work as an artisan has been diminished. Aside from her decision to not construct a studio in her garage, the only evidence that went to Ms. Gordon's capacity to work as an artisan in the future related to repetitive strain injuries she has suffered to her wrists and forearms since 2006. Ms. Gordon made no claim for those injuries themselves, and, because they are not compensable, no loss consequent to them can be compensable.

### Loss of Rents

**202** Ms. Gordon says that she had to move her ceramic supplies and production equipment into her home after her lease at the art centre expired. She stored those materials in the middle bedroom. Ms. Gordon had been renting that bedroom for $500 per month. She lost that rent income when her ceramic supplies moved in and the room's tenant moved out. Ms. Gordon claims $500 per month from September 2007 forward.

**203** Had Ms. Gordon acted reasonably by renovating her garage into a roughed in studio, she would have been free to continue to rent the middle bedroom to tenants. Ms. Gordon's failure to mitigate her loss by building a temporary studio led to her not collecting rent on the middle bedroom.

### Loss of Tax Benefits

**204** Ms. Gordon's complaint here is that had she set up her ceramic business in her home as she planned in September 2007 she would have had the benefit of deducting a portion of her housing

expenses against her art income. Had Ms. Gordon constructed her studio and carried on with her work as an artisan she would have been able to claim deductions some of her housing expenses. Because Ms. Gordon did not mitigate her loss by carrying on with her business in a roughed in studio, she can have no claim for the loss of the value of those deductions.

### Cost of Borrowing

**205** Ms. Gordon claims the interest she has paid on loans she has taken out in order to fund legal fees and disbursements for this litigation and to meet some of her everyday expenses. The difficulty with this claim is, firstly, that Ms. Gordon's living expenses are not items of loss in this case; secondly, as a matter of law Ms. Gordon's legal fees are not recoverable as damages and so neither should interest incurred on borrowings to pay those fees be recoverable as a head of loss; and, thirdly, it will be for a registrar on an assessment of a bill of costs to determine whether interest on fees or disbursements is recoverable.

## Third Party Claims

**206** William and Kathleen Krieg and Wolfram Krieg are not liable to Ms. Gordon. They do not have to pay damages to Ms. Gordon and they do not, therefore, have a need to claim indemnity or contribution from other parties or as between themselves. The third party notices that the Kriegs and Wolfram Krieg and his brokerage issued to other parties must be dismissed. In the event that the parties to those notices are not able to resolve costs between themselves, they may make an application for an order determining costs.

**207** Similarly, third party notices issued by PTP against the Kriegs and Wolfram Krieg and his brokerage must be dismissed. Again, the parties to those notices may apply for an order determining costs between them if they cannot agree on that issue.

**208** PTP issued a third party notice against Interior Testing Services Ltd. seeking contribution, citing failures in Interior Testing's prescription to stabilize the Cerise Drive lot. As I noted earlier, the geotechnical engineer Mr. Smith testified that the three methods proposed by Mr. Williams of Interior Testing were reasonable in light of what was known about the lot at the time. According to Mr. Williams' notes, the area on which the foundation was placed was excavated one foot deeper than Mr. Williams recommended and that in other respects the lot was prepared for construction as he recommended. There was no evidence at trial that Mr. Williams' advice departed from the generally accepted geotechnical engineering standards in effect at the time. I cannot say that Mr. Williams or Interior Testing breached their duty to take reasonable care in prescribing methods by which the foundation of the house could be stabilized. Further, I find that the fact that the house did settle is as consistent with faulty installation of roof drains as with poor soil preparation. For those reasons I cannot give effect to PTP's third party notice to Interior Testing.

**209** PTP also sought declarations that non-parties including Ms. Tremeer, the City of Kelowna, Wyatt Homes, Knorr Homes and Eugene Knorr bear responsibility for Ms. Gordon's loss. I cannot find that Ms. Tremeer is liable to Ms. Gordon for the same reason that Wolfram Krieg is not liable to her: the slope of the floors in the house was a patent defect to which Ms. Gordon simply failed to give heed.

**210** As for the City of Kelowna, there was no evidence at trial that could implicate the City in a claim for negligent issuance of a building permit or inspection. I think that it is more likely than not that the placement of the rain downspouts around the perimeter of the building caused or largely

contributed to its settlement, but I have no evidence of who, exactly, it was that installed those downspouts. There is not enough evidence before me to declare that Knorr Homes or Wyatt Homes (if that entity actually built the house) is liable for the placement of the downspouts.

**Conclusion**

**211** The plaintiff's claims against William and Kathleen, Wolfram Krieg and his broker must be dismissed. Those parties are entitled to their costs against Ms. Gordon on Scale B.

**212** The plaintiff's claim against Mr. Hostland is dismissed. Mr. Hostland is entitled to his costs on Scale B.

**213** The third party claims are dismissed with cost to be agreed or determined upon application.

**214** The plaintiff is entitled to judgment against PTP and Mr. Kirby. The amount of that judgment is limited to 75% of $408 plus court order interest.

**215** Ms. Gordon's recovery is within the monetary jurisdiction of the small claims court. Subject to any application she may make respecting the application of Rule 14-1(10), Ms. Gordon is entitled to recover her disbursements but not her costs from PTP.

**216** Finally, the parties are at liberty to make applications concerning the cost consequences of any pre-trial settlement offers that were made between them.

P. ROGERS J.

# TAB 14

*Case Name:*

# Loychuk v. Cougar Mountain Adventures Ltd.

**Between**
**Deanna Loychuk and Danielle Westgeest, Appellants (Plaintiffs), and**
**Cougar Mountain Adventures Ltd., Respondent (Defendant)**

[2012] B.C.J. No. 504

2012 BCCA 122

318 B.C.A.C. 204

90 C.C.L.T. (3d) 181

212 A.C.W.S. (3d) 730

31 B.C.L.R. (5th) 23

96 B.L.R. (4th) 192

347 D.L.R. (4th) 591

2012 CarswellBC 520

Docket: CA038870

British Columbia Court of Appeal
Vancouver, British Columbia

**M.V. Newbury, S.D. Frankel and E.A. Bennett JJ.A.**

Heard: December 14, 2011.
Judgment: March 15, 2012.

(71 paras.)

*Tort law -- Negligence -- Dangerous things and situations -- Appeal by plaintiffs from trial judgment dismissing their negligence action dismissed -- Appellants participated in respondent's*

*zip-lining tour -- Due to respondent's negligence, both appellants were injured when they collided while zip-lining -- Release signed by appellants releasing respondent from all claims, including claims arising from respondent's own negligence, was complete defence to action -- Release was not unconscionable or unenforceable at common law or under Business Practices and Consumer Protection Act.*

*Tort law -- Defences -- Release -- Voluntary assumption of risk (volenti non fit injuria) -- Waiving right of action -- Appeal by plaintiffs from trial judgment dismissing their negligence action dismissed -- Appellants participated in respondent's zip-lining tour -- Due to respondent's negligence, both appellants were injured when they collided while zip-lining -- Release signed by appellants releasing respondent from all claims, including claims arising from respondent's own negligence, was complete defence to action -- Release was not unconscionable or unenforceable at common law or under Business Practices and Consumer Protection Act.*

Appeal by the plaintiffs from trial judgment dismissing their negligence action. The respondent operated zip-lining tours. The appellants had contracted with the respondent to take part in such a tour. Both appellants had signed waivers releasing the respondent from all liability, including claims arising from the respondent's own negligence. Due the respondent's negligence, the appellants collided on the zip-line, which caused injury to them both. The trial judge held that the releases were not unconscionable. He found that, having regard to the information about zip-lining on the respondent's website and the statements in the release as to the risks and dangers involved, it could not be said that the company had taken unfair advantage of the appellants. The trial judge rejected the appellants' argument that the release failed for lack of consideration because it was not part of their respective contracts with the respondent when their tours were booked.

HELD: Appeal dismissed. The releases were not unconscionable or unenforceable at common law. It was not unconscionable for the operator of a recreational-sports facility to require a person who wished to engage in activities to sign a release that barred all claims for negligence against the operator and its employees. There was no power imbalance where a person wished to engage in an inherently risky recreational activity that was controlled or operated by another. It was not unfair for the operator to require a release or waiver as a condition of participating. The provisions of Business Practices and Consumer Protection Act relied on by the appellants did not lead to the invalidation of the release because the facts did not support a finding of unconscionability. The consideration the appellants received for signing the release was being allowed to participate in the zip-lining activity. Whether either of them had read the statement on the respondent's website regarding the requirement to sign a waiver was immaterial.

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, SBC 2004, CHAPTER 2, s. 1, s. 3, s. 4(1), s. 5(1), s. 8, s. 8(3)(e), s. 9(2), s. 171(1)(a)

**Appeal From:**

On Appeal from: Supreme Court of British Columbia, February 17, 2011 (*Loychuk v. Cougar Mountain Adventures Ltd.*, 2011 BCSC 193, Vancouver Registry No. S093741)

**Counsel:**

Counsel for the Appellants: K.F. Gourlay and J.S. Stanley.

Counsel for the Respondent: R.B. Lindsay, Q.C. and M.R.S. Hufton.

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**Reasons for Judgment**

The judgment of the Court was delivered by

S.D. FRANKEL J.A.:--

## Introduction

**1** The issue on this appeal is the enforceability of a release (i.e., waiver of liability) signed by the appellants, Deanna Loychuk and Danielle Westgeest, before going on a zip-line tour operated by Cougar Mountain Adventures Ltd. The appellants were injured when they collided while travelling on the same zip-line. They commenced an action against Cougar Mountain for damages. Cougar Mountain admitted that the accident was caused by the negligence of its employees but asserted that the appellants had waived their cause of action. On a summary trial, Mr. Justice Goepel of the Supreme Court of British Columbia held that the release was a complete defence to the appellants' claims and dismissed their action. This appeal is from that decision.

**2** For the reasons that follow, I agree with the trial judge that the release is a complete defence to the appellants' claims.

## Factual Background

**3** Cougar Mountain operates zip-line tours at Whistler, British Columbia. The tours involve strapping a person into a harness and trolley which is then sent down a line from a higher platform to a lower one. There is a guide on each platform. Those guides, who communicate by walkie-talkie, are responsible for determining when each person is to be sent down a line.

**4** At the time of the accidents (on August 18, 2007), Cougar Mountain's website described the tours as follows:

> Come out to Cougar Mountain for Whistler's most exciting eco adventure! Our new Skyline is an exhilarating cable line expedition through old growth forests. Skyline's leading edge technology takes you flying side by side on our unique tandem-line system. Ride in a comfortable harness reaching speeds of up to 100 km an hour. The system offers 5 dual Skylines, with the longest ride being over 1,500 feet long, 200 feet off the ground with a 200 foot vertical drop. The lines are connected to each other by a trail system which includes a 150 ft suspension bridge. Our guides will share their wealth of interpretive information and local Whistler knowledge about the ecosystem you will be exploring, giving you a unique Whistler experience.

**5** The website also contained a link to "Policies and Cancellations". That link opened a page which provided information on a number of things, including:

> **Waivers:**
>
> All guests are required to sign a liability waiver.
>
> . . .
>
> **Cancellations:**
>
> Tours cancelled within 24 hours of the tour, and "no shows", are subject to the full price of the tour.

**6** Ms. Loychuk, who was 41 years old at the time of the accident, went to Whistler as part of a group to celebrate a friend's birthday. That friend suggested they all go zip-lining. She made a reservation for the group and then each person called Cougar Mountain to pay individually by credit card. Ms. Loychuk's payment was made with her husband's credit card, although it is not clear which of them called in. As Ms. Loychuk had never gone zip-lining before, she accessed Cougar Mountain's website to find out more about the activity.

**7** Ms. Loychuk is the owner of a business that offers a kick boxing/fitness program for women. She requires her clients to sign a waiver of liability. She explains the waiver to her clients and will not allow anyone who has not signed a waiver to participate. She also franchises her business. The franchise package includes a waiver of liability and assumption of risk agreement. Ms. Loychuk explains the waiver of liability and assumption of risk agreement to potential franchisees.

**8** When Ms. Loychuk arrived at Cougar Mountain's office she was given a release to fill out and sign. She understood that she would not be allowed to participate if she did not sign the release. In both her affidavit and the answers she gave on being cross-examined on that affidavit, Ms. Loychuk stated that she understood the release would prevent her from suing the zip-line company for certain things, such as if she tripped and broke her leg. Her evidence was that she did not realize that the release gave Cougar Mountain immunity for its own failures, no matter how severe. Ms. Loychuk had previously signed waivers in connection with purchasing family ski passes. She purchased those passes online and signed the waivers when she picked them up.

**9** Ms. Westgeest was 26 years old at the time of the accident and had recently graduated from law school. She went to Whistler with a group of friends to celebrate the impending marriage of one of them. Ms. Westgeest had discussed the cost and safety of zip-lining with two friends who had accessed Cougar Mountain's website. Based on information on that website they decided to go zip-lining. One of the two friends called in and made a reservation for the group using her credit card.

**10** When Ms. Westgeest and her friends arrived at Cougar Mountain's office they paid individually by credit card and each was given a release to fill out and sign. At her examination for discovery, Ms. Westgeest said that when one of her friends asked about the release, she made a flippant remark to the effect that based on her contracts class, "Releases may or may not be binding." She further deposed that although she had been aware she was waiving certain rights, she had not been

aware she was waiving all rights against Cougar Mountain, including claims arising from the company's own negligence. She had previously signed a waiver in connection with renting a kayak.

**11** Ms. Loychuk's and Ms. Westgeest's groups were merged into one mid-way through the tour. The accident occurred when Ms. Loychuk was sent down a line but stopped before reaching the lower platform. Ms. Westgeest, who was unable to see that Ms. Loychuk was suspended on the line, was sent down by a guide. With no ability to stop herself, Ms. Westgeest collided with Ms. Loychuk, causing injury to both. Miscommunication between the guides was the sole cause of the accident.

**12** The release is a one-page document with the following at the top:

SKYLINE WAIVER

**RELEASE OF LIABILITY, WAIVER OF CLAIMS AND**

**ASSUMPTION OF RISKS AGREEMENT**

(hereinafter referred to as the "Release Agreement")

**BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION FOLLOWING AN ACCIDENT**

***PLEASE READ CAREFULLY!***

Signature

**13** Below a list of "Releasees" that includes Cougar Mountain, each participant is required to fill in his or her name and address. There is a space towards the bottom of the release for each participant to fill in his or her weight. Beneath that, there is a signature line under the wording:

> I have read the Release Agreement above, and I agree to be bound by its terms.

**14** There is a "Tour Description" in the body of the release, after which there is the following:

> **ASSUMPTION OF RISKS**
>
> I am aware that participating in Eco Activities involves many risks, dangers and hazards including but not limited to: hiking on rough and uneven terrain; changing weather conditions which may cause the tree top trails, suspension bridges, canopy walkways, and Skylines to be slippery; equipment failure; failure to properly adjust or fasten equipment; improper use of equipment; falls; slips and falls while snowshoeing; over-exertion; fear of heights; failure to remain within designated areas; impact or collision with trees, other participants or guides; negligence of other participants or guides; and **NEGLIGENCE ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF PARTICIPATING IN ECO ACTIVITIES. I FREELY ACCEPT AND**

**FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND LOSS RESULTING THEREFROM.**

**RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT**

In consideration of the RELEASEES agreeing to my participation in Eco Activities and permitting my use of their equipment, parking and other facilities, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, I hereby agree as follows:

1. **TO WAIVE ANY AND ALL CLAIMS** that I have or may in the future have against the RELEASEES AND TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death, that I may suffer or that my next of kin may suffer, as a result of my participation in Eco Activities, DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE ***OCCUPIERS LIABILITY ACT***, R.S.B.C. 1996, C. 337 ON THE PART OF THE RELEASEES, AND FURTHER INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF PARTICIPATING IN THE ECO ACTIVITIES REFERRED TO ABOVE;

**15** The release also contains the following statement:

> In entering into this Release Agreement I am not relying on any oral or written representations or statements made by the Releasees with respect to the safety of participating in Eco Activities, other than what is set forth in this Release Agreement.

**16** In completing their respective releases, Ms. Loychuk and Ms. Westgeest filled in the required information and signed at both the top and bottom of the form.

**Trial Judge's Reasons**

(2011 BCSC 193, 81 C.C.L.T. (3d) 89)

**17** In unsuccessfully resisting Cougar Mountain's summary trial application for dismissal of their action, the appellants argued that the release was ineffective because it is:

(a) unenforceable, because a reasonable person should and would have known that the appellants were not consenting to the terms at issue and Cougar Mountain failed to take steps to apprise them of the terms, constituting misrepresentation by omission;
(b) unconscionable;

(c) invalidated by s. 3 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], because of deceptive and/or unconscionable acts committed by Cougar Mountain; and
(d) invalid as having been obtained without any, or only past, consideration.

**18** The trial judge found that each appellant signed the release knowing that it was a legal document affecting her rights and that there was nothing in the circumstances that would have led Cougar Mountain to conclude otherwise. He further found that Cougar Mountain had taken steps to bring the contents of the release to their attention and that they had sufficient time to read it. The judge did not accept that the general law relating to waivers of liability should be limited to hazardous activities in which participants have some measure of control over the risks they are assuming.

**19** The trial judge held that the releases were not unconscionable. He found that there was "no evidence of duress, coercion or unfair advantage resulting from economic or psychological need." He also found that the appellants voluntarily went zip-lining, knowing that they had to sign a release to do so.

**20** The appellants' arguments with respect to the *BPCPA* focused, in part, on the following representation as to the safety of Cougar Mountain's zip-line; they tendered the statement as being from the "Frequently Asked Questions" page on the company's website:

> Q: Is it safe?
>
> A: The Skyline system is fully engineered and certified. Skyline is the safest cable ride system in the world because it utilizes a permanent rock anchor system rather than anchoring cables into trees. The cables used are also 3 times the thickness of conventional zip line systems.

**21** The appellants contended that this statement was misleading because two other accidents had occurred on Cougar Mountain's zip-line in August 2007; one before and one after their accident. They also submitted that Cougar Mountain failed to warn potential customers that the most common accidents in the zip-line industry involved person-to-person collisions, and that Cougar Mountain placed unfair pressure on them to sign the release just before the tour was to start. In response, Cougar Mountain submitted, in part, that the *BPCPA* does not apply to recreational sports activities such as zip-lining.

**22** Without determining the applicability of the *BPCPA*, the trial judge held that the appellants had not established a breach of its provisions. He found there was "no evidence that the representation on the website ... is anything but true." He noted that "[t]he answer relates to the structure of the system, not its operation" and "[t]he fact that there have been some accidents does not lead to the contrary conclusion."

**23** The trial judge further held that, having regard to the information about zip-lining on Cougar Mountain's website, and the statements in the release as to the risks and dangers involved, it could not be said that the company had taken unfair advantage of the appellants. The judge referred to a statement in the affidavit of one of Cougar Mountain's directors that the company's policy is to give a full refund to anyone who, having paid in advance for a zip-line tour, declines to sign a release.

**24** Last, the trial judge rejected the appellants' argument that the release failed for lack of consideration because it was not part of their respective contracts with Cougar Mountain when their tours were booked. In this regard, the judge stated:

> [49] ... The [appellants] had both accessed the website which disclosed that all guests were required to sign a liability waiver. The parties were advised before commencement of the activity that they must sign the waiver or they would not be allowed to participate. Further, the Release itself specifically sets out that the consideration for the Release is Cougar's agreement to allow the [appellants] to participate in Eco Activities.

**25** It is convenient to mention here that the only finding of fact by the trial judge challenged by the appellants is the statement that Ms. Westgeest personally accessed Cougar Mountain's website. They say this finding is unsupported by the evidence. They are correct in that regard.

## Grounds of Appeal

**26** In their factum, the appellants allege that the trial judge made the following errors:

a. He erred in finding the Release was not unconscionable pursuant to s. 8 of the *BPCPA*;
b. He erred in holding that he was bound by prior authorities to conclude that the Release is not unconscionable;
c. He erred in failing to consider and apply the reverse onus provisions of ss. 5(2) and 9(2) of the *BPCPA*; and
d. He erred in finding that there was consideration in exchange for the signing of the Release.

## Analysis

### Is the Release Unconscionable or Unenforceable at Common Law?

**27** The Supreme Court of Canada considered unconscionability in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, a case dealing with the enforceability of an exclusion of liability clause relating to a tendering process. Although Mr. Justice Binnie dissented in the result, his analytical approach was adopted by the majority: see para. 62. The following from his judgment is apposite:

> [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between

> the parties" ([*Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426], at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.
>
> [Italics in original.]

**28** In the case at bar, the parties agree that the first step in the *Tercon* analysis is satisfied, i.e., the release applies in the circumstances. Where they part company is with respect to the next two steps. The appellants' position is that the release was unconscionable at the time it was signed and that even if it was not unconscionable, it should be held unenforceable on public policy grounds. Cougar Mountain's position is that it did not act unconscionably in obtaining the release and, further, that the appellants have not established that it should be invalidated for public policy reasons.

**29** The language used to express the test for unconscionability has varied over the years. It was put this way by Mr. Justice Davey, as he then was, in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 at 713 (B.C.C.A.):

> [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].

**30** That test was recently discussed in *McNeill v. Vandenberg*, 2010 BCCA 583, and *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500. In *McNeill*, Madam Justice Garson stated:

> [15] In order to set aside a bargain for unconscionability, a party must establish:
>
> (a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
> (b) proof of substantial unfairness in the bargain.
>
> This test was articulated in *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (B.C.C.A.) at 173 and reiterated in *Klassen v. Klassen,* 2001 BCCA 445.

**31** In *Roy*, Mr. Justice Tysoe (at para. 29), quoted the following from the judgment of Madam Justice McLachlin, as she then was, in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263 (C.A.):

> Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrsion v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

Mr. Justice Tysoe went on to state (at para. 30), that in *Tercon*, Binnie J. was "not intending to signal a departure from the usual test for unconscionability."

**32** The appellants acknowledge that there is a well-established line of authority in Canada holding that releases relating to recreational sports activities are not unconscionable. However, they submit those authorities are inapplicable because they do not relate to activities in which the operator has total control of the risk. I disagree.

**33** To begin, the authorities are clear that there is no power-imbalance where a person wishes to engage in an inherently risky recreational activity that is controlled or operated by another. Equally important, they are also clear that it is not unfair for the operator to require a release or waiver as a condition of participating.

**34** The Supreme Court of Canada dealt with this question in *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589. In order to participate in a snowmobile race run by the association, Mr. Dyck was required to sign a form releasing the association and others from liability however caused, including by their negligence. He was injured when he attempted to swerve around and then collided with a race official who was standing in the track. He commenced an action for damages against both the association and the official. In holding that the release was a complete defence to Mr. Dyck's claim, the Court stated (at p. 593):

> Nor does the relationship of Dyck and the Association fall within the class of cases, notable among which are contracts made on dissolution of marriage, where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities. As already mentioned, the races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of such dangers. It follows from this that there are no grounds of public policy on which the waiver clause should be struck down, an issue also raised on behalf of the appellant.
>
> [Emphasis added.]

**35** In *Delaney v. Cascade River Holidays Ltd.* (1983), 44 B.C.L.R. 24 (C.A.) aff'g (1981), 34 B.C.L.R. 62 (S.C.), the issue arose in the context of a release signed by Dr. Delaney in order to go white water rafting. Before boarding the raft he was given a life-jacket. However, the life-jacket's buoyancy was inadequate for the river conditions. Dr. Delaney was thrown from the raft when it struck a rock. He was swept away by the current and drowned. Mrs. Delaney sued the rafting company on behalf of herself and her children. The trial judge found that the company had been negligent in failing to provide a more buoyant life-jacket, but dismissed the action on the basis that the release was a complete defence. This Court dismissed Mrs. Delaney's appeal. Writing for the majority, Mr. Justice McFarlane first found against Mrs. Delaney on the issue of causation, holding that she had failed to prove that the failure to provide a more buoyant life-jacket caused, or contributed to, Dr. Delaney's death. Mr. Justice McFarlane then went on to agree with the trial judge that the release was a bar to the action. In so doing, he held (at p. 44) that there was no basis on which to "rescind" the release as a "consumer transaction involving a deceptive or unconscionable act or practice" under what was then s. 22(1)(b) of the *Trade Practice Act*, R.S.B.C. 1979, c. 406.

**36** The question of unconscionability also came before this Court in two skiing accident cases. In *Ocsko v. Cypress Bowl Recreations Ltd.* (1992), 74 B.C.L.R. (2d) 159 (C.A.), aff'g (October 7, 1991), New Westminster C901348 (S.C.), Mr. Ocsko, an experienced skier, obtained a free ski pass from Cypress Bowl in exchange for volunteering to be a first aid attendant and a member of the ski patrol. He signed a release and indemnity agreement to obtain the pass. While skiing one day, he had to take evasive action to avoid a bare rock and was injured. Mr. Ocsko sued Cypress Bowl, alleging that it had been negligent in several ways, including, by failing to inspect the run after it had been closed for lack of snow and failing to adequately mark the rock or draw it to the attention of skiers. Cypress Bowl brought a summary trial application which resulted in the action being dismissed on the basis that the release was a complete defence to the action. In upholding that dismissal, the Court held that it was not unconscionable for Cypress Bowl to rely on the release: para. 15.

**37** More recently, in *Mayer v. Big White Ski Resort Ltd.* (1998), 112 B.C.A.C. 288, Mr. Mayer, who had signed a release to obtain a ski pass, was injured when he collided with a snowmobile driven by a Big White employee and sued the company. In upholding the dismissal of that action, the Court rejected a submission that it was contrary to public policy and unconscionable to permit the company to rely on the release: paras. 4, 15

**38** In addition, there are two trial decisions involving skiing accidents that I wish to mention. The first is *Knowles v. Whistler Ski Corp.*, [1991] B.C.J. No. 61 (S.C.). Mrs. Knowles was injured when the binding on one of her rented skis did not release properly. She sued the rental company, alleging that the employee who adjusted her bindings had been negligent. In submitting that the release she signed should be found unconscionable, Mrs. Knowles argued that it was a standard-form one-sided contract that had been entered into without any opportunity for negotiations between two parties in unequal bargaining positions. In rejecting that submission and dismissing the action, Madam Justice Huddart, as she then was, stated:

> I disagree. I cannot see anything in the nature of the Release Agreement or in the circumstances in which it was signed divergent from community standards of commercial morality.
>
> The circumstances in which Mrs. Knowles signed the Release Agreement are far-removed from the hurried execution of a document containing a release that

> only the most attentive could read such as rent-a-car and other standard form contracts. There is no evidence of duress, coercion, or unfair advantage, resulting from economic or psychological need or the inability to understand the nature of the contract. This is the evidence generally adduced when the validity of a consumer contract is challenged. This is not a case where the party seeking to rely on the waiver of liability clause was seeking to avoid all the burdens of the contract. The ski shop provided the ski equipment at a cost of $36.00.
>
> Nothing that was said or done could have led anyone to believe the waiver would not apply. Mrs. Knowles understood fully what she was signing and why. One of the risks she assumed when she skied that day was that the technician at the ski shop might have been negligent in setting the binding adjustment or otherwise. The Release Agreement not only says that, it also sets out specifically the risks inherent in the ski-boot binding system. If Mrs. Knowles did not want to waive any claim in negligence she could have done what her counsel suggest others in her situation will do. She could have refused to ski.
>
> [Emphasis added.]

(The reference to "community standards of commercial morality" in the first paragraph of the above quotation is to *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 at 177 (C.A.), wherein Mr. Justice Lambert, in discussing unconscionability, stated that the "single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded." See also: *Gindis v. Brisbourne*, 2000 BCCA 73, 72 B.C.L.R. (3d) 19 at paras. 42-44.)

