

COMMERCIAL LAW

CASE BRIEFS

Jasmine Chan | COMM 393 | February 19, 2015

Case Brief Summaries – Precedents

Case Name	Topic	Legal Principle
Liebmann Vs. Canada	<i>Charter of Rights and Freedoms s. 15</i>	<p>Does the Charter Apply? Are any rights infringed? Would section 1 justify any infringement?</p> <p>Constitutionality of the Charter of Rights is not an issue so the court will not assess it. It only refers to people serving in peacekeeping missions.</p> <p>The Charter only applies to public matters – government agencies & bodies – and is applicable in this case</p> <p>Under S. 15 of the charter of rights and freedom, Liebmann’s equality rights were limited as he did not get the position as he was a Jew. As the respondent was unable to prove that dissemination was not beyond “what was reasonable”, the courts ruled that Liebmann’s equality rights were breached and he was therefore entitled to remedy.</p>
R. vs. 279707 ALBERTA LTD.	<i>Offer</i>	<p>Advertising is not regarded as an offer, but merely an invitation to buy. These are, however, legislations regarding false advertising both at the federal and provincial levels.</p>
RUDDER vs. MICROSOFT CORPORATION	<i>Acceptance [legally defensible clauses are binding in contracts]</i>	<p>You are bound by what you sign.</p> <p>A jurisdiction clause will generally be upheld. The court can decide that it is not the right jurisdiction if...</p> <ol style="list-style-type: none"> 1) The place does not have a real and substantial connection to the contract 2) There is a legal bias towards or against one of the parties
MONTANE VENTURES LTD. vs. SCHROEDER	<i>Counter-offer/ Repudiation</i>	<p>A request for information is not a counter-offer, and therefore not a rejection of the offer or repudiation.</p>
CALIGUIRI vs. TUMMILLO	<i>Consideration (Forbearance)</i>	<p>An act of forbearance (patience/kindness in agree not to do something), in this case a promise not to call the note, means that the contract signed has consideration.</p>
TULSA HEATERS INC. vs. SYNCRUDE CANADA LTD.	<i>Equitable Estoppel & Quantum Meruit</i>	<p>If a party changes his or her position substantially either by acting or forbearing from acting in reliance upon a gratuitous promise, then that party can enforce the promise although the essential elements of a contract are not present.</p> <p>Outcome: gratuitous promise is enforced by equitable estoppel</p>

		<p>Equity will enforce a gratuitous promise if the following is present:</p> <ol style="list-style-type: none"> 1) Pre-existing legal relationship 2) One of the parties promises to release the other from obligations, even by implication 3) Contract is modified by promise 4) Injurious reliance on the gratuitous promise 5) Shield not Sword: used as a defense
BKDK HOLDINGS vs. 692831 BC LTD.	<i>Interpretation & Contra Proferentum</i>	<p>The use of liberal interpretation and contra proferentum showed that the clause referring to purchase price adjustments showed intent and is based on sound commercial principles. The clause is valid and the purchase price should be lowered.</p>
BLACK SWAN vs. GOLDBELT RESOURCES	<i>Interpretation</i>	<p>When there is no ambiguity in a clause, there is no need to look at the surrounding circumstances.</p> <p>Parties to contracts do not show acceptance of views of interpretations simply by being silent or showing complacency</p> <p>Liberal interpretation cannot revoke terms explicitly stated or alter their basic meaning.</p>
KOBELT MANUFACTURING CO. vs. PACIFIC RIM ENGINEERED PRODUCTS	<i>Sale of Goods Act s. 18 Implied Fitness of Purpose</i>	<p>As Kobelt did not communicate that purpose for which he would use the brakes, there was no breach of any implied condition or warranty under the Sale of Goods Act because the required communication of a particular purpose and reliance is absent.</p> <p>There is no implied warranty for fitness of purpose. The seller is off the hook for fitness of purpose because the seller was not made aware for what parts they should be used for and was not relied upon for their expertise.</p> <p>Exclusion clause must explicitly be communicated and be brought to the attention of the buyer, cannot be introduced after the contract has been formed, and words excluding implied warranties/conditions must be interpreted closely.</p>
KOVACS vs. HOLTAM	<i>SGA s. 23 Title & Passing of Risk – Deliverable State</i>	<p>The party who holds title to the subject good is ultimately for all risks and liabilities associated with this ownership</p>
BEVO FARMS vs. VEG GRO INC.	<i>SGA s. 23 Unascertained</i>	<p>With regards to unascertained goods, transfer of title and risk is deemed to pass to the buyer upon delivery of</p>

	<i>Goods</i>	goods to a 3rd party carrier.
DAWE vs. CYPRESS BOWL RECREATIONS	<i>Exclusion Clauses</i>	<p>If an exemption clause is communicated to a party, and the party consents to the clause (whether explicitly by acknowledgment or implicitly by continuation of the agreement) the party is bound by the clause and it will be strictly enforced in court</p> <p><i>Reasonable</i> attempt must be made to communicate the presence of an exclusion clause, and not necessarily what the clauses say.</p>
PORELLE vs. EDDIE'S AUTO SALES LTD.	<i>Exclusion Clauses with regards to implied terms</i>	<p>A seller can exempt themselves from liability with a clause in the contract for sale. Exclusion clauses relate and apply to used goods.</p> <p>Implied terms in the Sale of Goods Act are meant to protect the purchasers of new and used goods.</p> <p>Terms agreed to in contractual negotiations (i.e. exemption clauses) can alter or negate these implied terms, provided it is not during: a <u>retail sale of new goods to an individual for non-business use.</u></p>
GREEVEN vs. BLACKCOMB	<i>Exclusion Clauses</i>	The defendant must do what is reasonably sufficient to bring the fact that there are exclusionary terms to the attention of the plaintiff.
MALONEY vs. DOCKSIDE MARINE CENTRE LTD.	<i>Breach of Contract & Exclusion Clauses</i>	<p>Exclusion Clause: Was the clause brought to the attention of the party?</p> <p>Doctrine of fundamental breach can be applied when a plaintiff seeks to escape the effect of a contractual term to which he/she had previously agreed. In order to apply this law, the plaintiff must prove that at least one of the conditions below have not been met.</p> <p>Exclusion Clauses can be set aside if...</p> <ol style="list-style-type: none"> 1. Does the clause apply to the circumstance? 2. Is it unconscionable? 3. Does public policy apply?
COLLINS	<i>Infants Act</i>	<p>Contracts entered into by those under this legal age are considered unenforceable against the minor (though they may be enforced by the minor against the other party)</p> <p>Courts can grant infants capacity and call contracts enforceable against a minor provided that: a) The contract directly benefits the minor, and b) The minor does not require protection under the "Infant's Act"</p>

SATURLEY vs. LUND	<i>Breach or Frustration of Contract</i>	If there is no condition precedent stated in the contract, there is no implied term of the agreement and a failure to carry out obligations results in a breach of the contract, it was self-induced and not frustration.
BREALTA ENERGY INC. vs. FIRST CAPITAL MANAGEMENT LTD	<i>Anticipatory Breach of Contract</i>	Anticipatory breach occurs when a party notifies the other party in advance that it will not be able to perform its obligations. Breach can be accepted and party can be sued for damages.
WESTCOAST TRANSMISSION vs. CULLEN	<i>Damages</i>	<p>Damages are meant to be equal to the amount that would return the injured party to the position they would be in presuming the other party performed their contractual obligations.</p> <p>The injured party has the obligation to take all necessary steps to minimize their injury due to the breach of the other party.</p> <p>Damages must flow naturally and directly from the breach and be expected to a contract at the time the contract was made</p>
BLACKCOMB SKIING ENTERPRISES vs. SCHNEIDER	<i>Damages (liquidated damages)</i>	<p>If a party foresees that breach of the contract may cause them to suffer harm, they may include these foreseen consequences in the contract in the form of mandatory deposit.</p> <p>If the clause is perceived to be a genuine attempt by the firm to pre-estimate damages, the courts will hold that it is a deposit; if it is interpreted as punitive in nature, it will be construed as a penalty and declared invalid.</p> <p>If considered a deposit, the clause will remain enforceable even if the party does not suffer the damages it genuinely expected to incur in breach.</p>

<p>GENERAL TIRE CANADA V. AYLWARDS LTD</p>	<p><i>Parol Evidence Rule</i></p>	<p>When terms of a written contract are clear and unambiguous, the parties are not permitted to introduce evidence outside of the contract to alter its fundamental meaning</p> <p>Where ambiguous agreements made between parties come at odds with the express terms of a written contract, the terms of the contract will stand</p> <ul style="list-style-type: none"> • Oral collateral (separate contract) • Terms were incompatible with the guarantee <ul style="list-style-type: none"> • Parole evidence rule applies • Courts said don't rely on anything not in written agreement
<p>COLLINS v. DODGE CITY EAST</p>	<p><i>Misrepresentation</i></p>	<p>Remedies for Misrepresentation: A person need only show that he or she was misrepresented about a material aspect of the contract in order to receive the appropriate remedy</p> <ul style="list-style-type: none"> • Negligent misrepresentation on fundamental element <ul style="list-style-type: none"> • Induced plaintiff to enter into contract • Recite what misrepresentation is
<p>WEINMAN v. BRINKMAN</p>	<p><i>Misrepresentation & Caveat Emptor</i></p>	<p>Caveat Emptor "Let the Buyer Beware" is the general rule in the purchase of land</p> <p>Misrepresentation: a person need only show that he/she was misrepresented about a material aspect of the contract in order to receive the appropriate remedy</p> <ul style="list-style-type: none"> • Water in the house • No effort to conceal → no misrepresentation • Patent defect, detectable on ordinary inspection
<p>BUCKWOLD WESTERN LTD v. SAGAR</p>	<p><i>Undue Influence / Duress</i></p>	<p>Where there is a special relationship resulting in domination, the contract is voidable for undue influence</p> <p>Threats of violence/imprisonment to force individuals into contracts are considered duress; the contract is voidable at the option of the injured party</p> <ul style="list-style-type: none"> • Duress or undue influence • Wife signs personal guarantee <ul style="list-style-type: none"> ○ Bank says no pressure ○ She freely exercised own will in signing
<p>MAKSYMETZ v. KOSTYK</p>	<p><i>Legality</i></p>	<p>A contract that involves illegality cannot be enforced by a party that knowingly agreed to the illegality</p> <ul style="list-style-type: none"> • Object of a contract must be legal • What they were doing was contrary to public policy
<p>PHOENIX RESTORATIONS LTD.</p>	<p><i>Legality "Prima</i></p>	<p>Legality: An employer seeking to rely on a restrictive covenant must show that the restrictions are no wider than reasonably</p>

vs. BROWNLEE	<i>Facie</i> "	<p>required to adequately protect its interests.</p> <p>Restrictive covenants are only enforceable if they are reasonable between the two parties with reference to the public interest</p> <p>“Prima Facie Void” – use test for reasonableness</p> <ul style="list-style-type: none"> • When a restrictive covenant in employment contract is enforceable • First: when there is a employment contract and there’s restriction <ul style="list-style-type: none"> ○ It is prima facie void → void unless parties show it is reasonable between them • Is it reasonable in terms of public interest? • Does it protect legitimate proprietary interests? • Is it reasonable between the parties in terms of time, geography, and what’s being restricted?
PEACOCK vs. ESQUIMALT & NANAIMO RAILWAY CO.	<i>Privity of Contract</i>	<p>Outsiders to a contract cannot enforce any promises made between contracting parties to which the outsider does not have privity</p> <p>To succeed in an action in contract law, the plaintiff MUST prove that he/she has privity [is a contractual party] to the agreement</p> <ul style="list-style-type: none"> • Investor was not party to contract – no privity • Only the investor → no rights to enforce the contract
BANK OF NOVA SCOTIA vs. ROCK CORP OF CANADA	<i>Negotiable Instruments</i>	<p>The rights of a holder in due course (of a negotiable instrument) are superior to those of a regular assignee of contractual rights</p> <p>In order to receive these superior rights, the holder must satisfy the court that it has accepted an endorsed negotiable instrument from the designated payee and is completely ignorant of any stop payments or fraudulent causes of payment that would render the instrument void</p> <p>A bank may <u>acquire</u> the rights of a holder in due course if it meets all of the above conditions except endorsement, and in the absence of such endorsement credits the payee’s account for the face value of the instrument</p> <ul style="list-style-type: none"> • Bank subject to equities, not a holder in due course as the cheque was cashed without being endorsed and was not put through anyone’s account • Any problems with the cheque – bank is on the hook
2203850 NOVA SCOTIA LTD vs. SARKAR	<i>Negotiable Instruments</i>	<p>A holder in due course acquires the rights of the payee without having to be concerned with the elements of the transaction for which the rights arose</p> <p>In the case of a holder in due course of a cheque, the drawer</p>

