

## **CHAPTER 12**

### **CONTRACTUAL REMEDIES**

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#### **TEACHING APPROACH**

Although the next two chapters deal with special types of contract (sales of goods and negotiable instruments), this chapter represents the last part of our general discussion of the topic. Students therefore should once again be urged to consider the topic as a whole. While some parts of the subject can be passed over as time constraints require, most form essential elements of an integrated whole. A contract therefore should be seen as a process, beginning with offer and acceptance, following through to performance, and culminating in some form of discharge or termination.

The cases and concepts addressed in this chapter presume that one party has breached the contract. That is an important concept. However, students should also appreciate that breach is the exception, rather than the rule. Most contracts are properly performed without incident. Consequently, while an understanding of contractual remedies is a necessary part of devising a risk management scheme, students should not “look for trouble.” Moreover, even when difficulties do arise, it is often prudent from a business perspective to settle matters informally, rather than litigate them fully in the court system.

As a matter of risk management, it is also important to emphasize the extent to which liability may be imposed, even on the basis of a relatively simple contract. In that regard, a heavy emphasis must be placed upon the fact, almost unique in our legal system, that a cause of action for breach of contract supports forward-looking relief. Having committed a breach, the defendant cannot always satisfy liability by simply restoring the plaintiff to the position that it enjoyed before the contract was created. Reliance damages certainly are available for that purpose, but they are the exception. Most claims for contractual

relief focus on expectation damages. The plaintiff is entitled to have the defendant's promise fulfilled, either through performance or through the monetary proxy of damages. As a result, a minor breach may expose the defendant to catastrophic liability if the plaintiff is thereby deprived of a valuable benefit that it expected to receive as a result of the agreement.

The forward-looking nature of contractual relief raises two specific points for risk management. First, expectation damages are not available for *all* losses that are factually caused by a breach. The concept of remoteness operates on policy grounds and imposes a limit on the extent of the defendant's liability. To avoid the consequences of that rule, the potential victim of a breach should, at the time of creating the contract, ensure that the defendant is fully aware of the possible consequences of a breach. While the defendant will be assumed to know of risks that the reasonable person would recognize, the plaintiff should, if there is any doubt, expressly draw the defendant's attention to a particular risk. And as always, as a matter of evidence, it is better to have proof in writing than to rely upon the perceived reliability and veracity of witnesses.

From the perspective of a potential defendant, the threat of liability points in another direction. A contract is an exercise in risk allocation. All else being equal, I will be willing to pay more for your performance if I have the ability to recover damages from you in the event of breach. In contrast, if my rights do not include the ability to claim substantial damages in the event of breach, I will be willing to pay less for your performance. Consequently, at the time of creating our contract, you must predict how the situation may unfold in the future. If you believe that there is a serious risk of substantial liability, you may wish to demand a higher price, insist upon the inclusion of a limitation or exclusion clause, or walk away from the proposed deal altogether. Of course, to undertake the necessary calculation, you must know the basic rules governing contractual liability.

Finally, because of the centrality of expectation damages, it is important to clearly explain the manner in which such relief is calculated. That exercise often seems more difficult than it is. Much of the perceived difficulty can be dispelled, however, by working through problems with students. Take a relatively simple example.

On May 1, Pam agreed to buy a widget from Dave. The total price was \$100 000. Pam paid \$30 000 immediately and promised to pay the remainder on delivery. The contract required Dave to deliver on June 1. Dave breached the contract by refusing to deliver. By June 1, the market value of a widget had increased to \$125 000.

Because of the contract, Pam is entitled to have her expectation fulfilled. She expected to start with \$100 000 and to end up with a widget. That last point bears emphasis. In identifying Pam's expectation, it is enough to say that, at the time of entering into the agreement with Dave, she expected to get a widget. It is not necessary to say, at that time, that she expected to make a profit under the agreement. Virtually every contract is a gamble. By agreeing to pay \$100 000, Pam effectively was betting that on June 1, a

widget would be worth at least that much to her. As it turned out, it was actually worth more: \$125 000. The contract was, in other words, a good bet for Pam and a bad bet for Dave.

Pam started with \$100 000 and paid \$30 000 to Dave. She therefore was left with \$70 000 on the day of the breach. According to the terms of the contract, however, she should have held \$125 000 in value on that day. Consequently, to fulfill Pam's expectation, Dave must pay her \$55 000.

The same figure can be produced through a slightly different analysis. Under the terms of her agreement with Dave, Pam had the right to acquire a widget in return for a payment of \$100 000. Since she paid \$30 000 at the outset, she was entitled to receive a widget upon the payment of another \$70 000. On the day of breach, however, Pam would be required to pay \$125 000 to a third party in order to acquire a substitute widget. Dave therefore is responsible, because of the risk that he accepted under the contract with Pam, to provide the difference in the purchase price ( $\$125\,000 - \$70\,000 = \$55\,000$ ). (Of course, after receiving expectation damages from Dave, Pam is not actually required to use that money to buy a substitute widget from a third party.)

## **ADDITIONAL TEACHING SUGGESTIONS**

### **Mitigation and Specific Performance**

Students may ask about the relationship between the so-called duty to mitigate and the availability of specific performance.

The duty to mitigate states that damages will be denied to the extent that the plaintiff failed to take a reasonable opportunity to staunch the flow of losses flowing from the defendant's breach. If the parties' contract concerned a sale, that means that the plaintiff should (depending upon whether it was the vendor or the purchaser) either try to sell the same item to a third party or buy a substitute item from a third party.

An order for specific performance allows the plaintiff to require the defendant to actually fulfill a contractual undertaking (as opposed to merely provide monetary damages in lieu of performance). A claim for specific performance is usually sought if the plaintiff was contractually entitled to purchase a particular piece of property, especially a piece of land.

Of course, by entering into a contract to buy, say, a piece of land from the defendant, the plaintiff demonstrated a desire to acquire *that* piece of land and *not* others. Not only did the plaintiff want the particular property and no others, it also wanted only one piece of property. Consequently, if it legitimately brings a claim for specific performance, it is relieved of the need to mitigate its losses prior to trial. After all, there would be little sense in seeking an order to acquire the defendant's land if the plaintiff was *also* required to buy *another* piece of land in the interim. The plaintiff wants one piece of land – not two.

Of course, as seen in *Asamera* (which is explained below in a Case Brief), the plaintiff cannot always avoid the duty to mitigate by claiming specific performance. The duty to

mitigate is displaced only if the plaintiff's claim for specific performance was legitimate (even if, as in *Semelhago*, which is also explained in a Case Brief below, the plaintiff ultimately chooses damages rather than specific enforcement).

### **Difficulty of Calculation and the Availability of Reliance Damages**

As a general rule, the plaintiff is entitled to choose as between expectation damages and reliance damages (subject to the fact that reliance damages are not available to the extent that a contract was unprofitable). And as another general rule, a court will not be dissuaded from awarding expectation damages merely because the plaintiff's loss is difficult to quantify (*Chaplin v Hicks*). There are, however, situations in which expectations are not merely *difficult* to accurately quantify – they are *impossible* to sensibly quantify. In those circumstances, the plaintiff does not enjoy an option. If it wishes to receive substantial relief (*ie* something more than nominal damages), it must claim reliance damages.

The Australian case of *McRae v Commonwealth Disposals Ltd* (1951) 84 CLR 377 (Aust HC) provides a classic illustration. The parties created a contract under which the plaintiff purchased the rights to a certain cargo ship that was purportedly sunken in a certain reef. In reliance upon that contract, the plaintiff incurred a number of expenses. It paid £285 to the defendant. It refitted the ship that it intended to use during the salvage operation. It hired a salvage expert and a crew. It passed up opportunities to earn money on other projects. And so on. In fact, however, contrary to the defendant's promise, neither the specified ship, nor the specified reef, actually existed. The plaintiff sued for breach of contract and alternatively claimed expectation damages and reliance damages.

The court refused to award expectation damages. Although the plaintiff's expectations under the contract were disappointed, it was impossible to assess that loss with any degree of precision. The contract did not specify the nature of the purported ship or its purported cargo. Furthermore, the contract did not guarantee that the plaintiff's salvage operation would be successful (assuming that the reef and the ship actually existed). Expectation damages therefore would amount to a hopeless stab in the dark. The court was not willing to perform such an exercise.

The plaintiff therefore was restricted to reliance damages for the various expenses that it incurred under the contract.

### **Liability for Intangible Losses**

Case Brief 12.2 provides a summary of the Supreme Court of Canada's decision in *Fidler v Sun Life Assurance Co of Canada*.<sup>1</sup> That decision appears to have introduced a dramatic change in the law of contractual damages insofar as it denies the need for any special rules regarding mental distress, and instead holds that damages are available for intangible losses, as long as the usual contractual rules are satisfied. The focus therefore falls upon the reasonable foreseeability test of remoteness under *Hadley v Baxendale* that is discussed in the text. The situation appears to simplicity itself.

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<sup>1</sup> (2006) 271 DLR (4th) 1 (SCC).

*Fidler*'s apparent simplicity is, however, misleading. Most significantly, a number of loosely-written passages virtually invite mis-interpretation. At various points, the decision seems to say that mental distress is compensable as long as it was reasonably foreseeable *tout court*. Indeed, articles appearing in the popular press and professional publications already have arrived at that conclusion. If true, the result would be disastrous. Reasonable foreseeability is a low threshold and it is not far-fetched to contemplate, with respect to a great many contracts, that breach may induce substantial psychological harm. As a close reading of *Fidler* confirms, however, that is not what the court truly intended. McLachlin CJ and Abella J treated *Hadley v Baxendale* (*supra*) as the touchstone of liability. And from that perspective, reasonable foreseeability is important not in itself, but rather insofar as it informs the parties' allocation of risks. Compensable losses are identified by asking "what did the contract promise?" Relief is available only to the extent that the defendant assumed (or is taken to have assumed) responsibility for the plaintiff's emotional well-being.

Unfortunately, two years after *Fidler*, the Supreme Court of Canada returned to the issue of intangible injuries in *Honda Canada Inc v Keays*.<sup>2</sup> As explained in a case brief that appears below, that appeal primarily dealt with the issue of "Wallace damages" in the employment context. In the course of judgment, however, Bastarache J indicated, albeit without discussion or analysis, that reasonable foreseeability itself is indeed the test for recovery of intangible losses—that concept is not simply shorthand for an inquiry into the parties' allocation of risks. Given the dangers inherent in that approach, the court will need to revisit the matter yet again.

The new approach to intangible injuries raises other issues or problems, as well. Where a contract is silent on point, the court will need to decide whether the defendant *implicitly* assumed responsibility for the claimant's peace of mind. Such an inference will often be plausible. People frequently seek psychological security in contractual relations. That arguably is true not only with respect to all types of insurance, but also, for instance, many employment contracts, residential leases, and consumer warranties. But do insurers, employers, landlords, and vendors of consumer goods thereby become responsible for psychological harm? And if so, will dissatisfied employees, tenants, and customers routinely claim damages for mental distress? For fear of opening those floodgates, Canadian courts may be tempted to hold, as a matter of policy rather than fact, that certain types of contracts simply do not support a right to peace of mind. They may, in other words, find that liability for mental distress requires special rules after all.