**39** The second trial decision is *Ochoa v. Canadian Mountain Holidays Inc.*, [1996] B.C.J. No. 2026 (S.C.). Mr. Ochoa was killed when he was caught in an avalanche while heli-skiing. His wife sued the heli-skiing company and two of its guides. In holding that the release Mr. Ochoa had signed was not unconscionable, Madam Justice Koenigsberg stated (at para. 139):

> It is true that the promotional materials emphasized that the guiding would be careful, meet a high standard of professionalism and minimize risks inherent in the sport of heli-skiing. However, it did not purport to be a guarantee of no mistakes or lapses in judgment in the exercise of skill and judgment. Reading all the literature and seeing how the operation was carried out, in fact, Mr. Ochoa as a reasonable person would likely have understood the waiver to address the possibility that human error, even in the form of the exercise of judgment falling below the standard of care in the industry, might occur. If such a thing occurred as an isolated incident, in my view, it would arguably be negligence but would not remove from the contract the very thing being contracted for.

**40** The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.

**41** This brings me to the third inquiry set out in *Tercon* (at para. 123), namely, whether the appellants in this case have established "an overriding public policy" for not enforcing the release. Although the Supreme Court of Canada in *Dyck* (snowmobile racing) and this Court in *Mayer* (skiing) held that comprehensive releases are not contrary to public policy, the appellants submit that the present facts should lead to a different conclusion because zip-lining is an activity totally within the control of the operator. For example, they say that unlike skiers who have some control over where and how they ski, zip-liners have no control whatsoever once they are sent down a line.

**42** The appellants reply on two law reform commission reports. The first is the Law Reform Commission of British Columbia's *Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (October 1994), which recommended the enactment of legislation to preclude commercial recreational operators from excluding or limiting liability for personal injury or death from a number of sources of risk, including the unsafe operation of mechanical equipment or recreational apparatus by the operator's employees: pp. 47-49. The second is the Manitoba Law Reform Commission's *Waivers of Liability for Sporting and Recreational Injuries* (January 2009), which recommended the enactment of legislation to prohibit completely the use of waivers of liability for personal injury and death resulting from negligence in sporting and recreational activities: p. 43. In the alternative, the Manitoba Law Reform Commission recommended that such waivers be prohibited except where they are "in all the circumstances ... fair and reasonable". The circumstances to be considered in determining whether a particular waiver is fair and reasonable include: (a) the representations made to the consumer at the time the waiver is obtained; (b) the steps taken to bring the waiver to the consumer's attention; (c) whether the hazard causing the injury or death is exclusively under the control of the operator; and (d) the relationship between the consumer and the operator: p. 44.

**43** For its part, Cougar Mountain referred to the British Columbia Law Institute's *Consultation Paper on Proposals for Unfair Contracts Relief* (December 2010), in which the Unfair Contracts Relief Project Committee set out tentative recommendations for a proposed *Contract Fairness Act*, but did not recommend the inclusion of any provisions focusing on exclusion clauses: pp. 187-190. In explaining why it had come to that conclusion, the Committee stated (at p. xxvii):

> The committee decided not to propose specific reforms tailored to exclusion clauses. In its view, the timing is not right. The latest Supreme Court of Canada decision [*Tercon* ] should be given some time to operate, to see if it will have a beneficial impact on the law. In addition, the committee's general proposals in relation to unconscionability and good faith performance may ameliorate many of the problems caused by unfair exclusion clauses.

Cougar Mountain says that this is an indication that the current law works well.

**44** While the law reform commission recommendations are interesting, they do not establish an overriding public policy that would justify judicial nullification of an agreement knowingly and voluntarily entered into by a person wishing to engage in an inherently risky recreational activity. Releases such as the one in issue here have been in use for many years and have consistently been upheld by the courts. If, as the appellants submit, there are policy reasons why such releases should not be enforceable when an activity is totally within the control of an operator, then any change in the law is properly a matter for the Legislature.

**45** As Binnie J. stated in *Tercon*, "The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised": para. 117. He then provided examples of when it would be appropriate for a court to refuse to give effect to an exclusion clause. The first involves food suppliers who knowingly or recklessly sell toxic products to the public: para. 118. The second example, which Binnie J. described as "less extreme", involves a company that knowingly supplies defective plastic resin to a customer who uses it to make natural gas pipelines: para. 119. After giving these examples, he stated (at para. 120):

> Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract.

**46** What those examples have in common is that the party seeking to rely on an exclusion clause either knew it was putting the public in danger by providing a substandard product or service, or was reckless as to whether it was doing so. In other words, that party engaged in conduct that is so reprehensible that it would be contrary to the public interest to allow it to avoid liability. I am not convinced that where a participant is injured through the negligence of an operator, there is such a difference between situations where participants have some measure of control and those where they do not, that the latter rises to this high level of public policy. In both cases the injury was caused by negligence which cannot itself be controlled by the participant.

**47** I, therefore, find that the release signed by the appellants is neither unconscionable nor unenforceable at common law.

**Applicability of the *BPCPA***

**48** The appellants submit, with reference to the definitions in s. 1 of the *BPCPA*, that: (a) they were "consumers"; (b) Cougar Mountain was a "supplier"; and (c) their contracting for and participating in the zip-line tour was a "consumer transaction". On the basis that the *BPCPA* applies to their relationship with Cougar Mountain, they rely on its provisions dealing with unconscionable or deceptive acts and practices.

**49** I do not find it necessary to decide whether the *BPCPA* applies to the recreational sports activities industry to dispose of this appeal. Like the trial judge, I have concluded that even if the *BPCPA* does apply, the provisions relied on by the appellants do not lead to the invalidation of the release. Accordingly, the discussion below is based on the assumption that the *Act* applies.

**Is the Release Unconscionable by Reason of the *BPCPA*?**

**50** The appellants submit that even if the release they signed is not unconscionable at common law, it is unconscionable by virtue of s. 8 of the *BPCPA*. That provision, which is in Part 2 ("Unfair Practices") / Division 2 ("Unconscionable Acts or Practices"), reads, in part:

> 8(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
>
> (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

...

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
(f) a prescribed circumstance.

[Emphasis added.]

**51** The appellants submit that as the *BPCPA* is consumer protection legislation, it is to be interpreted generously in favour of the consumer. They say that "inequitable" in s. 8(3)(e) should be interpreted to mean "unfair" or "unjust" and that, as a result, the bar for unconscionability is lower under the statute than it is at common law.

**52** The difficulty with the appellants' position is that it equates "unconscionable" with "inequitable". This ignores the fact that s. 8(3) merely directs a court to consider the listed "circumstances" in coming to a determination as to whether a particular transaction is unconscionable.

**53** When the *BPCPA* was enacted there was a well-developed body of judicial authority setting out the high standard to be met before a contract could be set aside on the basis of unconscionability. The degree to which a contract can be said to be unfair has always been a factor in that determination. However, it has never been the only factor and I cannot read s. 8(3)(e) as having defined "unconscionable" to mean "inequitable". Had the Legislature intended such a result then it could easily have done so.

**54** In my view, whether one is considering unconscionability at common law or under the *BPCPA*, the essential elements are the same. As the facts here do not support a finding of unconscionability at common law, neither do they support such a finding under the *BPCPA*. In saying this, I am mindful of the fact that s. 9(2) of the *BPCPA* places the burden of proving that a transaction was not unconscionable on Cougar Mountain. It satisfied that burden by establishing that the appellants knowingly and voluntarily signed releases in order to participate in an inherently risky recreational activity.

**Is the Release Void Because of Deceptive Advertising?**

**55** The appellants contend that the trial judge failed to properly take into consideration their allegation that Cougar Mountain's website contained information that was deceptive and designed to

mislead consumers regarding the safety of zip-lining. For ease of reference, I will repeat the statement from the "Frequently Asked Questions" page upon which they rely:

> Q: Is it safe?
>
> A: The Skyline system is fully engineered and certified. Skyline is the safest cable ride system in the world because it utilizes a permanent rock anchor system rather than anchoring cables into trees. The cables used are also 3 times the thickness of conventional zip line systems.

**56** In advancing their argument, the appellants rely on the following provisions found in Part 2 ("Unfair Practices") / Division 1 ("Deceptive Acts or Practices") of the *BPCPA*:

> 4(1) In this Division:
>
> "deceptive act or practice" means, in relation to a consumer transaction,
>
> (a) an oral, written, visual, descriptive or other representation by a supplier, or
> (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;
>
> "representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.
>
> ...
>
> 5(1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

**57** In addition, reference was also made to the following provision, found in Part 10 ("Inspections and Enforcement") / Division 5 ("Court Proceedings") of the *BPCPA*:

> 171(1) Subject to subsection (2), if a person, ... has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a
>
> (a) supplier,
>
> ...

> who engaged in or acquiesced in the contravention that caused the damage or loss.

**58** The appellants say that the combined effect of ss. 4 and 5 of the *Act* requires Cougar Mountain to prove that the question and answer referred to above did not have "the capability, tendency or effect of misleading a consumer".

**59** My first difficultly with this argument is that there is nothing to indicate that either Ms. Loychuk or Ms. Westgeest was aware of, or relied on, the impugned question and answer. Neither provided direct evidence that she did so. The only evidence with respect to Cougar Mountain's website is in an affidavit sworn on January 14, 2011, by a paralegal at the law firm of the appellants' counsel. Attached as exhibits to that affidavit are copies of five Cougar Mountain webpages. Each of the first four pages is described as "a true copy of an Internet Printout dated August 28, 2007" (i.e., ten days after the accident). The last page, which contains the question and answer, is described as "a true copy of an [*sic*] Web archive". However, there is nothing in the affidavit stating that this page was on the website around the time of the accident. In other words, there is no evidence that the question and answer had anything to do with either appellant's decision to go zip-lining.

**60** Deceptive statements cannot be pleaded in the abstract. A consumer cannot allege that a statement was deceptive -- either in support of an assertion that a transaction was unconscionable or as an independent basis for damages -- without establishing that he or she relied on that statement in entering into the transaction in issue. Absent such a nexus a statement would not be a "representation", as it would not have been "used or relied upon by a supplier in connection with a consumer transaction."

**61** In any event, even if the appellants had read and relied on the question and answer, their position would be no better. This is because the answer is not capable of bearing the meaning the appellants seek to place on it, i.e., that zip-lining at Cougar Mountain was represented to be a safe, risk-free, activity. In particular, it cannot be understood as making a representation with respect to the skill, training, and safety of guides. Rather, the answer relates only to Cougar Mountain's infrastructure.

**62** Section 5 of the *BPCPA* does not require a defendant to prove that an impugned statement is true, but that "the [alleged] deceptive act or practice was not committed". While affirmatively proving that an impugned statement is true would be one method of proving it is not deceptive, in this case Cougar Mountain has met its burden of showing that it did not commit the deceptive act alleged because that allegation rests on giving the statement a broader meaning than it is capable of bearing.

**63** It is, therefore, unnecessary to decide the effect of the clause in the release which excludes reliance by a participant on any representations or statements about the safety of zip-lining other than those set out in the release: see para. 15 above.

**Is the Release Unenforceable for Lack of Consideration?**

**64** The appellants contend that they entered into their respective contracts to go zip-lining before going to Whistler and that, therefore, the releases were given without any consideration. Ms. Loychuk says her contract was entered into when a reservation was made using her husband's credit card. Ms. Westgeest says her contract was entered into when her friend made a reservation for their

group using her own credit card or, alternatively, that it was complete 24 hours prior to the start of her tour because of the 24-hour cancellation policy on Cougar Mountain's website. Their argument rests on the dissenting judgment of Chief Justice Nemetz in *Delaney*.

**65** As previously mentioned, Dr. Delaney drowned while white water rafting and his widow's action against the rafting company was dismissed at trial. One of the issues at trial was whether the release signed by Dr. Delaney was unenforceable for lack of consideration. In dealing with this point, the trial judge stated (at pp. 64, 67):

> The next morning the party assembled in the hotel parking lot where they were met by Cascade's employees, including the reservation manager, Louella Morrison, and the defendant Reambeault. At this juncture, Morrison attended upon the members of the group including Delaney and requested each to read and sign a liability release form. She indicated that those who refused to sign would not be permitted to participate in the white water adventure. All members of the party signed.
>
> . . .
>
> It was submitted by counsel for the plaintiff that the consideration herein was past consideration and consequently the contract is not valid and enforceable. But the deceased Delaney paid his money on the morning of 5th May at or about the time the release was signed. See the reservation log, Ex. 32. Cascade employees were in the hotel parking lot at Yale only a few minutes, just enough time to load the van and have the release signed. It would therefore be unreasonable to conclude that Delaney did not have actual or imputed knowledge at the time he paid his fee and received a ride ticket that a liability waiver would be required before embarkation. There was valid consideration.

**66** This Court divided on the consideration question. Chief Justice Nemetz would have found the release unenforceable. He held that Dr. Delaney did not have notice of the terms of the release or even its existence contemporaneous with the formation of the contract which, in the Chief Justice's view, occurred the very moment the company accepted payment. He opined that once the contract had been entered into, the company had no more right to require Dr. Delaney to sign the release than it would have had to require him to pay a higher fare: p. 33.

**67** The majority, however, was of the view that the release did not fail for lack of consideration. In this regard, McFarlane J.A. stated (at p. 44):

> Upon the basis of [the trial judge's] findings which are fully supported by the evidence I think the argument of "past consideration" must fail. It seems clear that the deceased was informed that unless he signed the release form he would not be taken on the trip. The immediate consideration which he received was therefore that he was permitted to enter the van and carry on with the venture.

**68** *Delaney* was applied in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd on other grounds (1987), 49 B.C.L.R. (2d) 99 (C.A.). Mr. Milina entered into a performance contract in Vancouver with the organizers of an acrobatic ski event to take place in Toronto. The night before

the event, the organizers explained to all the performers that they had no insurance and could not accept responsibility for the risks involved in any of the performances. The performers were told they would not be allowed to perform unless they signed a waiver. Mr. Milina did so. He was injured while performing and sued the organizers and a number of other parties.

**69** The enforceability of the waiver was an issue at trial. The organizers' position was that the waiver constituted an independent contract, the consideration for which was allowing Mr. Milina to perform. He contended that the contract had been entered into in Vancouver and that the waiver was an attempt by the organizers to vary that agreement without any new consideration being given. In accepting the organizers' position, McLachlin J. held that *Delaney* was dispositive. After summarizing the majority judgment in that case, she continued (at p. 73):

> In [*Delaney*], as in the case at bar, the parties had entered into a contract prior to the release being presented and signed (I cannot accept the distinction offered by counsel for the plaintiff that *Delaney* proceeded on the basis there was no prior contract.). In that case as in this, the plaintiff was told that he would not be allowed to pursue the activity in question unless he signed the release. If permission to continue with the activity in question constituted consideration for the waiver in *Delaney*, so must it in the case at bar.
>
> To put the matter another way, [the organizers] owed no duty under the contract made in Vancouver to allow the plaintiff to perform (although they might have been obliged to pay him in any event). The plaintiff wanted to perform. He was allowed to perform in consideration for signing the release. That was not past consideration, as the plaintiff contends, but new consideration.

**70** The reasoning of the majority in *Delaney*, which is binding on this division, is also dispositive in the present case. The consideration the appellants received for signing the release was being allowed to participate in the zip-lining activity. Whether either of them had read the statement on the Cougar Mountain website regarding the requirement to sign a waiver is immaterial.

**Conclusion**

**71** I would dismiss this appeal.

S.D. FRANKEL J.A.
M.V. NEWBURY J.A.:-- I agree.
E.A. BENNETT J.A.:-- I agree.

# TAB 15

*Case Name:*

# Arif v. Li

**Between**
**Mohammed Siddeeq Arif, Plaintiff, and**
**Xiaonping Li, The Ping Way Inc. operating**
**as Zen Climb and Rattlesnake Point**
**Conservation Area c/o Halton Conservation Authority, Defendants**

[2016] O.J. No. 4013

2016 ONSC 4579

Court File No.: CV-15-524295

Ontario Superior Court of Justice

**M.D. Faieta J.**

Heard: June 13, 2016.
Judgment: July 13, 2016.

(88 paras.)

*Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- No triable issue -- To dismiss action -- Motion by defendants for summary judgment dismissing plaintiff's action allowed -- Motion by plaintiff to adjourn defendants' motion to allow him to deliver further affidavit dismissed -- Plaintiff claimed damages arising from injury suffered while rock climbing in conservation area owned by defendant Conservation Authority during introductory rock climbing course offered by defendant Zen Climb -- Reasonable for defendants to rely on releases signed by plaintiff -- Releases were unambiguous and covered plaintiff's claim -- Defence of volenti applied as plaintiff, by own actions, voluntarily assumed risks of rock climbing -- Rules of Civil Procedure, Rule 39.02(2).*

*Tort law -- Defences -- Release -- Voluntary assumption of risk (volenti non fit injuria) -- Voluntary acceptance of risk -- Motion by defendants for summary judgment dismissing plaintiff's action allowed -- Motion by plaintiff to adjourn defendants' motion to allow him to deliver further affidavit dismissed -- Plaintiff claimed damages arising from injury suffered while rock climbing in conservation area owned by defendant Conservation Authority during introductory rock climbing course offered by defendant Zen Climb -- Reasonable for defendants to rely on releases signed by plaintiff*

*-- Releases were unambiguous and covered plaintiff's claim -- Defence of volenti applied as plaintiff, by own actions, voluntarily assumed risks of rock climbing -- Rules of Civil Procedure, Rule 39.02(2).*

Motion by the defendants for summary judgment dismissing the 62-year-old plaintiff's action. Motion by the plaintiff to adjourn the defendants' motion to allow him to deliver a further affidavit. The plaintiff claimed damages arising from an injury suffered while rock climbing in a conservation area owned by the defendant Conservation Authority during an introductory rock climbing and rappelling course offered by the defendant Zen Climb. To enter the conversation area, the plaintiff had to pay an entrance fee. The receipt contained a release of liability. A notice posted at the trailhead also included an exclusion of liability for the Conversation Authority. The plaintiff signed two releases, one for Zen Climb and one for the Conversation Authority, at the beginning of the course. Zen Climb provided a safety talk after the releases were signed. The plaintiff wished to deliver the affidavit of a rock climbing expert.

HELD: Motion by defendants allowed; motion by plaintiff dismissed. The affidavit was not relevant to the operation of the releases and the defence of volenti non fit injuria. It was reasonable for the defendants to rely on the plaintiff's signature of the releases. The plaintiff understood he would not be permitted to participate in the rock climbing unless he signed the releases. The defendants were not obliged to ensure the plaintiff understood the legal effect of the releases. The releases were not unconscionable or contrary to public policy. The releases were unambiguous and covered the plaintiff's claim. The defence of volenti applied as the plaintiff, by his own actions, voluntarily assumed the risks of rock climbing.

**Statutes, Regulations and Rules Cited:**

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20, Rule 39.02(2)

**Counsel:**

*Rachelle Mitri,* for the Plaintiff.

*Stephen Libin*, for the Defendant.

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M.D. FAIETA J.:--

## INTRODUCTION

**1** The Plaintiff, Mohammed Siddeeq Arif ("Arif"), brings this action for damages arising from an injury suffered while rock climbing in the Rattlesnake Point Conservation Area during an introductory rock climbing and rappelling course offered by the Defendant, The Ping Way Inc., which operates as Zen Climb ("Zen Climb"). The Defendant Xiaoping Li ("Li") (who is misnamed in the Statement of Claim as Xiaonping Li) is the President of Zen Climb. Rattlesnake Point is owned by the Defendant Halton Region Conservation Authority ("HRCA"), which is misnamed in the Statement of Claim as "Rattlesnake Point Conservation Area c/o Halton Conservation Authority."

**2** The Defendants, Zen Climb and HRCA, bring this motion for summary judgment to dismiss this action on the grounds that Arif released the Defendants from liability by signing two releases and voluntarily assumed the risks associated with rock climbing by participating in this course. The Plaintiff has provided his consent to a dismissal of the action only against Li.

**3** For the reasons described below, I have granted summary judgment and have dismissed this action.

## BACKGROUND

**4** Arif is 62 years old. He is married and has four adult children. In 1975, he obtained a university degree in pharmacy. He worked as a production manager for a multinational pharmaceutical manufacturer for about two decades before he moved to Canada in 1999. While in Pakistan, Arif spoke English exclusively at university and at work. Today, Arif is a supervisor for another pharmaceutical company. About 25 employees report to him.

### Website Booking

**5** During a visit to Canada, Arif's son-in-law, Nihal Javed, asked Arif to go rock climbing. Arif had never been rock climbing before. Arif thought that rock climbing would be a hiking activity. Arif and Nihal were joined by Arif's son, Naeem Arif.

**6** On June 29, 2013 Li received a completed registration form through the website www.zenclimb.com from Nihal for Zen Climb's introductory rock climbing and rappelling course that was offered on July 1, 2013. The following statement appears below the registration form on the website:

> By submitting the above information, you agree to our Booking Conditions and Cancellations Policy.
>
> Booking Conditions:
>
> All participants are required to read, understand and sign this waiver of liability. Those under the age of 18 years must have a parent or legal guardian co-sign their waiver, and must be accompanied by an adult. The minimum age to climb is 6. [Hyperlink underline in original.]

**7** Clicking on "this waiver" leads to the Zen Climb Release of Liability, Waiver of Claims and Assumption of Risks and Indemnity Agreement ("Zen Climb Release") described below.

**8** Naeem and Nihal used Arif's credit card to pay for the rock climbing course registration on Zen Climb's website.

**Receipt**

**9** There is only one public entrance to Rattlesnake Point. All visitors must pay an entrance fee prior to entering Rattlesnake Point. The receipt for the entrance fee must be displayed on the dash of the visitor's automobile.

**10** The reverse side of the receipt states in black font:

LEGAL NOTICE TO ALL USERS PLEASE ENSURE
ALL MEMBERS OF YOUR GROUP ARE AWARE
OF THIS NOTICE EXCLUSION OF LIABILITY
-- ASSUMPTION OF RISK - JURISDICTION
AND CHOICE OF LAW

**11** The reverse side of the receipt continues in red font:

THE CONDITIONS WILL AFFECT YOUR LEGAL
RIGHTS INCLUDING THE RIGHT TO SUE OR
CLAIM FOR COMPENSATION FOLLOWING AN ACCIDENT

**12** Under the heading "**PLEASE READ CAREFULLY**" the reverse side of the receipt continues with the following statement in a bright yellow box surrounded by a red frame:

> As a condition of your use of the facilities, properties or bodies of water, you assume all risk of personal injury, death or property loss resulting from any cause whatsoever including, but not limited to off road cycling, rock climbing, swimming, all other permitted activities, travel within or beyond the Park boundaries, or negligence, breach of contract or breach of statutory duty of care or breach of the Occupiers Liability Act on the part of The Halton Region Conservation Authority, its employees, agents, ...(collectively referred to as The Halton Region Conservation Authority). You agree that the Halton Region Conservation Authority shall not be liable for any such personal injury, or death or property loss and you release The Halton Region Conservation Authority and waive all claims with respect thereto. You agree that any litigation involving The Halton Region Conservation Authority shall be brought solely within the province of Ontario and shall be within the exclusive jurisdiction of the Court of the Province of Ontario. You further agree that these conditions and any rights, duties and obligations or litigation as between The Halton Region Conservation Authority and you shall be governed by and interpreted solely in accordance with the laws of the Province of Ontario and no other jurisdiction.

**13** Beneath the bright yellow box on the receipt is the following statement:

**THE HALTON REGION CONSERVATION AUTHORITY LIABILITY IS EXCLUDED BY THE TERMS OF THESE CONDITIONS.**

PLEASE BE RESPONSIBLE FOR YOUR OWN SAFETY IN ALL ACTIVITIES.

PLEASE USE FACILITIES CAREFULLY.

**14** Arif acknowledges that he received the above receipt. However, he states that he did not see the reverse side of the receipt.

**Posted Notice**

**15** The following notice is posted on a sign, measuring 18 inches by 24 inches, that is affixed to the entrance to the trailhead. The word NOTICE appears in large white font against a red background. Immediately below, the following statement appears in black font against a white background:

> Conservation Halton
>
> (The Halton Region Conservation Authority)
>
> Legal Notice to All Users
>
> Exclusion of Liability / Assumption of Risk
>
> PLEASE READ CAREFULLY

**16** Immediately beneath the above statement appears a yellow box with the same statement shown on the reverse side of the receipt described above. Beneath the yellow box is the following statement in white font against a black background:

> The Halton Region Conservation Authority's Liability is excluded by the terms of these conditions.

**17** Arif does not recall seeing the Posted Notice.

**Meeting in the Parking Lot**

**18** Upon Arif's arrival within Rattlesnake Point, he met other persons who had signed up for the introductory rock climbing course in the parking lot.

**19** Li states:

> I provided the plaintiff, his son and his son-in-law with the Zen Climb Release and the Conservation Halton Release while they were standing in the parking lot. I asked them to please read, understand and then sign the two releases.
>
> After approximately three to five minutes, Mr. Arif returned the executed releases to me.
>
> At no point did Mr. Arif, his son or son-in-law ask me any questions about the waivers. If I am not asked questions about the release, then I assume that the people signing understand unless they show signs of bewilderment or reluctance. Mr. Arif, his son and son-in-law did not express any bewilderment or reluctance when they returned the releases. It was my impression that Mr. Arif, his son and son-in-law completely understood the documents that they signed. ...

**20** The Plaintiff was wearing a helmet and a harness when he signed the Releases. The Plaintiff admitted that he was given an opportunity to review the Releases and could have asked for more time to review the Releases if he wanted more time. The Plaintiff admitted that he did not ask for

more time to review the Releases. Even though on cross-examination the Plaintiff admitted that the titles of the Releases clearly indicated their purpose, and even thought he had admitted that he had not read all the clauses of the Releases, the Plaintiff testified that he thought that he was not releasing the Defendants from liability for matters within their control. He stated:

> Q: You understood, though, that a document that was titled Individual Waiver of Public Liability was a waiver of liability, correct?
>
> A: That's right.
>
> Q: You understood that a document that was called Release of Liability, Waiver of Claims and Assumption of Risks and Indemnity Agreement, the purpose was pretty clear, wasn't it?
>
> A: Yeah, but I thought it's the liabilities against for anything happens which is beyond Mr. Xiaonping's control, right? Anything within his control, obviously, I wasn't aware that I'm sign --- I'm waiving off my right to release his responsibilities.

**21** On cross-examination Li stated that "we joked about signing away their life" when the Plaintiff, Naeem and Nihal returned the signed Releases to Li.

**Conservation Halton -- "Individual Waiver of Public Liability"**

**22** Once in the conservation area, Arif met other people who were in his group and had also signed up to take this course. At this juncture, Arif learned that the rock climbing activity involved climbing using ropes and harnesses. They were also provided with some directions. They were shown how to put on a harness. They were given a form entitled "Individual Waiver of Public Liability" to sign ("Conservation Halton Release"). Conservation Halton does not permit visitors to Rattlesnake Point to participate in rock climbing or other inherently risky activities unless they sign the form.

**23** The one page Conservation Halton Release signed by Arif states:

> Halton Region Conservation Authority
>
> INDIVIDUAL WAIVER OF PUBLIC LIABILITY
>
> W A R N I N G!
>
> THE SPORT OF ROCK CLIMBING, MOUNTAINEERING AND CAVING IS RECOGNIZED TO BE AN ACTIVITY IN WHICH A HIGH LEVEL OF RISK IN TERMS OF PERSONAL INJURY AND/OR DEATH IS INVOLVED. THE HALTON REGION CONSERVATION AUTHORITY ACCEPTS NO RESPONSIBILITY FOR ANY ACCIDENT, INJURY, DEATH OR LOSS OR DAMAGE TO PERSONAL PROPERTY RESULTING FROM THE USE OF ITS PROPERTY FOR SUCH ACTIVITIES, AND ANY PERSON OR GROUP

OF PERSONS ENGAGING THESE ACTIVITES DO SO AT THEIR OWN RISK. [Underlining in original.]

