Tab 10

1978 CarswellOnt 125
Ontario Supreme Court [Court of Appeal]

Tilden Rent-A-Car Co. v. Clendenning

1978 CarswellOnt 125, [1978] 1 A.C.W.S. 604, [1978] O.J. No. 3260, 18 O.R. (2d) 601, 4 B.L.R. 50, 83 D.L.R. (3d) 400

TILDEN RENT-A-CAR COMPANY v. CLENDENNING

Dubin, Lacourciere and Zuber JJ.A.

Heard: October 20 and 21, 1977
Judgment: March 30, 1978

Counsel: *D.G. Cormack*, for plaintiff, appellant.
A.A. Morscher, for defendant, respondent.

Subject: Corporate and Commercial; Contracts; Insurance

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Contracts

III Formation of contract
III.1 Consensus ad idem
III.1.c Intention of parties

Contracts

III Formation of contract
III.4 Communication and acceptance of specific terms

Insurance

III Contracts of insurance
III.2 Formation of contract
III.2.f Communication of terms

Headnote

Contracts --- Formation of contract — Consensus ad idem — Intention of parties

Contracts --- Formation of contract — Acceptance of specific terms

Insurance --- Contracts of insurance — Formation of contract — Communication of terms

Contracts — Standard form car rental contract signed by customer — Additional charge paid for full non-deductible coverage — Exclusionary provisions on reverse side of contract not read by customer — Conditions required

customer not to operate vehicle after having consumed intoxicating liquor — Car damage after customer consumed intoxicating liquor — Reasonable steps to bring exclusionary clauses to attention of customer not taken by rental agency — Customer not liable for damage to car.

The defendant, as he had done on many occasions, rented a car from the plaintiff. The defendant was asked if he wanted additional coverage and he replied affirmatively. A contract was submitted to him and he signed it without reading it. However, a clause on the face of the contract provided that notwithstanding payment of the additional fee, the defendant was to be fully liable for all collision damage if the vehicle were used or driven in violation of any provision of the rental contract.

On the reverse side of the contract, in small type and so faint on the customer's copy as to be hardly legible, were a series of provisions which included an agreement by the defendant that he would not use the vehicle in violation of any law of any public authority and that the vehicle would not be operated by any person who had drunk or consumed any intoxicating liquor, whatever the quantity. The defendant, while endeavouring to avoid a collision, damaged the vehicle by driving it into a pole. The defendant pleaded guilty to a charge of impaired driving, but he maintained that he had done so on the advice of counsel and that, at the time of the accident, he had been capable of proper control of the vehicle. It was established that the practice of the plaintiff was not to draw the attention of the customer to the exclusionary conditions unless inquiries were made. If inquiries were made, the plaintiff would advise that by payment of the additional fee the customer had complete coverage unless he were intoxicated or unless he committed an offence under the Criminal Code such as intoxication. The defendant assumed that he would not be responsible for any damage to the vehicle on payment of the additional fee unless such damage was caused by reason of his being so intoxicated as to be incapable of proper control of the vehicle. On the evidence it was clear that the defendant had not acquiesced to the exclusionary terms.

The plaintiff's action for damages to the vehicle was dismissed at trial. The plaintiff appealed.

Held (Lacourciere J.A. dissenting):

The appeal was dismissed.

Per Dubin J.A. (Zuber J.A. concurring):

The English rule established in *L'Estrange v. Graucob Ltd.* is that a party who signs a contract is bound by its terms whether he has read them or not, unless such party can show fraud or misrepresentation or can rely on the defence of non est factum. The Canadian approach has not been as rigid. Consensus ad idem is as much a part of the law of written contracts as it is of oral contracts. The signer of a contract is bound by the terms of the document only if the other party believes on reasonable ground that the terms of the contract truly express the signer's intention.

In the present case, the contract was signed in a hurried informal manner and the exclusionary provisions were inconsistent with the overall purpose for which the contract was entered into by the defendant. In these circumstances something more should have been done by the plaintiff than merely handing the contract over to be signed. In modern commercial practice, a party cannot seek to rely on the terms of a standard printed contract where he knows or ought to know that the signature of the other party does not represent his true intention and that the signing party is unaware of stringent and onerous provisions contained in the contract. Under such circumstances the party seeking to rely on such terms should not be able to do so unless he has first taken reasonable measures to draw such provisions to the attention of the other party. In the absence of such measures it is not necessary for the party denying knowledge of such provisions to prove either fraud, misrepresentation or non est factum.

The plaintiff took no steps to alert the defendant of the onerous provisions in the plaintiff's standard form contract. The defendant was unaware of them. Consequently the plaintiff could not rely on them and the defendant was not liable for any damage to the vehicle while being driven by him. Also the trial Judge was wrong to have imputed a term into the contract to the effect that the defendant had full coverage unless at the time of damage he was operating the vehicle while under the influence of intoxicating liquor to such an extent as to be for the time incapable of the proper control of the vehicle, as such a provision had not in fact been represented as being a term of the contract.

Per Lacourciere J.A. (dissenting):

There is a distinction at common law between standard form contracts that have been signed and those that have not. A person who signs such a contract is bound by its printed conditions, absent fraud, misrepresentation or the defence of non est factum, even if he has not read them. A person who has not signed such a contract must be given notice of any such conditions before he will be bound by them. In the instant case, in order to escape liability, the onus was on the defendant to establish that the terms of the contract were misrepresented to him. The defendant had not met this onus. The common law has refused to strike down contractual standard form conditions unless the terms are so unreasonable as to amount to fraud or are manifestly irrelevant to the object of the contract. The exclusionary provisions of the contract were not of this nature nor were they unfair, unreasonable or oppressive.

Table of Authorities

Cases considered:

Can. Bank of Commerce v. Foreman, 22 Alta. L.R. 443, [1927] 1 W.W.R. 783, [1927] 2 D.L.R. 530 (C.A.) — *applied*

Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.; Okanagan Mainline Real Estate Bd. v. Whillis-Harding Ins. Agencies Ltd., [1971] S.C.R. 493, [1971] 1 W.W.R. 289, (sub nom. *Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.)* 16 D.L.R. (3d) 715, (sub nom. *Okanagan Mainline Real Estate Bd. v. Can. Indemnity Co.)* [1971] I.L.R. 1-383 — *referred to*

Colonial Invts. Co. v. Borland (1911), 1 W.W.R. 171, affirmed 5 Alta. L.R. 71, 2 W.W.R. 960, 6 D.L.R. 211 (C.A.) — *applied*

Gibaud v. Great Eastern Ry. Co., [1920] 3 K.B. 689, affirmed [1921] 2 K.B. 426, [1921] All E.R. Rep. 35 (C.A.)*referred to*

Gillespie Bros. & Co. v. Roy Bowles Tpt. Ltd., [1973] Q.B. 400, [1973] 1 All E.R. 193 — *considered*

Jaques v. Lloyd D. George & Partners Ltd., [1968] 1 W.L.R. 625, [1968] 2 All E.R. 187 (C.A.) — *referred to*

Lee (John) & Son (Grantham) Ltd. v. Ry. Executive, [1949] 2 All E.R. 581 (C.A.) — *referred to*

L'Estrange v. F. Graucob Ltd., [1934] 2 K.B. 394, [1934] All E.R. Rep. 16 — *not followed*

Linton (B.G.) Const. Ltd. v. C.N.R., [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, 3 N.R. 151, 49 D.L.R. (3d) 548 — *referred to*

McCutcheon v. David MacBrayne Ltd., [1964] 1 W.L.R. 125, [1964] 1 All E.R. 430 (H.L.) — *referred to*

Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown (1883), 8 App. Cas. 703 (H.L.) — *referred to*

Neuchatel Asphalte Co. v. Barnett, [1957] 1 W.L.R. 356, [1957] 1 All E.R. 362 (C.A.) — *referred to*

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

O'Connor Real Estate Ltd. v. Flynn (1969), 3 D.L.R. (3d) 345, affirmed 1 N.S.R. (2d) 949, 11 D.L.R. (3d) 559 (C.A.) — *referred to*

Provident Savings Life Assur. Society v. Mowat (1902), 32 S.C.R. 147 — *referred to*

Smith v. Hughes (1871), L.R. 6 Q.B. 597, [1861-73] All E.R. Rep. 632 — *referred to*

Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 All E.R. 61 (H.L.) — *referred to*

Thompson v. London, Midland & Scottish Ry. Co., [1930] 1 K.B. 41 (C.A.) — *referred to*

Statutes considered:

Sale of Goods Act, 1893 (U.K.), c. 71.

Authorities considered:

Sales, "Standard Form Contracts" (1953), 16 M.L.R. 318.

Spencer, "Signature, Consent and the Rule in L'Estrange v. Graucob", [1973] C.L.J. 104.

Waddams, "Contracts — Exemption Clauses — Unconscionability — Consumer Protection" (1971), 49 Can. Bar Rev. 578.

Waddams, The Law of Contracts, p. 191.

Appeal from a decision of the trial Judge dismissing the plaintiff's claim for damages to a rented automobile.

***Dubin J.A.* (*Zuber J.A.* concurring):**

1 Upon his arrival at Vancouver airport, Mr. Clendenning, a resident of Woodstock, Ontario, attended upon the office of Tilden Rent-A-Car Company for the purpose of renting a car while he was in Vancouver. He was an experienced traveller and had used Tilden Rent-A-Car Company on many prior occasions. He provided the clerk employed at the airport office of Tilden Rent-A-Car Company with the minimum information which was asked of him, and produced his American Express credit card. He was asked by the clerk whether he desired additional coverage, and, as was his practice, he said "yes". A contract was submitted to him for his signature, which he signed in the presence of the clerk, and he returned the contract to her. She placed his copy of it in an enevelope and gave him the keys to the car. He then placed the contract in the glove compartment of the vehicle. He did not read the terms of the contract before signing it, as was readily apparent to the clerk, and in fact he did not read the contract until this litigation was commenced, nor had he read a copy of a similar contract on any prior occasion.

2 The issue on the appeal is whether the defendant is liable for the damage caused to the automobile while being driven by him by reason of the exclusionary provisions which appear in the contract.

3 On the front of the contract are two relevant clauses set forth in box form. They are as follows:

> **15. COLLISION DAMAGE WAIVER BY CUSTOMERS INITIALS 'J.C.'**
>
> *In consideration of the payment of 2.00 per day customers liability for damage to rented vehicle including windshield is limited to NIL.* But notwithstanding payment of said fee, customer shall be fully liable for all collision damage if vehicle is used, operated or driven in violation of any of the provisions of this rental agreement or off highways serviced by federal, provincial, or municipal governments, and for all damages to vehicle by striking overhead objects.
>
> 16. I, the undersigned have read and received a copy of above and reverse side of this contract.
>
> Signature of customer or employee of customer
>
> 'John T. Clendenning'

4 'The italics are mine.'

5 On the back of the contract in particularly small type and so faint in the customer's copy as to be hardly legible, there are a series of conditions, the relevant ones being as follows:

> 6. The customer agrees not to use the vehicle in violation of any law, ordinance, rule or regulation of any public authority.
>
> 7. The customer agrees that the vehicle will not be operated:
>
> (a) By any person who has drunk or consumed any intoxicating liquor, whatever be the quantity, or who is under the influence of drugs or narcotics ...

6 The rented vehicle was damaged while being driven by Mr. Clendenning in Vancouver. His evidence at trial, which was accepted by the trial Judge, was to the effect that in endeavouring to avoid a collision with another vehicle and acting out of a sudden emergency, he drove the car into a pole. He stated that although he had pleaded guilty to a charge of driving while impaired in Vancouver, he did so on the advice of counsel, and at the time of the impact he was capable of the proper control of the motor vehicle. This evidence was also accepted by the trial Judge.

7 Mr. Clendenning testified that on earlier occasions when he had inquired as to what added coverage he would receive for the payment of $2 per day, he had been advised that "such payment provided full non-deductible coverage". It is to be observed that the portion of the contract reproduced above does provide that "in consideration of the payment of $2.00 per day customers liability for damage to rented vehicle including windshield is limited to NIL".

8 A witness called on behalf of the plaintiff gave evidence as to the instructions given to its employees as to what was to be said by them to their customers about the conditions in the contract. He stated that unless inquiries were made, nothing was to be said by its clerks to the customer with respect to the exclusionary conditions. He went on to state that if inquiries were made, the clerks were instructed to advise the customer that by the payment of the $2 additional fee the customer had complete coverage "unless he were intoxicated, or unless he committed an offence under the *Criminal Code* such as intoxication".

9 Mr. Clendenning acknowledged that he had assumed, either by what had been told to him in the past or otherwise, that he would not be responsible for any damage to the vehicle on payment of the extra premium unless such damage

was caused by reason of his being so intoxicated as to be incapable of the proper control of the vehicle, a provision with which he was familiar as being a statutory provision in his own insurance contract.

10 The provisions fastening liability for damage to the vehicle on the hirer, as contained in the clauses hereinbefore referred to, are completely inconsistent with the express terms which purport to provide complete coverage for damage to the vehicle in exchange for the additional premium. It is to be noted, for example, that if the driver of the vehicle exceeded the speed limit even by one mile per hour, or parked the vehicle in a no-parking area, or even had one glass of wine or one bottle of beer, the contract purports to make the hirer completely responsible for all damage to the vehicle. Indeed, if the vehicle at the time of any damage to it was being driven off a federal provincial or municipal highway, such as a shopping plaza for instance, the hirer purportedly would be responsible for all damage to the vehicle.

11 Mr. Clendenning stated that if he had known of the full terms of the written instrument, he would not have entered into such a contract. Having regard to the findings made by the trial Judge, it is apparent that Mr. Clendenning had not in fact acquiesced to such terms.

12 It was urged that the rights of the parties were governed by what has come to be known as "the rule in *L'Estrange v. F. Graucob Ltd.*", [1934] 2 K.B. 394, [1934] All E.R. Rep. 16, and in particular the following portion from the judgment of Scrutton L.J. at p. 403:

> ... In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. *When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.*

[The italics are mine.]

13 In the same case Maugham L.J. added at p. 406:

> ... There can be no dispute as to the soundness in law of the statement of Mellish L.J. in *Parker v. South Eastern Ry Co.*, 2 C.P.D. 416, 421, which has been read by my learned brother, to the effect that where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents. That is true in any case in which the agreement is held to be an agreement in writing.
>
> There are, however, two possibilities to be kept in view, The first is that it might be proved that the document, though signed by the plaintiff, was signed in circumstances which made it not her act. That is known as the case of Non est factum.

14 And at p. 407:

> Another possibility is that the plaintiff might have been induced to sign the document by misrepresentation.

15 Consensus ad idem is as much a part of the law of written contracts as it is of oral contracts. The signature to a contract is only one way of manifesting assent to contractual terms. However, in the case of *L'Estrange v. F. Graucob Ltd.*, supra, there was in fact no consensus ad idem. Miss L'Estrange was a proprietor of a cafe. Two salesmen of the defendant company persuaded her to order a cigarette machine to be sold to her by their employer. They produced an order form which Miss L'Estrange signed without reading all of its terms. Amongst the many clauses in the document signed by her, there was included a paragraph with respect to which she was completely unaware, which stated "any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded". In her action against the company she alleged that the article sold to her was unfit for the purposes for which it was sold and contrary to The Sale of Goods Act [1893 (U.K., 56 & 57 Vict., c. 71)]. The company successfully defended on the basis of that exemption clause.

16 Although the subject of critical analysis by learned authors (see, for example, Spencer, "Signature, Consent, and the Rule in *L'Estrange v. Graucob*", [1973] C.L.J. 104), the case has survived, and it is now said that it applies to all contracts irrespective of the circumstances under which they are entered into, if they are signed by the party who seeks to escape their provisions.

17 Thus, it was submitted that the ticket cases, which in the circumstances of this case would afford a ready defence for the hirer of the automobile, are not applicable.

18 As is pointed out in Waddams, The Law of Contracts. p. 191:

> From the 19th century until recent times an extraordinary status has been accorded to the signed document that will be seen in retrospect, it is suggested, to have been excessive.

19 The justification for the rule in *L'Estrange v. F. Graucob Ltd.*, supra, appears to have been founded upon the objective theory of contracts by which means parties are bound to a contract in writing by measuring their conduct by outward appearance rather than what the parties inwardly meant to decide. This, in turn, stems from the classic statement of Blackburn J. in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607, [1861-73] All E.R. Rep. 632:

> ... I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke* [(1848), 2 Ex. 654 at 663, 154 E.R. 652]. *If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he has intended to agree to the other party's terms.*

[The italics are mine.]

20 Even accepting the objective theory to determine whether Mr. Clendenning had entered into a contract which included all the terms of the written instrument, it is to be observed that an essential part of that test is whether the other party entered into the contract in the belief that Mr. Clendenning was assenting to all such terms. In the instant case, it was apparent to the employee of Tilden-Rent-A-Car that Mr. Clendenning had not in fact read the document in its entirety before he signed it. It follows under such circumstances that Tilden-Rent-A-Car cannot rely on provisions of the contract which it had no reason to believe were being assented to by the other contracting party.

21 As stated in Waddams, The Law of Contracts, p. 191:

> 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.

22 In ordinary commercial practice where there is frequently a sense of formality in the transaction, and where there is a full opportunity for the parties to consider the terms of the proposed contract submitted for signature, it might well be safe to assume that the party who attaches his signature to the contract intends by so doing to acknowledge his acquiescence to its terms, and that the other party entered into the contract upon that belief. This can hardly be said, however, where the contract is entered into in circumstances such as were present in this case.

23 A transaction, such as this one, is invariably carried out in a hurried, informal manner. The speed with which the transaction is completed is said to be one of the attractive features of the services provided.

24 The clauses relied on in this case, as I have already stated, are inconsistent with the overall purpose for which the contract is entered into by the hirer. Under such circumstances, something more should be done by the party submitting the contract for signature than merely handing it over to be signed.

25 In an analogous situation Lord Devlin in the case of *McCutcheon v. Davin MacBrayne Ltd.*, [1964] 1 W.L.R. 125, [1964] 1 All E.R. 430 (H.L.), commented as follows at pp. 132-134 [p. 436]:

> ... It would be a strangely generous set of conditions in which the persistent reader, after wading through the verbiage, could not find something to protect the carrier against 'any loss ... wheresoever or whensoever occurring'; and condition 19 by itself is enough to absolve the respondents several times over for all their negligence. *It is conceded that if the form had been signed as usual, the appellant would have had no case.* But by a stroke of ill luck for the respondents it was upon this day of all days that they omitted to get Mr. McSporran to sign the conditions. What difference does that make? *If it were possible for your lordships to escape from the world of make-believe, which the law has created, into the real world in which transactions of this sort are actually done, the answer would be short and simple. It should make no difference whatever. This sort of document is not meant to be read, still less to be understood. Its signature is in truth about as significant as a handshake that marks the formal conclusion of a bargain.*
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> Your Lordships were referred to the dictum of Blackburn J., in *Harris v. Great Western Railway Co.* (1876), 1 Q.B.D. 515 at p. 530. The passage is as follows:
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> > And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in delivering the judgment of the Exchequer in *Freeman v. Cooke* (1848), 2 Exch. 654, that is, if he "means his representation to be acted upon, and it is acted upon accordingly: or if, whatever a man's real intentions may be, he so conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true".
>
> If the ordinary law of estoppel was applicable to this case, it might well be argued that the circumstances leave no room for any representation by the sender on which the carrier acted. I believe that any other member of the public in the appellant's place, — and this goes for lawyers as well as for laymen, — would have found himself compelled to give the same sort of answers as the appellant gave; and I doubt if any carrier who serves out documents of this type could honestly say that he acted in the belief that the recipient had 'made himself acquainted with the contents'. But Blackburn, J. (1876), 1 Q.B.D. at p. 530, was dealing with an unsigned document, a cloakroom ticket. Unless your lordships are to disapprove the decision of the Court of Appeal in *L'Estrange v. F. Graucob Ltd.*, [1934] All E.R. Rep. 16, [1934] 2 K.B. 394, — and there has been no suggestion in this case that you should, — the law is clear, without any recourse to the doctrine of estoppel, that a signature to a contract is conclusive.

[The italics are mine.]

26 An analysis of the Canadian cases, however, indicates that the approach in this country has not been so rigid. In the case of *Colonial Invts. Co. v. Borland* (1911), 1 W.W.R. 171 at 189, affirmed 5 Alta. L.R. 71, 2 W.W.R. 960, 6 D.L.R. 211 (C.A.), Beck J. set forth the following propositions:

> *Consensus ad idem* is essential to the creation of a contract, whether oral, in writing or under seal, subject to this, that as between the immediate parties (and merely voluntary assigns) apparent — as distinguished from real — consent will on the ground of estoppel effect a binding obligation unless the party denying the obligation proves:

> (1) That the other party knew at the time of the making of the alleged contract that the mind of the denying party did not accompany the expression of his consent; or
>
> (2) Such facts and circumstances as show that it was not reasonable and natural for the other party to suppose that the denying party was giving his real consent and he did not in fact give it ...

27 In commenting on the *Colonial Invt. Co. v. Borland* case, Spencer, in the article above cited, observes at p. 121: "It is instructive to compare a Canadian approach to the problem of confusing documents which are signed but not fully understood."

28 And at p. 122 the author concludes his article with the following analysis:

> Policy considerations, but of different kinds, no doubt lay behind both the Canadian and the English approaches to this problem. The Canadian court was impressed by the abuses which would result — and, in England, *have* resulted — from enabling companies to hold ignorant signatories to the letter of sweeping exemption clauses contained in contracts in standard form. The English courts, however, were much more impressed with the danger of furnishing an easy line of defence by which liars could evade contractual liabilities freely assumed. It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of any express misrepresentation by the other party of that legal effect. Forty years later, most lawyers would admit that the English courts made a bad choice between two evils ...

29 The significance of the circumstances under which a contract is entered into is noted by Taschereau J. in *Provident Savings Life Assur. Society v. Mowat* (1902), 32 S.C.R. 147, as follows at p. 162:

> ... As remarked by Mr. Justice Maclennan [27 O.A.R. 675 at 699]:
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> > The case of a formal instrument like the present, prepared and executed, after a long negotiation, and correspondence delivered and accepted, and acted upon for years, is wholly different from the cases relating to railways and steamship and cloak-room tickets, in which it has been held that conditions qualifying the principal contract of carriage or bailment, not sufficiently brought to the attention of the passenger or bailor are not binding upon him. Such contracts are usually made in moments of more or less haste and confusion and stand by themselves.

30 I see no real distinction in contracts such as these, where the signature by itself does not truly represent an acquiescence of unusual and onerous terms which are inconsistent with the true object of the contract, and the ticket cases. This point was made y Beck J.A. in *Can. Bank of Commerce v. Foreman*, [1927] 2 D.L.R. 530, at 537, 22 Alta. L.R. 443, [1927] 1 W.W.R. 783, where he stated:

> Personally I have a very strong opinion, which is not to the full extent shared by other members of the Court and expressed in *Gray-Campbell Ltd. v. Flynn*, [1923] 1 D.L.R. 51, 18 Alta. L.R. 547, and for which I see some support in some circumstances in *Ball v. Gutschenritter*, [1925] 1 D.L.R. 901, at p. 908 (and see also *Jadis v. Porte* (1915), 23 D.L.R. 713, 8 Alta. L.R. 489) — *the opinion that when a contract of a common type contains special onerous and unusual provisions it is the duty of the party in whose interest such provisions are inserted to see that they are effectively called to the attention of the other party under the penalty of their being held not binding upon the latter party* but I think that would not ordinarily affect the residue of the contract and consequently the question does not arise in the present case. The only special provision which the bank needs to invoke, and which is of that special character that it alters the rights of the parties, is that permitting the giving of time to the debtor etc.; but this I would not place under the category of special provisions of an onerous or special character but would consider to be such a provision as the ordinary layman would suppose to express the law independently of a special provision.

[The italics are mine.]

31 The same point of view was expressed by Lord Denning in the case of *Jaques v. Lloyd D. George & Partners Ltd.*, [1968] 1 W.L.R. 625 630, [1968] 2 All E.R. 187 at 190 (C.A.):

> The principles which, in my opinion, are applicable are these: When an estate agent is employed to find a purchaser for a business or a house, the ordinary understanding of mankind is that the commission is payable out of the purchase price when the matter is concluded. If the agent seeks to depart from that ordinary and well-understood term, then he must make it perfectly plain to his client. He must bring it home to him so as to make sure he agrees to it. When his representative produces a printed form and puts it before the client to sign, he should explain its effect to him, making it clear that it goes beyond the usual understanding in these matters. In the absence of such explanation a client is entitled to assume that the form contains nothing unreasonable or oppressive. If he does not read it and the form is found afterwards to contain a term which is wholly unreasonable and totally uncertain, as this is, then the estate agent cannot enforce it against the innocent vendor.

32 In commenting on *Jaques v. Lloyd D. George & Partners Ltd.*, supra, and on the case of *O'Connor Real Estate Ltd. v. Flynn* (1969), 3 D.L.R. (3d) 345, affirmed 1 N.S.R. (2d) 949, 11 D.L.R. (3d) 559, in 49 Can. Bar Rev., Professor Waddams makes the following observations at pp. 590-591:

> These cases suggest that there is a special onus on the supplier to point out any terms in a printed form which differ from what the consumer might reasonably expect. If he fails to do so, he will be guilty of a 'misrepresentation by omission', and the court will strike down clauses which 'differ from the ordinary understanding of mankind' or (and sometimes this is the same thing) clauses which are 'unreasonable or oppressive'. If this principle is accepted, the rule about written documents might be restated as follows: the signer is bound by the terms of the document if, and only if, the other party believes on reasonable grounds that those terms truly express the signer's intention. This principle retains the role of signed documents as a means of protecting reasonable expectations; what it does not allow is that a party should rely on a printed document to contradict what he knows, or ought to know, is the understanding of the other party, Again this principle seems to be particularly applicable in situations involving the distribution of goods and services to consumers, though it is by no means confined to such situations.

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.

34 In the case at bar, Tilden Rent-A-Car took no steps to alert Mr. Clendenning of the onerous provisions in the standard form of contract presented by it. The clerk could not help but have known that Mr. Clendenning had not in fact read the contract before signing it. Indeed the form of the contract itself with the important provisions on the reverse side and in very small type would discourage even the most cautious customer from endeavouring to read and understand it. Mr. Clendenning was in fact unaware of the exempting provisions. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses, and it was not incumbent on Mr. Clendenning to establish fraud, misrepresentation or non est factum. Having paid the premium, he was not liable for any damage to the vehicle while being driven by him.

35 As Lord Denning stated in *Neuchatel Asphalte Co v. Barnett*, [1957] 1 W.L.R. 356, at 360, [1957] 1 All E.R. 362 at 365:

> We do not allow printed forms to be made a trap for the unwary.

36 In this case the trial Judge held that "the rule in *L'Estrange v. Graucob*" governed. He dismissed the action, however, on the ground that Tilden Rent-A-Car had by their prior oral representations misrepresented the terms of the contract. He imputed into the contract the assumption of Mr. Clendenning that by the payment of the premium he was "provided full non-deductible coverage unless at the time of the damage he was operating the automobile while under the influence of intoxicating liquor to such an extent as to be for the time incapable of the proper control of the automobile". Having found that Mr. Clendenning had not breached such a provision, the action was dismissed.

37 For the reasons already expressed, I do not think that in the circumstances of this case "the rule in *L'Estrange v. Graucob*" governed, and it was not incumbent upon Mr. Clendenning to prove misrepresentation.

38 In any event, if "the rule in *L'Estrange v. Graucob*" were applicable, it was in error, in my respectful opinion, to impute into the contract a provision which Tilden Rent-A-Car had not in fact represented as being a term of the contract.

39 As was stated in *Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.; Okanagan Mainline Real Estate Bd. v. Whillis-Harding Ins. Agencies Ltd.*, [1971] S.C.R. 493 at 500, [1971] 1 W.W.R. 289, 16 D.L.R. (3d) 715 *(sub nom. Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.)*, [1971] I.L.R. 1-383 *(sub nom. Okanagan Mainline Real Estate Bd. v. Can. Indemnity Co.)*:

> A party who misrepresents, albeit innocently, the contents or effect of a clause inserted by him into a contract cannot rely on the clause in the face of his misrepresentation ...

40 Under such circumstances, absent the exclusionary provisions of the contract, the defendant was entitled to the benefit of the contract in the manner provided without the exclusionary provisions, and the action, therefore, had to fail.

41 In the result, therefore, I would dismiss the appeal with costs.

***Lacourciere J.A.* (dissenting):**

42 I have had the advantage of reading the reasons for judgment prepared for release by my brother Dubin, which relieves me of the obligation of setting out the facts in this appeal, which are not really in dispute, or the relevant clauses of the contract. In my view the printing is not difficult to read, and the presence of conditions on the reverse side of the signed contract is brought to the signatory's attention in a very clear way.

43 It is not in dispute that the respondent violated two conditions of the contract: he drove the company's vehicle into a post, after drinking an unrecalled quantity of alcohol between 11:30 p.m. and 2 a.m. He was given a breathalyzer test, indicating a police officer's belief, on reasonable and probable grounds, that he had committed an offence of driving a motor vehicle while his ability to drive was impaired by alcohol or after having consumed alcohol in such quantity that the proportion of alcohol in his blood exceeded the penal limit. On the advice of counsel he pleaded guilty to a charge of impaired driving. I have set this out only to show that the respondent's violation of the contractual conditions was not a mere technical breach of an admittedly strict clause.

44 In the wisdom of the common law there has been a traditional distinction with respect to standard form contracts between the position of a person who signed the contract and the one who did not do so. In the absence of duress, fraud or misrepresentation — and subject to the defence of non est factum — the former was bound by the printed conditions, even if he or she did not read them: *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394, [1934] All E.R. Rep. 16. The non-signatory was also bound if that person knew of the existence of the conditions; in the absence of knowledge, the question of the notice given by the other party became important. The distinction rests clearly on that essential prerequisite of a contract, consensus ad idem. The signatory is legally bound by the plain meaning of the words to which he has given assent, whereas the non-signatory should not be deemed to have assented to unknown printed conditions, unless he was given notice of their existence. See H.B. Sales, "Standard form Contracts" (1953), 16 M.L.R. 318.

45 The respondent, a frequent user of rented vehicles, could not recall what was said at the Tilden counter before he signed the agreement and initialled the collision damage waiver clause. He was aware that the contract contained writing on the back, but he claims that his attention was never drawn to the printed conditions until the action was brought against him.

46 After careful examination of the evidence, I am unable to agree with the learned trial Judge's conclusion that Tilden's counter clerk misrepresented the contract. The evidence of all witnesses concerning the common practice at a car rental counter had minimal probative value, and was probably inadmissible by reason of the parol evidence rule, in addition to being, at best, secondary evidence of what passed between the parties before the signing of the written contract.

47 I am therefore in agreement with Dubin J.A. that the learned trial Judge was in error when he imported into the contract an assumption made by the respondent concerning the extent and import of the exemption clause relating to alcohol, on the basis of tenuous and doubtful evidence. Once the respondent, not claiming fraud or duress, admitted having signed the contract, the onus was on him to prove by a preponderance of acceptable evidence that the conditions were misrepresented to him. In my view, this onus was not met by the respondent. The appellant has accordingly shown reversible error in the trial below.

48 Although the above would be sufficient to dispose of the appeal, I feel bound to express my view on the submission made on behalf of the respondent that the contract contained such unusual and onerous exculpatory terms that the respondent is not bound by them unless the appellant proves that reasonable measures were taken to draw them to his attention. The words "onerous and unusual", used by Beck J.A. in *Can. Bank of Commerce v. Foreman*, [1927] 2 D.L.R. 530 at 537, 22 Alta. L.R. 443, [1927] 1 W.W.R. 783 (C.A.), correspond to the words "unreasonable or oppressive" used by Lord Denning in *Jaques v. Lloyd D. George & Partners Ltd.*, [1968] 1 W.L.R. 625 at 630, [1968] 2 All E.R. 187 (C.A.). The principle developed in these cases relied upon by the appellant for the above submission, was there applied to signed documents.

49 I note, first, that these decisions, however persuasive they may be, have no binding effect on this Court, and that in the *Jaques* case, supra, Edmund Davies L.J. and Cairns J. agreed in the result, but for different reasons (misrepresentation and uncertainty) and they did not refer to Lord Denning's dicta on unreasonableness and oppression. Even Lord Denning found the clause there in question to be not merely "wholly unreasonable", but also "totally uncertain" at p. 630. He went on to find misrepresentation on the facts. In *Can. Bank of Commerce v. Foreman*, supra,the question of whether the defendant there understood the effect of certain exemption clauses did not arise. Beck J.A. at p. 537 was of the opinion that the clause relied on by the plaintiff bank was not of an "onerous or special character". He did not expand on what was meant by those words.

50 It is recognized that certain exemption clauses can be particularly unfair and unreasonable: some are irrelevant and "foreign to the contract" in the sense that they are contradictory and incompatible with the main oject of the contract. Sankey L.J. in *Thompson v. London, Midland & Scottish Ry. Co.*, [1930] 1 K.B. 41 at 56 (C.A.), referred to "such unreasonable conditions that nobody could contemplate that they exist". In *Gibaud v. Great Eastern Ry.*, [1920] 3 K.B. 689 at 699-700, affirmed [1921] 2 K.B. 426, [1921] All E.R. Rep. 35 (C.A.), Bray J. said:

> ... Every contract is voidable by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then I should say that the assent of the party receiving the ticket was obtained by fraud, and he would not be bound. The mere fact that the judge or jury considered the condition unreasonable would not in my opinion be sufficient justification for a finding that the assent was obtained by fraud.

51 One can think of many examples of such irrelevant clauses which would amount to fraud.

52 Sales in his article, supra, makes a distinction between such irrelevant conditions and unreasonable conditions at p. 326:

> Certainly terms of that kind 'referring to irrelevant conditions' are not inserted in their contracts by such sober bodies as railway companies on their successor, but this is not to say that harsh, unfair or unreasonable conditions might not be imposed by companies having the necessary economic power to refuse to bargain or the good fortune to escape detection until the contract is concluded. There has, however, never been a case decided in the plaintiff's favour because a condition of a contract, not subject to statutory restriction, was unreasonable, harsh, or unfair and it is apparent that no conditions in a standard form contract could, apart from statute, be invalidated on the score of unreasonableness, unless they were of a fraudulent nature. As has been tersely said by Viscount Haldane, L.C. in *Grand Trunk Ry. of Canada v. Robinson*, [1915] A.C. 740, 747, 'if the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice.'

53 Lord Denning went beyond that in the *Jaques* case, supra, and in *John Lee & Son (Grantham), Ltd. Ry. Executive*, [1949] 2 All E.R. 581 at 584 (C.A.), in referring to an unreasonably onerous term in a standard form contract referred to the "vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused".

54 Lord Denning repeated the above words in *Gillespie Brothers & Co. v. Roy Bowles Tpt. Ltd.*, [1973] Q.B. 400 at 415-416, [1973] 1 All E.R. 193, where he talked of unreasonableness amounting to unconscionability. However, that case involved an attempt by a party to exempt himself from his liability at common law, which is not the situation in the present case. Furthermore Lord Buckley, while agreeing with Lord Denning in the result, disagreed with his approach and stated at p. 421:

> ... It is not in my view the function of a court of construction to fashion a contract in such a way as to produce a result which the court considers that it would have been fair or reasonable for the parties to have intended. The court must attempt to discover what they did in fact intend.

55 Some attempts at exemption from common law liability may merit the harsh words of Lord Denning. But the common law has traditionally refused to strike down contractual "standard form" conditions unless the terms are "so unreasonable as to amount to fraud, or manifestly irrelevant to the object of the contract": *Gibaud v. Great Eastern Ry. Co.*, supra.

56 The traditional attitude, with which I respectfully agree, has been for judges to avoid the difficult task of deciding the issue of "reasonableness" of clauses in businesses which compete freely in the marketplace for consumer support. This attitude is reflected in the remark of Lord Bramwell in *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown* (1883), 8 App. Cas. 703 at 718:

> ... It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not.

57 Lord Reid in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61, [1967] 1 A.C. 361 (H.L.) in dealing with the doctrine of fundamental breach in the construction of exemption clauses, did not depart from this view, and in fact confirmed it, when he said at p. 76:

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must surely imply some choice or room for bargaining. At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason; but this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable, or whether it was freely agreed by the customer. It does not seem to me to be satisfactory that the decision must always go one way

> if, e.g., defects in a car or other goods are just sufficient to make the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people, and it appears to me that its solution should be left to Parliament. If your lordships reject this new rule, there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation.

58 The "Suisse Atlantique" case was quoted with approval and applied by the majority in the Supreme Court of Canada in *B.G. Linton Const. Ltd. v. C.N.R.*, [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, 3 N.R. 151, 49 D.L.R. (3d) 548.