		<p>(writer of the cheque) cannot subsequently revoke the obligation provided by the instrument</p> <ul style="list-style-type: none"> • Money Mart took cheque without notice of dispute <ul style="list-style-type: none"> • Took as holder in due course
<p>WALDRICK vs. MALCOLM</p> <p>Waldrick slips on ice of Malcolm's property</p>	<p><i>Negligence: Occupier's Liability</i></p> <p><i>"Volenti" defense</i></p>	<p>Occupier's liability – standard of care</p> <p>Standard of ensuring that those using your property are not aware of the harm</p> <p>Voluntary Assumption of Risk: "Volenti non fit injuria"</p> <p>If after being fully advised of the risk or danger associated with the behavior, the plaintiff continues the behavior and is injured in the predicted way, the defendant will not be found liable since the plaintiff voluntarily assumed the risk.</p> <ul style="list-style-type: none"> • Occupiers liability is that of reasonable care, not community standard • You can't say it's okay to have ice all over a farm • It's one of reasonable care
<p>HOLLIS vs. DOW CORNING</p> <p>Breast implant rupture within body and silicon capsule lost in chest & failure in warning</p>	<p><i>Negligence Product Liability & Duty to Warn</i></p>	<p>The duty to warn is an ongoing obligation.</p> <p>The responsibility of a manufacturer is to warn a learned intermediary of risks associated with the products usage where warnings are unlikely to reach the consumer directly</p> <ul style="list-style-type: none"> • Even where a product is not capable of being negligent at the time is manufactured, the duty to warn is ongoing • You can warn
<p>MORSI vs. FERMAR</p> <p>Morsi killed in accident after asphalt to gravel transition causes car to go out of control</p>	<p><i>Contributory Negligence Duty of Care</i></p>	<p>Contributory negligence: a partial defence to a negligence action when the plaintiff's conduct also contributed to the injury. If the defendant exercised ordinary care, the accident could have been avoided.</p> <p>Breach of duty of care causes negligent action</p>
<p>RANGEN INC. vs. DELOITTE & TOUCHE</p> <p>Financial statements prepared but business defaults on credit, no special relationship/ purpose prepared for acknowledged</p>	<p><i>Professional's Liability Negligent Misstatement</i></p>	<p>Special Relationship: professional must know for whom and what the information prepared will be used</p> <p>Purpose Prepared for Test: Duty of care of misstatement is limited to those parties it can reasonably foresee will use the prepared statements and only for those purposes the professional expect at the time of preparation</p> <ul style="list-style-type: none"> • Professional negligence • Limited the scope, you must be aware of the group who will be relying on your information
<p>HERCULES MANAGEMENT LTD. vs. ERNST & YOUNG</p> <p>Hercules using statements to guide</p>	<p><i>Professional's Liability</i></p>	<p><u>Special relationship and Purpose Prepared For Test</u></p> <p><u>Purpose Prepared for Test:</u> When the purpose is not made apparent to the professionals prior to it being prepared, no duty of care is established.</p>

investment decision		
<p>HODGKINSON vs. SIMMS & WALDMAN</p> <p>Breach of duty from advising to invest in MURBS, where there was significant conflict of interest undisclosed</p>	<p><i>Fiduciary Duty</i></p>	<p>"Fiduciary Duty": Financial advisors are burdened with the duty to act in the best interests of their clients (specifically by avoiding "conflicts of interest")</p> <p>Breach of fiduciary duty exists where the plaintiff can establish a reliance was made upon the party giving advise, which lead to losses being suffered by the plaintiff</p> <p style="text-align: center;">Special Relationship Exists</p> <p>Professional must act honestly, in good faith, fidelity and loyalty, and only in the best interests of the client, cannot benefit personally without disclosure and consent</p> <ul style="list-style-type: none"> • Fiduciary duty • Vulnerability is key • Must be reasonable expectation that other party will act in your best interests
<p>PEMBERTON BENCHLANDS HOUSING CORP vs. SABRE TRANSPORT LTD</p> <p>Dispute over how much to pay for a portion of construction done and whether Patterson had apparent authority</p>	<p><i>Agency Relationships & actual authority</i></p>	<p>Four conditions must be met to entitle a contractor to enforce against a company a K entered into on behalf of the company by an agent who had no actual authority to do so</p> <ol style="list-style-type: none"> 1. That a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor 2. That such representation was made by a persons who had "actual" authority to manage the business of the company 3. That he (the contractor) was induced by such representation to enter into the contract and that he fact relied upon it 4. Under its articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent <ul style="list-style-type: none"> • When you want there to be apparent authority, it must be made by a person with authority • No authorized signatory → no apparent authority
<p>LANZ vs. LANZ</p> <p>Son wants to claim partnership but he only got share of profits, no management role, joint risk taking etc.</p>	<p><i>Partnerships</i></p>	<p>A partnership is essentially two or more persons acting in common for a business purpose with a view of making a profit</p> <p>"The Partnership Act" incorporates not only profit sharing, but also joint risk taking (in debt obligations) and degree of managerial influence in its assessment of whether the firm is indeed a partnership</p> <p>Criteria: Carrying on a business together with a view to profit, management role, profit sharing, joint risk taking, capital contribution</p>

		<ul style="list-style-type: none"> • No rule in management • No liability in debt • Courts looked at substance of relationship and said no partnership
<p>PEN-BRO HOLDINGS LTD. VS DEMCHUK</p> <p>Dad says two years ago that he would back payments on a lease but there was no partnership established</p>	<i>Partnerships</i>	<p>Partnership was never indicated or implied in writing or verbally that they were partners in a business, that he would be liable for payments, receive profits of the business or agreed to share in risks of the business.</p> <ul style="list-style-type: none"> • Father did not present evidence of being partner <ul style="list-style-type: none"> • No intention of being partner
<p>CHALLENGER VS NUCLEUS FINANCIAL NETWORK INC.</p>	<i>Corporations</i>	
<p>DATA BUSINESS FORMS LTD vs. MACINTOSH</p> <p>Macintosh moves from sole proprietorship to a corporation under Maritime. Changes letterhead but fails to expressly inform party that he is working with.</p>	<i>Corporations</i>	<p>Under the law it is up to the party that intends to incorporate to let the appropriate parties know about it if he is supposed to get the limited liability benefits of incorporation. The defendant should have expressly informed the plaintiff about this change as he cannot expect them to notice the change by themselves.</p> <ul style="list-style-type: none"> • Must have actual notice that party is acting as agent rather than in their own personal capacity
<p>UNIVERSAL PROPERTY MANAGEMENT vs. WESTMOUNT</p>	<i>Corporations</i>	<p>Shareholders of a corporation are not liable for the company's debts or obligations, with the exception that shareholders may be ordered to repay the firm's obligations (known as "lifting the corporate veil") where some form of fraud or unconscionability is committed by this shareholder</p> <ul style="list-style-type: none"> • Corporate veil was not lifted because it was not fraudulent, not unconscionable • 1)Individual must control company 2)Control must be used to commit fraud 3)Misconduct must have caused the loss
<p>Strother</p>		<ul style="list-style-type: none"> • Liability of partners for the wrongful acts of a partner • Fiduciary duty ends after about a year of leaving a partnership
<p>Soloman vs. Soloman</p>		<ul style="list-style-type: none"> • Company alone is liable even if it's one man company <ul style="list-style-type: none"> • As long as statute is

LIEBMANN V. CANADA (Minister of National Defense)

Section 15 of the Charter of Rights and Freedom

FACTS

Liebmann, a proven and accomplished member of the Canadian Forces' Naval Reserve was nominated for the important post of executive assistant to the Commander of the Canadian Forces Task Force in the Middle East during the Persian Gulf crisis. The Maritime Command staff officers seemed to initially look favorably upon the appellant's nomination. When command staff became aware the Liebmann was Jewish, they decided not to select Liebmann. A staff officer who participated in the decision making process said that officers had "decided it was better not to send a Jew to the Middle East." At the time, Canadian Forces had no formal policy regarding the consideration of personal characteristics such as religion in the selection of personnel for employment in non-peacekeeping operations. Liebmann challenged this decision under section 15 of the Charter (Right to Equality). He also sought declarations and injunctions relating to the Canadian Forces Administrative Order (CFAO) 29-53, Policy for Employment of Canadian Forces Personnel on Peacekeeping Duty, which foresees the possibility that certain personnel may be restricted from participating in peacekeeping operations due to the "cultural, religious, or other sensitivities of the parties or host country"

ISSUES

1. Should the court consider the constitutionality of CFAO 20-53?
2. Does the Charter apply to the decision made not to appoint Liebmann?
3. Were the appellant's rights to equality under s. 15 of the Charter infringed?
4. If the appellant's equity rights were limited, was the infringement within "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (s. 1 of the Charter)"?

REASONS

1. CFAO 20-53 was not the reason that Liebmann was not permitted to serve in the Persian Gulf and was not in effect when the decision was made. The policy applied only to the selection of personnel for peacekeeping operations and Operation Friction was not one. Therefore was not relevant to the action before the court and should not be considered.
2. The Charter applies to decisions made under delegated statutory authority. The decision regarding Liebmann was made under delegated authority under the National Defence Act.
3. Liebmann was treated differently from others based on personal characteristics of the type enumerated in s. 15, and there was discrimination in a constitutional sense in that the decision had a profound impact upon his human dignity.
4. The respondents made little attempt to collect evidence that might validate their concerns so as to justify a reason to discriminate against Liebmann because he was Jewish.

DECISION/CONCLUSION

1. The court should not consider the constitutionality of CFAO 20-53
2. The Charter does apply to the decision made not to appoint Liebmann
3. Liebmann's equality rights under s. 15 of the Charter were infringed
4. The infringement could not be justified under s. 1 of the Charter.
5. Respondants ordered to pay the appellant's costs both at trial and in appeal.

LEGAL PRINCIPLES

- The Charter applies to decisions made under delegated statutory authority (government action)
- Infringement of s. 15 of the Charter occurs if someone is treated differently based on characteristics of the type enumerated in s. 15, and if as a result that person's dignity was likely to be demeaned
- The court will not assess the constitutionality of provisions that do not apply to the case before the court.

R. vs. 279707 ALBERTA LTD.

Offer [Federal Competition Act – sanctions against false advertising]

Alberta Court of Appeal: Judgment 1991

When directed to the public at large, an advertisement is not usually considered an offer, so the advertiser is not usually bound in contract to sell the goods at the advertised price. There is, however, legislation at both the federal and provincial level containing sanctions against false advertising. In the following case, the court applies the federal *Competition Act*.

The Provincial Court convicted the accused of virtually all the counts. The Court of Queen's Bench allowed appeal and entered acquittals. This court allowed an appeal and restored the convictions entered in the Provincial Court, except for four counts which were conceded by the Crown.

FACTS

During the period of the advertisement, customers tried repeatedly to buy from the accused a certain television model that had been advertised as on sale at a bargain price. Salespeople told potential buyers that the sets were sold out, had been sold for some time, and future inventory of the same model was unlikely. Most potential buyers requested rain checks; some were issued; none were honored.

LEGAL ISSUES

1. The accused is charged with misleading advertising under s. 52 of the Competition Act and
2. Not supply bargain goods advertised under s. 57 of the Competition Act

LAW AND APPLICATION

1. Accused wholesaler had on hand a large and ready supply of the advertised model. It is estimated that a reasonable supply of the model would have been 100. The President of the accused strongly disputed this estimate. During the period in question, the accused inventory records showed a very small number of models on hand (2-5).
 - a. Appellant's arguments: The charge of false advertising must stand or fall on facts existing at the time the advertisement was run and that later acts or omissions cannot make an advertisement punishable which is not punishable beforehand. But advertisements with identical wording were run during the time various shoppers were attempting to buy this tv set.
 - b. Crown's arguments: The accused never had an honest intent and the whole thing was a scheme from start to finish. The trial judge agreed, and this court had no inclination to interfere with the fact finding. The court determined that 2-5 sets were too small a reserve to fulfill the advertisement.
2. Section 57 is directed toward "bait and switch" advertising. After being unable to buy the advertised model, shoppers were led to other more expensive sets. Still, the charge is failing to supply the goods advertised in reasonable quantities.
 - a. The accused failed to have reasonable quantities and failed to supply
 - b. Appellant's Argument: Kienapple principle should apply. Virtually all the elements of the charges under s. 52 and 57 were the same. Half the conviction were redundant.
 - i. The court disagreed. The essence of s. 52 is of the false advertising charge in publishing an untrue/misleading advertisement. The essence of s. 57 charge is failing to sell after the advertisement has come out. Although an implemented "bait and switch" strategy would generally entail a violation of both sections, this might not always occur

DECISION/CONCLUSION

1. The convictions for false or misleading advertising under s. 52 are sound and proper.
2. The convictions under s. 57 are sound and proper.
3. The court restored the convictions under s. 52 and s. 57 entered in the Provincial Court, except for four counts, which were conceded by the Crown.

RUDDER vs. MICROSOFT CORPORATION

Offer & Acceptance [legally defensible clauses are binding in contracts]

When a party is transacting business with someone in another jurisdiction, there will often be a clause in the contract whereby the parties agree where any litigation in connection with the contract will take place. The court will usually, but not always, give effect to such a clause. In this case, the plaintiffs argued that there were a number of factors that should influence the court in refusing to enforce the forum selection clause.

FACTS

A class action was filed on behalf of two Canadian citizens, representing a common class of Canadian subscribers to the MSN Messenger service, against the Microsoft Corporation. The suit alleges that the corporation engaged in unfair billing practices relating to subscription fees charged to its clients; the suit was filed in the Ontario Supreme Court. The defendants have filed for a permanent stay on these proceedings, pursuant to a clause in their “membership agreement” referring all disputes related to the Messenger service to the jurisdiction of King County, WA. The plaintiffs claim that, as they were not aware of this clause when agreeing to the service, they should not be bound by its terms.