*Fidler* also raises serious questions regarding the calculation of relief. In awarding \$20,000 for mental distress, the trial judge did little more than say that he was "satisfied that [the plaintiff] genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage."<sup>3</sup> Unfortunately, the Supreme Court of Canada upheld that decision without substantial comment. It did not indicate whether relief is measured by reference to the injury actually incurred, or treated as a conventional sum. (The answer will, of course, affect litigation costs.) Nor did it indicate whether

<sup>2</sup> (2008) 294 DLR (4th) 577 (SCC).

<sup>3</sup> [2002] 11 WWR 352 at 357 (BC SC).

damages for mental distress will be artificially capped, or merely subject to the rules of remoteness. Those issues were left for another day.

## DISCUSSION BOXES

### You Be the Judge 12.1

#### Calculation of Expectation Damages

Maria made a good deal with Jose. She agreed to pay \$5000 for a car that was really worth \$7500. She has already paid \$4000 of the total price of \$5000. A judge therefore would calculate the difference between the value that Maria expected to have at the end of the contract and the value that she currently has. She expected to have a total of \$7500 (*ie* the true value of the car), but she currently only has \$1000 (*ie* she was expected to pay \$5000, but she only really spent \$4000). She therefore must be awarded the difference of \$6500.

	\$7500	(value expected under contract – <i>ie</i> market value of car)
–	<u>\$1000</u>	(current value under contract – <i>ie</i> money still retained)
=	\$6500	(expectation damages)

### You Be the Judge 12.2

#### Calculation of Expectation Damages

Maria made a bad bargain with Jose. She agreed to pay \$5000 for a car that was really worth \$1000. She has already paid \$4000 of the total price of \$5000, leaving her with \$1000. Since that is as much as she expected to receive under the contract, she is not entitled to any further expectation damages.

	\$1000	(value expected under contract – <i>ie</i> market value of car)
–	<u>\$1000</u>	(current value under contract – <i>ie</i> money still retained)
=	\$0	(expectation damages)

While it may initially seem unfair that she is not entitled to receive any damages as a result of Jose’s breach, while he is entitled to retain both the car and the \$4000 that Maria has already paid, those conclusions flow from the nature of contracts.

Significantly, however, as discussed at the end of this chapter, Maria has another option (albeit one that lawyers often overlook). Once she discharges the contract on the basis of Jose’s breach, she is entitled to claim either damages for breach of contract (which will be nil) *or* she can claim restitution for unjust enrichment. Under the latter claim, she proves that: (i) Jose was enriched by the receipt of \$4000, (ii) she suffered a corresponding deprivation by paying \$4000, and (iii) there is, once the contract has been discharged, an absence of any juristic reason for Jose’s enrichment. Maria therefore is entitled to restitution, which means that Jose must “give back” the value of the enrichment that he received from her. She therefore can recover \$4000 from him.

### Business Decision 12.1

#### Mitigation of Damages

1. Manfred is almost certainly not liable for all of your losses. The victim of a breach of contract has a “duty” to mitigate the losses that flow from the breach. In these circumstances, that means that you are *not* entitled to receive damages with respect to losses that you unreasonably failed to prevent by securing an alternative supply of chips from another source. On the facts, there is no reason to believe that it would be unreasonably difficult to arrange an alternative supply fairly quickly.
2. If an alternative supply of chips could be arranged within three weeks, then Manfred is liable for losses occurring only during that period. With respect to the losses that occur during the remainder of the year, you must assume responsibility for your own unreasonable failure to mitigate the losses.

### **Business Decision 12.2**

#### **Expectation Damages and Reliance Damages**

1. This question asks students to consider which measure of damages is preferable. On the facts, either expectation damages or reliance damages are available because the contract was not unprofitable. To the contrary, you expected that the contract would generate a *net* profit of \$7000. In other words, assuming that Ursula performed as promised, you expected to have \$7000 in your pocket, even after incurring your expenses.

Expectation damages are intended to place you in the position that you would have enjoyed if the contract had been properly performed. If they are claimed, you will receive \$12 000. You started with \$5000 in your pocket and expected to finish with \$7000 in your pocket. Since you paid \$5000 to Ursula, you now have a *deficit* of \$5000. Consequently, to achieve the expected benefit of \$7000, you must receive damages of \$12 000. From that \$12 000, \$5000 will eliminate the \$5000 deficit and \$7000 will provide the expected benefit.

Reliance damages are intended to compensate you for costs incurred under the contract. If you chose to claim reliance damages, rather than expectation damages, Ursula would simply be required to restore your original position, rather than fulfill your contractual expectation. You therefore would only be entitled to receive \$5000 – *ie* the amount that you spent in reliance upon the contract.

In this situation, expectation damages (\$12 000) are clearly preferable to reliance damages (\$5000).

### **Ethical Perspectives 12.1**

#### **Reliance Damages and Bad Bargains**

1. Many students may feel that the result is unfair insofar as it allows Anwar to retain \$3000 despite breaching the contract. Other students may feel otherwise, presumably for the reasons cited below.
2. In most situations, such as the present one, a breach of contract is not a wrong in any great moral sense. While there is something to be said for the view that “a promise is

a promise” and that obligations should always be fulfilled, the law is generally more inclined to adopt a less emotive view. According to Oliver Wendell Holmes’ “bad man theory” of contract law, a contractual undertaking is simply a promise to fulfill an expectation, either through performance or through the proxy of monetary relief. So long as the innocent party is made whole, at least economically, there is no basis for complaint. In this case, since you expected to enjoy a total value of \$2000 at the end of the contract, your position is sufficiently protected if you receive reliance damages in that amount.

The same basic point can be made in different terms. Contractual obligations are voluntarily assumed. You exercised your free will when you decided to enter into your agreement with Anwar. As a general moral precept, there is something to be said for the view that you should be required to assume responsibility for your own actions. That fact is not displaced by the mere fact that your bargain turned out to be a bad one or that Anwar broke his promise. Both of those events were risks that you voluntarily assumed when you entered into the contract.

As the accompanying note suggests, however, you may be entitled to recover all of the money that you paid to Anwar as restitution under the cause of action in unjust enrichment.

## REVIEW QUESTIONS

1. Although not common, it certainly is possible for the victim of a breach of contract to receive more than one remedy.

The overriding rule precludes “double recovery.” Most significantly, that means that the plaintiff generally cannot have both expectation and reliance damages. Those two remedies point in opposite directions. Expectation damages look forward and aim to fulfill the contract, through the proxy of damages rather than performance. Reliance damages, in contrast, look backward and aim to restore the plaintiff to the position that would have existed if the contract had not existed.

Likewise, disgorgement damages, or the account of profits, are understood to be available as an alternative to expectation or reliance damages. The plaintiff must elect between gain-based relief and loss-based relief.

Nominal damages also are exclusive of expectation, reliance, or disgorgement damages. Nominal damages symbolically vindicate the plaintiff’s rights in the absence of any loss. They therefore are available precisely because the plaintiff cannot prove an expectation or reliance loss, nor a wrongful gain.

Some measures of relief, however, invariably exist alongside others. Punitive damages are measured to ensure that, combined with other measures of relief (usually some form of compensatory damages), the defendant is punished and other potential wrongdoers are discouraged from future breach.



Likewise, the equitable remedies may be combined. A court may, in the same case, order an injunction to un-do a past breach, as well as specific performance to compel future fulfillment of an obligation.

Usually, however, if a court is prepared to order specific performance, the plaintiff must elect between actual performance and damages reflecting the value of that performance.

2. A court may respond to a breach of contract in a variety of ways. Leaving aside equitable remedies, six measures of damages are available.

- *Expectation damages* are a form of forward-looking compensation. The defendant must provide the plaintiff with the monetary value of the benefits that the plaintiff expected to receive under the agreement.
- *Reliance damages* are a form of backward-looking compensation. The defendant must provide the plaintiff with the monetary value of the losses and expenses that the plaintiff incurred in reliance upon the agreement.
- *Account of profits* is a defendant-sided, rather than plaintiff-sided, remedy. Whereas contractual damages usually focus upon the loss that the plaintiff suffered as a result of the defendant's breach, an account of profits focuses on the benefits that the defendant obtained as a result of the breach. The defendant must hand over, or disgorge, to the plaintiff the wrongful benefits.
- *Nominal damages* are damages in "name." They are used to symbolically vindicate the plaintiff's rights when the defendant's breach has caused neither a compensable loss to the plaintiff or a reversible gain to the defendant. Nominal damages are calculated, somewhat arbitrarily, in a small amount.
- *Punitive damages* are awarded in response to an egregious breach of contract. They serve the purpose of punishing the defendant and deterring other potential wrongdoers.
- *Liquidated damages* enforce the parties' genuine pre-estimate of the loss that would be suffered in the event of the defendant's breach. That pre-estimate is contained in a contractual clause. Such clauses are desirable because they avoid the need for costly and protracted investigations into the plaintiff's loss and the defendant's gain.

Restitution is a monetary remedy. It is awarded, however, in response to unjust enrichment, rather than breach of contract. The action in unjust enrichment is available only if the relevant events are *not* governed by a valid and enforceable agreement.

3. Expectation damages represent the monetary value of the benefit the plaintiff expected to receive under the contract. Expectation damages are forward-looking in the sense that they are intended to put the plaintiff in the position that it expected to be in after the contract was properly performed. For that reason, expectation damages are calculated as the difference between the value that the plaintiff expected to have at the end of the contract and the value that it actually held after the defendant's breach.

4. Loss of value damages give the plaintiff the value of the end product that it expected to receive, whereas cost of cure damages give the plaintiff the value of the

services necessary to achieve the end product. For example, the plaintiff in *Groves v John Wunder Co* expected to receive level land at the end of its lease agreement, but due to economic reasons, the defendant refused to perform. In that case, the loss of value damages was \$12 000, whereas the cost of cure damages was \$60 000.

Cost of cure damages may be justified on several grounds. First, unless such relief is available, the court will disrupt the bargain to which the parties agreed. The plaintiff in *Groves* could argue that if it had known that the land would not be leveled, it would have required the defendant to pay a higher monetary price. If the defendant's right to mine the land was worth \$105 000 *plus* the obligation to level the land, it follows that it must have been worth more money *without* the obligation to level the land. Second, the plaintiff can also argue that monetary damages should, as near as possible, facilitate the actual fulfillment of its expectations. Since it expected to receive \$105 000 *plus* leveled land, it should receive \$105 000 *plus* enough money to secure the leveling services from someone other than the defendant. Cost of cure damages therefore should be available to fulfill the plaintiff's legitimate expectations.

On the other hand, cost of cure damages occasionally fly in the face of the general societal desire to avoid wasteful expenditures. Although the parties are normally free to set the rules amongst themselves, the law sometimes intervenes on policy grounds. A great deal of money should not be spent to secure a minimal benefit. (That is especially true if, as often is the case, the plaintiff would not actually use cost of cure damages to affect a cure, but would choose instead to put the money to a better use.) In *Ruxley*, for instance, the House of Lords rejected the suggestion that £22 000 should be spent to repair a "defect" that neither diminished the market value of the pool nor made the pool less enjoyable.