59 I set out here for convenience the impugned clauses in this case:

> 6. The customer agrees not to use the vehicle in violation of any law, ordinance, rule or regulation of any public authority.
>
> 7. The customer agrees that the vehicle will not be operated:
>
> (a) By any person who has drunk or consumed any intoxicating liquor, whatever be the quantity, or who is under the influence of drugs or narcotics;
>
> (b) By any person who is for the time being not authorized by law or qualified to drive or operate the vehicle or under the age of 18 years in any event;
>
> (c) In any race, speed test or contest;
>
> (d) To propel or tow any vehicle;
>
> (e) To carry explosives or to carry radio-active material;
>
> (f) Outside the scope of the employment of the driver, when the driver is the employee of the customer;
>
> (g) At an illegal, reckless or otherwise abusive speed;
>
> (h) For the transportation of passengers or goods for a consideration expressed or implied;
>
> (i) For any illicit or prohibited trade or transportation.

60 These clauses are certainly not irrelevant or foreign to the contract in the sense of the *Gibaud* case, supra. They do not, for example, purport to exempt Tilden from any implied undertaking as to the roadworthy fitness of the vehicle. They are not exemptions from common law liability or statutory liability, as was the impugned clause in *Gillespie Bros.*, supra.

61 In this contract of bailment of a vehicle for a fixed remuneration, the customer is normally bound to take reasonable care of the vehicle, and is liable for damages caused by his negligence. This is subject to collision insurance: the customer is responsible for the deductible amount, $100 or $200 depending on location. By the payment of an additional premium, this liability of the customer is eliminated with this proviso:

> ... notwithstanding payment of said fee, customer shall be fully liable for all collision damage if vehicle is used, operated or driven in violation of any of the provisions of this rental agreement or off highways serviced by federal, provincial, or municipal governments, and for all damages to vehicle by striking overhead objects.

62 The clause is undoubtedly a strict one. It is not for a court to nullify its effect by branding it unfair, unreasonable and oppressive. It may be perfectly sound and reasonable from an insurance risk viewpoint, and may indeed be necessary in the competitive business of car rentals, where rates are calculated on the basis of the whole contract. On this point, see the majority judgment delivered by Lord Wilberforce in *New Zealand Shipping Co. v. A.M. Satterthwaite & Co. Ltd.*,

[1975] A.C. 154 at 169, [1974] 1 All E.R. 1015 (P.C.), where it was held that the court must give effect to the clear intent of a commercial document.

63 I am of the view that, even if the respondent's signature is not conclusive, the terms of the contract are not unusual, oppressive or unreasonable and are binding on the respondent. I would therefore allow the appeal with costs, set aside the judgment below and in lieu thereof substitute a judgment for the amount of the agreed damages and costs.

Appeal dismissed.

Tab 11

1978 CarswellOnt 126
Ontario Supreme Court [Court of Appeal]

Aita v. Silverstone Towers Ltd.

1978 CarswellOnt 126, [1978] 2 A.C.W.S. 97, [1978] O.J. No. 3362, 19 O.R. (2d) 681, 4 B.L.R. 92, 86 D.L.R. (3d) 439

AITA et al. v. SILVERSTONE TOWERS LTD.

Arnup, MacKinnon and Lacourciere JJ.A.

Heard: April 13, 1978
Judgment: May 2, 1978

Counsel: *W.D. Martin*, for plaintiffs, repondents.
John Weingust, for defendant, appellant.

Subject: Corporate and Commercial; Contracts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Contracts

X Discharge
X.5 Right to rescind after repudiation
X.5.c Election to accept repudiation or to affirm contract

Real property

X Condominiums
X.12 Remedies

Headnote
Contracts --- Discharge — Right to rescind after repudiation — Anticipatory breach

Sale of Land --- Condominiums — Remedies

Contracts — Repudiation — Fundamental breach — Treating contract as continuing — Limitation of liability clause — Condominium — Specific performance and damages in lieu thereof.

The plaintiffs entered into a written agreement of purchase and sale with the defendant to purchase a condominium unit in a project under construction. The agreement was conditional, among other things, upon approval of the purchasers by the first mortgagee and upon registration by the defendant of the condominium declaration and the rules as to common elements. In the event the latter was not obtained by the June 30, 1974 closing date, but the premises were ready for occupancy, the unpaid balance of the purchase moneys was required to be paid and the unit would be rented to the plaintiffs until the conditions were satisfied.

The plaintiffs were approved as purchasers by the mortgagee. The unit was not ready on the specified closing date but the plaintiffs made frequent visits to the site to view progress and were told by the defendant's representative

that the building would be ready in May 1975. In February 1975 the defendant advised the plaintiffs that it was returning their deposit and treating the transaction as cancelled and null and void.

The solicitor for the plaintiffs advised the defendant that his clients had agreed to extend the closing from time to time, had shown frequent interest in the premises and had ordered various items for the unit. The plaintiffs tendered on the defendant's solicitors, who, having no instructions to close, declined to accept the tender.

The plaintiffs commenced an action for specific performance or, in the alternative, damages. In the interim, the defendant sold the unit to someone else on the rising market.

The plaintiffs were successful at trial in obtaining damages. The defendant appealed.

Held:

The appeal was dismissed.

The defendant contended that Plannning Act approval and registration of the relevant condominium documents under The Condominium Act (Ontario) were true conditions precedent, which, not having been fulfilled by the date the writ was issued, denied the plaintiffs a cause of action. In the alternative, if the defendant were unsuccessful in this defence, it relied on a provision of the agreement of purchase and sale limiting its damages to the return of the plaintiffs' deposit.

The agreement, to be valid, had to be conditional on compliance with The Planning Act (Ontario), but that Act would have been complied with by registration under The Condominium Act. Both parties contemplated that the registration of the condominium might not take place until after the closing date and agreed that occupancy would be taken on a rental basis in that event. Apart from mortgagee approval of the purchasers, the only true condition precedent in the agreement was that registration of the condominium occur by a date to be filled in on the agreement form. However, this blank was completed at the time of execution as "to be designated" and so was no condition at all. Thus the only true condition precedent, namely mortgagee approval of the purchasers, had been fulfilled.

The plaintiffs had not accepted the purported termination of the agreement by the defendant but continued to rely on it and sued for specific performance. The defendant relied on a clause in the agreement limiting its liability "in the event the transaction is not completed by reason of default on the part of the Vendor" to return of the deposit. The defendant's interpretation of this provision would have allowed it to refuse arbitrarily capriciously or wrongfully to complete the contract and the purchasers' only remedy would be to get their deposit back.

The defendant had repudiated the agreement, and the plaintiffs were thus entitled to treat it as either discharged or still in force. The plaintiffs, by claiming specific performance, clearly treated the contract as still in force, including the limitation of liability clause. However, this clause did not have the effect asserted by the defendant but was limited in application to the defendant's default in carrying out a term of the agreement requiring it to do something. It did not apply to a complete and outright repudiation of the entire contract. The defendant's interpretation would make the agreement a sham and its promises meaningless.

Table of Authorities

Cases considered:

Barnett v. Harrison, [1976] 2 S.C.R. 531, 5 N.R. 131, 57 D.L.R. (3d) 225 — *referred to*

Crossroads Apts. Ltd. and Phillips, Re (1974), 4 O.R. (2d) 72, 47 D.L.R. (3d) 172 — *referred to*

F.T. Devs. Ltd. v. Sherman, [1969] S.C.R. 203, 70 D.L.R. (2d) 426 — *referred to*

Goetz v. Whitehall Dev. Corpn. (1978), 19 O.R. (2d) 33 (C.A.) — *referred to*

Queensway Const. Ltd. v. Trusteel Corpn., [1961] S.C.R. 528, 28 D.L.R. (2d) 480 — *referred to*

Turney v. Zhilka, [1959] S.C.R. 578, 18 D.L.R. (2d) 447 — *referred to*

Wimpey (George) Can. Ltd. v. Focal Properties Ltd., [1978] 1 S.C.R. 2, (sub nom. *Focal Properties Ltd. v. George Wimpey Can. Ltd.*) 16 N.R. 71, 78 D.L.R. (3d) 129 — *referred to*

Statutes considered:

Condominium Act, R.S.O. 1970, c. 77.

Judicature Act, R.S.O. 1970, c. 228, s. 21.

Planning Act, R.S.O. 1970, c. 349, s. 29.

Authorities considered:

Cheshire and Fifoot, Law of Contract (8th ed., 1972), pp. 563-574.

APPEAL from decision of the trial Judge awarding the plaintiff damages for breach of contract in lieu of specific performance.

The judgment of the Court was delivered by *Arnup J.A.*:

1 This is an appeal by the defendant, the builder of a condominium, from the judgment of the Honourable Mr. Justice Weatherston whereby the plaintiffs, the purchasers of a condominium unit, recovered from the defendant $8,410 damages for breach of contract. In 1973 the defendant commenced the construction of a condominium building on Silverstone Drive in the Borough of Etobicoke, and as construction progressed, the defendant proceeded to enter into agreements for the purchase and sale of units within the condominium. On October 13, 1973 the plaintiffs as purchasers entered into an agreement to purchase the unit numbered 808 on the eighth floor of the building under construction, for the price of $35,990, payable $500 as a deposit, the assumption of a first mortgage in the sum of $23,230, the giving of a second mortgage for $9,760, and the balance of the purchase price on closing, subject to adjustments.

2 The following provisions of the agreement are material:

> 3. This offer shall be null and void in the event the Purchaser is not approved by the first mortgagee lending institution. ...
>
> 4. The Purchaser acknowledges that the declaration and the description and the by-laws of the Condominium Corporation to be created by the registration of the declaration and the description and the rules respecting the use of the common elements as required by The Condominium Act, R.S.O. 1970 and amendments thereto (hereinafter referred to as the "Act") have not as of the date of this Agreement been registered and that this Agreement is conditional upon compliance with Section 29 of The Planning Act of Ontario.

5. This Agreement and the transaction arising therefrom are conditional upon the following:

(a) the approval of the Purchaser by the first Mortgagee prior to the closing date;

(b) the registration by the Vendor of a Condominium Plan, description, and of the Declaration and By-law No. 1 on or before 'to be designated'. 'The words in single quotation marks are typed in; the balance of paragraph 5, and most of the agreement of purchase and sale, is on a printed form.'

In the event that either condition has not been complied with, this Agreement shall be null and void and all moneys paid by the Purchaser shall be returned without interest or deductions subject however to paragraph 7 hereof.

6. This transaction of purchase and sale is to be completed on the closing date which is to be on or before the 30 day of June 1974, except as otherwise herein provided or such other date as may be required in accordance with the provisions for postponement referred to in paragraph 7 hereof.

7. If the Unit is completed and fit for occupancy by the date fixed for closing hereunder but prior to the date of registration of the Condominium Plan, Description, Declaration and By-Law Number 1 and the Purchaser has been approved by the First Mortgagee, then the Purchaser shall pay to the Vendor the balance of the purchase moneys and shall take occupancy of the Unit on the date fixed for closing hereunder on a rental basis at a rental of $338.62 per month in advance commencing on the date of occupancy and payable on the same date of the next succeeding month during the term of such occupancy until the agreement of purchase and sale can be completed in accordance with the provisions hereof. Any prepaid rent shall be adjusted on completion of sale.

If the within agreement can not be completed the Purchaser agrees to vacate the premises within thirty (30) days of the date he receives notice to vacate and the Vendor will forthwith return the moneys held by it less the rental for the term during which the premises were occupied by the Purchaser. The parties herein agree that acceptance of possession of the premises hereunder by the Purchaser shall not be deemed or considered in any way as a Release or abandonment of any of the Purchaser's rights under this agreement of purchase and sale.

The Purchaser in occupation under this clause further agrees to complete the agreement of purchase and sale within fifteen (15) days after written notice shall have been given by the Vendor to the Purchaser or to the Purchaser's Solicitor by ordinary mail that the Condominium Plan, Description, Declaration and By-law Number 1 has been registered in the Office of Land Titles. ...

16. The Purchaser shall be deemed to be in default under this Agreement if he fails to fulfil any of the provisions of this Agreement and if any lien, execution or encumbrance arising from any action or default whatsoever of the Purchaser is charged against or affects the unit or the building of which the unit forms a part so as to prevent advances on the first mortgage and shall include registration on title on behalf of the Purchaser of any documents prior to closing. In the event of such default on the part of the Purchaser, the Vendor may, in addition to any other remedies it may have, declare this Agreement to be cancelled and null and void and the deposit moneys paid by the Purchasers shall thereupon be forfeited to the Vendor as liquidated damages. In addition, upon default by the Purchaser in any of the provisions of this Agreement, the Purchaser waives tender by the Vendor and all further obligations of the Vendor to the Purchaser shall cease. In the event the transaction is not completed by reason of default on the part of the Vendor, the liability of the Vendor hereunder shall be limited to the return to the Purchaser of the deposit moneys herein. ...

22. Time shall be of the essence of this Agreement.

3 We were told by counsel that before the necessary approval required for registration of the declaration and description and the rules respecting use of the common elements can be obtained, at least 60 per cent of the units must have been sold and be occupied. It is therefore obvious that para. 7 quoted above was going to come into operation with respect to

at least 60 per cent of the units, i.e. the "purchasers" were going to have to move in and pay the balance of the purchase moneys, plus rent, before registration of the condominium plan was effected.

4 The plaintiffs, who are husband and wife, went to the premises on a fairly regular basis to see how construction was coming along. In May 1974 they were approved as purchasers by the mortgagee, so that the first expressed condition was satisfied. By the closing date of June 30, 1974, the unit purchased by the plaintiffs was not yet completed and fit for occupancy. It was on the eight floor. There were to be 15 or 16 floors in the building. By June, 1974 the building was up to the sixth floor. By the end of 1974 it had reached nine or ten floors.

5 The plaintiffs, in purchasing the unit, had dealt with a salesman named Murray Swartz, and when they returned to the premises every two or three weeks to see what progress was being made, they spoke frequently to Swartz. In February, 1975, on one of their regular visits, the plaintiffs were told by a salesman other than Swartz that the building was going to be ready in May, 1975. In the meantime the plaintiffs had chosen the carpet, tiles, cabinets and painting for their unit.

6 From the middle of 1973, when the plaintiffs had made their agreement, the sale price of condominium units steadily increased, and by early 1975, units comparable to that for which the plaintiffs had agreed to pay roughly $36,000 had become worth $47,000 or $48,000.

7 By a letter dated February 14, 1975, without any previous warning, the defendant wrote to the plaintiffs as follows:

> We notice that the closing date of the above transaction has expired some time ago and you have not since that time made any indication that you have any interest in completing the transaction.
>
> We are therefore taking the position that the transaction is cancelled and the offer is null and void.
>
> You will find a cheque enclosed herein in the amount of $500 representing the return of the deposit.

8 The plaintiffs took this letter to their solicitor, who wrote to the solicitors for the defendant, stating that the plaintiffs wished to complete the transaction, that they had spoken to the sales agent from time to time asking when the apartment would be ready, that they had last done so in mid-February and had been told that the apartment would be ready for occupancy in the middle of April, 1975. The solicitor stated that his "clients had agreed to this extension". His letter referred also to the choosing of carpets, cabinets and tiles with the sales agent. The solicitor sent back to the solicitors for the vendor the $500 cheque forwarded by them.

9 On April 15, 1975 the plaintiffs' present solicitors tendered upon the solicitors for the vendor a certified cheque for $2,500, and a certified cheque for $338.62, being one month's occupation rental for the unit. The letter confirming tender, written the following day by the plaintiffs' solicitors, states that the vendor's solicitors had said that they had no instructions to close, and had declined to accept the tender. On April 25, 1975 the plaintiffs issued a writ claiming specific performance or in the alternative, damages.

10 While the action was pending, the defendant sold the unit, and accordingly specific performance became impossible.

11 Weatherston J., after quoting the foregoing facts, said that the defendant might have terminated the contract on June 30, 1974, but not having done so until the unit was ready for occupancy, the covenants in para. 7 came into force. He held that those covenants gave the plaintiffs some proprietary right in the unit pending registration of the condominium plan, description, declaration and by-law. He held it was the defendant's duty to notify the plaintiffs that the unit was ready for occupancy, and to be ready to perform its obligations under the contract; that the defendant was not entitled to arbitrarily terminate the contract, as it attempted to do, and that there continued to be a valid contract up to February 14, 1975, on which date, by its letter, the defendant wrongfully repudiated the contract.

12 The defendant took the position at trial that there had been no breach by it of the contract, and that in any event under para. 16 of the agreement its liability was limited to the return to the plaintiffs of the deposit money. Weatherston J. said on this point:

On this point I refer by analogy to those cases where a defaulting party to a contract relies on an exemption clause. In those cases where there has been a fundamental breach of the contract, such clauses are not given effect to, for otherwise the seller's promises in the contract would be meaningless.

So in this case, if the defendant were able to rely on the clause which I have just read limiting its liability to the return of the deposit, its covenants and this agreement of purchase and sale would be meaningless. There is no fundamental breach of contract here but the defendant had repudiated the entire contract and with it the clause limiting its own liability.

At the date of breach specific performance was not possible because the building had not been registered in accordance with the Condominium Act and damages must, therefore, be assessed as of the date of the breach and not as of the date of trial of this action.

13 The trial Judge then proceeded to fix the damages at $7,910 plus the deposit of $500, or a total of $8,410.

14 Two points arise for determination on this appeal:

1. Are the provisions with respect to compliance with s. 29 of The Planning Act [R.S.O. 1970, c. 349], and registration of the requisite documents pursuant to The Condominium Act, R.S.O. 1970, c. 77, as amended, true conditions precedent, which had not been fulfilled at the date of the issue of the writ in this matter, and therefore the plaintiffs have no cause of action because the conditions precedent had to be fulfilled before the agreement of purchase and sale became effective?

2. If the plaintiffs succeed in the issues raised by the first point, is their remedy limited by the last sentence of para. 16 of the agreement to the return of their deposit?

15 The first point, in the form in which I have stated it, was really raised by the Court itself. We had in mind the line of cases beginning with *Turney v. Zhilka*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447, and including *Queensway Const. v. Trusteel Corpn.*, [1961] S.C.R. 528, 28 D.L.R. (2d) 480, *F.T. Devs. Ltd. v. Sherman*, [1969] S.C.R. 203, 70 D.L.R. (2d) 426, *Barnett v. Harrison*, [1976] 2 S.C.R. 531, 5 N.R. 131, 57 D.L.R. (3d) 225, *George Wimpey Can. Ltd. v. Focal Properties Ltd.*, [1978] 1 S.C.R. 2, 16 N.R. 71 *(sub nom. Focal Properties Ltd. v. George Wimpey Can. Ltd.)*, 78 D.L.R. (3d) 129, *Goetz v. Whitehall Dev. Corpn.*, Court of Appeal Feb. 10, 1978 [Since reported at 19 O.R. (2d) 33].

16 On further consideration, I do not think the doctrine of "true condition precedent" applies to this case. It was necessary, in order to avoid the invalidity that s. 29 of The Planning Act, R.S.O. 1970, c. 349, might otherwise impose on the agreement, to make it conditional upon compliance with that Act: s. 29(7). The Planning Act is complied with by registration of the condominium and The Condominium Act, as amended by 1972 (Ont.) c. 7, s. 1, 1973, c. 121, 1974, c. 133, and 1977, c. 67, then takes over: see *Re Crossroads Apts. Ltd. and Phillips* (1974), 4 O.R. (2d) 72. (The important amendments made by the 1974 Act did not come into force until April 1, 1975. They were not the subject of any argument in this Court nor before Weatherston, J. I am not suggesting those amendments affected the agreement in this case. I simply do not propose to refer to the statute again.)

17 In this case, the parties themselves contemplated that the closing date might arrive before the requisite registrations of the condominium documents had been effected. They did not agree that in such event, the agreement was at an end. On the contrary, they agreed in para. 7 that if the unit was completed and fit for occupancy by the closing date, the plaintiffs would pay the balance of the purchase price, without getting title, and take occupancy of the unit on a rental basis, at the amount of rent stipulated in the agreement.

18 The draft agreement of purchase and sale, as an incomplete printed document, contemplated two true conditions precedent, non-compliance with either of which was to render the agreement automatically null and void, subject to para. 7 thereof. The first, approval of the purchasers by the first mortgagee, was complied with. The second, requiring

registration of the condominium documents by a date to be filled in before the agreement was executed, was filled in "to be designated". It was no condition at all, with that language, let alone a "true condition precedent".

19 In my view, therefore, the defendant cannot rely on non-compliance with true conditions precedent as having put an end to the agreement.

20 It follows that I am in agreement with the trial Judge that when the closing date went by, with neither party doing anything about it, the agreement continued in force. It follows also that the defendant had no right to purport to terminate the agreement on the basis stated in its letter of February 14, 1975. The premises had just become fit for occupancy, and so para. 7 would be applicable. The defendant did not call upon the plaintiffs to pay the balance of the purchase moneys, or to pay rent, or to take occupancy. Instead, the defendant attempted to say the contract was at an end.

21 The plaintiffs did not accept this. They promptly sued for specific performance. Thus they relied on the contract. Did this entitle the defendant to rely on para. 16 of the agreement, which I repeat:

> In the event the transaction is not completed by reason of default on the part of the Vendor, the liability of the Vendor hereunder shall be limited to the return to the Purchaser of the deposit moneys herein.

22 This is an extraordinary clause. On the defendant's interpretation, it can refuse, arbitrarily, capriciously, or wrongfully, to carry out the bargain it made, and the purchaser's only remedy is to get his money back. The reason for refusal may be only that property values have risen substantially, and the vendor can sell to another purchaser at a much higher price. (This is undoubtedly what happened here.)

23 The trial Judge held that there was "no fundamental breach of contract here but the defendant has repudiated the entire contract and with it the clause limiting its own liability". The distinction between repudiation and fundamental breach is discussed in Cheshire and Fifoot's Law of Contract (8th ed., 1972), pp. 563-568, and the effect of each, at pp. 568-574. These passages make it clear that in the event of either repudiation or fundamental breach by one party, the innocent party may elect whether to treat the contract as discharged, or to treat it as still in force, and seek to enforce it. Here the plaintiffs have clearly chosen the second course. They claimed specific performance, and claimed damages only as an alternative to it. When specific performance became impossible, s. 21 of The Judicature Act, R.S.O. 1970, c. 228, enabled the Court to give damages in lieu thereof.

24 This election to treat the contract as continuing had the effect, in my view, of keeping all of its applicable terms effective, including para. 16. It then becomes a question of what construction is to be placed upon para. 16, in the circumstances of this particular case. I do not accept the defendant's construction of that paragraph as limiting its liability, even in the event of its arbitrary refusal to carry out the contract. In my view, the paragraph was intended to cover default by the defendant in carrying out a term of the contract that required it to do something. This is the ordinary meaning of the word "default". The paragraph was not intended to cover a complete and outright repudiation of the entire contract. As the trial Judge pointed out, the defendant's construction makes its promises meaningless. In my words, it makes the defendant's purported agreement a mere sham; it could perform or not, as it chose. This cannot have been the intention of the parties.

25 It is to be noted that the agreement of purchase and sale had a separate provision, in para. 18, reading:

> 18. If the Vendor is unable to fulfill the requirements of the Act, then the Vendor shall give written notice to the Purchaser or his solicitor and this Agreement, notwithstanding any intervening negotiations, shall be null and void and the purchase moneys paid by the Purchaser shall be returned without interest and without deductions.

26 If para. 16 was as wide in its ambit as the defendant contends, para. 18 would be redundant. The defendant could simply repudiate the contract, in the event of its inability to fulfill the requirements of the Condominium Act, and return the deposit.

27 Since para. 16 does not, in my view, limit the defendant's liability on the facts of this case, the trial judgment is right, and the appeal should be dismissed with costs.

Appeal dismissed.

Tab 12

2015 ONCA 86
Ontario Court of Appeal

1465152 Ontario Ltd. v. Amexon Development Inc.

2015 CarswellOnt 1317, 2015 ONCA 86, 249 A.C.W.S. (3d) 202, 330 O.A.C. 344, 381 D.L.R. (4th) 66, 50 R.P.R. (5th) 167

1465152 Ontario Limited, Respondent and Amexon Development Inc., Appellant

Alexandra Hoy A.C.J.O., K. van Rensburg, David Brown JJ.A.

Heard: January 21, 2015
Judgment: February 6, 2015
Docket: CA C59083

Counsel: Hillel David, for Appellant
Catherine Francis, Mark Freake, for Respondent

Subject: Civil Practice and Procedure; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Remedies

II Injunctions
II.2 Availability of injunctions
II.2.f Injunctions in specific contexts
II.2.f.xi Landlord and tenant
II.2.f.xi.C Miscellaneous

Headnote

Remedies --- Injunctions — Availability of injunctions — Injunctions in specific contexts — Landlord and tenant — Miscellaneous

Tenant leased premises from landlord — In February 2014, landlord delivered notice to vacate to tenant — Tenant brought successful application for declaration that notice to vacate was void, and for permanent injunction restraining landlord from terminating lease — Landlord appealed — Appeal dismissed — There was no basis upon which to interfere with application judge's interpretation of lease, his declaration that notice to vacate was void, and his conclusion that tenant was not contractually limited to remedy in damages — Landlord sought to trespass, and it fell within discretion of application judge to restrain landlord from committing trespass — Application judge did not find that tenant was seeking injunction for improper purpose — Permanent injunction did not constitute disproportionate remedy in circumstances.

Table of Authorities

Cases considered by *David Brown J.A.*:

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 461 N.R. 335, 25 B.L.R. (5th) 1, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 59 B.C.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1 (S.C.C.) — considered

Denovan v. Lee (1989), 9 R.P.R. (2d) 84, 65 D.L.R. (4th) 103, 1989 CarswellBC 519 (B.C. C.A.) — referred to

Evergreen Building Ltd. v. IBI Leaseholds Ltd. (2005), 2005 BCCA 583, 2005 CarswellBC 2848, 38 R.P.R. (4th) 179, 262 D.L.R. (4th) 169, [2006] 3 W.W.R. 616, 219 B.C.A.C. 165, 361 W.A.C. 165, 50 B.C.L.R. (4th) 250 (B.C. C.A.) — considered

Evergreen Building Ltd. v. IBI Leaseholds Ltd. (2006), 2006 CarswellBC 1600, 2006 CarswellBC 1601, 392 W.A.C. 320 (note), 237 B.C.A.C. 320 (note), 357 N.R. 393 (note) (S.C.C.) — referred to

Michael Santarsieri Inc. v. Unicity Mall Ltd. (1999), [2000] 1 W.W.R. 228, 1999 CarswellMan 485, 1 B.L.R. (3d) 48, 181 D.L.R. (4th) 136, 142 Man. R. (2d) 63, 212 W.A.C. 63, 28 R.P.R. (3d) 298 (Man. C.A.) — referred to

Pointe East Windsor Ltd. v. Windsor (City) (2014), 2014 ONCA 467, 2014 CarswellOnt 8045, 374 D.L.R. (4th) 380, 23 M.P.L.R. (5th) 173 (Ont. C.A.) — considered

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 397 N.R. 331, [2010] 1 S.C.R. 69, 281 B.C.A.C. 245, 475 W.A.C. 245, 315 D.L.R. (4th) 385, 2010 CarswellBC 296, 2010 CarswellBC 297, 2010 SCC 4, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, [2010] 3 W.W.R. 387, 100 B.C.L.R. (4th) 201 (S.C.C.) — followed

Authorities considered:

Sharpe, Robert J., *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (looseleaf)

APPEAL by landlord from decision granting tenant's application for declaration that notice to vacate was void, and for permanent injunction restraining landlord from terminating lease.

***David Brown J.A.*:**

Overview

1 Amexon Development Inc., the Landlord of a building located at 1200 Sheppard Avenue East, Toronto, appeals from the judgment of Justice Frederick L. Myers dated June 27, 2014 (the "Judgment"), in which the application judge declared that the February 28, 2014 Notice to Vacate issued by the Landlord to the respondent Tenant, 1465152 Ontario Limited, was void. The application judge also enjoined the Landlord from re-entering the leased premises and from otherwise failing to fulfill its obligations to supply the leased premises with the services and utilities required by the lease.

2 For the reasons set out below, I would dismiss the appeal on the basis that the application judge did not err in his interpretation of the lease for the premises or in exercising his discretion to grant a permanent injunction.

Facts

3 By lease dated April 1, 2000 (the "2000 Lease") the Tenant leased premises at the building for use by the Rubenstein, Siegel law firm. The term of the 2000 Lease was renewed for five years in 2007. Pursuant to an October 12, 2010 Lease Expansion and Extension Agreement (the "Extension Agreement"), the Landlord and Tenant agreed to a further extension of the term until March 31, 2016. The Extension Agreement provided the Tenant with an option to renew for a further five-year term "based on mutually agreed terms and conditions, based on fair market rents." All other terms and conditions of the 2000 Lease remained in full force and effect.

4 Sometime after entering into the Extension Agreement, the Landlord decided it wanted to demolish the building and redevelop the property. The Landlord was able to negotiate lease termination agreements with all the tenants in the building except for the respondent Tenant. Efforts between the parties to negotiate a lease termination agreement spanned several months, but proved unsuccessful.

5 On February 28, 2014, the Landlord delivered to the Tenant a Notice to Vacate which read as follows:

> This is to confirm that services to and in the Building will be turned off as at 12:01 a.m. on September 1, 2014 and as at and from that time you will not have pedestrian or vehicular access to the Building.
>
> Please remove all fixtures and leasehold improvements and fully vacate the Premises by August 31, 2014. Any trade fixtures not removed from the Premises by such date will be disposed of by the Landlord as waste.
>
> Demolition of the Building will occur immediately thereafter.

6 On April 1, 2014, the Tenant commenced an application seeking a variety of declaratory relief, including a declaration that the Notice to Vacate was void, as well as a permanent injunction restraining the Landlord from terminating the lease and trespassing onto the leased premises.

Grounds of appeal

7 The Landlord advances two main grounds of appeal:

> i. The application judge erred in his interpretation of s. 13.07 of the 2000 Lease which, the Landlord contended, limited the remedy the Tenant could seek for any breach of the 2000 Lease to damages; and
>
> ii. The application judge erred in granting a permanent injunction because the leased premises were not unique and the Landlord had offered the Tenant equivalent alternative premises.

The interpretation of s. 13.07 of the 2000 Lease

8 Section 13.07 of the 2000 Lease is entitled "Remedies Generally" and provides, in part, as follows:

> Whenever the Tenant seeks a remedy in order to enforce the observance or performance of one of the terms, covenants and conditions contained in this Lease on the part of the Landlord to be observed or performed, the Tenant's only remedy shall be for such damages as the Tenant shall be able to prove in a court of competent jurisdiction that it has suffered as a result of a breach (if established) by the Landlord in the observance and performance of any of the terms, covenants and conditions contained in this Lease on the part of the Landlord to be observed or performed.

9 The Landlord submits that s. 13.07 limits the remedy available to the Tenant for the Landlord's breach of any of its obligations under the Lease to a claim for compensatory damages. The application judge rejected that submission holding:

> But this is not just any breach. The Landlord is walking away from its fundamental promise. This is not a balanced win-win but an effort by the Landlord to make more money by denying or rescinding its bargain. Allowing landlords to evict tenants because something better has come along is fraught with a risk of abuse. If the law of leases is to change, it will be more incremental, with nuanced protections for both parties.
>
> The limitation of remedies s. 13.07 may be seen to support the notion that the transaction as contemplated was always economic at its core and this would support an efficient breach concept. But the parties cannot oust the jurisdiction of a court of equity. Moreover, I do not read s. 13.07 as applying when the Landlord commits not just

> a breach of covenant, but a complete repudiation of its grant and consideration [and a tort (trespass) to which the clause does not apply].

10 In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, 373 D.L.R. (4th) 393 (S.C.C.), the Supreme Court of Canada held, at paras. 50 to 55, that the interpretation of a contract involves an issue of mixed fact and law on which an appellate court should defer to the application judge, except where it is possible to identify an extricable question of law, such as the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor.

11 The Landlord characterizes s. 13.07 as a type of exclusionary clause which limits the remedies available to the Tenant upon any breach by the Landlord. The Landlord submits that the application judge applied an incorrect principle by failing to follow the approach to contractual interpretation described by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.). At paras. 121 to 123 in that decision the Supreme Court of Canada set out the inquiries a court must make when a party seeks to escape the effect of an exclusion clause or other contractual term to which it had previously agreed. The first inquiry is to ascertain whether "as a matter of interpretation the exclusion clause even *applies* to the circumstances established in the evidence" (emphasis in original). As stated by Binnie J., at para. 122 of *Tercon Contractors*:

> 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.

12 In my view, the application judge followed the principles in *Tercon Contractors* by first inquiring whether s. 13.07 applied to the Notice to Vacate issued by the Landlord. He concluded that it did not because the Landlord had committed "a complete repudiation of its grant and consideration [and a tort (trespass) to which the clause does not apply]." That conclusion was a reasonable one and merits deference for two reasons.

13 First, at the hearing of the appeal the Landlord acknowledged that it did not enjoy any right under the Lease to issue the Notice to Vacate or to insist the Tenant vacate the leased premises so that the Landlord could demolish the building. Sections 13.01 and 13.05 of the Lease specified the circumstances in which the Landlord could re-enter the leased premises. The right of the Landlord to do so under either section required some failure by the Tenant to comply with the Lease. In the present case, the Landlord's February 28, 2014 Notice to Vacate did not allege that the Tenant had breached any provision of the Lease, nor did it identify any specific provision of the Lease under which the Landlord was purporting to re-enter the leased premises.

14 To accept the Landlord's interpretation of s. 13.07 of the Lease would render ss. 13.01 and 13.05 meaningless. The Landlord could ignore those contractual provisions and re-enter the leased premises arbitrarily and without any contractual justification. The Tenant would not be able to restrain the unlawful trespass and could only sue for damages.

15 In oral argument Landlord's counsel acknowledged that the Landlord would not be entitled to invoke s. 13.07 if it was acting arbitrarily or for an improper purpose. The Landlord contended that it had not acted arbitrarily because, in issuing the Notice to Vacate, it was pursuing the legitimate business objective of re-developing the property. The application judge considered and rejected that submission. The application judge found, in essence, that the Landlord was acting arbitrarily, in the sense of without lawful authority or purpose, when he held that the Landlord was trying "to make more money by denying or rescinding its bargain", had committed "a complete repudiation of its grant and consideration [and a tort (trespass) to which the clause does not apply]", and had engaged in "tortious misconduct".

16 A commercially unreasonable interpretation of s. 13.07 would result if the Landlord could act without lawful authority to bring the Lease to an end and re-occupy the premises, and then rely on the disclaimed Lease to prevent the Tenant from restraining the Landlord's unlawful conduct. Section 13.07 applies "[w]henever the tenant seeks a remedy in order to enforce the observance or performance of one of the terms, covenants and conditions contained in this Lease

on the part of the Landlord". Much clearer language would be required in order to restrict the remedies available against the Landlord when it acted arbitrarily and without any basis in the rights conferred on it under the Lease.

17 Second, as his endorsement discloses, the application judge interpreted s. 13.07 in the context of the entire Lease. He found that the Lease did not contain a demolition clause. It was open to the Landlord to negotiate the inclusion of a demolition clause in the Lease, but it did not do so.

18 In sum, I see no basis upon which to interfere with the application judge's interpretation of s. 13.07 of the Lease, his resulting declaration that the February 28, 2014 Notice to Vacate was void, and his conclusion that the Tenant was not contractually limited to a remedy in damages.

The permanent injunction

19 The Landlord also appeals para. 2 of the Judgment in which the application judge ordered that the Landlord was "enjoined from re-entering the Leased Premises and otherwise failing to fulfill its obligations to supply the Leased Premises with services and utilities and all other goods and services required by the Lease."

20 In his endorsement the application judge gave the following reasons for granting the permanent injunction:

> An injunction will only be granted for breach of contract where damages are an inadequate remedy. *Pointe East Windsor* 2014 ONCA 467 (CanLII). Here damages are inadequate because the applicability and quantum of punitive damages and restitutionary damages is so unclear. I cannot say today that the Tenant will be adequately compensated by damages. Moreover, there is still a property law element to a lease despite long- standing recognition as commercial contracts. Injunctions remain a powerful arrow to preserve property rights and to restrain tortious misconduct.

21 The Landlord submits that the application judge erred in granting a permanent injunction for several reasons: (i) an award of damages would adequately compensate the Tenant because the leased premises were not unique or special in any way; (ii) the Tenant was seeking an injunction for an improper purpose, namely to enhance its bargaining position with the Landlord; and, (iii) an injunction was a disproportionate remedy in the circumstances. I do not accept the Landlord's submissions.

22 First, the Landlord contends that in *Pointe East Windsor Ltd. v. Windsor (City)*, 2014 ONCA 467, 374 D.L.R. (4th) 380 (Ont. C.A.), at para. 17, this court held that equitable relief, such as a permanent injunction, is only available where damages are an inadequate remedy. The Landlord submits that the leased premises are not unique, so an award of compensatory damages to the Tenant would serve as an adequate remedy. However, in *Pointe East Windsor Limited*, the issue of remedy arose in the context of an action for breach of contract, not where the holder of an interest in property, such as the Tenant, was alleging a wrongful interference with a proprietary interest.