LEGAL ISSUES

1. If the plaintiffs did not knowingly consent to the “forum selection clause,” should they be bound by its term?
2. Should the OSC forcibly override this clause to ensure fair and equitable justice is served?

REASONS

1. The plaintiffs were repeatedly notified of the forum selection clause when registering for the service, and by agreeing to this online contract they should be bound by its terms. As law school graduates, the plaintiffs should especially be aware that agreeing to the terms of a contract equates to agreeing to each and every term stipulated within the contract (bar fine-print that is not effectively communicated to the parties)
 - a. Plaintiff’s Argument: only a portion of the agreement was presented on the screen at one time. The terms which were not on the screen were essentially “fine print”
 - b. Judge: The agreement cannot be displayed at once on the computer screen but this is not materially different from a multi-page written document which requires a party to turn the pages. There are no particular differences which make a particular term of the agreement more difficult to read than any other term.
2. There is no evidence that the courts in King County, WA will rule in a biased or inequitable fashion. Microsoft has demonstrated substantial connection to the State of Washington and in particular King County. Furthermore, it will be easier and more efficient to claim any awards that the class may win as a result of the action when the hearings are within Washington’s borders.

DECISION/CONCLUSION

1. The plaintiffs have not met the burden of showing a “strong cause” as to why the forum selection clause should not be determinative. The plaintiffs will be effectively bound by the terms of the clause.
2. The OSC will not overrule the clause, and a permanent stay will be granted to the defendants.

LEGAL PRINCIPLES

- Legally defensible exemption clauses will bind parties to all terms and conditions provided within the clause (where defensible means that the clause has consideration)

MONTANE VENTURES LTD. vs. SCHROEDER

Counter-offer/ Repudiation of an offer & Specific Performance

British Columbia Supreme Court: Judgment: March 27, 2000

The essence of a contract is, in theory, the meeting of minds of the contracting parties. The two parties must have a common will in relation the subject matter of their negotiations and must have struck an agreement. Sometimes it is difficult to tell what constitutes a rejection or a counter-offer. When the offeree is merely requesting information or clarification, that does not constitute a counter-offer or a rejection and the offer remains in force.

FACTS

- Montane Ventures seeks an order of specific performance directing the defendant Frank Schroeder, to complete an agreement to sell real property at 100 Mile House.
- Montane and Mr. Schroeder negotiated a contract of purchase and sale of a commercial property on September 3 or 4 at a price of \$215,000. The completion of the contract pursuant (subject to) a term, which allowed Montane to receive and be satisfied with a copy of the leasehold interest (Internet Café tenant) by September 10, with the sold benefit to the purchaser.
- Mr. Schroeder and Mr. Jeves (Montane's real estate agent) communicated via telephone regarding the alterations done to the property for the leased premises. Jeves requests a final inspect report of the alterations, to which Schroeder agrees to give.
- On Sept 9, Jeves forwards an addendum to the contract removing the original subject to clause and adding "seller agrees to provide final inspection certificates for alterations re above lease by Sept 22"
- Schroeder responds to the addendum to be a repudiation or counter offer by Montane and makes a new offer for \$225,000.

LEGAL ISSUES

1. Is the addendum a breach, repudiation, counter-offer or an inquiry?

LAW APPLICATIONS

1. Chesire, Fifoot, Furmston's Law of Contracts
 - a. The task of the courts is to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surround and follow it. Is the preparation of a further document a condition precedent to the creation of a contract or is it an incident in the performance of an already binding obligation?
2. Singh v. Chung (1995)
 - a. Counter offers generally constitute a rejection of the offer and terminate it so that it is no longer open for acceptance
 - b. Objective test: Whether the communication is a counter offer or a request for information depends on the intention, objectivity ascertained, with which it was made.

DECISION/CONCLUSION

1. The inclusion of the inspection certificates in the addendum of the sentence regarding the inspection certificates follows from the condition precedent that Montane must be satisfied with the lease arrangement with the Internet café. He included the sentence merely to confirm his conversation with Mr. Schroeder the previous day and had no intention of putting forward a counter offer. It is decided that the addendum was neither a counter offer nor repudiation.
2. Therefore, the court awarded Montane specific performance and party costs.

CALIGIURI vs. TUMMILLO

Consideration

FACTS

Mrs. Caligiuri gave \$50,000 to her son to start up a company to own and run with other shareholders. In exchange, all shareholders had to sign a promissory note in her favour. Tummillo later became a shareholder, and signed the same promissory note. A new promissory note was then signed, where each shareholder promised to repay 1/6 of \$50,000 to Caligiuri on demand. The company later failed and Caligiuri sued on the promissory note. She received judgment against the company and the shareholders. Now Tummillo is appealing this decision because he says that he gave his promise to repay without getting anything in return from Caligiuri; the advancement of funds (\$50k) by Caligiuri to the company had been made before Tummillo became a shareholder

LEGAL ISSUES

1. Was there adequate consideration given by Caligiuri in exchange for Tummillo's promissory note?

LAW

- A court of appeal can only rule on questions of law, not of fact.
- Consideration consists of: "some right, interest, profit or benefit, accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other."
- Consideration is the mutual exchange of promises (bilateral) or a promise in exchange for an act or service (unilateral).
- The exchange need not be one of equivalents nor does it have to be a benefit. Consideration can be the promise NOT to do something (a forbearance)

APPLICATION

- Tummillo's Argument
 - a. The defendant joined after the fact; therefore, he should not be held responsible for repayment
 - b. He argues that he did not receive consideration – in which case the promissory note would not be legally binding
- Caligiuri's Argument
 - a. Her consideration is in the form of forbearance
 - i. She did not exercise her right to call the loan in exchange for the signing of the promissory note by each shareholder
 - ii. Signing the promissory note allowed Tummillo to become a shareholder. This action was an acknowledgement of Tummillo's promise to pay Caligiuri 1/6 in exchange for her promise to forbear on her loan.
- Judge's decision
 - a. The case cannot be decided based on fact, just on law. And it is the law that forbearance (which is indisputably exercised by Caligiuri) constitutes consideration. Therefore, the promissory note is enforceable and binding by law
 - b. There was consideration in either of two acts. If Tummillo did not sign the note, he would not have become a shareholder. Second, if the shareholders were not prepared to become personally responsible, Caligiuri would have called the note. Her promise not to call the note was an act of forbearance. Thus, Caligiuri's promise to forbear from demand repayment of her son's \$50k debt in exchange for Tummillo's promise is good consideration.

DECISION/CONCLUSION

1. Appeal application is dismissed with costs. Tummillo is liable to pay 1/6 or \$50k as promised to Caligiuri, as well as the costs incurred to her of the trial.

TULSA HEATERS INC. vs. SYNCRUDE CANADA LTD.

Consideration: Equitable Estoppel & Quantum Meruit

FACTS

Tusla was supplying Syncrude with a heater. Syncrude requested seamless pipes, didn't specify a specific company to supply these pipes, but provided a list of approved pipe suppliers. This list, however, did not include any manufacturers capable of supply seamless Incoloy 825 pipe of the dimensions in question. Tulsa proceeded on that basis that welded pipe would be used for the radiant portion of the heater. Tulsa informed Syncrude that the pipe had been ordered and that the Incoloy would be provided by Bristol Metals LP, without specifically pointing out to Syncrude that Bristol would be supplying welded pipes. After Tusla had already purchased the welded pipe, Syncrude informed Tusla they should get the seamless pipe from Kaiser, a supplier not on the approved list. Syncrude refused to pay for the additional seamless pipe to replace the welded pipe. Tulsa sued and won because Syncrude had approved the provision of the welded pipe and had not provided a supplier appropriate for the timeline they were asking.

LEGAL ISSUES

1. Was Syncrude liable to compensate Tulsa for seamless pipes?

APPLICATION

- Syncrude's Argument
 - a. The contract was never amended to allow the supply of welded pipe
 - b. The specifications were not ambiguous, and the trial judge erred in admitting extrinsic evidence relative to such alleged ambiguities
 - c. Syncrude received no consideration for the alleged amendments
 - d. Syncrude's conduct did not amount to an acceptance of welded pipe
 - e. Tulsa was disqualified from the equitable remedy of quantum meruit, because it did not come to court with "clean hands"
- Judge's decision
 - a. At the time the job was awarded to Tulsa, the seamless pipe in specific dimensions was not commercially available, notwithstanding that it made a worldwide search
 - b. It would have been impossible for Tulsa to complete the heater within the original schedule and the contract would have been effectively frustrated if Syncrude had insisted on the requirement for seamless pipe
 - c. Tulsa requested Bristol to be added to the AML and it clearly showed that it was a manufacturer of welded pipe
 - d. Further evidence was found that Syncrude knew and approved of the provision of welded pipe
 - e. Syncrude directed writing that "work may proceed" in accordance to Tulsa's drawings
 - f. Syncrude specifically waived any requirement for seamless pipe during the time that the delivery schedule for the heater was being maintained
 - g. Syncrude was estopped from relying upon a lack of formal approval and was obligated to pay Tulsa for the extra pipe obtained at Syncrude's request.
 - h. Quantum meruit also supported the need for reasonable compensation for the costs implicit in the decision to change from welded to seamless pipe. Tulsa's conduct did not disentitle it to equitable relief.

TRIAL JUDGMENT

1. The Court dismisses the appeal the judgment of \$587,170 awarded to Tulsa Heaters Inc. for additional costs expended by Tulsa to obtain both welded and seamless pipe for the fabrication of a large industrial vacuum heater.
2. The trial judge found liability against Syncrude on a number of alternate grounds
 - a. Ambiguity in the specifications as to whether seamless pipe was a requirement for a large diameter pipe, as distinct from a preference
 - b. Amendment of the contract to accept welded pipe
 - c. Followed by a second amendment to revert to seamless pipe
 - d. Conduct of Syncrude including elements both of promissory estoppel, waiver and quantum meruit

BKDK HOLDINGS vs. 692831 BC LTD.

Liberal Approach to Interpretation & Contra Proferentem

FACTS

692831 BC Ltd. (“692831”) entered into an agreement with BKDK Holdings Ltd. (“BKDK”) to purchase shares of Meridian Travel Ltd. (“Meridian”) for \$750,000. At around the time of the sale, the parties believed that a major client of Meridian, Teck Cominco (now referred to as Teck Resources Ltd., or “Teck”), was going to issue an RFP for its travel account. This resulted in the following clause being included in the contract:

“2.2 In the event that the Company is unable to successfully win the RFP and retain the Teck Cominco corporate travel business, then the Seller agrees that the Purchase Price shall be reduced by \$70,000, which amount the Purchaser may deduct from the final payment as set out in Sub-Sub-Clause 1.2.3.”

In reality, Teck was not engaged in an RFP process, and instead decided to substantially move its business to Amex Bank of Canada’s corporate travel arm without any opportunity for recourse by Meridian. BKDK acknowledges that Teck made an independent business decision to transfer the account, and accepts a trial on that basis.

Teck billed \$160,000 of travel to Meridian in the year following the transfer of the account. Previous annual billings amounted to approximately \$5,000,000.

LEGAL ISSUES & REASONING

The principal **issue is “is 692831 entitled to the \$70,000 discount?”** However, as this is an issue of interpretation, the question can also be phrased as “What is the proper interpretation of clause 2.2?”

BKDK uses the plain language approach to interpret clause 2.2, as a precise set of requirements to be met. In their view, as Teck did not issue an RFP an instead made an independent business decision to transfer the account, this does not satisfy 2.2 and renders it inoperative. The essence of the clause was a test of Meridian fighting to maintain Teck’s business, but since no RFP was issued, it is unclear if this occurred or was possible.

692831 uses the liberal approach to interpretation, and contends that the purpose of 2.2 was a method to adjust the purchase price if Meridian lost this lucrative account. The clause, in their opinion, serves to quantify the price adjustment if the account was lost.

BKDK provided an alternative submission, that Meridian must lose 100% of the Teck account to be considered “lost”.

LAW

Justice Sewell applied case law from **Scanlon v. Castlepoint Development Corp.** (ONCA, 1992).

- “...should be construed in accordance with sound commercial principles and good business sense.”
- “The provisions should be read, not standing alone, but in light of the agreement as a whole and the other provisions thereof.”
- “The court is to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract.”

This case is used as a summarization of two Supreme Court of Canada cases, Consolidated-Bathurst Export Ltd. V. Mutual Boiler and Machinery Insurance Co. (1980) and Frenette v. Metropolitan Life Insurance Co. (1992)

APPLICATION

The judge found both meanings proposed to be legitimate interpretations of the contract. However, he favoured the interpretation of 692831. This decision was made for several reasons:

1. The presence of clause 2.2 shows the parties both considered the Teck account to be a significant determinant of Meridian's share price. The manner in which Meridian loses the account is not relevant, as the outcome will be the same: a lower share price. As such, the judge decided that the purpose of the clause was a share price adjustment provision as this appears to be the true intent of the parties at the time of entry into the contract.
2. In the context of the agreement, it is clear that the parties did not intend for an RFP to be a condition, rather an explanation of the situation as they understood it.
3. In the judge's opinion, the interpretation proposed by BKDK is contrary to good business sense. He notes that BKDK's interpretation would result in an absurd outcome; 692831 would be in a worse position if Meridian was provided no opportunity to retain the account than if it was able to fight to retain it.