IN CONSIDERATION OF THE HALTON REGION CONSERVATION AUTHORITY permitting me to utilize its property, THE UNDERSIGNED does, for himself or herself and his or her heirs, executors, administrators and personal representatives, hereby remise, release and forever discharge the HALTON REGION CONSERVATION AUTHORITY and its successors, assigns, staff and employees, from all manner of action, causes of action, suits, claims or demands of whatsoever nature or kind against the HALTON REGION CONSERVATION AUTHORITY or its successors, assigns, staff or employees, which the undersigned, his or her heirs, executors, administrators and personal representatives had, now have or may hereafter have by reason of personal injury or death or loss or damage to property arising out of the participation of the undersigned in such activities or instructional program at the:

RATTLESNAKE POINT CONSERVATION AREA

on _____ 07/01/2013_____
Date(s) of Activity

THE UNDERSIGNED, hereby acknowledges that as of the date hereof, he or she is eighteen (18) years of age or over, and has read and understands the above.

IN WITNESS WHEREOF, the undersigned has hereunto set his or her hand.

_____"signature"_____ Signature of Participant or Parent/Legal Guardian

_____MOHAMMED ARIF_____ Participant's Name -- PLEASE PRINT

_____07/01/13_____ Date Name of Group

**24** Arif states that he signed this form within an hour of his arrival to the conservation area and before any climbing activities occurred. He understood that it was not possible to participate in the activity without signing the Conservation Halton Release.

**25** Arif states that he read some of the Conservation Halton Release but not every word. He admits that there was nothing unclear in that document and thus he did not ask for clarification. Arif states that he understood the purpose of the Conservation Halton Release in a general way.

**Zen Club -- "Release of Liability, Waiver of Claims and Assumption of Risks and Indemnity Agreement"**

**26** The Zen Climb Release that was signed by Arif is a two page document. The first page of the Zen Climb Release states:

**The Ping Way Inc.**

**Operating as Zen Climb**

**RELEASE OF LIABILITY, WAIVER OF CLAIMS AND ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT**

**BY SIGNING THIS DOCUMENT YOU WILL WAIVE OR GIVE UP CERTAIN RIGHTS TO SUE OR TO CLAIM COMPENSATION FOLLOWING AN ACCIDENT**

**PLEASE READ CAREFULLY!**

_____ Signature of Participant or Parent or Legal Guardian

To: The Ping Way Inc. operating as ZEN CLIMB and To: HER MAJESTY THE QUEEN IN RIGHT OF Canada and their directors, officers, employees, agents, guides, independent contractors, subcontractors, sponsors, assigns and representatives (all of whom are hereinafter referred to as "the RELEASEES")

DEFINITION

THE RELEASEES' programs include, but are not limited to, rock climbing, hiking, camping including winter camping, mountaineering, cross-country skiing, waterfall ice climbing, glacier travel and high altitude climbing and travel, slacklining, teambuilding initiatives and exercises, canoeing, kayaking and general physical exercise both outdoors and indoors.

In this Agreement, the term "Wilderness Activities" shall include but is not limited to: hiking, orienteering, nature study, snow sports, touring, slacklining, mountaineering, rock or ice climbing, expeditions, trekking, glacier travel, mountain biking, horseback riding, swimming, boating, fishing, water sports, and all activities, services and use of facilities either provided by or arranged by the Releasees including orientation and instructional sessions or classes, transportation, accommodation, food and beverage, water supply, rescue and first aid services, and all travel by or movement around vehicles, helicopters, other aircraft, horses and pack animals, all terrain vehicles, watercraft or other vehicles.

**ASSUMPTION OF RISKS**

I understand that the Releasees' programs involve intrinsic, unknown or unanticipated hazards and risks, not all of which can be listed here. Among the more obvious and frequent are:

1. Steep terrain where a fall, whether roped or unroped, may cause injury or death.

2. Falling rock, ice or other objects, which may cause injury or death.

3. Violent and unpredictable weather, which may cause injury due to extremes of heat or cold, and which may prevent travel to, from or within an area.

4. Unfamiliar country, where the program participants may get lost, off route or be separated from the rest of the party.

5. Wild animals, which have been known to maul, sometimes fatally, mountain travelers.

6. Avalanches, which are highly dangerous and may be triggered by the activities of skiers or climbers or by natural forces.

7. Remoteness of location with poor communications and inability to get rescue or medical assistance quickly or easily.

8. Medical problems arising from climbing at high altitudes or in areas where adequate supplies of clean food or water may be unavailable.

9. Transport by public or private motor vehicle, helicopter and light fixed wing aircraft or through the use of animals.

10. Hazards involved in canoeing, kayaking and other water activities such as capsize, striking rocks in rivers, and drowning.

11. Scrapes, bruises, fractures and other injuries sustained in physical activity indoors and outdoors.

**12. NEGLIGENCE ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE BY THE RELEASEES TO TAKE REASONABLE STEPS TO SAFE GUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF WILDERNESS ACTIVITIES.**

**I AM AWARE OF THE RISKS, DANGERS AND HAZARDS ASSOCIATED WITH WILDERNESS ACTIVITIES AND I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND LOSS RESULTING THEREFROM.**

**NON-SCHEDULED OR EMERGENCY EVACUATION, RESCUE OR FIRST AID**

I acknowledge and agree that all expenses associated with non-scheduled or emergency evacuation, rescue or first aid will be my responsibility and will not be covered by the Releasees.

_____ Initials

27 The second page of the Zen Climb Release states:

**THE PING WAY INC.**

**Operating as Zen Climb**

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT

In consideration of the Releasees accepting my application for any of the Releasees' programs or activities, I agree to this release of claims and waiver of liability as follows:

1. **TO WAIVE ANY AND ALL CLAIMS** that I have or may in the future have against **THE RELEASEES** from any and all liability to the fullest extent permitted by law for any loss, damage, expense or injury including death that I (or my child) may suffer, or that my next of kin may suffer, as a result of my or child's participation in wilderness activities DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER ANY APPLICABLE OCCUPIERS' LIABILITY LEGISLATION IN THE PART OF THE RELEASEES, AND ALSO INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS REFERRED TO ABOVE;

2. I am not relying on any oral or written statements made by the Releasees or their agents, whether in brochures, advertisements or in individual conversations to lead me (or my child) to become involved in this program on any basis other than my assumption of the risks involved.

3. I accept all of the risks and the possibility of death, personal injury, property damage and loss resulting from my or my child's involvement with the program I am taking with the Releasees.

4. I certify that I am (or my child is) physically capable and fit to participate in this activity.

5. I confirm that I am eighteen years of age or older.

6. I confirm that I assign my child's teacher or climbing instructor as my child's guardian during my child's participation in Wilderness Activities in the absence of my presence.

6. I confirm that I have read over this agreement before signing, that I understand it, and that it will be binding not only on me but also on my heirs, my next of kin, my executors, administrators and assigns.[1]

7. I hereby irrevocably submit to the exclusive jurisdiction of the courts of the Province of Ontario and I agree that no other courts can exercise jurisdiction over the agreements and claims referred to herein. Any litigation to enforce this agreement shall be instituted in Ontario and nowhere else.

8. **I HEREBY AGREE TO HOLD HARMLESS AND INDEMNIFY THE RELEASEES** from any and all liability to the fullest extent permitted by law for any property damage or personal injury to any third party resulting from my (or my child's) participation in wilderness activities.

**I HAVE READ AND UNDERSTOOD THIS AGREEMENT PRIOR TO SIGNING IT AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I OR MY HEIRS, NEXT OF KIN, EXECUTORS, ADMINISTRATORS, ASSIGNS AND REPRESENTATIVES MAY HAVE AGAINST THE RELEASEES.**

"signature" _____ Witness

___"signature"_____ Signature of Participant or Parent or Legal Guardian

___Xiaoping Li_____ Witness's

___MOHAMMED ARIF_____ Printed Name
Printed Name of Participant or Parent or Legal Guardian

___July 1, 2013_____ Date

_____ Printed Name of Participant under the age of 18

PARTICIPANT'S EMERGENCY CONTACT:

Name: ____Lubna Arif_____

Phone: _____[omitted]_____

*The "Safety Talk"*

**28** Li provided a "safety talk" in the parking lot after the Releases were signed. He stated:

> I provided a safety talk in the parking lot. It is my standard procedure during a safety talk to explain the inherent dangers of rock climbing, including the risk of personal injury. I also typically remind all the participants that it is important for everyone to keep an eye on their own safety and that all participants have a right to refuse to participate in any activity that they feel is unsafe.

**The First Climb and Fall**

**29** After the safety talk and checking that all of the participants had executed waivers and were equipped with harnesses and helmets, Li led the participants to the rock face. Li performed a demonstration for the participants. Arif volunteered to be the 'climber' for the purposes of the demonstration. Li acted as the belayer.[2] During this demonstration, Arif fell off the wall. Arif states that he fell because he lost his grip on the rope. Arif was approximately 3-4 meters up the face of the wall when he fell. However, Arif did not fall to the ground as the rope and harness supported him while he dangled in the air before being lowered to the ground by Li.

**30** Arif admitted that after his first fall, he knew that he could possibly fall from the rock, hit the rock face and injure himself while rock climbing. Li states that at no point did Arif show any reluctance or hesitancy. Arif did not ask to remove himself from the program; he independently decided to participate. Arif agreed that he could have withdrawn from participating in further rock climbing but stated "... since I thought I was there and have paid for it so I'm -- I just wanted to try it."[3]

**The Second Climb, Fall and Injury**

**31** Approximately 30-60 minutes after the First Climb, it was Arif's turn to climb again. Li suggested that Arif climb an easier route a few minutes away from the demonstration site. During this second rock climb, Naeem acted as the belayer. Once again, Arif lost his grip. Arif fell to the ground from a height of about two metres. His fall resulted in an injury to his right leg.

**ISSUES**

**32** This motion for summary judgment raises the following issues:

1) Should leave be granted to produce further affidavit evidence pursuant to Rule 39.02(2)?

2) Should this motion for summary judgment be adjourned to permit the Plaintiff to provide this court with additional evidence regarding the circumstances in which the Releases were signed?

3) Are the Releases a Full Defence to the Plaintiff's Claim?

4) Is the defence of *Volenti Non Fit Injuria* a complete answer to the Plaintiff's Claim?

**ANALYSIS**

**33** A motion for summary judgment is governed by Rule 20 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194. Summary judgment shall be granted if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

**34** On a motion for summary judgment a court must consider the evidence submitted by the parties and it may, unless the interests of justice dictate otherwise, weigh the evidence, evaluate credibility of a deponent and draw any reasonable inference from the evidence.

**35** In *Hryniak v. Maudlin,* 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49 the Supreme Court of Canada stated:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

**36** The onus is on the moving party to show that there is no genuine issue requiring a trial. Each side must put its "best foot forward" with respect to the existence or non-existence of material issues.[4] A motions judge is entitled to assume that the record contains all the evidence that the parties would present if there were a trial.[5]

**Issue #1: Should Leave Be Granted To Allow Arif To Deliver A Further Affidavit And To Adjourn This Motion For Summary Judgment To Allow For Cross-Examination?**

**37** At the outset of this motion, I denied Arif's motion for leave to deliver the affidavit of Derek Wilding, sworn June 6, 2016, pursuant to Rule 39.02(2) of the *Rules of Civil Procedure,* and for an adjournment of this motion for summary judgment in order to permit the Defendants to cross-examine Wilding. Rule 39.02(2) states:

> A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. [Emphasis added.]

**38** I make two self-evident observations regarding the language used in Rule 39.02(2): (1) the moving party bears the onus of establishing that leave should be granted; and (2) the granting of leave is the exception, not the rule. I agree with the following observations made by Morawetz, R.S.J. in *Redstone Investment Corp (Re)*, 2016 ONSC 513, 263 A.C.W.S. (3d) 590, at paras. 9-10:

> There is a high threshold for admissibility under Rule 39.02(2).
>
> In *Shah v. LG Chem, Ltd.*, 2015 ONSC 776 at para. 23, Perell J. summarized the principles that have emerged in Rule 39.02(2) jurisprudence:

1. Leave under Rule 39.02(2) should be granted sparingly.

2. The moving party has a very high threshold to meet.

3. The rule about the delivery of subsequent affidavits should not be used as a "mechanism for correcting deficiencies in the motion materials."

4. The rule is designed to fairly regulate and provide closure to the evidence gathering process for motions and applications.

**39** In *Lockridge v. Ontario (Ministry of the Environment, Director)*, 2013 ONSC 6935, 234 A.C.W.S. (3d) 34, at para. 24, the Ontario Divisional Court stated that the following test should be applied in deciding whether to grant leave under Rule 39.02(2):

1) Is the evidence relevant?

2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?

3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

**40** The affidavit of Govind Upadyayula, sworn June 2, 2016, was delivered by Arif in support of this motion.

**Is the Evidence Relevant?**

**41** Wilding is a purported expert in rock climbing. His affidavit appends his seven page letter dated April 21, 2016 that concludes that Li's actions were "markedly below industry best practices." This same letter was appended to the affidavit of Zeitoon Vaezzadeh, another lawyer representing Arif, sworn April 22, 2016, who opined that "... the evidence suggests that the Defendant(s) was/were negligent and likely grossly negligent, so even if the Waiver Documents are held up by the Court, these documents would not protect the Defendant(s) against gross negligence." In my view, evidence regarding whether Li and Zen Climb were negligent or grossly negligent is not relevant on this motion for summary judgment. As I note below, there is no differentiation in the law between gross negligence and negligence as it pertains to the operation of the Releases and the defence of *volenti*.

**Does the Affidavit Respond to a Matter Raised on Cross-Examination?**

**42** Upadyayula's affidavit states that counsel for Arif had planned to obtain a report from an expert in rock climbing long before the cross-examinations were held. Paragraphs 4 and 5 of his affidavit state:

> I am advised by Ms. Mitri and verily believe that prior to the within motion, the Plaintiff had not contemplated retaining an expert. The Plaintiff had to put his best foot forward in defending this motion, so Ms. Mitri took steps to identify potential experts whom could opine on rock climbing industry standards.
>
> I am advised by Ms. Mitri and verily believe that Mr. Libin knew of Ms. Mitri's intentions to retain an expert to render an opinion with respect to the Incident and whether or not the Defendants met industry practice standards with respect to providing rock climbing instruction courses. I am advised by Ms. Mitri that this factor was raised by her at the February 19th court appearance when determining dates for the timetable attached as Exhibit "A".

**Would Leave Result in Non-Compensable Prejudice?**

**43** The Defendants did not take the position that leave would result in non-compensable prejudice.

**Is there a Reasonable Explanation for the Failure to include the Evidence from the Outset?**

**44** A date for the hearing of this motion for summary judgment, including a timetable for the exchange of evidence, was set by Justice Firestone in CPC Court on February 19, 2016. The timetable provided that Arif's Responding Record was to be delivered by March 31, 2016 and that cross-examinations were to be completed by April 27, 2016. Arif, Li and a representative of Conservation Halton were cross-examined on their affidavits on April 27, 2016.

**45** Paragraphs 4, 6, 7, 8, 9, 10, 11, 17 and 19 of Upadyayula's affidavit provide the following explanation for the failure to include the expert rock climbing evidence prior to the delivery of the responding motion record:

> I am advised by Ms. Mitri and verily believe that prior to the within motion, the Plaintiff had not contemplated retaining an expert. The Plaintiff had to put his best foot forward in defending this motion, so Ms. Mitri took steps to identify potential experts whom could opine on rock climbing industry standards. ...
>
> I am advised by Ms. Mitri and verily believe that finding an expert that could comment on the issues at hand was not an easy task, as there were some new factors that a couple of the experts she conversed with inquired about, such as very particular questions surrounding the type of bolts and ropes used, that a non-expert in the industry may not have turned their minds to. Ms. Mitri further advised that there was quite a delay in obtaining many of the responses the rock climbing experts she had been talking to had to figure out before they could comment on whether they could assist with a report that could opine on such a matter.
>
> I am advised by Ms. Mitri and verily believe that she spoke with Mr. Libin on a number of occasions to obtain further information from his insured that she now understood to be relevant and to produce certain relevant documents as part of his ongoing duty to provide relevant documentary disclosure that was in his client's possession or control. Mr. Libin hesitantly provided a response to one in-

quiry and not to others, but instead invited the Plaintiff to take steps to figure it out on his own, since examinations for discovery had already taken place and it was the Plaintiff's case to prove. Mr. Libin further took the position that the issue of negligent is not relevant to this motion, but Ms. Mitri disagreed due to the distinction between negligence and gross negligence. ...

I am advised by Ms. Mitri and verily believe that she hired private investigator, Harold Schlesinger, to attend Zen Climb with the Plaintiff and his son. This visit was facilitated by opposing counsel and the Defendant Li, and took place on or around March 26, 2016. ...

I am advised by Ms. Mitri and verily believe that she found an expert that was able to opine on the aforementioned matters and provide a report with respect to same on or around April 7th, 2016.

I am advised by file review and verily believe that on or around April 22, 2016, our office sent Mr. Libin correspondence including the expert report of Mr. Derek Wilding, the day it was received. ...

Mr. Libin confirmed that Ms. Vaezzadeh would not be examined and at no point raised any concerns with regards her affidavit evidence introducing Mr. Wilding's report as exhibit or his intentions to exclude same unless he was afforded the opportunity to cross-examine him on the 27th or on a date thereafter. ...

I am advised by Ms. Mitri and verily believe that upon a review of the Defendant's factum, this was the first time that she became aware of the Defendant's position with respect to the admissibility of Mr. Wilding's Report itself. ...

I am advised by Ms. Mitri and verily believe that the Report was originally not served by way of obtaining an affidavit of Mr. Wilding primarily due to impractical circumstances. Notably, said circumstances included the fact that Mr. Wilding lives and works in Alberta, delay in receiving particulars in order for the expert report to be prepared, and thereafter the fast-approaching deadline to file the Responding materials prior to the scheduled Cross-Examinations. Finally, due to prior commitments, Mr. Wilding was not available for cross-examinations at any point in April or May.

**Conclusion**

**46** In my view, leave should not be granted for the following reasons. First, I am not satisfied that the Wilding affidavit provides relevant evidence. In my view, the Releases respond to any liability of the Defendants which includes negligence (which in turn includes gross negligence). Second, the Wilding affidavit does not respond to a matter raised on the cross-examination of the Defendants. Third, Arif has failed to provide a reasonable explanation for the very late delivery of the Wilding affidavit: counsel did not retain Wilding until a week after the deadline for filing responding material had passed despite having commenced this action in 2013 and having had examinations for discovery completed by November 2015. Arif was well aware of the necessity of a party to put

its "best foot forward" on a motion for summary judgment. The late delivery of this affidavit also results, in part, from an attempt to correct the perceived deficiencies of the responding motion materials which arise from Arif's attempt to tender the Wilding report as admissible evidence on this motion by appending it as an exhibit to a solicitor's affidavit.

**Issue #2: Should This Motion For Summary Judgment Be Dismissed To Permit The Plaintiff To Provide This Court With Additional Evidence Regarding The Circumstances In Which The Releases Were Signed?**

**47** The Plaintiff submits that there is evidence not before this Court including: 1) any representations or undertakings made by the Defendants as to the safety and quality of the rock climbing course; 2) the circumstances at the time that the Releases were signed; 3) the timing at which the Releases were presented to the Plaintiff; 4) what explanations and discussions occurred during the signing of the Releases. The Plaintiff submits that this evidence is necessary in determining whether the Releases are binding. I reject this submission. The Plaintiff has had many months to prepare for this motion for summary judgment. The timetable for this motion was established by the Court in February 2016. The Plaintiff has filed affidavits. He has conducted examinations for discovery and cross-examinations. The Plaintiff has not explained why this evidence was not gathered earlier. By his own admission, he has failed to put his "best foot forward" on this motion for summary judgment as required under Rule 20 of the *Rules of Civil Procedure*. Accordingly, I dismiss the Plaintiff's request to dismiss this motion for summary judgment in order that he may gather additional evidence.

**48** In any event, much of the evidence that the Plaintiff states is not before this court has, in fact, been addressed by the affidavits and examinations that have been filed.

**Issue #3: Are The Releases A Full Defence To The Plaintiff's Claim?**

**49** Arif raises the following issues:

1) Is the Plaintiff bound by the terms of the Releases?

2) Do the Releases cover the Plaintiff's claim?

**Is the Plaintiff Bound by the Terms of the Releases?**

**50** A review of the case law shows that a person is bound by a signed release unless one of the following circumstances exist:

* *Non Est Factum* -- The signer, through no carelessness on his or her part, is mistaken as to the document's nature and character;[6]

* Fraud or Misrepresentation -- The signer is induced to sign the contract by fraud or misrepresentation;[7]

* Objective Lack of *Consensus Ad Idem* - Where it is unreasonable for a person relying on the signed contract to believe that the signer really did assent to its terms;[8]

* Unconscionable -- was the contract formed in unconscionable circumstances;

* Public Policy -- There is an overriding public policy that outweighs the very strong public interest in the enforcement of contracts.

**51** The Plaintiff did not plead or rely upon *non est factum* or misrepresentation. There is no dispute that the Plaintiff understood that the two documents that he signed were releases. Similarly, the Plaintiff does not allege that he was induced to sign the Releases by a misrepresentation made by the Defendants.

Lack of Consensus *Ad Idem*

**52** Professor Stephen M. Waddams in The Law of Contracts, 6th ed. (Toronto: Canada Law Book, 2010), at para. 318, states:

> One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words he uses their reasonable meaning. But the other side of the same coin is that only a reasonable expectation will be protected. If the party seeking to enforce the document knew or had reason to know of the other's mistake the document should not be enforced. [Emphasis added.]

**53** The above statement was cited with approval in *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601 (C.A.). Dubin J.A. stated, at para. 33:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*. [Emphasis added.]

**54** Similarly, in *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160, McLachlin, C.J.S.C., as she then was, adopted the Ontario Court of Appeal's approach in *Tilden* and stated, at para. 26:

> It follows that Miss Karroll is bound by the release unless she can establish: (1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the content of the release to her attention.

**55** I now turn to apply the above two-part test described above.[9]

**(A) In the circumstances, would a reasonable person have known that the Plaintiff did not intend to agree to the Releases that he signed?**

**56** The following principles apply in determining whether a reasonable person would have known that the Plaintiff did not intend to agree to a release that he or she signed:

> Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.[10]

**57** Applying the above principles, I find that it is reasonable for the Defendants to rely on the Plaintiff's signature of the Releases. I am not satisfied that Li and the Defendants knew or ought to have known that the Plaintiff did not assent to the Releases for the following reasons:

(1) The title of each Release, "Individual Waiver of Public Liability" and "Release of Liability, Waiver of Claims and Assumption of Risk and Indemnity Agreement", written in capital letters, clearly communicates the purpose of each Release. The balance of the Releases is written in regular size font with many words in capital letters.

For instance, the Zen Climb Release states in bold capital letters that one of the hazards and risks being fully assumed by the Plaintiff is:

> **NEGLIGENCE ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE BY THE RELEASEES TO TAKE REASONABLE STEPS TO SAFE GUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF WILDERNESS ACTIVITIES.**
>
> **I AM AWARE OF THE RISKS, DANGERS AND HAZARDS ASSOCIATED WITH WILDERNESS ACTIVITIES AND I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND LOSS RESULTING THEREFROM.**

The Zen Climb Release goes on to state:

> ... I agree to this release of claims and waiver of liability as follows:

> 1. **TO WAIVE ANY AND ALL CLAIMS** that I have ... against **THE RELEASEES** from any and all liability ... for any loss, damage, expense or injury including death that I ... may suffer ... as a result of my ... participation in wilderness activities DUE TO ANY CAUSE WHATSOEVER INCLUDING NEGLIGENCE, ... AND ALSO INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS REFERRED TO ABOVE;

Unlike *Tilden*, this is not a case where an exclusion of liability was buried in small font on the reverse side of a contract and whose purpose was inconsistent with the overall purpose of the contract;

(2) The Plaintiff understood that he would not be permitted to participate in the rock climbing activities unless he signed the Releases. The Plaintiff acknowledged that he was aware of the general nature of the Releases which was to exempt the Defendants from liability.[11]

(3) The Plaintiff returned the signed Releases to Li about 3 to 5 minutes after being provided with a copy of them for his review and signature. The Plaintiff did not suggest that he was rushed to sign the Releases. The Plaintiff agreed that he could have asked for more time to review the Releases had he wished to do so. After the Plaintiff read the Releases, he did not ask Li any questions about them nor did he say anything about them to Li. Unlike *Tilden,* this is not a case where it was apparent to Li that the Plaintiff had not read the Releases.

**(B) Alternatively, did the Defendants take reasonable steps to bring the content of the Releases to the Plaintiff's attention?**

**58** The Plaintiff submits that the Defendants have an obligation to ensure that the Plaintiff understood the legal effect of the Releases prior to signing them. I reject this submission. There is no independent obligation on a person seeking the benefit of a release to explain its legal effect to the signer of the release. No such obligation is contemplated in *Tilden* or any other decision of the Ontario Court of Appeal or the Supreme Court of Canada that has come to my attention. As McLachlin C.J.S.C, as she then was, stated in *Karoll*, at para. 24:

> It emerges from these authorities that there is no general requirement that a party tendering a document for signature to take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

**59** Even though I have concluded that a reasonable person would not have known that the Plaintiff did not intend to agree to the Releases that he had signed, I will nevertheless consider whether the Defendants took reasonable steps to bring the contents of the Releases to his attention.

**60** As noted, the heading of the Releases loudly announced their purpose and call for the reader's attention. The heading of Zen Climb Release states "**PLEASE READ CAREFULLY!**" in bold, capital letters. The heading of the Conservation Halton Release states "**W A R N I N G !**" in bold, capital and underlined letters. The Plaintiff admits that he took a few minutes to read the Releases and could have asked for additional time to read them but did not do so.

**61** Further, during registration for this program, Zen Climb's website provided the Plaintiff, if not his son and son-in-law, with a copy of the Zen Climb Release and notified them that all participants would be required to sign the Zen Climb Release. Finally, the receipt provided by Conservation Halton to the Plaintiff and the Posted Notice also served to notify the Plaintiff that Conservation Halton's liability was excluded.

**62** In my view, the Defendants clearly satisfied the requirement to take reasonable steps to bring the content of the Releases to the Plaintiff's attention.

Is the Release Unconscionable?

**63** A person seeking to set aside a contract on the ground that it is unconscionable must show that: 1) the person who claims the benefit of the contract abused its bargaining power and preyed upon the person who signed the contract; and 2) the bargain was improvident.[12] While the Supreme Court of Canada's decision in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 recognizes a duty of honest performance, it does not extend the common law test for unconscionability.[13]

**64** In *Dyck v. Manitoba Snowmobile Assn. Inc.* [1985] 1 S.C.R. 589 the Supreme Court of Canada dismissed the plaintiff's submission that the release was unconscionable, at 593:

> Nor does the relationship of Dyck and the association fall within the class of cases, notable among which are contracts made on dissolution of marriage, where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities. As already mentioned, the races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an organization like the association to seek to protect itself against liability from suit for damages arising out of such dangers. It follows from this that there are no grounds of public policy on which the waiver clause should be struck down, an issue also raised on behalf of the appellant.

**65** The above reasoning is equally applicable in this case. The Plaintiff is a well-educated man who is fluent in English and has held a management position for many years. There is no inequality of bargaining power, nor was he preyed upon by the Defendants. Further, as noted in *Dyck*, it was entirely reasonable for the Defendants to seek to limit their liability in circumstances where the Plaintiff voluntarily participates in a dangerous activity.

Is the Release Contrary to Public Policy?

**66** The Plaintiff submits that the Releases should not be enforced on the grounds that they are contrary to public safety in these circumstances. The Plaintiff states:

> While contractual freedom is an admirable public policy objective, upheld to ensure business are able to operate with the assurance their private agreements will be given deference, it should not be overweighed when contracts seek to undercut the intended safety standards. By allowing businesses to seek waiver for actions beyond just negligence, and in turn gross negligence, public policy is jeopardized.