23 As the law in Ontario currently stands, different considerations apply in the latter circumstance, as was explained in Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (consulted on 30 January 2015), (Toronto: Canada Law Book, 2014), at 4.10 and 4.20:

> Where the plaintiff complains of an interference with property rights, injunctive relief is strongly favored. This is especially so in the case of direct infringement in the nature of trespass.
>
> . . . . .
>
> The reason for the primacy of injunctive relief is that an injunction more accurately reflects the substantive definition of property than does a damages award. It is the very essence of the concept of property that the owner should not be deprived without consent. An injunction brings to bear coercive powers to vindicate that right. Compensatory damages for a continuous and wrongful interference with a property interest offers only limited protection in that the plaintiff is, in effect, deprived of property without consent at an objectively determined price. Special justification

> is required for damages rather than an injunction if the principle of autonomous control over property is to be preserved. A damages award rather than an injunction permits the defendant to carry on interfering with the plaintiff's property. [Footnotes omitted.]

24 The Landlord relies on the decision of the British Columbia Court of Appeal in *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2005 BCCA 583, 50 B.C.L.R. (4th) 250 (B.C. C.A.), leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 43 (S.C.C.), [1] in support of its position that the application judge should not have granted a permanent injunction. That case also involved an argument by a landlord that it should be permitted to re-enter leased premises in order to demolish a building for redevelopment even though the lease did not contain a demolition clause and the tenant had not breached the lease. The British Columbia Court of Appeal, at para. 31 of its reasons, held that the chambers judge had erred in granting a permanent injunction because he had treated the remedies related to a lease and a contract as "water-tight compartments", leading him to ignore the issue of whether damages were an adequate remedy in the circumstances. The British Columbia Court of Appeal re-instated the interim injunction restraining the landlord from breaching the covenant of quiet enjoyment and remitted the issue of the permanent injunction back to the British Columbia Supreme Court for consideration of the equities between the parties.

25 In the present case, the application judge turned his mind to the adequacy of an award of damages and then went on to observe, correctly, that "[i]njunctions remain a powerful arrow to preserve property rights and to restrain tortious misconduct." The Landlord sought to trespass by seeking to enter the leased premises without any authority, terminate the Lease and demolish the leased premises. Under those circumstances it fell within the discretion of the application judge to restrain the Landlord from committing such a trespass, and I see no error in his exercise of that discretion.

26 Second, the Landlord argues that the Tenant was seeking an injunction for an improper purpose, namely to enhance its bargaining position with the Landlord. Such a motivation, according to the Landlord, operated as a reason to deny granting an injunction. Certainly some courts have refused to grant an injunction where they have found that the request for injunctive relief was being used to force a hard bargain rather than protecting the actual enjoyment of *bona fide* property rights: *Michael Santarsieri Inc. v. Unicity Mall Ltd.* (1999), 181 D.L.R. (4th) 136 (Man. C.A.), at para. 25 and *Denovan v. Lee* (1989), 65 D.L.R. (4th) 103 (B.C. C.A.), at p. 106. In the present case, however, the application judge made no such finding of improper purpose on the part of the Tenant and, by contrast, found that the Landlord had engaged in tortious misconduct.

27 Finally, the Landlord submits that the permanent injunction constituted a disproportionate remedy in the circumstances, arguing that it was unreasonable to permit the Tenant to continue to occupy premises which amounted to less than three per cent of the building's total rental area when all other tenants had vacated the building. I would not accept that submission for two reasons. First, as pointed out in *Injunctions and Specific Performance*, at 4.590:

> Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favoring injunctive relief is even stronger than in the nuisance cases. Especially where the trespass is deliberate and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction. A damages award in such circumstances amounts to an expropriation without legislative sanction ... In trespass, there has been less concern than in nuisance with the problem of "extortion". Even if the plaintiff is merely holding out for the highest possible price, and suffers no out-of-pocket loss because of the trespass, the courts have awarded injunctions. Such orders may be said to vindicate the plaintiff's right to exploit the property for whatever it is worth to the defendant and prevent the defendant from circumventing the bargaining process. [Footnotes omitted.]

28 In addition, the application judge balanced the parties' respective interests and tailored the scope of the injunction to that which was necessary to restrain the specific unlawful conduct of the Landlord — i.e. its intention to trespass onto the leased premises pursuant to the Notice to Vacate in order to terminate the tenancy. His endorsement clearly states that the injunction would not protect the Tenant from the consequences of future breaches or future application of the Lease, nor did it address the issue of the right of the Tenant to renew the Lease upon the expiry of its current term on March 31, 2016.

Disposition

29 For those reasons, I would dismiss the appeal. The parties agreed that in the event the appeal did not succeed, the Landlord would pay the Tenant costs, all-in, of $25,000, and I so order.

***Alexandra Hoy A.C.J.O.*:**

I agree

***K. van Rensburg J.A.*:**

I agree

Appeal dismissed.

Footnotes

1 The appeal was subsequently abandoned. See Supreme Court of Canada, *IBI Leaseholds Ltd. v Evergreen Building Ltd.* (December 3, 2012), online: <http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=31286>.

Tab 13

1987 CarswellBC 76
British Columbia Court of Appeal

Principal Investments Ltd. v. Thiele Estate

1987 CarswellBC 76, [1987] B.C.W.L.D. 1601, 12 B.C.L.R. (2d) 258, 37 D.L.R. (4th) 398, 4 A.C.W.S. (3d) 123

PRINCIPAL INVESTMENTS LTD. v.THIELE ESTATE (THIELE) and BROWN

Craig, Aikins and McLachlin JJ.A.

Judgment: March 31, 1987
Docket: Vancouver No. CA003410

Counsel: *J.K. Lowes*, for appellant.
R.A. Kasting, for respondents.

Subject: Civil Practice and Procedure; Property; Contracts; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Commercial law

V Sale of goods
V.9 Buyer's remedies
V.9.c Consumer protection legislation
V.9.c.i Applicability of legislation

Equity

IV Relief from unconscionable transactions
IV.1 Unconscionable or improvident transactions
IV.1.b Inequality of bargaining power

Public law

VIII Statutory and public holidays
VIII.2 Federal legislation
VIII.2.c Prohibited activities
VIII.2.c.iii Contracts
VIII.2.c.iii.B Sale of land

Real property

III Sale of land
III.4 Remedies
III.4.h Damages
III.4.h.viii Miscellaneous

Headnote

Equity --- Relief from unconscionable transactions — Unconscionable or improvident transactions — Inequality of bargaining power

Sale of Goods --- Buyer's remedies — Consumer protection legislation — Applicability of legislation

Sale of Land --- Remedies — Damages

Sunday Observance and Public Holidays --- Federal legislation — Prohibited activities — Contracts — Sale of land — General

Sale of land — Validity and enforceability — Contracts in contravention of statute — Unconscionable transactions — Plaintiff suing defendants for breach of contract for purchase of land — Appeal allowed from dismissal of action based on contract being unconscionable, void for uncertainty and void under Lord's Day Act — Evidence not establishing inequality of bargaining power or substantial unfairness or lack of certainty of terms — Lord's Day Act not invalidating contract.

Sunday observance — Plaintiff suing defendants for breach of contract for purchase of land — Appeal allowed from dismissal of action based on contract being unconscionable, void for uncertainty and void under Lord's Day Act — Evidence not establishing inequality of bargaining power or substantial unfairness or lack of certainty of terms — Lord's Day Act not invalidating contract.

In 1981 the plaintiff offered a house for sale in Vancouver. The defendant B. and her mother, T., since deceased, liked the house but considered it too expensive, since T., for whom the house was to be bought, had insufficient funds and little cash income. They came up with the idea of financing the purchase through the sale of T.'s house and a revenue property owned by B. and her husband in Surrey. An agreement to that effect was drawn up on Saturday, 11th July 1981. In this agreement the defendants promised to pay a $9,000 deposit with the balance of the $359,000 purchase price to be secured by six-month mortgages on the two properties of the defendants. The balance was payable when the properties were sold or at the end of the six months. On Sunday, 12th July 1981, the parties executed an amending agreement increasing the down payment to $30,000 and reducing the mortgage interest rate. A few days later the defendants gave notice to the plaintiff that they would not complete. The house was ultimately sold for $230,000 and the plaintiff brought an action for damages. The trial judge held that the agreement should be set aside as being unconscionable under the Consumer Protection Act, that it was void for uncertainty and void or unenforceable under the Lord's Day Act. The plaintiff appealed.

Held:

Appeal allowed.

Section 43 of the Consumer Protection Act, which deals with land transactions, came into force in October 1981. Nothing in the language of s. 43 justified the conclusion that it was intended to have retrospective application, and it did not apply to this transaction. At common law, in order to establish that a contract is unconscionable, it is necessary to establish that there was inequality in the positions of the parties arising out of the ignorance, need or distress of one party, and also substantial unfairness in the bargain. There was no evidence here of undue pressure by the plaintiff, or of misrepresentations or inequality of bargaining power. Nor was the agreement unfair or improvident, since each party bore some risk. The agreement was not void for uncertainty, as all the essential elements were present.

As for the Lord's Day Act, if the amendments made on Sunday were merely a variation of the agreement made on Saturday, the Act did not apply. If the Sunday agreement was a new contract and void, the Saturday agreement was still in force. If it was a new contract and merely unenforceable, then the Act did not apply, since the Act was inoperable as at the date of trial because of the Charter of Rights.

Table of Authorities

Cases considered:

Ball v. Crawford (1983), 53 B.C.L.R. 153, 31 R.P.R. 58 (C.A.) — *referred to*

Beaudoin-Daigneault v. Richard, [1984] 1 S.C.R. 2, 37 R.F.L. (2d) 225, 51 N.R. 288 [Que.] — *referred to*

First City Invt. Ltd. v. Fraser Arms Hotel Ltd.; Cumberland Mtge. Corp. v. Fraser Arms Hotel Ltd., 13 B.C.L.R. 107, [1979] 6 W.W.R. 125, 104 D.L.R. (3d) 617 (B.C.C.A.) — *referred to*

Goodman's Indust. Maintenance Ltd. v. Serendipety Pools (West) Ltd., [1981] 5 W.W.R. 683, 126 D.L.R. (3d) 140, 10 Man. R. (2d) 132 (C.A.) — *referred to*

Harry v. Kreutziger (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.) — *referred to*

Matejka, Re (1984), 53 B.C.L.R. 227, 39 R.F.L. (2d) 453, 16 E.T.R. 304, 8 D.L.R. (4th) 481 (C.A.) — *referred to*

Morrison v. Coast Fin. Ltd. (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.) — *referred to*

Noble v. Ward (1867), L.R. 2 Exch. 135 — *referred to*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81 — *referred to*

Stein v. The Kathy K (Storm Point), [1976] 2 S.C.R. 802, 62 D.L.R. (3d) 1, 6 N.R. 359 [Fed.] — *referred to*

Superior Motors Ltd. v. Cade, 24 Sask. L.R. 558, [1930] 2 W.W.R. 448, [1930] 3 D.L.R. 1003 (C.A.) — *referred to*

United Dom. Corp. (Jamaica) Ltd. v. Shoucair, [1969] 1 A.C. 340, [1968] 3 W.L.R. 893, [1968] 2 All E.R. 904 (P.C.) — *referred to*

Statutes considered:

Canadian Charter of Rights and Freedoms

Consumer Protection Act, R.S.B.C. 1979, c. 65

s. 42

s. 43 [am. 1980, c.6, s.20]

Lord's Day Act, R.S.C. 1970, c. L-13

Appeal from judgment dismissing action for damages for breach of contract of sale of land.

The judgment of the court was delivered by *McLachlin J.A.*:

1 The appellant Principal Investments Ltd. appeals from the dismissal of its action for damages for breach of contract for the sale of a house to Agnes Thiele and Gladys Brown. The appeal raises questions of whether the contract should be set aside for unconscionability, whether the contract is void for uncertainty, and whether the contract is void or unenforceable under the Lord's Day Act.

The facts

2 In July 1981 Principal Investments Ltd. offered for sale a house which it owned in the Oakridge area of Vancouver. The asking price was $359,000.

3 Gladys Brown, a school teacher, decided that the house would be a suitable one for her mother, Agnes Thiele. She confirmed with Mr. Wauthier, principal of Principal Investments Ltd., that the house was for sale and informed him that her mother was interested and that she would bring her mother to see it.

4 The next day, 8th July 1981, Mrs. Brown and Mrs. Thiele inspected the house together. Mrs. Thiele liked the house but considered it too expensive for her.

5 Mrs. Brown came up with the idea of paying for the house by proceeds obtained from the sale of a house which her mother owned in the Kitsilano area of Vancouver and a revenue property that Mrs. Brown and her husband had recently purchased in Surrey. The next day, 9th July, she and Mrs. Thiele again visited the Oakridge house and informed Mr. Wauthier that they did not feel they could afford it. Mrs. Brown's idea of paying for the house by the sale of Mrs. Thiele's existing house and the revenue property in Surrey was discussed with Mr. Wauthier. Mr. Wauthier told the women that he was experienced in finance and agreed that by combining the Surrey and Kitsilano properties they could probably afford the Oakridge house.

6 The following day, 10th July, Mrs. Thiele, Mrs. Brown and Mr. and Mrs. Wauthier visited the Surrey property and the Kitsilano property and made rough estimates of their probable values. Dave Brown, Mrs. Brown's husband, also visited the Kitsilano property and later he and Mr. and Mrs. Wauthier inspected the Oakridge property. The parties again talked about financing the purchase through the sale of the Surrey and Kitsilano properties. That evening, the Browns and Mrs. Thiele discussed the matter among themselves.

7 On the morning of Saturday, 11th July 1981, Mrs. Brown and Mrs. Thiele again visited the Oakridge house. As she entered, Mrs. Brown told Mr. Wauthier that he should take the "for sale" sign down. Further discussions ensued and an interim agreement was drawn up and executed whereby Principal agreed to sell the house to Mrs. Thiele and Mrs. Brown for $359,000. Mrs. Brown gave Mr. Wauthier a cheque for $9,000 payable to Principal as a deposit. The purchasers agreed to give Principal three-month mortgages on Mrs. Thiele's Vancouver house and the Browns' Surrey property, renewable for a further three months, bearing interest at 6 per cent per annum. The balance of the purchase price was to be paid when the mortgaged properties were sold or at the expiry of the six-month term of the mortgages.

8 When he learned about the transaction that day, Mrs. Brown's husband expressed misgivings. As a result, Mrs. Brown went once again to the Oakridge house and asked for the return of her cheque. Mr. Wauthier told her that she had a case of the "jitters" and that he would talk to her husband the next morning. He did not return the cheque.

9 On Sunday, 12th July 1981, Mr. Wauthier drove to the Browns' home where he once again reviewed the matter with them and with Mrs. Thiele. Mr. Brown's concern, it turned out, was over the amount of the interest payable under the agreement. As a result of further discussion, a new document was executed whereby the interest was reduced from 12 per cent to 6 per cent per annum and the down payment was increased from $9,000 to $30,000. Mrs. Brown gave Mr. Wauthier two cheques to make up the down payment. The parties parted, apparently happy.

10 A few days later Principal was advised that the purchasers were not prepared to complete the purchase. The cheques tendered by way of down payment were not honoured.

11 Principal, while demanding that the purchasers complete their contract, put the house on the market. It ultimately sold, in September 1983, for $230,000.

12 Principal sued for specific performance of the contract and, alternatively, for damages. Principal abandoned its claim for specific performance at trial, the house having been sold shortly before the matter came on for trial.

13 The trial judge dismissed Principal's claim on the grounds that the transaction should be set aside as being unconscionable under the Consumer Protection Act; that the contract was void for uncertainty; and that the contract was void or unenforceable under the Lord's Day Act.

14 Principal, on this appeal, contends that the trial judge erred in all of these conclusions. Insofar as the conclusions involve findings of fact, Principal submits that the trial judge's conclusions are unsupported by the evidence and so unreasonable as to constitute clear and overriding error, permitting this court to interfere.

1. Unconscionability

15 The trial judge concluded that the interim agreement was unconscionable within s. 43 of the Consumer Protection Act, R.S.B.C. 1979, c. 65. The appellant Principal submits that, quite apart from the facts, this conclusion is in error because s. 43 did not come into force until 15th October 1981, some months after the contract was made. The respondents reply that s. 43 operates retrospectively.

16 I see nothing in the language of the Consumer Protection Act in general and in s. 43 in particular to indicate that the legislators intended it to have retroactive or retrospective application. Sections 42 and 43, it is true, refer to the time the mortgage transaction "was entered into". However, the use of the past tense does not, in my opinion, reflect an intention that the Act should apply to contracts made before its proclamation. Rather, the past tense is used to distinguish between the time when the court is making a determination of unconscionability (where the present tense is used) and the time when the mortgage transaction was entered into (where the past tense is used). Before a court will hold a statute to have retroactive or retrospective effect, it must be satisfied that it is clear, from the terms of the statute or by necessary implication, that it was intended to have that effect: *Re Matejka* (1984), 53 B.C.L.R. 227 at 230-231, 39 R.F.L. (2d) 453, 16 E.T.R. 304, 8 D.L.R. (4th) 481 (C.A.). The statutory provisions here in question do not meet that test. Accordingly, I am satisfied that the trial judge erred in concluding that the agreement should be set aside under the Consumer Protection Act.

17 It remains to consider whether the contract in question should be set aside as unconscionable at common law quite apart from the provisions of the Consumer Protection Act.

18 The question of unconscionability is one of mixed fact and law. The trial judge's conclusions as to the events which occurred are questions of fact with which this court may interfere only if clear and overriding error is established: *Stein v. The Kathy K (Storm Point)*, [1976] 2 S.C.R. 802, 62 D.L.R. (3d) 1, 6 N.R. 359 [Fed.]; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2 at 8, 37 R.F.L. (2d) 225, 51 N.R. 288 [Que.]. On the other hand, determination of whether the established facts support a conclusion of unconscionability on the ap plicable legal principles is primarily a question of law, with which this court can interfere if it finds the conclusion to be wrong.

19 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: *Morrison 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.).

20 With respect to the first requirement of an unconscionable transaction, the trial judge made the following comments.

21 (a) That Mr. Wauthier "would not take no for an answer" when told that Mrs. Thiele could not afford the house;

22 (b) That Mr. Wauthier "(falsely ...) posed as a financial expert";

23 (c) That Mr. Wauthier "said he could show the defendants how they could get the house with money to spare";

24 (d) That Mr. Wauthier "presumed to size up for [the purchasers] the values of Vine Street and Surrey properties without the slightest knowledge or experience in evaluation";

25 (e) That Mr. Wauthier "worked on [the purchasers'] sensibilities as devout Catholics";

26 (f) That Mr. Wauthier represented the house to Mrs. Thiele as maintenance free when in fact it was "far from that";

27 (g) That Mr. Wauthier "asserted that not one but two prospective tenants were available to share the house and not only look after the lawn but pay an incredible figure for rent";

28 (h) That, recognizing that Mrs. Brown was desperate to get her cheque back on the Saturday, Mr. Wauthier kept it as a bargaining cipher for "negotiations" which took place the following day;

29 (i) That Mr. Wauthier "was attempting to rush the purchasers into a transaction";

30 (j) That the purchasers "were not afforded an opportunity to seek competent independent advice"; indeed, Mr. Wauthier wanted "at all costs" "to isolate the defendants from an independent advice in the certain knowledge that competent advice would have killed the sale at first glance";

31 (k) That the advice of Mr. Wauthier "was not only suspect, it was thoroughly one-sided improvident from the standpoint of the defendants and bad".

32 With respect to the second requirement of an unconscionable transaction, that the transaction be unfair, the trial judge said:

33 (a) "The plaintiff took no risk whatever";

34 (b) Mr. Wauthier "intended that the total risk be placed on the backs of two naive and unsuspecting ladies";

35 (c) "If there was a shortfall there is no evidence to suggest how or from what fund it could be made up save from the sale of the McGuigan Street (the subject) property";

36 (d) The transaction into which Mr. Wauthier "was attempting to rush the defendants" called for "adjustments to be calculated prior to possession, completion to be more than seven days and perhaps less from the date of sale, possession 'on date mortgage signed or before date' whatever that may mean".

37 Having carefully perused the transcript, I am satisfied that these conclusions and the inferences of unconscionability which the trial judge drew from them are not supported on the evidence. It is not a question of the court assessing the credibility of witnesses differently than the trial judge did. The evidence, for the most part, was clear and uncontradictory. Disregarding Mr. Wauthier's evidence entirely, and relying solely on the evidence of the defendants, I am driven to conclude that there is no sound factual basis for the trial judge's overall conclusions.

38 There is no evidence that Mr. Wauthier would not take no for an answer or otherwise unduly pressured Mrs. Brown and Mrs. Thiele. It was Mrs. Brown who approached Mr. Wauthier in the first place. It was she who on repeated visits to the premises pursued the purchase of the house. It was she who, apparently unprompted, told Mr. Wauthier to take the signs down and made the decision to buy, and it was she who conceived the idea of selling her mother's house and the Browns' investment property as a means of paying for the Oakridge house. The parties together visited the

properties in ques tion to determine if their value might be sufficient to support the purchase. None were professionals. While Mr. Wauthier stated that he dealt in finances (which was true to a limited extent, although not in the field of real estate), the evidence does not support the view that the purchasers relied on him with respect to the value of the property or the wisdom of mortgaging and eventually selling the other properties for the purpose of buying the Oakridge house. Rather, Mrs. Brown did her own calculations and substituted her own figures for the value of the properties as she thought appropriate.

39 Nor is inequality of bargaining power made out. Mrs. Brown had previously been involved in the purchase of real estate for investment purposes and was a professional school teacher. She was advised by her husband who had similarly been involved in the purchase of real estate.

40 Finally, the evidence does not establish misrepresentations as to the nature of the property. Nor does it establish that Mr. Wauthier played on Mrs. Brown's and Mrs. Thiele's sensibilities as devout Catholics. The negotiations took place over six days, affording ample opportunity to the purchasers to obtain independent advice had they wished to do so.

41 Similarly, the trial judge's conclusions with respect to the second requirement of an unconscionable transaction, namely, that it be unfair and improvident, are not supported by the evidence. The trial judge does not address this issue directly. However, he appears to have felt that the agreement was unfair from the point of view of the purchaser because a shortfall in the price obtained for the properties to be sold might require the eventual sale of the Oakridge house. The risk, as he put it, was all on the purchasers.

42 It is my conclusion that the purchasers failed to adduce any evidence capable of supporting the conclusion that the bargain was improvident or unfair. The purchasers very much wanted the house, which they viewed as ideal for Mrs. Thiele's particular needs. The vendor, understandably, wished to sell. The problem the parties faced was the fact that Mrs. Thiele had insufficient funds and very little monthly cash flow. They set about to solve this problem by an arrangement whereby payment of the purchase price was deferred for a reasonable time, allowing the purchasers time to raise funds, while securing the purchase price on assets other than the subject property.

43 This arrangement had various advantages and disadvantages for both the vendor and the purchasers. From the vendor's point of view, the agreement, if it had been completed, would have given the ven dor what it wished to obtain, i.e., cash in return for the Oakridge house. On the other hand, apart from the relatively small down payment, the vendor would have been obliged to wait for up to six months for payment. In the meantime, it had agreed to accept an interest rate far below that prevailing in the market.

44 From the point of view of the purchasers, the agreement had the advantage of "holding" the property while the Surrey and Kitsilano properties were sold. This was of great importance to the purchasers who were afraid that if the property remained on the market someone else would buy it and it would be lost to them. They would virtually obtain immediate possession of the house and would be paying interest at rates far below market without any periodic payments in the period during which they were raising the purchase price by the sale of their other properties. Of course, the ultimate risk, should they be unable to raise the money, was with the purchasers. This is not inappropriate; a purchaser, who commits himself or herself to payments as a consequence of which the property is removed from the market-place, can reasonably expect to bear the risk should he or she fail to perform the purchaser's agreed obligations. Moreover, the purchasers adduced no evidence suggesting that there would in fact have been a shortfall had they sold the Surrey and Kitsilano properties and proceeded with the transaction. Insofar as Mr. Wauthier's statements about maintenance and the prospect of renters may be shown to have any bearing on the purchasers' decision to purchase, it was not established that either of these representations was untrue, or that, had the purchasers completed the transaction, they would have been unable to retain possession of or maintain the house.

45 In summary, there is no evidence capable of supporting the conclusion that the purchasers were disadvantaged by reason of undue pressure or their inferior position or knowledge, or that the transaction into which they entered was

unfair or improvident. The trial judge's error lay in the unwarranted inferences which he drew from the facts, which were virtually undisputed. That being the case, this court can and must intervene.

46 I would set aside the trial judge's conclusions with respect to unconscionability.

2. Uncertainty

47 I am satisfied that the agreement is not void for uncertainty. All the essential terms are spelled out. The property to be sold is at 66 McGuigan Avenue in Vancouver and the purchase price was $359,000. Title was to be conveyed on 19th July 1981 or sooner, and possession was to be granted on the date that the mortgage to secure the unpaid purchase price was executed, on 19th July 1981. Adjustments were to be made as of 11th July 1981. The identity of the purchasers and vendors is clearly established. It was agreed in writing that the purchase price was to be paid by specified instalments with the balance, together with interest at 6 per cent per annum to be paid within three months of the execution of the mortgage which secured the balance. It was further agreed that the vendor would renew the mortgage for another three months on the same terms at the request of the purchasers. The identity of the properties to be mortgaged is clear.

48 In short, there is no ambiguity on the face of the agreement. All the essential terms are present. In these circumstances, it is unnecessary to have recourse to the principle of construction that the court will seek if possible to uphold an agreement and give effect to the intention of the parties in the event of a lack of clear expression of such intention in the document to be construed: *First City Invt. Ltd. v. Fraser Arms Hotel Ltd.*; *Cumberland Mtge. Corp. v. Fraser Arms Hotel Ltd.*, 13 B.C.L.R. 107, [1979] 6 W.W.R. 125, 104 D.L.R. (3d) 617 (C.A.).

3. The Lord's Day Act

49 The first interim agreement was signed on a Saturday. The next day, Sunday, the parties agreed to certain changes and typed up and signed a new appendix to the agreement, increasing the amount of the down payment and reducing the interest rate on the balance of the purchase price secured by the mortgages from 12 per cent to 6 per cent per annum.

50 The trial judge accepted the purchasers' submission that the contract was made on a Sunday and hence was unenforceable. He said:

> Finally, the matter of the Lord's Day Act. The defendants signed a schedule containing the terms of the sale on Sunday. As those provisions were to govern the contract but were vitiated by the Lord's Day Act, I hold the whole contract vitiated by that Act.

51 I am satisfied that the Lord's Day Act does not vitiate the contract. The first question must be whether the discussions and signature of a new schedule on Sunday amounted to a variation of the contract arrived at on Saturday (in which case the contract would be made on Saturday), or whether, on the other hand, the discussions had the effect of discharging the Saturday contract and replacing it with a fresh contract wholly made on Sunday. However one answers this question, the respondents' contention must fail.

52 If the Sunday amendments constituted a mere variation of the contract, then the contract remained one which was essentially made on Saturday, 11th July 1981, and, consequently, does not fall within the ambit of the Lord's Day Act as interpreted by the authorities: *Ball v. Crawford* (1983), 53 B.C.L.R. 153, 31 R.P.R. 58 (C.A.).

53 On the other hand, if the effect of the transaction on Sunday, 12th July, was to create a new agreement discharging and hence invalidating the previous Saturday agreement, the Lord's Day Act still does not apply. The Act could have one of two effects on the Sunday contract. First, it could render it void. In this case it would be void for all purposes, including the purpose of discharging the Saturday contract: *Noble v. Ward* (1867), L.R. 2 Exch. 135; *United Dom. Corp. (Jamaica) Ltd. v. Shoucair*, [1969] 1 A.C. 340, [1968] 3 W.L.R. 893, [1968] 2 All E.R. 904 (P.C.).

54 On the other hand, if the effect of the Lord's Day Act were to render the Sunday contract merely unenforceable (the better view, in my opinion, on the authorities: *Goodman's Indust. Maintenance Ltd. v. Serendipety Pools (West)*

Ltd., [1981] 5 W.W.R. 683, 126 D.L.R. (3d) 140, 10 Man. R. (2d) 132 (C.A.); *Superior Motors Ltd. v. Cade*, 24 Sask. L.R. 558, [1930] 2 W.W.R. 448, [1930] 3 D.L.R. 1003 (C.A.); *Ball v. Crawford*, supra, then the Lord's Day Act has no application because, since the advent of the Charter, it is inoperative: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81. The Charter was not in force at the time the agreement here in question was made. However, the question of whether the agreement is enforceable falls to be determined at the date of trial. At that date, the Lord's Day Act was inoperative. It follows that the agreement would be enforceable as of that date, with the result that the Sunday contract would stand intact.

55 In my view, the respondents, insofar as the argument on the Lord's Day Act is concerned, find themselves on the horns of a dilemma from which they cannot escape. Whatever view one takes of the matter, this defence cannot succeed.

Conclusion

56 I would allow the appeal and refer the matter back to the trial judge for assessment of damages.

Appeal allowed.

Tab 14

2007 SCC 50
Supreme Court of Canada

Domtar Inc. v. ABB Inc.

2007 CarswellQue 10433, 2007 CarswellQue 10434, 2007 SCC 50, [2007] 3 S.C.R. 461, [2007] S.C.J. No. 50, 162 A.C.W.S. (3d) 1050, 287 D.L.R. (4th) 385, 369 N.R. 152, 36 B.L.R. (4th) 1, J.E. 2007-2243

ABB Inc. and Alstom Canada Inc. (Appellants) and Domtar Inc. (Respondent)

Chubb Insurance Company of Canada (Appellant) and Domtar Inc. (Respondent)

Domtar Inc. (Appellant) and Arkwright Mutual Insurance Company (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: November 8, 2006
Judgment: November 22, 2007 *
Docket: 31176, 31177, 31174

Proceedings: affirming *Domtar Inc. c. Arkwright Mutual Insurance Co.* (2005), 2005 CarswellQue 6506, [2005] R.R.A. 1046, 2005 QCCA 732 (C.A. Que.); affirming *Domtar Inc. c. Abb Inc.* (2005), 2005 CarswellQue 6503, 2005 QCCA 733, [2005] R.J.Q. 2267 (C.A. Que.)

Counsel: Éric Mongeau, Patrick Girard, Charles Nadeau for Appellants, ABB Inc., Alstom Canada Inc., Chubb Insurance Company of Canada
André Legrand, Olivier F. Kott, Gregory B. Bordan, Emmanuelle Demers for Appellant / Respondent, Domtar Inc.
Gordon Kugler, Stuart Kugler for Respondent, Arkwright Mutual Insurance Company

Subject: Public; Civil Practice and Procedure; Corporate and Commercial; Contracts; Property; Insurance; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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Headnote

Statutes --- Operation — Repeal — Miscellaneous

D Inc., Canadian paper manufacturer whose principal activities consist of production of pulp and paper, had bought recovery boiler from CEC Inc. — Eighteen months after boiler was put into service, D Inc. discovered numerous leaks and cracks — D Inc. asked CEC Inc. to repair superheater, but CEC Inc. refused — D Inc. decided to replace entire superheater and then initiated legal proceedings against CEC Inc. and Underwriters at Lloyd's ("Lloyd's"), in respect of damage resulting from purchase of boiler — Agreement occurred between D Inc. and Lloyd's — D Inc. also claimed enforcement of performance bond under which second insurance company stood surety for CEC Inc. in respect of its obligations — Finally, D Inc.'s property was covered by all risk insurance policy, issued by third insurer, that excluded damage resulting from breakdown of or defect in recovery boiler — Superior Court of Quebec concluded that problem was not design defect, but rather design feature of superheater — Court found that CEC Inc. had not discharged its duty to inform and, consequently, could not invoke limitation of liability clause — Trial judge condemned CEC Inc. to pay damages, less amount paid by Lloyd's following agreement between D Inc. and

Lloyd's — Because he had found that there was no latent defect, trial judge dismissed action against second insurer relating to performance bond — He also dismissed D Inc.'s claim against third insurer because of exclusion clause — Court of Appeal shared trial's judge views except in respect of absence of latent defect — Court of Appeal also disagreed with trial judge on deducting amount paid by Lloyd's following agreement between D Inc. and Lloyd's — It therefore condemned CEC Inc., solidarily with second insurer, to pay D Inc. $725,938.90 — CEC Inc., D Inc. and second insurer appealed — Appeals dismissed — Main case concerned contract of sale signed by parties on December 31, 1984 — Section 83 of Act respecting the implementation of the reform of the Civil Code provides that rules of Civil Code of Lower Canada ("CCLC") governing legal and conventional warranties continue to apply to contract entered into before 1994 — Since all facts alleged in support of this action occurred before 1994, issues relating to warranty against latent defects had to be resolved by applying CCLC.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — General principles

D Inc., Canadian paper manufacturer whose principal activities consist of production of pulp and paper, had bought recovery boiler from CEC Inc. — Eighteen months after boiler was put into service, D Inc. discovered numerous leaks and cracks — D Inc. asked CEC Inc. to repair superheater, but CEC Inc. refused — D Inc. decided to replace entire superheater and then initiated legal proceedings against CEC Inc. and Underwriters at Lloyd's ("Lloyd's"), in respect of damage resulting from purchase of boiler — Agreement occurred between D Inc. and Lloyd's — D Inc. also claimed enforcement of performance bond under which second insurance company stood surety for CEC Inc. in respect of its obligations — Finally, D Inc.'s property was covered by all risk insurance policy, issued by third insurer, that excluded damage resulting from breakdown of or defect in recovery boiler — Superior Court of Quebec concluded that problem was not design defect, but rather design feature of superheater — Court found that CEC Inc. had not discharged its duty to inform and, consequently, could not invoke limitation of liability clause — Trial judge condemned CEC Inc. to pay damages, less amount paid by Lloyd's following agreement between D Inc. and Lloyd's — Because he had found that there was no latent defect, trial judge dismissed action against second insurer relating to performance bond — He also dismissed D Inc.'s claim against third insurer because of exclusion clause — Court of Appeal shared trial's judge views except in respect of absence of latent defect — Court of Appeal also disagreed with trial judge on deducting amount paid by Lloyd's following agreement between D Inc. and Lloyd's — It therefore condemned CEC Inc., solidarily with second insurer, to pay D Inc. $725,938.90 — CEC Inc., D Inc. and second insurer appealed — Appeals dismissed — Court of Appeal's conclusion that trial judge should have found that there was latent defect in equipment sold was not inconsistent with principle of deference for trial judge's assessment of facts — Rather, issue was one of legal characterization, and therefore question of law — Consequently, Court of Appeal had power to vary trial judge's finding on existence of latent defect.

Commercial law --- Sale of goods — Buyer's remedies — Consumer protection legislation — Applicability of legislation

D Inc., Canadian paper manufacturer whose principal activities consist of production of pulp and paper, had bought recovery boiler from CEC Inc. — Eighteen months after boiler was put into service, D Inc. discovered numerous leaks and cracks — D Inc. asked CEC Inc. to repair superheater, but CEC Inc. refused — D Inc. decided to replace entire superheater and then initiated legal proceedings against CEC Inc. and Underwriters at Lloyd's ("Lloyd's"), in respect of damage resulting from purchase of boiler — Agreement occurred between D Inc. and Lloyd's — D Inc. also claimed enforcement of performance bond under which second insurance company stood surety for CEC Inc. in respect of its obligations — Finally, D Inc.'s property was covered by all risk insurance policy, issued by third insurer, that excluded damage resulting from breakdown of or defect in recovery boiler — Superior Court of Quebec concluded that problem was not design defect, but rather design feature of superheater — Court found that CEC Inc. had not discharged its duty to inform and, consequently, could not invoke limitation of liability clause — Trial judge condemned CEC Inc. to pay damages, less amount paid by Lloyd's following agreement between D Inc. and Lloyd's — Because he had found that there was no latent defect, trial judge dismissed action against second insurer relating to performance bond — He also dismissed D Inc.'s claim against third insurer because of exclusion clause — Court of Appeal shared trial's judge views except in respect of absence of latent defect — Court of Appeal also disagreed with trial judge on deducting amount paid by Lloyd's following agreement between D Inc. and Lloyd's —

It therefore condemned CEC Inc., solidarily with second insurer, to pay D Inc. $725,938.90 — CEC Inc., D Inc. and second insurer appealed — Appeals dismissed — Buyer was entitled to expect that manufacturer guarantee quality of products it design and market — Manufacturers are subject to obligation to disclose latent defects — Buyer's expertise serves to assess whether defect is latent or apparent — Duty to inform derives from general principle of good faith and principle of free and informed consent — Where seller fails to discharge duty to disclose defect, on other hand, it can probably be said at same time that he or she has also breached general duty to inform buyer.