In terms of BKDK's alternative submission, this requires definition of "Teck Cominco corporate travel business". The judge states that the parties intended this phrase to represent the prior situation, where Meridian provided virtually all of Teck's travel needs. As roughly 3% of Teck's previous annual travel billings remain with Meridian, Meridian is deemed to have lost the account.

DECISION/CONCLUSION

The judge decided that the proper interpretation of the clause is that proposed by 692831. That is:

1. 692831 is entitled to the \$70,000 discount
2. The proper interpretation of clause 2.2 is as a price-reduction mechanism

BKDK also asked the judge to determine the remaining amount payable by 692831 to BKDK, however as this was not touched upon in the petition the judge declined to rule on the issue. The parties were instead instructed to come before the Court again if they could not come to an agreement. 692831 is also entitled to costs.

LEGAL PRINCIPLES

The agreement is a negotiated commercial document which should be construed in sound commercial principle and good business sense. The court is to search for the true intent of the parties at the time of entry into the contract. In the event of ambiguity, the contract will be construed against its author.

BLACK SWAN vs. GOLDBELT RESOURCES

Liberal Approach to Interpretation

British Columbia Court of Appeal – May 29, 1995

The large majority of contractual disputes are not regarding the formation of contracts, but are about the meaning, or interpretation, of contracts. Whenever there is a dispute involving the meaning of a specific term or terms, the courts have a choice of applying the literal meaning of the term or adopting a more liberal approach that tries to determine the parties' intent. Even determining the literal meaning of the terms of a contract is not as simple as it might first appear.

FACTS

- Both companies, Black Swan and Goldbelt, negotiated separate contracts with Comptoir, providing \$5.5 M in exchange for being a majority shareholder. Instead of going to court, Black Swan and Goldbelt negotiated a settlement agreement, where Black Swan exchanged its shares in Comptoir in exchange for money and \$1.2M in Goldbelt, i.e. 31.6% control of the company without dilution.
 - Included in the settlement agreement was a top-formula to protect Black Swan's control over Goldbelt, i.e. if Goldbelt sells shares or anything convertible to shares than the top-formula is triggered, and Black Swan would be entitled to the shares which it allow it to retain % control.
- After the settlement agreement, Goldbelt entered a loan agreement of \$18 M with Pegasus, which could be convertible to shares of Goldbelt. The original trial judge used a literal approach with the contract and found the Pegasus' agreement to trigger the top-formula in the settlement agreement.

LEGAL ISSUES & REASONING

- 1) To what extent should contextual facts influence the meaning of the text (contractual interpretation)?
- 2) Do the loan from Pegasus apply to the said contract, and should it be interpreted as an issuance of equity position?
- 3) Should it be implied that Black Swan's holdings be topped up conditional to the topping up of Comptoir's holdings?

DECISIONS

1. The explicit words alone shall be strictly interpreted as being the final form agreement.
2. Yes, it is both applicable to the contract and a necessary input in the top-up calculation.
3. No, Black Swan's contract is independent of the contract between Goldbelt and Comptoir.

APPLICATION

- 1) The objectives of the parties prior to formalizing an agreement in a written contract are dynamic. As such, the only means to legitimately interpret an agreement is through strict interpretation of the terms found in the final form agreement. Any further interpretation would be speculative as to what was a genuine intention of a party versus what was the give and take of the process of negotiation.
- 2) The loan from Pegasus (in the form of convertible debentures) implies the offering of "rights to purchase." As such, the loan stipulates a top-up of Black Swan's holdings, and the face value of the loan shall be incorporated in the top-up formula.
- 3) This is contingent upon the evidence found admissible in (1.) As it is not explicitly stated in the contract, and the court could not find this view "giving effect to the intentions of the parties," the interpretation of Black Swan's top-up contingent upon Comptoir's top-up cannot stand. As such, the appeal is dismissed.

LEGAL PRINCIPLES

- Any agreements between parties not finalized in the contract form may be revoked or altered at any time
- Parties to contracts do not show acceptance of views of interpretations simply by being silent or showing complacency
- Liberal interpretation cannot revoke terms explicitly stated or alter their basic meaning

KOBELT MANUFACTURING CO. vs. PACIFIC RIM ENGINEERED PRODUCTS

Sales of Goods Act s.18: Implied Fitness for Purpose

FACTS

- Kobelt sells brakes to industry, and PREP is the buyer. PREP is opting not to buy because brakes did not work for its intended purpose. PREP said that brakes were leaking and malfunctioning, not allowing them to perform the intended task, relying on SGA's implied condition or warranty of fitness in s. 18. PREP tries to claim damages based on costs incurred (labour, cost of replacement brakes) during the investigation of the malfunctioning brakes. Kobelt insists that brakes are in optimal condition and they had an exclusion clause on the website, which was apparently not known to PREP. Kobelt denies providing suggestions to PREP in their purchase and claims that leaking happened not due to faulty brakes but because they were used in an improper manner.

LEGAL ISSUES & REASONING

- 1) Was there an implied condition or warranty of fitness for the particular purpose for which the defendant intended to use the brakes pursuant to s. 18 of the sales of goods act? Or is any alleged warranty not applicable because the sale was of a specified article under its trade name or because any such warranty is excluded by the limited warranty and exclusion clauses that the plaintiff assert form part of the terms of the agreement?
- 2) Has PREP demonstrated a breach of the implied warranty of fitness for purpose?
- 3) If there was a breach of contract and damages are not limited by the contractual warranty and exclusion clause, what amount by way of set-off or damages is PREP entitled to?

DECISIONS

- 1) There is no evidence in showing defective brakes
- 2) Seller does not know of the intended purpose of the use of the buyers
- 3) No evidence that the buyer informed or relied on the seller's skill to select the brakes in question.
- 4) The exclusion clause is not part of the contract because the buyer didn't have adequate knowledge of the clause. If it were, it would not have had the effect of excluding liability for breach of a condition, had a breach of the condition been established.

LEGAL PRINCIPLES

- As Kobelt did not communicate that purpose for which he would use the brakes, there was no breach of any implied condition or warranty under the Sale of Goods Act because the required communication of a particular purpose and reliance is absent.
- There is no implied warranty for fitness of purpose. The seller is off the hook for fitness of purpose because the seller was not made aware for what parts they should be used for.
- Exclusion clause must explicitly be communicated and be brought to the attention of the buyer, cannot be introduced after the contract has been formed, and words excluding implied warranties/conditions must be interpreted closely.

KOVACS vs. HOLTAM

Sales of Goods Act s.21 Title and Passing of Risk – Deliverable State

FACTS

The plaintiff made a purchase agreement with the defendant for the sale of a 1963 Falcon Futura for the price of \$2500. As stipulated in the agreement, the defendant would retain the vehicle for the purpose of restoring it, at which point he would contact the plaintiff for delivery. Before the restoration was complete, the vehicle was destroyed in a fire (believed to be caused by arson.) The plaintiff has brought this action to the court seeking damages in the amount of the purchase price.

LEGAL ISSUES & REASONING

1. Is the defendant liable for the loss of the car?
2. What remedy does the plaintiff have?

DECISIONS

1. The defendant is held ultimately liable.
2. The appropriate remedy is the forfeiture by the defendant of the purchase price (\$2500) plus applicable legal costs.

REASONS

1. Title remained with the defendant until the appropriate maintenance had been done to the good, and the purchaser had been notified of its completion, as stipulated in the Sale of Goods Act. As such, the risk of loss is born by the defendant in this case, and the purchaser is entitled to a repayment of the funds if the good cannot be delivered.
2. As the defendant is not in the position to perform his obligation as defined in the contract (namely, the delivery of the property from the seller to the buyer,) the plaintiff is entitled to a return of his money. Since the ruling is in favour of the plaintiff, the defendant is also liable for legal costs on scale 3 (\$80.)

LEGAL PRINCIPLES

- If a party must perform an additional act/service to the subject good, title does not transfer until that act/service has been performed, until the good is in a deliverable state, and **until the buyer has been notified as such**
- The party who holds title to the subject good is ultimately for all risks and liabilities associated with this ownership

BEVO FARMS vs. VEG GRO INC.

Sales of Goods Act s.23: Passing of Title & Risk for Unascertained Goods

FACTS

This is a case for the BC Supreme Court of Appeal. Veg Gro is appealing the decision where it was found liable for pay Bevo \$354,623.26 for tomato seedlings and had its counterclaim dismissed. Veg Gro (located in Ontario) purchased seedlings from Bevo (located in Langley), Veg Gro planned to grow the tomato plants to maturity then sell them. Half of the seedlings purchased were to be delivered Jan 9, and the other half Jan 13. They are required to be there by mid January to ensure there is adequate time to grow the tomatoes. The contract states that the goods travel at buyer's risk (this term had also been used before in their many transactions). The first delivery truck got in an accident and a load of seedlings was lost. The plaintiff filed a claim against the carrier for the cost of the lost goods and replaced the seedlings that had been lost in mid march. Even though they had been replaced, Veg Gro said it had lost profits as the tomatoes wouldn't be mature enough to sell.

LEGAL ISSUES & REASONING

- 1) Who had the property in the seedlings at the time the shipment was lost in the road accident?
- 2) Was there an error in the previous decision made by the judge.

DECISIONS

- 1) Veg Gro had the property during the accident, assuming all risk and liability for the tomatoes, as clearly stated in the contract that the buyer bears all risk while the goods are in travel and in the SGA where risk passes to the buyer when delivered to a 3rd party carrier.
- 2) No, there was no error, and therefore the appeal is dismissed.

REASONS

- The Sale of Goods Act states that the risk of loss is deemed to have passed to the buyer upon delivery of goods to a carrier. Veg Gro tried to use s. 36(1) as an exception, however, there was no evidence to the contrary as in previous shipments they had used 3rd party carriers. There was no presumption that the good had been delivered to the buyer.
- The trial judge from the previous trial had used the Sale of Goods Act and found the same conclusion as the appeal judge

LEGAL PRINCIPLE

- Sale of Goods Act – the intention of the parties as to the passing of the property in the goods
- Risk passes with property and delivery to carrier on the sale of unascertained goods

DAWE vs. CYPRESS BOWL RECREATIONS

Exclusion Clauses

FACTS

The plaintiff (Ted Dawe) was injured in a skiing accident on January 6th, 1991. This accident was allegedly caused by the negligence of the ski-lift operator, "Cypress Bowl Recreations Ltd," whom the plaintiff argues did not adequately inform him of the risks associated with a section of the skiing area. At argument is whether the exemption clause on the lift purchase ticket should waive Cypress Bowl's liability for the injuries experienced by the plaintiff.

LEGAL ISSUES & REASONING

- 1) Did the defendant take reasonable care to inform the plaintiff of the exemption clause (or can we reasonably expect the plaintiff to be aware of this clause)?
- 2) Should the said clause exempt the defendant from liability to the plaintiff?

DECISIONS

- 1) The defendant made all necessary efforts to inform the plaintiff; therefore, we can reasonably expect the plaintiff was aware of the clause
- 2) The clause will apply and the defendant is not liable for damages

REASONS

1. The clause was printed in bold letters directly on the front of the ticket. As well, numerous signs were placed throughout the ski area indicating that the defendant exempts itself from liability for any accidental injury (including one within the vicinity of the area in which the plaintiff himself was injured.) As well, since the plaintiff is a learned individual who is clearly literate, we can definitely expect he would be aware of this clause.
2. Provided the defendant makes a reasonable effort to inform the plaintiff of the exemption clause, and the plaintiff agrees to continue the transaction/relationship, the plaintiff will assume all risks associated with the contractual activity. Continuing the relationship while being aware of the clause's existence equates to consenting to the exemption clause, whether or not consent is explicitly stated.

LEGAL PRINCIPLE

- If an exemption clause is communicated to a party, and the party consents to the clause (whether explicitly by acknowledgment or implicitly by continuation of the agreement) the party is bound by the clause and it will be strictly enforced in court
 - **Reasonable attempt must be made to communicate the exemption clause**
- If a plaintiff is aware that there is writing on a ticket/contract, and is able to read or comprehend this writing, he or she is bound by any conditions stated within this writing (whether he or she is actually aware of the implications or not)

PORELLE vs. EDDIE'S AUTO SALES LTD.

Exclusion Clauses

FACTS

The plaintiff (Porelle) purchased a used 1987 Oldsmobile Delta 88 from the defendant. After a short period of ownership, the plaintiff experienced problems with the vehicle, requiring repairs to the amount of \$2141.42. At the time of the sale, the plaintiff signed a contract with the defendant exempting himself from damages due to defects in the vehicle. At issue is whether the implied conditions in the "Sale of Goods Act," in reference to the sale of used goods, will override the explicit clause in the contract.

LEGAL ISSUES & REASONING

- 1) Was there a breach in the "implied term as to fitness" condition?
- 2) Will the exemption clause in the contract negate all the implied terms of the act?

DECISIONS

- 1) The implied condition has not been breached
- 2) The implied terms in the Act can be negated by the express terms in the exemption clause

REASONS

1. According to the Sale of Goods Act s. 16 (D) in reference to "the implied warranty as to fitness," if an express condition agreed to by the contracting parties is inconsistent with the implied warranty of the Act, the implied term is waived. As the conditions of the exemption clause were consented to by the plaintiff (by means of signature) the plaintiff effectively exempted the defendant from any liability for a lack of fitness for purpose. The courts must uphold this exemption.
2. In reference to the sale of used goods (as opposed to the sale of new goods) the warranties/conditions implied by the Act only apply when there are no express terms within the contract that come at odds with these implied terms. By seeing the exemption clauses printed clearly on the front and back of the written contract, and signing agreement to these clauses, the plaintiff waived his rights provided to him under the Act.