For the preceding reasons, the courts are reluctant to award cost of cure damages unless the plaintiff has already spent money curing the defect caused by the defendant's breach or the plaintiff has a legitimate interest in doing so in the future. In other words, the courts try to strike a balance between the competing policy considerations.

5. Canadian courts traditionally followed the common law. Compensation for intangible injuries initially was refused. Beginning in the mid-twentieth century, courts then began to make relief available if a contract was created to provide the claimant with "peace of mind."

Canadian law was fundamentally changed, however, in 2006 with *Fidler v Sun Life Assurance Co of Canada*. The Supreme Court of Canada there decided that intangible injuries ought to be treated, like any other type of injury, within the rules of remoteness provided by *Hadley v Baxendale*. It therefore appears that intangible injuries will be recoverable any time that the loss was reasonably foreseeable, either in the normal course of events or on the basis of special information provided to the defendant at the time of contract formation. The full scope of that proposition, however, remains to be explored. It may be that the simple proposition is too broad and in need of restriction.

6. Expectation damages are usually available even if they are very difficult to calculate. The courts will do the best they can. In one famous case,<sup>4</sup> the defendant breached a contract by depriving the plaintiff of an opportunity to win a beauty contest. While the plaintiff's actual chance of winning the contest was largely guesswork, the court awarded expectation damages based on its best guess as to how she would have fared in the competition. In contrast, if the calculation of the plaintiff's loss is not merely difficult, but entirely speculative, a court will not award damages. A court of law is not a proper place for a stab in the dark.

7. Damages will be considered remote and therefore unavailable if the plaintiff fails to show that the defendant either should have known, or actually did know, that that sort of loss might occur if the contract was breached. So even if the plaintiff does not specifically mention the type of loss that is possible, the defendant may still be held liable if a reasonable person would have known that that type might occur. The reasoning behind this principle is that it would be unfair to hold a party liable for a loss that it could not have predicted.

8. Mitigation occurs when the plaintiff takes steps to minimize the losses that result from the defendant's breach. Mitigation is governed by four rules. First, there is a "duty" to mitigate in the sense that a plaintiff who chooses not to mitigate is precluded from recovering expectation damages. Second, the plaintiff is only responsible for taking reasonable steps to mitigate a loss. Third, damages are unavailable only to the extent that the plaintiff unreasonably failed to mitigate. And finally, the plaintiff can recover the costs associated with taking reasonable steps to mitigate a loss.

9. While there may not be a "correct" answer to this question, students should be expected to recognize the relevant issues and considerations. It might be suggested that the plaintiff should not have any obligation to help the defendant by taking steps to minimize the losses flowing from a breach. That view, however, proceeds upon the basis of an anomalously moralizing view of breach. It sees the defendant as a wrongdoer who should be, if not punished, then certainly not helped. More importantly, the argument against mitigation fosters economic waste. While a contract is generally a matter that should be confined to the parties, society does have some interest in preserving resources and preventing useless expenditures. If the plaintiff can reasonably stop the losses flowing from the defendant's breach (*eg* by arranging the supply of goods from another source), it should do so. It should not sit idly by while losses accumulate.

10. A party cannot escape the consequences of a bad bargain by claiming reliance damages rather than expectation damages. Reliance damages are only available to the extent that a contract is not unprofitable. That rule is based on the fact that the plaintiff must assume responsibility for the fact that it entered into a bad bargain.

11. Disgorgement refers to a measure of relief. Most private law actions, including most actions for breach of contract, contain a demand for *compensation* of the *loss* that the *plaintiff* suffered as a result of the defendant's breach. Disgorgement provides the

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<sup>4</sup> *Chaplin v Hicks* [1911] 2 KB 786 (CA).

other side of the remedial coin. It focuses on the *gains* that the *defendant* obtained as a result of the defendant's breach.

Disgorgement also is known as an *account of profits*. Unfortunately, disgorgement also is frequently confused with *restitution*. Disgorgement pertains to *all* of the benefits that the defendant received as a result of breaching the contract with the plaintiff. In most cases, the *material* source of the defendant's gain is not the plaintiff, but rather some third party. In *Attorney General v Blake*, for instance, the breach against the plaintiff allowed the defendant to obtain £150 000 from a publisher. Restitution, in contrast, is limited to the value that the defendant obtained from the plaintiff. That remedy is always an only triggered by the action in unjust enrichment.

Because disgorgement is a relatively new remedy, its precise scope of availability is not entirely clear. The courts, however, have said that the plaintiff may be entitled to it in "exceptional circumstances." That will be true if the plaintiff has a legitimate interest in preventing the defendant's profit-making activity and hence in depriving him of his profit.

12. Nominal damages represent the court's recognition that the plaintiff technically suffered a wrong when the defendant failed to perform a promise. Nominal damages are awarded when the plaintiff is unable to prove that it suffered any loss. As such, nominal damages do not represent the value of what the plaintiff expected to receive or the resources the plaintiff expended under the contract. Rather, nominal damages are simply intended to make a statement. Consequently, they are awarded in very small amounts (*eg* \$10).

13. This is a relatively difficult question. Although the issue was not directly addressed in the text, students can be expected to generate the correct answer from first principles.

The duty to mitigate "requires" the plaintiff to take reasonable steps to stem the flow of losses flowing from the defendant's breach. There is no positively enforceable duty *per se*, but compensatory damages may be reduced to the extent that the plaintiff failed to adopt reasonable measures to avoid a loss.

By its very nature, the rule applies to compensatory relief only. The reasonable avoidance of losses is logically irrelevant if the court awards relief calculated by reference to something other than the plaintiff's loss. The duty to mitigate therefore is inapplicable to an account of profits (*ie* disgorgement). That remedy focuses exclusively upon the gain that the defendant obtained as a result of breaching a contractual obligation owed to the claimant.

14. Liquidated damages represent a genuine attempt to estimate the value of the loss that may occur as a result of a breach. A penalty, in contrast, requires a party to pay an excessive amount if it breaches the contract. If a contract is breached, the innocent party is entitled to recover the liquidated amount, even if the amount turns out to be greater

than the loss actually suffered. Penalties, on the other hand, are not enforceable because they are merely an attempt to coerce the performance of an agreement. If a contract contains a penalty clause, the courts will ignore it and calculate damages in the usual way.

15. Punitive damages are available in addition to compensatory damages and they are intended to punish the defendant for bad behaviour. They are available only in unusual circumstances where two criteria are met. First, in addition to the requisite breach of contract, the defendant must act in a way that is harsh, vindictive, reprehensible and malicious. Second, in committing the breach of contract, the defendant also must have committed another independently actionable wrong, such as a tort.

16. The courts generally prefer to award monetary damages, rather than specific performance, because, in most situations, money is an entirely adequate remedy. For example, monetary damages may allow the plaintiff to go out and acquire goods that are virtually identical to the ones that it expected to receive under the agreement. Furthermore, the defendant is saved from the difficult task of retaining the disputed goods while the lawsuit makes its way through the court system. In that way, monetary damages allow the defendant to carry on with business as usual.

17. Specific performance compels a person to *do something* that is required by the contract, whereas an injunction compels the defendant to *refrain from doing something* that is prohibited by the contract. The courts are much more willing to award injunctions than specific performance because they do not like to limit an individual's freedom of choice. An order that prevents a person from doing one thing (an injunction) is not particularly intrusive. While not doing one thing, the defendant remains free to do anything else. On the other hand, an order that compels a person to do something (specific performance) is very intrusive. While doing one thing, the defendant does not remain at liberty to do anything else.

18. An exclusion clause excludes or limits liability for breach of contract. The clause may apply to certain types of breach or it may limit the amount of damages that are available in the event of breach. Exclusion clauses play an important role in the commercial world by allowing for the clear allocation of risks and thereby creating an important form of risk management. Unfortunately, exclusion clauses may also create unfair hardship, especially when they are contained in standard form contracts that large corporations force upon consumers. For that reason, they are subject to a number of rules and limitations.

- *Unambiguous Language* An exclusion clause is strictly enforced against the party that drafted it. For instance, a sign in a restaurant that excludes liability for “lost and stolen clothes” may not protect the restaurateur if a diner’s briefcase is stolen. Similarly, an exclusion clause that limits liability in contract may not be effective against a claim in tort. Exclusion clauses should therefore be written in clear, unambiguous language.

- *Reasonable Notice* A business that wants to limit its liability must provide reasonable notice of its exclusion clause. The effect of that requirement depends upon the circumstances. In some situations, a court may simply assume that the clause in question is so common that the customer must have known about it. Often, however, the business must actually draw the customer's attention to the clause *before* entering into the contract. For instance, a large, easily read sign may need to be posted at the entrance of a parking lot. Or a car rental agent may be required to specifically identify and explain an unusually onerous clause in a rental contract.
- *Agreement* If a business wants to rely upon an exclusion clause, it must prove that the other party agreed to it. Although that agreement may take any form, the best evidence is usually a signature.
- *Fundamental Breach* Finally, even if all of those requirements have been met, an exclusion clause will not apply to a fundamental breach if the effect of enforcing the clause would be unfair. Although the law remains somewhat unclear, a fundamental breach essentially consists of a breach that goes to the very "core" of the contract. If a breach of that sort was protected by an exclusion clause, then the contract would become radically different from what the parties had initially agreed upon. Assume, for example, that the plaintiff paid to store his car in the defendant's garage. The defendant required the plaintiff to sign a contract that excluded liability "for any loss or damage, however caused, either intentionally or by accident." That clause would not protect the defendant if he deliberately destroyed the plaintiff's vehicle.

19. The courts will allow a party to bring an action in unjust enrichment only if the parties' transaction is not governed by an enforceable contract. Consequently, unjust enrichment can be used in a "contractual context" if: (i) there never was an enforceable contract between the parties, (ii) the contract is void because its terms are not certain, (iii) the contract is unenforceable because it is not in writing, or (iv) a valid contract has been discharged on the basis of a breach. The court must also be satisfied that: (i) the defendant was enriched, (ii) the plaintiff suffered a corresponding deprivation, and (iii) there was an absence of any juristic reason for the enrichment. In such circumstances, the plaintiff will be entitled to receive restitution from the defendant.

20. The statement is partly true and partly false.

Contract trumps unjust enrichment. That means that the action in unjust enrichment cannot be used as long as the relevant events are governed by a contract between the parties. Unjust enrichment is available, however, if the innocent party somehow overcomes the contract. It may be, for instance, that the contract is void for uncertainty or unenforceable for lack of required formality. A contract also is sufficiently avoided if the innocent party reacts to the guilty party's breach of a condition by discharging the agreement. In that situation, the innocent party can sue for breach of contract or for unjust enrichment.

A claim for breach of contract normally focuses on the plaintiff's loss and the usual remedy looks forward to what the claimant expected to have following proper performance: *expectation damages*. The action in unjust enrichment, in contrast, always looks backward and seeks to restore the enrichment that the defendant obtained from the plaintiff: *restitution*.

A claim for breach of contract necessarily is governed by the terms of the contract and by the parties' allocation of risks. As a result, if the plaintiff entered into a bad bargain, by promising to perform for less than market value, then — notwithstanding the defendant's breach — the plaintiff is limited to the amount that was available under the agreement.