Commercial law --- Sale of goods — Statutory contract — Warranty — Implied warranty — General principles

D Inc., Canadian paper manufacturer whose principal activities consist of production of pulp and paper, had bought recovery boiler from CEC Inc. — Eighteen months after boiler was put into service, D Inc. discovered numerous leaks and cracks — D Inc. asked CEC Inc. to repair superheater, but CEC Inc. refused — D Inc. decided to replace entire superheater and then initiated legal proceedings against CEC Inc. and Underwriters at Lloyd's ("Lloyd's"), in respect of damage resulting from purchase of boiler — Agreement occurred between D Inc. and Lloyd's — D Inc. also claimed enforcement of performance bond under which second insurance company stood surety for CEC Inc. in respect of its obligations — Finally, D Inc.'s property was covered by all risk insurance policy, issued by third insurer, that excluded damage resulting from breakdown of or defect in recovery boiler — Superior Court of Quebec concluded that problem was not design defect, but rather design feature of superheater — Court found that CEC Inc. had not discharged its duty to inform and, consequently, could not invoke limitation of liability clause — Trial judge condemned CEC Inc. to pay damages, less amount paid by Lloyd's following agreement between D Inc. and Lloyd's — Because he had found that there was no latent defect, trial judge dismissed action against second insurer relating to performance bond — He also dismissed D Inc.'s claim against third insurer because of exclusion clause — Court of Appeal shared trial's judge views except in respect of absence of latent defect — Court of Appeal also disagreed with trial judge on deducting amount paid by Lloyd's following agreement between D Inc. and Lloyd's — It therefore condemned CEC Inc., solidarily with second insurer, to pay D Inc. $725,938.90 — CEC Inc., D Inc. and second insurer appealed — Appeals dismissed — Trial judge's conclusion that superheater did not have latent defect was based on two errors — First was to limit definition of defect to problem preventing good from being used at all, while second was to confuse sale of lower-performance version of good with sale of defective one — Defect will be considered to be serious if it renders good unfit for its intended use or so diminishes its usefulness that buyer would not have bought it at price paid — In instant case, numerous leaks and cracks were detected in superheater shorlty after its delivery — This clearly suggested abnormal wear and tear of machine — These findings of fact supported Court of Appeal's conclusion that D Inc. would not have bought such boiler if it had been properly informed of its design.

Commercial law --- Sale of goods — Buyer's remedies — Contractual limitations on remedies — Miscellaneous issues

D Inc., Canadian paper manufacturer whose principal activities consist of production of pulp and paper, had bought recovery boiler from CEC Inc. — Eighteen months after boiler was put into service, D Inc. discovered numerous leaks and cracks — D Inc. asked CEC Inc. to repair superheater, but CEC Inc. refused — D Inc. decided to replace entire superheater and then initiated legal proceedings against CEC Inc. and Underwriters at Lloyd's ("Lloyd's"), in respect of damage resulting from purchase of boiler — Agreement occurred between D Inc. and Lloyd's — D Inc. also claimed enforcement of performance bond under which second insurance company stood surety for CEC Inc. in respect of its obligations — Finally, D Inc.'s property was covered by all risk insurance policy, issued by third insurer, that excluded damage resulting from breakdown of or defect in recovery boiler — Superior Court of Quebec concluded that problem was not design defect, but rather design feature of superheater — Court found that CEC Inc. had not discharged its duty to inform and, consequently, could not invoke limitation of liability clause — Trial judge condemned CEC Inc. to pay damages, less amount paid by Lloyd's following agreement between D Inc. and Lloyd's — Because he had found that there was no latent defect, trial judge dismissed action against second insurer relating to performance bond — He also dismissed D Inc.'s claim against third insurer because of exclusion clause — Court of Appeal shared trial's judge views except in respect of absence of latent defect — Court of Appeal also disagreed with trial judge on deducting amount paid by Lloyd's following agreement between D Inc.

and Lloyd's — It therefore condemned CEC Inc., solidarily with second insurer, to pay D Inc. $725,938.90 — CEC Inc., D Inc. and second insurer appealed — Appeals dismissed — Limitation of liability clause could be relied on only if CEC Inc., as manufacturer, could rebut presumption of knowledge applicable to it — Simply having honest belief in adequacy of its product was not enough to relieve manufacturer of liability — There was latent defect in superheater that CEC Inc. knew or should have known about.

Insurance --- Claims — Settlement and release — General principles

D Inc., Canadian paper manufacturer whose principal activities consist of production of pulp and paper, had bought recovery boiler from CEC Inc. — Eighteen months after boiler was put into service, D Inc. discovered numerous leaks and cracks — D Inc. asked CEC Inc. to repair superheater, but CEC Inc. refused — D Inc. decided to replace entire superheater and then initiated legal proceedings against CEC Inc. and Underwriters at Lloyd's ("Lloyd's"), in respect of damage resulting from purchase of boiler — Agreement occurred between D Inc. and Lloyd's — D Inc. also claimed enforcement of performance bond under which second insurance company stood surety for CEC Inc. in respect of its obligations — Finally, D Inc.'s property was covered by all risk insurance policy, issued by third insurer, that excluded damage resulting from breakdown of or defect in recovery boiler — Superior Court of Quebec concluded that problem was not design defect, but rather design feature of superheater — Court found that CEC Inc. had not discharged its duty to inform and, consequently, could not invoke limitation of liability clause — Trial judge condemned CEC Inc. to pay damages, less amount paid by Lloyd's following agreement between D Inc. and Lloyd's — Because he had found that there was no latent defect, trial judge dismissed action against second insurer relating to performance bond — He also dismissed D Inc.'s claim against third insurer because of exclusion clause — Court of Appeal shared trial's judge views except in respect of absence of latent defect — Court of Appeal also disagreed with trial judge on deducting amount paid by Lloyd's following agreement between D Inc. and Lloyd's — It therefore condemned CEC Inc., solidarily with second insurer, to pay D Inc. $725,938.90 — CEC Inc., D Inc. and second insurer appealed — Appeals dismissed — Because clause in insurance contract between Lloyd's and D Inc. expressly excluded damage resulting from breakdown of or defect in recovery boiler, payment made by Lloyd's could not have been related to damages being claimed by D Inc. — Lloyd's was not, therefore, subrogated to D Inc.'s rights — Court of Appeal's reasons were sound, and there was no need to intervene.

Remedies --- Damages — Practice — Appeals — Grounds for appeal — Quantum unreasonable — Miscellaneous

D Inc., Canadian paper manufacturer whose principal activities consist of production of pulp and paper, had bought recovery boiler from CEC Inc. — Eighteen months after boiler was put into service, D Inc. discovered numerous leaks and cracks — D Inc. asked CEC Inc. to repair superheater, but CEC Inc. refused — D Inc. decided to replace entire superheater and then initiated legal proceedings against CEC Inc. and Underwriters at Lloyd's ("Lloyd's"), in respect of damage resulting from purchase of boiler — Agreement occurred between D Inc. and Lloyd's — D Inc. also claimed enforcement of performance bond under which second insurance company stood surety for CEC Inc. in respect of its obligations — Finally, D Inc.'s property was covered by all risk insurance policy, issued by third insurer, that excluded damage resulting from breakdown of or defect in recovery boiler — Superior Court of Quebec concluded that problem was not design defect, but rather design feature of superheater — Court found that CEC Inc. had not discharged its duty to inform and, consequently, could not invoke limitation of liability clause — Trial judge condemned CEC Inc. to pay damages, less amount paid by Lloyd's following agreement between D Inc. and Lloyd's — Because he had found that there was no latent defect, trial judge dismissed action against second insurer relating to performance bond — He also dismissed D Inc.'s claim against third insurer because of exclusion clause — Court of Appeal shared trial's judge views except in respect of absence of latent defect — Court of Appeal also disagreed with trial judge on deducting amount paid by Lloyd's following agreement between D Inc. and Lloyd's — It therefore condemned CEC Inc., solidarily with second insurer, to pay D Inc. $725,938.90 — CEC Inc., D Inc. and second insurer appealed — Appeals dismissed — Under performance bond contract, second insurer had agreed to guarantee performance of CEC Inc.'s obligations under contract of sale for recovery boiler — Since there was latent defect in superheater, that insurer was solidarily liable for amount of its guarantee as surety in favour of D Inc., as Court of Appeal held.

Insurance --- Extent of risk (exclusions) — Causation — Casualty insurance — Boiler and machinery insurance

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Lois --- Application — Abrogation — Divers

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier qui avait acheté de CEC une chaudière de récupération — Dix-huit mois après la mise en service de la chaudière, D inc. a découvert de nombreuses fuites et fissures — D inc. a demandé à CEC inc. de réparer le surchauffeur, mais CEC inc. a refusé — D inc. a donc choisi de remplacer le surchauffeur en entier et a ensuite entamé des poursuites judiciaires contre CEC inc. et contre Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière — Une règlement hors cour est survenu entre D inc. et la Lloyd's — Par ailleurs, D inc. a réclamé la mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC inc. — Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière — Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du surchauffeur — Elle a conclu que CEC inc. n'avait pas rempli son obligation de renseignement et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité — Juge de première instance a condamné CEC inc. à payer à D inc. des dommages-intérêts, moins le montant du règlement intervenu entre D inc. et la Lloyd's — En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement — Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion — Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché — Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation — Cour d'appel a donc condamné CEC inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — Dossier principal portait sur un contrat de vente conclu entre les parties le 31 décembre 1984 — Article 83 de la Loi sur l'application de la réforme du Code civil prévoit que les règles du Code civil du Bas Canada (« CcBC ») concernant les garanties légales et conventionnelles continuent de s'appliquer à un contrat conclu avant 1994 — Comme tous les faits allégués au soutien de la présente

action s'étaient produits avant 1994, les questions dans le présent dossier concernant la garantie contre les vices cachés devaient être réglées par application du CcBC.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Principes généraux

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier qui avait acheté de CEC une chaudière de récupération — Dix-huit mois après la mise en service de la chaudière, D inc. a découvert de nombreuses fuites et fissures — D inc. a demandé à CEC inc. de réparer le surchauffeur, mais CEC inc. a refusé — D inc. a donc choisi de remplacer le surchauffeur en entier et a ensuite entamé des poursuites judiciaires contre CEC inc. et contre Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière — Une règlement hors cour est survenu entre D inc. et la Lloyd's — Par ailleurs, D inc. a réclamé la mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC inc. — Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière — Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du surchauffeur — Elle a conclu que CEC inc. n'avait pas rempli son obligation de renseignement et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité — Juge de première instance a condamné CEC inc. à payer à D inc. des dommages-intérêts, moins le montant du règlement intervenu entre D inc. et la Lloyd's — En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement — Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion — Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché — Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation — Cour d'appel a donc condamné CEC inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — Cour d'appel, en émettant l'opinion que le juge de première instance aurait dû conclure que l'équipement vendu était affecté d'un vice caché, n'a pas violé le principe de retenue judiciaire à l'égard de la détermination des faits par le juge de première instance — Il s'agissait plutôt d'un problème de qualification juridique, donc d'une question de droit — Par conséquent, la Cour d'appel avait le pouvoir de modifier la conclusion du juge de première instance sur l'existence d'un vice caché.

Droit commercial --- Vente de biens — Recours de l'acheteur — Législation de protection du consommateur — Application de la législation

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inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — Acheteur avait le droit de s'attendre à ce que le fabricant se porte garant de la qualité du produit qu'il conçoit et met en marché — Fabricant a l'obligation de dénoncer les vices cachés — Expertise de l'acheteur se limite à évaluer si le vice est caché ou apparent — Obligation de renseignement du vendeur découlait du principe général de bonne foi et du principe du consentement libre et éclairé — Dans la mesure où le vendeur manque à son obligation de dénoncer un vice, l'on peut probablement affirmer du même coup qu'il aura aussi violé son obligation générale de renseigner l'acheteur.

Droit commercial --- Vente de biens — Contrat prévu par la loi — Garantie — Garantie implicite — Principes généraux

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier qui avait acheté de CEC une chaudière de récupération — Dix-huit mois après la mise en service de la chaudière, D inc. a découvert de nombreuses fuites et fissures — D inc. a demandé à CEC inc. de réparer le surchauffeur, mais CEC inc. a refusé — D inc. a donc choisi de remplacer le surchauffeur en entier et a ensuite entamé des poursuites judiciaires contre CEC inc. et contre Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière — Une règlement hors cour est survenu entre D inc. et la Lloyd's — Par ailleurs, D inc. a réclamé la mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC inc. — Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière — Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du surchauffeur — Elle a conclu que CEC inc. n'avait pas rempli son obligation de renseignement et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité — Juge de première instance a condamné CEC inc. à payer à D inc. des dommages-intérêts, moins le montant du règlement intervenu entre D inc. et la Lloyd's — En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement — Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion — Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché — Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation — Cour d'appel a donc condamné CEC inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — Conclusion du juge de première instance que le surchauffeur n'était pas atteint d'un vice caché reposait sur deux erreurs — D'abord, il définissait le vice uniquement comme un problème qui empêchait toute utilisation du bien, puis il confondait la mise en marché d'une version moins performante d'un bien avec celle d'un bien déficient — Un vice sera considéré grave s'il rend le bien impropre à l'usage auquel on le destine, ou en diminue tellement l'utilité que l'acheteur ne l'aurait pas acheté à ce prix — En l'espèce, de nombreuses fuites et fissures ont rapidement été observées dans le surchauffeur après sa livraison — Cette situation suggérait clairement une usure anormale de l'appareil en question — Ces constatations de fait soutenaient la conclusion de la Cour d'appel à l'effet que D inc. n'aurait pas acheté une telle chaudière si on lui avait fait part des risques associés à sa fabrication.

Droit commercial --- Vente de biens — Recours de l'acheteur — Limites contractuelles au recours — Questions diverses

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier qui avait acheté de CEC une chaudière de récupération — Dix-huit mois après la mise en service de la chaudière, D inc. a découvert de nombreuses fuites et fissures — D inc. a demandé à CEC inc. de réparer le surchauffeur, mais CEC inc. a refusé — D inc. a donc choisi de remplacer le surchauffeur en entier et a ensuite entamé des poursuites judiciaires contre CEC inc. et contre Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière — Une règlement hors cour est survenu entre D inc. et la Lloyd's — Par ailleurs, D inc. a réclamé la mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC inc. — Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière — Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du

surchauffeur — Elle a conclu que CEC inc. n'avait pas rempli son obligation de renseignement et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité — Juge de première instance a condamné CEC inc. à payer à D inc. des dommages-intérêts, moins le montant du règlement intervenu entre D inc. et la Lloyd's — En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement — Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion — Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché — Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation — Cour d'appel a donc condamné CEC inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — Clause limitative de responsabilité ne pouvait être invoquée que si CEC inc., à titre de fabricant, pouvait réfuter la présomption de connaissance qui pesait sur elle — Or, la seule croyance sincère du fabricant quant au caractère adéquat de son produit ne lui permettait pas de s'exonérer de sa responsabilité — Surchauffeur était atteint d'un vice caché que CEC inc. connaissait ou aurait dû connaître.

Assurance --- Réclamations — Transaction et libération — Principes généraux

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier qui avait acheté de CEC une chaudière de récupération — Dix-huit mois après la mise en service de la chaudière, D inc. a découvert de nombreuses fuites et fissures — D inc. a demandé à CEC inc. de réparer le surchauffeur, mais CEC inc. a refusé — D inc. a donc choisi de remplacer le surchauffeur en entier et a ensuite entamé des poursuites judiciaires contre CEC inc. et contre Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière — Une règlement hors cour est survenu entre D inc. et la Lloyd's — Par ailleurs, D inc. a réclamé la mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC inc. — Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière — Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du surchauffeur — Elle a conclu que CEC inc. n'avait pas rempli son obligation de renseignement et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité — Juge de première instance a condamné CEC inc. à payer à D inc. des dommages-intérêts, moins le montant du règlement intervenu entre D inc. et la Lloyd's — En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement — Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion — Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché — Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation — Cour d'appel a donc condamné CEC inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — Puisqu'une clause du contrat d'assurance de la Lloyd's excluait expressément les dommages subis par suite de bris ou de défectuosité de la chaudière de récupération, le paiement versé par Lloyd's ne pouvait viser les dommages réclamés par D inc. — Par conséquent, Lloyd's n'avait pas été subrogée dans les droits de D inc. — Les motifs de la Cour d'appel étaient bien fondés et il n'y avait pas lieu d'intervenir.

Réparations --- Dommages — Procédure — En appel — Motifs pour interjeter appel — Quantum déraisonnable — Divers

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier qui avait acheté de CEC une chaudière de récupération — Dix-huit mois après la mise en service de la chaudière, D inc. a découvert de nombreuses fuites et fissures — D inc. a demandé à CEC inc. de réparer le surchauffeur, mais CEC inc. a refusé — D inc. a donc choisi de remplacer le surchauffeur en entier et a ensuite entamé des poursuites judiciaires contre CEC inc. et contre Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière — Une règlement hors cour est survenu entre D inc. et la Lloyd's — Par ailleurs, D inc. a réclamé la

mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC inc. — Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière — Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du surchauffeur — Elle a conclu que CEC inc. n'avait pas rempli son obligation de renseignement et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité — Juge de première instance a condamné CEC inc. à payer à D inc. des dommages-intérêts, moins le montant du règlement intervenu entre D inc. et la Lloyd's — En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement — Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion — Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché — Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation — Cour d'appel a donc condamné CEC inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — En vertu d'un contrat de cautionnement, l'autre compagnie d'assurance avait accepté de cautionner l'exécution des obligations de CEC inc. découlant du contrat de vente de la chaudière de récupération — Comme le surchauffeur était affecté d'un vice caché, cet assureur était solidairement responsable du montant pour lequel elle s'était engagée à titre de caution envers D inc., comme l'a décidé la Cour d'appel.

Assurance --- Étendue du risque (exclusions) — Cause — Assurance dommages — Assurance bris de machines

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier qui avait acheté de CEC une chaudière de récupération — Dix-huit mois après la mise en service de la chaudière, D inc. a découvert de nombreuses fuites et fissures — D inc. a demandé à CEC inc. de réparer le surchauffeur, mais CEC inc. a refusé — D inc. a donc choisi de remplacer le surchauffeur en entier et a ensuite entamé des poursuites judiciaires contre CEC inc. et contre Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière — Une règlement hors cour est survenu entre D inc. et la Lloyd's — Par ailleurs, D inc. a réclamé la mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC inc. — Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière — Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du surchauffeur — Elle a conclu que CEC inc. n'avait pas rempli son obligation de renseignement et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité — Juge de première instance a condamné CEC inc. à payer à D inc. des dommages-intérêts, moins le montant du règlement intervenu entre D inc. et la Lloyd's — En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement — Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion — Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché — Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation — Cour d'appel a donc condamné CEC inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance — CEC inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois — Pourvois rejetés — Biens de D inc., incluant la chaudière de récupération, étaient protégés par une police d'assurance de dommages tous risques émise par le troisième assureur au moment des événements — Cette police contenait cependant une clause excluant les dommages pour vices cachés de la chaudière — Accepter la prétention de D inc. selon laquelle des parties de la chaudière étaient dissociables du surchauffeur viderait la clause d'exclusion de couverture de sa raison d'être, puisqu'il serait presque toujours possible d'isoler une composante à l'origine du vice — Prétentions de D inc. dans cet appel contre le troisième assureur étaient mal fondées en droit et le coût du remplacement du surchauffeur vicié était exclu de la police d'assurance.

D Inc. was a Canadian paper manufacturer whose principal activities were the production of pulp and paper. In 1984, D Inc. decided to build a new pulp and paper mill in Windsor, Quebec, including the acquisition of a recovery

boiler. CEC Inc., now ABB Inc. and AC Inc., was a company in the business of manufacturing and installing industrial equipment. In August 1984, D Inc. bought from CEC Inc. a recovery boiler for $13,500,000. Eighteen months after the boiler was put into service, D Inc. shut it down for an unscheduled inspection after the superheater began making an unusual noise. Numerous leaks and cracks were then discovered. D Inc. asked CEC Inc. to make the necessary repairs. After the boiler was returned to service, the parties held discussions with a view to finding a permanent solution to the problem. D Inc. asked CEC Inc. to repair the superheater, but CEC Inc. refused. D Inc. decided to replace the entire superheater. D Inc. then initiated legal proceedings against CEC Inc. and a number of insurers, including Underwriters at Lloyd's ("Lloyd's"), in respect of the damage resulting from the purchase of the boiler. An agreement occurred between D Inc. and Lloyd's. D Inc. also claimed the enforcement of a performance bond under which a second insurance company stood surety for CEC Inc. in respect of its obligations. Finally, D Inc.'s property was covered by an all risk insurance policy, issued by a third insurer, that excluded damage resulting from a breakdown of or defect in the recovery boiler.

The Superior Court concluded that the problem was not a design defect, but rather a design feature of the superheater. The Court found that CEC Inc. had not discharged its duty to inform, since it had not given D Inc. the information it possessed about the respective characteristics of tie welds and hinge-pin attachments and, consequently, could not invoke the limitation of liability clause. The trial judge condemned CEC Inc. to pay the damages, less the $1,578,900 (US$1,000,000) paid by Lloyd's, on the basis that Lloyd's was, as a result of that payment, subrogated to D Inc.'s rights. Because he had found that there was no latent defect, the trial judge dismissed the action against the second insurer relating to the performance bond. He also dismissed D Inc.'s claim against the third insurer because of the exclusion clause. The Court of Appeal shared the trial's judge views except in respect of the absence of a latent defect. The Court of Appeal also disagreed with the trial judge on deducting the amount paid by Lloyd's following the agreement. It therefore condemned CEC Inc., solidarily with the second insurer, to pay D Inc. $725,938.90 based on the performance bond.

CEC Inc., D Inc. and the second insurer appealed against this decision.

Held: The appeals were dismissed.

The main case concerned a contract of sale signed by the parties on December 31, 1984. Section 83 of the Act respecting the implementation of the reform of the Civil Code provides that the rules of the Civil Code of Lower Canada ("CCLC") governing legal and conventional warranties continue to apply to a contract entered into before 1994. Since all the facts alleged in support of this action occurred before 1994, the issues relating to the warranty against latent defects had to be resolved by applying the CCLC.

The Court of Appeal's conclusion that the trial judge should have found that there was a latent defect in the equipment sold was not inconsistent with the principle of deference for a trial judge's assessment of the facts. Rather, the issue was one of legal characterization, and therefore a question of law. Consequently, the Court of Appeal had the power to vary the trial judge's finding on the existence of a latent defect.

Manufacturers are considered to be the ultimate experts with respect to the goods, because they have control over the labour and materials used to produce them. Moreover, buyers are entitled to expect that manufacturers guarantee the quality of the products they design and market. Consequently, manufacturers are subject to the strongest presumption of knowledge and to the most exacting obligation to disclose latent defects. The buyer's expertise is also relevant to the analysis, but for a different purpose than the seller's expertise. Whereas the seller's expertise serves to determine the scope of his or her obligation to disclose, that of the buyer serves, rather, to assess whether the defect is latent or apparent. As a manufacturer, CEC Inc. had greater expertise than D Inc. as regards the characteristics of the recovery boiler in question.

The trial judge's conclusion that the superheater did not have a latent defect was based on two errors he made in interpreting the seriousness of the loss of use. The first was to limit the definition of a defect to a problem preventing the good from being used at all, while the second was to confuse the sale of a lower-performance version of a good with the sale of a defective one. A defect will be considered to be serious if it renders the good unfit for its intended use or so diminishes its usefulness that the buyer would not have bought it at the price paid. In the instant case, the superheater was a new product at the time of delivery. After 18 months of use, numerous leaks and cracks were detected in the superheater's various compartments. The cost of these repairs reached $445,483.57, and the boiler was out of service for 13 days. Six months later, a full inspection revealed new leaks and new cracks, including some that were severe. This clearly suggested abnormal wear and tear of the machine. These findings of fact supported the Court of Appeal's conclusion that D Inc. would not have bought such a boiler if it had been properly informed of its design. Where there is a serious problem that affects the use of a good and the manufacturer is aware of the problem, the manufacturer must address the problem to avoid being held liable for it. The manufacturer cannot simply put the product on the market and wait for reactions from users. In all probability, the defect existed at the time of the sale. The defect was not apparent simply because D Inc. was assisted by an expert. Since the cause of the excessive cracking was unknown to both D Inc. and the expert, the defect in this case was indeed latent.

Whereas the warranty against latent defects is expressly provided for in the CCLC and the Civil Code of Quebec, the duty to inform derives instead from the general principle of good faith and the principle of free and informed consent. Furthermore, the scope of the general duty to inform is much broader than that of the disclosure of a latent defect. Where a seller fails to discharge the duty to disclose a defect, on the other hand, it can probably be said at the same time that he or she has also breached the general duty to inform the buyer of a factor of decisive importance in respect of the good sold.

The limitation of liability clause could be relied on only if CEC Inc., as a manufacturer, could rebut the presumption of knowledge applicable to it. It could be seen from the evidence that the technical knowledge of the time had led some of CEC Inc.'s competitors, and even its parent company, to change their standards. Simply having an honest belief in the adequacy of its product was not enough to relieve a manufacturer of liability. There was a latent defect in the superheater that CEC Inc. knew or should have known about. Since CEC Inc. had failed to rebut the presumption of knowledge applicable to it, it could not rely on the limitation of liability clause in its defence.

Because a clause in the insurance contract between Lloyd's and D Inc. expressly excluded damage resulting from a breakdown of or defect in the recovery boiler, the payment made by Lloyd's could not have been related to the damages being claimed by D Inc.. Lloyd's was not, therefore, subrogated to D Inc.'s rights. The Court of Appeal's reasons were sound, and there was no need to intervene.

Under the performance bond contract, the second insurer had agreed to guarantee the performance of CEC Inc.'s obligations under the contract of sale for the recovery boiler. Since there was a latent defect in the superheater, that insurer was solidarily liable for the amount of its guarantee as surety in favour of D Inc., as the Court of Appeal held.

D Inc.'s property, including the recovery boiler, was covered by an all risk insurance policy issued by the third insurer at the time of the events in question. However, the policy contained a clause excluding damage resulting from latent defects in the boiler. To accept D Inc.'s contention that parts of the boiler could be dissociated from the superheater would render the exclusion clause meaningless, since it would in almost every case be possible to isolate one component as the cause of the defect. D Inc.'s submissions in this appeal against the third insurer were unfounded in law and the cost of replacing the defective superheater was excluded under the insurance policy.

D inc. était une papetière canadienne dont les principales activités consistaient en la production de pâte et papier. En 1984, D inc. a décidé de construire une nouvelle usine de pâte et papier à Windsor, au Québec, incluant l'acquisition

d'une chaudière de récupération. CEC Inc., maintenant ABB Inc. et AC Inc., était une compagnie de fabrication et d'installation d'équipement industriel. En août 1984, D inc. a acheté de CEC une chaudière de récupération pour 13 500 000 $. Dix-huit mois après la mise en service de la chaudière, D inc. a procédé à un arrêt imprévu de l'appareil afin de l'inspecter à la suite d'un bruit anormal provenant du surchauffeur. On a alors découvert de nombreuses fuites et fissures. D inc. a demandé à CEC Inc. de procéder aux réparations nécessaires. À la suite de la remise en service de la chaudière, les parties ont poursuivi des discussions afin de trouver une solution permanente au problème. D inc. a demandé à CEC Inc. de réparer le surchauffeur, mais CEC Inc. a refusé. D inc. a donc choisi de remplacer le surchauffeur en entier. D inc. a ensuite entamé des poursuites judiciaires contre CEC Inc. et, parallèlement, contre divers assureurs dont Underwriters at Lloyd's (« Lloyd's ») pour les dommages découlant de l'achat de la chaudière. Une règlement hors cour est survenu entre D inc. et la Lloyd's. Par ailleurs, D inc. a réclamé la mise en oeuvre du cautionnement d'exécution auquel une autre compagnie d'assurance était tenue en garantie des obligations de CEC Inc. Enfin, D inc. était couverte par une police d'assurance tous risques émise par un troisième assureur comportant une exclusion à l'égard des dommages pour les vices cachés de la chaudière.

La Cour supérieure du Québec a conclu qu'il n'y avait pas de vice de conception mais plutôt une particularité technique du surchauffeur. Elle a conclu que CEC Inc. n'avait pas rempli son obligation de renseignement, n'ayant jamais dévoilé les informations sur les caractéristiques respectives des attaches rigides et des attaches souples et, en conséquence, ne pouvait pas invoquer la clause limitative de responsabilité. Le juge de première instance a condamné CEC Inc. à payer à D inc. des dommages-intérêts, moins le montant du paiement de 1 578 900 $ (1 000 000 $US) effectué par Lloyd's, qui aurait opéré subrogation en sa faveur. En raison de sa conclusion quant à l'absence de vice caché, le juge de première instance a rejeté l'action contre l'autre compagnie d'assurance fondée sur le cautionnement. Il a également rejeté l'action de D inc. contre le troisième assureur en raison de la présence de l'exclusion. La Cour d'appel a conclu dans le même sens que la Cour supérieure, sauf en ce qui concerne l'absence de vice caché. Selon elle, le montant du règlement intervenu entre D inc. et la Lloyd's ne devrait pas être déduit du montant de la condamnation. La Cour d'appel a donc condamné CEC Inc. à payer à D inc. un montant de 725 938,90 $, solidairement avec l'autre compagnie d'assurance sur la base du contrat de cautionnement.

CEC Inc., D inc. et l'autre compagnie d'assurance ont formé des pourvois.

Arrêt: Les pourvois ont été rejetés.

Le dossier principal portait sur un contrat de vente conclu entre les parties le 31 décembre 1984. L'article 83 de la Loi sur l'application de la réforme du Code civil prévoit que les règles du Code civil du Bas Canada (« CcBC ») concernant les garanties légales et conventionnelles continuent de s'appliquer à un contrat conclu avant 1994. Comme tous les faits allégués au soutien de la présente action s'étaient produits avant 1994, les questions dans le présent dossier concernant la garantie contre les vices cachés devaient être réglées par application du CcBC.

La Cour d'appel, en émettant l'opinion que le juge de première instance aurait dû conclure que l'équipement vendu était affecté d'un vice caché, n'a pas violé le principe de retenue judiciaire à l'égard de la détermination des faits par le juge de première instance. Il s'agissait plutôt d'un problème de qualification juridique, donc d'une question de droit. Par conséquent, la Cour d'appel avait le pouvoir de modifier la conclusion du juge de première instance sur l'existence d'un vice caché.

Le fabricant est considéré comme l'expert ultime à l'égard du bien puisqu'il contrôle la main-d'oeuvre ainsi que les matériaux utilisés dans la production de ce bien. Aussi, l'acheteur a-t-il le droit de s'attendre à ce que le fabricant se porte garant de la qualité du produit qu'il conçoit et met en marché. En conséquence, le fabricant est assujetti à la présomption de connaissance la plus rigoureuse et à l'obligation la plus exigeante de dénoncer les vices cachés. L'expertise de l'acheteur représente aussi un élément pertinent de l'analyse, mais à un niveau différent de celle du vendeur. En effet, alors que l'expertise de ce dernier permet de déterminer l'étendue de son obligation

de dénonciation, l'expertise de l'acheteur sert plutôt à évaluer si le vice est caché ou apparent. Ainsi, en tant que fabricant, CEC Inc. avait une plus grande expertise que D inc. des caractéristiques de la chaudière de récupération en cause.

La conclusion du juge de première instance que le surchauffeur n'était pas atteint d'un vice caché reposait sur deux erreurs relatives à l'interprétation de la gravité du déficit d'usage. D'abord, il définissait le vice uniquement comme un problème qui empêchait toute utilisation du bien, puis il confondait la mise en marché d'une version moins performante d'un bien avec celle d'un bien déficient. Un vice sera considéré grave s'il rend le bien impropre à l'usage auquel on le destine, ou en diminue tellement l'utilité que l'acheteur ne l'aurait pas acheté à ce prix. En l'espèce, le surchauffeur était un produit neuf au moment de la livraison. Après 18 mois d'utilisation, de nombreuses fuites et fissures ont été observées dans les différents compartiments du surchauffeur. Le coût de ces réparations atteignait 445 483,57 $ et le fonctionnement de la chaudière a été interrompu durant une période de 13 jours. Six mois plus tard, une inspection complète a fait état de l'apparition de nouvelles fuites et de nouvelles fissures, dont certaines étaient sévères. Cette situation suggérait clairement une usure anormale de l'appareil en question. Ces constatations de fait soutenaient la conclusion de la Cour d'appel à l'effet que D inc. n'aurait pas acheté une telle chaudière si on lui avait fait part des risques associés à sa fabrication. Lorsqu'un problème important affecte l'usage du bien et que le fabricant est au courant du problème, il doit y pourvoir s'il entend éviter d'engager sa responsabilité. Il ne peut se contenter de mettre en marché un produit et d'attendre simplement ensuite la réaction des utilisateurs. Le vice existait, selon toute probabilité, au moment de la vente. Le fait que D inc. ait été assistée d'un expert lors de l'achat ne faisait pas en sorte que le vice était apparent. La cause de la fissuration excessive restant inconnue à la fois pour D inc. et pour son expert, le vice en l'espèce était véritablement caché.

Alors que la garantie contre les vices cachés est expressément prévue au CcBC et au Code civil du Québec, l'obligation de renseignement découle plutôt du principe général de bonne foi et du principe du consentement libre et éclairé. De plus, l'obligation générale de renseignement a un champ d'application beaucoup plus vaste que la simple dénonciation d'un vice caché. Par ailleurs, dans la mesure où le vendeur manque à son obligation de dénoncer un vice, l'on peut probablement affirmer du même coup qu'il aura aussi violé son obligation générale de renseigner l'acheteur sur un élément déterminant en rapport avec le bien vendu.

La clause limitative de responsabilité ne pouvait être invoquée que si CEC Inc., à titre de fabricant, pouvait réfuter la présomption de connaissance qui pesait sur elle. Il ressortait de la preuve que les connaissances techniques de l'heure avaient permis à des concurrents, et même à la compagnie-mère de CEC Inc., de modifier leur standard. Or, la seule croyance sincère du fabricant quant au caractère adéquat de son produit ne lui permettait pas de s'exonérer de sa responsabilité. Le surchauffeur était atteint d'un vice caché que CEC Inc. connaissait ou aurait dû connaître. Compte tenu que CEC Inc. n'avait pas réussi à réfuter la présomption de connaissance qui pesait contre elle, elle ne pouvait invoquer en sa faveur la clause limitative de responsabilité.

Puisqu'une clause du contrat d'assurance de la Lloyd's excluait expressément les dommages subis par suite de bris ou de défectuosité de la chaudière de récupération, le paiement versé par Lloyd's ne pouvait viser les dommages réclamés par D inc.. Par conséquent, Lloyd's n'avait pas été subrogée dans les droits de D inc.. Les motifs de la Cour d'appel étaient bien fondés et il n'y avait pas lieu d'intervenir.

En vertu d'un contrat de cautionnement, l'autre compagnie d'assurance avait accepté de cautionner l'exécution des obligations de CEC Inc. découlant du contrat de vente de la chaudière de récupération. Comme le surchauffeur était affecté d'un vice caché, cet assureur était solidairement responsable du montant pour lequel elle s'était engagée à titre de caution envers D inc., comme l'a décidé la Cour d'appel.

Les biens de D inc., incluant la chaudière de récupération, étaient protégés par une police d'assurance de dommages tous risques émise par le troisième assureur au moment des événements. Cette police contenait cependant une clause

excluant les dommages pour vices cachés de la chaudière. Accepter la prétention de D inc. selon laquelle des parties de la chaudière étaient dissociables du surchauffeur viderait la clause d'exclusion de couverture de sa raison d'être, puisqu'il serait presque toujours possible d'isoler une composante à l'origine du vice. Les prétentions de D inc. dans cet appel contre le troisième assureur étaient mal fondées en droit et le coût du remplacement du surchauffeur vicié était exclu de la police d'assurance.

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POURVOI de D inc. à l'encontre d'une décision publiée à *Domtar Inc. c. Arkwright Mutual Insurance Co.* (2005), 2005 CarswellQue 6506, [2005] R.R.A. 1046, 2005 QCCA 732 (C.A. Que.), ayant rejeté l'appel de D inc. à l'encontre d'une décision publiée à *Domtar Inc. v. Arkwright Mutual Insurance Co.* (2003), 2003 CarswellQue 2163, [2003] R.R.A. 1392 (C.S. Que.); POURVOIS de CEC inc. et de l'autre compagnie d'assurance à l'encontre d'une décision publiée à *Domtar Inc. c. Abb Inc.* (2005), 2005 CarswellQue 6503, 2005 QCCA 733, [2005] R.J.Q. 2267 (C.A. Que.), ayant ayant accueilli l'appel de D inc. à l'encontre d'une décision publiée à *Domtar Inc. v. Abb Inc.* (2003), 2003 CarswellQue 1823, [2003] R.J.Q. 2194 (C.S. Que.), ayant accueilli en partie la requête de D inc. à l'encontre de CEC Inc et d'une autre décision publiée à *Combustion Engineering Canada Inc. v. Domtar Inc.* (2003), 2003 CarswellQue 8913 (C.S. Que.), ayant accueilli une action sur compte déposée par CEC inc. à l'encontre de D inc.