LEGAL PRINCIPLE

- Implied terms in the Sale of Goods Act are meant to protect the purchasers of new and used goods
- **Terms agreed to in contractual negotiations (i.e.// exemption clauses) can alter or negate these implied terms, provided it is not during: a retail sale of new goods to an individual for non-business use.**

GREEVEN vs. BLACKCOMB

Exclusion Clauses

FACTS

Greeven was injured skiing on Whistler Blackcomb on February 17, 1991 while on vacation. Greeven is from the UK and has very limited skiing experience: alleges that Blackcomb was negligent and didn't give adequate warnings of the dangerous drop-offs. Blackcomb claims that it is protected because liability is excluded by the contract. The ticket issued to the plaintiff stated the terms of the agreement and bars Blackcomb from any responsibility under "assumption of risk". The warnings are also found at the base of the mountain and on yellow wicket signs.

LEGAL ISSUES & REASONING

- 1) Is the plaintiff barred by the terms of the ticket that excludes the defendant from all liability?

DECISIONS

1. The defendant is NOT entitled to enforce exclusionary terms upon the defendant as stipulated by the Supreme Court of BC.

REASONS

1. McQuary vs. Big White ('93) and Dawe vs. Cypress Bowl (93') are virtually identical and in these cases exclusionary terms were upheld because both of the plaintiffs had frequented the mountain and were well aware of the protocols (at least in general about the exclusionary terms)
2. Greeven was distinguished from the two other cases based on the degree of knowledge the plaintiff possessed about the geographical area and the activity. Greeven was a tourist to Canada and had never skied in the area before. Also, the clause was in relatively small print and they had never seen the notices.

LEGAL PRINCIPLE

- The defendant must do what is reasonably sufficient to bring the fact that there were exclusionary terms to the attention of the plaintiff.

MALONEY vs. DOCKSIDE MARINE CENTRE LTD.

Fundamental Breach of Contract due to unconscionability

FACTS

Mr. Maloney bought a used Bayliner for \$47,000, plus taxes, from Dockside Marine Centre. Without reading it, he signed a standard form purchase contract that expressly stated Dockside gave “no warranties or conditions, express or implied, concerning” the vessel. The contract also included an exclusion clause that stressed sections 17, 18, and 19 of the Sale of Goods Act. Mr. Maloney went on two separate trips shortly after his purchase, and the vessel stalled and would not restart. On the second occasion, the mechanics accessed the engine manufacturer’s website and learned its history. It had been purchased new three years earlier for \$78,000 but had been the subject of several engine failures and resulting warranty claims. Mr. Maloney is suing Dockside for fundamental breach of contract. Dockside had knowledge of deficiencies but did not disclose them. Mr. Maloney signed an exclusion clause with regards to the purchase.

LEGAL ISSUES & REASONING

- 1) The main issue: Can the doctrine of fundamental breach be applied to Dockside?
 - a. As a matter of interpretation, does the exclusion clause apply to the circumstances established by the evidence?
 - b. If yes, was the exclusion clause unconscionable at the time the contract was made?
 - c. If the exclusion clause is applicable and valid, should the court, nevertheless, refuse to enforce the valid exclusion clause because of the existence of an overriding public policy?

LAW

- Doctrine of fundamental breach can be applied when a plaintiff seeks to escape the effect of a contractual term to which he/she had previously agreed. In order to apply this law, the plaintiff must prove that at least one of the criteria illustrated above has not been met.

REASONS

1. These were used goods, and the exclusion clause relates and applies to used goods.
2. Dockside acted unconscionably by having knowledge of problems and did not disclose such information to the unsophisticated purchaser, Maloney
 - a. Unlike Maloney, Dockside had access to the engine manufacturer’s website and was fully aware of the history of the recurring engine problems.
3. There were no public policy reasons preventing the Court from overriding the contract provisions

DECISION

1. The parties entered into the contract on unequal footing. Maloney was an unsophisticated purchaser and Dockside had knowledge and expertise that it did not disclose, regarding engine problems with the otherwise seemingly attractive Bayliner. As a result, the doctrine of fundamental breach was applied, and the effect of the contractual terms on which Dockside and Maloney had previously agreed was nullified.
2. The court provide Maloney with the remedy of returning Bayliner to and receiving a full repayment from Dockside, as well as costs at Scale B.

LEGAL PRINCIPLE

1. Exemption clauses can be set aside if..
 - a. Does the exemption clause apply?
 - b. Was it unconscionable at the time the contract was made?
 - c. Does public policy apply that overrides it?

COLLINS

Infants Act

FACTS

After the divorce of Mr. Philip Collins and Ms. Andrea Collins, Mr. Collins has made annual spousal support payments and generous child support payments to their two children (Simon and Joely Collins.) Once Ms. Collins remarried to a Mr. Fleming, Mr. Collins ended the spousal support payments, thus relieving Ms. Collins from her state of financial security. Mr. Collins then subsequently purchased a property for his two children, to be held in trust and maintained by their mother until they reach the age of maturity. Ms. Collins, who had no ownership interest in the property, made the children aware of her discomfort with her current financial position. The children each agreed to sign over their ownership of the property to their mother, who would then have ultimate discretion as to the maintenance of the property and estate. Due to the infants act, neither title transfer offer was legally enforceable. Once Joely reached the age of majority, she confirmed her agreement (thus making it legally enforceable); this action is to grant a court order allowing the remaining infant, Simon, to officially transfer his ownership interest to his mother.

LEGAL ISSUES & REASONING

- 1) Is the agreement to transfer title to Ms. Collins to Simon's direct benefit?
- 2) Does Simon Collins require the protection accorded by the Infants Act?

DECISION

1. It is not for the child's direct benefit or "best interest" to have the contract ordered enforceable
2. Simon will be best served by the protection of the act.

REASONS

1. The proposed contract does nothing more than offer direct benefit to Ms. Collins at the direct expense of the children. Furthermore, granting such a request will not alter the contributions required by Mr. Collins to Simon, and will therefore provide any financial benefit whatsoever. As such, the proposed contract confers no direct benefit to Simon and should therefore not be ordered enforceable.
2. At this time, Simon requires the protection of the Infant's Act to maintain his vested interest in the trust created solely for his benefit. If at a later age he wishes to transfer these benefits to his mother he may do so, but if he changes his mind he should not be bound by an illegitimate agreement.

LEGAL PRINCIPLE

- The age at which a person reaches majority at common law is 21
- Contracts entered into by those under this legal age are considered unenforceable against the minor (though they may be enforced by the minor against the other party)
- Courts can order contracts enforceable against a minor provided that: a) The contract directly benefits the minor, and b) The minor does not require protection under the "Infant's Act"

BREALTA ENERGY INC. vs. FIRST CAPITAL MANAGEMENT LTD

Anticipatory Breach of Contract & Equitable Estoppel

FACTS

Brealta and FCM entered into a loan and option agreement for Brealta to provide FCM with a term loan of \$650,000 at a 12% rate of interest per annum, and a promissory note attached and an option to acquire shares in oil sands underground mining corp. The loan and option were set to expire on the maturity date and expiry date March 28, 2009 but the date was extended to Sept 26, 2010. In March 2010, Brealta wanted to exercise his options of shares but FCM said they were not available Brealta alleges that he attempted several times to exercise options before expiry date. FCM filed for bankruptcy on Sept 15, 2010. Brealta sent a letter to exercise the option but did not arrive on top because he was in Saskatchewan and did not courier it. Oct 8 2010, Brealta wrote a formal letter demanding shares. FCM wrote, saying it had been past the expiry date of Sept 26 and they were bankrupt.

LEGAL ISSUES & REASONING

- 1) Was there an anticipatory breach by either FCM or the Trustee?
- 2) If not, was the Trustee estopped from arguing that there must be strict compliance?

DECISION

1. There was no anticipatory breach by either FCM or the Trustee
2. The doctrine of promissory estoppel is not applicable
3. The agreement is clear as to how the option was to be exercised. It was not followed and the option expired.

REASONS

- Brealta had several opportunities before September 26 to exercise the option. It missed the date and the option expired. The formal demand to exercise the option was done too late on Oct 8.

LEGAL PRINCIPLE

- Anticipatory breach occurs when a party notifies the other party in advance that it will not be able to perform its obligations. Breach can be accepted and party can be sued for damages

SATURLEY vs. LUND

Breach vs. Frustration of Contract

FACTS

Saturley and Lund had a binding contract for Saturley to sell their house on Southland Drive in Halifax to Lund for \$243,000 on August 20, 2004. Lund owned another house and agreed to sell to a third party for \$410,000 with a closing date of August 4, 2004. On July 23, Lund discovered that oil had leaked into the basement of their house and into the ground under it and so the house could not be sold and a collateral mortgage on Lund's house allowed a line of credit of \$190,000. Lund planned to use these funds from the sale to purchase Saturley's house but did not have other options for financing; Saturley was aware of Lund's lack of financing. Saturley relisted their property for sale later. In Oct, Saturley commenced this action for specific performance or alternative damages for breach of contract, seeking summary judgment that they have clearly proven their case and that Lund does not have any arguable defence to this case. Lund stated that their offer was conditional on the sale of their other property and that this condition was an implied condition. Due to external factors, Lund's house was not sold and so Lund does not have to abide by the contract. They argue that the doctrine of frustration of contract applies so they are not liable and the oil spill make it impossible for them to complete the contract. The oil spill was cleaned in December and the property of sold the next July.

LEGAL ISSUES & REASONING

- 3) Is a summary judgment applicable in this case?
- 4) Is the contract dependent on Lund's ability to sell their own house first?
- 5) Is there a breach or frustration of contract?

DECISION

4. A summary judgment is allowed in this case
5. The contract did not depend on the sale of Lund's house
6. It was a breach of contract, not a frustration of contract.

LAW

- Frustration of a contract states that "the law excuses a party from performance when circumstances beyond the control of the parties have made performance impossible, pointless, or radically different from that contemplated by the parties"

REASONS

- It is apparent that Saturley has a reasonable argument over Lund's argument because Saturley and Lund had created a contract which Saturley was prepared to fulfill but Lund could not complete. The intended sale of Lund's other property had no connection to the contract since the condition was not included in the contract.
- The document is complete and unambiguous. Lund did not state in the contract that without the sale of their own house, they could not buy Saturley's house. It was not a condition precedent and there is no support for an implied term of the agreement for purchase and sale.
- It is impossible for Lund to carry out the contract and buy Saturley's house so it is not frustration of contract. Lund could have used other financing and did not specifically state in the contract that they were using the funds from the current sale of their house to buy Saturley's house.

LEGAL PRINCIPLE

- Frustration of a contract states that “the law excuses a party from performance when circumstances beyond the control of the parties have made performance impossible, pointless, or radically different from that contemplated by the parties”
- If there is no condition precedent stated in the contract, there is no implied term of the agreement and a failure to carry out obligations results in a breach of the contract, not frustration.

WESTCOAST TRANSMISSION vs. CULLEN

Damages

FACTS

Kato engineering, the supplier of power generators to Cullen for assembly into “genset” power units for sale to Westcoast Transmissions, was found liable to Cullen for the sale of unmerchantable (non-workable) products in reference to the Sale of Goods Act. This liability, which Cullen was then liable to Westcoast Transmissions for, was calculated as the purchase price of the defective units. Westcoast Transmissions appeals this decision to include the costs of replacement power generation (i.e.// alternate power generators) required to maintain operations, as well as the purchase price of the units, in the calculation of damages.

LEGAL ISSUES & REASONING

- 1) Does Cullen’s liability to Westcoast include the costs of backup/replacement power generation?

DECISION

1. The trial judge’s ruling that Cullen is held liable only for the sale price of the “gensets” is upheld.

REASONS

- Presumably even if the power generators provided by Cullen worked, Westcoast Transmissions would have to incur the costs of backup generation in order to reduce the risks of operating on only one source of power. Since the injured party should take all reasonable steps to minimize the extent of their injury, we should have expected Westcoast to invest in backup power generators and cannot hold Cullen responsible for their mismanagement.

LEGAL PRINCIPLE

- Damages are meant to be equal to the amount that would return the injured party to the position they would be in presuming the other party performed their contractual obligations; damages are limited to the amount the offending party should reasonably expect the injured party to incur in costs as a result of their breach
- The injured party has the obligation to take all necessary steps to minimize their injury due to the breach of the other party.
- Damages must be foreseeable
- A reasonable person would not have concluded that there wasn’t another power source

BLACKCOMB SKIING ENTERPRISES vs. SCHNEIDER

Damages

FACTS

The defendant (Darwin Schneider) submitted a deposit for the option to purchase land from the plaintiffs at a later date. After several written exchanges over the year since the option was purchased, the defendant's solicitor informed Blackcomb's representatives that Mr. Schneider could not close on the deal (due to financial difficulties.) The plaintiff offered the defendant a final extension on the agreement, at which point the defendant would be considered in breach and have his rights to purchase and deposit forfeited to the plaintiff. This action is brought by the plaintiff to receive a court order for the amount of the deposit (plus applicable interest) provided for the plaintiff.