**67** The Plaintiff did not provide a precedent for his submission that the exclusion of liability for gross negligence, by contract, should not be given effect for public policy reasons.

**68** In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4, [2010] 1 S.C.R. 69, the Supreme Court of Canada stated that a court may refuse to give effect to an exclusion clause where there is an overriding public policy that outweighs the very strong public interest in the enforcement of contracts. Binnie J. outlined, albeit in dissent, the applicable principles:

> 117 1As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause. ...
>
> 120 Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement. [page123] [Italics emphasis in original; underlining emphasis added.]

**69** In my view, the Plaintiff has not identified an overriding "well accepted and substantially incontestable" public policy to justify avoiding the effect of the Releases. The conduct identified by the Plaintiff does not approach criminality, egregious fraud or the like. Further, the Supreme Court of Canada's decision in *Dyck v. Man Snowmobile Assn. Inc.*, rejected the submission that a release

that protects a defendant from liability in negligence for damages arising from the dangers of a recreational activity undertaken by the plaintiff should not be enforced on public policy grounds.

**70** Finally, I note that concerns over the fairness of the enforcement of contracts that excludes liability for personal injury arising from negligence has led to legislative reform in England and to recommendations for legislative reform by two Law Reform Commissions in Canada.[14] However, I agree with the view expressed in *Loychuk v. Cougar Mountain Adventures Ltd.,* 2012 BCCA 122, [2012] B.C.J. No. 504, at para. 44, that such change in the law is a matter for the legislature and not the judiciary.

Conclusion

**71** For the reasons given above, the Plaintiff is bound by the terms of the Releases.

**Do the Releases Cover the Plaintiff's Claim?**

**72** At the outset of this motion, Arif was granted leave on consent of the Defendants to amend his Statement of Claim to plead gross negligence. Arif submits that his damages were a result of the Defendants' gross negligence. He further submits that the releases do not bar a claim in gross negligence.

Principles of Contractual Interpretation

**73** The goal in interpreting a contract is to discover, objectively, the parties' intention at the time the contract was made.

**74** The intention of the parties is determined by reading the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." Accordingly, the interpretation of a contract is a question of mixed fact and law as "... it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix."[15]

**75** "Surrounding circumstances" (also referred to as the "factual matrix") is limited to any objective evidence of knowledge that was or reasonably ought to have been within the common knowledge of the parties at the time of the execution of the contract. Such knowledge includes "... anything that would have affected the way in which the language of the document would have been understood by a reasonable man."[16] It includes the purpose of the contract, its background and the relationship between the parties, but it does not include the previous negotiations of the parties or their declarations of subjective intent.

**76** The principle that words should be given their ordinary and grammatical meaning "... reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes particularly in formal documents."[17] The interpretation of a contract "... must always be grounded in the text and read in light of the entire contract." The surrounding circumstances cannot be used "...to deviate from the text such that the court effectively creates a new agreement."[18] Evidence of the surrounding circumstances of a contract is only "... an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words". However, such evidence may enable the court to choose between the possible meanings of a contract by avoiding an interpretation that leads to an "unrealistic result" in favour of a "commercially sensible result."

**77** If there is an ambiguity in the meaning of a contract despite the application of the above principles, then the ambiguous words used will be construed against the author of the contract if the other contracting party did not have an opportunity to modify its wording.

Conservation Halton Release

**78** The Conservation Halton Release is quite broad. It is entitled "Individual Waiver of Public Liability." It states that any person engaging in the sport of rock climbing is doing so "at their own risk." It also provides that the undersigned "releases and forever discharges [Conservation Halton] "...from all manner of action, causes of action, suits, claims, or demands of whatsoever nature or kind against [Conservation Halton] ... by reason of personal injury ... arising out of the participation of the undersigned in such activities or instructional program at the Rattlesnake Point Conservation Area." [Emphasis added.]

**79** In my view, the Release is unambiguous. The words used in the Release convey to a reasonable person that Arif had agreed to release Conservation Halton from all claims for personal injury arising from his rock climbing activities at Rattlesnake Point. The language of the Release covers all causes of action, which include negligence and statutory liability. I am not persuaded that "gross negligence" is a separate cause of action from negligence. Regardless, gross negligence is covered given that it comes within the scope of the phrase "all manner of action, causes of action, suits, claims or demands of whatsoever nature or kind."

Zen Club Release

**80** The Zen Club Release is quite broad as well. It is entitled "Release of Liability, Waiver of Claims and Assumption of Risks and Indemnity Agreement." It defines "wilderness activities" to include hiking and rock climbing. It states that "... I agree to ... WAIVE ANY AND ALL CLAIMS that I have or may in the future have against THE RELEASEES from any and all liability to the fullest extent permitted by law for any loss, damage, expense or injury including death that I ... may suffer ... as a result of my ... participation in wilderness activities DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, OWED UNDER ANY APPLICABLE OCCUPIERS' LIABILITY LEGISLATION IN THE PART OF THE RELEASEES, AND ALSO INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS REFERRED TO ABOVE."

**81** In my view, the Zen Climb Release is also unambiguous. Once again, the ordinary meaning of the words used in the Release would convey to a reasonable person that Arif had agreed to release Zen Climb from all claims for personal injury arising from his rock climbing activities at Rattlesnake Point, from any and all liability for any injury that he may suffer as a result of his participation in rock climbing activities due to any cause whatsoever, including negligence, breach of contract, or breach of any statutory or other duty of care. In my view, a claim of gross negligence would come within the scope of the above Release.

**Conclusions**

**82** For the above reasons I find that the Plaintiff raises no genuine issue requiring a trial regarding whether the Releases are a complete defence to the Plaintiff's claim in that there is no genuine issue that the Plaintiff is bound by the Releases and that the scope of the Releases covers the

alleged wrongful conduct of the Defendants. In reaching this conclusion I place no weight on the website registration notice, the notice on the reverse side of the parking receipt notice or the Posted Notice as the evidence is that none of these notices came to the Plaintiff's attention.

**Issue #4: Is The Defence Of*Volenti Non Fit Injuria*A Complete Answer To The Plaintiff's Claim ?**

**83** The Defendants submit that the defence of *volenti non fit injuria* bars the Plaintiff's claim. To succeed, the Defendants must show that the Plaintiff consented to, or assumed, the physical and legal risk involved in the activity.[19] In other words, the Defendants must show that there was "... an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and the plaintiff did not expect him to."[20]

**84** Rock climbing is a dangerous activity. Although the Plaintiff thought he would be going hiking, I find that he was well aware that he would be rock climbing, rather than hiking, by the time that he had placed his helmet and climbing harness on in the parking lot and had read the Releases. The Plaintiff did not show any hesitation in participating nor did he indicate that he no longer wished to participate. Instead, the Plaintiff explained that he decided to carry on with the rock climbing course since he was there and had paid for the course.

**85** Further, I have no doubt that the Plaintiff was acutely aware of the risks of rock climbing before he decided to embark on the Second Climb given that he had fallen on the First Climb.

**86** Finally, there is no suggestion that the Plaintiff's mind was clouded by alcohol or anything else when he participated in this activity or when he reviewed and knowingly signed the two Releases.

**87** I find that the defence of *volenti* applies as the Plaintiff, by his own actions, voluntarily assumed the risks of rock climbing.

**CONCLUSIONS**

**88** This action raises no genuine issue requiring a trial. This motion for summary judgment is granted. This action is dismissed. The parties have settled the question of costs of this action. The Plaintiff shall pay costs in the amount of $15,000.00 to the Defendants.

M.D. FAIETA J.

1 This paragraph is also numbered as paragraph 6 in the original document.

2 Belay means "to control a rope that a climber is attached to and keep it tight, so that if the climber falls, they do not fall very far". See dictionary.cambridge.org.

3 Examination for Discovery, November 30, 2015, Question 447.

4 *Papaschase Indian Band No. 136 v. Canada (A.G.)*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para 11

5 *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96, 98 O.R. (3d) 641, at paras. 17-19.

6 *Gold Leaf Products Ltd. v. Pioneer Flower Farms Ltd.,* 2015 ONCA 365, 255 A.C.W.S. (3d) 83, at para. 8; *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, at p. 785-786.

7 *Curtis v. Chemical Cleaning and Dyeing co.* [1951] 1 K.B. 805, [1951] 1 All E.R.631.

8 *Tilden Rent-a-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601 (C.A.)

9 These principles were applied in *Isildar v. Rideau Diving Supply Ltd.*, 2008 CanLII 29598 and *Trimmeliti v. Blue Mountain Resorts Ltd.* 2015 ONSC 2301, 254 A.C.W.S. (3d) 243 at paras. 81-3.

10 *Karroll,* at para. 25:

11 In *Crocker v. Sundance Northwest Resorts Ltd.,* [1988] 1 S.C.R. 1186, the Supreme Court of Canada did not give effect to an exclusion clause found in an "Official Entry Form and Waiver" for a tube race on a ski hill as the Plaintiff thought he was simply signing an entry form and was not aware of the Defendant's intention that the form would exempt it from liability. On the other hand, in *Dyck v. Manitoba Snowmobile Assn. Inc.*, [1985] 1 S.C.R. 589 a waiver clause on the reverse side of the entry form for a snowmobile race barred the Plaintiff's action against the Defendant as he had signed the entry form in full knowledge of the Defendant's intention to exempt itself from liability.

12 *Bank of Montreal v. Javed*, 2016 ONCA 49, 344 O.A.C. 237, at para. 7; *Rosen v. Rosen* (1994), 18 O.R. (3d) 641, at paras. 11-13.

13 *Javed*, at para. 12.

14 See Philip H. Osborne, The Battle of Contractual Waivers of Liability for Personal Injury in Sporting and Recreational Activities: An Annotation to *Loychuk v. Cougar Mountain Adventures Ltd.* (2011), 81 C.C.L.T. (3d) 89.

15 *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 47, 50.

16 *Investors Compensation Scheme v. West Bromwich Building Society*, [1998] 1 W.L.R. 896 (H.L.)

17 *Investors Compensation Scheme Ltd. v. West Bromwich Building Society,* [1998] 1 W.L.R. 896 at 913.

18 *Sattva,* at para. 57.

19 *Crocker v. Sundance Northwest Resorts Ltd.* [1988] 1 S.C.R. 1186, at para. 32

20 *Levita v. Crew*, 2015 ONSC 5316, 257 A.C.W.S. (3d) 747, at paras. 110-112.

# TAB 16

All ER Reprints/[1874-80] All ER Rep /Bain and others v Fothergill and others - [1874-80] All ER Rep 83

**Bain and others v Fothergill and others**

[1874-80] All ER Rep 83

Also reported LR 7 HL 158; 43 LJ Ex 243; 31 LT 387; 39 JP 228; 23 WR 261

**HOUSE OF LORDS**

**LORD CHELMSFORD AND LORD HATHERLEY**

**30 JUNE 1873, 15 MAY, 22 JUNE 1874**

**22 June 1874**

*Sale of Land - Contract - Breach - Breach by vendor - Failure to make good title - Right of purchaser to recover expenses, repayment of deposit, and damages.*

Where, on a contract for the sale of land the vendor, in the absence of any fraud and any express stipulation, is unable to make a good title the purchaser is not entitled to recover damages for the loss of the bargain. He can only recover the expenses he has incurred in investigating the title and repayment of the deposit where he has paid one.

The defendants, lessees of a mining royalty who had covenanted not to assign without the consent of the lessors, agreed to sell their interest therein to the plaintiffs. The plaintiffs paid to the defendants a deposit, but the lessors, after some negotiations, refused their consent to the sale. In an action by the plaintiffs to recover the amount of the deposit, the expenses incident to the investigation of the defendants' title, and also damages for the loss of their bargain,

Held: the plaintiffs were only entitled to recover their deposit and the expenses they had incurred in investigating the defendants' title.

*Flureau v Thornhill* (1) (1776) 2 Wm Bl 1078, applied.

*Hopkins v Grazebrook* (2) (1826) 6 B & C 31, overruled.

Notes

Distinguished: *Barrow v Scammell* (1881) 19 Ch D 175. Followed: *Re Higgins and Hitchman* (1882) 30 WR 700. Considered: *Rock Portland Cement Co v Wilson* (1882) 52 LJ Ch 214. Applied: *Coombs v Cook* (1883) Cab & El 75; *Gas Light and Coke Co v Towse* (1887) 35 Ch D 519; *Rowe v London School Board* (1887) 36 Ch D 619. Distinguished: *Royal Bristol Permanent Building Society v Bomas*, [1886-90] All ER Rep 283. Applied: *Lee v Soames* (1888) 36 WR 884; *Re Scott and Alvarez's Contract, Scott v Alvarez*, [1895] 1 Ch 596. Considered: *Day v Singleton*, [1899] 2 Ch 320; *Jones v Gardiner*, [1902] 1 Ch 191. Distinguished: *Holliwell v Seacombe*, [1906] 1 Ch 426. Applied: *Morgan v Russell*, [1909] 1 KB 357. Distinguished: *Re Daniel, Daniel v Vassall*, [1916-17] All ER Rep 654; *Braybrooks v Whaley*, [1919] 1 KB 435; *Goffin v Houlder* (1920) 90 LJ Ch 488. Applied: *Grindell v Bass*, [1920] 2 Ch 487. Distinguished:

*[1874-80] All ER Rep 83 at 84*

*Keen v Mear*, [1920] All ER Rep 148. Considered: *Wallington v Townsend*, [1939] 2 All ER 225. Followed: *JW Cafés, Ltd v Brownlow Trust, Ltd*, [1950] 1 All ER 894. Referred to: *Gray v Fowler* (1873) LR 8 Exch 249; *Wall v London City Real Property Co* (1874) LR 9 QB 249; Re *Hargreaves and Thompson's Contract* (1886) 32 Ch D 454; *Synge v Synge* (1893) 63 LJQB 202; *Re Wilson's and Steven's Contract*, [1894] 3 Ch 546; *Baynes v Lloyd*, [1895] 2 QB 610; *Pease v Courtney*, [1904] 2 Ch 503; *Curtis Moffat v Wheeler*, [1929] 2 Ch 224; *Barnes v Cadogan Developments, Ltd*, [1930] 1 Ch 479; *Thomas v Kensington*, [1942] 2 KB 181; *Elliott v Pierson*, [1948] 1 All ER 939; *Phillips v Lamdin*, [1949] 1 All ER 770; *Diamond v Campbell-Jones*, [1960] 1 All ER 583.

As to remedies under an uncompleted contract for the sale of land, see 34 HALSBURY'S LAWS (3rd Edn) 320 et seq; and for cases see 40 DIGEST (Repl) 235 et seq.

Cases referred to:

(1) *Flureau v Thornhill* (1776) 2 Wm Bl 1078; 96 ER 635; 40 Digest (Rep]) 284, 2358.

(2) *Hopkins v Grazebrook* (1826) 6 B & C 31; 9 Dow & By KB 22; 5 LJOSKB 65; 108 ER 364; 40 Digest (Repl) 286, 2375.

(3) *Walker v Moore* (1829) 10 B & C 416; 8 LJOSKB 159; 109 LR 504; 40 Digest (Repl) 284, 2360.

(4) *Robinson v Harmon* (1848) 1 Exch 850; 18 LJ Ex 202; 13 LTOS 141; 154 ER 363; 30 Digest (Repl) 443, 857.

(5) *Pounsett v Fuller* (1856) 17 CB 660; 25 LJCP 145; 26 LTOS 240; 4 WR 323; 139 ER 1235; 40 Digest (Repl) 289, 2417.

(6) *Sikes v Wild* (1861) 1 B & S 587; 30 LJQB 325; affirmed (1863) 4 B & S 421; 32 LJQB 375; 8 LT 642; 11 WR 954; 122 ER 517; sub nom *Sykes v Wild*, 2 New Rep 456, Ex Ch; 40 Digest (Repl) 289, 2422.

(7) *Engell v Fitch* (1868) LR 3 QB 314; 9 B & S 85; 37 LJQB 145; 16 WR 785; affirmed (1869) LR 4 QB 659; 10 B & S 738; 38 LJQB 304; 17 WR 894, Ex Ch; 40 Digest (Repl) 285, 2369.

(8) *Hadley v Baxendale* (1854) 9 Exch 341; 23 LJ Ex 179; 23 LTOS 69; 18 Jur 358; 2 WR 302; 2 CLR 517; 156 ER 145; 17 Digest (Repl) 91, 99.

Appeal by the plaintiffs from a decision of the Exchequer Chamber, affirming decision of the Court of Exchequer, reported LR 6 Exch 59, on a Special Case.

The Court of Exchequer held that the plaintiffs were entitled to recover only their deposit money and the expenses incidental to the investigation of the defendants' title.

The judges were summoned, and KEATING, BRETT, and DENMAN, JJ, and MARTIN, PIGOTT and POLLOCK, BB, attended.

The following questions of law were left by their Lordships to the judges: (i) whether upon a contract for the sale of real estate, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain? (ii) whether the actual possession of the property, the subject of the contract is essential to bring the case within the rule laid down in *Flureau v Thornhill* (1)? (iii) whether, if the rule of law is correctly laid down in *Flureau v Thornhill* (1) the circumstances of the present case distinguish it, and take it out of that rule?

On 15 May 1874, the judges delivered their opinions. They were unanimous in answering questions (i) and (ii) in the negative and with the exception of DENMAN, J, answered question (iii) also in the negative.

Sir George Jessel, QC, and Herschell, QC, for the appellants.

Manisty, QC, Holker, QC, and Mellor for the respondents.

*[1874-80] All ER Rep 83 at 85*

*Their Lordships took time for consideration.*

*22 June 1874. The following opinions were read.*

**LORD CHELMSFORD:**

1 This appeal brings in review *Flureau v Thornhill* (1) and the other cases which have engrafted exceptions upon it, and the first question is whether that case was rightly decided. The decision was nearly a century ago, in 1775, and has been followed ever since - not, however, without an occasional expression of doubt. The rule established by it is that upon a contract for the purchase of a real estate, if the vendor, without fraud is incapable of making a good title, the purchaser is not entitled to any compensation for the loss of his bargain. The case is very shortly reported. DE GREY, CJ, merely laid down the rule, without giving any reason for it; but BLACKSTONE J, said this:

> "These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title."

2 The rule and the reason for it have been adopted and followed in subsequent cases. In *Walker v Moore* (3) PARKE, J, said (10 B & C at pp 422, 423): "A jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title, than those which were allowed in *Flureau v Thornhill* (1) ... In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

3 In *Robinson v Harman* (4) the same learned judge said (1 Exch at p 855):

> "The case of *Flureau v Thornhill* (1) qualified the rule of the common law, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

4 Again, in *Pounsett v Fuller* (5) the court held that where a vendor failed to make a good title, pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation) was not entitled to damages for the loss of his bargain. CRESSWELL, J, in delivering his opinion, said (17 CB at p 679):

> "We are not called upon here to investigate the grounds upon which the decision in *Flureau v Thornhill* (1) proceeded, or to pronounce any opinion as to the wisdom or expediency of the rule there laid down. It is enough for us to say that it has been received and acted upon in too many subsequent cases to allow us to call it in question."

5 In *Sikes v Wilde* (6) the Courts of Queen's Bench and Exchequer Chamber adopted the rule and acted upon it. In *Engell v Fitch* (7) COCKBURN, CJ, expressed his opinion that *Flureau v Thornhill* (1) was unsatisfactory, and gave his sanction to the doubt of ABBOTT, CJ, as to the soundness of that decision.

6 There is, perhaps, some difficulty in ascertaining the exact grounds of the judgment, but in addition to those which have been previously assigned, it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision. "The fancied goodness of the bargain" must be a matter of a purely speculative character, and in most cases would be very difficult to determine in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a re-sale appears to me to be a consequence too remote from the breach. I am aware that in *Engell v Fitch* (7) where, after the contract and before the breach, the purchaser contracted for a re-sale at an advance of 105 pounds, the



court, though pressed with the decision in *Hadley v Baxendale* (8) held that, "if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of that case."

7 But it must be borne in mind that this question as to damages depends, as ALDERSON, B, said in *Hadley v Baxendale* (8) upon what

> "may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract as the probable result of the breach of it."

8 Although the purchaser in *Engell v Fitch* (7) when he entered into the contract, may have contracted a re-sale at an advance, it is not likely that the loss of this profit should have occurred to the vendor as the probable result of the breach. The judges were, no doubt, influenced by the fact that the

profitable re-sale had actually taken place, and were in consequence drawn aside from considering what must have been in the minds of both parties at the time when they made the contract.

9 The decision in *Flureau v Thornhill* (1) derives great additional authority from the opinion of LORD ST LEONARDS, who considers that it was rightly decided: VENDORS AND PURCHASERS (14th Edn) p 360. The almost unanimous approval of the decision was broken in upon by an expression of disapprobation from ABBOTT, CJ, in *Hopkins v Grazebrook* (2). He there said (6 B & C at p 33):

> "Upon the present occasion I will only say that if it is advanced as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration."

10 That case was one which, according to the opinion of the court, was not within the operation of the rule in *Flureau v Thornhill* (1) but the decision itself cannot be supported. The seller in that case had undoubtedly an equitable estate, in respect of which he had a right to contract. Therefore, the language of ABBOTT, CJ, that "the defendant had entered into a contract to sell without the power to confer even the shadow of a title," is not warranted by the circumstances, as he could certainly have assigned his equitable estate, and thus the sole ground upon which he was held responsible for damages entirely failed. But although the facts in that case did not justify the decision, yet it has always been treated as having introduced an exception into the rule in *Flureau v Thornhill* (1) and as having withdrawn from its operation a class of cases where a person knowing that he has no title to real estate, enters into a contract for the sale of it.

11 The rule has been recognised in several cases since. In *Robinson v Harman* (4) PARKE, B, said, "the present case comes within the rule of the common law, and I cannot distinguish it from *Hopkins v Grazebrook* (2)", and ALDERSON, B, and PLATT, B, expressed the same opinion. In *Pounsett v Fuller* (5) it was treated as a valid authority by all the judges, the question which they considered being, whether the case fell within the rule in *Flureau v Thornhill* (1) or the exception in *Hopkins v Grazebrook* (2) and they decided that it was within the former case. But in *Engell v Fitch* (7) the Courts of Queen's Bench and Exchequer Chamber proceeded expressly on *Hopkins v Grazebrook* (2) and *Robinson v Harman* (4) KELLY, CB, quoting the very words Of COCKBURN, CJ, and relying on those cases. It was after this decision that the plaintiffs in error declined to argue the present case in the Exchequer Chamber, as the authorities could only be fully reviewed by a higher tribunal.

*[1874-80] All ER Rep 83 at 87*

12 Notwithstanding the repeated recognition of the authority of *Hopkins v Grazebrook* (2) I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced into the rule established by *Flureau v Thornhill* (1) with respect to

damages upon the breach of a contract for the sale of real estate, for as to the case itself not falling within the exception to the rule (if any such exists) I suppose no doubt can now be entertained. The exception has always been taken to be that in an action for breach of a contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain. In SEDGWICK ON DAMAGES (4th Edn.) p. 234, it is said: "To this general rule there undoubtedly exists an important exception, which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform, because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case the plaintiff can only recover whatever money has been paid by him, with interest and expenses. In the latter he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice."

13 I quite agree that this distinction is not to be justified or explained on principle. I fully agree in the doubt expressed by BLACKBURN, J, in *Sikes v Wild* (6) as to the soundness of the exception in *Hopkins v Grazebrook* (2) and in the observations which follow the expression of that doubt, and upon a review of all the decisions on the subject, I think that it ought not any longer to be regarded as an authority.

14 Entertaining this opinion, I can have no doubt that the judgment of the Court of Exchequer in the present case is right, whether it falls within the rule, as established by *Flureau v Thornhill* (1) or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule, because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception. If a person enter, into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit. It is only necessary to add that, in my opinion, if there were any exceptions from the rule in *Flureau v Thornhill* (1) the present case would not fall within any of them, but is within the rule itself. There is no reason to think that the respondents were not acting throughout under a bona fide belief that the lessor's consent might be obtained at any time upon application. They were prevented from performing their contract, not from any wilful act or fraud on their part, but by an unexpected defect in their title, which it was beyond their power to cure. The case falls precisely within the terms of the rule, as stated in *Flureau v Thornhill* (1) and, therefore, in my opinion, the judgment appealed from is right, and ought to be affirmed.

**LORD HATHERLEY:**

15 I entirely concur in the view which has been expressed by my noble and learned friend. If the question in this case depends entirely upon *Flureau v Thornhill* (1) it can scarcely, in my judgment, after the lapse of time which has taken place since that decision, be argued at your Lordships' Bar. The rule, as settled by *Flureau v Thornhill* (1) has prevailed for ninety-nine years, and it has affected and governed I may say thousands of transactions annually, and nobody, I apprehend, has ever yet contradicted it. Whatever

*[1874-80] All ER Rep 83 at 88*

may have been the expressions of dissatisfaction uttered with regard to it, nobody has come to the conclusion that it should be overthrown. Your Lordships' House has been in the habit of acting upon a much less extensive series of practice by conveyancers, but in this case there is not merely the practice of conveyancers, but the common dealings of mankind, which, continuing year after year, as I have said, in many thousands of cases, have required the practice to be put into effect. As far, therefore, as this case falls within the rule in *Flureau v Thornhill* (1) it must be considered as beyond all doubt.

16 As regards *Engell v Pitch* (7) that certainly was a very peculiar case, whether or not the course taken by the court was correct in the decision upon the point of damages arising in consequence of the loss of the benefit of the contract. The vendor in that case was bound, as every vendor is, by his contract to do all that he could to complete the conveyance; but, having sold his estate and having; failed to do everything in his power to compel possession to be given up, and being in a condition in which, if a bill had been filed in equity, be would have been compelled by the court to take proceedings in order to obtain the delivery of premises according to his contract, he refused to take any such proceedings simply on the ground of the expense it might entail on him. There could be no doubt that he was acting in gross violation of his contract; but whether or not the proper mode of correcting that abuse was by giving damages to the plaintiff in respect of the loss of his contract, I will not stop to inquire.

17 It is, however, quite clear that that case was exceedingly different from that of *Flureau v Thornhill* (1) where it turned out on investigation that the vendor had no legal title. The reasons given for the judgment in *Flureau v Thornhill* (1) were certainly not altogether satisfactory, because DE GREY, CJ, is said to have stated simply, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad and the vendor is incapable (without fraud) of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain; to which BLACKSTONE, J, adds (2 Win Bl at p 1078):

"These contracts are merely upon a condition, frequently expressed, but always implied, that the vendor has a good title."

18 That is scarcely a correct representation of the case, because, if the vendor's contract with his vendee was on the condition that he had a good title, then, in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded. If the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract. Therefore, the reason is not that the contract is made upon that condition, but the foundation of the rule has been more clearly expressed by my noble and learned friend in saying that, having regard to the very nature of this transaction, it is recognised on all hands that the purchaser knows that there must be some degree of uncertainty whether, with all the complications of our law, a good title can be made by his vendor, and, taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have incurred in investigating the matter. He has a right also to take the estate and complete the purchase with that defective title, if he thinks proper to do so, but he is held to have bargained with the vendor that he shall not be entitled, under all circumstances, to have the contract completed, and, therefore, he is not put in a position to make a re-sale before the matter has been fully investigated. A contract for the sale of real estate is very different from a contract for the sale of a chattel, where the vendor must know, or at all events

*[1874-80] All ER Rep 83 at 89*

is taken to know, what his right to the chattel is. And further, in the case of chattels, as regards the larger part of those contracts, the chattels are purchased with a view to re-sale, the loss of profit is within the contemplation of both parties, and it is, therefore, assumed to be the actual contract which the vendor wished to enter into.