***Per curiam*:**

1 The development of Quebec's law of obligations has been marked by efforts to strike a proper balance between, on the one hand, the individual's freedom of contract and, on the other, adherence by contracting parties to the principle of good faith in their mutual relations. This trend in the law of obligations has had a profound influence on the choices made by the Quebec legislature and on the decisions of our courts. It should of course inform the approach of parties to a contract of sale to the exercise of their rights and the performance of their obligations.

2 There are three appeals before the Court. The main case involves a claim concerning a latent defect and pits two major industrial concerns against one another. The other two cases involve incidental claims against insurance companies. This judgment deals with all three of these cases, but we will first discuss the main case, its origins and the issues it raises with regard to the nature and application of certain aspects of the legal framework of contracts of sale in Quebec civil law.

3 Our analysis will focus on the legal warranty against latent defects. We will discuss, *inter alia*, the effect of the parties' level of expertise on their mutual obligations, and the nature of the civil law presumptions regarding knowledge of certain defects. As part of this discussion, we will consider the right of sellers to set limitation of liability clauses up against buyers. Thus, after reviewing the facts and the judicial history, we will discuss the relevant principles and how they apply to the facts of the case at bar.

1. Facts

1.1 Acquisition of a Recovery Boiler by Domtar

4 Domtar Inc. is a Canadian paper manufacturer whose principal activities consist of the production of pulp and paper and of related by-products. In 1984, it decided to build a new pulp and paper mill in Windsor, Quebec. It retained H.A. Simons and Sandwell & Company Limited ("Simons-Sandwell") as consultants for all aspects of the construction of the mill, including the acquisition of a recovery boiler.

5 Combustion Engineering Canada Inc. ("C.E.") (now ABB Inc. and Alstom Canada Inc.) was an international company in the business of manufacturing and installing industrial equipment. It was the largest producer of recovery boilers in Canada. In August 1984, it offered to sell Domtar a recovery boiler with rigid "H-style" tie welds for $13,500,000. Domtar accepted C.E.'s offer on December 31, 1984, and the boiler was put into service on September 21, 1987.

6 The recovery boiler purchased by Domtar was a complex and massive piece of equipment. Its upper portion was equipped with a superheater divided into three banks: the Low Temperature Superheater ("LTSH"), the Intermediate Temperature Superheater ("ITSH") and the High Temperature Superheater ("HTSH"). These banks consisted of 75 miles of tubes, which were connected together by approximately 48,000 tie welds. A recovery boiler, whose purpose is the recovery of black liquor, is designed to be in continuous use, apart from scheduled maintenance periods.

1.2 Appearance of Cracks in and Leaks from the Superheater's Tubes

7 In the 1970s, C.E. had noted that the design of the "A-style" tie welds it was then using was causing cracks to form. To remedy this, it adopted a new design in 1977: the H-style tie weld. Believing that it had in so doing solved the cracking problem, C.E. did not conduct a stress analysis of the new H-style welds. Instead, it waited for comments from its buyers. Between January 1983 and the end of 1986, a number of internal memoranda were circulated at C.E., and at its parent company, regarding problems with the use of H-style tie welds and the resulting dissatisfaction of their customers in the United States and Canada. Furthermore, C.E. had also been using flexible hinge-pin attachments since the early 1980s, and these were recommended to one customer in 1985.

8 Nevertheless, the technical specifications set out in the tender prepared by C.E. for Domtar in August 1984 did not propose a specific type of attachment. Only one discussion on this subject has been mentioned, and it took place during a meeting in October 1984. At that meeting, Domtar's project manager asked C.E. if it would be possible to obtain hinge-pin attachments instead of tie welds. C.E.'s answer was limited to confirming that this was possible and mentioning that this solution would cost an additional $500,000. Domtar did not pursue the matter further.

9 According to Hilton J., the trial judge, it was mentioned in an internal C.E. memorandum in May 1987 that most of the proposals C.E. was submitting to customers involved the use of hinge pins. The author of the memorandum added that for C.E.'s engineering branch, which was responsible for preparing its proposals, hinge-pin attachments had become the new standard. C.E. accordingly began offering hinge-pin attachments in 1988, but to keep its prices competitive, it proposed them only where there were problems with the tie welds or if a buyer specifically requested hinge pins. It did not actually adopt hinge-pin attachments as its standard until the following year. C.E. did not cease entirely to use H-style tie welds, as it still uses them to this day for certain new boilers and for repairs to existing boilers that were delivered with tie welds.

10 On March 24, 1989, 18 months after the boiler was put into service, Domtar shut it down for an unscheduled inspection after the superheater began making an unusual noise. Standard tests revealed 6 leaks and 97 cracks in the ITSH; another 667 cracks were detected in the HTSH. Domtar asked C.E. to make the necessary repairs. During this shutdown, only 20 percent of the welds were inspected in detail. C.E. replaced 99 tie welds in the ITSH and 690 in the HTSH with hinge-pin attachments. The recovery boiler was not returned to service until April 6, 1989.

1.3 Decision to Replace the Superheater

11 After the boiler was returned to service, the parties held discussions with a view to finding a permanent solution to the problem. Domtar asked C.E. to repair the superheater, but C.E. refused. It proposed to Domtar that the HTSH section be replaced with a new one using more hinge-pin attachments, and that all tie welds in the LTSH and ITSH sections be inspected. Domtar instead decided to replace the entire superheater.

12 Because of the disagreement, Domtar initiated legal proceedings against C.E. It also sued a number of insurers, including Underwriters at Lloyd's ("Lloyd's"), in respect of the damage resulting from the purchase of the boiler from C.E. On June 12, 2001, in an agreement entitled "Confidential Settlement Agreement and Release", Domtar agreed to waive a series of insurance claims against Lloyd's in exchange for a total payment of US$10,500,000, including US $1,000,000 expressly identified as being for the settlement "of all past, present and future claims of any and all other types" (*Domtar Inc. v. Abb Inc.*, [2003] R.J.Q. 2194 (C.S. Que.), at para. 228). In accordance with the agreement, it discontinued its action against Lloyd's.

13 Domtar also claimed the enforcement of a performance bond under which Chubb Insurance Company of Canada ("Chubb") stood surety for C.E. in respect of its obligations to Domtar. In a second case, Domtar sued Arkwright Mutual Insurance Company ("Arkwright") under an all risk insurance policy issued to it.

14 In October 1989, Babcock & Wilcox ("B. & W."), another recovery boiler manufacturer, replaced the three banks of the C.E. superheater with elements installed using hinge-pin attachments. After this, a comprehensive analysis of the C.E. superheater revealed three new leaks and a tube failure in the ITSH, as well as 272 cracks in the HTSH, 463 in the ITSH and 124 in the LTSH. The depth of some of the cracks in the ITSH exceeded 50 percent of the thickness of one of the tubes. Domtar used the B. & W. superheater for 10 years without any reported leaks or unscheduled shutdowns because of leaks. This superheater was replaced in 1999.

2. Judicial History

2.1 Quebec Superior Court

15 According to Hilton J., the cracks and leaks related to the use of tie welds did not constitute a design defect, but rather a design feature of the superheater, since the superheater could be used for its intended purpose despite the cracks. However, he found that C.E. had not discharged its duty to inform, since it had not given Domtar the information it possessed about the respective characteristics of tie welds and hinge-pin attachments. The judge was satisfied that Domtar would have opted for hinge-pin attachments had it received this information from C.E. He also felt that while it might have been open to C.E. to set up the limitation of liability clause against a latent defect claim, C.E. could not invoke the clause in the instant case to defend against the consequences of the breach of its duty to inform Domtar. The trial judge condemned C.E. to pay the damages agreed upon by the parties, less the $1,578,900 (US$1,000,000) paid by Lloyd's, on the basis that Lloyd's was, as a result of that payment, subrogated to Domtar's rights.

16 Finally, because he had found that there was no latent defect, the trial judge dismissed the action against Chubb relating to the performance bond: [2003] R.J.Q. 2194 (C.S. Que.). In a separate judgment, he also dismissed Domtar's claim against its other insurer, Arkwright, on the basis that the damage connected with the superheater did not constitute an insured loss: SOQUIJ AZ-50181803.

2.2 Quebec Court of Appeal

17 Although it did not question the trial judge's findings of fact, the Court of Appeal ruled that C.E. was liable on the basis of the legal warranty against latent defects. According to the Court of Appeal, the evidence clearly established that Domtar was looking for a reliable boiler that would operate without interruption, and that C.E. was aware of this. Domtar would not have purchased this boiler had it known that the tie welds would cause unscheduled shutdowns. The Court of Appeal then considered C.E.'s duty to inform. Like the trial judge, it held that C.E. had breached its duty to inform Domtar. Since C.E. knew or was presumed to have known about the defect, it could not rely on the limitation

of liability clause. In the Court of Appeal's opinion, Domtar was accordingly entitled to replace the entire superheater at C.E.'s expense. However, the Court of Appeal disagreed with the trial judge on deducting the $1,578,900 paid by Lloyd's. It therefore allowed Domtar's cross-appeal and increased the quantum of the order against C.E. accordingly: [2005] R.J.Q. 2267, 2005 QCCA 733 (C.A. Que.).

18 The Court of Appeal condemned the insurer Chubb, solidarily with C.E., to pay Domtar $725,938.90 based on the performance bond: 2005 QCCA 730. Finally, in the action against the insurer Arkwright, the Court of Appeal dismissed Domtar's appeal on the basis of the clause excluding from coverage losses resulting from latent defects: [2005] R.R.A. 1046, 2005 QCCA 732 (C.A. Que.).

3. Analysis

3.1 Issues

19 In the main case, the parties put five questions to this Court. First, was there a latent defect in the superheater? Second, did C.E. breach its duty to inform or Domtar its duty to inquire? Third, in what circumstances may a limitation of liability clause be set up against a buyer? Fourth, is Domtar entitled to recover the costs it incurred to replace the superheater? Fifth, was Lloyd's subrogated to Domtar's rights in respect of the payment it made to Domtar?

20 In the two incidental cases, the parties ask the Court to decide whether Domtar may require Chubb to execute its performance bond and whether the replacement of the superheater is a loss covered by Arkwright's all risk insurance policy.

21 We will begin by summarizing the parties' arguments and reviewing the most important of the relevant statutory provisions. We will then turn to the questions of law raised in the three cases.

3.2 Arguments of the Parties in the Main Case

22 C.E. has changed its arguments since the case began. At first, one of its main submissions was that the problems were due to improper use of the superheater. This defence has been abandoned. C.E. now submits that the rigidity of the attachments or the cracking inside the superheater does not constitute a latent defect. It argues that Domtar, as an informed user of recovery boilers, cannot claim to have been unaware of the characteristics of tie welds and hinge-pin attachments and that Domtar breached its own duty to inquire.

23 C.E. also submits that it was protected by a limitation of liability clause, because Domtar had a power of negotiation equal to its own. In C.E.'s view, the voluntary agreement of the parties must therefore prevail. Finally, C.E. argues that Domtar failed to mitigate its damages and that the $1,578,900 payment by Lloyd's to Domtar should reduce Domtar's claim against C.E. accordingly.

24 Domtar defends the Court of Appeal's conclusion that there was a latent defect in the superheater. According to Domtar, C.E. knew or should have known at the time of the sale about the problem with the type of attachments to be used and should have proposed hinge-pin attachments to Domtar. It therefore breached its duty to inform with regard to the likelihood of leaks and cracks associated with the use of tie welds. The decision to replace the superheater was reasonable in light of the information disclosed by C.E.

25 Before turning to the merits of the case, we must resolve two preliminary questions. First, in light of the date and nature of the claim, is it the *Civil Code of Lower Canada* ("C.C.L.C.") or the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), that applies under the transitional law rules? Second, did the Court of Appeal have jurisdiction to interfere with the trial judge's conclusion that there was no latent defect?

3.3 Transitional Law

26 The main case concerns a contract of sale signed by the parties on December 31, 1984. As mentioned above, the parties' arguments require that this Court determine whether there was a latent defect in the superheater and, if so, whether C.E. may rely on a limitation of liability clause.

27 Section 83 of the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57 ("A.I.R.C.C."), provides that the rules of the C.C.L.C. governing legal and conventional warranties continue to apply to a contract entered into before 1994. It reads as follows:

> **83.** In any contract made before [January 1, 1994], the former legislation continues to apply to the warranties, both legal or conventional, to which the contracting parties are obliged between themselves or in respect of their heirs or successors by particular title.

This provision represents a specific application of the general rule in s. 4 A.I.R.C.C. that the former supplementary legislation subsists for the purpose of determining the extent and scope of the parties' rights and obligations and the effects of the contract: *Commentaires du ministre de la Justice* (1993), vol. 3, at p. 71.

28 Section 83 A.I.R.C.C. is complemented in civil liability matters by s. 85 A.I.R.C.C. which reads as follows:

> **85.** The conditions of civil liability are governed by the legislation in force at the time of the fault or act which causes the injury.

In his commentary on this provision, the Minister of Justice took care to specify

> [TRANSLATION] that since the conditions of civil liability are thus governed by the legislation in force at the time of the injurious fault or act, the grounds for exemption from liability, which are necessarily tied to the conditions of that liability, will also be governed by that same legislation ....
>
> (*Commentaires du ministre de la Justice*, vol. 3, at p. 72)

29 Sections 83 and 85 A.I.R.C.C. belong to the chapter setting out special provisions (ss. 11 to 170). In the event of conflict, they take precedence over the Act's general provisions (ss. 2 to 10): P.-A. Côté and D. Jutras, *Le droit transitoire civil: Sources annotées* (loose-leaf), at pp. I/3-1 *et seq.*

30 In the case at bar, Domtar has brought against C.E. an action in contract for damages that is based on the warranty against latent defects. All the facts alleged in support of this action occurred before 1994. In light of ss. 83 and 85 A.I.R.C.C., we conclude that in this case, the issues relating to the warranty against latent defects must be resolved by applying the C.C.L.C.

31 This being said, whether it is the C.C.L.C. or the C.C.Q. that is applied will have no impact on the outcome of the case, since the C.C.Q. essentially reproduces the C.C.L.C.'s rules where the warranty against latent defects in issue here is concerned, despite certain changes in the wording of the provisions relating to the issues of this case. The relevant provisions are reproduced in the Appendix.

32 Finally, the issue of subrogation in respect of the payment made by Lloyd's and the incidental actions involving Chubb and Arkwright do not raise any special problems of transitional law. The answers to these questions depend essentially on a review of the stipulations in the contracts between the parties.

33 At this point, it will be necessary to consider whether the Court of Appeal had the authority to interfere with the trial judge's finding that there was no latent defect. C.E. contests the legitimacy of the Court of Appeal's recharacterization of the defects as latent defects, which it sees as improper interference with the trial judge's assessment of the facts.

3.4 Standard for Intervention by the Court of Appeal

34 In discussing the Court of Appeal's position, it is important to clearly understand the nature of its intervention with regard to the facts. Some fundamental distinctions must be drawn. In *St-Philippe d'Arvida (Paroisse) c. Desgagné*, [1984] 1 S.C.R. 19 (S.C.C.), this Court distinguished the simple assessment of facts from the legal characterization of those facts. Thus, an appellate court has the power, in exercising its jurisdiction, to reach its own legal characterization of the facts even though it accepts the trial judge's assessment of them. Beetz J. stated the following (p. 31):

> Counsel for the respondents and appellant Lauréanne Harvey Desgagné argued that the gradual appearance of the construction defects is a question of fact which is within the exclusive province of the trial judge. That is not my view. Rather, I think it is a question of characterization and so considerably more than a simple question of fact. It is necessary to apply to the facts the legal concept of gradual emergence under art. 2259, just as, for example, in a civil liability case the Court has to decide whether a person's act or omission should be characterized as fault within the meaning of art. 1053. This requires making an essentially normative judgment. It therefore does not entail substituting my own view of the evidence for that of the trial judge, but drawing conclusions in law based on the facts which she herself considered to have been established. When an appellate court accepts all the conclusions of fact as such made by the trial judge, as I do, it is in as good a position as he is to characterize those facts.

35 A few years later, in *Placement Jacpar Inc. c. Benzakour*, [1989] R.J.Q. 2309 (C.A. Que.), at p. 2318, the Court of Appeal confirmed that the legal nature of the distinction between a latent defect and an apparent defect is also a question of law:

> [TRANSLATION] To [Benzakour], the characterization of a latent defect is essentially a question of fact. With respect for the opinion expressed in *Lafontaine v. Audet*, in which this question was seen primarily as one coming within the trier of fact's power of assessment [p. 8 of the reasons of Monet J.A.], this Court's position appears instead to be that this is a legal characterization issue. This Court is in as good a position as the trial judge to rule on it once the trial judge has established the facts on which the conclusions are based.

See to the same effect: *Saltsman c. 1463-0198 Québec inc.* (2002), J.E. 2002-1729 (C.A. Que.) [2002 CarswellQue 1895 (C.A. Que.)], SOQUIJ AZ-50143509, at para. 51; *Rousseau c. 2732-1678 Québec inc.*, [1999] R.D.I. 565 (C.A. Que.), at pp. 568-69; *Wadieh c. Société en commandite A.C. Enr.*, [1997] R.D.I. 345 (C.A. Que.), at p. 348; *Bertrand c. Pelletier*, [1997] R.D.I. 321 (C.A. Que.), at p. 325; *Poirier c. Martucelli*, [1995] R.D.I. 319 (C.A. Que.), at p. 320; *Trottier c. Robitaille*, [1994] R.D.I. 537 (C.A. Que.), at p. 538; *Cloutier c. Létourneau* (1992), [1993] R.L. 530 (C.A. Que.), at p. 531; *Rousseau c. Gagnon* (1986), [1987] R.J.Q. 40 (C.A. Que.), at p. 46.

36 In the instant case, the Court of Appeal began by noting that the parties were not contesting the trial judge's findings of fact (para. 42). Thus, because tie welds were used, it was inevitable that cracks would develop, and probable that leaks would occur (paras. 100-101). According to the Court of Appeal, the trial judge had not attached enough importance to Domtar's intention to keep the recovery boiler in continuous use. It noted that the trial judge had found even so that Domtar would not have purchased the boiler had it known that the tie welds were likely to cause unscheduled shutdowns. Because the unscheduled shutdowns of the boiler resulted in an inability to use it, the Court of Appeal characterized this defect as a latent defect.

37 In intervening, the Court of Appeal did not reassess the evidence in the record. Rather, it relied directly on the trial judge's findings of fact to arrive at a different conclusion of law regarding the nature of the defect (para. 99):

> [TRANSLATION] The trial judge did not find that there was a latent defect in the equipment sold. With respect, we are of the opinion that his findings of fact should have led him to an affirmative conclusion on this point.
>
> [Emphasis added.]

This conclusion is not inconsistent with the principle of deference for a trial judge's assessment of the facts. Rather, the issue here is one of legal characterization, and therefore a question of law. Consequently, the Court of Appeal had the

power to vary the trial judge's finding on the existence of a latent defect. Now that these preliminary issues have been settled, we will turn to the issue of the legal warranty against latent defects in a contract of sale governed by the C.C.L.C.

3.5 Effect of the Status of the Manufacturer and the Buyer on Their Obligations Under the Contract of Sale

38 In the case at bar, C.E. argues that a separate scheme must govern contracts of sale between professional sellers and professional buyers. In its view, the seller's warranty against latent defects should vary depending on the respective expertise of the seller and the buyer. It will therefore be necessary to consider the legal effect of this expertise on rights and obligations under a contract of sale.

39 Where the warranty against latent defects is concerned, the characterization of a party as a manufacturer or a professional seller plays an important role in determining whether that party can be presumed to have known about the defects in the good offered for sale. Article 1527 C.C.L.C. provides that any seller who knows or is legally presumed to know about the defects of the thing is obliged to pay for all damage suffered by the buyer. This provision has been interpreted in Quebec civil law as recognizing three categories of sellers corresponding to the individual's level of expertise: manufacturers, professional sellers (specialized or non-specialized) and non-professional sellers.

40 This categorization will determine whether the presumption of knowledge on the seller's part is applicable and will also, as a corollary, determine the scope of the seller's duty to disclose latent defects. Thus, a non-professional seller is not legally presumed to know about the defects of the good being sold, since selling the good in question is not this person's usual occupation. Professional sellers, however, being far more aware of the characteristics of their merchandise, are subject to the presumption of knowledge.

41 In the case at bar, the category of sellers that interests us most is that of the manufacturer. Manufacturers are considered to be the ultimate experts with respect to the goods, because they have control over the labour and materials used to produce them: J. Edwards, *La garantie de qualité du vendeur en droit québécois* (1998), at p. 289. Moreover, buyers are entitled to expect that manufacturers guarantee the quality of the products they design and market. Consequently, manufacturers are subject to the strongest presumption of knowledge and to the most exacting obligation to disclose latent defects.

42 In the context of the warranty against latent defects, the buyer's expertise is also relevant to the analysis, but for a different purpose than the seller's expertise. Whereas the seller's expertise serves to determine the scope of his or her obligation to disclose, that of the buyer serves, rather, to assess whether the defect is latent or apparent. Thus, the more knowledge a buyer has of a good being purchased, the more likely it is that a defect in that good will be considered apparent. An apparent defect is one that the buyer either detected at the time of the sale or could have detected given his or her knowledge (art. 1523 C.C.L.C. and art. 1726, para. 2 C.C.Q.). Buyers therefore have an obligation to inform *themselves* by carrying out a reasonable inspection of the good. In all cases, the test is whether a reasonable buyer in the same circumstances could have detected the defect at the time of the sale.

43 We will conclude the discussion in this section with a few comments on the specific situation raised by the parties in the case at bar, that is, where the seller and the buyer are characterized as [TRANSLATION] "professionals of identical expertise", in which case they would be able to contract out of the warranty against latent defects. This argument is based on three judgments of the Quebec Court of Appeal: *Boréal assurances inc. c. Corp. des concessionnaires automobiles du Québec inc.*, [2001] R.J.Q. 856 (C.A. Que.); *Wellington, cie d'assurance c. 2426-9888 Québec inc.*, [2001] R.J.Q. 865 (C.A. Que.); *M.G.B. Auto inc. c. Trois Diamants Autos (1987) ltée*, [2001] R.J.Q. 860 (C.A. Que.).

44 The position taken by the Court of Appeal in this trilogy of cases does not support the appellants' argument. The court's decisions did not relate to the situation of a manufacturer. Nor did the court recognize a presumption of knowledge on the buyer's part that would be incompatible with the warranty against latent defects. Furthermore, the position taken by this Court on the manufacturer's warranty in *Kravitz v. General Motors Products of Canada Ltd.*, [1979] 1 S.C.R. 790 (S.C.C.), is clear. In that case, at pp. 798-99, the Court confirmed that, for the purposes of art. 1527 C.C.L.C.,

a manufacturer and a professional seller are always presumed to be in bad faith and that the fraudulence associated with the manufacturer's actual or presumed knowledge of a defect is unaffected by the professional status of a buyer who is a dealer. The implication of this line of reasoning is that the buyer's expertise does not nullify the presumption applicable to the manufacturer. Even if a professional buyer is personally in the business of selling a manufacturer's automobiles, he or she cannot be considered to have the same expertise as the manufacturer. Professional buyers, too, are protected by the warranty against latent defects. If a defect is latent, the manufacturer will be unable to rely on a limitation of liability clause unless it can rebut the presumption of knowledge of the defect.

45 At any rate, in the case at bar, C.E. is a manufacturer of recovery boilers, and Domtar bought one of C.E.'s boilers for use in the production of pulp and paper. However expert Domtar may be at using boilers, it cannot be characterized as a professional "of identical expertise" to C.E. As a manufacturer, C.E. had greater expertise than Domtar as regards the characteristics of the recovery boiler in question. The warranty against latent defects is applicable in this case.

3.6 Manufacturer's Liability for Defects in the Item Sold

46 When enforcing a legal warranty, a court must first determine whether there was a latent defect in the good sold. At this stage, the analysis relates essentially to the good and to the buyer's conduct. Second, the court will determine whether the seller is liable; this part of the analysis consists in establishing whether the seller knew or is legally presumed to have known about the alleged defect. This determination will enable the court to decide whether a clause limiting the seller's liability can be set up against the buyer. It is therefore important to distinguish the conditions of the seller's liability for a latent defect from the scope of his or her liability.

3.6.1 Conditions of Liability: Existence of a Latent Defect

3.6.1.1 Different Types of Latent Defects

47 The legislature has not expressly defined what constitutes a "defect". Article 1522 C.C.L.C. does, however, contain some useful information. For example, the first criterion for determining whether a latent defect exists is the loss of use it causes. The purpose of the warranty against latent defects is thus to ensure that the buyer of a good will be able to make practical and economical use of it.

48 There are three main types of latent defects: the material defect, which relates to a specific good; the functional defect, which relates to the good's design; and the conventional defect, which arises where the buyer has disclosed that the good is to be put to a particular use. Material and functional defects are assessed in light of the normal use to which buyers put the good, whereas a conventional defect is assessed in light of the particular use indicated by the buyer to the seller. However, it is necessary, in discussing this classification, to briefly consider the problem of technological change.

49 Technological change is a modern-day reality that is characterized by the rapid pace at which improvements are made to products. The trial judge rightly noted that manufacturers are constantly redesigning their products: para. 161. He was wary, and rightly so, of a tendency to condemn a manufacturer simply because a different version of the original product has since emerged on the market. Selling an improved or better performing version of a product does not render the previous version defective. Differences in quality and possible use between these two versions of the product cannot be characterized as a latent defect. The key factor in the analysis resides in the loss of use, as assessed in light of the buyer's reasonable expectations.

50 The categories of defects can sometimes overlap. In the case at bar, Domtar complains that the tie welds, which were integral to the superheater, compromised the normal operation of the boiler by causing cracks and unforeseeable shutdowns. According to Domtar, the argument that it should not have to accept untimely shutdowns flows from the very nature of the equipment purchased and from the fact that this equipment operates continuously. In this sense, the defect of which Domtar complains is both functional and conventional. However, regardless of how the defect is characterized, it must have four characteristics, all of which are essential to the warranty: it must be latent, must be sufficiently serious, must have existed at the time of the sale and must have been unknown to the buyer.

3.6.1.2 Latency of the Defect

51 The latency of the defect is assessed objectively, that is, by reviewing the buyer's examination of the good in light of what a prudent and diligent buyer of identical expertise would have done: P.-G. Jobin, "Précis on sale", in *Reform of the Civil Code* (1993), vol. 3 A, at p. 61; M. Pourcelet, *La vente* (5th ed. 1987), at p. 149. In other words, the issue is not limited to ignorance of the defect; it must also be determined whether a reasonable buyer in the same circumstances would have realized that there was a defect.

3.6.1.3 Seriousness of the Defect

52 Loss of use does not in itself suffice to support the conclusion that a latent defect exists. The loss must also be serious, that is, it must render the good unfit for its intended use or must so diminish its usefulness that the buyer would not have purchased it at the price paid. This second criterion, the seriousness of the defect, flows from the words of art. 1522 C.C.L.C. However, the defect does not have to render the good completely unusable but simply has to reduce its usefulness significantly in relation to the legitimate expectations of a prudent and diligent buyer.

3.6.1.4 Existence of the Defect at the Time of the Sale

53 The defect must also have existed at the time of the sale. This third criterion was developed by the courts and commentators before being codified in art. 1726, para. 1 C.C.Q.: *Commentaires du ministre de la Justice* (1993), vol. I, at p. 1078. What this basically means is that a seller cannot be held liable for a defect caused by abnormal use of the good by the buyer.

3.6.1.5 Defect Unknown to the Buyer

54 It is not enough for the defect to be latent. It must also be unknown to the buyer, as is required by the concluding words of art. 1522 C.C.L.C. This criterion is assessed subjectively. Unlike the seller, the buyer is not subject to a presumption of knowledge, since the buyer is always presumed to be in good faith. As a result, the burden of proving actual knowledge of the defect always rests on the seller: Jobin, at p. 60; Pourcelet, at p. 149; T. Rousseau-Houle, *Précis du droit de la vente et du louage* (2nd ed. 1986), at p. 134.

55 The seller's liability is not the same in every latent defect case. Il will accordingly be necessary to review the conditions that determine the scope and applicability of the seller's liability.

3.6.2 Scope of the Seller's Liability

3.6.2.1 Presumption of Knowledge of Latent Defects on the Seller's Part

56 According to art. 1524 C.C.L.C., when a buyer has shown that a latent defect exists, the seller will be held liable "unless it is stipulated that he shall not be obliged to any warranty". However, even if the contract contains a limitation of liability clause, the seller will not always be able to invoke it. Presumed or actual knowledge of the defect can, in certain circumstances, bar the seller from relying on such a clause. Since actual or presumed knowledge of a defect on the seller's part is an indication of bad faith, the seller, in such a case, has not only to repay the sale price, but also to compensate the buyer for any damage caused by the latent defect. A limitation of liability clause may not be set up against the buyer if the seller knew or is legally presumed to have known about the defect: J. Deslauriers, "La vente 1", in Cours de la formation professionnelle du Barreau du Québec 1988-1989, vol. 3, 51, at p. 82; Pourcelet, at p. 160; Rousseau-Houle, at pp. 135 and 156. The presumption of knowledge is thus determinative not only of the issue of whether a seller may limit the warranty against latent defects, but above all of that of the scope of the seller's liability.

57 Although the warranty against latent defects originated in Ancient Rome, the presumption of knowledge made its first appearance only in old French law, in particular in the works of DuMoulin, Domat and Pothier: Edwards, at p. 275. Before then, a seller had to have actual knowledge of a defect to be liable for it, since all sellers were presumed

to be in good faith. The new presumption came into being as a result of the work of certain authors, who were of the opinion that manufacturers and specialized sellers, by reason of their occupations, should know about any defects in their goods. According to Pothier, manufacturers should be considered to be masters of their craft and specialized sellers should be presumed to have a detailed knowledge of the products they sell, and both should accordingly be deprived of the protection afforded sellers in good faith:

> [TRANSLATION] There is one case in which the seller, despite having no knowledge whatsoever of the defect in the thing sold, is nevertheless obliged to make reparation for the wrong this defect has caused to the buyer in respect of the buyer's other property: where the seller is an artisan, or a merchant who sells works of his craft, or of the trade that is his profession. Even if this artisan or merchant should claim not to know about the defect, he is obligated to make reparation for any damage the buyer has sustained because of the defect in using the thing for its intended purpose. ... The reason is that an artisan, by profession of his craft, *spondet peritiam artis*. He becomes liable to all who contract with him for the quality of his works, when they are put to the use for which there are by nature intended. His incompetence or lack of knowledge in any aspect of his craft is a fault on his part, since no one should publicly profess a craft if he does not possess all the knowledge needed to exercise it properly: *Imperitia culpae annumeratur*; l. 132, ff. *Reg. J.* The same is true of the merchant, whether or not he is also the manufacturer. By reason of his public profession of his trade, he becomes liable for the quality of the wares he sells, when they are put to their intended use. If he is a manufacturer, he must employ, to make his wares, only good artisans, and he is answerable for this. If he is not a manufacturer, he must display only good wares for sale; he must have expert knowledge of his wares and sell only good ones.
>
> [Emphasis added.]
>
> (*Oeuvres de Pothier* (new ed. 1823), vol. II, No. 214)

58 This passage, sometimes referred to as [TRANSLATION] "Pothier's rule", was regarded as the main source of art. 1527 para. 2 C.C.L.C.: Edwards, at pp. 280-81; *Traité de droit civil du Québec*, vol. 11, by L. Faribault, 1961, at p. 295; P. B. Mignault, *Le droit civil canadien* (1906), vol. VII, 1906, at p. 112. Inspired by the principles enunciated by Pothier, the commissioners who drafted the C.C.L.C. introduced presumed knowledge into Quebec civil law: Edwards, at p. 276. This attributed knowledge is provided for in arts. 1527 and 1528 C.C.L.C. In principle, sellers are presumed to be in good faith (art. 2202 C.C.L.C.), but they will be held liable if they had actual knowledge of defects (art. 1527, para. 1 C.C.L.C.). Moreover, art. 1527, para. 2 C.C.L.C. relieves the buyer of the burden of proving bad faith on the seller's part if the seller is legally presumed to have known about the defects. What remains is to identify the sellers to whom this presumption applies.

3.6.2.2 Sellers to Whom the Presumption of Knowledge Applies

59 The authors agree that the presumption of knowledge under the C.C.L.C. applies to manufacturers and to specialized professional sellers. Thus, they would not apply it to non-specialized professional sellers or non-professional sellers, since such sellers lack technical expertise or commercial experience with respect to the good, which makes it impossible for them to personally verify the quality of the good: Pourcelet, at p. 158; Rousseau-Houle, at pp. 139-52; F. Langelier, *Cours de droit civil de la province de Québec* (1909), vol. V, at p. 77; Mignault, at p. 118.

60 It should be noted, however, that since the enactment of art. 1733 C.C.Q., the presumption of knowledge has applied to all professional sellers without distinction. Only non-professional sellers are now exempt from the presumption.

3.6.2.3 Rebuttable Nature of the Presumption of Knowledge

61 The nature of the presumption must now be examined to determine its effect, that is, whether it can ultimately be rebutted and, if so, under what conditions. This Court has considered this question in a number of judgments. *Samson & Filion v. Davie Shipbuilding & Repairing Co.* (1924), [1925] S.C.R. 202 (S.C.C.), was one of the first leading decisions in which the presumption of knowledge on the seller's part was addressed. That case concerned the sale of used pipes.

The contract of sale did not contain a limitation of liability clause. This Court held that the presumption of knowledge does not apply to a non-professional seller with no expertise. Such a seller is not liable for damage caused by the good unless he or she had actual knowledge of the defect. Manufacturers and professional sellers ([TRANSLATION] "who [sell] works of [their] craft, or of the trade that is [their] profession"), on the other hand, are subject to a presumption of knowledge, which is rebuttable.

62 A few years later, this Court rendered its decision in *Touchette v. Pizzagalli*, [1938] S.C.R. 433 (S.C.C.), which concerned the sale of a new car by a professional seller to a non-professional buyer without the manufacturer's involvement. Under the contract, the warranty was limited to the one provided by the manufacturer. The Court noted that professional sellers are presumed to know about any defects in the goods they sell, although it implicitly acknowledged that a manufacturer or a specialized professional seller can rebut the presumption of knowledge:

> It is now settled that the seller is responsible in respect of all damages sustained by the purchaser by reason of latent defect where the seller is either a manufacturer or a person who deals in, as merchant, articles of the same kind as that which was the subject of the sale. Unless he can establish that the defect was such that it could not have been discovered by the most competent and diligent person in his position, his ignorance is no excuse, because it is conclusively presumed (in the absence of such proof) to be the result of negligence or of incompetence in the calling which he publicly practises and in respect of which he thereby professes himself to be competent. The principle is *spondet peritiam artis*.
>
> [Emphasis added; p. 439 (*per* Duff C.J.).]

63 As mentioned above, this Court noted in *Kravitz* that, in the context of the warranty against latent defects, the manufacturer and professional seller of a defective good are presumed to be in bad faith (p. 798). In that case, the Court went even further, however, refusing to allow the manufacturer to transfer its liability to the dealer despite the dealer's professional knowledge (p. 798):

> What is the situation when, as in the case at bar, the manufacturer has sold a new thing to a dealer who is himself a professional seller? If the latter is presumed to be aware of the defects when he resells the thing, does it not follow that he is also presumed to be aware of them when he buys it from the manufacturer? While this reasoning could have some appeal in certain circumstances, it cannot serve to exempt the manufacturer from his liability for latent defects in the thing he has manufactured when he sells it to a dealer who is responsible for reselling it. The manufacturer of a defective thing must assume the ultimate responsibility for his incompetence, actual or presumed. The bad faith of the professional seller toward the non-professional buyer does not convert the "dol" of the manufacturer toward his dealer into an act of good faith.
>
> [Emphasis added.]

64 The Court then analysed the sub-purchaser's action against the dealer and noted that in France, limitation of liability clauses do not relieve manufacturers of liability, since the presumption of knowledge applicable to them is not rebuttable (pp. 799-801). The Court did not rule on the nature of the presumption of knowledge applicable to manufacturers (p. 802). It simply concluded that neither the limitation of liability clause included by the dealer in the contract of sale nor the manufacturer's limited warranty could be a bar to the sub-purchaser's extra-contractual remedy against the manufacturer based on the warranty against latent defects.