A claim for unjust enrichment, in contrast, is not governed by the terms of the agreement or by the parties' allocation of risk. The value of the benefit that was transferred between the parties may instead be assessed at market value. That is true even if, under the contract, the plaintiff had entered into a bad bargain.

As a result, as demonstrated in *Boomer v Muir* (Case Brief 12.8), the action in unjust enrichment may allow the plaintiff to recover restitution that exceeds the value of the contractual damages that would be available under a claim for breach of contract.

## CASES AND PROBLEMS

1. Because Bunyon did not expect to earn a profit under the contract with Redwood, it cannot recover any expectation damages. And even though Bunyon paid \$300 000 in reliance on the contract, it can only recover reliance damages to the extent that the contract was not unprofitable. Since the contract, if fully performed, would have caused a loss of \$150 000, Bunyon will not recover any reliance damages.

Because the contract has been discharged on the basis of breach, Bunyon can alternatively claim restitution for unjust enrichment. That cause of action requires proof of three elements. First, Redwood received a benefit of \$300 000 because that is the true market value of the services that it received from Bunyon. Second, Bunyon suffered a corresponding deprivation of \$300 000 by providing the services. However, it has also already received payment of \$75 000. Its deprivation therefore is \$225 000. And finally, there is an absence of any juristic reason for the enrichment. Although the services were initially rendered pursuant to a contractual obligation (which normally constitutes a juristic reason), the contract was subsequently discharged by Bunyon on the basis of Redwood's breach. Bunyon is therefore entitled to get back what it gave to Redwood (without reference to the price contained in the contract): \$225 000.

[Based on *Bowlay Logging Ltd v Domtar Ltd* (1982) 135 DLR (3d) 179 (BC CA)—as discussed below in a Case Brief.]

2. This question concerns the difference between “cost of cure” damages and “loss of value” damages. There are two possible outcomes to the situation. On the one hand, following *Groves v John Wunder Co*, the OIRC might be entitled to recover \$3 000 000

as cost of cure damages. Expectation damages are intended to monetarily place the plaintiff in the position that is expected to enjoy once the contract was properly performed. The OIRC expected to enjoy a re-forested island. It will cost \$3 000 000 to fulfill that expectation. Moreover, if the OIRC had known at the outset that the island would not be re-forested, it presumably would have demanded a higher price in exchange for giving Pacific Guano the right to mine for phosphate (*eg* they might have charged \$23 000 000 and no reforestation, instead of \$20 000 000 and \$3 000 000 worth of reforestation services).

On the other hand, since the residents have permanently resettled on another island, they arguably no longer have a legitimate interest in the reforestation of Ocean Island. In addition, there is a considerable difference in the cost of curing the defect and the value that would be gained as a result of the cure. When that is the case, as it was in *Ruxley Electronics v Forsyth*, judges are reluctant to award cost of cure damages. Moreover, since the OIRC did not spend any money curing Pacific Guano's defective performance, a court probably would refuse the company cost of cure damages and award, instead, loss of value damages in the amount of \$600 000. That, in fact, was the result in the case upon which this question is based: *Tito v Waddell (No 2)* [1977] 2 WLR 496 (Ch D).

3. This question is concerned with the rules of remoteness. Adam may not be entitled to recover expectation damages because his \$50 000 loss does not fall within either branch of the remoteness test. First, objectively speaking, it is unlikely that a reasonable person would have known that the breach of the rental agreement would cause Adam a \$50 000 loss. That is particularly true given that limousines are rented almost invariably to people planning weddings. Second, on the facts, it does not appear that Adam drew Classique's attention to the possibility that such a loss may occur. Indeed, it was not until Classique called Adam to inform him that he would not receive a vehicle that Classique learned of the unique use to which the limo would be put.

Even if it were not for the fact that the loss is remote, Adam had a duty to mitigate his loss by renting a limousine from one of the other rental companies. Since Adam did not take reasonable steps to minimize his loss, he will not be entitled to recover damages.

4. This exercise requires students to analyze two different types of compensatory damages.

#### *Lost Income*

The first type is simpler. Because it has admitted that Marta did not commit a "serious" breach of her employment contract, it was the company that breached the parties' agreement when it fired her without notice or payment in lieu. As usual, Marta is entitled to *expectation* damages that provide her with the monetary equivalent of the benefit that she expected to receive under the contract. That expectation is reckoned in terms of employment income.

The employment contract did not entitle Marta to be employed for life. On the contrary, the agreement expressly stated that the company could fire her simply upon the provision



of three-months' notice or payment in lieu. Under the rule in *Hamilton v Open Window Bakery*, damages are calculated on the assumption that the defendant would have performed in the least costly manner that complies with the contract. In the circumstances, because it wished to part ways with Marta, the company would have invoked its right to terminate her position on three months' notice or payment in lieu. Assuming that \$600 000 was Marta's salary (*ie* that the situation is not complicated by the computation of bonuses and commissions), the plaintiff is entitled to \$150 000 (*ie* \$600 000 annual income ÷ 12 months = \$50 000 per month; \$50 000 per month x 3 months = \$150 000 damages). Because those damages involve a simple application of contractual remuneration, there is no question of remoteness. The loss clearly was a reasonably foreseeable consequence of the defendant's breach.

#### *Intangible Loss—Emotional Distress*

The analysis is much more complicated in connection with Marta's demand for compensation pertaining to her emotional distress as a result of the defendant's breach.

Damages for intangible losses, such as disappointment and distress, has undergone a substantial change in recent years. The courts traditionally were very reluctant to award such relief. Not only were such claims thought to be difficult to prove and easy to fake, emotional distress did not fall easily within the commercial law paradigm through which courts generally viewed the law of contract.

The situation began to change in the last quarter of the twentieth century when courts held that damages for intangible losses were recoverable in the context of contracts created for "peace of mind." The claimant accordingly was required to show not only that the defendant's breach in fact caused emotional upset, but also that the agreement was of a type that typically is created to provide peace of mind. That was true, for instance, of a contract for a relaxing holiday.

More recently, the Supreme Court of Canada appears to have adopted a new approach to the topic. Although it will be some time before the implications of *Fidler v Sun Life Assurance Co of Canada*<sup>5</sup> are fully understood, the court significantly held that intangible loss should not be treated as an exceptional category of injury. It should instead be subsumed within general contractual principles. An intangible loss consequently ought to be recoverable as long as it falls within the *Hadley v Baxendale* test of remoteness. The defendant will be held responsible for the claimant's loss as long as that loss was reasonably foreseeable either in the normal course of things or on the basis of special information possessed by the defendant.

On the facts of this exercise, however, it does not appear that Marta's emotional distress was reasonably foreseeable. She was an experienced and established professional. Her personality was such that her co-workers referred to her as "Ice."

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<sup>5</sup> (2006) 271 DLR (4th) 1 SCC).

Furthermore, cases since *Fidler* have been careful to ensure that the new rule regarding mental distress does not degenerate into easy money. Damages are not available for the grief and upset that invariably attends upon the loss of a job. Although the rules have been loosened, they must still be satisfied. In this instance, Marta will not be able to persuade the court that the company is responsible for her surprising over-reaction to being fired.

[Based loosely on *Soost v Merrill Lynch Canada Inc* (2010) 322 DLR (4th) 428 (SCC).]

5. This question is concerned with the rules for mitigation. First, the plaintiff is unable to claim damages for a loss if that loss was mitigated, or removed, by subsequent events. Compensatory damages are, after all, intended to compensate the plaintiff for a loss that it has suffered. Furthermore, the plaintiff is generally entitled to recover compensatory damages with respect to the losses that it suffers as a result of the breach of contract. That rule is subject to an exception however. The plaintiff cannot recover damages to the extent that it unreasonably failed to mitigate its damages. In other words, notwithstanding a breach of contract, the plaintiff cannot recover damages that it could have avoided through reasonable steps.

On the facts, Paolo is under a “duty” to mitigate the losses flowing from Dhalia’s breach. The situation is complicated, however, by the fact that there is a high vacancy rate in Paolo’s apartment complex. As a result, it might not be possible for Paolo to reasonably mitigate his losses. Furthermore, it cannot necessarily be assumed that Paolo has mitigated his losses merely because he rented Dhalia’s unit to Xavier. The key question is whether or not Xavier effectively is a substitute for Dhalia.

Unless there is some causal connection between Dhalia’s departure and Xavier’s arrival, Paolo’s damages will not be reduced on the basis of mitigation. That is because, even if Dhalia had stayed, Paolo could have rented another unit to Xavier. And in that situation, Paolo would be entitled to receive rent from both Dhalia and Xavier.

The situation might be different, however, if there was a causal connection between Dhalia’s departure and Xavier’s arrival. The mere fact that Dhalia introduced Xavier to Paolo is not sufficient to disentitle Paolo to damages. After all, on the simple basis of an introduction, Paolo might have been able to recover rent from both parties. However, if Xavier was introduced to Paolo *only because* Dhalia was leaving, then Xavier truly is a substitute for her. And in that situation, Paolo’s loss would be mitigated, with the result that he could not recover damages.

Students should be reminded that the plaintiff can recover the costs associated with taking reasonable steps to mitigate. Assume that Dhalia gave Paolo Xavier’s long distance phone number only because she was moving out and because she knew Xavier needed a place to live. Paolo would be entitled to recover from Dhalia the amount he spent in long distance phone calls while trying to convince Xavier to live in the apartment.

6. This case contains two issues: interpretation and enforcement of exclusion clauses, and remoteness of damage. As to the former, a court would hold that the exclusion clause contained in the parties' contract does *not* apply to limit liability. Because it takes away rights that Cornwall would otherwise enjoy, it will be read narrowly. (That is especially true if the clause was written by Purolator. However, the court on which this question is based found in favour of Cornwall even though the clause was required by statute.) The clause refers to "loss or damage to the package." That is not, however, the gist of Cornwall's complaint. Instead, it is complaining about late delivery. (While Chapter 11 said that time usually is *not* of the essence in contract, a contrary approach is clearly appropriate on these facts.)

The rule in *Hadley v Baxendale* says that a loss will be remote if it pertained to a risk that: (i) the defendant did not actually know about, and (ii) would not generally be known to the reasonable person in similar circumstances. In this case, Cornwall expressly told Purolator's employee that the envelope contained a "tender" and that prompt delivery was absolutely crucial. A final determination of the issue would require a decision as to whether the employee either knew, or ought to have known, of the sort of loss that might occur if the envelope was delivered late. Given the frequency with which courier companies deal with such matters, it would probably be safe to assume that, given Cornwall's instructions, Purolator's employee either did know, or should have known, of the potential loss. And if that is correct, then Cornwall is entitled to receive expectation damages of \$700 000. That is the benefit that it lost as a result of losing the government contract.

This case bears some resemblance to *BDC Ltd v Hofstrand Farms Ltd*, which was discussed in Chapter 6. In that case, the Supreme Court of Canada denied liability in negligence on the basis that the loss was not reasonably foreseeable. The cases are, however, distinguishable. The crucial fact in *BDC Ltd* was that the plaintiff did not inform the defendant courier of the contents of the envelope.