19 The only question, therefore, really remaining in the case is whether it can be distinguished in any way from the decision in *Flureau v Thornhill* (1). It appears to me that there is nothing whatever to distinguish it; for the contract was made bona fide by the vendor (there is no allegation to the contrary) in the genuine belief that he had a good title. I entirely agree with the comments which my noble and learned friend has made upon *Hopkins v Grazebrook* (2). I think it would be impossible to say, regard being had to the principles on which the courts have proceeded since the rule in *Flureau v Thornhill* (1) was laid down, that it can be substantially distinguished from that case, because the vendor had made a bargain with another person for the purchase of a property which he had every reason to suppose would be conveyed to him within a reasonable time, and, having made that bargain, he made another contract for the sale of the same property. The circumstance of his not being in possession is not a circumstance which in itself ought at all to lead the court to say that he must have known that he could not complete the title. In a vast number of instances, from a variety of circumstances, the actual vendor may not be immediately in possession, although he may have a right to obtain that possession in a reasonable time, and to compel (as in *Engell v Fitch* (7)) those who are in possession to hand over that possession to him. I do not think, therefore, that there is any sound distinction between *Hopkins v Grazebrook* (2) and that class of authorities which are

governed by *Flureau v Thornhill* (1). Under these circumstances I have no hesitation in coming to the conclusion that the decision of the court now appealed from was right, and ought to be affirmed.

*Appeal dismissed.*

Solicitors: Helder & Roberts; Thomas & Hollams.

Reported by CE MALDEN, ESQ, Barrister-at-Law.

# TAB 17

*Indexed as:*

# A.V.G. Management Science Ltd. v. Barwell Developments Ltd.

**A.V.G. Management Science Ltd. (Plaintiff), Appellant; and Barwell Developments Ltd., Cambie Construction Ltd., Canada Permanent Trust Company and Raymond Outtrim (Defendants), Respondents.**

[1979] 2 S.C.R. 43

[1979] 2 R.C.S. 43

Supreme Court of Canada

1978: November 23 / 1978: December 21.

**Present: Laskin C.J. and Ritchie, Spence, Dickson and Estey JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Sale of land -- Inability of vendors to give title -- Agreeing in effect to sell to two different purchasers -- No fraud or bad faith on part of vendors -- Damages -- Rule in Bain v. Fothergill not applicable -- Whether Rule in Bain v. Fothergill should no longer be followed in common law Canada -- Land Registry Act, R.S.B.C. 1960, c. 208, s. 38 [am. 1971, c. 30, s. 7].*

On November 21, 1973, the respondents accepted an offer from Jordan Development Corporation Ltd. to purchase an apartment building for $495,000. The agreement was subject to a provision for the benefit of the purchaser Jordan, to be met by 12 noon on November 28, 1973. On November 23, 1973, the appellant bade an offer, open for acceptance until 11 p.m. on November 29, 1973, to purchase the same property for $515,000. The vendors mistakenly concluded after noon on November 28, 1973, that the Jordan deal was off for failure of Jordan to meet the provision in its contract, and they accepted the appellant's offer at 2:00 p.m. on that day. Jordan refused to accept a return of its deposit tendered by the vendors, and on December 10, 1973, lodged a caveat on the land under the Land Registry Act, R.S.B.C. 1960, c. 208, as amended. Subsequently, Jordan succeeded in an action of specific performance after registering a lis pendens against the property.

The contract with the appellant called for a closing date of January 23, 1974, and on January 14, by agreement, the closing date was extended to February 15, 1974. It was on January 23, 1974, that Jordan registered its lis pendens, and the decree of specific performance was obtained on August 18,

1975. The appellant stood ready and able all this time to complete. It subsequently brought an action for damages. They were assessed at trial at $37,000 if recoverable on ordinary contract principles, but by reason of the rule in Bain v. Fothergill (1873), L.R. 7 H.L. 158, the appellant was denied recovery for the loss of its bargain and its damages were limited to $6,628.50, consisting of return of the deposit, the costs of investigating title and solicitor's fees and disbursements preparatory to carrying out the contract. (The rule in Bain v. Fothergill is an affirmation by the House of Lords of a limiting principle for assessing damages in favour of a purchaser for breach of a contract for the sale first enunciated in Flureau v. Thornhill (1776), 2 Wm. Bl. 1078. The purchaser was held disentitled to recover damages for the loss of his bargain if the sale fell through because of the vendor's inability, absent fraud or bad faith, to give a good title.)

The Court of Appeal for British Columbia (Robertson J.A. dissenting) dismissed the appellant's appeal from the trial judgment. The Court of Appeal held that the trial judge had correctly found the Jordan agreement, although unregistered, to constitute a defect of title under the rule of Bain v. Fothergill. With leave of the Court of Appeal, the appellant then appealed to this Court.

Held: The appeal should be allowed, the judgments below set aside and judgment entered for the purchaser for $37,000 plus $6,628.50, a total of $43,628.50.

This Court agreed with Robertson J.A. that the present case was not within the rule in Bain v. Fothergill. Although the Court of Appeal majority felt that to oust the rule would be to reinstate Hopkins v. Grazebrook (1826), 6 B. & C. 31, the facts here were quite different. (An exception to the rule as enunciated in Flureau v. Thornhill, which exception was recognized in later cases, denied to a vendor the benefit of the rule if at the time he entered into a contract of sale he knew that he had no title and could not make title at the time for closing. That exception, reflected in Hopkins v. Grazebrook, was rejected by the House of Lords in Bain v. Fothergill.) There was here no case merely of a vendor who, knowing he has no title (as, where he himself has merely a contract of purchase), purports to sell to another. The vendors here, somewhat greedy as the trial judge found, had title and then proceeded, in effect, to agree to sell the property twice. There was neither fraud nor want of good faith (save possibly in respect of Jordan), but it is enough to oust the limiting rule in Bain v. Fothergill if the vendor, having title, has either voluntarily disabled himself from being able to convey or has risked and lost his ability to do so by what were in effect concurrent dealings with two different purchasers.

The question as to whether the rule in Bain v. Fothergill should no longer be followed in common law Canada did not really arise here. However if it had been necessary, in order to decide this case, to come to a conclusion on the matter, the Court was of the opinion that the rule in Bain v. Fothergill should no longer be followed in respect of land transactions in those Provinces which have a Torrens system of title registration or (as in British Columbia and parts of Ontario) a near similar system. In all such jurisdictions and areas, where the title is that shown on an official registry, there can be no claim by a vendor of uncertainty of title or of the necessity to gather in deeds and documents through which he would seek to establish title.

The Court was further of the opinion that, in principle, a similar view should be taken in respect of land transactions governed by a registration of deeds and documents system such as exists in the Atlantic Provinces, in parts of Ontario and in parts of Manitoba. Despite the differences between the Torrens system and kindred systems and deed registry systems, there is no reason why a line should be drawn between them to rule out Bain v. Fothergill in respect of the former and not in respect of the latter. The existence of public registers upon which transfers of interest must be recorded to be

protected could be considered as ousting the rationale on which the rule in Bain v. Fothergill was founded.

**Cases Cited**

Ontario Asphalt Block Co. v. Montreuil (1916), 52 S.C.R. 541, considered; Day v. Singleton, [1899] 2 Ch. 320; Goffin v. Houlder (1920), 90 L.J. Ch. 488; Wroth v. Tyler, [1973] 1 All E.R. 897; A.S.A. Construction Pty. Ltd. v. Iwanov, [1975] 1 N.S.W.L.R. 512; Sikes v. Wild (1861), 1 B. & S. 587, aff'd (1863), 4 B. & S. 421; McNamara Construction (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654; Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198; Stephens v. Bannan, (1913) 6 Alta. L.R. 418; O'Neil v. Drinkle (1908), 8 W.L.R. 937; United Trust Co. v. Dominion Stores Ltd., [1977] 2 S.C.R. 915, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia [[1978] 1 W.W.R. 730], dismissing the appellant's appeal from a judgment of McKenzie J. whereby it was held that the rule in Bain v. Fothergill applied so as to limit the damages recoverable by the appellant on the inability of the respondents to give title to certain property which they had contracted to sell to the appellant. Appeal allowed.

G.K. Macintosh, for the plaintiff, appellant. W.B. MacAllister, for the defendants, respondents.

Solicitors for the plaintiff appellant: Farris, Vaughan, Wills & Murphy, Vancouver.
Solicitors for the defendants, respondents: Boughton & Co., Vancouver.

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The judgment of the Court was delivered by

1 **LASKIN C.J.**:-- There are two questions in this appeal. The first is whether the rule in Bain v. Fothergill was properly applied by McKenzie J. of the British Columbia Supreme Court and by the majority of the British Columbia Court of Appeal. In purported application of the rule, the two Courts limited the damages recoverable by the appellant purchaser on the inability of the respondent vendors to give title to certain property which they had contracted to sell to the appellant. The second question is whether the rule in Bain v. Fothergill should no longer be followed in common law Canada, if it was properly applied in this case.

2 The facts here are not in dispute and may be shortly stated on the concurrent findings of the Courts below. On November 21, 1973, the respondents accepted an offer from Jordan Development Corporation Ltd. to purchase an apartment building for $495,000. The agreement was subject to a provision for the benefit of the purchaser Jordan, to be met by 12 noon on November 28, 1973. On November 23, 1973, the appellant made an offer, open for acceptance until 11 p.m. on November 29, 1973, to purchase the same property for $515,000. The vendors mistakenly concluded after noon on November 28, 1973, that the Jordan deal was off for failure of Jordan to meet the provision in its contract, and they accepted the appellant's offer at 2:00 p.m. on that day. Jordan refused to accept a return of its deposit tendered by the vendors, and on December 10, 1973, lodged a caveat on

the land under the Land Registry Act, R.S.B.C. 1960, c. 208, as amended. Subsequently, Jordan succeeded in an action of specific performance after registering a lis pendens against the property.

3 The contract with the appellant called for a closing date of January 23, 1974, and on January 14, by agreement, the closing date was extended to February 15, 1974. It was on January 23, 1974, that Jordan registered its lis pendens, and the decree of specific performance was obtained on August 18, 1975. The appellant stood ready and able all this time to complete. It subsequently brought an action for damages. They were assessed at $37,000 if recoverable on ordinary contract principles, but by reason of the rule in Bain v. Fothergill the appellant was denied recovery for the loss of its bargain and its damages were limited to $6,628.50, consisting of return of the deposit, the costs of investigating title and solicitor's fees and disbursements preparatory to carrying out the contract.

4 The rule in Bain v. Fothergill [(1973), L.R. 7 H.L. 158] is an affirmation by the House of Lords, having first "summoned the Judges" (of whom six attended), of a limiting principle for assessing damages in favour of a purchaser for breach of a contract for the sale of the land first enunciated in Flureau v. Thornhill [(1776), 2 Wm. Bl. 1078]. The purchaser was held disentitled to recover damages for the loss of his bargain if the sale fell through because of the vendor's inability, absent fraud or bad faith, to give a good title.

5 Bain v. Fothergill was heard by three members of the House of Lords of whom one, Lord Colonsay died before judgment was delivered. In the course of the reasons of Lord Chelmsford (with whom Lord Hatherley also sat) that learned Lord agreed with the view that the exception which denies damages for loss of a bargain due to a defect in title, if the vendor acts bona fide, cannot be justified in principle. However, having accepted the rule as enunciated in Flureau v. Thornhill, the House of Lords went further and rejected an exception to it which had been recognized in later cases. That exception, reflected in Hopkins v. Grazebrook [(1826), 6 B. & C. 31], denied to a vendor the benefit of the rule if at the time he entered into a contract of sale he knew that he had no title and could not make title at the time for closing. Bain v. Fothergill destroyed the authority of Hopkins v. Grazebrook and brought the situation in that case within its limiting principle, unless the vendor was fraudulent.

6 Of course, the rule in Bain v. Fothergill runs counter to ordinary contract principles governing damages for breach, and it invited a reliance on a tort element, e.g. fraud, as a ground of avoiding it, notwithstanding that the damages may be different if based on deceit and not on breach of contract for loss of the bargain. The rationale of the rule lay in the uncertainty of English titles, in the want of any reliable registration system (let alone a Torrens system) and in the need to have recourse to and gather up relevant documents of title. (There was only a voluntary registration system in effect in England when Bain v. Fothergill was decided, the Transfer of Land Act, 1862 (Imp.), c. 53, and it had very little effect.) Lord Hatherley mentioned this rationale in his reasons at pp. 210-11 of the Report and I need not quote what he said. Indeed, I am relieved of the necessity of canvassing the rationale, history and application of the rule and the exceptions grafted on it (exceptions to an exception) by the full report on the rule by the British Columbia Law Reform Commission, published in 1976. Reference is there made to the exceptions to the rule, these exceptions being (1) fraud of the vendor; (2) bad faith of the vendor; (3) defects arising out of matters of conveyancing (as, for example, the unwillingness of a vendor to pay off a mortgage, which he could do), and (4) breach of covenants in an executed conveyance. Of course, the third exception above covers any outright failure of a vendor to complete when it was within his power to do so. It is an extension of this, giving rise to the exception of bad faith, as in Day v. Singleton [[1899] 2 Ch. 320] where a vendor lessee

failed to make a reasonable effort to obtain the lessor's consent to an assignment of the leasehold. Another extension is exhibited by Goffin v. Houlder [(1920), 90 L.J. Ch. 488] where the vendor, having title at the time of a contract giving an option to purchase, sold the property to another before the option expired. It may be said, however, that this case is completely outside the rule in Bain v. Fothergill because there was no defect of title when the option contract was entered into.

7 McKenzie J., in his reasons in the present case, referred extensively to the judgment of Megarry J. (now V.-C.) in Wroth v. Tyler [[1973] 1 All E.R. 897], although in that case the rule in Bain v. Fothergill was held inapplicable. Briefly, the situation in Wroth v. Tyler was that the vendor had title subject to a mortgage, and contracted to sell his interest and give vacant possession to a purchaser. The wife of the vendor thereafter registered her matrimonial right of occupation under the Matrimonial Homes Act of 1967 as a charge against the property. After considering and denying the claim for specific performance, Megarry J. turned to the matter of damages and refused to apply Bain v. Fothergill, holding that it was an anomalous rule, not to be extended. Differing positions were taken by counsel for the parties on whether there was a defect of title at the date of the contract. The learned judge dealt with this issue as follows (at p. 917):

> ... The most helpful approach seems to me to take the matter by stages. First, if the mere existence of the wife's charge, before registration, creates a defect in title within the rule, then Parliament has at a blow imposed a defect in title on many millions of homes vested in one or other of the parties to a marriage. On 1st January 1968 millions of perfectly good titles became defective. I should be slow indeed to impute to Parliament any intention to produce this result. This is all the more striking in the case of registered land, where the operation of the rule in Bain v. Fothergill might be expected to be minimal; for the main purpose of the Land Registration Acts is to simplify titles and conveyancing. Furthermore, if the mere existence of an unregistered charge under the 1967 Act constitutes a defect in title, it is a singularly impotent defect, for on completion of a sale it will be void against the purchaser for want of registration. If instead the vendor refused to complete, plainly he would be refusing to take a step which would remove the defect from his title; and on the principle of Day v. Singleton he would appeal to Bain v. Fothergill in vain. As at the date of the contract in this case, I therefore cannot see how the rule in Bain v. Fothergill could have applied. In other words, looking at matters immediately after the contract had been made, the case could not, in my judgment, be said to fall within either the spirit or the letter of the rule in Bain v. Fothergill.

8 When in this case the wife's rights were registered the day after the contract had been made, a different situation arose; for then her rights could no longer be destroyed by completing the sale. On the footing that the wife's rights thereupon became capable of attracting the rule in Bain v. Fothergill, does the rule apply to cases where, at the date of the contract, the necessary conditions for the application of the rule did not exist, but those conditions first came into being after the contract had been made? It has not been suggested that there is any authority bearing directly on this point. The action is an action for damages for breach of contract, and I should be slow to hold that some supervening event could bring within the rule a case initially outside it. Furthermore, the basis of the rule is that of the contract having been made against a background of the uncertainty of titles to land in England; ... As I have indicated, a rule laid down for defects in title which lay concealed in title

deeds which were often, in the phrase attributed to Lord Westbury, 'difficult to read, disgusting to touch, and impossible to understand', seems singularly inapposite to the effect of a modern statute on registered land, with its aseptic certainty and clarity of title.

9 McKenzie J., although relying on the analysis of Megarry J. in Wroth v. Tyler in respect of the rule in Bain v. Fothergill, distinguished the case as one where the wife's occupation interest did not constitute a defect of title at the time of the contract of sale. Contrarywise, he held the Jordan agreement, even though unregistered, to constitute such a defect within the rule, notwithstanding that it would have been possible to register a conveyance in favour of the appellant before the Jordan caveat was lodged. The trial judge went on to reject fraud or bad faith on the part of the respondents and concluded that they were entitled to the benefit of the rule.

10 He held also that neither s. 35 nor s. 38 of the Land Registry Act precluded this result. Those sections, so far as material, read as follows:

> 35. Except as against the person making the same, no instrument ... purporting to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land ... until the instrument is registered ...
>
> 38. (1) Every certificate of indefeasible title issued under this Act shall be received in evidence in all Courts of justice in the Province without proof of the seal or signature thereon, and, so long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against Her Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee-simple in the land therein described against the whole world, subject to
>
> (a) the subsisting exceptions or reservations contained in the original grant from the Crown;
> (b) any Dominion or Provincial tax, rate, or assessment at the date of the application for registration imposed or made a lien or which may thereafter be imposed or made a lien on the land;
> (c) any municipal charge, rate, or assessment at the date of the application for registration imposed or which may thereafter be imposed on the land, or which had theretofore been imposed for local improvements or otherwise, and which was not then due and payable, including any charge, rate, or assessment imposed by any public corporate body having taxing powers over an area in which the land is situate;
> (d) any lease; or agreement for lease, for a period not exceeding three years, where there is actual occupation under the same;
> (e) any public highway or right-of-way, watercourse or right of water, or other public easement;
> (f) any right of expropriation by Statute;
> (g) any lis pendens or mechanic's lien, judgment, caveat, or other charge, or any assignment for the benefit of creditors or receiving order or assignment

under the Bankruptcy Act, registered since the date of the application for registration;

(h) any condition, exception, reservation, charge, lien, or interest noted or endorsed thereon;

(i) the right of any person to show that the whole or any portion of the land is by wrong description of boundaries or parcels improperly included in such certificate;

(j) the right of any person to show fraud, wherein the registered owner or wherein the person from or through whom the registered owner derived his right or title otherwise than bona fide for value has participated in any degree;

(k) any restrictive condition, right of reverter, or obligation imposed on the land by the Forest Act when noted and endorsed thereon.

11 [McKenzie J. noted that an agreement for sale was not within the exceptions.] It was McKenzie J.'s view that, in terms of s. 35, the Jordan agreement, although unregistered, was effective against the respondents and hence operated as a defect in their title in respect of their subsequent agreement with the appellant. He regarded s. 38 as simply a signal to purchasers to obtain a conveyance for speedy registration, and hence the appellant might have defeated any claim Jordan had to obtain title by preceding Jordan to the Land Registry office, leaving Jordan (assuming no caveat had been filed beforehand) to a remedy in damages.

12 The majority of the Court of Appeal (Hinkson J.A., Taggart J.A. concurring) affirmed the finding of the trial judge that there was no fraud or bad faith on the part of the respondents and refused to hold that the rule in Bain v. Fothergill was inapplicable if the vendors were careless or even reckless in agreeing to sell their property to different purchasers. The Court disapproved of A.S.A. Construction Pty. Ltd. v. Iwanov [[1975] 1 N.S.W.L.R. 512], where the facts were similar. There there were two successive contracts of sale of the one property to different purchasers. Each sued for specific performance and the actions were tried together. The second purchaser admitted the priority of the first and successfully sued for damages for loss of the bargain. It was held that the limiting rule of Bain v. Fothergill did not apply where a vendor was the author of his own misfortune. Hinkson J.A. felt that this was an attempt to resurrect Hopkins v. Grazebrook.

13 Again, the Court of Appeal held that the trial judge had correctly found the Jordan agreement, although unregistered to constitute a defect of title under the rule of Bain v. Fothergill. It rejected the appellant's contention that because at the time of its agreement with respondents there was nothing registered against their title, the prior Jordan agreement could not prevail against s. 38 of the Land Registry Act.

14 Robertson J.A., dissenting, took a different view of the Iwanov case in New South Wales and treated it as supporting his own view of the scope of Bain v. Fothergill. For him the scope was reflected in the three considerations upon which Lord Chelmsford proceeded, namely, there was no fraud of the vendor, no wilful act preventing performance but rather an unexpected and insuperable defect in title. Applying these considerations to the present case, he said this:

> Here, however, there was no "unexpected defect" in the defendant's title. They held a certificate of indefeasible title to the land, and it was conclusive evidence at law and in equity, against all persons whomsoever, that the defendants

were seized of an estate in fee simple in the land against the whole world. The defect, far from being unexpected, arose from the defendants' own act in contracting to sell the land to Jordan. Moreover, that act was "a wilful act on their part."

I have gone to some pains to show that the rule in Bain v. Fothergill was developed to meet circumstances such as do not exist here. Its application should, then, be limited to cases which fall fairly and squarely within what it specifically decided: general words in it should not be used to expand the scope of what it actually decided. The circumstances here do not fall within the scope of what it actually decided.

15 I share the opinion of Robertson J.A. that the present case is not within the rule in Bain v. Fothergill, and I also share the view of Megarry J. in Wroth v. Tyler that the anomalous character of the rule is a good reason for a strict limitation of its scope. Although the Court of Appeal majority felt that to oust the rule would be to reinstate Hopkins v. Grazebrook, the facts here are quite different. There is here no case merely of a vendor who, knowing he has no title (as, where he himself has merely a contract of purchase), purports to sell to another. The vendors here, somewhat greedy as McKenzie J. found, had title and then proceeded, in effect to agree to sell the same property twice. I do not say that there was fraud or a want of good faith (save possibly in respect of Jordan) but, in my view, it is enough to oust the limiting rule in Bain v. Fothergill if the vendor, having title, has either voluntarily disabled himself from being able to convey or has risked and lost his ability to do so by what were in effect concurrent dealings with two different purchasers.

16 This is enough to dispose of the first question posed at the beginning of these reasons. In view of the disposition, the second question does not really arise. This Court was however invited in express terms by all three members of the British Columbia Court of Appeal to declare its refusal to follow the rule in Bain v. Fothergill. They could speak only, of course, in respect of its application in British Columbia.

17 The appellant here was concerned primarily with establishing that the rule did not apply; in this he succeeded, and it was only in the alternative that its counsel urged that the rule no longer be followed. Counsel for the respondents took the position that the rule, having survived so long, should be followed by the Courts and it should be left to the various Legislatures to decide on its abolition. British Columbia itself recently moved to this end in the enactment on June 20, 1978, of the Conveyancing and Law of Property Act, which by s. 33 expressly abrogates the rule, but the Act has not as yet been proclaimed.

18 As might be expected with a rule that has had as long a history as that in Bain v. Fothergill, it has spawned other suggested justifications than the major one of uncertainty of title which inspired it. The complexity of real property law and the consequent hardship on a bona fide vendor putting his property on the market should not, it was said, result in visiting him with all the consequences of an ordinary breach of contract if his title proved defective: see Sikes v. Wild [(1861), 1 B. & S. 587, aff'd (1863), 4 B. & S. 421]; Di Castri, Canadian Law of Vendor and Purchaser (2nd ed. 1976), at p. 748. Lord Hatherley had given support for this view in his reasons in Bain v. Fothergill, at p. 211, by saying that the purchaser must be considered to have bargained on that basis.

19 Another justification for the rule was said by 5 Corbin on Contracts (1964), s. 1098, at p. 531, to rest on the fact that "land in England [was] not subject to rapid fluctuation, that contracts were nearly always quickly closed, and that the contract price [was] usually substantially the same as the market value at the time of breach". The learned author cited the judgment of this Court in Ontario Asphalt Block Co. v. Montreuil [(1916), 52 S.C.R. 541] for this proposition and I will return to this case later. Corbin added this statement, which is equally applicable to Canada:

> ... This reason is certainly one that is not to be accepted in the United States. If the market value and the contract price are the same it makes no difference which rule is adopted. But in the United States there are innumerable long-time contracts for a future conveyance, and land often rapidly fluctuates in price. The English rule, therefore, would discriminate against the purchaser when it is not useless.

20 Another point made in justification of the rule is referred to in 5 Corbin on Contracts, at p. 530, in the following words:

> A few [American] cases follow the English rule entirely, sometimes on the ground that, since no substantial damages are recoverable on the covenant of title contained in a deed of conveyance, no more should be recoverable for breach of the preliminary contract to convey.

It is questionable, however, that no substantial damages are recoverable on breach of a covenant of title in a conveyance if, for example, the purchaser is compelled to give up possession, as opposed to a defect which does not produce such a drastic result: see McGregor on Damages (13th ed. 1972), at p. 484, citing Lock v. Furze [(1866), L.R. 1 C.P. 441]; and see the Canadian cases cited in the report of the Law Reform Commission of British Columbia, at p. 11.

21 Although some jurisdictions in the United States follow the rule in Bain v. Fothergill, with its qualifications, including as a qualification instances where a vendor knowingly contracts beyond his power, the generally prevailing position is a rejection of the rule and an adherence to ordinary contract principles of recovery for loss of a bargain: see 3 American Law of Property (1952), s. 11.67, at pp. 169-170.

22 Despite the other supports for the rule that I have mentioned, the foundation was the uncertainty of title because of the absence of any uniform registration system through which title could be more easily ascertained than by relying on the production of deeds without the back-up of a state-operated register. The rule was said to be a prop in support of the marketability of land and, presumably, it was up to the purchaser, if he could succeed in doing so, to obtain a contractual promise in avoidance.

23 Even if the exceptions have not eaten deeply into the rule, it seems to me that its main rationale has disappeared in those jurisdictions which have a Torrens system, as for example, Alberta, Saskatchewan and Manitoba (under its Real Property Act, R.S.M. 1970, c. R30) and, similarly, in British Columbia whose registration Act, the Land Registry Act approximates the Torrens system. The same can be said of Ontario in respect of those areas governed by The Land Titles Act, R.S.O. 1970, c. 234. In all such jurisdictions and areas, where the title is that shown on an official registry, there can be no claim by a vendor of uncertainty of title or of the necessity to gather in deeds and documents through which he would seek to establish title.

24 In my view, the venerability of the rule and the fact that Legislatures have not moved long ago to abolish it, cannot be viewed as a decisive reason against a refusal by this Court to follow it. It was, after all, a judge-made rule, based on considerations that do not operate in Canada. The fact that it has not been cast aside before may have to do with the decision of this Court in the Ontario Asphalt Block case, supra, decided at a time when this Court was still subject to the Privy Council and through it to the House of Lords in matters of common law. That situation no longer obtains, and this Court has asserted its freedom not only to depart from its own decisions but from Canadian decisions of the Privy Council as well: see McNamara Construction (Western) Ltd. v. The Queen [[1977] 2 S.C.R. 654]; Reference re Agricultural Products Marketing Act [[1978] 2 S.C.R. 1198].

25 The Ontario Asphalt Block case was an Ontario appeal to this Court which divided four to two on whether the rule in Bain v. Fothergill applied to its facts. The issue arose in respect of a ten-year lease with an option to the lessee to purchase the fee, and with an obligation on its part to make improvements during the leasehold term which it did. Both Fitzpatrick C.J. and Davies J., dissenting, were of opinion that these facts took the case out of the rule when, upon the exercise of the option the lessor could not give title as he had covenanted to do. The Chief Justice held that, accepting the rule in Bain v. Fothergill, "this case is outside the transactions to which in its widest interpretation the rule making exception to the general law of contracts has any application" (at p. 548). He quoted from Sedgwick on Damages (9th ed. 1913), vol. 3., at p. 2121 as follows:

> If the defendant fails to convey because he has not a good title, he is always liable in substantial damages. This is commonly called the United States Supreme Court rule, and represents one extreme of the series of principles of which the highest English court has adopted the other extreme. It seems to be the correct one on principle.