65 Some authors have cited the principles enunciated by Pothier or the reference in *Kravitz* to French law as a basis for stating that the presumption of knowledge is irrebuttable where manufacturers and specialized professional sellers are concerned, because of their duty to be masters of their craft. But these authors concede that the presumption remains rebuttable for non-specialized professional sellers who have no control over the manufacture of the product and no specific knowledge of the product: Edwards, at pp. 289-94; Pourcelet, at pp. 158-59; Mignault, at p. 113.

66 However, the majority view in Quebec law is that the presumption of knowledge provided for in art. 1527 C.C.L.C. is rebuttable, even for manufacturers: *Boiler Inspection & Insurance Co. of Canada c. St-Louis de France (Corp. municipale de la paroisse)*, [2006] R.R.A. 879 (C.A. Que.); also *Oakwood Construction Inc. c. Ratthé*, [1993] R.D.I. 181 (C.A. Que.), at p. 183; *Blandino c. Colagiacomo* (1988), [1989] R.D.I. 148 (C.A. Que.), at pp. 151 and 153; *Oppenheim c. Forestiers R.P.G.M. inc.* (2002), J.E. 2002-1197 (C.A. Que.) [2002 CarswellQue 1085 (C.A. Que.)], SOQUIJ AZ-50133145, at para. 24. Several authors have observed that it is very difficult for a manufacturer to rebut this presumption by showing the court that it was impossible to know about the defect: D.-C. Lamontagne, *Droit de la vente* (1995), at pp. 103-4; Jobin, at p. 62; Deslauriers, at p. 82; Faribault, at pp. 295-96. Indeed, it has been pointed out that there are no known cases in which a manufacturer has in fact succeeded in rebutting the presumption: Rousseau-Houle, at pp. 138-52; Langelier, at p. 77.

67 The new wording of the C.C.Q.'s provisions, which codify the case law under the C.C.L.C., confirms the majority view. In art. 1729 C.C.Q., the legislature kept the word "presumed" rather than using "deemed" (*réputé*). A presumption "concerning presumed facts is simple and may be rebutted by proof to the contrary" (art. 2847, para. 2 C.C.Q.). When the first and second paragraphs of art. 1733 C.C.Q. are read together, it is apparent that the legislature has provided that a professional seller who "was aware or could not have been unaware" of a defect cannot exclude his or her liability. In our opinion, if the legislature took care to mention two situations in which professional sellers cannot exclude their liability, this was because it realized that situations arise in which they might raise as a defence that they were not or could not have been aware of the defect in the thing. Otherwise, the legislature would simply have stated that professional sellers may not exclude their liability by contract.

3.6.2.4 Means of Rebutting the Presumption of Knowledge on the Manufacturer's Part

68 It can be seen from the case law and the academic commentaries that a single standard governs the defences available to all sellers to rebut the presumption of knowledge applicable to them. As this Court held in *Samson & Filion*, it must be determined whether a reasonable seller in the same circumstances would have been able to detect the defect at the time of the sale.

69 Contrary to C.E.'s position, it is never open to a manufacturer to rely on its ignorance of the defect as its sole defence: *Samson & Filion, Touchette* and *Kravitz*. The manufacturer may rebut the presumption only by showing that it did not know about the defect *and that its lack of knowledge was justified*, that is, that it could not have discovered the defect even if it had taken every precaution that the buyer would be entitled to expect a reasonable seller to take in the same circumstances.

70 The principle underlying this rule is that to absolve a manufacturer from liability will be justified if the manufacturer shows that it had full knowledge of the technology in its field at the time the good was designed and that the defect in question cannot be attributed to it. This principle is consistent with the idea that gave rise to the presumption of knowledge, as set out by Pothier, according to which manufacturers must be masters of their craft.

71 Although the standard for a rebuttal of the presumption of knowledge will always be an objective one, the strength of the presumption will vary depending on the seller's expertise. A non-specialized professional seller will be able to rebut the presumption more easily than a specialized professional seller. Manufacturers will have difficulty rebutting it because they have special knowledge and because they are responsible for manufacturing the goods.

72 Even though the possibility of manufacturers rebutting the presumption is accepted, the high standard of diligence they are required to meet means that the range of defences available to them remains very narrow. Only two defences have been recognized so far, and C.E. has invoked neither of them. Under the first of these defences, a manufacturer can rebut the presumption by proving causal fault on the part of the buyer or a third person, or superior force: *Manac inc./ Nortex*, at para. 138; *Commentaires du ministre de la Justice*, vol. 1, at p. 902. The second defence is that of development risk, but it is still subject to debate in contract matters. This defence enables the manufacturer to avoid liability if it would have been impossible to detect the defect given the state of scientific and technical knowledge at the time the good

was put on the market. In such a case, only scientific or technological discoveries made after the good was put on the market will have permitted the defect to be detected. This defence originated in *Cie F.X. Drolet v. London & Lancashire Guarantee & Accident Co.*, [1944] S.C.R. 82 (S.C.C.), and is now partially codified in respect of extra-contractual matters in art. 1473 C.C.Q.

3.6.2.5 Application of the Limitation of Liability Clause

73 The rules discussed above mean that a professional seller who was aware of a defect or who has not rebutted the presumption of knowledge cannot avoid liability. Such a seller cannot rely on a limitation of liability clause, but is obliged to reimburse the buyer for the sale price and provide compensation for any damage resulting from the latent defect (art. 1527 C.C.L.C.).

3.6.3 Comparative Aspects

74 Following this survey of the rules relating to latent defects in Quebec civil law, it may be of interest to consider the extent to which these rules resemble the rules of French law or those that are applied in the rest of Canada. In fact, every provision of the C.C.L.C. respecting the warranty against latent defects is a restatement of the rules of the French Civil Code ("F.C.C."). It will therefore be interesting to see how the issues before the Court have been analysed in French law. Moreover, a brief review of the common law rules will show that they differ significantly from the applicable rules of Quebec law and French law.

3.6.3.1 French Law

75 In French law, the conditions for enforcing the warranty against latent defects are essentially the same as in Quebec law: the defect must be serious, must have existed before ownership was transferred, and must be latent (arts. 1641 and 1642 F.C.C.).

76 For the determination as to whether a defect is latent, the professional buyer is subject to a rebuttable presumption of knowledge of the defect: A. Bénabent, *Droit civil: Les contrats spéciaux civils et commerciaux* (5th ed. 2001), No. 226; see also O. Barret, "Vente", in *Répertoire de droit civil* (2nd ed. loose-leaf), vol. X, Nos. 563 and 565, and J. Huet, *Les principaux contrats spéciaux* (2nd ed 2001), at pp. 329-30. This presumption is stronger where the buyer is from the same field of expertise as the seller. However, professional buyers can rebut the presumption at any time by showing that it would have been impossible for them to detect the defect: Barret, Nos. 569 and 571, and Bénabent, No. 226.

77 When the conditions for enforcing the warranty are met, the buyer has a redhibitory or an estimatory action against the seller (art. 1644 F.C.C.). It is also open to the buyer to seek damages if the seller knew about the defect (art. 1645 F.C.C.) or is presumed to have known about it. However, these actions may be subject to the application of limitation of liability clauses (art. 1643 F.C.C.).

78 A professional seller is subject to a presumption of knowledge of latent defects in the good sold (Civ. 1 re, November 24, 1954, J.C.P. 1954.II.8565, obs. H.B.; also Civ. 1 re, January 19, 1965, D. 1965.389, obs. G. Cornu, *Rev. trim. dr. civ.* 1965.665). This presumption is almost irrebuttable; the only exception is where it would have been impossible to detect the defect, and the parties are a professional seller and a professional buyer [TRANSLATION] "from the same field of expertise". This exception has rarely been applied by the courts, which have interpreted it narrowly: Com., November 6, 1978, J.C.P. 1979.II.19178, obs. J. Ghestin, and obs. G. Cornu, *Rev. trim. dr. civ.* 1979.392; also Huet, at pp. 348-49, and P. le Tourneau, *La responsabilité civile* (3rd ed. 1982), at p. 375, No. 1183.

79 Developments in French law relating to the presumption of knowledge on the part of professional sellers have incorporated the rules governing the presumption into the legal framework applicable to limitation of liability clauses and have confirmed that the presumption is almost irrebuttable. As a result, the analysis of the presumption of knowledge on the part of professional sellers also applies to the review of limitation of liability clauses. This means that such clauses

are valid in principle (art. 1645 F.C.C.), but that they are inapplicable in cases involving professional sellers. On an exceptional basis, a professional seller will be able to invoke a limitation of liability clause if the buyer is a professional from the same area of expertise and if it would not have been impossible to detect the defect: Com., October 8, 1973, J.C.P. 1975.II.17927, obs. J. Ghestin; Civ. 3 e , October 30, 1978, J.C.P. 1979.II.19178, obs. J. Ghestin, obs. G. Cornu, *Rev. trim. dr. civ.* 1979.392; Com., November 6, 1978, J.C.P. 1979.II.19178, obs. J. Ghestin, obs. G. Cornu, *Rev. trim. dr. civ.* 1979.392. Thus, a professional seller will always be liable where it would have been impossible for the buyer to detect the defect, regardless of the buyer's status.

3.6.3.2 Common Law

80 In Canada, the common law rule is that a latent defect must affect an essential characteristic of the good and make that good unfit for its intended use: *Tony's Broadloom & Floor Covering Ltd. v. NCM Canada Inc.* (1995), 22 O.R. (3d) 244 (Ont. Gen. Div.), aff'd (1996), 31 O.R. (3d) 481 (Ont. C.A.); *Jenkins v. Foley* (2002), 215 Nfld. & P.E.I.R. 257, 2002 NFCA 46 (Nfld. C.A.). The onus is on the buyer to prove that the latent defect was known to the seller or that the seller showed reckless disregard for what he or she should have known. However, where it has been established that the seller could have obtained information about an essential characteristic of the good, the seller cannot simply allege an honest belief: *Parlby Construction Ltd. v. Stewart Equipment Co.* (1971), [1972] 1 W.W.R. 503 (B.C. S.C.), at pp. 507 and 509-10.

81 With some exceptions, provincial and territorial statutes generally allow sellers to limit the warranty against latent defects by contract. Contrary to French and Quebec law, the common law has no specific rule for the special case of professional sellers and buyers of identical expertise. In principle, a limitation of liability clause in a contract between two merchants will be valid unless it is declared to be unenforceable either for unconscionability or because failure to discharge the obligation to which it applies would amount to a fundamental breach of contract.

82 Under the doctrine of unconscionability, a limitation of liability clause will be unenforceable where one party to the contract has abused its negotiating power to take undue advantage of the other. This doctrine is generally applied in the context of a consumer contract or contract of adhesion.

83 Under the doctrine of fundamental breach, parties with equal bargaining power can, in certain cases, apply to have an unreasonable clause declared unenforceable on the basis that it does not reflect the intent of the parties, or this purpose, the breaching party's failure to perform its obligations under the contract must be such that it "deprives the non-breaching party of substantially the whole benefit of the agreement": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at para. 50. Thus, the existence of a latent defect does not automatically amount to a fundamental breach of contract: G. H. L. Fridman, *The Law of Contract in Canada* (5th ed. 2006), at p. 592; the latent defect must be "irreparable", or the good must be unusable: *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.), at pp. 501-2; *Guarantee Co. of North America*; *R.G. McLean Ltd. v. Canadian Vickers Ltd.* (1970), [1971] 1 O.R. 207 (Ont. C.A.), at pp. 211-12.

84 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 reasonableness, to declare the clause to be unenforceable, since this would amount to rewriting the contract negotiated by the parties.

3.6.3.3 Conclusion on Comparative Law

85 In short, owing to certain of its characteristics, the common law, to an even greater extent than French law, cannot easily be grafted on to Quebec civil law. Nor, despite the connections between Quebec civil law and French law, does it appear any more desirable to import the rules of the French system into Quebec law. What now remains to be considered is how to apply the Quebec rules to the facts of the instant case.

3.7 Analysis of C.E.'s Liability

86 The trial judge made findings of fact. The Court of Appeal saw no palpable errors in them, and the parties have not asked us to review them. Only the conclusions of law drawn from those facts are in issue. As mentioned above, the trial judge concluded that the cracking of the tubes was a design feature rather than a design defect. Domtar contests this conclusion and argues that the cracking constitutes a latent defect. It must therefore be determined whether there was in fact a latent defect in C.E.'s recovery boiler and, if so, whether C.E. knew or is presumed to have known that there was such a defect.

3.7.1 Existence of a Latent Defect

3.7.1.1 Seriousness of the Loss of Use

87 In the case at bar, the trial judge's conclusion that the superheater did not have a latent defect was based on two errors he made in interpreting this first criterion. The first was to limit the definition of a defect to a problem preventing the good from being used at all, while the second was to confuse the sale of a lower-performance version of a good with the sale of a defective one.

88 A defect will be considered to be serious if it renders the good unfit for its intended use or so diminishes its usefulness that the buyer would not have bought it at the price paid (arts. 1522 C.C.L.C. and 1726 C.C.Q.). An example frequently cited by the authors is where a house is at risk of water damage owing to a crack in its foundation. The crack does not actually have to cause such damage for a latent defect to exist; it is enough that the crack exists and that it is likely to lead to serious damage.

89 C.E. considers only the first aspect of the seriousness of the defect. According to its interpretation, the boiler could not be considered to be defective unless there were absolutely no possibility of it working. The trial judge, too, failed to ask whether the usefulness of the good had been diminished, as he stressed that the recovery boiler could continue to operate despite the cracks.

90 In the instant case, the superheater was a new product at the time of delivery. After 18 months of use, 6 leaks had to be repaired, 789 H-style tie welds had to be replaced, and 764 cracks were detected in the superheater's various compartments. The cost of these repairs reached $445,483.57, and the boiler was out of service for 13 days. Six months later, a full inspection revealed 3 new leaks and 859 new cracks, including some that C.E.'s expert described as being severe and likely to cause new leaks. Domtar replaced the superheater two years after it was put into service. However, the trial judge himself stated that this type of machine is designed for continuous use, apart from scheduled shutdowns, and generally has a lifespan, free of major problems, of at least 15 years. The fact that Domtar noticed leaks by chance does not make the defect less serious, especially since so little time had elapsed since the equipment was put into service. This clearly suggests abnormal wear and tear of the machine. Furthermore, an engineer who testified for C.E. acknowledged that it should normally take 15 to 20 years for cracks to occur in the superheater tubes.

91 For the defect to be considered serious, it was enough for there to be a problem with the boiler so serious that the buyer would not have purchased the boiler had it known about the problem. The trial judge himself concluded that Domtar would undoubtedly have elected to use hinge-pin attachments, just as any other paper manufacturer provided with the relevant information about the two types of attachments would have done. He added that if Domtar had elected to use hinge-pin attachments, it is probable that no leaks would have been discovered in the ITSH and that fewer cracks would have been found in the ITSH and HTSH. In our opinion, these findings of fact support the Court of Appeal's conclusion that Domtar would not have bought a boiler with H-style tie welds if it had been informed of the risks associated with this type of attachment.

92 There is another problem with the trial judge's characterization of the facts: the confusion between performance and defectiveness of a product. In the case at bar, C.E. submitted that the hinge-pin attachments were simply of higher quality than the H-style tie welds. While it is true that a manufacturer may design goods of varying quality, each version of a good must be fit for its intended purpose for as long as a buyer might reasonably be entitled to expect. Yet the technology

of hinge-pin attachments existed at the time the boiler was manufactured. What are in issue here are not two types of attachments of different quality or different brands, but rather two types of attachments, one of which tends to weaken the tubes, and is as a result likely to cause unscheduled shutdowns of the boiler, even after only a short time in operation.

93 C.E. knew about the problems associated with the rigidity of both A-style and H-style tie welds. Furthermore, it was the rigidity of H-style tie welds that prompted C.E.'s parent company to decide to offer hinge-pin attachments as the standard in superheater design. Nevertheless, C.E. used A-style and H-style tie welds without having independent analyses conducted to determine whether they could withstand the stress placed on the tubes by the circulation of steam at high temperatures. According to the trial judge, C.E. chose instead to rely on its customers' experience in this respect to assess the real efficacy of its new product. Moreover, it can be seen from a memorandum filed at trial that C.E. had delayed the adoption of hinge-pin attachments in order to maintain its competitive position in the marketplace, and that the decision to adopt them as the standard had been imposed on the manufacturer gradually by market forces:

> ... it is apparent that it was reluctantly responding to market forces that were to the effect that "the pulp and paper industry no longer considers the use of tie welds to be an acceptable superheater attachment ...."
>
> (*Domtar* (Sup. Ct.), at para. 41)

94 Where there is a serious problem that affects the use of a good and the manufacturer is aware of the problem, the manufacturer must address the problem to avoid being held liable for it. The manufacturer cannot simply put the product on the market and wait for reactions from users.

95 This being said, C.E. still uses H-style tie welds in the design of some of its products, sometimes in combination with hinge-pin attachments. The present reasons for judgment should not be understood to imply that H-style tie welds must never be used in the design of superheaters. However, as a boiler manufacturer, C.E. is required to take its customers' needs and objectives into account in designing its boilers. This is the standard that Domtar was entitled to expect C.E. to meet.

3.7.1.2 Existence of the Defect at the Time of the Sale

96 In the case at bar, the cracking caused by the use of H-style tie welds was not the result of abnormal use of the recovery boiler, as C.E. originally claimed. Moreover, the trial judge found that the cause of the cracking was related to the rigidity of the attachments used. C.E. decided, with good reason, not to pursue its original argument in this Court. In all probability, the defect existed at the time of the sale.

3.7.1.3 Domtar Was Unaware of the Defect at the Time of the Sale

97 This criterion requires the application of a subjective standard. The trial judge found that Domtar did not have actual knowledge of what he described as a design feature. According to the evidence, C.E. did not share the information it possessed on this subject with Domtar.

3.7.1.4 Latency of the Defect Despite Domtar's Expertise

98 The latency of a defect is analysed in relation to the buyer's level of expertise. In other words, should Domtar have known it was running a risk of excessive cracking because of the use of H-style tie welds?

99 The trial judge found that Domtar's "principal interlocutor" was aware of the two different opinions on the attachments, since he had been a member of the Black Liquor Recovery Boiler Advisory Committee, which met to discuss recent cases in which problems with recovery boilers had led to unscheduled shutdowns. The trial judge also mentioned the expertise of Domtar's engineering department and of Simons-Sandwell as regards the operation of pulp and paper mills. Although Domtar was characterized as a sophisticated operator of the equipment used in operating a pulp and paper mill, the issue here is the design of a custom-made piece of industrial equipment. C.E. is a company that specializes in the design of recovery boilers. According to the trial judge, approximately 50 to 60 percent of C.E.'s

revenue came from the design and sale of boilers. The company enjoyed an 80 percent share of the Canadian market for these machines. Expertise in operating such equipment does not automatically entail expertise in the actual design of the product. The manufacturer inevitably has more complete knowledge of the product it has designed, since it controls the materials and labour.

100 In discussing the professional qualifications of Domtar's representatives, the trial judge stated that Simons-Sandwell was knowledgeable to a certain extent about boilers and was aware of, among other things, the existence and potential advantages of hinge-pin attachments. However, neither Simons-Sandwell nor Domtar knew that the tie welds were in all probability *the cause* of the numerous cracks that had appeared.

101 C.E. submits that the trial judge did not attach sufficient importance to Simons-Sandwell's knowledge. This argument must fail. The defect is not apparent simply because Domtar was assisted by an expert. Since the cause of the excessive cracking was unknown to both Domtar and Simons-Sandwell, the defect in this case was indeed latent.

3.7.2 Applicability of the Limitation of Liability Clause

102 As mentioned above, the limitation of liability clause may be relied on only if C.E., as a manufacturer, can rebut the presumption of knowledge applicable to it. C.E. had to prove that another manufacturer in the same circumstances would not have known of the defect: *Samson & Filion*. Its argument in this Court is based not on fault on the part of Domtar or a third party, or on superior force or development risk, but on its own good faith throughout its business relations with Domtar. Although good faith has not yet been recognized as a means of rebutting the presumption, it will be helpful to review the facts as alleged by C.E. and found by the trial judge.

103 The trial judge reviewed in detail the evolution of the types of attachments used in recovery boilers. In 1977, C.E. had decided to replace A-style tie welds with H-style tie welds because A-style tie welds had been causing serious leakage problems over the previous five years. C.E. decided that H-style tie welds would be preferable, even though they had not been tested.

104 Manufacturers started using hinge-pin attachments in the early 1980s. It can be seen from internal C.E. memoranda that a number of customers in the United States had complained about problems with cracks and leaks linked to tie welds. As a result, C.E.'s parent company adopted hinge-pin attachments as its standard in the United States in 1984. But a similar problem was occurring in Canada: C.E. had received complaints about A-style tie welds from Canadian customers in January 1983, May 1983 and December 1984. In June 1985, C.E. recommended to one of its customers that it use hinge-pin attachments to avoid cracks and leaks. In 1988, C.E. decided to limit its use of hinge-pin attachments in order to maintain its competitive position in the marketplace:

> An internal memorandum insisted on the use of tie welds because of the additional cost to manufacture hinge pins, and that in order to maintain the competitive position of C.E. in the marketplace, hinge pins should only be used when there was a "known failure, deterioration, misalignment, etc. of our present standard tangent tube flex ties", or, "if specifically requested by the customer or when 'latest state-of-the-art' design is noted."
>
> (*Domtar* (Sup. Ct.), at para. 39)

C.E. did not finally adopt hinge-pin attachments as its Canadian standard until the following year. However, C.E. had known about the problems associated with tie welds since the early 1980s, that is, before Domtar submitted its purchase order in September 1985.

105 It can be seen from the evidence that the technical knowledge of the time had led some of C.E.'s competitors, and even its parent company, to change their standards. To successfully rebut the presumption of knowledge, it matters little that C.E. believed in good faith that it had solved the problem. Simply having an honest belief in the adequacy of its product is not enough to relieve a manufacturer of liability. It must be concluded that, since C.E. has failed to

raise a valid defence, it has not rebutted the presumption of knowledge applicable to it in accordance with the standard established in *Samson & Filion*.

106 It is therefore our view that the Court of Appeal correctly found that there was a latent defect in the superheater that C.E. knew or should have known about. Since C.E. has failed to rebut the presumption of knowledge applicable to it, it cannot rely on the limitation of liability clause in its defence.

3.8 Duty to Inform

107 The trial judge found that C.E. had breached its duty to inform, whereas in the Court of Appeal's view, the issue related to the warranty against latent defects. The two concepts overlap, but it is important to distinguish them in order to identify the circumstances in which each rule will be applied.

108 Whereas the warranty against latent defects is expressly provided for in the C.C.L.C. and the C.C.Q., the duty to inform derives instead from the general principle of good faith (*Québec (Commission hydroélectrique) c. Banque de Montréal*, [1992] 2 S.C.R. 554 (S.C.C.), at p. 586; arts. 6, 7 and 1375 C.C.Q.) and the principle of free and informed consent. Furthermore, the scope of the general duty to inform is much broader than that of the disclosure of a latent defect. This duty encompasses any information that is of decisive importance for a party to a contract, as Gonthier J. stated in *Bail* (see pp. 586-87). It is therefore easy to imagine a situation in which a seller would be in breach of the duty even though no latent defect exists.

109 Where a seller fails to discharge the duty to disclose a defect, on the other hand, it can probably be said at the same time that he or she has also breached the general duty to inform the buyer of a factor of decisive importance in respect of the good sold, namely the existence of a latent defect. The instant case in one example of this. If a party invokes the seller's warranty against latent defects, the duty to inform is in a sense subsumed in the analysis of the seller's liability for latent defects, and there is no need for the court to conduct a separate analysis on the seller's duty to inform. As a result, our analysis and conclusion regarding C.E.'s liability under the warranty against latent defects are sufficient to dispose of the case before the Court.

110 What now remains is to consider C.E.'s argument concerning the reduction of the quantum awarded to Domtar in light of Domtar's failure to mitigate its damages and of the payment it received from its insurer, Lloyd's, as well as the actions against Chubb, based on the performance bond, and Arkwright, based on the all risk insurance policy.

3.9 Reduction of the Quantum of the Damages

111 In this Court, C.E. has submitted two arguments for reducing the quantum of the damages awarded to Domtar by the Court of Appeal. First, C.E. contends that by replacing a superheater that was fully operational, Domtar failed to mitigate its damages and that Domtar is accordingly entitled to be reimbursed only for the repairs effected in the spring of 1989. Second, C.E. submits that the determination *a posteriori* by a court that the damage was not covered by the insurance policy does not alter the compensatory nature of the payment that has already been made. According to C.E., the payment made to Domtar by Lloyd's was intended to settle certain claims, including the one related to the purchase of the boiler from C.E., and once that payment was made, Lloyd's was subrogated to Domtar's rights and Domtar's claim for damages against C.E. had to be reduced accordingly.

112 The trial judge rejected C.E.'s suggestion that Domtar could have repaired the superheater instead of replacing it. He noted that Domtar had had to make a decision in light of the available information and that its inability to adequately assess the alternatives was due to C.E.'s breach of the duty to inform. Regarding the subrogation argument, the trial judge agreed with C.E. and held that the damages claimed by Domtar should be reduced by the amount it had received from Lloyd's.

113 The Court of Appeal also rejected the repair scenarios proposed by C.E., citing Domtar's need for reliable equipment. However, it reversed the trial judge's holding on the subrogation issue. According to the Court of Appeal,

for a payment to result in subrogation of an insurer to the rights of the insured, it must be made to the insured on account of an obligation arising from the insurance contract or by operation of law. In the instant case, because a clause in the insurance contract between Lloyd's and Domtar expressly excluded damage resulting from a breakdown of or defect in the recovery boiler, the payment made by Lloyd's could not have been related to the damages being claimed by Domtar. Lloyd's was not, therefore, subrogated to Domtar's rights. The Court of Appeal's reasons are sound, and there is no need to intervene.

3.10 Chubb's Appeal

114 This Court granted leave to appeal in this incidental case because its outcome depended directly on the outcome of the main case. In this case, Domtar relies on a contract establishing a performance bond in its favour. Under the contract, Chubb agreed to guarantee the performance of C.E.'s obligations under the contract of sale for the recovery boiler. Since there was a latent defect in the superheater, Chubb is solidarily liable for the amount of its guarantee as surety in favour of Domtar, as the Court of Appeal held.

3.11 Domtar's Appeal Against Arkwright

115 This incidental case concerns an "all risk" insurance policy issued by Arkwright that covered Domtar's property, including the recovery boiler, at the time of the events in question. Domtar has already been indemnified under this policy for the damage it sustained as a result of the repairs effected in the spring of 1989. However, the policy contained a clause excluding damage resulting from latent defects in the boiler.

116 In its appeal, Domtar seeks to demonstrate that the losses were nonetheless covered by the insurance policy. More specifically, it submits that the lost profits it suffered in the fall of 1989 when C.E.'s superheater was replaced with one from B. & W. resulted from the faulty design of the H-style tie welds. In other words, the latent defect affected not the entire boiler or superheater, but strictly the H-style tie welds, and the damage was accordingly covered by the policy.

117 The trial judge agreed with Arkwright. In his view, replacing the superheater was not the only possible solution for Domtar, since at the time the machine was replaced, it could have continued operating indefinitely. Domtar could not, therefore, rely on its all risk insurance policy to recover disbursements made to prevent a hypothetical future loss.

118 Domtar appealed that judgment. The Court of Appeal considered the replacement of the superheater to have been necessary. In its view, however, the tie welds could not be dissociated from the superheater itself and the insurer could rely on the exclusion clause because the design defect affected the entire superheater and not just the tie welds. According to the Court of Appeal, the narrow interpretation Domtar seeks to give the exclusion clause would deprive the clause of any effect, and the loss to which Domtar's claim applied was clearly not covered by the insurance policy with Arkwright.

119 In the main case, we held that the superheater's design was defective because of the excessive cracking of the tubes caused by the use of H-style tie welds, and that C.E., as the manufacturer, was liable for, *inter alia*, the cost of replacing the superheater. To accept Domtar's contention that the welds can be dissociated from the superheater would render the exclusion clause meaningless, since it would in almost every case be possible to isolate one component as the cause of the defect.

120 To sum up, Domtar's submissions in this appeal against Arkwright are unfounded in law. For the reasons given by the Court of Appeal, we are therefore of the opinion that the cost of replacing the defective superheater was excluded under the insurance policy.

4. Disposition

121 For these reasons, we would dismiss the three appeals and affirm the judgments of the Court of Appeal, with costs throughout.

Appeals dismissed.

Pourvois rejetés.

APPENDIX

Civil Code of Lower Canada

1522. The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

1523. The seller is not bound for defects which are apparent and which the buyer might have known of himself.

1524. The seller is bound for latent defects even when they were not known to him, unless it is stipulated that he shall not be obliged to any warranty.

1527. If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer.

He is obliged in like manner in all cases in which he is legally presumed to know the defects.

1528. If the seller did not know the defects, or is not legally presumed to have known them, he is obliged only to restore the price and to reimburse to the buyer the expenses caused by the sale.

Civil Code of Québec

1726. The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.

The seller is not bound, however, to warrant against any latent defect known to the buyer or any apparent defect; an apparent defect is a defect that can be perceived by a prudent and diligent buyer without any need of expert assistance.

1728. If the seller was aware or could not have been unaware of the latent defect, he is bound not only to restore the price, but to pay all damages suffered by the buyer.

1733. A seller may not exclude or limit his liability unless he has disclosed the defects of which he was aware or could not have been unaware and which affect the right of ownership or the quality of the property.

An exception may be made to this rule where a buyer buys property at his own risk from a seller who is not a professional seller.

Footnotes

* A corrigendum issued by the Court on January 31, 2008 has been incorporated herein.

Tab 15

2016 ONCA 747
Ontario Court of Appeal

Singh v. Trump

2016 CarswellOnt 16134, 2016 ONCA 747, [2016] O.J. No. 5285, 271 A.C.W.S. (3d) 503

Sarbjit Singh (Plaintiff / Appellant) and Donald John Trump Sr., Trump Toronto Hotel Management Corp., Trump Marks Toronto LP, Talon International Inc., Talon International Development Inc., Val Levitan, Alex Shnaider and Toronto Standard Condominium Corporation No. 2267 (Defendants / Respondents)

Se Na Lee (Plaintiff / Appellant) and Donald John Trump Sr., Trump Toronto Hotel Management Corp., Trump Marks Toronto LP, Talon International Inc., Talon International Development Inc., Val Levitan, Alex Shnaider and Toronto Standard Condominium Corporation No. 2267 (Defendants / Respondents)

Paul Rouleau J.A., K. van Rensburg J.A., M.L. Benotto J.A.

Heard: June 23, 2016
Judgment: October 13, 2016
Docket: CA C60787

Proceedings: reversing *Singh v. Trump* (2015), 47 B.L.R. (5th) 269, 2015 CarswellOnt 10437, 2015 ONSC 4461, Perell J. (Ont. S.C.J.)

Counsel: Mitchell Win, Kevin D. Sherkin, for Appellants
Symon Zucker, Melvyn L. Solmon, Nancy J. Tourgis, for Respondents

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Property; Securities; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Business associations

III Specific matters of corporate organization
III.1 Directors and officers
III.1.h Liabilities
III.1.h.viii Miscellaneous

Civil practice and procedure

VII Limitation of actions
VII.1 Principles
VII.1.c Practice and procedure
VII.1.c.i Pleadings
VII.1.c.i.A Pleading statute

Civil practice and procedure

VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.a Statutory limitation periods
VII.4.a.i General principles

Civil practice and procedure

XVIII Summary judgment
XVIII.3 Availability of summary judgment
XVIII.3.b Miscellaneous

Civil practice and procedure

XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.i General principles

Contracts

XVI Franchising contracts
XVI.5 Performance or breach
XVI.5.b Duty of franchisor
XVI.5.b.ii Good faith and fair dealing

Real property

III Sale of land
III.1 Agreement of purchase and sale
III.1.a Formation of contract
III.1.a.iv Legality of agreement
III.1.a.iv.B Statutory compliance
III.1.a.iv.B.2 Miscellaneous

Securities

II Commissions and exchanges
II.6 Rules
II.6.a Filing and reporting requirements

Torts

VII Fraud and misrepresentation
VII.1 Fraudulent misrepresentation
VII.1.d Particular relationships
VII.1.d.i Sale of land
VII.1.d.i.C Inducement

Torts

VII Fraud and misrepresentation
VII.3 Negligent misrepresentation (Hedley Byrne principle)
VII.3.a Nature and extent of duty of care
VII.3.a.iii Miscellaneous

Headnote

Civil practice and procedure --- Summary judgment — Availability of summary judgment — Miscellaneous

Ontario Securities Commission (OSC) granted hotel developer, T Inc., exemption from registration and prospectus requirements based on agreement not to use Reservation Program (RP) to market hotel units, emphasizing RP as

means of offsetting carrying costs of units or as basis for financial projections — T Inc.'s salesperson, Z, provided plaintiffs with Estimated Return on Investment (ERI) document — S and L bought units, expecting rent from RP to offset carrying costs — After closing, profits did not materialize, monthly fees were significantly higher than plaintiffs anticipated, and plaintiffs learned for first time of additional expenses — OSC declined to pursue regulatory action against T Inc. — S and L brought action against T Inc., Trump (T), T Inc.'s president, VL, and T Inc.'s chairman, AS, for rescission and damages and negligent and statutory misrepresentation — Motions judge dismissed L and S's motion for partial summary judgment, dismissed action as against T, VL and AS, and dismissed L's action as statute-barred — Plaintiffs appealed — Appeal allowed — Motions judge's order set aside; order rescinding S's agreement of purchase and sale, awarding damages to L as against T Inc. for negligent misrepresentation, dismissing only claims against T, VL and AS, advanced for breach of OSC Ruling and for misrepresentations, remitting claim for fraudulent misrepresentation to be decided on further motion for summary judgment or at trial before Superior Court, awarding pre and post-judgment interest on damages — Motion judge erred in dismissing action against individual defendants VL, AS and T — It was unfair for motions judge to dismiss causes of action pled but not encompassed in motions before him — Granting or dismissing claim on motion for summary judgment not within scope of motion was denial of procedural fairness and natural justice — Parties' summary judgment factums were consistent with motions for partial summary judgment limited to OSC Ruling claims and claims of misrepresentation — Respondents understood limited scope of motions for summary judgment.

Business associations --- Specific matters of corporate organization — Directors and officers — Liabilities — Miscellaneous

Ontario Securities Commission (OSC) granted hotel developer, T Inc., exemption from registration and prospectus requirements based on agreement not to use Reservation Program (RP) to market hotel units, emphasizing RP as means of offsetting carrying costs of units or as basis for financial projections — Plaintiffs, S and L, bought units, expecting rent from RP to offset carrying costs — Profits did not materialize, fees were significantly higher than anticipated, and S and L learned for first time of additional expenses — S and L brought action against T Inc., Trump (T), T Inc.'s president, VL, and T Inc.'s chairman, AS, for rescission and damages and negligent and statutory misrepresentation — Motions judge dismissed L and S's motion for partial summary judgment, dismissed action as against T, VL and AS, and dismissed L's action as statute-barred — Motions judge found that units were sold as investment with potential for capital gain and ongoing income gains that would more than cover expenses, that Estimated Return on Investments (ERIs) were deceptive documents "replete with misrepresentations of commission, of omission and of half-truth", and that many known expenses were not disclosed or were grossly understated — Motions judge found that ERIs were extraneous to offering memorandum and disclosure documents and outside scope of Securities Act — Motions judge found that S and L failed to establish reasonable reliance on misrepresentations in ERIs and that negligent misrepresentation claim was defeated by "entire agreement" clause and other exculpatory provisions — Plaintiffs appealed — Appeal allowed; order replaced with order rescinding S's agreement, awarding damages to L as against T Inc. for negligent misrepresentation, dismissing only claims against T, VL and AS, advanced for breach of OSC Ruling and for misrepresentations, and remitting claim for fraudulent misrepresentation for determination on further motion — Motions judge's finding that S and L's reliance on ERIs was unreasonable could not be reconciled with other findings as to marketing of units as investment with potential for capital gain and with ongoing income gains that would more than cover expenses — S and L did not assume risk that ERIs failed to disclose known expenses or grossly understated expenses — Motions judge erred in concluding that it was not unconscionable to enforce exculpatory provisions hidden in agreement — Having found units were sold as investment with potential for capital gain and with ongoing income that would more than cover expenses, motions judge erred in concluding that T Inc. did not breach Securities Act by marketing units as investment contracts with emphasis on RP.