LEGAL ISSUES & REASONING

- 1) Did the plaintiffs breach the agreement by not clearing encumbrances on the property prior to closing?
- 2) Will the 10% deposit provided by the plaintiff be interpreted as a deposit or a penalty?

DECISION

1. The plaintiffs were not in breach of contract
2. The fee is considered a deposit, and not a penalty. As such, it must be forfeited to the plaintiffs.

REASONS

1. The agreement specified encumbrances must be clear before the effective closing date. As the first closing date listed was June 14th of 1999, and the encumbrances were removed well before this date, there was no breach of contractual term.
2. A cash outlay is considered a penalty at the time of contract formation, and not at the time of dissolution. Since the plaintiff (Black comb) only stands to gain by the discharge of contract, as they can then sell the property for a significantly greater market price, they would have no motivation to penalize the defendant for not closing on the agreement. Since the fee was calculated as a genuine pre-estimate of damages at the time the contract was formed, it is considered a deposit regardless of the ensuing events.

LEGAL PRINCIPLE

- If a party foresees that breach of the contract may cause them to suffer harm, they may include these foreseen consequences in the contract in the form of mandatory deposit
- If the clause is perceived to be a genuine attempt by the firm to pre-estimate damages, the courts will hold that it is a deposit; if it is interpreted as punitive in nature, it will be construed as a penalty and declared invalid
- If considered a deposit, the clause will remain enforceable even if the party does not suffer the damages it genuinely expected to incur in breach

GENERAL TIRE CANADA V. AYLWARDS LTD

Parol Evidence Rule

FACTS

The plaintiff seeks summary judgment for money payable to the company under a loan guarantee. The defendant agrees on the principle debt outstanding, but argues against its liability on the debt due to collateral agreements of the debt structure that did not occur. Thus, the defendants argue, the guarantee was contingent upon conditions that were not met and is therefore legally unenforceable.

LEGAL ISSUES & REASONING

Should the alleged misrepresentations of the plaintiff automatically discharge the defendant's liability?

DECISION

The defendant is liable to pay the debt outstanding.

REASONS

The court finds the collateral representations to be "vague, non-specific, and incompatible with the guarantee." **Where ambiguous agreements made between parties come at odds with the express terms of a written contract, the terms of the contract will stand.** Therefore, the collateral agreement receives no consideration, and the defendants remain liable for the balance of the debt outstanding.

LEGAL PRINCIPLE

- **"Parol Evidence Rule": When terms of a written contract are clear and unambiguous, the parties are not permitted to introduce evidence outside of the contract to alter its fundamental meaning**
- Exceptions to this include: a) subsequent oral conditions; b) collateral oral agreements; c) written documents not meant to be the final form; or d) an oral condition precedent (subject to...)
 - In A, B, and C above consideration must be proven to exist for both parties to the agreement, such that it is clear that the intentions of the parties are markedly different from those implied in the written form

COLLINS v. DODGE CITY EAST

Misrepresentation

FACTS

The plaintiff purchased a used motor vehicle from the defendant. The defendant's agent purported that the vehicle would be "fully equipped," including an Air Conditioning (AC) feature that the agent himself actively demonstrated to the plaintiff. Several months after the plaintiff owned the vehicle (and during the season in which the AC was first needed to be and was used) the plaintiff realized that the AC was not actually installed. Subsequently, the plaintiff had AC installed by a certified mechanic, and brought this action to seek the damages equal to the costs of AC installation.

LEGAL ISSUES & REASONING

1. Did the agent engage in misrepresentation?
2. Should the court award the damages for loss of profits sought by the plaintiff?

DECISION

- 1) Agent engaged in material misrepresentation
- 2) Award costs to return injured party to original position

REASONS

1. Whether or not the agent knowingly made the misrepresentation, the agent's words and action lead the plaintiff into a false assumption that AC would be included in the vehicle. This was a material misrepresentation, as it altered her incentives and ultimately to purchase the vehicle that she otherwise would not have.
2. The purpose of damages is to rectify the injury party and return them to the position they would be in if performance was adequately provided by the offending party. In these circumstances, the plaintiff should be awarded the costs required to install the AC so that she would be in the same position as if the AC was installed at the given purchase price.

LEGAL PRINCIPLE

- Remedies for Misrepresentation: A person need only show that he or she was misrepresented about a material aspect of the contract in order to receive the appropriate remedy

WEINMAN v. BRINKMAN

Misrepresentation / Caveat Emptor

FACTS

-Real estate transaction between Pl and Def agreement of purchase and sale entered into on May 30, 2006-
Transaction closed on July 4, 2006. 8 days later plaintiff noticed water leaking into their basement. Plaintiff says the defendant was aware of problem, and were under duty to disclose to them at time of agreement. They seek to hold the Def liable for cost of repair (\$10,400 plus GST)

LEGAL ISSUES & REASONING

1. At the time of the agreement of purchase and sale was signed, were the parties aware of the water problem in the basement?
2. As a matter of law was this “patent” or a “latent” defect and, if the latter, had the defendants sought to conceal it from the buyers?
3. In all circumstances, are the plaintiffs entitled to recover from the sellers?

DECISION

- Plaintiff's and Defendant's claim is dismissed
- No order for the payment for court fees
- Plaintiff will pay Defendant a counsel fee fixed in the amount of \$250 and also pay disbursements for transportation between Ottawa and Toronto

REASONS

- Defendant made no effort to conceal any water problems in their basement
- Problem was disclosed in the SPIS that the plaintiff failed to review
- It had been open to plaintiff to make their offer conditional on an inspection- they waived their right to do so
- Inspection report from James Hammond makes it plain that water damage is visible
- Defendants knew there was a water leak, the ignorance of the plaintiffs can be directly related to their own lack of inquiry
- No attempts from defendant to conceal damage

LEGAL PRINCIPLE

- Caveat Emptor “Let the Buyer Beware” is the general rule in the purchase of land
- The Law of Vendor and Purchaser
 - Purchaser has no remedy either in damages or by way of rescission unless he pleads and proves fraud or breach of warranty

BUCKWOLD WESTERN LTD v. SAGAR

Undue Influence / Duress

FACTS

Ms. Collyne Sager (the defendant) signed a loan guarantee on June 27, 1991 on a loan from the plaintiff (Buckwold Western Ltd.) to her husband's company (London Carpets.) Ms Sager was a principal owner of shares in her husband's company, and maintained (unbeknownst to her) a substantial equity position in the company at the time of signing. As a condition of extended credit being provided by the plaintiff to London Carpets, both Mr. Sager and his wife were required to provide personal guarantees of repayment. Mr. Sager presented the documents to his wife without consultation of a legal professional, and after some debate she signed the documents. Ms. Sager raises the defense that, due to signing under duress or undue influence, she should not be required to repay the outstanding loan balance.

LEGAL ISSUES & REASONING

1. Is this case an example of duress or undue influence?
2. If not, is the creditor entitled to enforce the guarantee?

DECISION

- This is not a case of duress or undue influence.
- The creditor has all rights to legally enforce the guarantee.

REASONS

1. No improper pressure (duress) was ever placed upon Ms. Sager to sign the documents. Any pressure that was implied by Mr. Sager to sign the documents was purely commercial, and did not influence her ability to make a sound and reasonable judgment free of pressure from a party to the contract. The argument of undue influence is also not applicable, as Ms. Sager was given sufficient time to consider the consequences and signed the documents based on her independent judgment.
2. Since the creditor supplied the goods in reliance on the guarantee, they are entitled to legally enforce this document.

LEGAL PRINCIPLE

- Where there is a special relationship resulting in domination, the contract is voidable for undue influence
- Threats of violence/imprisonment to force individuals into contracts are considered duress; the contract is voidable at the option of the injured party

MAKSYMETZ v. KOSTYK

Legality

FACTS

Masymetz (the plaintiff) seeks an accounting of the value of shares owing him in a settlement reached during a prior legal action. This ownership interest in the firm (the Gateway Hotel Ltd.) was to correlate to Masymetz's interest in a partnership that managed the hotel (and which subsequently obtained an option to purchase the hotel.) However, due to legal and regulatory requirements the purchase was denied by a governing body (the Manitoba Liquor Board), which declared the option to purchase illegal and thus "void ad initio." The plaintiff wishes to have the court enforce compensation for the value of the interest in the hotel owing from the settlement. The defendants argue that, since the contract was illegal to begin with, it is "ultra vires" for the court to order such an accounting.

LEGAL ISSUES & REASONING

1. Was the original contract (that the settlement was based on) legal?
2. If not, can the court enforce a settlement based on the breach of an illegal contract?

DECISION

1. The original contract was not legal and was therefore invalid.
2. The court will not force an order upon the defendants based on an illegal contract.

REASONS

1. As the proposed division of ownership interest within the option to purchase did not comply with legislated standards (namely that a non liquor-license holder cannot hold more than 10% of the company) the ownership agreement was deemed illegal and therefore invalid.
2. Regardless of the circumstances, the court cannot force an order upon parties who are knowingly in breach of an illegal contract (as the illegal contract is ultimately unenforceable.)

LEGAL PRINCIPLE

- Legality: A contract that involves illegality cannot be enforced by a party that knowingly agreed to the illegality

PHOENIX RESTORATIONS LTD. vs. BROWNLEE

Legality “Prima Facie”

FACTS

Mr Brownlee entered into a written employment contract with Pheonix Restorations Ltd. The agreement contained non-competition and non-solicitation covenants (Restrictive Covenants). Prohibits B working for competitor in lower mainland from Whistler to Hope. For 24 months following termination employee shall not have interest or work for any competitive entity, which actively sought prospective clients or customers of the company. Pheonix seeks injunction to enforce both non-competition clause, and the non-solicitation clause—says contract is clear. B says covenants are ambiguous and unreasonable and should not be enforced. He has worked in industry since 2004 (6 years) and that an injunction preventing him from working in industry would cause him significant hardship.

LEGAL ISSUES & REASONING

1. Can Injunction of the clauses be enforced?
2. If enforced will the applicant suffer great hardships?
3. Is the restrictive covenant enforceable in court?

DECISION

1. Pheonix is not entitled to injunctive relief. Application for injunction is dismissed
2. B gets costs

REASONS

1. Pheonix has failed to establish a strong prima facie case that the non-competition clause will be enforced
2. An employer seeking to rely on a restrictive covenant must show that the restrictions are no wider than reasonably required to adequately protect its interests- same P has failed to establish a strong prima facie case for non-solicitation clause

LEGAL PRINCIPLE

- Legality: An employer seeking to rely on a restrictive covenant must show that the restrictions are no wider than reasonably required to adequately protect its interests.
- Restrictive covenants are only enforceable if they are reasonable between the two parties with reference to the public interest
- Use Prima Facie “test of reasonableness”

PEACOCK vs. ESQUIMALT & NANAIMO RAILWAY CO.

Privity of Contract

FACTS

Plaintiff put up a deposit on a land purchase on behalf of a syndicate of buyers (Wessex Management, West Steel Corp, Darrell Brown, and Alan Parkin) from the defendants (Esquimalt & Nanaimo Railway Company.) As a condition of the purchase agreement, if the contract is breached the purchasers are entitled to a refund of deposit (net the necessary costs of clean-up.) A fire occurred which rendered the land non-manageable for the purchasers (a subsequent frustrating event,) thus discharging the contract. The plaintiff pursues a claim to the value of the deposit, claiming that an oral agreement between itself and the defendants obligates the firm to return the deposit in the event the purchase is not completed. The defendants claim the plaintiff has no privity to the contract (as a third party) and has no title to repayment of the deposit.

LEGAL ISSUES & REASONING

- 1) Was the plaintiff a contracting party to the defendants for the purchase of property (subject to the balance of probabilities?)?
- 2) Are the defendants liable to the plaintiff for the amount of the deposit?

DECISION

1. The plaintiff does not satisfy the court that he is a contracting party.
2. The defendants have no liability to directly repay the deposit to the plaintiff.

REASONS

- 1) There is no established truth to the claim that an oral agreement existed between the plaintiff and the defendants. The signing over of the deposit obligation to the plaintiff acts as a creation of a contract between the purchasers and plaintiff (as the purchasers will be liable to repay the deposit if the purchase does not complete) but does not act to bring the plaintiff into the contract between purchaser and seller (in this case the defendants.)
- 2) Since the plaintiff is not a contracting party to the defendants, they have no financial or legal obligation in the courts to repay any charges that are components of the contractual agreement.

LEGAL PRINCIPLE

- Outsiders to a contract cannot enforce any promises made between contracting parties to which the outsider does not have privity
- To succeed in an action in contract law, the plaintiff MUST prove that he/she has privity [is a contractual party] to the agreement

BANK OF NOVA SCOTIA vs. ROCK CORP OF CANADA

Negotiable Instruments – Holder in due course

FACTS

The defendant (The Rock Corp of Canada) drew a cheque on RBC payable to the order of Bruno Tessori. Tessori took the cheque to BNS and cashed it, without endorsing it in any way. By the time the cheque made its way to BNS, a stop order had been placed on the cheque and it was dishonoured. BNS claims that it was a “holder in due course due” to the provisions of the Bill of Exchange Act (s. 165[3]) and therefore is due the face value of the cheque from the drawer. Whether or not the bank is considered a holder in due course is the sole issue brought before the court.