26 Both dissenting judges held to a strict interpretation of the rule, wishing to keep it within the bounds of the rationale which spawned it. The majority (in effect, only Anglin J. dealt with the application of the rule and taking his reasons) concluded that there was no evidence to warrant an inference that the optionor after discovering a defect in his title (he being a devisee for life) made no effort to obtain the consent of the remainder-men, to bring the case within Day v. Singleton, supra. It was clear from the reasons of Davies J. that the rule in Bain v. Fothergill, having been followed in Ontario, should not be called in question as part of the law of that Province, and hence for him the only question was whether the case was within the rule.

27 Not only this Court but other Courts in Canada were formerly under the same stricture, and any call for a denial of the rule would be a call for legislative intervention. In Stephens v. Bannan [(1913), 6 Alta. L.R. 418], Beck J. in the Supreme Court of Alberta en banc said at p. 431 that "the English rule as to damages in the case of breach of contract for the sale of land should be applied in this jurisdiction notwithstanding that we have here the Torrens system of land titles". On the other hand, in O'Neil v. Drinkle [ (1908), 8 W.L.R. 937], a Saskatchewan case, Lamont J. (who later became a member of this Court) took a bolder approach, as follows (at p. 944):

> In this province, however, the reasons for the adoption of this exception to the common law rule as to damages do not exist. Instead of the complicated law as to the title of real estate which they have in England, we have a very simple system of land transfer, under which a person having a certificate of title holds an

> indefeasible title to his land, which is not subject to those uncertainties and defects which led to the establishment of the exception as laid down in Flureau v. Thornhill, and as was said by Cockburn, C.J., in Engel v. Fitch, L.R. 3 Q.B. 314: "The limit of the exception is
>
> to be found in the reason on which it is based; the reason ceasing, the rule should also cease."
>
> Therefore, I am of opinion that the conditions being entirely different here, and the reasons which led to the establishment of the exception being entirely absent, there is no reason why a different principle should be adopted in assessing damages for breach of contract for the sale of land than that adopted for the breach of other contracts.

He did not, however, have to press this because he was satisfied on the facts that the rule did not apply.

28 I have no hesitation in saying, at a distance of seventy years from O'Neil v. Drinkle, that I fully agree with what Lamont J. there said about the rule in Bain v. Fothergill. It will suffice to refer to a common provision of the Torrens Acts in Alberta and Saskatchewan (The Land Titles Act, R.S.A. 1970, c. 198, s. 203 and The Land Titles Act, R.S.S. 1965, c. 115, s. 237) and in Manitoba (The Real Property Act, R.S.M. 1970, c. R30, s. 77) which is as follows (I quote the Alberta provision):

> 203. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor is he affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

29 There is a similar provision in s. 44 of the British Columbia Land Registry Act. Moreover, s. 28 of thai Act is also relevant to support the abolition of the rule in Bain v. Fothergill. It is in these terms:

> 28. It is the duty of any person selling or conveying land, or who enters into an agreement, or assignment of an agreement for the sale of land, whereby the purchase price is payable by instalments or at a future time, to register his own title, in order that any person to whom the land or any part thereof is conveyed, and any person claiming under the agreement, sub-agreement, or assignment, may be able to register his title; and so long as the failure of any person to comply with this section continues, no action shall be brought by the person so failing to register upon any covenant in such agreement or sub-agreement.

As the British Columbia Law Reform Commission report points out, at p. 20 thereof, this sanction upon a vendor should be complemented by giving a purchaser a remedy in damages now denied to him under Bain v. Fothergill.

30 In Ontario, there is no exact equivalent in its Land Titles Act, R.S.O. 1970, c. 234, as amended, to s. 203 of the Alberta Act, above quoted, and this Court has held that unregistered interests of which a purchaser for value has notice are not defeated by his prior registration of his interest when there is no express statutory provision to make notice irrelevant: see United Trust Co. v. Dominion Stores Ltd. et al. [[1977] 2 S.C.R. 915]. This, however, does not militate against the inaptness of the rule in Bain v. Fothergill in the face of the fact that in general the registry is the sole mirror of title.

31 In view of the foregoing, it would be my opinion, if it was necessary, in order to decide this case, to come to a conclusion on the matter, that the rule in Bain v. Fothergill should no longer be followed in respect of land transactions in those Provinces which have a Torrens system of title registration or a near similar system.

32 It seems to me that, in principle, a similar view should be taken in respect of land transactions governed by a registration of deeds and documents system such as exists in the Atlantic Provinces, in parts of Ontario and in parts of Manitoba. The Acts in the Atlantic Provinces require the keeping of public registers of deeds and documents (including plans) and provide, generally, for priority according to the order or time of registration: see the Registry Act, R.S.N.B. 1973, c. R-6; The Registration of Deeds Act, R.S.Nfld. 1970, c. 328; The Registry Act, R.S.N.S. 1967, c. 265; The Registry Act, R.S.P.E.I. 1974, c. R-11. The deeds and documents that are registered are not thereby invested with any greater legal force than they intrinsically possess; there is, in short, no public guarantee of title as under the Torrens system, but if they have intrinsic legal force their registration gives them priority over unregistered instruments, of which they had no notice. Registration is, of course, notice and hence the necessity for a search of the register and an examination of the intrinsic worth of the deeds and documents recorded thereon, involving a concern for the chain of title. In Prince Edward Island the statute goes further; it provides as follows in s. 43.

> 43. No constructive or other notice of any unregistered deed or mortgage shall defeat, impeach, or affect, or be construed to affect, any deed or mortgage relating to all or any part of the same lands, tenements or hereditaments, which has been registered under this Act, but every such unregistered deed or mortgage shall be deemed to be fraudulent and void against subsequent purchasers or encumbrancers for valuable consideration, whose deeds or mortgages are previously registered, whether the purchasers or encumbrancers had notice thereof or not, but nothing in this Act affects, or is construed to impeach any will, or security for a debt due or to become due to the Crown, although it or a memorial or entry thereof is not recorded in the office of a registrar.

33 In Ontario, the traditional registration of deeds system (The Registry Act, R.S.O. 1970, c. 409, as amended) has been modified by The Certification of Titles Act, R.S.O. 1970, c. 59, as amended. It applies to land not registered under The Land Titles Act and provides for the investigation and certification of title to such land. When a certificate of title is issued and registered, it has, pursuant to s. 15, a conclusive effect as against the Crown and all other persons subject to any exceptions, reservations, conditions, covenants, charges, mortgages and other encumbrances men-

tioned therein. In short, the Act gives a starting point for title searches and establishes a register akin to that under a Land Titles system.

34 The Manitoba Registry Act, R.S.M. 1970, c. R50 as amended, is similar to the Registry Acts above mentioned, but it does provide in s. 47 that lands that are subdivided must be brought under The Real Property Act, that is, into the Torrens system.

35 Despite the differences between the Torrens system and kindred systems (as in British Columbia and Ontario) and deed registry systems, I do not see why a line should be drawn between them to rule out Bain v. Fothergill in respect of the former and not in respect of the latter. The existence of public registers upon which transfers of interests must be recorded to be protected could be considered as ousting the rationale on which the rule in Bain v. Fothergill was founded. I need not, however, pursue this matter further in the present case.

36 In the result, I would allow the appeal, set aside the judgments below and direct that judgment be entered for the purchaser for $37,000 plus $6,628.50 a total of $43,628.50, the damages found and confirmed below if Bain v. Fothergill did not apply. The appellant is entitled to costs throughout.

Appeal allowed with costs.

# TAB 18

*Case Name:*

# KNUPP v. BELL et al.

[1968] S.J. No. 222

67 D.L.R. (2d) 256

Saskatchewan Court of Appeal

**Woods, Maguire, Hall, JJ.A.**

Judgment: February 19, 1968

(16 paras.)

**Counsel:**

*S. J. Safian*, Q.C., for appellant.

*A. W. Embury*, Q.C., for respondents.

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1 **WOODS, J.A.**:--This is an appeal from a judgment of Mac-Pherson, J., dated July 20, 1966, dismissing an action for specific performance of an agreement for sale or, in the alternative, damages for breach of contract and for an accounting for rents and profits.

2 In his statement of claim the plaintiff Knupp alleged an agreement for sale under which the late Annie Bell on October 2, 1963, agreed to sell to him the north half of 24-10-15 West 2nd for $11,200 and its breach by her in conveying the said land to the defendant Duncan Alexander Bell on December 12, 1963. It was also alleged that the said defendant was not a *bona fide* purchaser for value and that he had notice of the interest of the plaintiff. It went on to allege a conspiracy among the defendants, Duncan Alexander Bell, Marian Gower and Lillian Douglas, all children of the deceased and J. Maurice Douglas, the husband of the last named, to prevent the plaintiff from obtaining title and to induce the late Annie Bell to convey the land to the said defendant Duncan Alexander Bell.

3 By way of defence the defendants admit the terms of the agreement set out in the statement of claim, but plead unconscionable conduct on the part of the plaintiff.

4 While a number of grounds for appeal are set out in the notice, the first to be considered relates to the learned trial Judge's finding of unconscionable conduct on the part of the plaintiff. This

encompasses the question of the value of the land and the representations made concerning it. The learned trial Judge found as a fact that Annie Bell (since deceased), was 85 years of age at the date of the agreement, that she was easily led by members of her family, by friends, and by persons in whom she had confidence. He also found that she was frequently disorientated as to time, was of poor memory and somewhat senile, without any business experience. In addition he found no evidence that she had any knowledge of the value of land or that she had advice concerning the value before she signed the agreement with the plaintiff. With regard to the plaintiff, the learned trial Judge found him to be about 60 years of age, the owner of land adjoining that in question, a friend of Annie Bell and her late husband, of long standing, and desirous of acquiring the Bell property for his son. He had previously attempted to purchase the land. There is ample evidence to support all these findings.

**5** The plaintiff saw Annie Bell some time in September, 1963, when he made clear again his desire to purchase. They discussed it again on September 30th, but neither party named a price. On October 2nd the agreement was made. According to the plaintiff he asked her to name a price, suggesting $35, $40 or $45 per acre and she said that she would not accept any more than $35 an acre from him. The documents were drawn accordingly by a real estate agent in Weyburn known to both of them.

**6** A number of witnesses were called by both sides and considerable evidence given as to the value of the land. However, the learned trial Judge held, and to my mind correctly, that in the question before him he was concerned with the value of the land on the basis of what a neighbour might be expected to pay for it rather than with a fair market value. The plaintiff admitted that he would have paid $45 an acre for it and would even have considered $50 per acre. A neighbour and friend of Duncan Alexander Bell named Kot gave evidence that in 1960 he had offered $50 per acre for the Bell farm and that in 1963 he offered $65 per acre. These so-called offers were really just part of discussions at the time as the land was not offered for sale on either occasion. However, the learned trial Judge found Kot to be a believable witness and the offers sincere. This evidence was confirmed by Duncan Alexander Bell. There was other evidence called as to value but much of it was not helpful in showing what a neighbour might be expected to pay for the land. The learned trial Judge concluded that $35 per acre was grossly inadequate. He accordingly held that the contract was unconscionable and dismissed the plaintiff's action.

**7** The jurisdiction in equity to set aside unconscionable agreements is well established in Canadian Courts. In *Waters v. Donnelly* (1884), 9 O.R. 391, Boyd, C., at p. 401, stated that in relieving against an unconscionable agreement the Court is not dealing with fraud in the sense of deceit or circumvention. If the circumstances are such that the stronger party is given dominion over the weaker, then the one getting the benefit is required to prove the transaction was just, fair and reasonable. The distinction is referred to in the Appellate Division of the Alberta Supreme Court in *Anderson v. Morgan*, 34 D.L.R. 728, *per* Beck, J., at p. 731 and Walsh, J., at p. 732, [1917] 2 W.W.R. 969, 11 A.L.R. 526. Again in the Court of Appeal for Manitoba in *Hrynyk v. Hrynyk*, [1932] 1 D.L.R. 672, [1932] 1 W.W.R. 82, 40 Man. R. 173, the principle is applied relying on *Fry v. Lane* (1888), 40 Ch. D. 312.

**8** The plea that an agreement is unconscionable is also to be distinguished from allegations of undue influence and duress. In *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (2d) 710, 54 W.W.R. 257, Davey, J.A., at p. 713, makes clear the distinction when he says:

> A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable ...

**9** Sheppard, J.A., at p. 721 refers to the plea as one of constructive fraud which may be inferred from the inequality of the parties and the inadequacy of the consideration.

**10** The learned trial Judge [58 D.L.R. (2d) 466] held that the facts before him came within these principles so as to show that the contract was unconscionable. He found the price of $35 per acre to be grossly inadequate. He also expressed it as resulting in an immoderate gain at the expense of Annie Bell. These facts, combined with his findings as to her condition, as contrasted to that of the plaintiff, were the bases upon which he dismissed the action. In my view the learned trial Judge was justified in so holding. It is obviously difficult to delineate what degree of inequality between the parties or the extent of the inadequacy of the consideration which must exist before the jurisdiction may be invoked. In my view, however, the facts found by the learned trial Judge were supported by the evidence and come within the principles discussed. I would accordingly dismiss the appeal against the dismissal of the plaintiff's action on the agreement.

**11** Having so held, it is not necessary to consider the claim for damages against the defendants for interference with the agreement. It is also unnecessary to deal with the admissibility of the evidence given by the solicitor for the defendant because it related to these latter claims.

**12** It is necessary, however, to consider the appeal against the award against the plaintiff for the costs of summoning the jury. Before the trial, counsel for the plaintiff moved to strike out the jury notice. The learned trial Judge granted the motion and dismissed the jury. While allowing the plaintiff costs on the motion, the plaintiff was held responsible for the costs of summoning the jury. The learned trial Judge held on the authority of *Sick's Prince Albert Brewery Ltd. v. Central Cold Storage Ltd.* (1954), 13 W.W.R. (N.S.) 374, a judgment of this Court, that the plaintiff was not entitled to a jury within the meaning of s. 68 of the *Queen's Bench Act*, R.S.S. 1965, c. 73. He then went on to hold, for reasons stated that the case was of such a nature that he would not exercise his discretion in ordering a jury under the powers granted by s. 69 of the said Act. His reason for assessing costs of summoning the jury against the plaintiff was that the plaintiff delayed launching his motion until after the jury notices had been served. However, the defendants had served notice demanding a jury when it was clear on the law that they were not entitled to one as of right. Moreover, the defendants made no move to have the Court exercise its discretion under s. 69 of the Act until the plaintiff's motion to strike out the jury notices was being argued. On these facts and with every respect for the views of the learned trial Judge, I do not see any basis for holding that costs of summoning the jury should be borne by the plaintiff. On this point I would allow the appeal.

**13** As to costs, the general rule is that an appellant is entitled to his costs where he has succeeded substantially in the appeal. A successful appellant, however, may be deprived of his costs where he has appealed on several grounds and succeeded on one only: *Rygus v. Zawitowski*, [1928] 2 D.L.R. 539 at p. 540, [1928] 1 W.W.R. 753. The success of the appellant here is on one ground

only and that ground is not part of the main issue. There will, therefore, be no order as to costs incurred in this Court.

MAGUIRE, J.A.:--I concur.

**14** HALL, J.A.:--The learned trial Judge [58 D.L.R. (2d) 466] has found that the price agreed upon for the land was grossly inadequate. While I may have arrived at a different conclusion, I cannot say that there is no evidence to justify the finding of value made by the learned trial Judge. This finding cannot, therefore, be interfered with.

**15** As inadequacy of consideration does not of itself enable the Court to set aside the transaction, the learned trial Judge examined the circumstances which surrounded it. I do not think that there was any evidence on which he could base his subsequent finding that Mrs. Bell "was similar to the plaintiff in *Waters v. Donnelly* (1884), 9 O.R. 391" [p. 475] if he was referring to her mental capacity. However, as I interpret his judgment, he found that the relationship between the appellant and Mrs. Bell was one which made it the duty of the appellant to take care of the interest of Mrs. Bell. He further found that the appellant failed to carry out his obligation by not insisting that Mrs. Bell discuss the transaction with her family and obtain independent advice as to value. He in effect found that the appellant, by allowing the transaction to be completed so quickly, deprived Mrs. Bell of the opportunity to so discuss and obtain. There is evidence to support this finding. The finding that the contract was unconscionable was therefore a proper one.

**16** As I agree that there was no basis upon which the learned trial Judge could hold that the costs of summoning the jury be borne by the appellant, I concur in the disposition of the appeal in the manner set out by my brother Woods.

# TAB 19

*Case Name:*

# Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.

**Between**
**Plas-Tex Canada Ltd., Plastex Pipeline Systems Ltd., Plastex Profiles Ltd., Plastex Extruders Ltd., and Jaycan Construction Ltd., respondents/plaintiffs, and Dow Chemical of Canada Limited, appellant/defendant), and Alberta Opportunity Company, Canadian Standards Association, and Her Majesty the Queen in Right of Alberta, Not party to the Appeal/defendants**

[2004] A.J. No. 1098

2004 ABCA 309

245 D.L.R. (4th) 650

[2005] 7 W.W.R. 419

42 Alta. L.R. (4th) 118

357 A.R. 139

4 B.L.R. (4th) 194

27 C.C.L.T. (3d) 18

135 A.C.W.S. (3d) 75

2004 CarswellAlta 1290

Docket No.: 0301-0031-AC

Alberta Court of Appeal
Calgary, Alberta

**Conrad, O'Leary and Picard JJ.A.**

Heard: January 13, 2004.
Judgment: October 14, 2004.

(149 paras.)

*Commercial law -- Sale of goods -- Fitness and quality -- Merchantable quality -- Warranties -- Contracts -- Consensus, lack of -- Unconscionable transactions -- Tort law -- Negligence -- Causation -- Foreseeability and remoteness -- Duty of care -- Standard of care -- Damages -- General damages -- Categories of -- Loss of profits.*

Appeal by the defendant, Dow Chemical, against the plaintiffs, the Plas-Tex group of companies, from a trial decision awarding damages for breach of contract and negligence. The plaintiffs were affiliated companies providing pipeline systems to carry natural gas to rural co-ops. They shared common ownership, management and goals. Dow sold defective resin to two of the plaintiffs. Dow did not have a contractual relationship with the other plaintiffs. One of the contracts contained clauses limiting Dow's liability by stating that the plaintiff accepted all liability for loss or damage resulting from use of the resin. Dow knew that that the resin was defective and that some plaintiffs would use the resin to manufacture pipe installed by other plaintiffs to carry natural gas. The pipe was dangerous and allowed natural gas to escape. The plaintiffs were forced to undertake major remedial operations and use of the pipe was eventually prohibited. The plaintiffs' reputation was damaged, which caused it to lose some of its customers and be petitioned into bankruptcy. The trial judge found Dow liable in contract and tort. The plaintiffs were awarded damages for the purchase price of the resin, cost of pipe repairs and lost profits.

HELD: Appeal dismissed. Dow breached implied warranties under the Sale of Goods Act. Dow was in fundamental breach of the contract with the plaintiff and could not rely on the limitation of liability clauses. The contract was unconscionable. Before signing the contract with the plaintiff, Dow knew that defects in the product would cause the pipe manufactured from it to fail. Rather than disclosing this knowledge, Dow protected itself with limitation of liability clauses. While the relationship between the plaintiffs could not support an exception to the doctrine of privity of contract, it did support an award for loss of profits to the plaintiffs as a unit in tort. Dow knew of the corporate structure of the plaintiffs and their working relationships. Dow had a duty to warn all the plaintiffs of the resin dangers and to take reasonable care not to distribute a dangerous product. There was a reasonable foreseeability of harm to each plaintiff and no policy reason to limit the duty of care. In the absence of fraud or wrongdoing, the plaintiffs were entitled to organize their business to lessen risk and protect resources without prejudicing their right to claim against wrongdoers. It did not matter that Dow had a contractual relationship with certain plaintiffs but not others. Dow breached the standard of care. The receivership of all the plaintiffs was a reasonably foreseeable economic loss. There were no policy reasons why Dow should not be liable for the costs of repairs and loss of profits the plaintiffs suffered. The cost of the resin, cost of repairs and lost profits did not constitute double recovery. The losses were complementary.

**Statutes, Regulations and Rules Cited:**

Alberta Opportunity Fund Act, S.A. 1972, c. 11.

Sale of Goods Act, R.S.A. 2000, c. S-2, s. 16(2), 16(4).

**Appeal From:**

On appeal from the Judgment by The Honourable Mr. Justice McIntyre. Dated the 17th day of December, 2002. Filed on the 28th day of January, 2003. (2002 ABQB Docket: QC01-125376)

**Counsel:**

J.P. McMahon for the Respondents/Plaintiffs

E.P. Groody and J.T. Eamon for the Appellant/Defendant

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REASONS FOR JUDGMENT

Reasons for judgment were delivered by Picard J.A. Concurred in by Conrad J.A.. Concurred in by O'Leary J.A.

PICARD J.A.:--

INTRODUCTION

**1** The appellant, Dow, is a large petro-chemical company. The respondents were affiliated companies providing pipeline systems to carry natural gas to rural co-ops. Dow sold defective poly-ethylene resin to two of the respondents. It knew of the defect before it sent the first shipment but did not advise the respondents. It also knew that some respondents would be using the resin to manufacture pipe that would be installed by other respondents and that the pipe would carry natural gas throughout rural Alberta. The pipe produced with the defective resin was dangerous because it cracked, allowing natural gas to escape. There was an explosion and the frequency of leaks from the

pipe soared. The respondents were forced to undertake a major remedial and repair program. The respondents sought assistance from Dow but were refused. The production and installation of the pipe was 80% of the respondents' business. They lost customers, and their reputation deteriorated. Eventually, the provincial government prohibited use of the pipe. The respondents were left with large receivables and were unable to meet commitments. Two banks petitioned the respondents into bankruptcy.

**2** The trial judge found Dow liable in both contract and tort and awarded the respondents damages for the purchase price of the defective resin, cost of repairs of the dangerous pipe, and for lost profits.

**3** Dow never did warn the respondents about the defective resin, although it admitted in the lawsuits against its insurer that the resin was "inherently defective" and "intrinsically harmful".

**4** I find that the trial judge came to the correct result and uphold his damage award but find reviewable error in part of the legal analysis.

FACTS

**5** There are a number of features of the history of this case that make it unusual. Firstly, this litigation was begun 28 years ago. Secondly, Dow has been extensively involved in litigation as a result of the defective resin and settled claims by the government of Alberta, gas co-operatives, and gas supply companies. An American court dealing with Dow's litigation against its insurers noted that all but this case had been resolved. Thirdly, at this trial, Dow called no evidence. Fourthly, the trial judge did an extensive analysis in oral reasons (104 pages) that are not reported.

**6** There are also two important characteristics of the legal relationships that affect the analysis for liability. The first is the role played by the Alberta Opportunity Company and the second is the corporate structure of the respondents.

a) Role of the Alberta Opportunity Company

**7** The Alberta Opportunity Company (AOC) was created by the provincial government to administer a fund to promote the development of resources and the growth and diversification of the economy of Alberta: Alberta Opportunity Fund Act, S.A. 1972, c. 11.

**8** In 1973, one Alberta government venture that AOC was involved with was the rural gas program. Anticipating a shortage of plastic resin as a result of rising global demand and the increased need for plastic pipe to use in the rural gas initiative, AOC sourced Dow as a supplier of polyethylene resin to Alberta pipe extruders, including the respondents. AOC set up a system of financial and supply arrangements so that the respondents could manufacture and supply pipe for use in the rural gas initiative. This meant that in the early stages AOC was a conduit between the appellant and respondents. Prior to trial, Dow agreed to assume all of AOC's liability or responsibility, which allowed AOC to step out of this action. AOC's liability thus became Dow's liability.

b) Corporate Structure of the Respondents

**9** There are five respondent companies. They shared common ownership, management and a common goal: to be a fully-integrated provider of natural gas systems to rural gas co-ops. The main distinguishing feature was that each fulfilled a different function in the business venture that started with the resin and ended with the delivery of a fully functional natural gas system. There were no

formal written agreements amongst the companies but inter-company transactions were documented. The linkages between the companies meant that there was an internal reciprocal dependency that was dealt with by a charge-back system. During the time in issue, there was a re-organization of the companies with four of the respondents becoming wholly owned subsidiaries of the fifth.

**10** Prior to the re-organization, the group of companies consisted of Plas-tex Pipeline Systems Ltd. (PPSL), Plas-tex Extruders Ltd. (Extruders) and Carleton Distributors Ltd. (a warehousing distributor of materials and equipment for the gas industry but not involved in this appeal. Extruders, established in 1969, manufactured natural gas pipe using resin from several different suppliers. PPSL, established in 1973, supplied natural gas systems. These turn-key systems included the design, engineering, materials, construction and mapping of a natural gas system. PPSL entered into contracts with the rural co-ops to supply them with such gas systems and warranted their work and materials for one year.

**11** On December 31 1974, the respondent Plas-Tex Canada Ltd. (Plastex) was created and it acquired 100% of the assets of Extruders, which became inactive. Plastex Profiles Ltd. (Profiles) was set up as a wholly owned subsidiary of Plastex and took over the work that had been done by Extruders. Jaycan Construction Ltd. (Jaycan) was formed as another wholly owned subsidiary to assist PPSL which was 70% owned by Plastex, in the construction of pipelines. PPSL also did design and engineering for the pipelines. Plastex provided management and financial services to all of the respondents. That was the corporate structure when all respondents were forced into receivership in September 1976.

c) Supply of Resin

**12** Dow supplied resin in three stages. The first was a small sample shipment in March 1974. The second began on July 17, 1974. Both were set up with Dow as the vendor, AOC as the conduit purchaser, and Extruders as the ultimate purchaser. At this point, there was no single contract in writing but a series of purchase orders.

**13** The third was pursuant to a contract in writing dated February 15, 1975, between Dow and Profiles, for supply of resin during the period January 1, 1975, through December 31, 1977. That contract contained several clauses that limited Dow's liability, including that: Profiles assumed all responsibility and liability for loss or damage arising from the use of the resin; Dow's liability was limited to the selling price of the resin; failure of Profiles to give Dow notice in 30 days constituted unqualified acceptance and waiver of all claims and the lack of such notice constituted unqualified waiver, and finally that the contract set out the entire understanding between the parties.

d) Defects in the Resin

**14** On July 15, 1974, Dow became aware of serious defects in the resin. Two days later, on July 17, 1974, it shipped the first commercial shipment to Extruders without warning Extruders of the risk that the defect presented.

**15** An internal Dow document dated July 15, 1974, stated that: (a) tests on the resin had identified that it had a chemical deficiency; (b) "more and more of the customer difficulties" were attributable to that deficiency; (c) "[f]or the past few months off grade' [resin] has been sold to our customers"; and (d) "[w]hatever the reasons for the [chemical deficiency in our resin] may have been, I urge that top priority be given to ensuring that continuous addition of [the deficient chemi-

cal] to our resins at the levels recommended take place". The trial judge noted further Dow reports detailing the deficiencies in the resin dated: August 19, 1974; November 11, 1974; February 10, 1975; May 10, 1975; and August 5, 1975. Dow ceased selling the resin in July 1975.

**16** The levels of antioxidant in the resin were significantly below industry standards and there was no evidence that adequate changes were ever made. Indeed Dow was not prepared to acknowledge that there was a problem. However, the expert evidence at trial was that the resin was "inherently defective" and "unsuitable for gas pipe". Pipe made from the defective resin was brittle and, as a consequence, cracked.

e) Use of the Defective Resin

**17** Extruders, at first, and later Profiles, using the defective resin, manufactured pipe and provided it to PPSL which, along with Jaycan, constructed pipelines to supply gas to the rural co-ops in Alberta.