Torts --- Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Nature and extent of duty of care — Miscellaneous

Ontario Securities Commission (OSC) granted hotel developer, T Inc., exemption from registration and prospectus requirements based on agreement not to use Reservation Program (RP) to market hotel units, emphasizing RP as means of offsetting carrying costs of units or as basis for financial projections — Plaintiffs, S and L, bought units, expecting rent from RP to offset carrying costs — Profits did not materialize, fees were significantly higher than anticipated, and S and L learned for first time of additional expenses — S and L brought action against T Inc., Trump (T), T Inc.'s president, VL, and T Inc.'s chairman, AS, for rescission and damages and negligent and statutory misrepresentation — Motions judge dismissed L and S's motion for partial summary judgment, dismissed action as against T, VL and AS, and dismissed L's action as statute-barred — Motions judge found that units were sold as investment with potential for capital gain and ongoing income gains that would more than cover expenses, that Estimated Return on Investments (ERIs) were deceptive documents "replete with misrepresentations of commission, of omission and of half-truth", and that many known expenses were not disclosed or were grossly understated — Motions judge found that ERIs were extraneous to offering memorandum and disclosure documents and outside scope of Securities Act — Motions judge found that S and L failed to establish reasonable reliance on misrepresentations in ERIs and that negligent misrepresentation claim was defeated by "entire agreement" clause and other exculpatory provisions — Plaintiffs appealed — Appeal allowed; order replaced with order rescinding S's agreement, awarding damages to L as against T Inc. for negligent misrepresentation, dismissing only claims against T, VL and AS, advanced for breach of OSC Ruling and for misrepresentations, and remitting claim for fraudulent misrepresentation for determination on further motion — Motions judge's finding that S and L's reliance on ERIs was unreasonable could not be reconciled with other findings as to marketing of units as investment with potential for capital gain and with ongoing income gains that would more than cover expenses — S and L did not assume risk that ERIs failed to disclose known expenses or grossly understated expenses — Motions judge erred in concluding that it was not unconscionable to enforce exculpatory provisions hidden in agreement — Having found units were sold as investment with potential for capital gain and with ongoing income that would more than cover expenses, motions judge erred in concluding that T Inc. did not breach Securities Act by marketing units as investment contracts with emphasis on RP.

Civil practice and procedure --- Limitation of actions — Principles — Practice and procedure — Pleadings — Pleading statute

Ontario Securities Commission (OSC) granted hotel developer, T Inc., exemption from registration and prospectus requirements based on agreement not to use Reservation Program (RP) to market hotel units, emphasizing RP as means of offsetting carrying costs of units or as basis for financial projections — T Inc.'s salesperson, Z, provided plaintiffs with Estimated Return on Investment (ERI) document — S and L bought units, expecting rent from RP to offset carrying costs — After closing, profits did not materialize, monthly fees were significantly higher than plaintiffs anticipated, and plaintiffs learned for first time of additional expenses — OSC declined to pursue regulatory action against T Inc. — S and L brought action against T Inc., Trump (T), T Inc.'s president, VL, and T Inc.'s chairman, AS, for rescission and damages and negligent and statutory misrepresentation — Motions judge determined, among other things, that L's action was statute barred — Plaintiffs appealed — Appeal allowed — Motions judge's order set aside — Motions judge erred in finding that L's negligent misrepresentation claim was statute barred — Respondents neither pled Limitations Act, 2002 nor raised it in factum filed on summary judgment motions — Expiry of limitation period was defence that had to be pled in statement of defence — Plaintiffs' factum on summary judgment motions focused principally on negligent misrepresentation but also referred to fraud — While plaintiffs' pleadings could have been clearer, respondents knew statements were false and that there was intention they would be acted upon and respondents did not argue they were taken by surprise or prejudiced by pleadings.

Securities --- Commissions and exchanges — Rules — Filing and reporting requirements

Ontario Securities Commission (OSC) granted hotel developer, T Inc., exemption from registration and prospectus requirements based on agreement not to use Reservation Program (RP) to market hotel units, emphasizing RP as means of offsetting carrying costs of units or as basis for financial projections — Plaintiffs, S and L, bought

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Real property --- Sale of land — Agreement of purchase and sale — Formation of contract — Legality of agreement — Statutory compliance — Miscellaneous

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Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

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Contracts --- Franchising contracts — Performance or breach — Duty of franchisor — Good faith and fair dealing

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fraudulent misrepresentation for determination on further motion — Motions judge's finding that S and L's reliance on ERIs was unreasonable could not be reconciled with other findings as to marketing of units as investment with potential for capital gain and with ongoing income gains that would more than cover expenses — S and L did not assume risk that ERIs failed to disclose known expenses or grossly understated expenses — Motions judge erred in concluding that it was not unconscionable to enforce exculpatory provisions hidden in agreement — Having found units were sold as investment with potential for capital gain and with ongoing income that would more than cover expenses, motions judge erred in concluding that T Inc. did not breach Securities Act by marketing units as investment contracts with emphasis on RP.

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — General principles

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Torts --- Fraud and misrepresentation — Fraudulent misrepresentation — Particular relationships — Sale of land — Inducement

Ontario Securities Commission (OSC) granted hotel developer, T Inc., exemption from registration and prospectus requirements based on agreement not to use Reservation Program (RP) to market hotel units, emphasizing RP as means of offsetting carrying costs of units or as basis for financial projections — Plaintiffs, S and L, bought units, expecting rent from RP to offset carrying costs — Profits did not materialize, fees were significantly higher than anticipated, and S and L learned for first time of additional expenses — S and L brought action against T Inc., Trump (T), T Inc.'s president, VL, and T Inc.'s chairman, AS, for rescission and damages and negligent and statutory misrepresentation — Motions judge dismissed L and S's motion for partial summary judgment, dismissed action as against T, VL and AS, and dismissed L's action as statute-barred — Motions judge found that units were sold as investment with potential for capital gain and ongoing income gains that would more than cover expenses, that Estimated Return on Investments (ERIs) were deceptive documents "replete with misrepresentations of commission, of omission and of half-truth", and that many known expenses were not disclosed or were grossly understated — Motions judge found that ERIs were extraneous to offering memorandum and disclosure documents and outside scope of Securities Act — Motions judge found that S and L failed to establish reasonable reliance on misrepresentations in ERIs and that negligent misrepresentation claim was defeated by "entire agreement" clause and other exculpatory provisions — Plaintiffs appealed — Appeal allowed; order replaced with order rescinding S's agreement, awarding damages to L as against T Inc. for negligent misrepresentation, dismissing only claims against T, VL and AS, advanced for breach of OSC Ruling and for misrepresentations, and remitting claim for fraudulent misrepresentation for determination on further motion — Motions judge's finding that S and L's reliance on ERIs was unreasonable could not be reconciled with other findings as to marketing of units as investment with

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Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 SCC 8, 2014 CarswellOnt 642, 2014 CarswellOnt 643, 37 R.P.R. (5th) 63, 27 C.L.R. (4th) 65, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak*) 366 D.L.R. (4th) 671, 47 C.P.C. (7th) 1, 2014 CSC 8, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak*) 453 N.R. 101, 12 C.C.E.L. (4th) 63, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak*) 314 O.A.C. 49, 21 B.L.R. (5th) 311, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak*) [2014] 1 S.C.R. 126, 128 O.R. (3d) 799 (note) (S.C.C.) — referred to

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S. (W.E.) v. P. (M.M.) (2001), 2001 CarswellOnt 1083, 2001 CarswellOnt 1084, 270 N.R. 195 (note), 149 O.A.C. 397 (note) (S.C.C.) — referred to

Securities & Exchange Commission v. W.J. Howey Co. (1945), 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (U.S. Sup. Ct.) — referred to

Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (2014), 2014 ONCA 85, 2014 CarswellOnt 1133, 314 O.A.C. 341, 372 D.L.R. (4th) 90, 23 B.L.R. (5th) 26 (Ont. C.A.) — referred to

Shortt v. MacLennan (1958), [1959] S.C.R. 3, 16 D.L.R. (2d) 161, 1958 CarswellOnt 78 (S.C.C.) — referred to

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 2010 SCC 4, 2010 CarswellBC 296, 2010 CarswellBC 297, 100 B.C.L.R. (4th) 201, [2010] 3 W.W.R. 387, 86 C.L.R. (3d) 163, 65

B.L.R. (4th) 1, 397 N.R. 331, 315 D.L.R. (4th) 385, 281 B.C.A.C. 245, 475 W.A.C. 245, [2010] 1 S.C.R. 69 (S.C.C.) — considered

Zippy Print Enterprises Ltd. v. Pawliuk (1994), 100 B.C.L.R. (2d) 55, [1995] 3 W.W.R. 324, 20 B.L.R. (2d) 170, 1994 CarswellBC 4 (B.C. C.A.) — considered

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19
Generally — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

s. 1(1) "security" — considered

s. 25 — considered

s. 53 — considered

s. 74(1) — considered

s. 130.1 [en. 1999, c. 9, s. 218] — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 25.07(4) — considered

APPEAL by plaintiffs from judgment reported at *Singh v. Trump* (2015), 2015 ONSC 4461, 2015 CarswellOnt 10437, 47 B.L.R. (5th) 269 (Ont. S.C.J.).

***Paul Rouleau J.A.*:**

1 In the mid-2000s, Sarbjit Singh and Se Na Lee each bought a Hotel Unit in the Trump International Hotel, a five-star building to be built in Toronto's financial district. Mr. Singh and Mrs. Lee were both middle-class residents of the Greater Toronto Area and had no intention of occupying the Hotel Units themselves. Instead, they bought the units as investments, expecting that they would profit by participating in the hotel's "Reservation Program".

2 Under the Reservation Program, owners of individual Hotel Units could place their units in a common pool of rooms to be rented out at luxury rates by the hotel's operator. Their expectation was that high occupancy and rental rates at the one-of-a-kind Trump International Hotel would provide healthy returns, even after deducting monthly expenses such as property tax, mortgage payments and housekeeping.

3 Neither Mr. Singh nor Mrs. Lee were sophisticated investors, in real estate or otherwise. Both had to borrow heavily from family to finance their purchases. Both believed that buying into the Trump project would be an excellent investment. And in time, both came to realize that they were wrong.

4 In separate but similar actions, Mr. Singh and Mrs. Lee sued for rescission and damages, claiming they were misled by marketing materials that projected impressive profit margins for purchasers who participated in the Reservation Program. They brought motions for partial summary judgment against the respondents Talon International Inc. ("Talon"), Donald John Trump Sr. ("Trump"), Val Levitan and Alex Shnaider. The motions judge dismissed the motions and, in addition, dismissed the claims against Trump, Levitan and Shnaider in their entirety. This is an appeal from that decision.

A. BACKGROUND

5 The motions judge exhaustively reviewed the factual background in his lengthy reasons. I will focus on the details necessary to decide the appeal.

(1) The Trump International Hotel project

6 In the early 2000s, Talon International Development Inc. and its parent Talon launched plans to develop a luxury hotel and condominium in downtown Toronto. At that time, Alex Shnaider was a Director and the Chairman of Talon. Val Levitan was a Director and the Chief Executive Officer and President of Talon. Mr. Levitan had no previous experience in construction, hotel management, or operations.

7 Talon joined forces on the project with Donald J. Trump Sr., the New York-based developer, reality television personality and now presidential candidate. It entered into a licence agreement with Trump Marks Toronto LP to use the Trump name and trademarks for the building, which would be called Trump International Hotel & Tower. Talon also entered into an agreement with Trump Toronto Hotel Management Corp. to operate the Trump International Hotel.

8 The Trump International Hotel & Tower was intended to be, and was ultimately built as, a 70-storey mixed-use complex at the corner of Bay and Adelaide Streets in Toronto's downtown core. The building would contain two condominiums, one composed of residential condominium units and the other composed of full-service luxury hotel guestroom condominium units. Talon proposed to market and sell both types of units to the general public.

9 Persons who bought Hotel Units would have to participate in a maintenance and operation program to cover expenses related to the upkeep of the hotel. Crucially for purposes of these actions, they would also be given the option of participating in the hotel's Reservation Program. Under the Reservation Program, the hotel would rent the purchasers' units out through its own system when the purchasers themselves or their guests were not occupying them. After the hotel deducted the expenses related to the Reservation Program, it would remit the rental income to the Hotel Unit purchasers. The Hotel Unit purchasers would use the profits from the room rentals to offset the carrying costs of the condominiums and to generate income.

(2) The Ontario Securities Commission ruling

10 In 2004, Talon's then-lawyers wrote to the Ontario Securities Commission ("OSC") seeking a ruling under s. 74(1) of the *Securities Act*, R.S.O. 1990, c. S.5, which would exempt the sale of the Hotel Units from the dealer registration and prospectus requirements of ss. 25 and 53 of the Act.

11 Talon's lawyers sought this exemption because, under s. 1(1) of the *Securities Act*, the definition of "security" includes "any investment contract". Without conceding the point, Talon's lawyers explained in its application for the exemption that there was "a risk that a Hotel Unit could be considered an investment contract" for purposes of the Act. If so, without an exemption the units could not be sold or resold by real estate brokers, and any sale or resale would have to comply with the dealer registration and prospectus requirements of the Act.

12 In other words, Talon wanted the Hotel Units to be treated as real estate, not as securities.

13 In their application letter to the OSC, Talon's lawyers correctly explained that the test for what constitutes an "investment contract" — which makes it a "security" — is contextual. Generally, an investment contract is found to exist where:

(a) a person invests his or her money;

(b) in a common enterprise;

(c) with the expectation of profits;

(d) solely, primarily or significantly attributable to the efforts of others.

See *Securities & Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (U.S. Sup. Ct. 1945); *Hawaii Commissioner of Securities v. Hawaii Market Center Inc.*, 485 P.2d 105 (U.S. Hawaii S.C. 1971); *Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission)* (1977), [1978] 2 S.C.R. 112 (S.C.C.).

14 Talon's lawyers acknowledged that, upon applying these criteria, the Hotel Units "could be considered investment contracts because they must provide accommodation for gain or profit by being part of a Reservation Program". "Notwithstanding this interpretation," the lawyers went on, Talon should be exempt from the registration and prospectus requirements of the Act "because of the way in which the Hotel Units will be structured."

15 In particular, Talon's lawyers represented that the units would "not be marketed or structured as investments for profit or gain". They would be "marketed as luxury hotel condominium units entailing exclusive occupancy rights, coupled with an opportunity to defray related ownership expenses in connection with periods of non-occupancy through voluntary participation in the Reservation Program." Neither Talon nor the sales agents would "make any representation that any Hotel Unit will be able to be rented at any particular rate, or for any particular period of time".

16 Talon's lawyers explained that:

> In keeping with this marketing approach of emphasizing the predominance of the luxury transient hotel occupancy features of Hotel Units, prospective purchasers of Hotel Units will not be provided with rental or cash flow forecasts or guarantees or any other form of financial projection or commitment on the part of [Talon].

17 In a ruling dated May 25, 2004 (the "OSC Ruling"), the OSC granted Talon the exemption it requested. The key passages state:

> UPON the application of Talon International Inc. (the "Applicant") to the Ontario Securities Commission (the "Commission") for a ruling pursuant to s. 74(1) of the Act (the "Application") that the sale by the Applicant of hotel condominium units within a certain building to be known as Trump International Hotel & Tower ... will not be subject to sections 25 and 53 of the Act;
>
> AND UPON considering the Application and the recommendation of the staff of the Commission;
>
> AND UPON the Applicant having represented to the Commission as follows:
>
> . . . . .
>
> 23. Hotel Units will be marketed primarily as first-class luxury hotel condominium units to be used for short-term transient hotel occupancy or for longer term occupancy. The Reservation Program is merely a secondary feature which offers participating purchasers a means to defray related ownership expenses, as opposed to an investment vehicle for making a gain or profit.

> 24. Prospective purchasers of Hotel Units will not be provided with rental or cash flow forecasts or guarantees or any other form of financial projection or commitment on the part of the Applicant.
>
> . . . . .
>
> 29. The economic value of a luxury hotel condominium of this type will be attributable primarily to its real estate component because Hotel Units will be marketed as luxury transient occupancy hotel condominium properties and will not be offered and sold with an emphasis on the expected economic benefits of the Reservation Program and the Reservation Program Agreement.
>
> [Emphasis added.]

18 The ruling was clear: Talon was not to market the Hotel Units by emphasizing that prospective purchasers could profit through the Reservation Program. The Reservation Program was "merely secondary" to the primary marketing pitch that prospective purchasers could own a luxury Hotel Unit for their personal use. Any participation in the voluntary Reservation Program would simply allow purchasers to "defray" their expenses. And Talon was prohibited from providing prospective purchasers with "forecasts or guarantees or any other form of financial projection or commitment" related to the Reservation Program.

19 The OSC Ruling also required that before entering into an agreement of purchase and sale with a prospective purchaser, Talon would deliver an offering memorandum in the form of a disclosure statement required under the *Condominium Act, 1998*, S.O. 1998, c. 19. This Disclosure Document would include information about "the risk factors that make the offering of Hotel Units a risk or speculation" and explain that prospective purchasers would have a statutory right of action for misrepresentation in the offering memorandum under s. 130.1 of the *Securities Act*. Prospective purchasers would also be informed of their right under the *Condominium Act* to rescind an agreement of purchase and sale within ten days of receiving the Disclosure Document or a material amendment to the Disclosure Document.

(3) Marketing of the Hotel Units and the Estimates

20 Following the OSC Ruling, Talon began marketing the Hotel Units. It set up a sales centre on the building site and put ads in newspapers, magazines and other media. Visitors to the sales centre and to the Trump Tower website could watch a PowerPoint presentation that opened with a smiling Mr. Trump proclaiming: "It's going to be the most elegant building there is. There won't be a building to even compete with it. We're going to do something very special in Toronto."

21 Adina Zak was one of Talon's sales representatives who met with prospective purchasers at the sales centre. She deposed, and the motions judge accepted, that the Hotel Units were sold on the basis of the hotel's location, the fact that it was a turn-key operation, and on the strength of the Trump brand. The pitch was successful: of the 261 available Hotel Units, contracts for sale were entered into for 206 units.

22 Ms. Zak denied that the Hotel Units were marketed as investments but the motions judge rejected that evidence. He found as a fact that the Hotel Units "were sold as an investment with a potential for capital gain and with ongoing income gains that would more than cover expenses." The motions judge explained, at para. 59:

> I do not accept Ms. Zak's evidence that that she never spoke to prospective purchasers about the subject of revenues or mortgages, nor that she did not ever sell the Hotel Units based upon the room rates or occupancy rates. She said she did not discuss with the purchasers the income they might earn or the estimated return on investment, but I do not believe her. These matters were all discussed with potential purchasers.
>
> [Emphasis added.]

23 The plaintiffs Mr. Singh and Mrs. Lee both visited the sales centre and met with Ms. Zak in December 2006 and April 2007, respectively. Mr. Singh had heard about the Trump project from a friend and Mrs. Lee's husband Andrew had seen an ad for it in the newspaper.

24 The cornerstone of the plaintiffs' claims is a document that Ms. Zak presented to each of them when they met with her to discuss buying a unit in the Trump International Hotel: the "Estimated Return on Investment". I will refer to this document as "the Estimates" in the balance of these reasons.

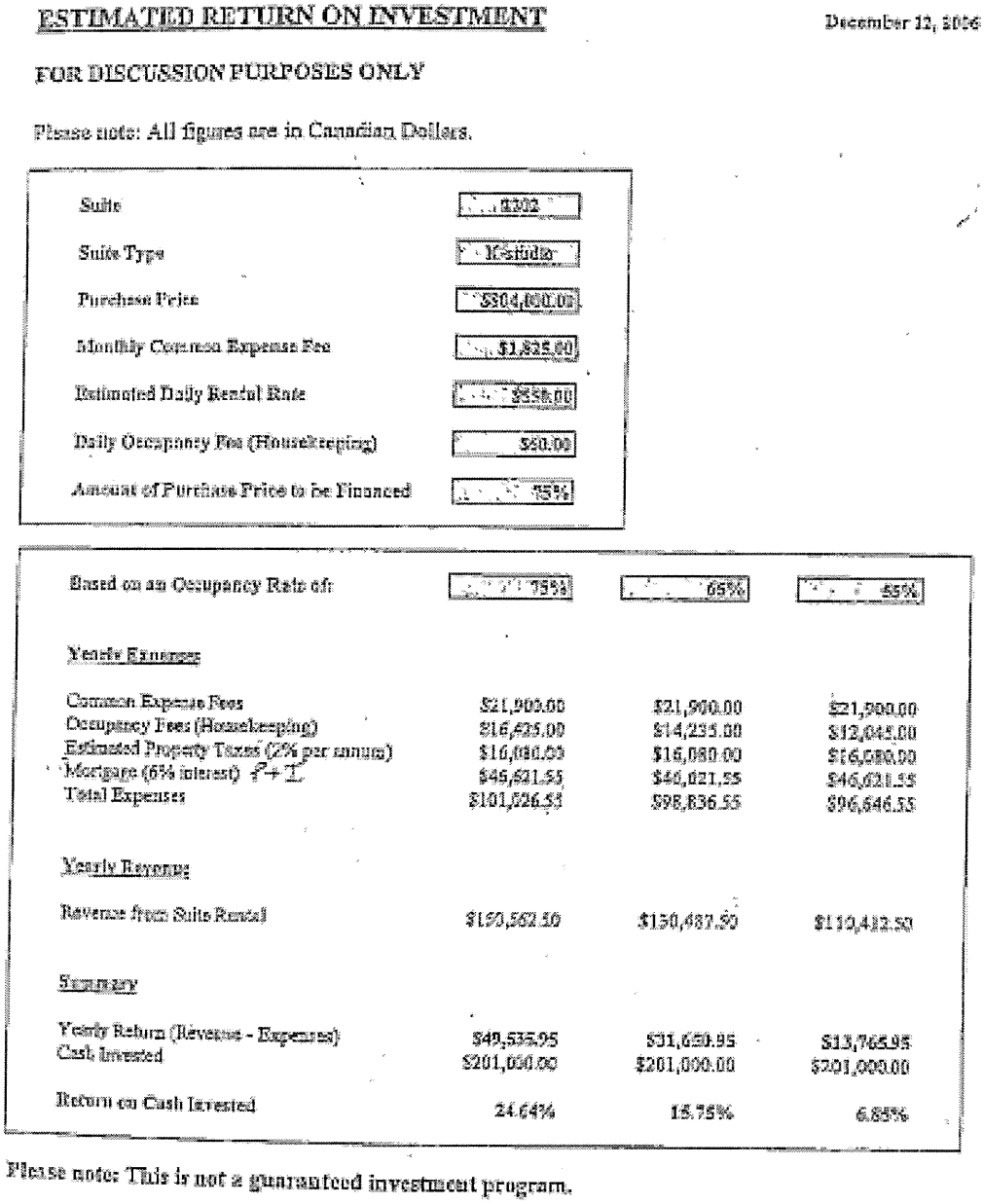
25 As the motions judge explained, the Trump International Hotel marketing materials, including the PowerPoint presentation, showed four different versions of the Estimates reflecting various expenses and revenues scenarios from four different types of hotel suites. Ms. Zak also prepared customized versions of the Estimates for prospective purchasers who visited the sales centre based on the type of unit they were interested in purchasing.

26 The Estimates contained in the PowerPoint presentation set out different sample units. The units were described in the PowerPoint presentation with the following information:

- the purchase price of the unit, ranging from $784,000 to $843,000;
- monthly common expense fees, ranging from $1,827 to $2,081;
- property taxes, estimated to be at 2% of the purchase price;
- mortgage interest, estimated to be at a 6% interest rate;
- a daily occupancy (housekeeping) fee of $60;
- the average occupancy rate of the hotel, ranging from 55% to 75%;
- the estimated daily room rental rate, ranging from $550 to $600;
- the yearly return earned by an investor in the hotel unit, which, depending on the unit and occupancy rate range from $18,144.41 to $63,627.70;
- a bottom line, bolded annual "return on cash invested", ranging from 6.46% to 21.57%; and
- the percentage amount of the purchase price to be mortgaged.

27 The Estimates had two disclaimers. At the top of the page in capital letters it read: "FOR DISCUSSION PURPOSES ONLY". At the bottom of the page in bold, it read: "*Please note: This is not a guaranteed investment program*".

28 Mr. Singh's Estimate looked like this:



ESTIMATED RETURN ON INVESTMENT

December 12, 2006

FOR DISCUSSION PURPOSES ONLY

Please note: All figures are in Canadian Dollars.

Suite	#302
Suite Type	Residential
Purchase Price	$804,000.00
Monthly Common Expense Fee	$1,825.00
Estimated Daily Rental Rate	$550.00
Daily Occupancy Fee (Housekeeping)	$80.00
Amount of Purchase Price to be Financed	75%

Based on an Occupancy Rate of:	75%	65%	55%
Yearly Expenses			
Common Expense Fees	$21,900.00	$21,900.00	$21,900.00
Occupancy Fees (Housekeeping)	$16,425.00	$14,235.00	$12,045.00
Estimated Property Taxes (2% per annum)	$16,080.00	$16,080.00	$16,080.00
Mortgage (6% interest) P + I	$46,621.55	$46,621.55	$46,621.55
Total Expenses	$101,526.55	$98,836.55	$96,646.55
Yearly Revenue			
Revenue from Suite Rental	$150,562.50	$130,487.50	$118,412.50
Summary			
Yearly Return (Revenue - Expenses)	$49,535.95	$31,650.95	$13,765.95
Cash Invested	$201,000.00	$201,000.00	$201,000.00
Return on Cash Invested	24.64%	15.75%	6.85%

Please note: This is not a guaranteed investment program.

Graphic 1

29 When Mr. Singh asked Ms. Zak if the $550 per night room rate was high, she said no because the hotel was a Trump property and would be a five-star hotel. When he asked about the occupancy rates of between 55% and 75%, she replied that since the Trump Hotel would be new and the "buzz" about it would be great, the hotel would be fully occupied.

30 Mrs. Lee's Estimate was similarly promising. Based on a unit which cost $857,000 and would rent out at $600, Mrs. Lee's annual "return on cash invested" ranged from 7.75% at a 55% occupancy rate to 20.90% at a 75% occupancy rate. Her Estimate looked like this:

ESTIMATED RETURN ON INVESTMENT April 10, 2007

FOR DISCUSSION PURPOSES ONLY

Please note: All figures are in Canadian Dollars.

Suite	[illegible]
Suite Type	[illegible]
Purchase Price	[illegible]
Monthly Common Expense Fee	[illegible]
Estimated Daily Rental Rate	[illegible]
Daily Occupancy Fee (Housekeeping)	[illegible]
Amount of Purchase Price to be Financed	[illegible]

$ 171,400 Total
non $85,700
oct07 42,850
April 08 42,850
- name
- passport, Social Ins.
- DOB
- contact info

Based on an Occupancy Rate of:	[illegible]	[illegible]	[illegible]
Yearly Expenses			
Common Expense Fees	$24,936.00	$24,936.00	$24,936.00
Occupancy Fees (Housekeeping)	$16,425.00	$14,235.00	$12,045.00
Estimated Property Taxes (2% per annum)	$17,140.00	$17,140.00	$17,140.00
Mortgage (6% interest)	$43,068.88	$43,068.88	$43,068.88
Total Expenses	$101,569.88	$99,379.88	$97,189.88
Yearly Revenue			
Revenue from Suite Rental	$164,250.00	$142,350.00	$120,450.00
Summary			
Yearly Return (Revenue - Expenses)	$62,680.12	$42,970.12	$23,260.12
Cash Invested	$299,950.00	$299,950.00	$299,950.00
Return on Cash Invested	20.90%	14.33%	7.75%

Please note: This is not a guaranteed investment program.

Graphic 2

31 Ms. Zak told the Lees that the unit would carry itself even at the 55% occupancy rate, but that in any event 55% occupancy was a worst-case scenario because of the Trump name.

32 Both Mr. Singh and Mrs. Lee decided to buy.

33 Mr. Singh had been discharged from bankruptcy three years earlier and was earning approximately $55,000 a year as a warehouse supervisor. He did not have enough money for the deposit. His father, a retired welder, agreed to help and took out a line of credit on his own home to finance the loan.

34 Mrs. Lee was a homemaker and her husband worked as a mortgage underwriter. Mrs. Lee's parents loaned her the money for the deposit. Although the Lees' unit was put in Mrs. Lee's name, her husband took the lead throughout the events leading to this litigation.

35 Mr. Singh deposed that he relied "heavily" on the information Ms. Zak gave him. He agreed in cross-examination that there was no "guarantee" about the occupancy rates reflected in the Estimates, but explained:

> [S]he was telling us that this is what they have estimated, and this is what the month...daily rent would be for the property through whatever channels that they got their information from. So to me, I relied heavily on this, because knowing that her words were, "This is like having an extra income to your home," that you could actually do that.... The way I looked at this is I took the lowest amount, 55 percent. With that yearly return, I said even if it did a lot less than that, I would still even break even to that point.

36 Mrs. Lee also deposed that she relied on the Estimates in deciding to buy a Hotel Unit. She said:

> The Estimate was very important to me in my consideration of a purchase. We could not afford to purchase a unit without any income as we did not even [have] the money for the down payment let alone for the annual carrying costs. The Estimate gave me confidence that our purchase of a Hotel Unit would be a good investment for our children.

37 As it turned out, the Estimates bore no relation to financial reality. The motions judge found as a fact that the Estimates were "deceptive documents" and "replete with misrepresentations of commission, of omission, and of half-truth": at para. 212.

38 Contrary to Mr. Singh's belief that the Estimates were based on "whatever channels that they got their information from", the motions judge found that the figures in the Estimates were merely hypotheticals dreamed up by Talon's principal Mr. Levitan who, it will be recalled, had no previous experience in the hotel business. The motions judge found, at para. 213:

> The Estimates' specifications of hotel rates and occupancy rates, which emanated from Mr. Levitan's mind, were, at best, just opinions or forecasts. However, they were uninformed and ill-informed opinions, and his figures were essentially just pick-a-number speculation about what might be charged and what might happen in the marketplace.

(4) The Disclosure Documents

39 Both Mr. Singh and Mrs. Lee signed agreements of purchase and sale within days of visiting Ms. Zak at the sales office. (Mr. Singh deposed that Ms. Zak had told him that the units were selling very quickly and he had to decide in the next day or so whether to buy.) Talon sent back a fully executed agreement of purchase and sale along with the Disclosure Document required by the OSC Ruling. Both plaintiffs deposed that the Disclosure Document was very thick (it was approximately 300 pages in length) and hard to understand. Neither read the Document in any detail. Mr. Singh handed the Document over to his lawyer.

(5) The closing and the Statement of Adjustments

40 In November 2008, Talon wrote to its purchasers advising that the closing had been extended from March 2009 to November 2010. In August 2010, Talon wrote again, requesting a further extension of the closing from November 2010 to as late as December 2011. Talon later requested three additional extensions of the closing.

41 The motions judge described the choice Talon set out in these letters, at para. 152: "Talon framed the choice for purchasers as whether they wished to take interim occupancy earlier and pay fees but not have any offsetting hotel revenue (since the Trump Hotel was not to open until January 31 st , 2012) or to sign the amendment and align interim occupancy with the opening of the hotel."

42 Both Mr. Singh and Mrs. Lee deposed that they agreed to the extensions because they didn't think they had any choice. Both said that if they had known they could withdraw from their agreements of purchase and sale, they would have. They weren't alone: all the purchasers agreed to the extensions.

43 The Trump International Hotel opened on January 31, 2012. On February 17, 2012, Talon provided purchasers with the interim occupancy closing documents, for a February 24 closing.

44 The closing documents included an Interim Statement of Adjustments setting out the fees purchasers would have to pay during interim occupancy. The figures were markedly different from those set out in the Estimates.

45 Mr. Singh's monthly fee statement totalled $8,306.13, broken down as follows:

Estimated Total Common Expenses:	$2,931.98
Estimated Realty Taxes:	$2,389.75
Interest on Deferred Purchase Monies:	$2,028.83
HST on Occupancy Fee:	*$955.57*
Total	$8,306.13

46 The combined common expense and realty tax numbers shown were $2,156.73 — or 68% — higher than the common expense and realty tax numbers ($1,825 and $1,340, respectively) set out in his original Estimate. Fees of $955.57 for HST, reflected in the Interim Statement of Adjustments, were not even listed in the Estimate originally given to Mr. Singh. Mrs. Lee got a similarly unpleasant surprise: her combined monthly fees for common expenses and realty taxes were $5,291.77, which is $1,785.44 — or 51% — higher than the monthly common expenses and realty taxes described in her original Estimate ($2,078 and $1,428.33, respectively). [1] An amount of $947.89 for HST also appeared for the first time.

47 Talon also sent purchasers a Maintenance Agreement containing expenses that had never been disclosed before: an annual management fee of between 3% to 3.25% of the Hotel Unit revenue; and a furniture, fixtures and equipment fund, which would be 2% of Hotel Unit revenue for 2013, 3% for 2014, and 4% for 2015. The Maintenance Agreement also listed a per use occupancy fee and, although it had been set out in the Estimates, the amount was now higher.

48 Finally, Talon revealed for the first time that Hotel Unit purchasers would have to pay a $48 fee for every night their units were rented out. This information appears in a document called "Reservation Program Frequently Asked Questions" that Talon emailed to purchasers four days before the interim occupancy closing.

49 Mr. Singh and Mrs. Lee signed all the required documents and took interim occupancy.

(6) The interim occupancy period

50 The Reservation Program provided purchasers with quarterly operating statements approximately 30 days after the end of each quarter. During the interim occupancy period, purchasers received statements for the period of February 24 to September 30, 2012.

51 As the motions judge found, all the purchasers lost substantial amounts of money in all three of the start-up quarters. As an illustration, Mr. Singh's losses during the interim occupancy period totalled $29,113.62, an average loss of about $4,000 per month:

Date	Revenue	Occ. %	Avg. Rate	Per Use	Res. Fee	HST	Net Pmt.{*}	Occ. Fee{**}	Gain/Loss
Feb.24-Mar.31	$4,210.00	18.92%	$601.43	$455.00	$336.00	$102.83	$3,863.47	$10,024.64	**-$6,161.17**
Apr.1-June 30	15,875.65	46.15%	377.99	2,795.00	1,968.00	619.19	10,493.46	24,918.39	**-14,424.93**
July 1-Sept.30	11,149.30	26.09%	464.55	1,560.00	1,152.00	352.56	8,084.74	16,612.26	**-8,527.52**

Total	**$31,234.95**	**33,18%**	**$427.88**	**$4,810.00**	**$3,456.00**	**$1,074.58**	**$22,441.67**	**$51,555.29**	**- $29,113.62**

Notes: * Payment to Owner in Q1 includes one-time HST payment of $547.30** Singh did not pay September Occupancy Fee of $8,306,13

52 As this table shows, the occupancy rates during this period ranged from just under 19% to just over 45% — well below the "worst-case scenario" of 55% that was in Mr. Singh's Estimate. The room rental rates started at a promising $601.43 per night, but then dipped to below $400 per night before rising to $464.55 — again, far lower than the $550 rate listed in Mr. Singh's Estimate. At the same time, the occupancy fees, which included common expenses, realty taxes, interest on deferred purchase monies and HST, were far higher than the amounts listed in the Estimate. The combination of much lower than expected revenue and much higher than expected expenses wiped out any possibility of profit.

53 Mrs. Lee fared even worse. She lost $36,288.16, an average loss of about $5,000 per month:

Pate	Revenue	Occ. %	Avg. Rate	Per Use	Res. Fee	HST	Net Pmt.{*}	Occ. Fee	Gain/Loss
Feb.24-Mar.31	$5,040.00	29.73%	$458.18	$715.00	$528.00	$161.59	$4,290.61	$9,944.02	**-$5,653.41**
Apr.1-June 30	16,806.50	54.95%	336.13	3,250.00	2,400.00	734.50	10,422.00	24,717.99	**-14,295.99**
July1-Sept.30	12,593.00	35.87%	381.61	2,145.00	1,584.00	484.77	8,379.23	24,717.99	**-16,338.76**
Total	**$34,439.50**	**42.73%**	**$366.38**	**$6,110.00**	**$4,512.00**	**$1,380.86**	**$23,091.84**	**$59,380.00**	**- $36,288.16**

(7) Final closing and the complaint to the OSC

54 On October 22, 2012, the Trump Hotel Condominium was registered in the Land Registry Office for the Land Titles Division of Toronto. This created Toronto Standard Condominium Corporation No. 2267. At the end of October 2012, Talon advised the purchasers that final closing would be on November 29, 2012.

55 By that time, the Toronto business press began reporting on the hotel's poor performance. Messrs. Shnaider and Levitan issued a public statement reassuring purchasers and the public that the losses were growing pains and that investors had to expect it would take some time to "ramp up" and "stabilize".

56 In November 2012, a lawyer retained by the plaintiffs wrote to the OSC and asked that it investigate possible breaches of the OSC Ruling. The letter argued that Talon had provided prospective purchasers with prohibited "financial projections" in the form of the Estimates. It also argued that Talon and its agents "made oral representations to prospective purchasers which emphasized the Reservation Program as an investment vehicle. The Reservation Program became the principal feature of the hotel operation and investment."

57 The OSC asked Talon to delay final closing and asked for it to respond to several questions about how the Hotel Units were marketed and sold.

58 In its response, Talon represented that it complied with the OSC Ruling. It stated that while it had not had time to undertake a "comprehensive assessment" of how the Estimates were presented to prospective purchasers, based on the "best recollection" of Talon's management, the information in the Estimates "was presented to purchasers as nothing more than an illustration or example. The illustration was provided to prospective purchasers as simply one component of the materials made available to them."