LEGAL ISSUES & REASONING

1. Is the Bank of Nova Scotia a “holder in due course” as specified in the Act?

DECISION

1. The Bank of Nova Scotia is not a holder in due course

REASONS

1. The relevant section of the Act, s. 163(5), states that: “where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course.” Since the bank did not actively deposit the funds to the credit of Tessori’s account, or make any dealings with the subject’s account whatsoever, the transaction in question does not infer such rights to the bank as specified in the Act. By not having the subject endorse the cheque in any manner when cashing it, the bank waived its rights to assume the role of a “holder in due course.”

LEGAL PRINCIPLE

- The rights of a holder in due course (of a negotiable instrument) are superior to those of a regular assignee of contractual rights
- In order to receive these superior rights, the holder must satisfy the court that it has accepted an endorsed negotiable instrument from the designated payee and is completely ignorant of any stop payments or fraudulent causes of payment that would render the instrument void
- A bank may acquire the rights of a holder in due course if it meets all of the above conditions except endorsement, and in the absence of such endorsement credits the payee’s account for the face value of the instrument

2203850 NOVA SCOTIA LTD vs. SARKAR

Negotiable Instruments

FACTS

The appellant (the Money Mart) brings an action against the respondent (Dr. Sarkar) that the respondent should be held liable for the face value of an instrument to which the appellant alleges he is a holder in due course of. The appellant effectively cashed a cheque post-dated by the respondent for a client of the Money Mart (for services rendered.) Prior to cashing, the respondent placed a stop payment for the amount at its financial institution, thereby dishonouring the cheque. In trial court, the adjudicator ruled that, in reference to “the Bank of Commerce v. Burman et al,” the appellant was not a holder in due course since the instrument was post-dated at the time of cashing. The appellant brings this action to establish that it is in fact a holder in due course, and is subject to the appropriate equities provided by this role.

LEGAL ISSUES & REASONING

1. Is the appellant (Money Mart) a holder in due course?
2. Does the appellant run the risk of countermanding (not receiving payment of funds) from the honouring of a post-dated instrument?

DECISION

1. The appellant is found to be a holder in due course
2. The appellant shall not be countermanded and shall receive payment for the honouring of the instrument

REASONS

1. A holder in due course must meet the necessary criteria, namely that it: (a) Became a holder prior to the complete and regular instrument becoming overdue and without notice of it being previously dishonoured; and (b) Took the bill in good faith at face value and had no notice of defect in the title of the person who negotiated it. Since post-dating a cheque does not render it less than complete or regular on its face, the action of the appellant do not bar it from being considered a “holder in due course.”
2. A holder in due course has the right to enforce payment against all parties that are liable on the face of the bill. Since it was established that the appellant is in fact a holder in due course, they may enforce payment against the respondent and his financial institution unencumbered.

LEGAL PRINCIPLE

- A holder in due course acquires the rights of the payee without having to be concerned with the elements of the transaction for which the rights arose
- In the case of a holder in due course of a cheque, the drawer (writer of the cheque) cannot subsequently revoke the obligation provided by the instrument

WALDRICK vs. MALCOLM

Negligence: Occupier's Liability and Volenti

FACTS

There had been an ice storm that made the laneway slippery and Mr Waldick was aware of the condition of the laneway and was very cautious driving. Later Mr. Waldick left Malcolm's house to get something out of his car, as he walked back he slipped on the ice fell backwards and fractured his skull. Mr. Waldick suffered a fractured skull when he fell on the icy parking area outside the Malcom's rented farmhouse. He sued the Malcolms for negligence.

LEGAL ISSUES & REASONING

1. Would the section of Ontario's Occupiers' Liability Act apply?
2. Did The Malcolm's' owe Waldrick a duty of care?
3. Could Mr. Waldick be contributory negligent? (Knew of risk)

DECISION

Mr. Waldick sued for negligence and won at the trial level

REASONS

Courts found Mr Malcolm liable because they should have anticipated the dangerous condition of the parking area because of the weather conditions and did nothing to make it safe

- M should have salted, sanded or cleared the parking area to serve as an entrance to the house

M argued that W had not salted his own driveway (whom lived nearby)

M could not use "volenti" as a defense which would have waived all liability because the PI must not only have knowledge of the risk, but also have shown a willingness to accept the entire risk of injury and have expected the defendant to take no care

Malcolm was liable to make sure the area was safe for any visitors to their property. As according to the Volenti doctrine, the volunteer does no harm, as Waldick voluntarily went on the property but he is still not at fault.

HOLLIS vs. DOW CORNING

Negligence: Product Liability & Duty to Warn

FACTS

Ms. Hollis was prescribed plastic surgery from her doctor to correct breast defects she naturally developed. After the surgery, and as a result of her line of work, the implants ruptured within her body, causing the silicon capsule to become lost within her chest. Ms. Hollis brought an action before trial court indicted the manufacturer of the implants (Dow Corning), the surgeon who conducted the implants (Dr. Birch), and the surgeon who removed the ruptured remnants (Dr. Quayle), all on counts of negligence in tort. The trial judge found the firm liable for negligence, while all other parties were cleared of their respective convictions. In appeals court, this decision was overturned on the grounds that the rupture could not be casually connected to faulty manufacture; however, the court did find that the firm was negligent in its failure to inform a “learned intermediary” (in this case the surgeon.) Dow Corning brings this case to the Supreme Court as a final appeal to clear itself of negligent liability.

LEGAL ISSUES & REASONING

1. Does a manufacturer have a liability to inform the end-user of risks inherit in the product when no direct communication link is expected?

DECISION

1. The manufacture is ultimately liable to inform the end-user (or a learned intermediary where no such direct communication is possible) of all risks associated with the product.

REASONS

1. Where the manufacturer cannot directly communicate with the consumer of the product, there is no manner in which to expect the customer will be fully aware with the risks associated with product usage. When the manufacturer has no liability to inform the administer/agent of the product, and they in turn have no source of information with which to warn the customer, the customer will have no recourse against damages resulting from using the product (as both parties can escape negligent liability.) Therefore, in the absence of a direct communication link between manufacturer and customer, the Supreme Court of Canada established a liability of the manufacturer to inform some “learned intermediary” that will administer the product.

LEGAL PRINCIPLE

- The responsibility of a manufacturer is to warn a learned intermediary of risks associated with the products usage where warnings are unlikely to reach the consumer directly
- Dow Corning would have been off the hook if they had warned the doctor about the risks of the breast implants

MORSI vs. FERMAR

Contributory Negligence & Duty of Care

FACTS

Mark Morsi was driving home from work. Major Mackenzie Drive had been resurfaced shortly before and on June 15 pursuant to a contract between York Region and Fermar. When Morsi drove along the newly paved area, there were several speed limit signs, load restriction signs and signs indicated a change in road surface asphalt to gravel. Mr. Morsi ignored these signs, especially the speed signs. Unfortunately, at the transition point Mr. Morsi lost control of his car. The car slewed sideways, became airborne, flew over a ditch, and hit a telephone pole. Tragically, Mr. Morsi was killed. The plaintiffs, Mr. Morsi's wife, two young children (one born after his death), father, brother and sister sued the two defendants

LEGAL ISSUES & REASONING

1. Does the York Region owe Mark duty of care to ensure roads were safe?
2. Would Mark be charged with contributory negligence due to him ignoring the speed limit signs?
3. The sole issue on the appeal is whether the trial judge erred by finding the appellants partially liable for the accident resulting in the death of Mr. **Morsi**.

DECISION

-The trial judge held that both defendants breached their duties of care to Mr. Morsi.

- The appellants are entitled to their costs of the appeal, which would fix at \$15,000 each inclusive of disbursements and HST, if requested.

-Fermar - 25 per cent; York Region - 25 per cent; and Mark Morsi - 50 per cent.

REASONS

-Section 44(1) of the Municipal Act, 2001 imposes a statutory duty of care on municipalities with respect to the maintenance of highways and bridges:

-If Mr. Morsi had driven at or even modestly above the speed limit or, in other words, had used 'ordinary care' while negotiating the reverse curve on the road, there would not have been an accident

-The trial judge found that Fermar had breached this standard of care by not properly inspecting the road surface at the transition point:

RANGEN INC. vs. DELOITTE & TOUCHE

Professional Negligent Misstatement: Special Relationship & Purpose Prepared for Test

FACTS

The plaintiff provided aqua culture products to a fish farming business based on audited financial statements conducted by the defendant. Subsequently, the fish farming business defaulted on its trade credit, inflicting an economic loss on the plaintiff of several hundred thousand dollars. In trial court, the judge found that there was not an acceptable proximity of closeness between the defendant and plaintiff with which to establish a duty of care. The plaintiff brings this action to the appeal court claiming that such a duty of care should exist and be enforced against the defendant.

LEGAL ISSUES & REASONING

1. Is there a substantial proximity of closeness between the defendant and plaintiff?
2. Should the defendants owe the plaintiff a duty of care, and be held liable for the plaintiff's purely economic losses.

DECISION

1. There is no substantial proximity of closeness between the parties.
2. The defendants owe no duty of care to the plaintiff, and as such are not liable for the losses.

REASONS

1. A substantial proximity exists where the defendant is aware of the parties that will make use of the information provided, or the precise purpose of the information when the names of the parties are not available. Since Deloitte & Touche could not reasonably foresee that the plaintiff would make use of the statements for this precise purpose, there is no substantial proximity established.
2. The main determinant of liability in cases of negligence causing purely economic losses is that a close proximity exists between the plaintiff and defendant. As discussed in (1), the facts of the case do not establish such proximity and thus do not provide awards for Rangen Inc. Given the case at hand, awarding damages to the plaintiff would constitute imposing liability of an indeterminate amount for an indeterminate time to an indeterminate class.

LEGAL PRINCIPLE

- An auditor's duty of care in cases of misstatement has been limited to those parties it can reasonably foresee will use the prepared statements, and only for those purposes the auditors expect the statements to be used for at the time of preparation (or more accurately the risks the auditors expect to incur.)
- Auditors do not owe a duty of care to any parties that the auditors do not expect to directly prepare the statements for

Special Relationship: professional must know for whom and what the information prepared will be used

Duty of care of misstatement is limited to those parties it can reasonably foresee will use the prepared statements and only for those purposes the professional expect at the time of preparation

HERCULES MANAGEMENT LTD. vs. ERNST & YOUNG

Professional's Liability: Special Relationship & Purpose Prepared for Test

FACTS

The plaintiffs in this case were investors in a firm (Northguard Acceptance Limited, or NGA – Hercules Management Ltd were share holders in NGA) that was regularly audited by the defendants. The plaintiffs used the audited financial statements provided by the defendants to guide their investment decisions, thereby leading them into investing in the firm before it went into receivership. The plaintiffs charge that the defendants negligently prepared the audited statements and as such should be held liable for the economic losses they suffered. This case is a summary judgment on the court's finding that the defendants weren't in fact liable for these damages.

LEGAL ISSUES & REASONING

1. Is there a real or substantial relationship between the defendants and the plaintiffs (or were the auditors aware that the plaintiffs were using their audited statements)?
2. Do the defendants owe the plaintiffs a duty of care for the purposes in which the statements were used?

DECISION

1. A real/substantial relationship exists between the auditors and Hercules Management.
2. The defendants do not owe a duty of care to the plaintiffs for the purposes in which the audited statements were used.

REASONS

1. It was earlier established that the defendants (E&Y) were well aware of the plaintiffs (Hercules Management) and were aware that the plaintiffs were making use of their audited financial statements. As such, a relationship between the two parties is implied.
2. Standard purpose of an audit is to guide shareholders as a group in making decisions as to how the corporations should be managed, to assess the performance of the directors and officers and to decide whether or not to retain existing management
 - a. Where shareholders use audits as guidance to make personal investment decisions, they are using the audit for a purpose for which it was not prepared
2. The purpose of the audited financial statements was to provide investors with an overview of management's performance and suggestions for retaining or removing management from office. However, the purpose of the statements was never to guide investment decisions, and therefore no duty of care is established for this purpose of usage.

LEGAL PRINCIPLE

- Auditors owe the users of the statements they prepare a duty of care where the injured party makes use of the statements for the purpose in which the statements were prepared, and the auditors are aware of this party's usage prior to preparing the statements.
- When the users of the statements are not made apparent to the auditors prior to the audit being prepared, no duty of care is established for the auditors to the users.

HODGKINSON vs. SIMMS & WALDMAN

Fiduciary Duty

FACTS

The plaintiff approached the defendant with the objective of receiving independent financial advice. After an initial consultation in which the plaintiff explained his circumstances and investment objectives, the defendant made the suggestion that Hodgkinson purchase a stake in "Multiple Urban Renewal Buildings" (or MURBs.) Subsequently, the real estate market collapsed, and the plaintiff lost a substantial portion of his investment funds (\$350,507.62 in total.) What the plaintiff did not know at the time, however, was that the defendant also acted on behalf of the firm the plaintiff invested in. As such, the plaintiff argued, the defendant should be held liable for his damages suffered due to the breach of fiduciary duty. This is a summary judgment of the Supreme Court's finding that the defendant is in fact liable for breach of duty.

LEGAL ISSUES & REASONING

1. Should the defendant's failure to disclose his relationship with the MURB firm constitute a breach of fiduciary duty?
2. If such a breach does exist, should the defendant be liable for the plaintiff's losses due to market movements?