[Based on *Cornwall Gravel Co Ltd v Purolator Courier Ltd* (1978) 83 DLR (3d) 267 (Ont H CJ), aff'd 115 DLR (3d) 511n (Ont CA), aff'd 120 DLR (3d) 575n (SCC).]

7. This case raises the issue of mitigation of damages. Although the innocent party *prima facie* is entitled to expectation damages reflecting the full benefit expected under the agreement, damages ultimately are limited by the so-called "duty to mitigate." Mitigation consists of any act that minimizes the losses flowing from a breach. The innocent party is not actually required to mitigate. It enjoys the option of remaining idle while losses accumulate. Damages are denied, however, to the extent that the innocent party fails to adopt reasonable steps to mitigate.

The basic mitigation rule ensures that DEI will not receive damages under the first option. It would be intolerably wasteful for a court to require HMC to provide compensation for eight years of lost profits, given that DEI could take steps to prevent at least a substantial portion of those lost profits.

At a minimum, DEI would be expected to adopt the second option by developing a method of producing couplers without the need for HMC's widgets. Expectation damages therefore would be available, at most, for a two year period.

In the circumstances, however, a court would likely hold that DEI ought to have accepted HMC's offer to provide widgets, on a limited time basis, under a new contract. As the Supreme Court of Canada held in *Evans v Teamsters Local Union No 31*, mitigation may require the innocent party to resume relations with the party in breach. That would be true in the current case if, as seems to be true, there are no overriding factors that would prevent the parties from dealing amicably, or at least effectively, with each other notwithstanding HMC's breach.

[Based on *Evans v Teamsters Local Union No 31* (2008) 292 DLR (4th) 557 (SCC)]

8. This case requires a consideration of several issues pertaining to damages for breach of contract: (i) reliance damages, (ii) expectation damages, (iii) intangible losses, (iv) remoteness, and (v) difficulty of calculation.

- *Reliance Damages* CanPro has offered to pay *reliance damages* for its breach. Reliance damages look backward and entitle the plaintiff to expenses that it incurred in reliance upon the agreement. Significantly, however, while reliance damages would be available in this case, that option lies with the plaintiff, rather than with the defendant. Smithee cannot be forced by CanPro to accept reliance damages.
- *Expectation Damages* Contracts are all about the future. Consequently, the usual measure of relief is *expectation damages*. Expectation damages are intended to monetarily put the plaintiff in the position that he expected to enjoy after the contract was properly performed. In this case, that would suggest that he is entitled to \$10 000 as the expected contractual payment *plus* \$100 000 for the other work that he would have received after enjoying the publicity attached to the movie. The latter head of damages does, however, raise a number of issues.
- *Intangible Losses* CanPro may attempt to argue that the \$100 000 relates to an *intangible loss* — *ie* a loss that does not have any apparent economic value. That argument would, however, probably fail. It might be more effective if the gist of Smithee's claim is that he lost the opportunity for an enhanced reputation. It is difficult to put a price on a reputation. In this case, however, the real gist of Smithee's claim is that he lost \$100 000 worth of employment as a result of losing the publicity attached to the film. That sort of loss is sometimes quantifiable in dollar figures and it has been recognized as being compensable.
- *Remoteness* Smithee would, however, have to prove that the \$100 000 loss was not too remote. The rule in *Hadley v Baxendale* requires a loss to be either: (i) one that the parties actually had in contemplation at the time of contract, or (ii) one that, without express mention, would be within the contemplation of a reasonable person at the time of contract. There is nothing to suggest that the first branch could be satisfied in this case. Smithee could, however, probably satisfy the second branch of *Hadley v Baxendale*. It is obvious to a reasonable person that the starring role in a major motion picture is valuable not only because of the

payment that it brings immediately, but also because of the benefit to the actor's reputation and career.

- *Difficulty of Loss* Nevertheless, even if a court was willing to accept that the loss of profit-generating publicity is not too remote from CanPro's breach, it would have some concern regarding the difficulty of assessment. As a general rule, a claim will not be defeated merely because damages are *difficult* to calculate (*Chaplin v Hicks* — discussed below in a Case Brief). A court will not, however, undertake an entirely speculative exercise (*McRae v Commonwealth Disposals Commissioners* — discussed below in a Case Brief). The evidence seems strong enough to conclude that Smithee would have earned approximately \$100 000 in the year following the movie's release. Beyond that, however, it would be impossible to calculate the extent to which his career was adversely affected by CanPro's breach.

[Based on *Herbert Clayton & Jack Waller Ltd v Oliver* [1930] AC 209 (HL).]

9. Marcy's can recover \$2 000 000 in liquidated damages. Liquidated damages represent a genuine attempt to estimate the value of the loss that may occur because of a breach. In this case, the parties agreed to the exact amount that Marcy's expected to receive under the contract. Despite the fact that the value of each Squiggles increased as a result of the labour dispute, Marcy's is only entitled to recover the liquidated amount.

10. Specific performance would allow the Rebels to compel Vladimir to play for them. A court would probably refuse such relief for several reasons. First, specific performance generally will not be awarded if it would require ongoing judicial supervision. That would be true in this case because, given the nature of the parties' relationship, there might frequently be disputes as to whether or not Vladimir was performing properly. (He might, for instance, refuse to play on the grounds of specious injuries.) Furthermore, specific performance of personal services smacks of slavery, which the courts obviously do not favour. Finally, specific performance is highly intrusive. If Vladimir was required to play for the Rebels, he could not, at the same time, do anything else. His freedom of choice would be greatly limited.

While a court almost certainly would not order specific performance with respect to Vladimir's positive promise to play, it might order an injunction with respect to his negative promise not to play for anyone other than the Rebels. As compared with specific performance, an injunction requires less judicial supervision, is not tantamount to slavery, and is relatively less intrusive (while not playing hockey for anyone other than the Rebels, Vladimir would be free to do anything else).

However, on the basis of *Page One Records*, a court might also refuse an injunction because it would, in effect, compel Vladimir to play for the Rebels. Although he would have the alternative of working in the fast food industry, a court might conclude that that is really no option at all. It would be unfair to demand a drop in income from \$6 000 000 to \$25 000.

A court may also consider the fact that, at the time Vladimir agreed to the terms and signed the agreement, the Rebel's style of play focused on skill. Had he known, when the contract was created, that the style of play would change, he may have insisted on a higher salary, or he may have refused term (a) entirely.

For the preceding reasons, a court might find that the fairest solution is to allow Vladimir to play for another team, but to allow the Rebels to recover compensatory damages from Vladimir. (Depending upon the circumstances, the Rebels might also be able to bring a tort action against the team that hires Vladimir on the basis of the tort of inducing breach of contract. That tort was examined in Chapter 5.)

11. This question requires an appreciation of the fact that remedies sometimes can be accumulated. Cuddy has suffered two types of losses as a result of RBI's breach: he has been deprived of past profits and he will experience future losses as well. In the circumstances, two types of remedies are appropriate.

- *Expectation Damages* If the contract had been performed as promised, Cuddy already would have received \$2 000 000 in dividend payments. He therefore is entitled to expectation damages of at least that amount.
- *Specific Performance* A more difficult question arises from the fact that the shares that RBI has refused to sell to Cuddy will continue to be valuable in the future. As a general rule, contractual expectations are fulfilled only through the substitute of expectation damages. In this instance, however, a court would likely order the company to specifically perform its obligation to sell 20 000 shares to Cuddy. Since the company does not publicly sell its shares, no amount of money would allow Cuddy to buy replacement shares in the open market. The difficulty in predicting the full future value of the shares further argues in favour of specific performance.

Finally, it is important to note that if Cuddy is to receive specific performance, he must specifically perform as well. The question does not specify the price at which RBI promised to sell the shares to Cuddy. The court's final order, however, would have to reflect Cuddy's obligation in that regard. He cannot get something for nothing.

12. McTiernan has committed an anticipatory breach of contract by indicating that he did not intend to complete the agreement as promised at the end of the year.

At a minimum, McTiernan is liable to pay damages to Dixon. Dixon has an option regarding the calculation of damages. He would be entitled to recover *reliance* damages, which would encompass the monetary value of the expenses incurred, and opportunities foregone, in reliance upon the agreement. On the facts, it appears that reliance damages would amount to \$5000 — *ie* the amount paid as a deposit.

Dixon obviously would much prefer *expectation* damages that would provide him with the monetary value of the benefit that he expected to receive under the contract. Expectation damages are intended to place the plaintiff as if the defendant had properly performed. In this instance, the court would have to determine the value of the vehicle

permit to Dixon. The final sum would include, for instance, the profits that he likely would earn as a result of the ability to use a vehicle as a taxi. (The total sum, however, would be reduced to reflect the fact that Dixon has paid only \$5000 toward the price of \$50 000.)

That computation, however, would be subject to the rule of *remoteness*. Despite being *factually* caused by the defendant's breach, a particular loss would not be compensable if it was not reasonably foreseeable at the time that the agreement was created. It nevertheless is clear that profits from a taxi business would be well within the reasonable person's contemplation in these circumstances.

Dixon most likely would prefer to have not damages, but rather *specific performance*. Expectation damages would require a difficult calculation (and relatively high litigation costs) and they would not provide Dixon with the actual long-term benefits that he sought under the agreement. Specific performance, in contrast, would require McTiernan to transfer the vehicle permit in exchange for payment of the remainder of the price.

Specific performance is an equitable remedy and, as such, is said to be *discretionary*. That discretion, however, is exercised on the basis of settled principles and considerations (eg mutuality, judicial supervision, personal services). Most importantly, the plaintiff must satisfy the court that damages would be *inadequate*. Damages are inadequate if no amount of money would allow the plaintiff, upon entering into the marketplace, to obtain a reasonable substitute for performance. That rule generally restricts specific performance to the acquisition of interests in land, on the theory that every parcel of land is unique and hence irreplaceable. (In *Semelhago v Paramadevan*,<sup>6</sup> the Supreme Court of Canada limited even that proposition.)

The present situation falls into the exceptional category. Granted, it *is* possible for the plaintiff to acquire a vehicle permit from either the city or another private vendor. The market, however, is such that it would be difficult, if not impossible, to do so in the foreseeable future. Specific performance has been awarded in connection with the sale of shares if the shares are associated with a company that does not publicly trade. Likewise, in the Australian case upon which this exercise is based, the High Court held that the defendant was obliged to fulfill his contractual promise to transfer the vehicle permit.

[Based on *Dougan v Ley* (1946) 71 CLR 142 (HCA).]

## CASE BRIEFS

***Chaplin v Hicks*** [1911] 2 KB 786 (CA)—note 5

The plaintiff was one of fifty finalists in a beauty contest. The defendant organizer of the contest breached his contract with the plaintiff by failing to arrange an interview between her and the judges. She therefore was disqualified from the competition. She then sued the defendant. While recognizing that the calculation of damages was somewhat speculative, the court awarded expectation damages measured by the value of the prizes, but discounted to reflect the chance that the plaintiff would not have won.

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<sup>6</sup> (1996) 136 DLR (4th) 1 (SCC).