59 In any event, Talon submitted that the Estimates did not constitute a rental or cash flow forecast, a guarantee, a financial projection or a commitment of the type prohibited by the OSC Ruling. Instead, the Estimates were "simply illustrative of certain scenarios in respect of a particular Hotel Unit to assist prospective purchasers in making an informed investment decision."

60 On December 4, 2012, the OSC advised that it would not be pursuing regulatory action against Talon. No reasons were provided.

61 On December 14, 2012, the Hotel Units finally closed. Only 50 of the 206 purchasers opted to close on the sale.

62 Mr. Singh was one of the 156 who backed out. His losses as of December 2014 (which included ongoing interest on the loan to his father) totaled $248,064.58. He commenced his action on November 30, 2012. Mrs. Lee was one of the 50 who closed.

63 About ten months after closing, Talon convened a meeting of the owners and advised them that it would take approximately five years for the hotel to become profitable.

64 Mrs. Lee stuck it out and suffered substantial losses in every quarter from December 2012 to March 2015. Her total losses as of December 2014 were $991,576.92. Mrs. Lee commenced her action in February 2015.

B. THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT

65 The plaintiffs' motions for partial summary judgment proceeded only against Talon, Shnaider, Levitan and Trump and were with respect to the alleged breach of the OSC Ruling and the misrepresentation by Talon. There were three lines of attack pursued before the motions judge, all of which focused on the Estimates.

(1) The claim against Shnaider, Levitan and Trump.

66 At the outset of his reasons, the motions judge dismissed the plaintiffs' motions as against Shnaider, Levitan and Trump. The plaintiffs were not attempting to pierce the corporate veil and, in the motions judge's view, there was no conduct on the part of these defendants that was outside of their role in the corporations. Further, the simple fact that Trump's name was associated with the project did not attract personal liability.

67 Despite the absence of a cross-motion for summary judgment, the motions judge considered it appropriate to dismiss the actions in their entirety as against all three individual defendants.

(2) The claim against Talon

(a) First allegation: Talon violated the OSC Ruling

68 The motions judge considered and rejected the defendant's submission that issue estoppel applied against the plaintiffs as a result of the OSC's public statement of December 4, 2012 that it would not be pursuing regulatory action against Talon. In his view, the OSC's review and public statement was not a binding determination as to whether the OSC Ruling had not been breached. Moreover, he held that the plaintiffs should not be bound by a decision made in a proceeding in which they did not have an opportunity to participate. That ruling was not challenged on appeal.

69 The plaintiffs argued that Talon violated the OSC Ruling in two ways. They claimed that the resulting agreements of purchase and sale were illegal contracts and that they were entitled to rescission as a private law remedy.

70 First, the plaintiffs submitted, Talon marketed the Hotel Units as "investment contracts" by emphasizing the Reservation Program as a vehicle for regular profits. This was contrary to paras. 23 and 29 of the OSC Ruling, which mandated that the units would be marketed "primarily" for the purchasers' own use, and that the Reservation Program was "merely secondary" and simply offered a way to "defray" ownership expenses.

71 The motions judge rejected this argument. He held that "Talon marketed the Hotel Units precisely in the way that it undertook to do in its application": at para. 98.

72 He explained, at para. 100: "The Reservation Program was an integral part of the marketing of the Hotel Units, but it did make the selling of Hotel Units, the selling of an investment contract." I pause here to note that the respondents say that this sentence contains a typo and should read: "The Reservation Program was an integral part of the marketing of the Hotel Units, but it did [not] make the selling of Hotel Units, the selling of an investment contract."

73 The motions judge continued, at paras. 100 and 104:

> There is an excruciating subtle point here because the Hotel Units were likely investment contracts. The point, however, is not whether Talon had investment contracts to sell, which is a debatable point, the point being made by the OSC's ruling is that whatever Talon had to sell, it should not sell it as an investment contract.
>
> . . . . .
>
> [I]n the case at bar, it is not necessary to actually determine whether Talon had an investment contract to sell. The point is that whatever it had to sell, it could not and should not be sold as an investment contract. I find as a fact that Talon did not sell whatever it had to sell as an investment contract.

74 The motions judge explained that when the OSC issued its ruling in 2004, it knew that a purchaser was buying a hotel condominium unit and that it was "very likely" the purchaser would participate in the Reservation Program. It also knew that a purchaser would receive financial information and budgets with respect to the operation of the condominium corporation and the hotel. "In other words," the motions judge held, "the OSC knew and anticipated and even directed that purchasers would receive financial information about the operation of the Reservation Program and of the hotel.... [T]he OSC would not have intended to prohibit a manner of sale that was inevitable": at paras. 105-107.

75 Second, the plaintiffs argued that the Estimates breached para. 24 of the OSC Ruling, which prohibited Talon from providing "rental or cash flow forecasts or guarantees or any other form of financial projection or commitment". The parties agreed that the Estimates were not rental guarantees, cash flow guarantees or a type of financial commitment. But the plaintiffs maintained that the Estimates were rental or cash flow forecasts or a form of financial projection. Although Talon agreed that the OSC Ruling prohibited providing prospective purchasers with either forecasts or projections, it argued that the Estimates were not forecasts or projections. They were simply illustrations of how the Reservation Program might function.

76 The motions judge took a different approach. He did not agree that para. 24 of the ruling prevented Talon from providing forecasts or estimates. He interpreted para. 24 "just to exclude financial commitments or guarantees by Talon of the financial returns of the hotel through the Reservations Program." He explained: "Another way to approach the interpretation of the OSC's ruling is that the adjectives are to be read as modifying or describing one type of commitment": at para. 114.

77 The motions judge held, at para. 115: "[O]nce the Plaintiffs conceded that the Estimate was not a guarantee or financial commitment on the part of Talon, which it clearly was not, it lost the debate about whether the OSC's ruling was breached".

(b) Second allegation: misrepresentation in the offering memorandum under s. 130.1 of the Securities Act

78 The plaintiffs argued that the Estimates constituted misrepresentations. As such, they had a statutory cause of action under s. 130.1 of the *Securities Act*, which provides a remedy for purchasers where there is a misrepresentation in an offering memorandum.

79 The motions judge rejected this argument. He held that, because the Estimates "came before and [were] extraneous to" the offering memorandum or Disclosure Documents directed by the OSC, they were outside of the scope of the Act.

(c) Third allegation: misrepresentation in the Estimates

80 Finally, the plaintiffs claimed that Talon, Shnaider, Levitan and Trump were liable for the misrepresentations contained in the Estimates. Although the plaintiffs argued the misrepresentations could be viewed as fraudulent in nature, the motions judge determined that the fraudulent misrepresentation claim had not been pleaded. As a result, he made no findings and said little in respect to that ground. He then turned to the claim for negligent misrepresentation and agreed that two misrepresentations had been made out:

> 1. Talon misrepresented that the Estimates were done based on the best available information to Talon to forecast potential revenue, expenses and net income, when in truth, the Estimates overstated revenue and understated expenses; and
>
> 2. Talon misrepresented that the Hotel Units would be profitable immediately when the Trump Hotel opened for business.

81 The motions judge was satisfied the plaintiffs had established four out of the five elements required to prove a claim of negligent misrepresentation, as set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.): (1) the defendants owed them a duty of care; (2) the defendants made an untrue, inaccurate or misleading representation; (3) the defendants did so negligently; and (4) the plaintiffs suffered damage as a result. It was in this context that the motions judge described the Estimates as "deceptive documents" that were "replete with misrepresentations of commission, of omission, and of half-truth". He explained, at para. 215: "Mr. Levitan had no training, experience, or justification from actual research to make any projections about the revenue streams for the new hotel in Toronto. What actually happened shows how inaccurate Mr. Levitan's guesswork was."

82 Despite these strong words, the motions judge held that the plaintiffs failed to establish the fifth required element: that they *reasonably* relied on the misrepresentation.

83 The motions judge accepted the plaintiffs' evidence that they had relied on the Estimates in making their decision to buy the Hotel Units. He went on to explain, however, that while the plaintiffs would not have known that the Estimates constituted misrepresentations:

> ... nevertheless, they would and should have known that it would be unreasonable for a prospective purchaser to rely on the Estimates or to be induced by the Estimates to enter into their Agreements of Purchase and Sale. Although Mr. Singh and Mrs. Lee may have subjectively relied on the Estimates in deciding to purchase the Hotel Units, their subjective reliance was objectively unreasonable.

84 The motions judge noted that the Estimates were "for discussion purposes" and were not "a guaranteed investment program". Mr. Singh and Mrs. Lee knew that all investments are risky and those risks were pointed out to them repeatedly in the Disclosure Documents. They knew they had a statutory cooling-off period under the *Condominium Act*, and they had an opportunity to conduct their own due diligence.

85 Further, the motions judge explained that around the time of the interim closings, the plaintiffs came to learn that the Estimates contained "misrepresentations of commission, omission and half-truths" about the quantum of expenses they would be liable to pay. Although the plaintiffs would not have known at that point about the misrepresentations regarding rental and occupancy rates, the motions judge considered that their going ahead with the interim closings "suggests that they were never reasonably relying on the Estimates as the inducement to enter into the Agreements": at para. 229. Rather, they were relying on "their rights and remedies associated with the documents required to be disclosed under the ruling of the OSC and pursuant to the provisions of the *Condominium Act*, 1998."

86 The motions judge went on to hold that, in any event, the plaintiffs' negligent misrepresentation claim was defeated by the "entire agreement clause and the other exculpatory provisions of the Agreement of Purchase and Sale and the related contracts": at para. 235.

87 The entire agreement clause in the agreement of purchase and sale reads as follows:

> 31. The Vendor and the Purchaser agree that there is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property or supported hereby other than as expressed herein in writing.

88 The Disclosure Document contained various exculpatory statements such as:

> Purchasers are advised that no representations are made with respect to expected or projected rental income. There is no assurance that Hotel Units will be able to be rented at any particular rate or for any particular period of time and the rates and the total income from each Hotel Unit will be affected by, among other things, competitions from other luxury hotels, guest preferences, economic conditions...

89 The Reservation Program agreement contained similar exculpatory statements as well as an entire agreement clause providing that the agreement "supersedes and replaces all prior negotiations and/or agreements made between the parties hereto, whether oral or written, and contains the entire understanding between the parties with respect to the subject matter hereof."

90 The motions judge held, without further analysis, that "there is no unconscionability or public policy reason to justify not enforcing" the clause: at para. 239.

91 Finally, although it was not pleaded, the motions judge dismissed Mrs. Lee's claim as time-barred. He held that she ought to have known about the misrepresentation claims around the time of interim closing in 2012, but she did not commence her action until 2015, which was beyond the statutory two-year limitation period: at para. 242.

C. DISCUSSION

(1) Overview

92 The plaintiffs appeal the motions judge's decision to dismiss the motions as against Talon on all three grounds they raised in the court below. They also appeal the dismissal of the claims against Shnaider, Levitan and Trump.

93 In my view, the appeal as against Talon can be decided on the basis that the motions judge, having found that four of the five elements for a claim of negligent misrepresentation were made out, erred in holding that the plaintiffs failed to establish the fifth element, reasonable reliance.

94 I would also hold that the motions judge erred in enforcing the entire agreement and other exculpatory clauses to bar the plaintiffs' actions. In light of the circumstances and context in which the clauses were entered into, it would be unconscionable to enforce those clauses to bar the plaintiffs' claims.

95 In addition, I would set aside the motions judge's dismissal of Mrs. Lee's claim as time-barred. Although they raised limitation provisions in the *Securities Act* and the *Condominium Act* in their statement of defence, the defendants did not plead the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B., nor did they seek leave to amend to do so. Further, they failed to raise a *Limitations Act* defence in their written submissions on the motions for summary judgment. In these circumstances, it was not appropriate for the motions judge to invoke the *Limitations Act* to dismiss Mrs. Lee's claim.

96 I also disagree with the motions judge's conclusion that fraudulent misrepresentation had not been pleaded. Although the statement of claim does not use the words "fraudulent misrepresentation", all of the elements and materials facts for such a claim are pleaded and the claim was brought to the respondents' attention in the factum filed on the

summary judgment motions. Because the motions judge did not make the necessary factual findings, this claim should simply be remitted to be determined on a subsequent motion or at trial.

97 With respect to the action against Shnaider, Levitan and Trump, I agree that the claims that were the subject of the motions for summary judgment were properly dismissed. In my view, however, the motions judge erred in dismissing the claims against the three individual defendants that were not properly before him.

98 I will elaborate on each point below.

(2) Reasonable reliance

99 As the motions judge indicated, the five elements of a claim for negligent misrepresentation are: (1) a duty of care based on a "special relationship"; (2) a misleading representation; (3) negligence in making the misrepresentation; (4) reasonable reliance on the representation; and (5) damage caused by the reliance: *Queen v. Cognos Inc.*, at p. 110. Only the "reasonable reliance" factor is at issue here.

100 Whether a plaintiff reasonably relied on a defendant's misrepresentations is a question of fact: *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.), at para. 81, leave to appeal refused, (1999), [2000] S.C.C.A. No. 96 (Ont. C.A.).

101 As I have just explained, the motions judge accepted that Mr. Singh and Mrs. Lee "subjectively relied" on the Estimates, but held that "their subjective reliance was objectively unreasonable" because:

> 1. The Estimates were "for discussion purposes only" and "not a guaranteed investment program". The plaintiffs were given various warnings, protections and rights, and as a result, it would not have been objectively reasonable for them to rely on the Estimates for what they knew was a "risky financial investment"; and
>
> 2. Once the plaintiffs learned of higher than expected expenses at the time of interim closing, they did not try to back out of their agreements of purchase and sale.

102 On the first point, the fact that the Estimates were "for discussion purposes only" and "not a guaranteed investment program" does not inevitably lead to the conclusion that it would be unreasonable for the plaintiffs to rely upon them. Earlier in his reasons, the motions judge rejected Ms. Zak's evidence that she did not sell the Hotel Units based on room rates and occupancy rates — the very information set out in the Estimates. Instead, he found as a fact that "the Hotel Units were sold as an investment with a potential for capital gain and with ongoing income gains that would more than cover expenses": at para. 59. This information came directly from the Estimates.

103 The motions judge does not explain how his finding that Talon sold the Hotel Units as investments based on the information contained in the Estimates can be reconciled with his finding that the plaintiffs' reliance on those Estimates was unreasonable. In other words, if the basis of the sale was the unit's value as an investment as expressed in the Estimates, why was reliance on that information unreasonable?

104 Further, although I agree with the motions judge's finding that the plaintiffs were warned about the risks of their investment, it does not follow that it was unreasonable for the plaintiffs to rely on the Estimates. The risks acknowledged and accepted were the risks that market conditions could change, that rental rates and occupancy rates could fluctuate, and that their expenses might go up. Those are known, expected risks and the disclaimers in the documentation clearly disclose their existence. It would have been unreasonable for the plaintiffs to rely on representations that these risks did not exist.

105 The actionable misrepresentations, however, were not that risks such as market conditions and fluctuations in rental and occupancy rates did not exist. The misrepresentations were: (1) that the figures in the Estimates were based on the best available information; and (2) that the hotel would be immediately profitable. On the motions judge's own findings, both misrepresentations were established. He found that the figures in the Estimates were based not on hard

numbers but on Mr. Levitan's "uninformed and ill-informed opinions". Many known expenses were not disclosed or were grossly understated. Moreover, he found that when both Mr. Singh and Mr. Lee pressed Ms. Zak about the high occupancy and rental rates in the Estimates, she assured them that the hotel would be fully booked because it was new and would attract "buzz".

106 I agree with the motions judge that it would have been unreasonable for the plaintiffs to rely on a representation that the Estimates were a guarantee that their investments would pan out exactly as they had hoped. They knew or ought to have known that the Estimates were not a guarantee that the investment would be profitable. They assumed the risk that room and occupancy rates would fluctuate and that they might earn less profit than they originally anticipated. It is unreasonable, however, to conclude that the plaintiffs assumed the risk that the Estimates upon which they decided to invest were simply made up in the first place and that known expenses were either not disclosed or were grossly understated.

107 On the second point, the fact that the plaintiffs learned in 2012 that their expenses would be higher does nothing to undermine the reasonableness of their reliance on the Estimates in 2006 and 2007. Ms. Zak sold the units as an investment using estimates that understated expenses and overstated revenue. She told prospective purchasers that the 55% occupancy rate set out in the Estimates was a worst-case scenario, and that even at that rate the hotel would be profitable. Even after it was revealed to purchasers for the first time at interim closing that expenses had been understated, the plaintiffs had yet to discover that revenue was overstated. Specifically, the room rental rates and occupancy rates set out in the Estimates were unrealistically high and were based on uninformed and ill-informed opinions. As Mr. Singh testified, he was nervous after hearing of the high occupancy fees but he thought he had no choice. He took comfort from the Estimate that indicated that his annual revenue would be more than enough to offset the fees.

108 The motions judge's conclusion that the plaintiffs' reliance on the Estimates was objectively unreasonable is clearly in error and cannot stand. The plaintiffs' reliance on the Estimates was objectively reasonable.

(3) The entire agreement and other exclusionary clauses

109 As noted earlier, the agreement of purchase and sale, the Disclosure Document and the Reservation Program agreement contained various entire agreement and exclusionary provisions. Those clauses, examples of which I have quoted earlier, advised purchasers that they should only rely on the agreements expressed in writing, that no representations were being made as to the projected income from the rental of the Hotel Units and that there were risks that income would not be as projected.

110 Unless inapplicable, unenforceable, or otherwise invalid, contractual provisions such as entire agreement clauses may limit a party's right to sue in tort: *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.), at p. 30. That is because duties based in tort "must yield to the parties' superior right to arrange their rights and duties in a different way": *BG Checo*, at p. 27.

111 In *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), Binnie J. (dissenting but supported by a unanimous court on this point) set out the following analytic approach to be used in deciding whether to enforce such clauses, at paras. 122-23:

> 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.
>
> 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.

112 In his reasons the motions judge referenced *Tercon* and the analytical approach described therein. His analysis and application to the facts of this case, however, are contained in their entirety in para. 239 of his reasons:

> [T]he entire agreement and other exculpatory provisions included in the Disclosure Documents or Statements apply and stands in the way of the success of the Plaintiffs' misrepresentation claims. As a matter of interpretation the clauses apply, and there is no unconscionability or public policy reason to justify not enforcing the exculpatory provisions.

113 In my view, the motions judge erred in concluding, without analysis, that it was not unconscionable to enforce the exculpatory provisions. Unconscionability provides that despite the general principle that parties should be held to the bargains that they have made, there are some parties that must be protected and some bargains that should not be enforced: see A. Swan and J. Adamski, *Canadian Contract Law*, 3d ed. (Markham, Ont.: Lexis Nexis, 2012) at para. 9.99.

114 In *Domtar Inc. c. ABB Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461 (S.C.C.), at para. 82, LeBel and Deschamps JJ. described the doctrine of unconscionability in the context of limitation clauses, a type of clause similar in nature to exclusion or entire agreement clauses:

> Under the doctrine of unconscionability, a limitation of liability clause will be unenforceable where one party to the contract has abused its negotiating power to take undue advantage of the other. This doctrine is generally applied in the context of a consumer contract or contract of adhesion.

115 In *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55 (B.C. C.A.), the British Columbia Court of Appeal declined to enforce an entire agreement clause to preclude a claim based on a misrepresentation made to a franchisee. The franchisor had made misleading statements about estimated gross sales, expenses, and profits to induce the franchisee to enter an agreement. In rejecting the enforcement of these clauses, Lambert J.A. expressed the following view, at para. 45:

> A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

116 In the present case, the entire agreement clause functioned as a trap to these unsurprisingly unwary purchasers. Neither the Singhs nor the Lees had anything more than minimal investing experience. Their real estate experience was limited to the purchase of their family homes, although Mr. Lee worked as a mortgage agent (as did Ms. Singh beginning in 2008). They would have known little or nothing regarding luxury hotel rental rates and occupancy. And both the Singhs and the Lees signed the agreements of purchase and sale without consulting with a lawyer.

117 The entire agreement clause was well hidden within the agreement of purchase and sale. The agreement of purchase and sale is almost 17 pages long including schedules, with 49 articles that often include sub-clauses of their own. The entire agreement clause is found on page seven, the third of twelve articles under the heading 'General'. Nothing distinguishes this article from the other rectangles of dense black ink nearby. Ms. Zak, the sales representative for both the Singhs and the Lees, acknowledged in her evidence that she never reviewed the entire agreement clause with the plaintiffs.

118 The relevant portion of the entire agreement clause simply states: "The Vendor and the Purchaser agree that there is no representation ... affecting this Agreement or the Property or supported hereby other than as expressed herein in writing." Such a clause would mean nothing to the Singhs or Lees. They gave evidence accordingly. They could not have reasonably been expected to have understood that this meant that the respondents were exempting themselves from any liability flowing from their misrepresentations that induced the Singhs and Lees to sign the contract in the first place.

119 The Disclosure Document stands on even more unstable ground. Notably, it was not provided to either the Singhs or the Lees until *after* they had signed the agreements of purchase and sale.

120 Even if the exculpatory provisions in the Disclosure Documents should be considered, many of the same factors supporting a finding of unconscionability apply. Although bolded in all-caps, the main exculpatory provision was found about ten pages into a roughly 300-page document. Other than the capitalization and bolding, nothing was done to draw the Singhs' or Lees' attention to the significance of such a clause.

121 Moreover, such a disclaimer comes too late to be of any assistance to the purchaser who has already been induced to enter into an agreement. As Professor McCamus explains with respect to such subsequent disclaimers, "[t]he trap has already been set and triggered. If the contract contains a disclaimer clause, it is simply a better trap": John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), at p. 365.

122 It would be grossly unfair to enforce these clauses to deny Talon's tort duty not to make negligent misrepresentations to the plaintiffs.

123 Although the above considerations should be sufficient to found a decision declining enforcement of those clauses, further support can be found when the context of the contract formation is considered. As I will explain, I would find that Talon breached and evaded the protections of *Securities Act* by both the marketing of the Hotel Units as investment contracts with emphasis on the Reservation Program as a vehicle for regular profits and the providing of rental and cash flow forecasts or projections that were contrary to the OSC Ruling.

124 In my view, the motions judge erred in concluding otherwise.

125 With respect to the marketing of the Hotel Units, it is to be recalled that Talon's lawyers represented that the Units would "not be marketed or structured as investments for profit or gain" but would rather be marketed "as luxury hotel condominium units entailing exclusive occupancy rights, coupled with an opportunity to defray related ownership expenses in connection with periods of non-occupancy through voluntary participation in the Reservation Program". The motions judge found that Talon marketed the Hotel Units "precisely in the way that it undertook to do in its application" to the OSC (at para. 98) and that "Talon did not sell whatever it had to sell as an investment contract" (at para. 104). He does not explain how this is to be reconciled with his earlier findings. Those findings were that "the Hotel Units were sold as an investment with a potential for capital gain and with ongoing income that would more than cover expenses", and that Ms. Zak "discuss[ed] with the purchasers the income they might earn or the estimated return on investment": at para. 59.

126 Similarly, the motions judge's description of the Reservation Program as "an integral part of the marketing of the Hotel Units" appears on its face to acknowledge that Talon breached the OSC Ruling, which provided in para. 23 that the Reservation Program would be marketed as "merely a secondary feature" to defray ownership expenses, as opposed to an investment vehicle.

127 With respect to the Estimates, the motions judge found that providing financial projections and rental or cash flow forecasts to prospective purchasers of Hotel Units did not contravene the OSC's prohibition against providing "rental or cash flow forecasts or guarantees or any other form of financial projection or commitment". In my view the motions judge's interpretation is simply unreasonable and cannot stand (*L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.), at paras. 55-56, 110). The reasonable reading of this provision is that it prevents both the giving of guarantees and commitments and the giving of financial projections and rental or cash flow forecasts. The motions judge's reading of the provision effectively reads out key terms and renders their inclusion meaningless.

128 As to the motions judge's suggestion that the Estimates do no more than give effect to the OSC's implicit assumption that Talon would explain how the Reservation Program functioned, it is apparent from even a cursory review of the Estimates provided to the plaintiffs that they went well beyond such a purpose. The carrying costs of the units as set

out in the Estimates have nothing to do with the operation of the Reservation Program. The title "estimated return on investment", the layout of the document and the setting out of annualized rates of return on cash invested all show the document to be much more than what the motions judge characterized as "information about the operation of the Reservation Program and of the hotel".

129 In my view, it would be unconscionable and would shock the conscience to allow a party to use an entire agreement or other exculpatory clause to escape liability for misrepresentations made in breach of the OSC's terms for granting an exemption from the *Securities Act* requirements. The entire agreement and other exculpatory clauses would operate to negate a negligent misrepresentation claim and the misrepresentation itself was only possible in this case because Talon evaded protective requirements under the *Securities Act* by obtaining the exemption and then breaching that exemption.

(4) The limitations issue

130 The motions judge found that Mrs. Lee's negligent misrepresentation claim was barred by the *Limitations Act*. He did so despite the fact that the defendants had not pled the *Limitations Act* and had not sought to amend their pleading to include such a plea. Although they raised the issue in oral submissions, the defendants had not raised it in the factum filed on the summary judgment motions.

131 In his reasons the motions judge neither refers to the fact that it was not pleaded nor does he explain why, in the absence of such a plea, he should nonetheless invoke the Act.

132 This court has consistently held that "[t]he expiry of a limitation period is a defence to an action that must be pleaded in a statement of defence": *Collins v. Cortez*, 2014 ONCA 685, [2014] O.J. No. 4753 (Ont. C.A.), at para. 10, per van Rensburg J.A. (citing *S. (W.E.) v. P. (M.M.)* (2000), 50 O.R. (3d) 70 (Ont. C.A.), at paras. 37-38, leave to appeal to S.C.C. refused, (2001), 149 O.A.C. 397 (note) (S.C.C.)). This requirement is embodied in rule 25.07(4) of the *Rules of Civil Procedure*, which Ontario courts have consistently held "applies to pleadings relating to limitations that might bar an action": *S. (W.E.) v. P. (M.M.)* at para. 37. Rule 25.07(4) provides as follows:

> In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.

133 Justice Cronk explained the rationale behind the requirement that a party specifically plead a limitation period defence in *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, 2012 ONCA 826, 225 A.C.W.S. (3d) 237 (Ont. C.A.), at para. 69:

> The failure to raise substantive responses to a plaintiff's claims until trial or, worse, until the close of trial, is contrary to the spirit and requirements of the Rules of Civil Procedure and the goal of fair contest that underlies those Rules. Such a failure also undermines the important principle that the parties to a civil lawsuit are entitled to have their differences resolved on the basis of the issues joined in the pleadings.

134 In *S. (W.E.) v. P. (M.M.)*, MacPherson J.A. confirmed that Ontario courts "have consistently held that rule 25.07(4) applies to pleadings relating to limitations that might bar an action": at para. 37. He went on to explain that even though in that case the trial judge had given counsel time to prepare submissions on the issue after he raised it during closing arguments, it did not remove the potential prejudice to P:

> If S had raised the issue in his pleadings, P might have tried to settle, or even have abandoned, her counterclaim. Either decision might have had costs consequences. Another potential source of prejudice arises from the fact that counsel for P might have adopted different tactics at trial. In particular, counsel might have called different or additional evidence to support an argument that the discoverability principle applied (at para. 38).

135 MacPherson J.A. also noted that at no time during trial, including during closing arguments when the trial judge raised the limitation issue, did S seek to amend his pleadings. Nor did he seek such an amendment during the appeal hearing.

136 In my view, the defendants' failure, in this case, to plead a *Limitations Act* defence or even to seek an amendment to their pleading to do so is, as it was in *S. (W.E.) v. P. (M.M.)*, fatal.

(5) The fraudulent misrepresentation pleading

137 The motions judge stated at para. 201 that "because the fraudulent misrepresentation claim was not pleaded I shall say little about it." The reasons, however, contain no analysis of the statements of claim nor an explanation of how he reached this conclusion.

138 While the factum filed by the plaintiffs on the summary judgment motions focused principally on negligent misrepresentation, it did refer to fraud. For example, the factum stated as follows at para. 351:

> If this Court determines (particularly in the case of Levitan) that the misrepresentation can be characterized as fraudulent then the individual liability of the employee is easier to establish since his actions take on the character of an individual and separate tort. [Footnote omitted.]

139 In response, the defendants' summary judgment factum acknowledged that the plaintiffs claimed Levitan's actions met the test for fraudulent misrepresentation, but then simply stated that the plaintiffs did not specifically plead fraudulent misrepresentation. No specific deficiency in the pleadings was identified, nor was any prejudice claimed.

140 On appeal the respondents again maintain that the pleadings were deficient and, specifically, they argue that the appellants' pleadings do not assert that the defendants knew that the statements were false or were indifferent to their truth or falsity. They further argue that there was no pleading that there was an intention that the appellants would act on the false representations.

141 Although it is not clear from the case law that an intention that the false representation be acted on is a necessary element of a fraudulent misrepresentation claim (see *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 21, and *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), at para. 88), the pleadings of both Mrs. Lee and Mr. Singh assert that the defendants knew the statements were false (Mrs. Lee's statement of claim at para. 76; Mr. Singh's at paras. 114-116) and that there was an intention that they would be acted upon (Mrs. Lee's statement of claim paras. 97-98; Mr. Singh's at para. 112).

142 The pleadings could certainly have been clearer and the absence of a specific statement that a fraudulent misrepresentation claim was being advanced is of concern. This having been said, the respondents do not argue that they have been taken by surprise or prejudiced. Provided that the particulars and material facts relied upon for a fraudulent misrepresentation claim are pleaded it is not essential that the word "fraud" or "fraudulent" be used: see *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2014 ONCA 85, 372 D.L.R. (4th) 90 (Ont. C.A.), at para. 54.

143 As a result, I would set aside the motions judge's dismissal of the fraudulent misrepresentation claim. In setting aside the dismissal I should not be taken as finding that the claim has merit. I am simply not prepared to rule on the merits of the claim. Contrary to the appellants' contention, I do not consider the motions judge's findings, such as the finding at para. 213 that some of the information contained in the Estimates "emanated from Mr. Levitan's mind", to be dispositive. While the motions judge was clearly unimpressed with Mr. Levitan's process for coming up with the projections, he never concluded that the misrepresentations were made with knowledge of their falsity or with recklessness as to whether they were true.

144 As a result, because necessary factual findings regarding this claim were not made, I would remit the issue to be decided on a further motion for summary judgment or at trial. In light of the disposition of the appeal, the appellants may

well decide not to proceed with the fraudulent misrepresentation claim. Should the appellants choose to proceed with that claim, however, and should they succeed in proving fraudulent misrepresentation, different or additional remedies may be available to them.

(6) The dismissal of the actions against Shnaider, Levitan and Trump

145 The appellants argue that the motions judge erred in dismissing the actions against Shnaider, Levitan and Trump. They contend that, although it was open to the motions judge to dismiss those claims that were the subject of the summary judgment motions, it was unfair for him to have dismissed the causes of action pled but not encompassed in the motions before him.

146 I agree.

147 The motions judge correctly noted that on a motion for summary judgment the judge may grant judgment in favour of a responding party, even in the absence of a cross-motion for such relief: *Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150, 394 D.L.R. (4th) 601 (Ont. C.A.), at para. 17; *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, 40 R.P.R. (5th) 26 (Ont. C.A.), at paras. 14-16; *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171 (Ont. C.A.), at paras. 50-52.

148 However, a motion judge may not grant or dismiss a claim on a motion for summary judgment that is not within the scope of the motion before him or her. Doing so would deny procedural fairness and natural justice.

149 A fair hearing requires that a party have notice of the matters that will be at issue at the hearing and of how that party may be affected by the hearing's outcome: see *Québec (Commission des relations ouvrières) v. Alliance des professeurs catholiques de Montréal*, [1953] 2 S.C.R. 140 (S.C.C.).

150 In the present case, the grounds set out in the notices of motion are that the plaintiffs were seeking "damages from Talon and the other Defendants for breaches set out in [the] Statement of Claim and *mov[ing] for summary judgment on the basis of the following claims*" (emphasis added). The claims that follow in the notices of motion are those concerning the OSC Ruling and misrepresentations by Talon. They did not include any of the plaintiffs' other claims, such as those based on oppression, collusion, or breach of fiduciary duties.

151 The parties' summary judgment factums were consistent with motions for partial summary judgment limited to the OSC Ruling claims and claims of misrepresentation. The plaintiffs' factum stated that "[t]he legal issues to be determined are as follows: a) Did Talon breach the terms of the Ruling and, if so, what remedy is available to the Plaintiffs; and b) Did these Defendants make any actionable misrepresentations and, if so, what remedy is available to the Plaintiffs."

152 The defendants' summary judgment factum suggested that they understood the limited scope of the motions for summary judgment. Their law and argument section addressed two categories of claims: those arising out of the OSC Ruling and the misrepresentation claims. The response of Trump, Levitan, and Shnaider was limited to arguing that no misrepresentations were made or that, in any event, they were not misrepresentations that would attract personal liability.

153 In their factum the respondents submitted that, if they were successful on the OSC or misrepresentation claims, *those* causes of action should be dismissed. Their requested order was for "the Motion for Summary Judgment [to] be dismissed, and *that the causes of action based upon the breach of the OSC Ruling and misrepresentation be dismissed*, with costs" (emphasis added).

154 For these reasons, I would set aside the motions judge's dismissal of the causes of action against Shnaider, Levitan and Trump that fall outside the scope of the motions for partial summary judgment.

(7) Remedy

155 The appellants argue that the appropriate remedy is to order rescission or, in the alternative, damages.

156 I agree that Mr. Singh, as a party to an executory agreement that never closed, is entitled to rescission. This court has long held that "[r]escission is available in the case of an executory contract where a material misrepresentation that was an inducement to enter into the contract is established": *Panzer v. Zeifman* (1978), 20 O.R. (2d) 502 (Ont. C.A.). Elaborating on this point, the motions judge correctly stated that rescission may be obtained on the basis of a non-fraudulent misrepresentation where the defendant has made a false statement that was material and that induced the plaintiff to enter the contract, and where the innocent party has sought rescission before the closing of the transaction. Having determined that the elements of negligent misrepresentation are made out, and that these misrepresentations were material and induced Mr. Singh to enter the agreement of purchase and sale that he refused to close in 2012, I find that Mr. Singh is entitled to rescission.

157 The same, however, cannot be said for Mrs. Lee who completed the purchase of the unit. Absent a finding of fraud, in the context of real estate transactions induced by misrepresentation, execution of the agreement has typically been held to constitute a barrier to rescission: *Nesbitt v. Redican* (1923), [1924] S.C.R. 135 (S.C.C.); *Shortt v. MacLennan* (1958), [1959] S.C.R. 3 (S.C.C.); *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (B.C. C.A.). The appellants have referred the court to more recent judicial support for the view that execution is a relevant but not decisive factor in determining whether rescission is available, at least in some limited contexts: *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, [1994] B.C.J. No. 598 (B.C. C.A.); see also McCamus, at pp. 354-355, and S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 424.

158 Even assuming without deciding that rescission could be a remedy available to Mrs. Lee after having executed her transaction, I would nevertheless not grant rescission in the circumstances of this case. It is not apparent from the record what effect rescission would have on innocent third parties such as Mrs. Lee's mortgagor, who was not made a party to these proceedings. Further, the claim was issued more than two years after she closed the transaction. In these circumstances I view the award of damages as constituting the appropriate remedy for Mrs. Lee.

D. DISPOSITION

159 For these reasons I would set aside the motions judge's order and substitute an order:

1. rescinding Mr. Singh's agreement of purchase and sale;

2. awarding damages to Mrs. Lee as against Talon for negligent misrepresentation;

3. as against Shnaider, Levitan and Trump, dismissing only those of the appellant's claims that were advanced for breach of the OSC Ruling and for misrepresentations;

4. remitting the claim for fraudulent misrepresentation to be decided on a further motion for summary judgment or at trial before the Superior Court;

5. awarding pre and post-judgment interest on the damage awards; and

6. for costs of the appeal on a partial indemnity basis to the appellants as against Talon fixed in the amount of $35,000, inclusive of disbursements and applicable taxes.

160 As the matter is continuing in the Superior Court, I leave that court to decide how Mrs. Lee's damages are to be calculated and fixed as well as to determine what is necessary to implement the order rescinding Mr. Singh's agreement of purchase and sale.

161 If the parties are unable to agree on the costs of the original motions, the appellants shall provide brief written submissions not to exceed three pages within 21 days of the release of these reasons and the respondents are to provide their response not to exceed three pages within 14 days thereafter.

K. van Rensburg J.A.:

I agree

M.L. Benotto J.A.:

I agree

Appeal allowed.

Footnotes

1 The motions judge's reasons show Mrs. Lee's increase to be $2,156.73 or 62% (at para. 165). Those figures appear to be in error and I have used the correct figures.