**18** By January 1975, over 1,700 miles of pipe manufactured from Dow's resin had been installed underground. In total, about 3,000 miles of pipe, using more than 1.3 million pounds of Dow resin, was manufactured and installed by the respondents pursuant to the rural gas program.

f) Consequences of the Defective Resin

**19** The installed pipe cracked and leaked. There was property damage not only to the pipe but to land. Gas escaped and was lost. In one case, pipe exploded. The nature and extent of damage was described by the American trial judge adjudicating Dow's claim against its insurer flowing from its liability in other actions similar to this one. He found that the categories of property damage were: (i) pipe that was destroyed and discarded prior to and during the installation; (ii) installed pipe that was replaced and discarded when repairs were made; (iii) all pipe in the ground when the replacement programs were undertaken; (iv) all unused pipe; and (v) all escaped gas: Associated Indemnification Corporation v. Dow Chemical Company, 814 F. Supp. 613 (E.D Michigan 1993) at 622 (the US decision). As the respondents did not know of the source of the defect in the resin, they accepted responsibility for the problems under the one year warranties and undertook extensive testing and repairs.

**20** In mid-1976, the Canadian Standards Association (CSA) and the Alberta Energy Resources Conservation Board (ERCB) banned the use of gas pipe made from the resin because of the danger and risks it presented to workers and the public.

**21** By this time, customers were refusing to pay the respondents and over $1.2 million in accounts receivable had accumulated. The customers were demanding refunds for all unburied pipe that they held in inventory. At this time, the respondents filed the Statement of Claim against Dow.

**22** In September 1976, all of the respondents were placed into receivership by their two secured lenders and they ceased all operations. All the companies were liquidated and, in 1984, were released from receivership.

g) Other Litigation

**23** In 1978, the ERCB directed that all the pipe that had been made from Dow's resin be replaced. The cost was approximately $27 million. A consolidated action by the government and the

38 rural gas co-ops against Dow for recovery of these costs was settled in November 1990. This case was not included in that settlement.

**24** In 1993, Dow claimed and was granted indemnification by its insurer for the amount of that settlement: see the US decision. Documents from that litigation, acknowledged by Dow as containing statements made with its authority, were made part of the record in this case as business documents. In the course of that litigation, Dow admitted that the resin was "intrinsically harmful" and that the resin was responsible for all of the problems that occurred with the pipe. As noted by the trial judge in this case, Dow stated in argument in the US case: "we are liable because the resin screwed up".

WHAT THE TRIAL JUDGE FOUND

**25** The trial judge found liability based on both contract and tort.

a) Liability in Contract

**26** The contractual liability flowed from the two contracts: the contract with Extruders in which AOC played a part; and the contract in writing between Dow and Profiles that commenced January 1, 1975.

**27** The trial judge found that the sales under the Extruders contract were subject to the requirements of the Sale of Goods Act, R.S.A. 2000, c. S-2 (SOGA) and that there were breaches of the implied conditions of fitness and merchantable quality for which Dow was liable. He went on to find that Dow was in fundamental breach of the written contract with Profiles and that the clauses in that contract limiting its liability were unenforceable.

**28** He was able to find breach of contract by Dow against all respondents. He dealt with privity based on the fact that Dow knew of the corporate structure and the relationship amongst the companies and on his conclusion that there could have been claims up through the chain of companies right back to Dow.

b) Liability in tort

**29** He also found that Dow had a duty in tort to warn the respondents and was negligent in failing to do so. He found that the "trigger" for the respondents' financial difficulties and eventual receivership was the failure of the pipe made from the defective resin.

c) Damages

**30** For purposes of assessing damages, the trial judge concluded that there was a single entity that he called the Plastex Group that was comprised of all respondents. The damages awarded were: a refund of the purchase price of the defective resin ($576,958); the cost of repairing the dangerous pipe ($291,000); and economic loss because of loss of profits prior to and as a result of the respondents being petitioned into bankruptcy ($1,916,500). The trial judge found all were foreseeable and directly attributable to the supply by Dow of the defective resin.

WHAT THE APPELLANT APPEALS

**31** The appellant alleges that the trial judge erred in his findings in respect of:

1. the contract with Extruders, in that finding the sales were subject to the provisions of the Sale of Goods Act which imply conditions of fitness and merchantable quality;
2. the written contract with Profiles, in finding that the limitation of liability clauses were not enforceable;
3. liability in tort, in finding that Dow owed the respondents a duty of care; and
4. damages, in finding that Extruders and Profiles suffered a loss and were entitled to a refund of the purchase price of the resin, and in awarding the respondents compensation for lost profits.

STANDARD OF REVIEW

**32** In its appeal, Dow alleges the trial judge made errors of fact, of law, and of mixed fact and law. As the role of an appellate Court is not to re-try a case, this Court must ensure that where an error on the part of the trial judge is alleged, the findings of the trial judge are granted the appropriate deference. The appropriate deference that appellate judges must give to findings of fact, law and mixed fact and law by trial judges was set out in Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33.

**33** Summarized briefly, the standard of review for a question of law is one of correctness: Housen, supra at para. 8. The standard of review for findings of fact is such that only where a trial judge makes a palpable and overriding error should an appellate Court overturn a finding of fact: Housen, supra, at para. 10. Where a matter involves a question of mixed fact and law, such as a finding of negligence, it will be important to characterize the issue as one that lies closer either to fact or to law. One way to determine whether an issue is closer to one of fact or of law, is to ask whether a legal principle is readily extractible: Housen, supra at para. 36.

**34** The degree of deference to be accorded by an appellate Court to a trial judge's assessment of damages is high. An appellate Court is not to substitute its assessment of damages for that of the judge or jury. An award of damages is not to be interfered with unless the trial judge applied the wrong principle of law or the overall amount is a wholly erroneous estimate: Herron v. Hunting Chase Inc. (2003), 330 A.R. 52, 2003 ABCA 219 at para. 38.

**35** These are the standards of review that must be applied to the grounds of appeal.

ANALYSIS

BREACH OF CONTRACT

a) The Contract: Dow and Extruders (and AOC)-March to December 31, 1974.

(1) s. 16(2) Sale of Goods Act

**36** Purchases were made by Extruders using purchase orders, with AOC as a conduit. These were treated by the trial judge as one contract and no issue was taken by the parties with this characterization.

**37** The trial judge held that s. 16(2) of the SOGA applied. This section says that where a buyer makes known to the seller the particular purpose for which goods are required, so as to show that the buyer relies on the seller's skill and that the goods are of a description that the seller supplies,

there is an implied condition that the goods are reasonably fit for that purpose. In his analysis of s. 16 (2) the trial judge noted that, in order for the warranty to be implied, three conditions must be met. Specifically, the goods must have been sold in the course of the seller's business, the seller must have known the purpose for which the goods were purchased, and the purchaser must have relied on the seller's skill or judgment.

**38**

Dow, at trial, and on this appeal, takes issue with the first and third condition. While there was no basis upon which Dow could argue that it was not in the business of selling resin, Dow argued that AOC was not in the business of doing so because it acted solely as a banker and was an arm of government. The trial judge found that AOC did sell and distribute resin but also characterized Dow as "the ultimate seller". At trial, Dow acknowledged that AOC was merely a conduit. Given this admission and the fact that Dow has assumed all liability on the part of AOC in this case, Dow cannot shelter behind AOC. Even if the trial judge erred in his finding regarding AOC, there is no error in the finding that Dow was in the business of selling resin.

**39** Dow says that it was an overriding and palpable error to find that Extruders relied on AOC's skill and knowledge about the resin. More importantly, it says there was no such reliance on it. As the evidence showed, and the trial judge found, Dow provided all the technical advice about the resin to the Extruders and knew that the resin would be used to manufacture pipe to transport natural gas. The trial judge found that all parties were aware that it was Dow who knew the properties of the resin and its proposed use. The trial judge made no error in finding, as a fact, that there was reliance as required by the SOGA. The defective resin that Dow was in the business of selling was not fit for the purpose of being made into pipe that could safely carry natural gas. Therefore there was a breach of contract under s. 16(2) SOGA for which Dow is liable.

(2) s. 16(4) Sale of Goods Act

**40** The trial judge also held that s. 16(4) of the SOGA applied and was breached. This section provides that where goods are bought by description from a seller who deals in goods of that description, whether the seller is the manufacturer or not, there is an implied condition that the goods are of merchantable quality. The trial judge found that the "goods", the resin, was referred to throughout the parties' dealings as "high density polyethylene N5303" and was therefore bought by description. Clearly, Dow was a seller that dealt in "goods" of that description. The trial judge decided that the implied warranty of merchantability applied to the sales of the resin, N5303.

**41** Dow argued that this warranty was not breached because Extruders failed to prove that the resin could not be used for any purpose other than producing pipe that carried natural gas. Interestingly, in the proceedings leading to the US decisions, Dow stated that N5303 resin was designed exclusively for the manufacture (extrusion) of pipe to carry natural gas for the rural gas program and that the product had no other application. In any case, Dow knew of the proposed use of the resin and that the pipe created from it would and did crack, allowing the escape of natural gas. Dow's argument that such pipe could still carry water or brine, especially since there was no evidence to support it, has no merit. Given the very dangerous consequences of transporting natural gas through pipe that would crack, the trial judge did not err in finding that no reasonable buyer aware of the defects of pipe made with the resin would have bought it at any price.

**42** Thus, Dow is also liable for the breach of contract under s. 16(4) of the SOGA.

**43** In summary, the trial judge was not in error in finding that s. 16(2) and (4) applied to the contract with Extruders, that these warranties were breached by Dow, and that Dow was liable either directly or on the basis that it had accepted all liability of AOC.

b) The Written Contract and Limitation of Liability Clause: Dow and Profiles--January 1, 1975 to December 31, 1977

**44** The written contract between Dow and Profiles, although not signed until late February 1975, took effect from January 1, 1975 through December 31, 1977. The contract included clauses that limited Dow's liability by stating that Profiles accepted all liability for loss or damage resulting from use of the resin.

**45** The trial judge concluded that there had been a fundamental breach of this contract because Profiles did not get what it contracted for and "[m]ore significantly, [the resin] was completely unsuitable for use as [natural gas pipeline]". Further, he found as fact that Dow, a sophisticated chemical company, knew the purpose for which the resin was to be used, had trouble meeting its own chemical requirements in formulating the resin, and knew of the problems with the resin before it entered into the contract with Profiles. Dow acknowledged in its factum that it did not appeal these findings of fact.

**46** The trial judge also found that there was an inequality in bargaining power of the parties because Dow, a sophisticated chemical company with complete knowledge of the formulation of the product (which it refused to share at a later ERCB inquiry), "knew that there were significant problems with the resin and did not disclose those concerns to the Plas-Tex Group". Therefore, he found that Dow could not rely on the clauses in the contract that limited its liability and that Dow was liable for breach of the contract.

**47** Dow argues that in order to find limitation of liability clauses unenforceable, there must be "grievous impairment of bargaining power or other instances of unfairness or unreasonableness" and that those did not exist in this case.

**48** Whether a breach of contract is a fundamental breach that deprives the breaching party of the benefit of any limitation of liability clause in the contract is a question of construction: Guarantee Co. of North America v. Gordon Capital Corp. [1999] 3 S.C.R. 423 at para. 52. In Alberta, the construction of contractual terms is an issue of law: Western Irrigation District v. Alberta (2002), 312 A.R. 358, 2002 ABCA 200 at para. 17. Findings of law are reviewed on a standard of correctness.

**49** Alberta Courts have generally held that contracts should be enforced regardless of the stringency of their terms limiting liability because parties require certainty that negotiated provisions in a contract will be legally enforceable: see for example, Catre Industries Ltd. v. Alberta (1989), 99 A.R. 321 (C.A.), Canadian Fracmaster Ltd. v. Grand Prix Natural Gas (1990), 109 A.R 173 (Q.B.). However, this principle is subject to an important caveat: the court will intervene when the party desiring to enforce a liability limiting clause has engaged in unconscionable conduct.

**50** In Hunter Engineering Co. v. Syncrude Canada Ltd. [1989] 1 S.C.R. 426, the Court determined that, as a result of a fundamental breach, the limited liability clauses contained in that contract protecting the breaching party were enforceable, but the five member Court was divided in its reasons. In Guarantee, supra another five member Court appeared to reconcile the two views by concluding that both views in Hunter affirmed that the decision as to whether a party is prevented

from relying on a limited liability clause is not a matter of law but a matter of construction. Further, the Court found, that the only limitation on enforcing a written contact, in the event of a fundamental breach, would be to refuse to enforce the limitation of liability clause in circumstances where to do so would be either unconscionable, according to Dickson C.J., or unfair, unreasonable, or contrary to public policy, according to Wilson J.

**51** Waddams has opined that the difference between unconscionable and unfair, unreasonable or otherwise contrary to public policy is "unlikely to be large": Waddams, S.M., The Law of Contracts, 4th Ed., (Toronto Canada Law Book, 1999) at 349. Dickson C.J. in Hunter held at 462 that unconscionability "might arise from situations of unequal bargaining power".

**52** The cases of Olshaski Farms Ltd. v. Skene Farm Equip. Ltd. (1987) 49 Alta. L.R. (2d) 249 (Q.B.), Bryandrew Holdings Ltd. v. Sifton Properties Limited (1994), 38 R.P.R (2d) 95 (Ont. Gen. Div.) and Atlas Supply Co. of Canada Ltd. v.Yarmouth Equipment Ltd. (1991), 103 N.S.R. (2d) 1 (C.A.), also provide, in similar cases, some guidance on what constitutes "unconscionability". The courts in those cases concluded that if a defendant (a) knew of a possible risk associated with its product, (b) failed to disclose important assumptions within its knowledge thereby preventing the other party from properly measuring the consequences and risks they were undertaking (c) deliberately withheld information and induced the claimant to enter the agreement on the basis that the other party had "scientifically done their homework", this would prohibit the defendant from relying on the limited liability clauses in the contract.

**53** These cases reinforce the principle that unconscionability should be used sparingly to avoid an exclusionary clause. However, such cases also establish that a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause.

**54** In this case, Dow knew that defects in its product would cause the pipe manufactured from it to fail. Further, it knew that the respondents and others would be burying the pipe in order to supply natural gas all over rural Alberta. Common sense says that anyone would know that cracking of such pipe could result in potential danger to property and persons. Dow was aware of all this before it made the first commercial shipment in July 1974. Moreover, by the time it signed the contract with Profiles, some seven months later, it had significantly more detailed information about the nature of the defect and the pipe's propensity for early failure. Dow also knew that the CSA was considering decertifying its resin. Rather than disclosing this knowledge to Profiles and other sister companies that were using the pipe made from the resin, Dow chose to protect itself from liability by inserting liability limiting clauses in its contract with Profiles.

**55** There can be no doubt that this conduct was unconscionable. The trial judge committed no reviewable error in finding that Dow was prevented from relying on the limitation of liability clauses in the contract with Profiles. It is important to note that, even had the attempt by Dow to limit is liability been successful, it would only have limited the damages claimed by Profiles.

c) Conclusion on the Contract Actions

**56** In summary, the trial judge made no reviewable error in finding that s. 16(2) and (4) applied to the contract with Extruders, and that Dow was liable directly, or on the basis that it accepted all liability of AOC.

**57** I also find that the trial judge made no error in determining that Dow was in fundamental breach of the contract with Profiles and that the exclusion of liability clause in the contract was unenforceable.

**58** Extruders paid $299,940 for the resin that it purchased and Profiles paid $277,468. In total, $576,958 was awarded by the trial judge for the cost of purchasing the defective resin. Dow takes no issue with the quantum of these claims.

**59** The issues of whether these contractual breaches can be extended beyond Extruders and Profiles to all of the respondents, and Dow's position that allowing damages for the cost of the resin would be to allow for double recovery, will be dealt with as separate issues.

BASIS OF LIABILITY

a) Concurrent Liability

**60** The trial judge found concurrent liability in contract and tort. He correctly recognized the principles from BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12 which was affirmed in Royal Bank of Canada v. W. Got & Associates Electric Ltd. [1999] 3 S.C.R. 408 that state that where a given wrong supports an action both in contract and in tort, a party may sue in either or both with the only limit on a party's right to sue in tort being the right of the parties to restrict their liability in tort through an effective limitation of liability clause in the contract.

**61** Dow did attempt to limit liability in that way but it was ineffective because the trial judge correctly found that the contract was fundamentally breached and the limitation clause was unenforceable.

**62** Where there is concurrent liability, the measure of damages should be the same. In Canlin Ltd. v. Fibres Canada Ltd. (1983), 40 O.R. (2d) 687 at 690-691, Cory J.A. (as he then was) stated that, in awarding damages for foreseeable losses, there is no difference whether the claim is founded in contract or in tort: see also Asamera Oil Corp. v. Sea Oil and Gen. Corp., [1979] 1 S.C.R. 633 at 646-647. The Supreme Court of Canada has confirmed that in situations of concurrent liability it would seem anomalous to award different levels of damages for what is essentially the same wrong on the basis of the form of action chosen. BG Checo, supra at 42. The trial judge did consider whether there would be a difference in the measure of damages that could be awarded under tort as compared to contract and said there should not be.

b) Damage Award to Respondents as a Unit

**63** The trial judge found it appropriate to award all damages to the respondents as a unit. He realized that Dow did not have privity of contract with all of the respondents. He noted, however, that the respondents were in a position to sue each other and could be seen as "on-selling" a defective product and he concluded that damages could be "considered in light of the inter-company relationships". He found support for his analysis in an English case, Global Marine Projects Ltd. v. Colvic Craft plc, [1998] E.W.J. No. 4468 (Eng. & Wales C.A.) (QL)

**64** Dow's challenge to that analysis in contract and the applicability of Global has some merit. In any case, in view of Dow's liability in tort, assessing damages in contract adds nothing. While the symbiotic relationship of the respondents could not, in law, support an exception to the requirement

of privity, it does, in this case, support an award for loss of profits to the respondents as a unit in tort. All respondents were wholly-owned subsidiaries of Plastex and operated in an inter-dependent fashion, each contributing a product or service to the system sold to the ultimate consumer. This was described by the parties as a "turn-key gas system". Extruders had been subsumed within Profiles and Jaycan created by the reorganization in December of 1974. Dow knew of the corporate structure of the respondents and their working relationships. The respondents were put into receivership as a group. The expert evidence supported no conclusion other than that they had to be considered as one unit for the assessment of loss of profits. The trial judge had no evidence of the loss of each respondent as a separate entity. As regards the appropriateness of awarding one sum for loss of profits, Mr. Clark, the valuation expert retained by the respondents, said that while the respondents operated as separate companies, the business could have been done by a single corporate entity and, more importantly, the quantum of damages would be the same whether calculated on the basis of a composite of the individual respondents or on a consolidated basis.

**65** In tort, negligence must be established against each respondent. In this case, however, it was not a reviewable error for the trial judge to award damages to the respondents as a unit. I find that damages should be assessed on the basis of tort and it is unnecessary to base them on concurrent liability in contract.

NEGLIGENCE

**66** Plastex, PPSL, and Jaycan are the respondents that did not contract directly with Dow for the purchase of resin. PPSL designed and installed the gas systems pipeline along with, after the reorganization, the new company Jaycan. Plastex was, after the corporate reorganization of December 1974, the owner and operator of all respondents (subject to some minority shareholdings in PPSL that did not enter into the lawsuit) until the receivership. So the respondents fall into two categories: Extruders and Profiles that were in a contractual relationship with Dow, and PPSL, Jaycan, and Plastex that were not. Dow alleges that the trial judge erred in finding a duty of care to any of the respondents.

**67** The finding of a duty of care is a conclusion of both fact and law. As noted in Housen, supra at paras. 29-30, where a finding of mixed fact and law is a finding involving the intepretation of evidence as a whole, as in a finding of negligence, the standard will be that of palpable and overriding error. In this case, the finding of the trial judge regarding duty of care was dependent on certain facts. Where Dow challenges the facts upon which the trial judge based his finding that a duty was owed, the appropriate standard of review is that of palpable and overriding error. However, where it is alleged that a trial judge has not applied the correct legal test to the facts, the question of mixed fact and law is really a question of law and the appropriate standard is that of correctness.

DUTY OF CARE

a) Law

**68** The oral reasons of the trial judge reviewing the basis for his finding a duty of care to all of the respondents are brief. He did not review the policy aspects of the two prongs of the test set out in Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.). That was an error of law. An analysis of the tests for duty of care and a review of their appropriate application must be done.

**69** The test for a duty of care begins with an analysis of relationship and includes a consideration of foreseeability and policy. In Anns, the court set out two-steps to be followed in determining

duty. Lord Wilberforce found that a court must first ask if there is a sufficiently close relationship between the parties so that, in the reasonable contemplation of party alleged to owe the duty, carelessness on its part might cause damage to the other party or parties? If the answer is yes, the court must then determine whether there are any considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise. In Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, the Supreme Court of Canada accepted the Anns test. In more recent cases, it has gone on to enrich this test by amplifying the scope of the relevance of policy concerns: Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79, Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, 2001 SCC 80.

**70** In Cooper, the Supreme Court said that on the first step of the Anns test two questions arise: firstly, was the harm that occurred reasonably foreseeable as a consequence of the defendant's act and secondly, notwithstanding the proximity of the parties, should there be liability in tort. In other words, a court is to consider not only foreseeability and proximity but also policy concerns that arise because of the relationship of the parties. Following this first step of the analysis, if the decision is that a duty arises it should be considered a prima facie duty.

**71** Next, the second- step of the Anns test is applied. At this stage, the court looks at residual policy concerns, extraneous to the relationship, that affect the prima facie duty. The Supreme Court said in Cooper that there are different kinds of policy considerations for each step.

**72** To return to the first step of Anns, the Supreme Court in Cooper explained that reasonable foreseeability of harm must be supplemented by proximity, that is, there must be the type of relationship in which a duty of care may arise. This moves us back to Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) and the famous question: who is my neighbour? Every student of law knows the answer given in that case: "... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question": Donoghue, supra at 580, see also Hollis v. Dow Corning Corp., [1995] 4 S.C.R. 634 at para. 21. Proximity describes a relationship between parties such that a defendant is under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs: Hercules Management Ltd. v. Ernst &Young, [1997] 2 S.C.R. 165. In Cooper, the following were listed as relevant factors in the evaluation of proximity: expectations, representations, reliance, and property or other interests. In the end the question is this: is it just and fair to impose a duty of care?

**73** The Supreme Court has stated that categories of negligence are created when a duty of care has been found in particular circumstances. One such category is that of a duty to warn of the risk of danger: Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189. However, while that may deal with proximity, reasonable foreseeability must also be established: Cooper, supra at para. 36. The court then goes on to consider policy concerns with the relationships. It is only then that the prima facie duty is established.

**74** Moving on to the second step of Anns, the focus is on residual policy concerns. In Cooper, supra at para. 37 the court said that the analysis under this step is not required where the duty of care in issue falls within a recognized category. It is only in cases where a new duty is advanced. As the court said, "... before a duty of care is imposed in a new situation, not only are forseeability and relational proximity present, but there are no broader considerations that would make the imposition of a duty of care unwise": Cooper, supra at para. 39. The court went on to set out residual policy considerations including a consideration of whether the law provides another remedy and the criti-

cal question of whether the recognition of a duty of care would create the spectre of unlimited liability to an unlimited class.

2) Application of Law

**75** The trial judge found that Dow had a duty to warn all of the respondents of the dangers associated with pipe made from the defective resin. However, Dow raises policy concerns that it says preclude the finding of a duty that Dow argues were not dealt with by the trial judge. The first is that the respondents chose to operate as separate companies with independent legal personalities so that their risk of liability to Dow would be limited. Dow argues that this apparent risk planning precludes the finding of separate duties to each of the respondents. Secondly, is that Dow claims that to find the existence of such duties would subject it to indeterminate liability.

**76** Given that the duty in issue falls into the recognized category of duty to warn of a danger associated with a product, this may not be a case in which it is necessary to go through a detailed Anns analysis given the statements in Cooper that build upon those in Rivtow. However, the relationships of the various respondents with Dow, the number of parties, and the policy concerns left unexamined by the trial judge support the need for an analysis for duty of care.

(1) Anns: the first step

**77** The very first step is to look at the relationships. Dow manufactured the polyethylene resin, in this case N5303. It knew the resin was defective before the first sale to Extruders. Extruders and Profiles manufactured pipe using the defective resin. It was known to all that parties that the pipe would be buried in the ground and that it would carry natural gas. PPSL, and later Jaycan, designed and constructed the pipeline. They did the warranty work on the pipeline. All companies were owned and controlled by Plastex. Dow provided information and advice about the qualities of the resin. There is no evidence of AOC providing information or of any of the respondents having any knowledge beyond what Dow provided. Indeed, when pipe began to crack, the respondents initially assumed that they were at fault. Dow knew of all of the respondents and how they worked together to provide a turn-key operation to the gas co-ops that were the penultimate consumers.

**78** In this picture, was there a reasonable foreseeability of harm to each of the respondents given that the resin was defective and intrinsically harmful?

**79** Applying the Donoghue test cited in Cooper: were the respondents, each of them considered separately, " persons' who are so closely and directly affected by [Dow's] acts" that it ought reasonably to have had them in contemplation as being so affected when it directs its mind to the acts or omissions that are called into question?

**80** Using the resin with no knowledge that it was defective, Extruders and Profilers were manufacturing pipe that was dangerous when used as intended. PPSL and Jaycan buried that pipe in the ground and it transported a very dangerous and explosive compound, natural gas. As all the respondent companies experienced loss of business, loss of reputation, warranty costs, and charge-backs, the parent company, Plastex, suffered the cumulative effect of all the losses. Applying the factors from Cooper: expectations, representations, reliance, property and other interests, the answer to the final question must be: it is just and fair to impose a duty of care owed to each respondent in such circumstances.

**81** My conclusion is that there was reasonable foreseeability of harm to each respondent and that there existed the requisite proximity with each respondent.

**82** While it may not be necessary to go on to examine policy considerations within the relationships, Dow has argued that there are considerations favourable to it that were not dealt with by the trial judge.

**83** Proceeding then to the second question of the first step of the Anns test, the question is: notwithstanding the finding of proximity under step one, are there policy reasons that support the conclusion that no duty should be owed to any of the respondents, and therefore Dow should have no liability to them in tort?

**84** Dow's argument, based on statements in Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd., [1997] 3 S.C.R. 1210, is that because only Extruders and Profiles were in a contractual relationship with it, it follows that the respondents had chosen to reduce their risk exposure towards Dow and it is unfair and unjust to now find that it owed a duty of care to any of the respondents. Put simply, their argument is that because of the corporate organization of the respondents and the opportunity to allocate risk of liability and reduce the exposure of assets, Dow should owe no duty of care to any of the respondents.

**85** It would come as a great surprise to the business community if this Court held that in the absence of any evidence of fraud or wrongdoing, corporate entities could not organize to lessen risk and protect resources without prejudicing each entity's right to claim against wrongdoers . In fact, the only risk allocation in the contracts was in favour of Dow as it attempted in the written contract to transfer the entire risk of defects in the resin (of which it had complete knowledge) to Profiles through clauses limiting liability. At the time of that contract the only other respondent that was active was PPSL.

**86** Dow argues that it should not have a duty to the non-contracting respondents because, "... imposing a duty of care to non-contracting affiliates in this case encroaches on the well-established principles of the separation of affiliated corporate entities." Dow is saying that the conclusion that there is a prima facie duty is negated where there is a contractual relationship with some of the involved parties but not all of them. The answer is that the analysis for duty must be done for the relationship between Dow and each of the individual respondents. If, in the result, each and all are owed duties, then the scope of Dow's potential liability is determined subject to the considerations of standard of care and scope of damages.

**87** Dow is correct in stating that its tort liability must be assessed in the contractual matrix: Bow Valley, supra at para. 26. It goes further and says that the existence of contracts with two of the respondents should negate its prima facie duties in torts to all respondents. Dow was found earlier to be in fundamental breach of the contract with Profiles. Therefore, it cannot rely on the limitation of liability clauses at all. Dow has not pointed to anything in the contract that could have negated a duty to warn other than the ineffective limitation clauses. The conclusion to be drawn from the contractual relationships is that there is nothing there to negate or limit the finding of a prima facie duty to each of the respondents. This case is distinguishable from Bow Valley where the majority held that the duty to warn was negated by clauses in a valid contract that limited liability.