***McRae v Commonwealth Disposals Commission*** (1951) 84 CLR 377 (Aust HC) — note 6

The parties created a contract under which the plaintiff purchased the rights to a certain cargo ship that was purportedly sunken in a certain reef. In reliance upon that contract, the plaintiff incurred a number of expenses. It paid £285 to the defendant. It refitted the ship that it intended to use during the salvage operation. It hired a salvage expert and a crew. It passed up opportunities to earn money on other projects. And so on. In fact, however, contrary to the defendant's promise, neither the specified ship, nor the specified reef, actually existed. The plaintiff sued for breach of contract and alternatively claimed expectation damages and reliance damages.

The court refused to award expectation damages. Although the plaintiff's expectations under the contract were disappointed, it was impossible to assess that loss with any degree of precision. The contract did not specify the nature of the purported ship or its purported cargo. Furthermore, the contract did not guarantee that the plaintiff's salvage operation would be successful (assuming that the reef and the ship actually existed). Expectation damages therefore would amount to a hopeless stab in the dark. The court was not willing to perform such an exercise. It therefore restricted the plaintiff to reliance damages for the various expenses that it incurred under the contract.

***Nu-West Homes Ltd v Thunderbird Petroleum Ltd*** (1975) 59 DLR (3d) 292 (Alta CA)—note 8

The defendant agreed to build a house for the plaintiff in exchange for payment of \$51 000. The defendant performed a considerable amount of work, but much of it did not conform with the contractual specifications. The plaintiff took possession of the property and paid the defendant \$10 000. The plaintiff then paid another builder \$16 000 to repair several defects in the defendant's performance and to entirely replace the basement that the defendant had installed. The relevant question at trial was whether the plaintiff was entitled to damages for that entire amount. The trial judge said "no" on the basis that the basement should have been repaired, rather than replaced.

The Alberta Court of Appeal allowed the appeal and awarded cost of cure damages to the plaintiff with respect to the basement. It said that cost of cure damages should generally be available so long as they are reasonable. And on the facts, it believed that the replacement of the basement was reasonable. That finding was supported by the fact that, with respect to the other defects in the defendant's performance, the plaintiff merely effected repairs, rather than replacement. The plaintiff, in other words, was not out to fleece the defendant.

***Ruxley Electronics & Construction Ltd v Forsyth*** [1996] 1 AC 344 (HL)—note 9

The facts and decision are explained in the text.

***Honda Canada Inc v Keays*** (2008) 294 DLR (4th) 577 (SCC)—note 10 and note 12

After working for eleven years with Honda Canada Inc, Kevin Keays was diagnosed with Chronic Fatigue Syndrome (CFS). The company tried for three years to accommodate his



health needs, but eventually ran out of patience and fired him. The failure to provide reasonable notice constituted a breach of contract. Keays then sued for several heads of damage, including mental distress.

The trial judge believed that the company's scepticism regarding Keays' condition was discriminatory. Consequently, in addition to awarding damages for a reasonable notice period of fifteen months, he added awarded an additional nine months' as "*Wallace* damages" (as explained in the next Case Brief), plus a whopping \$500 000 in punitive damages, plus costs on a "substantial indemnity scale" with a 25% premium. The Ontario Court of Appeal was only slightly less extravagant. It reduced the punitive award to \$100 000.

The Supreme Court of Canada rejected all relief other than the basic notice period. In the course of doing so, it overturned the notion of *Wallace* damages that Iacobucci J formulated in the eponymous case, and reiterated the basic proposition that punitive damages are available only if the defendant's breach of contract (1) was egregiously bad, and (2) constituted another independently actionable wrong.

On the issue of damages for mental distress, Bastarache J further developed the ideas that the court had articulated in *Fidler v Sun Life*. The earlier decision held that mental distress was recoverable as long as it was reasonably foreseeable. That notion of reasonable foreseeability, however, appeared to be tied to "peace of mind contracts." In *Fidler* itself, the relevant contract was an insurance policy for long term disability. In *Honda Canada*, however, Bastarache J expressly stated that the category of reasonably foreseeable mental distress was *not* confined to "peace of mind" contracts.

If taken at face value, *Honda Canada* is a remarkable development. Once mental distress damages are un-tethered from "peace of mind" contracts, the scope for liability seems enormous. It often is reasonably foreseeable that a contractual party will suffer substantial upset in the event of breach. To award relief in every such instance is to dramatically revise the law.

***Farley v Skinner* [2002] 2 AC 732 (HL)—note 10**

The plaintiff hired the defendant real estate agent to find a house to purchase. The plaintiff stressed from the outset that he wanted a house that would be quiet and tranquil. The defendant showed a certain property, which the plaintiff bought. After moving into the property, the plaintiff discovered that it sat beneath a major flight path. His new house consequently was subject to frequent disruptive noises. The defendant had breached its contractual obligation by failing to discover the flight paths prior to purchase.

The House of Lords held that the plaintiff was entitled to £10 000 damages for mental distress (aside from any damages for economic losses attributable to the fact that the property was less valuable than expected due to the noise). The court stressed that the plaintiff had entered into the contract for "peace of mind" and that the loss was within the parties' reasonable contemplation under the remoteness test in *Hadley v Baxendale*.

***Turczinski v Dupont Heating & Air Conditioning Ltd*** (2004) 246 DLR (4th) 95 (Ont CA) — note 10

The plaintiff hired the defendant to replace the heating system in her home. In breach of contract, the defendant was unable to complete the project in a timely manner. The trial judge held the defendant liable not only for the economic losses flowing from the breach, but also for the fact that the plaintiff, who suffered from a bipolar mental disorder, became highly distraught over the incident.

The Court of Appeal reversed the trial judge's decision to award damages for "mental distress." Feldman JA said that such damages are available only where the plaintiff entered into the contract for "peace of mind" and only where the plaintiff's mental distress could satisfy the test of remoteness set out in *Hadley v Baxendale*. On the fact, the defendant had no way of knowing of the plaintiff's mental difficulties and therefore could not be held liable for the fact that her reaction to the breach of contract was extreme.

***Jarvis v Swan Tours Ltd*** [1973] QB 233 (CA)—note 11

The plaintiff was a lonely lawyer with two weeks of vacation per year. He saw the defendant's brochure, which depicted a vibrant ski resort in the Swiss Alps. It promised skiing, tobogganing, skating, yodelling, "house parties," and lively company. On the basis of that brochure, the plaintiff booked a fortnight's holiday. Upon arrival, however, he was bitterly disappointed. The resort was virtually empty, the facilities was sub-par, and the only skis that were available were 3-foot long "mini-skis" that hurt his feet.

The court held that the defendant was in breach of contract. It awarded the plaintiff a refund of the price of the holiday plus £60 for his disappointment. Although intangible losses, such as disappointment and grief, are not normally compensable, the additional damages were justified on the facts because the contract was intended to provide the plaintiff with comfort and peace of mind, and because it was reasonably foreseeable that a breach by the defendant would result in bitter disappointment.

***Newell v Canadian Pacific Airlines Ltd*** (1976) 74 DLR (3d) 574 (Ont Co Ct)—note 11

The plaintiffs, an elderly couple, were very much emotionally attached to their dogs. When arranging to transport their pets through the defendant airline, they stressed the need for care. The defendant assured them that everything would be fine. The dogs actually died during the flight due to the defendant's carelessness. The plaintiffs sued for breach of contract and were awarded damages for their mental distress. While such relief is not normally available, an exception was made because, on the facts, it was reasonably foreseeable that such grief would result from a breach.

***Asamera Oil Corp v Sea Oil & General Corp*** (1978) 89 DLR (3d) 1 (SCC)—note 14

The plaintiff loaned 125 000 shares to the defendant in 1957. The defendant wrongfully refused to return those shares to the plaintiff in 1960. The parties then entered into protracted litigation, during which the plaintiff tried to recover possession of the shares themselves. In fact, as it eventually learned in 1967, the defendant had actually sold those shares to a third party. The matter finally went to trial in 1971.

The value of the shares fluctuated wildly during that period. They were each worth \$3 in 1957, \$0.29 in 1960, approximately \$6.50 in 1967, \$46.50 at the height of the market in 1969, and \$22 in 1971.

The plaintiff was denied specific performance of the defendant's obligation to return the shares themselves. Specific performance is available only if monetary damages would be an inadequate remedy and if the plaintiff has some substantial and legitimate reason for wanting the shares, rather than their value. In the circumstances, those requirements were not met. There was no particular need for the plaintiff to recover the shares themselves.

The question then concerned the quantification of damages. A plaintiff is entitled to compensation for the losses that it suffered as a result of the defendant's breach. The plaintiff said that since it was not awarded the shares themselves at trial, it should receive the value of the shares either at the height of the market (\$46.50) or at the date of trial (\$22).

The defendant argued, however, losses *prima facie* are assessed at the date of the breach. That rule is based on the fact that the plaintiff normally must mitigate its losses as soon as possible. And in most circumstances, losses can be mitigated immediately (*eg* by purchasing the same number of shares from another source).

The Supreme Court of Canada applied the mitigation rule, but exercised some leniency as to the appropriate date. Because the circumstances were complicated, the Court held that the plaintiff was *not* required to mitigate its losses immediately upon breach. The plaintiff was, rather, entitled to try to secure re-possession of the shares. Nevertheless, by 1967 at the latest, the plaintiff should have realized that the efforts at recover *in specie* would not succeed. It therefore should have expeditiously mitigated and litigated. The Court therefore awarded damages based on the market value of the shares at that time (\$6.50).

***Evans v Teamsters Local Union No 31*** (2008) 292 DLR (4th) 557 (SCC)—note 15

For 23 years, Donald Evans was employed as a business agent for the defendant union in Whitehorse. After a hotly-contested leadership race resulted in changes at the top of the organization, Evans was improperly terminated. A notice period of 24 months was appropriate in the circumstances. The defendant wanted Evans to continue working during that time, but he insisted upon certain conditions that the union could not accept. He therefore did not work during that time. An issue at trial accordingly concerned the defendant's allegation that Evans unreasonably failed to mitigate his loss.

The trial judge awarded damages of \$100 000 as compensation for Evans' loss of income during the notice period. The Yukon Court of Appeal, however, set aside the award on the basis that Evans had failed to mitigate his loss. The Supreme Court of Canada agreed.

The court held that an objective reasonable person test should be used to determine whether or not an improperly dismissed employee ought to mitigate the loss of income by re-joining the employer for the duration of the notice period. A reasonable person would

consider (1) whether the position and pay of the position on return would be comparable to the original conditions, (2) whether the situation would be demeaning, (3) whether personal relationships are acrimonious, (4) whether the employee has commenced litigation, and (5) whether the offer of re-employment was made before or after the original position actually came to an end. Furthermore, while subjective considerations are not determinative, an ex-employee probably need not return to work if doing so would entail humiliation, embarrassment, or hostility.

***Bowlay Logging Ltd v Domtar Ltd*** (1982) 135 DLR (3d) 179 (BC CA)—note 18

The plaintiff agreed to cut and load timber for the defendant. The defendant was required to provide logging trucks in a timely manner and to pay a total of \$150 000. The plaintiff performed part of the contract. Although it had received payment of \$108 000, it had incurred expenses of \$232 000. The discrepancy was attributable to: (i) the fact that the plaintiff had simply entered a bad bargain, and (ii) the plaintiff used economically inefficient ways of performing the contract. The defendant then breached the contract failing to provide logging trucks as promised. The plaintiff discharged the contract for the breach of that condition and claimed damages.