DECISION

1. The defendant is found guilty for a breach of fiduciary duty.
2. The defendant is ultimately liable for the losses suffered by the plaintiff.

REASONS

1. The defendant went out of his way to represent himself as an independent advisor. Since the objective of the plaintiff was to secure independent advice, and his reliance on the defendant caused him to suffer harm, the defendant's actions constitute breach of fiduciary duty.
2. If the plaintiff were aware of the relationship between the defendant and the MURB firm, he would likely not have invested in this industry. As such, the losses suffered by the plaintiff were contingent upon the breach of fiduciary duty conducted by the defendants, and liability should be assigned accordingly.

LEGAL PRINCIPLE

- Advisors run the risk of liability where they try to marry the interests of two clients
- "Fiduciary Duty": Financial advisors are burdened with the duty to act in the best interests of their clients (specifically by avoiding "conflicts of interest")
- Breach of fiduciary duty exists where the plaintiff can establish a reliance was made upon the party giving advise, which lead to losses being suffered by the plaintiff

PEMBERTON BENCHLANDS HOUSING CORP vs. SABRE TRANSPORT LTD

Agency Relationships and Actual Authority

FACTS

In early 2003, Glacier entered into a joint venture with Sabre to acquire and develop lands near Pemberton, they formed Pemberton Benchlands Housing Corporation. PBH acquired property, and Sabre did the civil work to develop it into 54 serviced lots, the first phase consisted of 30 lots. Dispute about amount to be paid by PBH to Sabre for construction work. PBH claims contract was fixed, def says it was a time and materials contract. Eric and Serge Cote got Dan Peterson (an employee and construction superintendent) to sign the 2.85 Million K to make construction contract fixed. Pl claim that it is fixed, Def claim that it is not b/c Peterson has no authorization to act on behalf of company to bind Sabre.

LEGAL ISSUES & REASONING

- 1) Whether the contract was for a fixed price of \$2,859,756 plus a contingency amount not to exceed \$500,000?
- 2) Whether David Paterson had apparent authority to signing the contract?
- 3) If so is the contract agreement enforceable against Sabre?

DECISION

1. The plaintiff here has not established that the alleged written terms of the construction K were signed by anyone with either actual or apparent authority to bind sabre- The plaintiffs claim was dismissed

REASONS

1. The plaintiff has not shown that anyone with actual authority for Sabre, such as Mr. Den Duyf, made representations to Mr. Cote or any one else at PBH that Mr. Paterson was authorized to enter into a 2.85 million dollar fixed price construction contract on behalf of Sabre

LEGAL PRINCIPLE

- Four conditions must be met to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so
 - a. That a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor
 - b. That such representation was made by a persons who had “actual” authority to manage the business of the company
 - c. That he (the contractor) was induced by such representation to enter into the contract- that he fact relied upon it
 - d. Under its articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent

LANZ vs. LANZ

Partnerships

FACTS

The plaintiff (Robert Lanz) associated himself with the business of his father, the defendant. After fifteen years working together, the pair had a falling out and left the business. The son's interest in the firm was a claim to 40% of the profits, with no obligation for debts and no clear title to assets. The son charges in this action that, since their arrangement was a partnership, he is entitled to an equal share in the returns of the business upon its dissolution in 1990. As a cause of action, he refers to income tax returns claiming the business as a partnership, and his father's reluctant acknowledgment that he "thought it was a partnership."

LEGAL ISSUES & REASONING

1. Should the firm be considered a partnership as described in "the Partnership Act?"
2. Is the plaintiff entitled to any past proceeds in the firm?

DECISION

1. The firm will not be considered a partnership, as it does not meet the definition as described in "the Partnership Act."
2. Since the son is not considered a partner to the firm, he has no claim to the firm's past proceeds.

REASONS

1. The plaintiff did not actively engage in any management of the firm, and made no more contribution than the driving of a truck in exchange for 40% profit compensation. As well, the plaintiff assumed no liability for the risks of the business and could not establish any title to any of the firm's assets. As such, the courts cannot imply that the plaintiff is a partner, as that would not meet the criteria of one who "carries on the business 'in common' with a view of making a profit.
2. The son received his fair share in compensation for his contributions to the business. Accounting records do not indicate that he made any financial contributions to the success of the firm, or roll back any of his earnings into its operations. As such, his compensation will be limited to that which he has received from the defendant.

LEGAL PRINCIPLE

- A partnership is essentially two or more persons acting in common for a business purpose with a view of making a profit
- The fact that owners of the business alone make comments indicating an individual is a partner will not make them a partner in the eyes of the court
- "The Partnership Act" incorporates not only profit sharing, but also joint risk taking (in debt obligations) and degree of managerial influence in its assessment of whether the firm is indeed a partnership

PEN-BRO HOLDINGS LTD. VS DEMCHUK

Partnerships

FACTS

Mr. Demchuk and his son met with landlord to talk about leasing second floor of building, the concept was introduced that they were partners in the proposed business. Donald agreed to provide his son with a loan to assist him in carrying on the business and purchased the pool hall's seized assets and leased them to his son. Elvis D urgently wanted to meet with landlord to get something in writing to show terms of the lease worked out for the premises to get a loan from bank. The landlord's agent, understanding that both the father and son would be involved as partners in the formal lease document, proceeded to prepare a one page agreement. The agreement was prepared under the sole name of Elvis. The landlord's representative makes it very clear that he had no intention of entering into an agreement with Elvis alone. After handwritten lease was signed by Elvis, Elvis asked that the formal lease agreement for the premises be made to the name of his company- landlord would only do this if Donald signed as a guarantor- and so this case begins.

LEGAL ISSUES & REASONING

- 1) Are Elvis and Donald Demchuk in a partnership and was there a joint venture agreement made?
- 2) If Donald was in a partnership with his son, would he be liable under the lease agreement?

DECISION

1. The evidence does not establish a partnership nor that Donald Demchuk represented knowingly allowed himself to be represented as a partner. The landlord's argument on this issue has no reasonable prospect of success.
2. No relevant facts to dispute. There is no need for a trial on the facts
3. Defendant gets costs

REASONS

1. Donald's Demchuk's name was not on the signed lease only Elvis'
2. Donald says he never indicated or implied in writing or verbally that he was a partner or joint venture participant in the business- nor would he be liable for any payments under the lease
3. There was never any intention that Donald would receive any of the profits of the business-neither did he agree to share in any risk of the business
4. Landlord's representative relied on a verbal conversation two years prior related to the second floor leasing for the night club

CHALLENGOR VS NUCLEUS FINANCIAL NETWORK INC.

Partnerships

FACTS

Plaintiff carries on the business of supplying consultancy services for computer software and systems. Plaintiff was engaged by Softek Computer Services to provide her services under a verbal agreement. Def Nucleus was formed and assumed assets of Softek in the course of this agreement. Tricaster is a private investment firm, which held the majority of shares in Nucleus. Again plaintiff was asked by nucleus to do more consulting service for them, and no agreement or linkage of contract was made with plaintiff and Tricaster even though they knew T was involved with S directly. N paid up until Dec but services done after Plaintiff didn't receive. Plaintiff has obtained summary judgment for the outstanding debt against N.

LEGAL ISSUES & REASONING

- 1) Can the plaintiff obtain payment from Tricaster of its claim against nucleus if there is a partnership?
- 2) Piercing the corporate veil of nucleus so as to fix liability for N on T?
- 3) Is there an implied partnership existing between N and T in relation to the undertaking for which the plaintiff had supplied services?

DECISION

- No Liability can be imposed upon Tricaster for the obligations of Nucleus to the plaintiff on the basis of piercing Nucleus corporate veil. Evidence does not disclose a partnership

REASONS

Plaintiffs arguments

T had exercised such complete control over N's financial affairs, that Plaintiff was entitled to assume that the services providing and invoicing to N was being ordered by T

Can claim and impose liability on T based on implied partnership or joint venture

As well at times, plaintiff would at times have communication with officials of T relating to services being performed to her

Position of T

- T stated the Pl has failed to lead evidence to establish T had complete control over N- only evidence that T was a majority shareholder in N, and secured creditors
- Can't prove partnership- T and N operated from different locations
- The plaintiff in her work received assignments, instructions solely from N officers
- The payment for her services was drawn on N's bank accounts

Plaintiff makes much of the fact that T failed to call any evidence or witnesses to establish that T was merely acting as a banker to N

No implied partnership

- -Aware that T had lots of shares in N
- -Aware that T was supplying funds to N for its operation
- -No official at Td ever told her that T would be responsible for her invoices to N
- Involvement of T was not sole purpose of why plaintiff continued to work for Nucleus

DATA BUSINESS FORMS LTD vs. MACINTOSH

Partnerships

FACTS

Data business forms limited is a body corporate, incorporated under the laws of Ontario and registered to carry business in Nova Scotia under Pakfold name. Mr. Macintosh supplied business and computer supplies, he was a sole proprietorship. Mac initiated contact with Pakfold to be their distributor in Nova Scotia. Mr. Macintosh- registered as a business name used by Maritime business forms ltd. And he eventually incorporated Maritime. The Def acknowledges that he gave no notice to the plaintiffs of the incorporation of maritime. Mr mac also did not apply for credit for Maritime. Ms glynn testified such a change would require a new credit application, credit checks. Maritime sent a letter stating Macintosh business systems was a division of maritime business forms ltd. Mr Keates acknowledges receiving letter, claims he didn't notice the letter head. Purchase orders were always made on forms headed Macintosh business systems, invoices always sent to MBS and even cheques made out to them even after the incorporation of Maritime. Mr Mackintosh acknowledges the debts, but says they are owed by Maritime not by Mr. Macintosh personally. Mr. K denies ANY awareness of Maritimes. No express notice of the incorporation of maritime was given to Data or Pakfold.

LEGAL ISSUES & REASONING

1. Did the defendant, Glenn Macintosh, contract for the purpose of goods and services in the amount agreed upon, in his personal capacity or as agent for Maritime business forms limited?
2. If the plaintiffs are successful are they entitled to interest in what amount?

DECISION

Found that the defendant failed to meet onus.

Not satisfied that either Data or Pakfold had actual knowledge of existence of the limited company- therefore they did not have knowledge of the agency relationship between Mr M and maritime. Thus the plaintiff is successful in its claim again Glenn McIntosh alone.

- Under ss 11 of s 28- court shall award interest
- Court finds there is an unreasonably delay in pursuing the action and that an appropriate length of time over which interest should be awarded is for period of two yeas only at 10% on 14,144.71.
- Plaintiff was successful- entitled to costs

REASONS

A person who changes his status from a sole proprietor to an agency relationship must do more than just hope that the new letterhead will be observed and absorbed by a person it is dealing with in a contractual relationship as showing a change in status. All the cheques paid went to clerks in the accounting office.

UNIVERSAL PROPERTY MANAGEMENT vs. WESTMOUNT

Agency Relationships and Actual Authority

FACTS

A third party to this action, Centennial Management Ltd., maintained a debt obligation outstanding with the defendant that had yet to be repaid. Patrick Copeland (a co-defendant) owned a majority stake in the defendant firm (Westmount Windows and Door Ltd.) At one meeting between managers of these two firms, Copeland was offered a sum from a third party (the plaintiff, Universal Property) as an assignment of the debt owed by Centennial. The reason that this offer was made was in large part due to the closeness of Universal and Centennial, with the owners of both firms being from the same family. The defendant declined to accept this offer, and continued to hold Centennial's debts on its ledger without conducting any business with the plaintiff. By mistake, the plaintiff sent a cheque to the defendant meant for another firm, "Westmount Draperies", totaling \$30,635.41. The defendant's accountants immediately applied the funds to the credit of Centennial's account (which at that time stood at \$20,154.46) for which they assumed the funds were meant for. When the plaintiff firm informed Copeland that the funds were sent in error, Copeland refused to repay the funds to Universal. This action is brought by Universal to seek remittance of funds by Westmount for the \$30,635.41, along with punitive damages to Copeland for his disregard in refusing to repay the balance.

LEGAL ISSUES & REASONING

1. Is Westmount liable to return the funds to Universal?
2. Should Copeland be held liable for punitive damages based on his actions?

DECISION

1. Westmount is liable, and is ordered to remit the funds to Universal.
2. Copeland reacted in a reasonable manner, and thus should not be charged with punitive damages.

REASONS

1. The offer to extinguish Centennial's debt by the plaintiff was never accepted by the defendant, and thus the defendant should not have expected that funds sent by the plaintiff should be applied to the Centennial account. Furthermore, since the amount of the cheque bore no resemblance to the balance owing from Centennial, the courts will not imply a claim by the defendant to the balance of the funds. As such, Westmount is liable to remit all funds to the plaintiff.
2. A reasonable bystander would expect (given the extenuating circumstances of the case) that Copeland would react in a similar manner to that which he had. Given the poor credit quality of Centennial, and the request of the plaintiff's management to provide funds on Centennial's behalf, Mr. Copeland should be expected to hold onto the funds until the matter was formerly determined. As such, the courts will not charge Copeland with any counts of fraud or unconscionability, and accordingly no punitive damages are awarded.

LEGAL PRINCIPLE

- Shareholders of a corporation are not liable for the company's debts or obligations, with the exception that shareholders may be ordered to repay the firm's obligations (known as "lifting the corporate veil") where some form of fraud or unconscionability is committed by this shareholder