**88** In determining how to analyze for a duty and to whom the duty is owed, the Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85, provides helpful guidance. A land developer had contracted with the defendant contractor to build an apartment

building and he subcontracted for the masonry work. Because of dangerous structural defects in the masonry work, the subsequent purchaser, a condominium corporation, had to replace the cladding on the building. It sued the contractor.

**89** Upon an application of the Anns test, the contractor was found to owe a prima facie duty of care to the subsequent purchasers. The Court rejected the contractor's argument that liability was to be determined solely under contract and liability in negligence was not available. The Court found a duty independent of the obligations owed under the contract, to construct a building without dangerous defects. It was characterized as being a duty that was "not parasitic upon any contractual duty between the contractor and the original owner."

**90** D.F. Edgell in the text, Product Liability in Canada, (Toronto: Butterworths Canada, 2000) says there is no reason not to extend the logic of Winnipeg Condominium to products liability. I agree. There is a duty, independent of any contractual obligation, to take reasonable care not to manufacture and distribute a product that is dangerous. Breach of such a duty can be pursued in negligence by persons who are in contract with the manufacturer (subject to the viability of limitation of liability clauses) and also by persons who are not in contract: Bow Valley, supra at para. 19 per McLachlin C.J. dissenting, but not on this point.

**91** In this case there are no policy considerations within the relationships that would negate or limit the prima facie duty of Dow to each of the respondents, including those in a contractual relationship with Dow and those not.

**92** Indeed, on the facts of this case, the policy considerations based on Dow's knowledge of the very dangerous nature of the pipe produced from the defective resin and the danger to the public strongly support the affirmation of duty. These will be dealt with in depth under the second step of the Anns test.

**93** I find that there are no policy concerns that even challenge my conclusion that there is the necessary relationship, foreseeability, and proximity to found a duty of care owed by Dow to each of the companies.

(2) Anns: the second step

**94** This step requires a look at residual policy concerns, that is, those outside of the relationship of the parties. As the Court said in Cooper, supra at para. 37, these are concerned with the effect of recognizing a duty of care on other legal obligations, in the legal system and in society more generally. It may not be necessary to do such an analysis in this case because the duty to warn falls into a recognized category. However, Dow argues that imposing liability in this case would raise the spectre of indeterminate liability. That enquiry is properly made in this part of the Anns test.

**95** The claim of indeterminate liability can be broken down into parts: indeterminate class of plaintiff, over an indeterminate period of time, in an indeterminate amount. Winnipeg Condominium, supra at paras. 48-50.

**96** This lawsuit is at the end of a long line of litigation brought on by the manufacture and sale of the defective resin. According to the US decision dealing with Dow's indemnity claims against its insurer, at the date it issued its decision, only this action had not been resolved. While Dow has acknowledged that it settled a number of relevant claims, it has not brought forward evidence that

there are any more parties or any other litigation. There seems to be no basis, at this time, for concerns about other plaintiffs.

**97** The resin has not been produced in nearly 30 years. Even at the time it was produced it was for a specific purpose, namely, to supply five Alberta pipe extruder companies. In addition, limitations periods for all plaintiffs have passed and Dow pursued its insurer for indemnity: see the US decision.

**98** There remains little doubt that Dow's accountability for the defective resin has been concluded, except for the resolution of this case.

**99** This last case in the chain represents a determined, finite claim. Dow disputes the quantum. The respondents have not cross-appealed. Dow's liability can be no more than that set by the trial judge. Thus, this is not a case where Dow faces the risk of indeterminate damage claims.

**100** From a policy perspective, the facts in this case support the finding that Dow owed duties of care to each of the respondents. As discussed by La Forest J. in Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, in some cases there is the need to provide for additional deterrence against negligence. Dow sold a defective product that it knew presented a danger to consumers. It tried to shift the risk to others ignorant of it. There was an inequality in knowledge, bargaining power, and a vulnerability when the defect in the resin became a danger in the product representing 80% of the respondents' business.

**101** The other legal obligations of the parties are a relevant consideration too. In this case, Dow is in breach of contract both directly and standing in the shoes of AOC. The breaches went to the core of what the parties had bargained for and deprived the respondents of any benefit of the product they had purchased. The breaches had profound implications for the other respondents. In this situation, the fact that two of the respondents could be awarded damages on the basis of breach of contract does not undermine or negate the finding of a duty of care in tort to those respondents in a contract relationship. Since the decision in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, the law is clear that a duty of care in torts can be imposed on parties in a contractual relationship. A plaintiff may base a claim in either contract or tort where liability in both exists. See also, BG Checo , supra and Bow Valley, supra.

**102** I find that there are no residual policy considerations that negate or limit the finding that Dow owed a duty of care to each of the respondents. The policy considerations actually support finding such duties.

**103** I find that the trial judge made no error in finding that Dow had a duty to warn all of the respondents of the dangers associated with the use of the defective resin: Rivtow, supra. I also find Dow had a duty to take reasonable care not to manufacture and distribute a dangerous product: Winnipeg Condominium, supra.

STANDARD OF CARE

**104** The trial judge found that Dow breached the requisite standard of care as of August 1974 when its own internal documents showed inadequate antioxidant levels in the resin. Further, he found that Dow was "well aware" of the problems by the time the CSA set up a task force to review the situation in November of 1974. He noted that Dow did not challenge the conclusions of Dr. Williams, the expert witness for the respondents, who concluded that the resin was defective because of a low level of antioxidant and low density polyethylene. He agreed with Dow's submission

that it was to be judged by the level of knowledge at the critical times, namely 1974 and 1975. He also noted that the trial judge in the US decision found that all of the resin, N5303, sold by Dow was "intrinsically harmful" such that pipe made from it was "deficient" for use in the "rural gasification" program.

**105** Dow did not appeal the finding of the trial judge on standard of care but challenged it indirectly in submissions on the SOGA and the limitation of liability clause.

**106** In its arguments on the application of the SOGA, it noted the fact that the resin was "a CSA approved black pipe compound for natural gas, water and brine" and that in late 1974 the resin met the CSA criteria. The fact that the resin was approved by the CSA was relevant in the determination of the appropriate standard of care. The trial judge dealt with that by finding that, given Dow's knowledge of the deficiency in the resin from internal reports, it could not rely on the "questionable actions of another".

**107** In his conclusions, Dr. Williams states that a surprising fact of this case was that CSA did so little to test the Dow resin for certification. He said: "The CSA, as an organization, seems to have ignored their mission in relation to the approval and certification of the Dow resin almost entirely." The trial judge was entirely correct in discounting as a consideration in determining the standard of care, the fact that the resin had been certified by CSA.

**108** Explanations put forward by Dow in its factum such as, a "general feeling" at a task force meeting in November 1974 that brittleness in the pipe was not caused by the resin, and that there was "no evidence to indicate that the Dow personnel did not believe that the new level of antioxidant would be appropriate" are challenges to fact finding. Dow called no evidence at the trial. The trial judge appropriately gave these submissions little weight.

**109** Dow also states in its factum that it does not appeal the finding of the trial judge that it was a sophisticated company with knowledge of its formulation of the product and that it had difficulty meeting its own chemical requirements. Most importantly, it does not appeal the finding of the trial judge that Dow knew of the problems before entering into the contracts.

**110** In conclusion, the trial judge did not err in setting the appropriate standard of care or in determining that Dow breached it.

CAUSATION

a) Law

**111** In a negligence action, the defendant must be found to be the cause-in-fact and the cause-in-law of the injury to the plaintiff. The former is measured by the "but-for" test which is often difficult to apply. The latter involves legal tests and requires the determination of the limits of the plaintiff's liability: it is often dealt with under the heading of "remoteness" of damage and usually requires an analysis of policy considerations similar to that done under duty of care.

**112** Was there reviewable error in the trial judge's findings of fact on the injuries and damages caused by the negligence? Did the trial judge ascertain the correct test for finding liability for pure economic loss? Did he correctly apply the correct test to the proven facts?

b) Application

(1) Cause-in-fact

**113** What injuries did the defective resin cause? The trial judge found that pipes manufactured with N5303, the resin produced by Dow, were brittle and cracked and that this was caused by the "intrinsically defective" resin. The judge in the US decision had come to the same conclusion. Indeed, this causal connection was acknowledged by Dow in its brief in that litigation. According to the expert evidence, accepted by the trial judge, the level of antioxidant in the resin was enormously below industry standards and pipe made from it was, therefore, subject to "thermo-oxidant degradation". Given that no palpable and overriding error is alleged by Dow with respect to these findings of the trial judge, the respondents have proven that "but-for" the deficient resin, the pipes it fabricated and placed in the ground would not have cracked.

**114** What damages resulted from the injuries caused by the defective resin? Firstly, the gas co-ops refused to pay the respondents and by mid-1976 the respondents were owed $1.2 million dollars. Secondly, refunds were demanded for all pipe held in inventory. Thirdly, the pipe was no longer saleable and there was no evidence that it had any salvage value. Lastly, there were unrecoverable repair costs, mounting operating expenses, and accelerated demands for payment from suppliers.

**115** Damages under all heads are recoverable and will be dealt with specifically later in this judgment.

(2) Cause-in-law (remoteness)

**116** There is a legal test to measure the extent to which a negligent defendant ought to be held liable for the damages suffered by a plaintiff . The principle is that injured parties should be restored to the position that they would have been in had the wrong not been committed. Often the question asked is: what damages were reasonably foreseeable, or, to put it another way, what damages are not too remote? The application of this test is difficult where the loss is economic.

**117** The claim for lost profits for the year of the receivership, 1976, and the following five years is a claim for loss of profits and therefore is for economic loss. Since there was no physical damage recognized by law, it is a claim for "pure" economic loss. The trial judge found that the receivership of all of the respondents was foreseeable. However, the trial judge did not do the analysis required to determine whether relevant policy concerns should limit the extent of Dow's liability for the pure economic loss. That was an error of law because a policy analysis is now part of the legal test to determine foreseeability, or remoteness, of pure economic loss: Viridian Inc. v. Dresser Canada Inc. (2002), 312 A.R. 93, 2002 ABCA 173 at para. 28 and Cooper, supra at para. 31.

**118** When the loss is economic loss, courts are concerned about maintaining control: in the words of Justice Cardozo, the fear is of "liability in an indeterminate amount for an indeterminate time to an indeterminate class": Ultramares Corp. v. Touche (1931), 255 N.Y. Supp. 170 (C.A.) at 179. The Supreme Court of Canada has been searching for a "principled mechanism" that would provide assistance to the courts in deciding when an award for economic loss would be appropriate but it has proven to be elusive: Norsk, supra at 1137 per McLachlin J.(as she then was). Some of the earlier requirements were: to prove there was an "independent tort"; to fit the claim into a category, such as negligent misrepresentation; or, to found the claim on the physical loss of a third party, sometimes called a contractual relational loss. However, as stated by McLachlin J., in Norsk, supra, there is no single universal formula and the categories are not closed. What is required is a

case-by-case analysis, where the appropriate legal tests for duty and causation and a thorough policy review are done.

**119** In a new situation where the loss is pure economic loss, a policy analysis is especially critical. A policy analysis must be done to establish a duty of care (using the Anns tests), and also to determine the extent to which a defendant should have to compensate the plaintiff. This analysis easier to describe than to carry out. That there is overlap is not surprising. For example, it is necessary in both to determine foreseeability of harm. But there is also a basis for distinction with a difference.

**120** In deciding whether there is a duty of care, the focus is on the relationship, proximity, and foreseeability of some harm and on relevant policy considerations. In determining scope of liability for damages for pure economic loss, the focus is on the nature of the negligent action and the foreseeability of the extent of the harm and relevant policy considerations.

**121** In this case, a duty was found to warn and not to manufacture a dangerous product. The duty was breached because the appropriate standard of care was not met. The negligent actions caused harm, including pure economic loss. Dow says it should not be liable for any economic loss because the respondents suffered no physical harm and, further, it is not a case of "contractual relational economic loss" that is, economic loss suffered as a result of damage to the property of a third party. It relies on Bow Valley Husky, supra.

**122** The lay person or the scientist might find it hard to believe that in this case the respondents' property has suffered no harm. After all, the defective resin was a critical component in the pipe and made the pipe defective also. However, finding property damage in this manner, described as "complex structure theory", was rejected by La Forest J. in Winnipeg Condominium, supra. He expressed concern that the theory would "circumvent and obscure underlying policy questions" and emphasized that "it is preferable for courts to weigh the policy issues openly": Winnipeg Condominium, supra at para. 15. Thus, Dow is correct, as far as the law is concerned (at least at this time) the respondents have suffered no physical damage.

**123** This is not a case of "contract relational economic loss" and can be distinguished from the Bow Valley case on its facts. In Bow Valley, the plaintiffs sued to recover money that they were required by contract to pay for the rental of an oil rig that was not useable because of the defendant's negligence. The plaintiffs suffered pure economic loss because of the damage to the rig that was owned by a third party. The parties similarly located in this case would be the gas co-ops who are not a party to this action.

**124** This is a case where the claims are for pure economic loss and cost of repairs resulting from failure to warn (at any time) and is a products liability case based on the manufacture of a product known by the manufacturer to be dangerous. Both the Rivtow and Winnipeg Condominium cases are applicable. Like Rivtow, it is a case where repairs had to be done and there were economic consequences beyond just the cost of repairs. Like Winnipeg, it is a case where a defect posed a real and substantial danger to the public and compensation for timely repair and pure economic loss was held to be recoverable and supported by policy considerations. The respondents here did have a property interest in the pipe as the plaintiffs in those cases had in the crane and building. However, the nature of the pure economic loss here differs from both as it involved not only the loss but also the total termination of profits of the respondents.

**125** In all of its recent decisions on pure economic loss, the Supreme Court of Canada has undertaken a policy analysis in order to determine whether a defendant ought to be held liable and to what extent, and has made it clear that lower courts must do the same. I must do the policy analysis not done by the trial judge using both a narrow and a broad focus. There is an overlap with the policy analysis done for duty of care, especially with that done for the second step of the Anns test.

**126** Looking at Dow's situation through the lens of policy, are there reasons that Dow should not be required to pay for any part or all of the economic loss of the respondents? Are there reasons that it ought to? What is the effect on law and on society of a decision one way or the other?

**127** This takes us back to some of the basic facts. Dow, a major petro-chemical company, sold resin that it knew was defective and dangerous when used as it knew it would be. It never warned any of the respondents about the risk. The respondents were small companies with no relevant expertise who relied for that on Dow. While Dow did acknowledge the critical facts in litigation in which it claimed indemnity from its insurer, it required the respondents to prove them in the trial of this action. The respondents did not stop manufacturing pipe and installing it, when it became apparent that the pipe was cracking because the respondents did not know the cause. They carried on trying to satisfy customers and doing repairs under the warranties.

**128** They did question Dow about the quality of the resin in August 1975 and sent back some resin that they had received. Dow responded in writing, saying that they had tested some of the pipe and found it "indicated very uniform blending and consistent black levels. [...] Well done!" It is possible to interpret this as an intentional evasion of the question. In any case, Dow never did admit to the respondents that they had a problem with the resin. Later, the respondents asked for financial assistance but were refused. They carried on business until their financial position became untenable and they were forced into receivership by the Canadian Imperial Bank of Commerce. The respondents went from flourishing to moribund in two years. The expert evidence was that they missed out on an opportunity to participate in the booming oil and gas industry in Alberta.

**129** The contractual matrix does not assist Dow in limiting liability because it was found to have fundamentally breached its contractual obligations and its attempt to limit its liability unconscionable.

**130** From a narrow, or case-specific perspective, are there policy reasons why Dow should not be liable for the cost of repairs and loss of profits suffered by the respondents? I find there are none.

**131** What are the relevant policy considerations from the broader perspective? Given that the tort was the negligent manufacture of a product as well as that its intended use was dangerous followed by a failure to warn of the known dangers, policy considerations support the tortfeasor paying the entire loss suffered by the injured parties. I agree with the statement by D.F. Edgell in Product Liability, supra at 245, that there is a strong public interest in deterring manufacturers from marketing dangerous products. This case is not atypical in that there was a significant difference in knowledge and expertise between the parties. Indeed, here there was an intentional withholding of information. There are policy reasons to support liability so that consumers can reasonably expect that they can rely on manufacturers not to supply products that they know to be dangerous and to warn them if risks are discovered.

**132** As for compensation for the cost of repairs, it is now clear that the ruling in Rivtow precluding such an award is no longer good law. As La Forest J. said later in Norsk, supra at para. 37, it is important to encourage the prevention of harm and reduction of risk goals achieved by timely

repairs: see also Product Liability, supra at 238. LaForest J .went on to say in Winnipeg Condominium, supra that barring recovery for the cost of repair of dangerous defects had a chilling effect on incentive and action to effect repairs .

**133** In summary, policy considerations support liability in this, a products liability case where the defect presented a known danger to the public and the consumer was reasonable in relying on the manufacturer's expertise. I find that the trial judge committed no error in deciding that Dow should be liable for economic loss, that is the loss of profits, of the respondents and also for the cost of repairs. The extent of that liability will be reviewed in the next section.

DAMAGES

**134** The compensation claimed by the respondents for the damage caused by the defective resin was for:

(i) recovery of the purchase price of the resin paid by Extruders and Profiles between July 1974 and June 1975;
(ii) the cost of repairs to the pipelines done by PPSL and Jaycan; and
(iii) the loss of profit of all companies, including the parent company, Plastex from 1976 through 1981. (The term "loss of profit" in this case refers to the loss of net income before taxes.)

**135** The trial judge awarded damages under all three heads. He found the cost of the Dow resin purchased to be $576,958. As to the cost of repairs (and the associated additional testing required and out-of-pocket expenses), the trial judge accepted the estimates of Mr. Kenway, the comptroller and vice-president of finance for the respondents but, taking a cautious approach and taking into account repairs unrelated to resin problems, he discounted them by 25%, awarding $291,000. Again using what he described as a cautious approach, he reduced by 50% the award suggested by the expert witness, Mr. Clark, for loss of profit and set that amount at $1, 916,500.

**136** An award of damages by a trial judge is not to be interfered with on appeal unless the trial judge applied the wrong principle of law or the overall amount is a wholly erroneous estimate: Herron,supra.

**137** Dow does not challenge the quantum of the awards for the cost of resin or the repairs and, at the hearing, accepted that an award for loss of profits might be appropriate up to the date of the receivership in September of 1976. However, it says that awarding the cost of resin and of repairs would be a double recovery and that the award for loss of profits after the bankruptcy is too remote. Further, it says that if lost profits are awarded, then there should be no award for the cost of the resin.

**138** The issues raised by Dow require that all of the damages suffered by the respondents be reviewed more specifically. Firstly, as the defective pipe made from the defective resin was under warranty, it had to be repaired. All parties (it seems with the exception of Dow) were concerned about safety. Because Dow refused to divulge the nature of the defect, the respondents spent money attempting to repair the unrepairable. The monies spent on repairs, including the associated costs of testing and "out-of-pocket expenses" were caused-in fact by Dow's failure to divulge the nature of the defect and to warn of the danger.

**139** Secondly, as eventually all the defective pipe had to be replaced, the money spent to purchase the resin was a wasted expenditure. Had the pipe been repairable, that would not have been so and Dow's argument that awarding damages for the cost of resin and the cost of repairs would be a double recovery might have some merit. Thus, the money spent by the respondents for the purchase of the defective resin and in the attempt to repair the defective, unrepairable pipe, was wasted. But for Dow's negligence, the respondents would not have suffered loss under both heads of damage. The losses are complementary and not duplicitous.

**140** The respondents claimed loss of profits after they were put into receivership in September 1976 because they lost the opportunity to continue in a profitable business. This is the claim most strenuously challenged by Dow. As to the calculation for all years, it says that the trial judge here made the same error as the trial judge in Houweling Nurseries Ltd. v. Fisons Western Corporation (1988), 37 B.C.L.R. (2d) 2 (C.A.) because he failed to review the evidence and consider the validity of the factual assumptions upon which the mathematical calculations were based. As to the years 1977 to 1981, it says that the loss is too remote.

**141** Cory J., then a member of the Ontario Court of Appeal said that to deny loss of future or prospective business profits "flies in the face of reason and common sense" because commercial contracts for sale and delivery of goods must be entered into with the goal of making a profit in the future: Canlin, supra at 690. Cory J. recognized that the assessment of damages may be difficult and must of necessity be an estimate, but emphasized that a court nevertheless has the responsibility to do an assessment based on the available evidence. He said that evidence should include the past history and future business prospects of the company and should include a consideration of the loss of goodwill and reputation because of the breach: Canlin, supra at 695.

**142** Mr .Clark, a chartered accountant, was tendered as an expert in the field of business evaluations and the determination of business losses; he testified and supplied a report. In his report he detailed the documents and information, including the factors suggested by Cory J., that he had reviewed prior to coming to his conclusions. Dow did not challenge Clark's expertise and called no witnesses.

**143** The time frame for the calculation of loss of profits was 1976 to 1981. Clark's opinion was that the respondents (he refers to them together as Plas-Tex), with their established operational infrastructure, skilled employees, management, equipment, and potential, would have captured business in the oil and gas industry in the years 1976 to 1981. It was Clark's opinion that, but for the receivership triggered by the consequences of the defective pipe, Plas-Tex would have continued as a going concern beyond 1981. Referring to the booming oil and gas industry in Alberta during the 1976-1981 period, he said, "[i]n the aftermath of the defective resin problems and the ensuing receivership, Plas-Tex missed out on an opportunity to participate in this growth." He stated that his forecast of lost profits for 1976 reflected the fact that the respondents had over $8.5 million in unbilled work-in-progress and contracts-in-hand in September 1975. It is noteworthy that Clark estimated lost profits for the one year 1976 at $1,086,000 and the total award by the trial judge was $1,916,500 to cover the entire period of the claim, namely the years 1976 to 1981.

**144** Dow's attempt to characterize the receivership as the fault of the respondents was rejected by the trial judge. He found that, after an initial meeting with the Canadian Imperial Bank of Commerce, the bank moved quickly and appointed a receiver. The receiver then decided to liquidate the business without any attempt to preserve it. The trial judge accepted the evidence of the respond-

ents' financial officer that any reprieve from this course of action would not have been sufficient to save the respondents.

**145** The conclusion of the trial judge that the defective resin caused the respondents to lose profits is supported by the evidence. The calculation of the quantum presented a difficult but not insurmountable task: Canlin, supra at 691. The expert evidence of Clark on the fiscal past and future of the respondents and the time frame with regard to loss of profits was accepted by the trial judge. However, in his reasons, the trial judge recognized that a trial judge "is not shackled to the evidence of these professionals alone": Nathu v. Imbrook Properties Ltd. (1992), 2 Alta .L.R. (3d) 48 (C.A.) at 54, and did a thorough, critical analysis of the evidence before arriving at his decision, both as to entitlement to an award for loss of profits and as to the quantum. He stated that he was taking a cautious approach and applying a substantial discount factor to the quantum suggested by the expert, which was $3,833,000. He awarded 50% of that amount, $1,916,500. There is absolutely no merit in Dow's position that the trial judge in dealing with cause-in-fact, simply accepted the expert report or came to a global figure without examining the evidence.

**146** Further, there is no merit in Dow's argument that an award for loss of profits and for the cost of the resin and repairs would be double recovery. As stated earlier, the amounts spent for the resin and on repairs were separate losses. The loss of profit as calculated by Clark was loss of net income after the deduction of expenses and was based on a profiling of the respondents over a number of years. There is no merit in Dow's argument that to allow damages on all of the three heads claimed would be double recovery.

**147** In any case, there is authority for the award of loss of profits and well as loss for the cost of materials. The trial judge referred to Gill v. Kittler (1983), 44 A.R. 321 (Q.B.), which relied on a decision of this court, affirmed by the Supreme Court of Canada, Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd. (1972), 27 D.L.R. (3d) 434 (Alta.S.C.A.D.), (affirmed, [1973] 3 W.W.R. 288 (S.C.C.)) In the Sunnyside case damages were given for the purchase price of roof panels for a greenhouse, the wasted cost of installation, and the loss of profits when the panels did not permit light sufficient for the growth of plants. Although these cases were decided in contract, as discussed below, the measure of damages in tort should be the same.

**148** In summary, the trial judge found that the defective resin caused injuries to the respondents and he set the quantum of the damages under each head of damages. He did not assign the damages to any particular respondent but instead to them as a unit. I find that he made no error in the assessment and award of damages.

CONCLUSION

**149** The decision of the trial judge on damages is affirmed on the basis of the liability of Dow to the respondents in negligence. The appeal is dismissed.

PICARD J.A.

CONRAD J.A.: I concur.

O'LEARY J.A.: I concur.

# TAB 20

# Canadian Contractual Interpretation Law

THIRD EDITION

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The interpretation of a contract always begins with the words it uses. All of the various aspects of contractual interpretation are rooted in the actual language used by the parties.[3] "[E]ffect must first be given to the intention of the parties, to be gathered from the words they have used."[4] A court "should give effect to the intentions of the parties as expressed in their written document".[5] It is a "cardinal presumption" that the parties have intended what they have said in a contract.[6] As expressed by the New Brunswick Court of Appeal: "It is beyond dispute that the goal of any contractual interpretation is the determination of the parties' intent at the time of entry into the contract. That state of mind is ascertained by reference to the meaning of the words as used by the parties."[7] While some rules of contractual interpretation may take meaning beyond the words used by the parties — sometimes because context is paramount,[8] other times because some other policy goal or substantive principle of law is paramount[9] — the words are always the starting point for the exercise and provide an anchor for the endeavour.

Indeed, some cases go so far as to suggest that an examination of the language of a contract can be the beginning and the end of the interpretive exercise. The Ontario Court of Appeal has expressed the sentiment in the following manner:

> The cardinal interpretive rule of contracts ... is that the court should give effect to the intention of the parties as expressed in their written agreement. Where that intention is plainly expressed in the language of the agreement, the court should not stray beyond the four corners of the agreement.[10]

The Supreme Court of Canada has expressed the same sentiment in the following manner:

> Were I convinced that a different interpretation would advance the true intent of the parties, I would gladly subscribe to it. However, when the wording of a contract is unambiguous, as in my view it is in this case, courts should not give it a meaning different from that which is expressed by its clear terms,

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3 *Leggett & Platt Canada Co. v. Brink Forest Products Ltd.*, [2010] B.C.J. No. 52, 69 B.C.L.R. (4th) 1 at para. 20 (B.C.C.A.).

4 *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1979] S.C.J. No. 133, [1980] 1 S.C.R. 888 at 889 (headnote) (S.C.C.).

5 *Manulife Bank of Canada v. Conlin*, [1996] S.C.J. No. 101, [1996] 3 S.C.R. 415 at para. 79 (S.C.C.), *per* Iacobucci J., dissenting.

6 *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083, 85 O.R. (3d) 254 at para. 24 (Ont. C.A.) and *Venture Capital USA Inc. v. Yorkton Securities Inc.*, [2005] O.J. No. 1885, 75 O.R. (3d) 325 at para. 26 (Ont. C.A.).

7 *Stenstrom v. McCain Foods Ltd.*, [2000] N.B.J. No. 379, 230 N.B.R. (2d) 234 at para. 16 (N.B.C.A.).

8 See, for example, the discussion of consumer contracts in section 8.2.

9 See, for example, the discussion of arbitration clauses in section 9.1 and the discussion of choice of forum clauses in section 9.4.

10 *KPMG Inc. v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 4746 at para. 5 (Ont. C.A.), leave to appeal refused [1999] S.C.C.A. No. 36, [1999] 2 S.C.R. vi (S.C.C.).

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., ET AL.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., ET AL.

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Proceeding Commenced at Toronto

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