The plaintiff was denied expectation damages for the simple reason that its contract was unprofitable. Expectation damages are intended to place the plaintiff in the position that it would have enjoyed if the contract had been properly performed. In the circumstances, however, if the contract had been fully performed, the plaintiff would not have enjoyed a profit. To the contrary, it would have suffered an even greater loss. It therefore was not entitled to any more money from the defendant.

Reliance damages can be claimed as an alternative to expectation damages, but only to the *extent that the contract was not unprofitable* from the plaintiff's perspective. A contract is a consensual agreement between the parties. The law takes the parties' autonomy seriously. The plaintiff is entitled to expectation damages if it entered into a good bargain because the defendant agreed to provide that profit to the plaintiff. The defendant must accept responsibility for that decision. By the same token, however, the plaintiff must accept responsibility for creating a bad bargain if it enters into a unprofitable arrangement. Consequently, while the plaintiff *prima facie* is entitled to recover reliance damages for expenses that it incurred under a contract, the right to do so is eliminated to the extent that the agreement was unprofitable.

On the facts, the contract was wholly unprofitable from the plaintiff's perspective. It clearly suffered a loss under the agreement, but that loss was caused not by the defendant's breach (indeed, the breach saved the plaintiff from further losses), but rather by the plaintiff own incompetence and inefficiency.

As explained more fully in connection with *Lodder v Slowey* and *Komorowski v Van Weel*, there was nevertheless a mechanism by which the plaintiff in *Bowlay* could have avoided the consequences of its bad bargain. Having discharged the contract on the basis of the defendant's breach of a condition, the plaintiff enjoyed an option. First, it could bring an action in breach of contract for contractual relief. As we have seen, that claim

would generate nothing by way of damages. Second, it could claim restitution under the cause of action in unjust enrichment: (i) the defendant was enriched by the receipt of the plaintiff's logging services, (ii) the plaintiff suffered a corresponding deprivation by providing those services, and (iii) there is an absence of juristic reason for the enrichment because the contract was discharged. Having established that claim, the plaintiff would be entitled to restitution. Moreover, as a matter of precedent, the value of that restitution would be the *market value* of the services that the plaintiff provided to the defendant. Significantly, restitution would *not* be capped by the contract price. Given that the plaintiff had incurred expenses of \$232 000, but was paid only \$108 000, the market value of the services was presumably in the neighbourhood of \$124 000. (That calculation is approximate because part of the plaintiff's costs were attributable to its own inefficient practices, rather than the actual market value of the services.)

***Bush v Canfield*** 2 Conn 485 (1818)—note 19

The plaintiff agreed to buy a shipment of flour from the defendant for a price of \$14 000. The plaintiff paid \$5000 before the date of delivery. The defendant then broke the contract by refusing to deliver the flour. It did so despite the fact that the market value of the flour was actually \$11 000, rather than \$14 000. The plaintiff sought recovery of its \$5000.

The defendant argued that relief should be limited to \$2000. Expectation damages were unavailable because the plaintiff had entered into a bad bargain. If fully performed, the contract would not have generated a profit; it would have generated a loss of \$3000 (*ie* \$14 000 paid for \$11 000 worth of flour). The defendant also noted that reliance damages would be limited to \$3000. The plaintiff was entitled to claim reliance damages to recover expenses that it incurred under the contract, but only to the *extent* that the contract was not unprofitable. Since the plaintiff agreed to pay \$14 000 for flour worth only \$11 000, the plaintiff must assume responsibility for the fact that it had effectively agreed to suffer a loss of \$3000. It therefore could only claim reliance damages of \$2000. It was only that loss that was attributable to the defendant's breach.

For reasons explained in the case brief for *Bowlay*, the court nevertheless allowed the plaintiff to recover \$5000 as restitution under the cause of action in unjust enrichment. The plaintiff proved that: (i) the defendant was enriched by the receipt of \$5000, (ii) the plaintiff suffered a corresponding deprivation because it provided that money, and (iii) there is an absence of juristic reason for the enrichment after the contract was discharged for breach of a condition. The plaintiff therefore was entitled to restitution. And that measure of relief is not capped by the terms of the contract (which had been discharged).

***Tito v Waddell*** [1977] Ch 106 – note 21

The parties entered into a contract that allowed the defendant to conduct extensive mining operations on Ocean Island. That island had been home to the plaintiffs. The contract required the defendant to undertake an extensive reforestation program after it had completed mining. It subsequently left the island without fulfilling that promise. The plaintiffs suffered no loss because they had relocated to another island. They consequently argued that the defendant should instead be forced to disgorge its ill-gotten

gain. The plaintiff reasoned that the defendant had saved an enormous expense by refusing to perform as promised. The court rejected that claim on the basis that contractual remedies must focus on the plaintiffs' loss rather than the defendant's gain.

That decision is often thought to be unfair. By breaching the contract, the defendant substantially altered the agreement that existed between the parties. It obtained all of its benefit without incurring satisfying all of its obligations. If the plaintiffs had known at the outset that the defendant would refuse to replant the island, they presumably would have insisted on some other deal (*eg* one in which the expected cost of reforestation was added to the basic price payable for the right to conduct mining operations).

***Bank of America Canada v Mutual Trust Co*** (2002) 211 DLR (4th) 385 (SCC)—note 23

Reemark intended to build a condominium complex. It arranged long-term financing, in the form of a mortgage for \$36.5 million, through Mutual Trust Co (MT). It also arranged short-term financing, in the form of a construction loan for \$33 million, through Bank of America Canada (BAC). That loan carried compound interest. The two transactions were then consolidated, with the result that MT was obliged to advance money under the mortgage directly to BAC in discharge of Reemark's construction loan. MT subsequently breached that agreement by refusing payment. BAC was entitled to the outstanding amount, but a difficult question arose as to whether it was entitled to claim damages representing compound interest as well.

The lower courts denied that claim. The Supreme Court of Canada, however, held that the plaintiff was entitled to compound interest. Justice Major relied primarily on a compensatory analysis. If MT paid as promised, BAC would have enjoyed both the receipt of money *and* the ability to lend those funds to another borrower on a compound basis. Moreover, given the circumstances, both of those losses were within the parties' contemplation at the time of the contract. Interestingly, however, Major J. also drew motivation for his decision from "restitutionary" principles. Both parties were financial lenders. Consequently, the breach not only deprived BAC of income, it also supplied MT with funds with which it supported loans to its own customers. The award of compound interest therefore had the salutary side-effect of stripping MT of the profit that it improperly earned.

On the possibility of tripping the defendant's wrongful profit, Major J said:

"Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract."

...

"In contract, restitution damages can be invoked when a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the

contract been performed but the plaintiff's loss is less than the defendant's gain. So the plaintiff can be fully paid his damages with a surplus left in the hands of the defendant. This occurs with what has been described as an efficient breach of contract. In some but not all cases, the defendant may be required to pay such profits to the plaintiff as restitution damages. ...Courts generally avoid this measure of damages so as not to discourage efficient breach."

For a discussion of this aspect of *Bank of America Canada v Mutual Trust Co*, see M McInnes "Restitutionary Damages for Breach of Contract" (2002) 37 Canadian Business LJ 125.

***Whiten v Pilot Insurance Co*** (2002) 209 DLR (4th) 257 (SCC) – note 26

The plaintiff purchased house insurance from the defendant. The plaintiff's house was destroyed by fire, thereby triggering the defendant's obligation to pay a benefit. The defendant nevertheless refused to pay that benefit. While its own investigations established that the cause of the fire was innocent, it accused the plaintiff of arson. It did so in part because it recognized that she was vulnerable and it believed that she was not in a position to litigate the matter.

At trial, the defendant was held liable for breach of contract and the jury awarded \$1 000 000 in punitive damages, in addition to compensatory damages. The Ontario Court of Appeal reduced the punitive damages to \$100 000.

The Supreme Court of Canada restored the jury's verdict and reinstated the award of \$1 000 000. In doing so, it reiterated its earlier view (*Vorvis v Insurance Corp of British Columbia* (1989) 58 DLR (4th) 193 (SCC)) that punitive damages generally should be available for breach of contract only if the defendant acted in an outrageous manner *and* committed an independently actionable wrong. The defendant argued that there was no independently actionable wrong because it had not committed a tort. The Court therefore clarified its earlier position. An independent actionable wrong may be a tort, but it may also be another breach of contract or some other breach of a civil obligation. On the facts, the primary breach of contract arose from the fact that the defendant wrongfully refused to pay a benefit to the plaintiff under the policy. The defendant also independently committed another breach of contract by acting in bad faith. (Under an insurance contract, the insurer is contractually obliged to act in good faith. Insurance is usually purchased for "peace of mind." Consequently, the insurer must act honestly and fairly with the insured if a claim is made.)

***Royal Bank of Canada v W Got & Associates Electric Ltd*** (1999) 178 DLR (4th) 385 (SCC)—note 26

The plaintiff had a line of credit with the defendant bank that was secured by a floating charge debenture, a general assignment of book debts and a personal guarantee of its president. The plaintiff exceeded the line of credit. The parties then entered into negotiations with a view to creating an agreement regarding repayment. Those negotiations failed. The defendant then cut off contact with the plaintiff and abruptly brought a motion to appoint a receiver and obtained a court order for the sale of the

plaintiff's assets. In doing so, it committed a breach of contract. Its agreement with the plaintiff required it to provide advance notice of any intention to enforce its security. Furthermore, while the defendant's actions did not amount to "fraud, malicious prosecution, or abuse of process," its application to the court did rely on a misleading affidavit that created "false sense of urgency."

While the plaintiff was clearly liable to repay its outstanding debt, it also counterclaimed for breach of contract and sought punitive damages. The Supreme Court of Canada agreed. That decision is important for several reasons. Most significantly, notwithstanding the general rule, the Court awarded punitive damages for breach of contract, without insisting upon proof of an independently actionable wrong. Furthermore, while stressing that punitive damages in contract are exceptional, especially in commercial matters, it was willing to award such relief because the defendant's breach "seriously affront[ed] the administration of justice" and because compensatory damages were insufficient to deter similar wrongdoing in the future.

***Robitaille v Vancouver Hockey Club Ltd*** (1981) 124 DLR (3d) 228 (BC CA)—note 27  
Mike Robitaille was a defenceman with the Vancouver Canucks. He suffered an injury. Under the terms of their contract, the team was obliged to provide him with appropriate medical care. It breached that obligation by forcing him to practice and play in his weakened condition. As a result of that breach, he eventually sustained a debilitating and career-ending injury.

Robitaille sued the team for breach of contract and sought compensatory and punitive damages. The court agreed. He received compensation for the losses that he suffered as a result of the defendant's breach. He also received punitive damages. Not only had the defendant acted in an offensive and abusive manner, it had also committed the tort of negligence (*ie* an independent actionable wrong) by failing to provide the plaintiff with adequate care.

***Semelhago v Parmadevan*** (1996) 136 DLR (4th) 1 (SCC)—note 29  
The parties entered into a contract under which the defendant agreed to sell a particular property and the plaintiff agreed to pay \$205 000. The defendant later refused to go through with the sale. The plaintiff therefore sued the defendant. By the time of trial, the disputed land had increased in value to \$325 000.

The plaintiff initially claimed specific performance of the contract. At trial, however, it decided to ask instead for \$120 000 as the monetary value of specific performance (*ie* the profit that it would have realized from the sale if the agreement had been performed). The claim for specific performance is significant. Generally speaking, the victim of a breach of contract is required to mitigate its losses as soon as possible after the breach (*eg* by purchasing a substitute property from another vendor). The need to mitigate is displaced, however, if the plaintiff has a legitimate claim for specific performance. After all, it only wants to acquire one property. It would make no sense to buy both a substitute property *and* to seek an order for specific performance that would require the defendant to transfer title to the disputed property.



Specific performance is available only if the plaintiff has a legitimate interest in receiving the property itself, such that monetary damages would not be an adequate remedy. Historically, specific performance was awarded for any contract for the sale of land. That rule was based on the belief that every parcel of land is unique and irreplaceable. Consequently, if the plaintiff is denied specific performance, no amount of money would allow it to acquire an adequate substitute from a third party.

In the Supreme Court of Canada, however, Sopinka J explained that while the traditional rule made sense in historical England, it does not invariably make sense in modern Canada. It simply is no longer true that every piece of land is unique and irreplaceable. Many commercial properties are mass-produced and fungible in the same way as other commodities. The plaintiff therefore must show that there is, in fact, a legitimate and substantial reason for seeking specific performance, rather than monetary relief. That requirement was satisfied on the facts, but only because the parties did not dispute the matter. (Sopinka J himself did not believe that the property truly was unique.)

***Co-Operative Insurance v Argyll Stores Ltd* [1998] AC 1 (HL)—note 30**

The defendant leased premises in the plaintiff's shopping mall for use as a grocery store. The parties' lease contract contained a covenant that required the defendant to keep its store open during regular business for the duration of the lease. The defendant was losing money under the contract and therefore announced its intention to close its grocery store. It offered to pay damages to the plaintiff. The plaintiff rejected that offer. It did not want to lose the defendant as a tenant because the defendant's grocery store was the mall's "anchor" (*ie* it was a primary reason why customers visited the mall).

The Court of Appeal awarded specific performance of the defendant's covenant to keep the store open. That decision was overturned by the House of Lords. The courts generally are very reluctant to impose an order that requires a party to carry on a particular business. Furthermore, even if a court was willing to supervise such an order, the facts in *Co-Operative Insurance* were not sufficiently clear. The parties' lease did not specify the level of trade, the areas of trade, and so on.

***Fraser Jewellers (1982) Ltd v Dominion Electric Protection Co* (1977) 148 DLR (4th) 496 (Ont CA)—note 32**

The plaintiff purchased an ADT security system from the defendant. The parties contract expressly stated (i) that the defendant was not an insurer, (ii) that the plaintiff should purchase property insurance to protect itself against loss, and (iii) that in the even of breach, the defendant's liability would be limited to the value of one year's fees under the contract.

The defendant breached the contract by failing to promptly call the police when thieves broke into the plaintiff's store. The trial judge found, as a fact, that if the police had been called immediately, the thieves would have been apprehended. Because the thieves were not caught, the plaintiff sued the defendant and argued that the limitation clause was inapplicable because the defendant had committed a fundamental breach.

The Court of Appeal held that the defendant had not committed a fundamental breach, and therefore was liable only to the extent indicated by the contract. The court further stressed that one purpose of the contract was to allocate the risk of loss in certain events.

***Tilden Rent-a-Car Co v Clendenning*** (1978) 83 DLR (3d) 400 (Ont CA)—note 34  
Discussed in Case Brief 9.1.

***Pettkus v Becker*** (1980) 117 DLR (3d) 257 (SCC)—note 35

The parties cohabitated for nearly 20 years. During that time, they both contributed a great deal of effort to the establishment of a successful bee-farming operation. Moreover, the plaintiff, Rosa Becker, dedicated her outside income to household expenses. In contrast, the man, Lothar Pettkus, used his income to purchase properties. As a result, title to almost all of the couple's assets was in his name alone. The relationship eventually fell apart due to Pettkus's abusive nature. Becker then claimed to have a proprietary interest in half of the accumulated assets.

The Supreme Court of Canada allowed the claim on the basis of the action in unjust enrichment: (i) Pettkus was enriched because he had received beneficial services, (ii) Becker had suffered a corresponding deprivation because she had provided those services, and (iii) there was an absence of juristic reason for the enrichment (or, phrased differently, there was a good reason to reverse the enrichment – *ie* Pettkus had freely accepted Becker's services despite knowing that she expected to receive payment in return). Having established the action in unjust enrichment, Becker was entitled to "restitution" – *ie* Pettkus was required to "give back" what he had received from her. Finally, the Court decided that in the circumstances, restitution was available in proprietary (rather than personal) form. Pettkus was not merely ordered to pay a certain sum of money to Becker. He was compelled to hold half of the properties for her benefit under a constructive trust.

***Garland v Consumers' Gas Co*** (2004) 237 DLR (4th) 385 (SCC)—note 35

The defendant, a natural gas provider, was required to apply periodically to the Ontario Energy Board (OEB), a provincial body, for approval of its pricing scheme. Beginning in the 1970s, that scheme included a late payment penalty (LPP) of 5 per cent of unpaid charges. In 1981, the federal government amended the Criminal Code to prohibit the receipt of interest at a rate exceeding 60% *per annum*. Although the point was not immediately appreciated by either party, many LPP payments violated that provision. When the plaintiff realized the truth of the matter, he began an action in 1994 to have the LPP scheme declared illegal and invalid. In 1998, the Supreme Court of Canada agreed with that argument. Remarkably, however, the defendant continued to request, receive and enforce the same pricing scheme for another three years!

The plaintiff then began a class action for the purpose of compelling restitution of LPP payments made in violation of the *Criminal Code*. Writing for a unanimous court, Iacobucci J held that *some* of the LPP payments were recoverable. He reached that conclusion on the basis of a new test of liability. Working in the mistaken belief that

restitution “is an equitable remedy that necessarily involve[s] discretion and questions of fairness,” he held that the reversibility of a transfer turns on a two-part “juristic reason analysis.”

- ☞ The plaintiff must demonstrate that the facts do not fall within one of the “established categories” of juristic reason: contract, disposition of law, donative intent, or “other valid common law, equitable or statutory obligations.” If so, restitution *prima facie* is available.
- ☞ The burden of proof then shifts to the defendant to show some other reason as to why the enrichment should be retained. Two factors are particularly important at that stage: the parties’ reasonable expectations and public policy.

As to the first branch of the new juristic reason analysis, Iacobucci J held that although the OEB’s rate orders were *intra vires* the province, they were inconsistent with the provisions of the federal Criminal Code. The doctrine of constitutional paramountcy consequently rendered the orders constitutionally inoperative to the extent of the conflict. Restitution *prima facie* was available.

The second branch of the juristic reason analysis was more complicated. Iacobucci J began by observing that the customers must have known that they would face some penalty for late payments, and that the defendant was entitled to assume that the OEB would not authorize illegal charges. He accordingly found that the “reasonable expectations of the parties” could be “achieved by restricting the LPPs to the limit prescribed” by the Criminal Code. In other words, the payments were valid and irreversible to the extent that they were within 60 per cent per annum.

That did not mean, however, that relief was available with respect to *every* dollar that fell afoul the Criminal Code. Iacobucci J also found that the defendant’s “reliance on the inoperative OEB orders provide[d] a juristic reason for the enrichment[s]” received prior to 1994, when the plaintiff formally complained about the scheme. Consequently, notwithstanding the rule of public policy that generally attacks the proceeds of crime, the defendant *was* allowed to profit from its own illegality for so long as it believed that it was acting lawfully.<sup>7</sup> Crime sometimes *does* pay.

**Clarke v Moir** (1987) 82 NSR (2d) 183 (CA)—note 36

A woman and her elderly uncle purportedly entered into a contract under which he gave all of his money to her and she promised to care for him for the rest of his life. That arrangement lasted for sixteen months, at which point he became irrational and the relationship fell apart. The uncle then claimed recovery of his money. The niece claimed that she was entitled to keep under the terms of their agreement.

The court held that the purported contract was invalid because it lacked certainty of terms. The uncle therefore *prima facie* was entitled to recover his money. The niece,

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<sup>7</sup> The decision to premise liability upon the recipient’s knowledge runs contrary to the orthodox view that Iacobucci J, writing for the Supreme Court of Canada, had forcefully reiterated in *Air Canada v. Ontario (Liquor Control Board)*: (1997) 148 DLR (4th) 193 (SCC).

however, was entitled to counterclaim for the value of her services under the action in unjust enrichment: (i) the uncle was enriched by the receipt of her services, (ii) she suffered a corresponding deprivation by providing those services, and (iii) she did so only on the assumption that a valid contract existed.

***Degelman v Guaranty Trust Co of Canada*** [1954] 3 DLR 785 (SCC)—note 36

A man and his elderly aunt entered into a contract. He promised to provide services to her for the rest of her life and she promised to leave a specific house to him under her will. He performed his end of the bargain, but was disappointed upon his aunt's death to learn that her will did not contain the promised disposition.

The Supreme Court of Canada held that while the parties had created a contract, that agreement was unenforceable under the *Statute of Frauds* because it pertained to the disposition of an interest in land but was not evidenced in writing.

The Court also held, however, that the nephew was alternatively entitled to claim restitution under the cause of action in unjust enrichment: (i) the aunt was enriched by the receipt of the nephew's services, (ii) the nephew suffered a corresponding deprivation by providing those services, and (iii) he did so only on the assumption that she would leave a house to him under her will. He therefore was entitled to \$3000 as restitution for the value of his services. (Since the contract could not be enforced, he was not entitled to receive the house as he had expected.)

***Lodder v Slowey*** [1904] AC 442 (PC)—note 37

The plaintiff agreed, for a specified price, to provide services for the construction of a tunnel. The defendant breached a condition of that contract by excluding the plaintiff from the worksite. The plaintiff claimed restitution under an action in unjust enrichment. The defendant argued that relief should be limited to a *pro rata* portion of the contract price. The court disagreed. It awarded restitution measured by the true market value of the services that the defendant received from the plaintiff.

***Komorowski v Van Weel*** (1993) 12 OR (3d) 444 (Ont Gen Div)—note 37

The court confirmed in *dicta* that the innocent party to a breach of a condition generally has the option of either: (i) continuing on with the contract, or (ii) discharging the contract. Upon discharge, the innocent party has another option of either: (i) claiming damages for breach of contract, or (ii) claiming restitution under the action in unjust enrichment. If the latter option is exercised, relief is measured by the true market value of the benefit that the defendant received from the plaintiff. Restitution is not capped by the price that would have been available under the contract. Consequently, the action in unjust enrichment may be used to escape the consequences of a bad bargain, in a way that expectation and reliance damages cannot be used.